DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS
38

DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS
38

SIGNE VIIMSALU

The meaning and functioning of secondary insolvency proceedings

TARTU UNIVERSITY PRESS

Faculty of Law, University of Tartu, Estonia

Dissertation is accepted for the commencement of the degree of *Doctor of Philosophy* on August 25, 2011, by the Council of the Faculty of Law.

Supervisors: Prof. Paul Varul (University of Tartu)
Prof. Dr. Bob Wessels (University of Leiden)

Opponents: Prof. Dr. Stefania Bariatti (University of Milan)
Assoc. Prof. Dr. Rimvydas Norkus (Mykolas Romeris University)

Commencement will take place October 12, 2011 at 12.00 in the Faculty of Law, Näituse 20 room K-03

Publication of this dissertation is supported by the Faculty of Law, University of Tartu

ISSN 1406–6394
ISBN 978–9949–19–847–4 (trükis)
ISBN 978–9949–19–848–1 (PDF)

Tartu Ülikooli Kirjastus
www.tyk.ee
Tellimus nr 579

TABLE OF CONTENTS

"Money knows no borders, but bankruptcy laws do"[1]
J. Kilppi

INTRODUCTION

Pursuant to the globalisation of the economy and the internationalisation of companies, the activities of persons have had ever increasing cross-border effects. Cross-border insolvency is the expression used to designate those cases of insolvency where assets, or liabilities, of an insolvent debtor are located in two or more separate jurisdictions, or where the personal circumstances of the debtor are such as to render him or it subject to the insolvency laws of more than one state. The legal provisions applicable to all situations of cross-border insolvency are of very great practical importance, both to debtors and creditors alike, and at the same time they raise questions of considerable interest from the standpoint of legal theory and principle.

On the 31st of May 2002, Council Regulation (EC) No 1346/2000, 29 May 2000 on Insolvency Proceedings[2] (hereinafter "the Regulation" or "the EIR"), which is applicable to all Member States of the European Union (except Denmark), entered into force. The Regulation aims to provide the EU-wide regulation of international jurisdiction, applicable law and recognition to enable efficient and effective operation of cross-border insolvency proceedings.

The Regulation has changed cross-border insolvency law in Europe more than all the treaties, case law and academic writings in innumerable decades previously. As a consequence, the enactment of this measure of European law has attracted global interest and all of a sudden the developments, interpretations and application of its rules became a trend-setter in this field of law for the rest of the world. Nowadays, a decision by the Court of Justice of the European Union about how an insolvent debtor's centre of main interests (the so-called "COMI") is to be understood forms a frame of reference for other courts in the world besides Europe. This stands in stark contrast to the times before when cross-border insolvency situations in Europe were observed and commented on, if at all, only occasionally and within small groups of insiders with rarely any impact or influence on other jurisdictions.[3] It has legitimately

[1] Kilppi. The Ethics of Bankruptcy. Routledge London and New York, 1997, p 137.
[2] OJ L 160 30.06.2000 p 1–18, as amended.
[3] Paulus in: Moss. Fletcher. Isaacs. (eds.) The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide. 2nd ed. Oxford University Press, 2009, p v.

been termed a "milestone" along the way to a uniform body of European commercial law.[4]

In this thesis, I will focus on the analysis of secondary insolvency proceedings opened after main insolvency proceedings according to the Regulation. The concept of secondary insolvency proceedings is an exceptional phenomenon. The Regulation does not establish any limit to the number of secondary insolvency proceedings which may be opened after main insolvency proceedings upon the establishment of an insolvent debtor within the meaning of Article 2 (h) of the EIR in the relevant Member State. The Regulation is based on the principle of respect for substantive diversity that each Member State retains its own insolvency law. The various insolvency procedures made available by law, as well as the substantive legal provisions themselves, are invariably related in an intimate way with many fundamental rules and principles of social, economic, and legal structures in question. The Regulation is therefore a subject especially suitable for historical, systematic, analytical and comparative study, but such an approach becomes indispensable whenever questions of various insolvency proceedings under the Regulation (whether main or secondary) are under consideration. In such cases, *ex hypothesi*, the insolvency laws of more than one Member State must be examined in order to determine the extent of these proceedings' potential mutual impact. The subject of the current thesis is topical also because this is the first doctoral dissertation in Estonia focusing on cross-border insolvency law and it could also be possible that no doctoral dissertations have been written on the given subject in Europe so far, which is why this might be the first attempt to give a systemic overview on questions related to that topic.

The main purpose of the current thesis is to find answers to the following questions: whether secondary insolvency proceedings are justified and necessary; and if so, what changes are needed in the national laws of the Member States and in the Regulation to facilitate efficient and effective administration of several cross-border insolvency proceedings pending simultaneously in the European Union.

In compiling this thesis I have raised the following hypothesis: secondary insolvency proceedings may be justified and necessary although several changes are needed in the national laws of the Member States and in the Regulation to facilitate efficient and effective administration of several cross-border insolvency proceedings pending simultaneously in the European Union.

To be able to answer the main questions I will examine the following sub-questions as main research problems:

a) What is the meaning of secondary insolvency proceedings?

---

[4] Eidenmüller. Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches internationales Insolvenzrecht, IPRax 2001, S 2, cited by Pannen/Riedemann in: Pannen (ed.) European Insolvency Regulation. De Gruyter Commentaries on European Law. De Gruyter Recht. Berlin, 2007, Introduction, mn 1, p 8.

b) Whether secondary insolvency proceedings are justified and needed?
c) How do secondary insolvency proceedings function?
d) What are the factors and methods which could facilitate efficient and effective administration of several cross-border insolvency proceedings pending simultaneously in the European Union?
e) Whether and how should the legislators of the Member States and the Regulation improve the provisions of the national laws of the Member States and the Regulation?

The structure of the thesis has been determined by the main research problems and their mutual connections in the thesis. The present thesis is divided into four chapters.

In the first chapter of the current thesis I will focus on the essence of the secondary insolvency proceedings. I will examine the genesis and history of the secondary insolvency proceedings to find out why secondary insolvency proceedings were created and included in the Regulation. Was there a special need? In addition, I will analyse what functions secondary insolvency proceedings fulfil and what purposes secondary insolvency proceedings may serve. I will examine the principles under which secondary insolvency proceedings should function and which are applicable to secondary insolvency proceedings according to the Regulation. One of the problems in the practice of the Member States that can be observed is the incompetence of the parties to conduct a cross-border insolvency case correctly and efficiently, which, in turn, might be caused by the fact that the theoretical grounds of the field are not known. The Regulation is a part of the valid legal order of the Member States, which is why in the thesis, the ideas of the legislator at developing and applying the Regulation must be specified, so that the theory behind the Regulation is applied correctly in the case of the cross-border insolvency proceedings implemented in the Member States. The purpose of first chapter is to find out what the meaning of secondary insolvency proceedings is and whether secondary insolvency proceedings are justified and needed.

To find answers to the aforementioned research questions I will analyse the whole course of the secondary insolvency proceedings starting from the opening and recognition, followed by the conduct, stay and closure of secondary insolvency proceedings. Thus, the second chapter of the thesis concentrates on the opening and recognition of the secondary insolvency proceedings. I will examine what are the prerequisites necessary to open secondary insolvency proceedings according to the EIR and how these prerequisites may influence national laws of the Member States. I will analyse how the court should handle the request to open secondary insolvency proceedings and what may be the main problems faced by the court in practice. I will also focus on the concept and definition of establishment as stipulated in Article 2 (h) of the EIR. I will concentrate on procedural efficiency and analyse whether the appointment of a temporary liquidator and the requirement to make an advance payment of costs and expenses or to provide appropriate security is justified and needed in

the case of secondary insolvency proceedings. I will deal with questions related to insolvency capacity, substantial requirements of the request and possibilities to change or withdraw the petition. I will analyse what should be the reasons to open secondary insolvency proceedings. Is *de facto* insolvency the only reason to open secondary insolvency proceedings or not? The question of the possibility to appeal against the judgement to open secondary insolvency proceedings will also be analysed. Finally, the automatic recognition and its effects will be examined. The purpose of this chapter is to find out what are the factors and methods which could facilitate efficient and effective administration of cross-border insolvency proceedings and are there any questions upon which the legislators of the Member States and the Regulation should improve the provisions of the national laws of the Member States and the Regulation.

In the third chapter I will examine how secondary insolvency proceedings function. First, I will analyse how secondary insolvency proceedings affect the position of different participants involved in those proceedings. Can the opening of secondary insolvency proceedings change the balance of the powers of the debtor? I will concentrate on the question of the debtor's rights, obligations and liability. I will also analyse the question of the appointment of the liquidator in secondary insolvency proceedings. I will examine how the creditors should know whether there is (economic) sense to participate in the insolvency proceedings. The question of the role of state supervisory authorities in cross-border insolvency proceedings is addressed. Secondly, I will deal with questions and problems related to the administration of the insolvency estate in secondary insolvency proceedings. I will analyse how to determine the assets belonging to the insolvency estate of the secondary insolvency proceedings. I will examine the role of the secondary insolvency liquidator in fulfilling his duties according to provisions stipulated in the Regulation and national laws of the Member State. I will examine how the scope of the powers of the main and secondary insolvency liquidators in parallel insolvency proceedings should be defined and aligned. For instance, is the secondary insolvency liquidator entitled to challenge the acts detrimental to creditors and is the secondary insolvency liquidator empowered to release an asset from the insolvency estate? I will deal with complex questions on coordination between liquidators in the administration of the insolvency estate in parallel insolvency proceedings. Thirdly, I will deal with questions related to the exercise of the creditors' rights by creditors themselves and by the liquidators. Finally, I will examine whether the coordination in exercising creditors' rights may be achieved in parallel insolvency proceedings. The purpose of this chapter is to find out how do secondary insolvency proceedings function, what are the factors and methods which could facilitate efficient and effective administration of cross-border insolvency proceedings and whether there are any questions upon which the legislators of the Member States and the Regulation should improve the provisions of the national laws of the Member States and the Regulation.

The fourth chapter of the current thesis is concentrated on the stay and closure of the secondary insolvency proceedings. First, it is necessary to clarify what is the "stay of liquidation" within the meaning of Article 33 of the EIR. I will focus on procedural aspects faced and to be solved by the court when a request of stay of liquidation is made. What are the substantial requirements of the request? To whom should the main insolvency liquidator submit the request? Also, I will analyse the scope of powers of the court in handling the request to stay, e.g. whether the court can or should, in addition to the stay of liquidation, stay the secondary insolvency proceedings in whole or in part and what kind of measures can the court seek to protect the interests of the creditors in the secondary insolvency proceedings. I will also raise the question whether Article 33 of the EIR as a cooperation measure serves the aim of the Regulation, taking into account all the procedural aspects to be followed. I will analyse the questions related to the termination of the stay of liquidation as well. I will deal with questions related to the closure of the secondary insolvency proceedings, for instance, the requirements for a proposal to close secondary insolvency proceedings. I will examine whether there is a need for fixed deadlines for the main insolvency liquidator to propose such a measure as rescue plan, composition or comparable measure to end secondary insolvency proceedings. In addition, I will analyse the position of the debtor and secondary insolvency liquidator in the case of proposing a potential rescue plan, composition or a comparable measure in the secondary insolvency proceedings. I will examine the meaning if the closure of the secondary insolvency proceedings "shall not become final without the consent of the liquidator in the main insolvency proceedings." I will examine what should be considered as costs and expenses of the secondary insolvency proceedings and who should bear the costs of expenses incurred in the secondary insolvency proceedings. In addition, I will analyse the rules regarding distribution in parallel insolvency proceedings and the transfer of remaining assets to the main insolvency proceedings. The purpose of this chapter is to find out how do secondary insolvency proceedings function, what are the factors and methods which could facilitate efficient and effective administration of cross-border insolvency proceedings and whether there are any questions upon which the legislators of the Member States and the Regulation should improve the provisions of the national laws of the Member States and the Regulation.

In this thesis, I have used the historical, systematic, analytical and comparative method. In compiling the thesis, I have used mainly foreign literature. The literature on the given subject is rather scarce and sometimes in languages I do not master. Nevertheless, the works of the internationally recognised jurists such as Herchen, Fletcher, Garcimartín, Goode, Isaacs, Koulu, Moss, Omar, Pannen, Paulus, Riedemann, Schmit, Smith, Wessels, Virgós, have mainly been used. Articles on the given subject have also been used, including works published in the Estonian legal magazines Juridica and Juridica International. Reports compiled by international cooperation bodies and expert groups have

also been used. When clarifying legal problems related to the topic, I have also relied on explanatory reports and the decisions of various courts of the Member States of the EU and the European Union Court of Justice in the field of the given research. Access to court cases on the given subject was practically impossible because of the non-existence of an EU-wide register for cross-border insolvency cases. The Estonian insolvency law regulation together with the Regulation and other insolvency law regulations of the Member States of the EU such as Finland, Sweden, Latvia, Lithuania, the Netherlands and Germany have been mainly used as comparative objects.

Pursuant to the volume limitations of the doctoral thesis, and the nature and aim of the current thesis, it has not been possible to deal with all the questions related to secondary insolvency proceedings, such as EU judicial cooperation and several exceptions laid down in Articles 5–15 of the EIR. The topic has been confined to the application sphere of the Regulation. In the present thesis, legal instruments have been used in the wording as at April 1, 2011.

1. HISTORY, FUNCTIONS AND PRINCIPLES APPLICABLE TO SECONDARY INSOLVENCY PROCEEDINGS

1.1. History of Secondary Insolvency Proceedings

Although the concept of secondary proceedings is not new, and one could point to various historic antecedents in literature,[5] the regulation of insolvencies with a European Union dimension had been the object of study and negotiation for almost forty years before the enactment of the European Insolvency Regulation. The need for negotiations on these matters had been clear to the Member States since the Community's inception.[6] Community activity leading up to the European Insolvency Regulation, in which secondary insolvency proceedings are stipulated, can be roughly divided into three main stages:[7] preparations in the years 1963–1980; little progress achieved in the years 1980–1990 and culmination in the years 1990–2000.

At an early stage it was recognised that cross-border insolvency would require a separate intergovernmental treaty – a convention between Member States.[8] From 1963 to 1980 the preparation of a bankruptcy convention remained in the hands of an autonomous committee of experts. Several unpublished drafts were prepared.[9] The first Preliminary Draft of a Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar

[5] See e.g. Draft Model Treaty adopted by the Institut de Droit International, Règles Générales sur les Rapports Internationaux en Matière de Faillite, 29 March 1874, Annuaire de l'Institut de Droit International XIII, 1894–1895, p 279; cf. Arnold. Straβburger Entwurf eines europäischen Konkursübereinkommen. IPRax 1986, S 133; Jitta. La Codification du Droit de la Faillite, 1895; cited in: Israël. European Cross-Border Insolvency Regulation. A Study of Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitas Europaea. Intersentia. Antwerpen-Oxford, 2005, p 236.

[6] The negotiations culminated in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which was signed in Brussels on 27 September 1968. However, insolvency matters were excluded from the scope of that Convention. See further: Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings. Report on the draft Convention. Bulletin of the European Communities, Supplement 2/82, p 3–4. Online available: http://aei.pitt.edu/5480/01/001994_1.pdf.

[7] Israël. *Op. cit.*, p 215. Fletcher has divided the most intense periods of activity up to 1996 broadly into 2 principal phases. See outline history in: Fletcher. Insolvency in Private International Law. National and International Approaches. Clarendon Press Oxford, 1999, p 247 ff; Omar. European Insolvency Law. Ashgate 2004, p 49 ff.

[8] Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings. Report on the draft Convention. Bulletin of the European Communities, Supplement 2/82, p 47; Lasok. Stone. Conflicts of Laws in the European Community, Professional Books Limited, Abigdon, Oxon, 1987, p 397.

[9] Houin. Konkursprobleme des gemeinsamen Marktes, KTS 1961, S 177; as cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 4, p 9. See also: Fletcher (1999), p 250 ff.

Proceedings was published on 16 February 1970,[10] followed by a draft version in 1980,[11] supplemented with an explanatory report by the Chairman of the Working Party, Mr Lemontey published in 1982[12] and followed again by a revised draft version in 1984.[13] In March 1986 the work was suspended for lack of sufficient consensus.[14]

The first published draft was premised on a strictly unified and universal proceeding. Article 2 entitled as "Unity of the bankruptcy" in the 1970 draft stipulated that "*The proceedings specified in this Convention, when instituted in one of the Contracting States, shall have full legal effect in the other Contracting States and shall be a bar to the institution of any other such proceedings in those States*." It also provided for the allocation of exclusive jurisdiction with automatic recognition, and was complemented by a set of rules for choice of law as well as for uniform insolvency law.[15] Independent territorial insolvency proceedings and secondary insolvency proceedings were not permitted.[16] However, because of the fundamental disparities between the national insolvency law regimes, numerous exceptions to the principle of universality were provided for during the drafting process.[17] Those provisions included the possibility of forming national "sub-estates" with regard to security interests, privileges and priority claims.[18] These sub-estates were created for accounting purposes and thus after the liquidator would have realised the assets. Distribution from these sub-estates would then take place according to local law.[19]

---

[10] EU Commission document 3.327/1/XIV/70, translation 4 June 1973. Online available: http://aei.pitt.edu/5612/01/002316_1.pdf.

[11] The 1970 draft had to be completely renegotiated after Denmark, Ireland and the United Kingdom joined the Community. Negotiations between the Member States continued during 1982.

[12] Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings. Report on the draft Convention. Bulletin of the European Communities, Supplement 2/82, p 3–4.

[13] Staak. Der deutche Insolvenzverwalter im europäischen Insolvenzrecht – Eine Analyse der EG-Verordnung Nr 1346/2000 des Rates vom 29. Mai 2000 über Insolvenzverfahren unter besonderer Berücksichtigung der Person des deutchen Insolvenzverwalters, 2004, S 6; as cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 4, p 9.

[14] Virgós. Schmit. Report on the Convention on Insolvency Proceedings, 3 May 1996, mn 3. Online available: http://aei.pitt.edu/952/01/insolvency_report_schmidt_1988.pdf.

[15] Israël. *Op. cit.*, p 225.

[16] Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 5, p 9.

[17] A second draft was prepared after the accession of Denmark, Ireland and the United Kingdom to the European Community. The approach of the draft essentially remained the same, though the list of uniform rules was reduced in favour of more choice of law rules. Instead of a qualitative test to determine the most appropriate forum, mechanical rules were proposed. See: Fletcher (1999). *Op. cit.*, p 253–255.

[18] Virgós-Schmit Report mn 5.

[19] Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings. Report on the draft Convention. Bulletin of the European Communities, Supplement 2/82, p 91.

The result of this compromise was a highly complicated regulation of this issue, which has been heavily criticized.[20] Overall, the system proved to be too complicated and ambitious. The Draft Convention was firmly committed to the implementation of the principles of universality and unity of insolvency as closely as possible. This desire was clearly reflected in Article 2, entitled "Unity of the bankruptcy" providing that "*The proceedings to which this Convention applies shall, when opened in one of the Contracting States, have effect ipso iure in the other Contracting States and, so long as they have not been closed, shall preclude the opening of any other such proceedings in those other States*."

During the second stage, in 1980–1990, little to no progress was made at Community level.[21] However, outside the Community context, developments in cross-border insolvency regulation accelerated during those years. While the Member States were still struggling with the principles of universality and territoriality, internationally those principles lost most of their ground to co-operation and practical results.[22] This intermediate stage concerns the emergence of the paradigm of cross-border insolvency co-operation,[23] for Europe, culminating in the European Convention on Certain Aspects of Bankruptcy, in Istanbul, on the 5th of June 1990 (still not in force),[24] in which the concept of secondary insolvency proceedings (at that time the so-called "secondary bankruptcies")[25] was first introduced. Fletcher has stated that establishing rules to enable secondary bankruptcies following the opening of a main bankruptcy is the principal innovation of the Istanbul Convention.[26] Historically, the concept of secondary insolvency proceedings led back to the ancillary proceedings provided for in Section 304[27] of the United States Bankruptcy Code, which Germany introduced as a discussion model in the Strasbourg negotiations of the Council of Europe leading to the Istanbul Convention.[28] The secondary

[20] Paulus. Europäische Insolvenzverordnung, Kommentar, Verlag Recht und Wirtchaft GmbH, Frankfurt am Main, 2006, Einl mn 4, S 58–59.

[21] Israël. *Op. cit.*, p 215.

[22] Israël. *Op. cit.*, p 232.

[23] Israël. *Op. cit.*, p 215.

[24] Council of Europe. European Convention on Certain Aspects of Bankruptcy, Istanbul, 5 June, 1990. Online available: http://conventions.coe.int/treaty/en/Treaties/Html/136.htm, 05.11.2010. It is doubtful whether this Convention will ever enter into force, because Article 44 (1) (k) of the EIR states that, the Regulation replaces the Convention, in respect of the matters to therein, in the relations between Member States. Initially the Convention required ratification by three states to enter into force. Belgium, Cyprus, France, Germany, Greece, Italy, Luxembourg and Turkey have signed the Convention. Only Cyprus has actually ratified the Convention (17 March 1994).

[25] See Chapter III Secondary Bankruptcies of the Istanbul Convention.

[26] Fletcher (1999), p 313.

[27] Note: nowadays replaced by Chapter 15 added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

[28] Balz. The European Union Convention on Insolvency Proceedings. American Bankruptcy Law Journal, 1996, p 520–521.

bankruptcy was characterised by a legal link with the main bankruptcy. It is this link that the authors of the Istanbul Convention wished to emphasise in choosing the term "secondary" in preference to "satellite" or "parallel".[29] Secondary insolvency proceedings were meant to safeguard the interests of secured and priority creditors and of employees and other local creditors of foreign establishments of the insolvent debtor, while making available any surplus obtained from the liquidation of the secondary estate to the main estate. Thus, the notion of unity was discarded and the principle of universality reduced in scope.[30]

The Istanbul Convention contains rules for bankruptcy cases having international aspects on account of the situation of the debtor's assets or of his creditors being spread over different states.[31] The ambition of the Convention is not to provide for a comprehensive regulation of cross-border insolvencies. Instead, as the preamble notes, it seeks to guarantee a minimum of legal co-operation. It does so by dealing only with certain international aspects, i.e. the powers of liquidators to act extraterritorially, the possibility of secondary insolvency proceedings and the possibility for creditors to lodge their claims in foreign insolvency proceedings. Consequently, the Convention essentially remains silent on the question of the extraterritorial effect of insolvency proceedings and the over-arching questions of universality and unity.[32] The Explanatory Report of the Istanbul Convention states that when a debtor declared bankrupt in one state has assets in one or more other states, the Convention offers two possibilities:

1) it allows liquidators to exercise, in countries other than the one in which the bankruptcy was opened, certain powers conferred upon them as liquidators (Chapter II);
2) it allows and organises the opening of secondary bankruptcies (Chapter III).[33]

It also stipulates that the use of one or the other of the possibilities depends on the amount of the assets situated in the other state. The impact of the measures to be taken can indeed be different depending on whether it concerns a bank account or an establishment of the debtor. A liquidator who has started the necessary formalities for exercising his powers under Chapter II may have to face a request of a creditor for the opening of a secondary or other local bankruptcy or may, himself, consider at a later stage that the number of credi-

---

[29] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 97. Online available: http://conventions.coe.int/treaty/en/Treaties/Html/136.htm.

[30] Balz. *Op. cit.*, p 494.

[31] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 1.

[32] Israël. *Op. cit.*, p 232–233.

[33] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 2.

tors or the amount of the assets justify a local bankruptcy and, as a result, the opening of a secondary bankruptcy.[34]

Chapter III of the Istanbul Convention contains rules allowing the opening of a secondary bankruptcy in a contracting state on the sole ground that a main bankruptcy has been opened against the same debtor by a court or a competent authority of another contracting state, and thus without it being necessary to prove the insolvency of the latter in this other contracting state.[35] Drafters of the Istanbul Convention stressed that such a possibility is aimed to give full consideration to the local claims most worthy of being dealt with and to proceed to a fair liquidation of the assets at the local level, which would perhaps not always be the case if the foreign liquidator were authorised to transfer all the bankrupt's assets located in another contracting state to the main bankruptcy.[36] The secondary bankruptcy could be opened not only on the request of the liquidator, but also on the initiative of any other natural or legal person qualified to request the opening of a bankruptcy according to the legislation in force in that country.[37]

According to authors of the Istanbul Convention, the secondary bankruptcy was designed as a system of compromise between, on the one hand, a complete procedure carried out in each state while being co-ordinated with the main bankruptcy and, on the other hand, a procedure which amounts, after the payment of the sole privileged creditors, to the transfer of the surplus of the assets to the main bankruptcy for the payment of all other creditors.[38] The link between main and secondary insolvency proceedings in matters of deployment, though not entirely absent, is too tenuous. Instead the goal is to ensure the application of local law to local assets for certain creditors.[39] The proceeds of liquidation in secondary insolvency proceedings are not available to all creditors of the insolvent debtor. The Istanbul Convention makes provisions for the payment, in the framework of the secondary bankruptcy, of the creditors who in the present social and political context appear to be important for the state, *viz*. the creditors with a preferential right (privilege or security), public law creditors (treasury, social security) and the creditors having a link with the functioning or the activity of the debtors' establishment or with employment in

[34] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 2.
[35] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 90.
[36] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 91.
[37] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 96.
[38] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 92.
[39] Israël. *Op. cit.*, p 237.

the service of the debtor, in particular the workers.[40] Only after the payment of these creditors, as the most important, will any surplus of the assets be transferred to the main bankruptcy.[41] However, this surplus is not completely merged with the assets of the main insolvency proceeding. Instead, a sub-estate is created within the main insolvency proceedings. Distribution from this sub-estate proceeds on a pure *pro rata* basis. Any priority, whether according to the law of the main or secondary insolvency proceedings, is inapplicable.[42]

In order to respect the specific character of the collective liquidation procedures in each contracting state, the Istanbul Convention submits the secondary bankruptcies to the *lex fori* in bankruptcy matters, and makes an exception to this principle only when it appears to be necessary for the good implementation of the Convention.[43] However, the Convention's provisions reflect only a limited degree of integration and co-ordination. Indeed, the failure to adopt the Istanbul Convention was not due to its substance, but entirely because of extraneous events.[44]

During 1989, even before the negotiations of the Istanbul Convention were concluded, the Member States of the European Community decided to revive the work. In an informal conference of the Ministers of Justice of the Community in San Sebastian on 25–27 May 1989, the decision was made to resume negotiations on the regulation of cross-border insolvency proceedings. An *ad hoc* group, which worked on the basis of the former projects, was created for this purpose and remained active until 1995.[45] The objectives of this fresh attempt at harmonization, as set out in the mandate of the Working Group, were, *inter alia* to:

1) retain the principle of universality to the extent practicable;
2) create a unitary system (without reservations) binding in all Member States;
3) adapt the system of secondary bankruptcies so as to make it compatible with maximum universality;
4) allocate jurisdiction directly among Member States, both for main and for secondary bankruptcies;
5) harmonize certain conflict rules that bear on the administration of bankruptcies;
6) take proper account of the introduction of rehabilitation (or reorganisation) proceedings into the laws of some Member State; and

---

[40] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 93.

[41] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 94.

[42] Israël. *Op. cit.*, p 238.

[43] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, General Introduction, mn 95.

[44] Israël. *Op. cit.*, p 215.

[45] Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 8, p 10.

7) create a more efficient and closely-knit system of legal cooperation within the emerging European internal market than did the Istanbul Convention.[46]

The preliminary draft was completed in January 1992[47] and the final draft (the so-called Convention on Insolvency Proceedings) presented open for signature on 23 November 1995.[48] It was stated in the literature that the 1995 Convention on Insolvency Proceedings is the most important international document yet written in the area of international insolvency law.[49] This Convention introduced a system of EU-wide main insolvency proceedings combined with the possibility for territorial (secondary) proceedings, in order to accommodate local interests. It still aimed to implement universality of proceedings, but, in contrast to the Draft Convention from 1980, it no longer associated universality with unity of proceedings. Indeed, there were debates over the 1995 Convention, for instance, whether to include rehabilitation proceedings, (and if so, which ones), and whether to allow them as secondary insolvency proceedings or not.[50] Universality was to be maintained through rules of co-operation and co-ordination between various liquidators. It was thus built on the approach taken by the Istanbul Convention and other examples of co-operation in cross-border insolvency. Both Conventions contained provisions allowing all creditors to prove claims in the secondary insolvency proceedings as well as the main insolvency proceedings.[51] It was this move from principles to co-operation that enabled the Member States to overcome the difficulties that had led to the failure of the 1980 Draft.[52] In contrast to its predecessor drafts, it was said to be a manageable compromise between the various national interests in the European Community.[53] However, the 1995 Convention on Insolvency Proceedings was never adopted.[54]

---

[46] Balz. *Op. cit.*, p 495.

[47] Pannen/Riedemann in: Pannen *Op. cit.*, Introduction, mn 10, p 10.

[48] Convention on Insolvency Proceedings. 23 November 1995. Online available: http://aei.pitt.edu/2840/01/070.pdf. The wording of the Convention on Insolvency Proceedings is nearly identical to the wording of the European Insolvency Regulation. See also: Perem. Rahvusvahelised pankrotid ja Euroopa Liidu maksejõuetuskonventsiooni ettevalmistamine. Juridica, V/1998, lk 226–234.

[49] Balz. *Op. cit.*, p 496.

[50] For this debate and political bargaining see: Balz. *Op. cit.*, p 500.

[51] Goode. Principles of Corporate Insolvency Law. Sweet and Maxwell, 2002, p 509.

[52] Israël. *Op. cit.*, p 240.

[53] Omar. *Op. cit.*, p 82.

[54] According to Article 293 EC it required signature and ratification by each Member State to enter into force. The deadline for signatures was 23 May 1996. Several Member States, among them the United Kingdom, postponed signing the Convention in the absence of the explanatory report, which became available on May 3, 1996. The United Kingdom refused to sign.

With the coming into force of the Treaty of Amsterdam on 1 May 1999,[55] the overall situation in Europe underwent fundamental changes. Since its enactment, cooperation in civil matters falls within the scope of the Community's jurisdiction. On the basis of the Treaty of Amsterdam the European Parliament called on the Commission to put forward a proposal for a Directive or a Regulation on bankruptcies involving companies which operate in several Member States.[56] Finland and Germany submitted an initiative to adopt the rules of the Convention on Insolvency Proceedings in the form of a Council Regulation.[57] Recital 12 in the submitted initiative stated that "*A parallelism between main insolvency proceedings recognised in other Member States and secondary proceedings enabling creditors in another Member State to invoke a local instrument in order to safeguard their interests avoids over-rigid centralisation. Mandatory rules of coordination with the main proceedings guarantee the need for unity in the Community*." Still, during the consultation process, the European Parliament held a fundamentally different view as to what territorial proceedings should be proposing to amend Article 29 on the opening of secondary insolvency proceedings and stating that "*The authorisation of secondary proceedings in addition to the main proceedings ought to be restricted, inter alia in order to comply more fully with the principle of unitary proceedings with the aim of ensuring that the European legal order is as uniform as possible. While it should be recognised that there is a need to allow territorial insolvency proceedings before the opening of the main proceedings, no such need exists after the latter have been opened. Here the unitary nature of the main proceedings should prevail absolutely, unless the liquidator in the main proceedings consents*."[58]

On 29 May 2000 the Council adopted Regulation 1346/2000 on insolvency proceedings. The Convention on Insolvency Proceedings was adopted nearly *verbatim* by the Regulation.[59] This is an important point considering that the 1995 Convention had been published at the time together with the Explanatory

[55] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, 10. November 1997, OJ 1997/C340.

[56] Resolution on the Convention on Insolvency Proceedings of 23 November 1995, 7 May 1999, OJ 1999/C279/499. Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:279:0499:0500:EN:PDF.

[57] Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999, OJ 1999/C221/6. Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:221:0008:0023:EN:PDF.

[58] Report on the proposal for a Council regulation on insolvency proceedings (9178/1999 – C5-0069/1999 – 1999/0806(CNS)), 23 February 2000.

[59] Virgós. Garcimartín. The European Insolvency Regulation: Law and Practice, Kluwer Law International 2004, p 7.

Report in 1996 (the so-called Virgós-Schmit Report).[60] Judicial opinion and legal academics unanimously hold that the Virgós-Schmit Report is authoritative for the interpretation of the Regulation as well.[61] However, the definitions contained in it are not binding.[62] Balz has stated that the concept and structure of the secondary insolvency proceedings in the Regulation and 1995 Convention follow the Istanbul Convention in a great many aspects, but the 1995 Convention and the Regulation diverge in two important issues, namely, the right of creditors to partake in the distribution of assets in the secondary insolvency proceedings and the degree of coordination between main and secondary insolvency proceedings.[63] Secondary insolvency proceedings, to which the 1995 Convention and the Regulation devote its Chapter III, mitigate or modify the principle of universality and mutual recognition of main insolvency proceedings for the sake of individual or public local interests.[64] Israël is of the opinion that compared to the previous (preliminary) drafts of European Conventions on insolvency proceedings the desire to implement the principles of universality and unity has been relaxed significantly. The Regulation allocates exclusive international jurisdiction and provides EU-wide (extra-territorial) effect *de iure*. Within this universalistic approach, however, the local interests and concerns of the Member States and their creditors are accommodated through the possibility of territorially limited proceedings.[65] The Regulation contains a set of uniform choice of law rules and occasionally a rule of uniform substantive law. The Regulation, with its primary and secondary insolvency proceedings in combination with the choice of law rules, exhibits a model in which the local interests of Member States and creditors are to a large extent respected. Israël states that the Regulation attempts to compensate for elements of territoriality by embedding the primary and secondary insolvency proceedings into a common, cooperative framework. An attempt is being made to set up genuinely cross-border insolvency proceedings, even though it may invoke local and territorial insolvency proceedings.[66] Virgós and Garcimartín state that secondary insolvency proceedings, stipulated in Chapter III of the Regulation, are legally linked to the main insolvency proceedings. This link consists of a set of rules establishing the mandatory coordination of secondary insolvency proceedings with the main insolvency proceedings and implies a certain degree of subordination to the latter. In other words, the local insolvency proceedings are regarded as satellites of the "planet" of the main insolvency proceedings. If no main insol-

[60] Virgós. Schmit. Report on the Convention on Insolvency Proceedings, 3 May 1996. Online available: http://aei.pitt.edu/952/01/insolvency_report_schmidt_1988.pdf.
[61] Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 42, p 17; Wessels. International Insolvency Law, Kluwer 2006, mn 10439, p 233.
[62] Virgós. Garcimartín. *Op. cit.*, p 7.
[63] Balz. *Op. cit.*, p 521.
[64] Balz. *Op. cit.*, p 520.
[65] Israël. *Op. cit.*, p 243.
[66] Israël. *Op. cit.*, p 244.

vency proceedings are opened (or until they are opened), the territorial proceedings are treated as "independent" proceedings; in other words, they are viewed as "small planets" in their own right.[67] Mandatory rules of coordination with the main insolvency proceedings should guarantee the needs of unity principle in the Regulation.

In conclusion, the introduction of territorial insolvency proceedings, in particular as secondary insolvency proceedings to the main insolvency proceedings, is the most far-reaching innovation from the draft conventions in the light of the history of the Regulation.[68] The years up to 1980 were dominated by a desire to establish a regime approaching the situation of unity of law and proceedings as closely as possible. However, this regime would have been too complex to administer for the Member States at that time. With the Istanbul Convention as an intermediate measure, the European effort moved from the elusive goal of universality and unity of insolvency proceedings, to a regime in which European cross-border insolvency proceedings are to be achieved through coordination and cooperation between main and secondary insolvency proceedings. The possibility of secondary insolvency proceedings has been viewed, in a European environment with widely different views on rehabilitation policies, as a necessary precondition for the inclusion of rehabilitation and reorganisation proceedings in the scope of application of the Regulation and their recognition by other Member States, because the main insolvency proceedings may negatively affect creditor rights when the law of the main forum prefers rehabilitation of the debtor and the social and macroeconomic interest in preserving existing economic entities over creditors' interests.[69] In general, the possibility of territorial insolvency proceedings under the Regulation is seen as a definitive break with the idea that unity of law and proceedings is a prerequisite for the effective regulation of cross-border insolvencies. The choice to enable Member States (and their creditors) to protect their interests under local law must be regarded as one of the main reasons why Member States have been willing to adopt the Regulation.[70] The basic principle is the universality of the proceedings: a single insolvency procedure in the Member State where the debtor has his centre of main interests (COMI), encompassing all of the debtor's assets, and in which all of the creditors can participate. This solution permits the maximum advantages associated with a centralized collective insolvency proceedings. However, the possibility of opening territorial insolvency proceedings can be justified for different reasons and this has lead to their admission by the Regulation. It should be viewed as a compromise between the Member States at that time to

[67] Virgós. Garcimartín. *Op. cit.*, mn 289, p 157.
[68] Balz. *Op. cit.*, p 520.
[69] Balz. *Op. cit.*, p 520.
[70] Israël. *Op. cit.*, p 290–291.

come up with the concept of secondary insolvency proceedings finally enacted in the Regulation.

1.2. Functions of Secondary Insolvency Proceedings

1.2.1. Protective Function

During the negotiations leading up to the 1995 Convention, also reflected in the Regulation later, there were two types of arguments put forward in favour of enabling secondary insolvency proceedings as territorially restricted proceedings,[71] each serving different functions:[72] a protective or defensive function; and assisting or auxiliary function.[73]

First, the protection of national interests is facilitated through the Regulation by opening secondary insolvency proceedings. From that point of time the debtor's assets situated within the territory of the secondary insolvency proceedings are removed from the ambit of the *lex fori concursus universalis* and are subject of the *lex fori concursus secundarii*.[74] This possibility makes sense for creditors who cannot rely on the recognition of their rights (or their preferential rank) in proceedings in another Member State.[75] The universal effect of the main insolvency proceedings does not apply to the secondary insolvency proceedings, opened in another Member State, whilst the effects of the secondary insolvency proceedings may not be challenged in other Member States as Article 17 of the EIR provides. Given the procedural and substantive effects of the secondary insolvency proceedings are determined by the *lex fori concursus*, through rules contained in Articles 4 and 28, the focus of the secondary insolvency proceedings is the protection of local interests.[76]

Some authors are of the opinion that the Regulation thereby achieves two purposes: on the one hand, the private international law rule is applied to which local creditors have adapted themselves within the framework of their business relations to the debtor. They are spared having to familiarize themselves with foreign (insolvency) laws in a language generally foreign to them.[77] On the

---

[71] Virgós. Garcimartín. *Op. cit.*, mn 287, p 155.

[72] Virgós-Schmit Report, mn 32 et seq.

[73] Herchen in: Pannen. *Op. cit.*, Art 27, mn 4, p 401.

[74] Duursma-Kepplinger in: Duursma-Kepplinger. Duursma. Chalupsky. Europäische Insolvenzverordnung, Kommentar, Springer-Verlag Wien New York 2002, Art 27 mn 9, S 460.

[75] Virgós-Schmit Report, mn 32.

[76] de Boer. Wessels. The Dominance of Main Insolvency Proceedings under the European Insolvency Regulation; in: Omar. (ed.) International Insolvency Law. Themes and Perspectives. Ashgate, 2008, p 186.

[77] Haβ. Huber. Gruber. Heiderhoff. EU-Insolvenzverordnung. Kommentar. Beck, Munich 2005, Art 27 EuInsVO mn 4; Weller. Inländische Gläubigerinteressen bei internationalen

other hand, it minimizes possible conflicts between the *lex fori concursus universalis* and any other laws of the country of the secondary insolvency proceedings, e.g. laws applicable to individual legal relationships affected by the insolvency proceedings, which may arise because of a lack of coordination between the two legal systems.[78] The idea of protecting local creditors has a defensive function. The possibility of opening secondary insolvency proceedings ensures that foreign debtors who operate through a local establishment can be subject to the same insolvency rules as domestic debtors. Hence, future creditors will not have to worry, if they enter into a contract through a local establishment, about the domestic or foreign quality of the company with which they are dealing: the risk of insolvency will, in principle, be the same.[79]

Virgós and Garcimartín submit that the defensive function is very important because the scope of application of the Regulation is very broad with regard to the type of proceedings listed in Annexes of the EIR. The Regulation applies to both winding-up and restructuring proceedings and is "neutral" on the question of which insolvency policies those proceedings may be aimed at. Once a national procedure is included in the Regulation lists, other Member States must recognise it and its effects,[80] which may imply a very different degree of "interventionism" in the respective rights of the debtor and creditors. The possibility of opening secondary insolvency proceedings according to the domestic law of the Member State in question serves to palliate that broad scope and it was this which facilitated agreements among the Member States. Virgós and Garcimartín state that facilitating the participation of small creditors in the proceedings was also one of the arguments given by some Member States to justify the possibility of secondary insolvency proceedings. Furthermore, secondary insolvency proceedings also act as a defence against the "mobility" of the debtor, who can legitimately change his COMI from time to time.[81]

In the opinion of Balz it should not be overlooked that secondary insolvency proceedings may also serve the interests of the foreign main insolvency estate and enrich the menu of options the foreign main liquidator will have. Recognition of foreign main insolvency proceedings in other Member States does not affect the rights of secured creditors who have a security interest in collateral

---

Konzerninsolvenzen ZHR 169, 2005, S 570, 584 et seq., cited by Herchen in: Pannen. *Op. cit.*, Art 27 mn 5, p 401.

78 Herchen in: Pannen. *Op. cit.*, Art 27 mn 5, p 401.

79 Virgós. Garcimartín. *Op. cit.*, mn 287 (a), p 156.

80 It is also pointed out in ECJ case C-341/04 – Judgment of the Court (Grand Chamber) – Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Supreme Court (Ireland), made by decision of 27 July 2004, received at the Court on 9 August 2004, in the proceedings Eurofood IFSC Ltd – 2 May 2006; and in ECJ case C-444/07 – Judgment of the Court (First Chamber) – Reference for a preliminary ruling under Article 234 EC from the Sąd Rejonowy Gdańsk-Północ w Gdańsku (Poland), made by decision of 27 June 2007, received at the Court on 27 September 2007, in the insolvency proceedings opened against MG Probud Gdynia sp. z o.o. – 21 January 2010.

81 Virgós. Garcimartín. *Op. cit.*, mn 287 (a), p 156.

situated outside the opening Member State according to Article 5 of the EIR. However, insolvency proceedings opened by the Member State where the collateral is situated may, and often will, affect secured creditors, for example, subjecting them to an automatic stay. The opening of a secondary insolvency proceeding in the Member State where collateral is situated thus may benefit the estate and the liquidator of the main insolvency proceedings. In another situation, avoidance rules in a secondary forum may be broader than those in the main forum, and the main liquidator may be able to avoid a transaction in a secondary forum which would otherwise be unavoidable under the rules of main insolvency proceedings. In these and other situations, secondary insolvency proceedings clearly benefit not only local creditors and the Member State of the secondary forum, but also the foreign main liquidator.[82]

In my opinion, it is also possible that under certain circumstances secondary insolvency proceedings may serve the interests of the debtor and provide several protective intervention measures to work against the liquidators and the creditors if the *lex fori concursus secundarii* provides so. As the debtor is probably the best aware of its/his affairs, business management and reasons which led to insolvency (which may be under dispute in appeal) in the first place, it/he may wish (if the *lex fori concursus secundarii* allows so) to challenge the act in the relevant insolvency proceedings where necessary in the case of possible detrimental acts, realisation of assets, distribution of proceeds or covering costs and expenses in the insolvency proceedings. There may be situations where entrepreneurs behind the insolvent company have a chance of buying back the assets of the company at a low price.

1.2.2. Assisting Function

Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the insolvency estate of the debtor is too complex to administer as a unit, or where differences in the legal systems concerned are so great that difficulties may arise[83] from the extension of effects deriving from the law of the Member State of the opening to the other Member States where the assets are located. For this reason, the liquidator in the main insolvency proceedings may request the opening of secondary insolvency proceedings when the efficient administration of the insolvency estate so requires.[84]

The idea that secondary insolvency proceedings facilitate the administration of the insolvency proceedings and the realisation of the debtor's assets has an

[82] Balz. *Op. cit.*, p 520.

[83] Note: immovable assets that may have to be sold through the intervention of a notary and a change in public register in some Member States could provide a good example.

[84] Recital 19 of the EIR.

auxiliary function.[85] In accordance with Article 3 (3) of the EIR secondary insolvency proceedings opened after the main insolvency proceedings must be winding-up proceedings within the meaning of Article 2 (c) of the EIR and listed in Annex B. Virgós and Garcimartín state that the Regulation aims to reflect these purposes by widening the circle of people authorized to request the opening, or by exempting courts from the need to examine the insolvency of the debtor in other Member States once the main insolvency proceedings have been opened. However, the predominance of the defensive function in these proceedings explains, in addition to operational simplicity, why they can only be winding-up proceedings.[86] Their purpose is to realise the debtor's assets. Wessels is of the opinion that the court cannot open these insolvency proceedings for the purpose of any reorganisation of the debtor's business or of his financial situation.[87] The fact that the company has decided to open an establishment in another Member State presupposes that there are economic motives which justify a certain degree of decentralisation in its operations or business administration. Virgós and Garcimartín submit that these motives can be reflected in the insolvency proceedings. In general, the insolvency proceedings must retain certain symmetry with the business activity: in the case of a centralised business activity in a single Member State (where the COMI is located) then a sole set of insolvency proceedings is justified; on the other hand, in the case of a decentralized activity, several sets of insolvency proceedings may be justified. Reasons of procedural economy and access to justice may also play a role; for example, when the number of domestic creditors involved is high, local proceedings organised from the Member State where the establishment is located may be more convenient than centralising everything in the Member State where the main insolvency proceeding has been opened. Furthermore, in the case of the Regulation, secondary insolvency proceedings can be used to affect the rights *in rem* of third parties over assets which are located outside the Member State where the main insolvency proceedings are opened and which would otherwise remain affected.[88] Herchen is of the opinion that secondary insolvency proceedings do not – probably not even if the *lex fori concursus secundarii* governed – allow the full value of objects to be included in the assets available for distribution, although the objects may generally be used for continuing the business operations of the debtor's enterprise pursuant to Article 31 (3) and Article 33 (1) of the EIR.[89] Pannen states that pursuant to Article 33 of the EIR, the liquidator in the main insolvency proceedings can cause a stay of the secondary insolvency proceedings; he must, however, take

[85] Varul. Tohvri. Laarmaa. Piiriülene pankrotimenetlus. Juridica, IV/2004, p 246.
[86] Virgós. Garcimartín. *Op. cit.*, mn 292, p 158.
[87] Wessels. European Union Regulation On Insolvency Proceedings: An Introductory Analysis; in: Wessels. Current Topics of International Insolvency Law. Kluwer BV, Deventer, 2004, p 28.
[88] Virgós. Garcimartín. *Op. cit.*, mn 287 (b), p 156–157.
[89] Herchen in: Pannen. *Op. cit.*, Art 27 mn 14, p 403–404.

all measures necessary to safeguard the interests of the creditors of the secondary insolvency proceedings.[90] But the court of the secondary insolvency proceedings is not afforded the same rights as those of the liquidator in the main insolvency proceedings, the purpose of the stay being safeguarding of the outcome of the main insolvency proceedings.[91]

To conclude, the functions of secondary insolvency proceedings can serve rather contradictory purposes depending whether they should protect local interests or assist main insolvency proceedings at the same time. The Regulation is silent on the question to which insolvency policies secondary insolvency proceedings should be aimed at. Therefore, it puts, in my opinion, extra responsibility on Member States in formulating and determining the most appropriate national insolvency proceedings within the meaning of Article 2 (c) of the EIR[92] to be included in Annex B of the Regulation. Once a national insolvency procedure is included in Annex B of the EIR, other Member States must recognise it and its effects. In addition, it also makes participants in the insolvency proceedings responsible for choosing an appropriate manner and method for solving the debtor's insolvency situation i.e. whether to request the opening of secondary insolvency proceedings or not. It certainly requires mutual trust, effective and efficient coordination of both (or several) insolvency proceedings simultaneously once they are opened.

1.3. Principles Applicable to Secondary Insolvency Proceedings

1.3.1. Principle of Mutual Trust and Automatic Recognition

The 1995 Convention on Insolvency Proceedings was based on the principle of Community trust and on the *favor recognitionis*, meaning that national borders of the Member States are no obstacles to the efficient administration of cross-border insolvency proceedings throughout the Community.[93] Recital 22 reflects the principle of mutual trust in the Regulation. It states that the Regulation should provide for immediate recognition of judgements concerning the

---

[90] Pannen. *Op. cit.*, Art 3 mn 127, p 130.

[91] Landesgericht Leoben NZI 2005, 646 (*Collins & Aikman*), with explanatory note by Paulus. Comments on Landesgericht Leoben of 31.08.2005 – 17 S 56/05, NZI 2005, S 647; Smid. EuGH zu „Eurofood", BGH zur internationalen Zuständigkeit: Neueste Judikatur zur EuInsVO, DZWiR 2006, S 325, 329; cited by Pannen in: Pannen. *Op. cit.*, Art 3 mn 127, p 130.

[92] Article 2 (c) of the EIR also refers to Articles 2 (a) and 1(1) of the EIR. These proceedings should be collective insolvency proceedings, which entail the partial or total divestment of a debtor and the appointment of a liquidator involving realisation of the debtor's assets, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets.

[93] Virgós-Schmit Report mn 147.

opening, conduct and closure of insolvency proceedings which come within its scope and of judgements handed down in direct connection with such insolvency proceedings. Recognition of judgements delivered by the courts of the Member States, whether in main or secondary insolvency proceedings, should be based on the principle of mutual trust.[94] Pannen is of the opinion that this is the most fundamental characteristic of the Regulation that a proceeding, whether main or secondary insolvency proceeding, opened in one Member State will be automatically recognized in all other Member States according to Article 16 (1) of the EIR.[95] This is a consequence of the principle of universality. According to the Court of Justice of the European Union in the *Eurofood* case C-341/04, the rule of priority laid down in Article 16 (1) of the EIR, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the Member State of the opening of proceedings, is based on the principle of mutual trust, which has enabled a compulsory system of jurisdiction to be established, and, as a corollary, has enabled the Member States to waive the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings.[96] The Virgós-Schmit Report states that not only must the opening judgement be recognized, but also the decisions to execute and terminate the insolvency proceedings, and insolvency derived proceedings according to Article 25 (1) of the EIR.[97] Grounds for non-recognition should be reduced to the minimum necessary.[98] The only stipulated reason for refusing recognition is the public policy clause in Article 26 of the EIR. According to the *Eurofood* case, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the judgment to open the insolvency proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such insolvency proceedings enjoys.[99] Recognition is automatic and it requires no preliminary decision by a court of the requested Member State,[100] because according to the Virgós-Schmit Report the Regulation

---

94 Recital 22 of the EIR.

95 Pannen: in Runkel. (ed.) Anwaltshandbuch – Insolvenzrecht. 2005, § 16 mn 44; cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 39, p 16.

96 ECJ case C-341/04 – Judgment of the Court (Grand Chamber) – Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Supreme Court (Ireland), made by decision of 27 July 2004, received at the Court on 9 August 2004, in the proceedings Eurofood IFSC Ltd – 2 May 2006.

97 Virgós-Schmit Report mn 143.

98 Recital 22 of the EIR.

99 ECJ case C-341/04 – Judgment of the Court (Grand Chamber) – Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Supreme Court (Ireland), made by decision of 27 July 2004, received at the Court on 9 August 2004, in the proceedings Eurofood IFSC Ltd – 2 May 2006.

100 Virgós-Schmit Report mn 143.

is based on the principle of mutual trust and on the legal presumption that the judgement handed down in another Member State is valid.[101] For instance, the publication of the opening judgement provided for in Article 21 and 22 of the EIR is not a requirement for recognition within the meaning of Article 16 of the EIR.[102] In general, the effects of the secondary insolvency proceedings may not be challenged in another Member States.[103]

The principle of mutual trust is also a dynamic principle because it must be taken into account when interpreting the Regulation. In the opinion of Paulus, this means that the reasons upon which decisions are based must be given in detail and that a certain degree of restraint must be exercised in the unilateral application of national laws.[104] The Regulation does not contain any explicit provision regarding its interpretation. The Virgós-Schmit Report states that the Regulation may be seen as a self-contained legal structure, and its concepts cannot be placed in the same category as concepts belonging to national law.[105] The Regulation must retain the same meaning within the different national systems. Its concepts may not, therefore, be interpreted simply as referring to the national law of one or another of the Member States concerned.[106] The Virgós-Schmit Report states that when the substance of a problem is directly governed by the Regulation, the international character of the Regulation requires an autonomous interpretation of its concepts.[107] This is the case, for instance, with the concept of establishment in Article 2 (h) of the EIR. Paulus submits that Article 2 of the EIR is the so-called definition norm containing the statutory definitions of key terms used throughout the Regulation. The intention is to ensure the most uniform interpretation possible of these terms in all the various Member States.[108] The interpretation of these terms is a matter for the ECJ.[109] However, the Regulation itself may require the meaning of a concept to be bound in the applicable national law, when it does not wish to interfere with

---

[101] Virgós-Schmit Report mn 202.
[102] Recital 29 of the EIR.
[103] Article 17 (2) first sentence of the EIR. An exception to this rule is stipulated in Article 17 (2) second sentence of the EIR.
[104] Paulus. *Op. cit.*, Einl mn 20, S 64–65.
[105] Virgós-Schmit Report mn 43.
[106] Ibid.
[107] Ibid. See also: ECJ case C-341/04 – Judgment of the Court (Grand Chamber) – Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Supreme Court (Ireland), made by decision of 27 July 2004, received at the Court on 9 August 2004, in the proceedings Eurofood IFSC Ltd – 2 May 2006. An autonomous interpretation implies that the meaning of its concepts should be determined by reference to the objectives and the system of the Regulation, taking into account the specific function of those concepts within the system and the general principles which can be inferred from all the national laws of the Member States.
[108] Paulus. *Op. cit.*, Art 2 mn 1, S 102.
[109] Smid. Deutsches und Europäisches Internationales Insolvenzrecht, 2004, Art 2 mn 1; cited by Riedemann in: Pannen. *Op. cit.*, Art 2, mn 1, p 52.

the national laws or when the function of the specific provision of the Regulation so requires. This is the case, for example, with the concept of insolvency in Article 1 or the concept of rights *in rem* as laid down in Article 5 of the EIR.[110] Thus, the principle of mutual trust is bilateral and flexible instrument although uniformity of interpretation should be required from the courts of the Member States in order to ensure effective and efficient administration of cross-border insolvency proceedings derived from the Regulation.

Neither the automatic recognition nor the principle of priority is conceivable without the principle of mutual trust.[111] The Virgós-Schmit Report states that the general principle of recognition is valid for all proceedings within the meaning of Article 2 (a) and (c) of the EIR opened under Article 3 of the EIR.[112] This Report also states that only such insolvency proceedings benefit from the system of recognition of the Regulation, which are listed in the Annexes of the EIR.[113] According to Article 2 (c) of the EIR, "winding-up proceedings" are collective insolvency proceedings within the meaning of Article 2 (a) of the EIR that involve the realization of the debtor's assets even if the proceedings have been closed by a composition or other measure terminating the insolvency, or closed because of insufficiency of assets. The proceedings relevant here are listed in Annex B of the EIR. The Virgós-Schmit Report states that this provision defines the type of proceedings permissible as secondary insolvency proceedings pursuant to Article 3 (2) and Article 27 of the EIR[114] since secondary insolvency proceedings may only take the form of winding-up proceedings.[115] Virgós and Garcimartín state that this "closed-list system"[116] provides legal certainty and mutual trust as it enables the parties applying it to ascertain exactly which insolvency proceedings fall within the scope of the Regulation's application.[117] I agree, because Annexes of the EIR are useful tools for the courts of the Member States in practice. Thus, the Member States should formulate and determine the most appropriate national insolvency proceedings within the meaning of Article 2 (c) of the EIR to be listed in Annex B of the Regulation. Once a national insolvency procedure is included in Annex B of the EIR, other Member States must recognise it and its effects.

The possibility of opening of territorial insolvency proceedings provided for in the Regulation is seen as an exception to the idea of a single set of insolvency proceedings with universal scope.[118] On the one hand, Virgós and Garcimartín state that the Regulation aims to allow those who possess the necessary

---

[110] Virgós-Schmit Report mn 43.
[111] Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 31, p 15.
[112] Virgós-Schmit Report mn 146.
[113] Virgós-Schmit Report mn 145.
[114] Virgós-Schmit Report mn 64.
[115] Riedemann in: Pannen. *Op. cit.*, Art 2, mn 10, p 53.
[116] Virgós. Garcimartín. *Op. cit.*, p 30.
[117] Riedemann in: Pannen. *Op. cit.*, Art 2, mn 3, p 52.
[118] Virgós. Garcimartín. *Op. cit.*, mn 22, p 17.

information to choose the insolvency proceedings best suited to each specific case while, nevertheless, preventing this choice from being made from purely opportunistic motives. For this reason, it can be said that the Regulation "does not impose" a specific model, but rather allows those involved selecting themselves one.[119] Therefore, it may be said that the Regulation trusts those persons who participate in insolvency proceedings. On the other hand, Virgós and Garcimartín are of the opinion that the Regulation tries to restrict the nature of territorial insolvency proceedings because of the possible opportunistic behaviour of the participants in these proceedings. That is why secondary insolvency proceedings are subject to different measures of mandatory coordination with main insolvency proceedings.[120] Thus, at the same time, it may be said that the Regulation does not trust the participants involved in the insolvency proceedings. Omar states that the principle of mutual trust is also the basis on which any dispute between the courts of the Member States is to be resolved where, for instance, both courts claim competence to open main insolvency proceedings.[121] Wessels is of the opinion that reference to mutual trust should be seen in the light of the central role the court has to play when exercising its jurisdiction and, likewise, the need for a court in another Member State to abstain.[122] He submits that due to the subordinate character of the secondary insolvency proceedings there should be no doubt concerning the type of insolvency proceedings that have been opened and it should be clear from the start which type of obligations must be fulfilled by the liquidator.[123] I agree. I think that principle of mutual trust has a central role in the Regulation, because the Regulation has been enacted having regard to the Treaty establishing the European Community.[124] However, the Regulation may not be directly based on Article 81 of the Treaty on the Functioning of the European Union (TFEU),[125] which establishes judicial cooperation in civil matters having cross-border implications based on the principle of mutual recognition of judgements and of decisions in extrajudicial cases in EU, it is crucial for the participants (especially for the courts and the liquidators) in the insolvency proceedings to

[119] Ibid.
[120] Virgós. Garcimartín. *Op. cit.*, mn 23, p 17–18.
[121] Omar (2004). *Op. cit.*, p 105.
[122] Wessels (2006). *Op. cit.*, mn 10551, p 302.
[123] Wessels (2006). *Op. cit.*, mn 10551, p 302–303.
[124] Nowadays known as one part of the Treaty on the Functioning of the European Union. Note: it has been argued in legal literature what is or should be the correct legal basis of the Regulation. For instance, Torremans submits that the Regulation is adopted on the basis of Article 65 of the Treaty establishing the European Community. See: Torremans. Cross Border Insolvencies in EU, English and Belgian Law. Kluwer Law International, 2002, p 137. Israël, on the other hand, argues that is should have been Article 95 of the Treaty establishing the European Community. See: Israël. *Op. cit.*, p 251.
[125] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 183, 30.03.2010, p 47–199.

follow the principle of mutual trust, otherwise the effective and efficient administration of cross-border insolvency proceedings may not be achieved.

1.3.2. Principle of Modified Universality

A fundamental issue in international insolvency law is whether the effects of an insolvency proceeding are to be universal,[126] i.e. in all countries where assets of the debtor are situated, or whether territoriality restricted insolvency proceedings may be opened in each country.[127] This issue has been discussed in the legal literature under the concepts of universal versus territorial or unified versus multiple insolvency proceedings.[128] Depending on the particular era, the responses varied. While legal scholars in the 19th century largely favoured[129] the territoriality of insolvency proceedings,[130] in the 20th century the majority seem to favour[131] universality.[132] Although there is now a broad consensus at least in theory that the principle of universality is the better solution in a globalized world, because it also reduces the cost of the credit by allowing *ex*

[126] The Draft Convention of 1980, which permitted secondary insolvency proceedings, was based on the implementation of the principles of universality and unity of insolvency as closely as possible. See: Article 18, 34 and 56 of the Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings. Report on the draft Convention. Bulletin of the European Communities, Supplement 2/82, p 3–4.

[127] Two normative models, i.e. the territorial model and the universal model, are analysed in detail in: Virgós. Garcimartín. *Op. cit.*, mn 9–16, p 11 ff.

[128] Smid. Europäisches Internationales Insolvenzrecht, 2002, S 5; cited by Pannen/ Riedemann in: Pannen. *Op. cit.*, Introduction, mn 35, p 15.

[129] However, in the latter part of the 19th century in the Netherlands, support could already be identified for the idea of universality, especially by Josephus Jitta, who is now considered to be one of the forerunners in the field of international insolvency and is recognized as having established and influenced the concept of "mitigated" universality of insolvency proceedings by the opening abroad of local ancillary, or territorial, proceedings. This idea, in Wessels' opinion, reflects, for example, the European Insolvency Regulation's concept of secondary insolvency proceedings. See: Wessels (2006). *Op. cit.*, mn 10010, p 6.

[130] See: Westbrook. Multinational Enterprises in General Default: Chapter 15, the ALI Principles and the EU Insolvency Regulation. American Bankruptcy Law Journal, Winter 2002, vol 76, p 1–42.

[131] In contrast to the territorial model, the universal model reflects some advantages, namely: a) the applicable law is easy to predict; b) cross-border movements of assets are irrelevant, and this prevents asset forum shopping; c) the process, because it is centralized, and so may reduce the administrative costs arising from a plurality of proceedings and can therefore be conducted more efficiently. This last point is particularly relevant when the aim of the insolvency process is to restructure the company. The administration and financial rescue of a company must be conducted in a centralized way, because the company, from the economic point of view, has to constitute an integrated whole. See: Virgós. Garcimartín. *Op. cit.*, mn 14, p 14.

[132] The principle of territoriality is opposed and the principle of universality is adhered to in legal literature in the USA, England, Germany and the Netherlands. See: Wessels (2006). *Op. cit.*, mn 10017, p 11.

ante more efficient assignment of capital and reduces *ex post* the rush by the creditors to request the opening of insolvency proceedings,[133] the practical implementation of it seems rather doubtful considering the wide diversity of insolvency law regimes.[134] However, the universal model can be modified, for example, a) by allowing certain subordinated territorial insolvency proceedings to run concurrently alongside the main insolvency process; b) by allowing, under certain conditions, the opening of territorial insolvency proceedings without the need to open proceedings with universal scope; or c) by establishing exceptions to the application of the *lex fori concursus*.[135] Therefore, intermediate models,[136] for instance, modified universalism,[137] cooperative territoriality[138] and universal proceduralism,[139] have been introduced.

According to Recitals 11 and 12 of the EIR, the Regulation uses a "combined model"[140] and responds to a model of modified[141] or mitigated universality.[142] Pannen and Riedemann submit that the idea underlying the concept of modified or mitigated universality is to have a single insolvency proceeding and to allow other subordinate insolvency proceedings in exceptional cases only.[143] Universality is thus restricted ("moderated" or "mitigated") in the Regulation by allowing, under certain conditions, the opening of secondary insolvency proceedings to run in parallel with the main insolvency proceedings and by establishing exceptions to the application of the *lex fori concursus*.

---

[133] Virgós. Garcimartín. *Op. cit.*, mn 14, p 15.

[134] Pannen in: Runkel. (ed.) Anwaltshandbuch – Insolvenzrecht. 2005, § 16 mn 44 (fn 2); cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 36, p 16.

[135] Virgós. Garcimartín. *Op. cit.*, mn 11, p 12.

[136] See: Virgós. Garcimartín. *Op. cit.*, mn 9–16, p 11 ff.

[137] Modified universalism, advocated by Jay Westbrook seeks to create one universal insolvency case, administered under the insolvency law of the jurisdiction where the debtor has its COMI. Courts of other "ancillary" jurisdictions participate to a limited extent in helping to gather assets and to implement the decisions of the "main" forum. See further in: Janger. Virtual Territoriality. Columbia Journal of Transnational Law, Forthcoming; Brooklyn Law School, Legal Studies Paper No. 169. Available at SSRN: http://ssrn.com/abstract=1468615.

[138] Cooperative territorialism, advocated by Lynn LoPucki, envisions multiple full scale insolvencies administering local assets and local claims according to local law, but with the multiple cases coordinated through judicial communication. See further in: Janger. *Op. cit.*, p 7.

[139] Under universal proceduralism, advocated by Edward J. Janger, the limited goal of harmonization would be to facilitate a single, coordinated, cross-border case while minimizing both the pressure to harmonize the substantive aspects of insolvency law and the stakes associated with forum choice. See further in: Janger. Universal Proceduralism. Brooklyn Journal of International Law 2007, p 819, 830.

[140] Wessels (2006). *Op. cit.*, mn 10456, p 241.

[141] A so-called modified universality has also found favour and is being endorsed by the UNCITRAL Model Law and by the ALI Principles. See: Westbrook. *Op. cit.*, p 9.

[142] Virgós. Garcimartín. *Op. cit.*, mn 17, p 15.

[143] Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 36, p 16.

These proceedings are limited in effect to the particular Member State in which they are commenced and are subject to rules of coordination with the main insolvency proceedings.[144] Nevertheless they represent a major incursion on the principle of universality.[145]

Wessels prefers to characterize the Regulation's functioning as "coordinated" universality.[146] He submits that the Regulation is built around the idea of "*diversa sed una*": (formally) divided, substantially one. Although formal proceedings are separated into main and (several) secondary insolvency proceedings, the claims of all (unsecured) creditors should be aligned against the same insolvent debtor. In addition, the main liquidator has significant coordinating powers to align main and secondary insolvency proceedings.[147] Although secondary insolvency proceedings only have territorial scope and are, by nature, winding-up proceedings, such limitations do not necessarily have to produce isolated results.[148] Therefore, the Regulation seeks to reconcile the advantages of the principle of universality and simultaneously the necessary protection of local interests. This explains, according to the Virgós-Schmit Report, why a combined model has been adopted which permits secondary insolvency proceedings to coexist with the main insolvency proceedings.[149] Being well aware of the difficulties involved with universally effective insolvency proceedings within the EU, the drafters of the Regulation opted in favour of a modified universality. Israël submits that "universality" was to be maintained through rules of cooperation and coordination between various courts and liquidators.[150] The Virgós-Schmit Report states that the legitimization for this is found in the absence in Europe of a uniform system of secured (property) rights and the widely disparate national law criteria for ascertaining the preferential rights of the various classes of creditors.[151] Although the Regulation essentially endorses the universal effects of the insolvency proceedings, it also allows – taking national differences into account – the opening of territorially restricted insolvency proceedings in those Member States in which an establishment of the insolvent debtor is situated.[152]

---

[144] See, for instance, Articles 31, 33 and 37 of the EIR.

[145] In contrast, in relation to insolvent insurers and banks, the regimes under the relevant directives make no provision for secondary proceedings but instead provide for true universality pursuant to which insolvency proceedings can be opened in, and only in, the home Member State of the insurer or bank. Cited by Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.52, p 246.

[146] Wessels (2006). *Op. cit.*, mn 10939, p 517.

[147] Ibid.

[148] Ibid.

[149] Virgós-Schmit Report mn 33.

[150] Israël. *Op. cit.*, p 240.

[151] Virgós-Schmit Report mn 12; Recital 11 of the EIR.

[152] Pannen: in Runkel. (ed.) Anwaltshandbuch – Insolvenzrecht. 2005, § 16 mn 44; cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Introduction, mn 37, p 16.

To summarize, some conclusions are provided below. It should be noted that during the drafting the Regulation (already in the 1995 Convention on Insolvency Proceedings) the universal model was modified by all three measures, e.g. allowing subordinated territorial insolvency proceedings to run in parallel with the main insolvency process; by allowing, under certain conditions, the opening of territorial insolvency proceedings without the need to open proceedings with universal scope, and by establishing exceptions to the application of the *lex fori concursus*. Thus, it may be said that the concept of secondary insolvency proceedings definitely has grown gradually and has an important role in the Regulation.

It is evidently too early to draw any bold conclusions, but my first observation is that the concept of secondary insolvency proceedings, as a compromise made between the Member States in the 1990s and finally enacted in the Regulation, may seem rather complex to administer. First, secondary insolvency proceedings serve contradictory purposes, e.g. to protect local interests and assist main insolvency proceedings at the same time. Secondary insolvency proceedings are subject to different measures of mandatory coordination with main insolvency proceedings. Second, the Regulation is silent on the question on which insolvency policies secondary insolvency proceedings should be aimed at. Third, the principle of mutual trust has a central role in the Regulation, because the Regulation has been enacted having regard to the Treaty establishing the European Community. However, the Regulation may not be directly based on Article 81 of the TFEU, which establishes judicial cooperation in civil matters having cross-border implications based on the principle of mutual recognition of judgements and of decisions in extrajudicial cases in EU, it is crucial for the participants (especially for the courts and the liquidators) in the insolvency proceedings to follow the principle of mutual trust, otherwise the effective and efficient administration of cross-border insolvency proceedings may not be achieved.

The principle of mutual trust is also a dynamic principle because it must be taken into account when interpreting the Regulation. The Regulation must retain the same meaning within the different national systems. Therefore, it puts responsibility on the Member States through formulating, amending and supplementing their national laws accordingly and on participants in the insolvency proceedings through choosing appropriate measures to solve the problems through relevant insolvency proceedings chosen. I am inclined to the view that if provisions formulating secondary insolvency proceedings in national laws of the Member States are not well-deliberated and in conformity with the Regulation, the secondary insolvency proceedings can also work against the effective and efficient administration of the cross-border insolvency proceedings within EU.

2. OPENING AND RECOGNITION OF SECONDARY INSOLVENCY PROCEEDINGS

2.1. Prerequisites to Open Secondary Insolvency Proceedings

2.1.1. Main Insolvency Proceedings

The rules of jurisdiction set out in the Regulation establish only international jurisdiction to open insolvency proceedings.[153] In addition to regulating international jurisdiction, Article 3 of the EIR regulates the relationship between main and territorial insolvency proceedings and the requirements pursuant to which they may be opened. Secondary insolvency proceedings are not the rule.[154] In order to open secondary insolvency proceedings, it is imperative that main insolvency proceedings have been opened in another Member State. Therefore, the secondary insolvency proceedings may only be opened parallel to main insolvency proceedings.[155] It follows that the competent court of the Member State empowered to open secondary insolvency proceedings needs to examine whether the court of another Member State, empowered to open main insolvency proceedings, opened insolvency proceedings within the meaning of Article 2 (a) of the EIR as listed in Annex A of the EIR and whether its judgement is effective.[156]

In this regard, the competent court of the Member State empowered to open secondary insolvency proceedings may face some problems to be solved. First problem relates to the question, how should the competent court of the Member State empowered to open secondary insolvency proceedings know that it has jurisdiction to open secondary insolvency proceedings. It seems to me that the competent court of the Member State which has jurisdiction to open main insolvency proceedings has to clearly express in the judgement that it has jurisdiction within the meaning of Article 3 (1) of the EIR, and that main insolvency proceedings listed in Annex A of the EIR have been opened. Indeed, the court has to have legal grounds to clearly specify its international jurisdiction and type of the insolvency proceedings opened in a given case. However, such a provision to express clearly what set of insolvency proceedings are being opened by the competent court of Member State is not laid down in the Regulation. I think that such a provision to express clearly what set of insolvency proceedings are being opened by the competent court of

[153] The Regulation does not specify which court within a Member State with international jurisdiction is competent to make decisions locally. National law itself determines territorial jurisdiction within a given Member State. See: Recital 15 of the EIR.

[154] Torremans. Cross Border Insolvencies in EU, English and Belgian Law. Kluwer Law International, The Hague, London, New York, 2002, p 157.

[155] Recital 12 of the EIR.

[156] Virgós-Schmit Report, mn 213; Article 16 of the EIR.

Member State may be inserted into the national laws of the Member States. In order to state whether the judgement opening of insolvency proceedings concerns main or secondary insolvency proceedings, the national laws of the Member States should be amended accordingly, if the court has no legal grounds to clearly specify its international jurisdiction and type of the insolvency proceedings opened in a given case. Thus, I find it reasonable if legislators of the Member States, such as Germany, the Netherlands and France, have already acknowledged that via improvement of national laws certain measures, such as the provision stating which insolvency proceedings are to be opened by the judgement of the competent court, are necessary to put the Regulation into practical effect in order to secure its seamless operation in the national legal environment.[157] As for Estonia, I think that the current legal solution as stipulated in the Estonian Bankruptcy Act[158] is not entirely sufficient to enable efficient and effective administration of cross-border insolvency proceedings. Section 33 subsections 1 and 5 of the Estonian Bankruptcy Act require publishing of the bankruptcy notice of the judgement opening insolvency proceedings in the official publication *Ametlikud Teadaanded*.[159] There is no requirement in the Estonian Bankruptcy Act to clearly express in the judgement itself that the court has international jurisdiction within the meaning of Article 3 (1) or Article 3 (2) of the EIR, and that main insolvency proceedings listed in Annex A of the EIR or secondary insolvency proceedings listed in Annex B of the EIR have been opened. In my opinion, such a provision to express clearly the international jurisdiction and type of the insolvency proceedings opened in a given case is needed in the Estonian Bankruptcy Act. Otherwise, conflicts in automatic recognition of judgements may occur,[160] because the notices of the judgements should not be necessarily recognised by the other Member States.[161]

Secondly, there is a question of effectiveness of the judgement which opened the main insolvency proceedings by competent court in another Member State. The court, where the opening of secondary insolvency proceedings is requested, needs to examine whether the foreign judgement is effective.[162] Herchen is of the opinion that effectiveness of the opening of proceedings does not mean whether it is formally or substantially final and absolute (*res judicata*), but

[157] See further: Wessels. Realisation of the EU Insolvency Regulation in Germany, France and the Netherlands. In: Wessels (2004). *Op. cit.*, p 229–238.
[158] Estonian Bankruptcy Act (in Estonian: *pankrotiseadus*), the Parliament (*Riigikogu*), 22.01.2003, RT I 2003, 17, 95...RT I, 14.03.2011, in force since 01.01.2004, hereinafter: EBA.
[159] Available only in electronic format in Estonian.
[160] See further: Mankowski. Some Topics Related to the Recognition and Enforcement of Judicial Decisions in Insolvency Matters. Reporters: Bootsma. Verweij. In: Verweij. Wessels. (eds.) Comparative and International Insolvency Law Central Themes and Thoughts. INSOL Europe, 2010, p 26–31.
[161] Recital 22 of the EIR and Article 16 of the EIR.
[162] Virgós-Schmit Report, mn 216; Article 16 of the EIR.

whether, pursuant to the *lex fori concursus universalis*, it gives rise to its immediate legal effects.[163] According to the literature, the fact that the judgement may be appealed against in the Member State in which the proceedings are opened does not deter from this.[164] However, Vallender is of the opinion that provisional main insolvency proceedings will not suffice.[165] If the judgement which opened insolvency proceeding mentioned in Annex A of the EIR acknowledges that it constitutes the opening of main insolvency proceedings and has begun to be effective, that judgement is recognized within the meaning of Article 16 of the EIR. The requirement laid down in the Regulation is according to the Virgós-Schmit Report thus met.[166]

Another problem is that the judgement opening main insolvency proceedings should be automatically recognised from the time that it becomes effective in the Member State of the opening of main insolvency proceedings.[167] In this aspect, the court empowered to open secondary insolvency proceedings has to know when main insolvency proceedings are opened in another Member State. Ascertaining the time of opening of main insolvency proceedings is a key factor in international insolvency.[168] Article 2 (f) of the Regulation defines the time of the opening of proceedings as the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not. The first problem which the competent court of the Member State handling secondary insolvency case faces is that national legislation may not refer to the concept of opening at all. As far as the United Kingdom and Ireland were concerned, the concept of "opening" was not known to these jurisdictions or their legislation prior to the Regulation coming into force. In England, the forms of order used in insolvency proceedings were brought in line with the Regulation by providing expressly that the making of a winding-up order was the "opening" of a proceeding. This was not, however, done in Ireland.[169] For instance, in the Estonian Bankruptcy Act, the opening of insolvency proceedings was brought in line with the Regulation as of 1st of January 2010 by providing expressly that

[163] Herchen in: Pannen. *Op. cit.*, Art 27 mn 20, p 405.
[164] Virgós-Schmit Report mn 147; Duursma-Kepplinger/Chalupsky in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 16 mn 10 et seq., S 356 ff; Fritz/Bähr. Die Europäische Verordnung über Insolvenzverfahren – Herausforderung an Gerichte und Insolvenzverwalter, DZWiR 2001, S 221, 225; in: Pannen. *Op. cit.*, Art 27 mn 20, p 405.
[165] Vallender. Die Voraussetzungen für die Einleitung eines Sekundärinsolvenzverfahrens nach der EuInsVO, InVO 2005, S 41, 42, 45; doubting this Mankowski. Klärung von Grundfragen des europäische Internationalen Insolvenzrechts durch die Eurofood-Entscheidung?, BB 2006, p 1753; in: Pannen. *Op. cit.*, Art 27 mn 20, p 405.
[166] Virgós-Schmit Report, mn 217.
[167] Article 16 (1) of the EIR.
[168] Moss. When is a proceeding opened? Insolvency International, 2008, 21(3), p 33.
[169] Moss (2008). *Op. cit.*, p 33.

the declaration of bankruptcy is the "opening" of an insolvency proceeding.[170] Latvia also made relevant amendments to its Insolvency Act as of the 1st of November 2010.[171] Thus, I think that the concept of opening has to be clearly determined in national laws to give relevant guidance to the foreign court empowered to open secondary insolvency proceedings. The national laws of the Member States should have relevant provisions stating which "judgement" should be understood as "the opening of the insolvency proceedings" within the meaning of the Regulation.

In addition, there are two important points to be evaluated by the courts empowered to open secondary insolvency proceedings on the "effectiveness" of the "judgement" based on differences in the national laws of Member States. The following factors affect the time at which the opening of the (main) insolvency proceedings takes place:

1) the effectiveness of the judgement may depend on some other step, such as publishing or registration;[172]
2) the judgement may be stayed or the judgement of the opening does not have to be final, it can be subject to review.[173]

Thus, it seems to me that the court of the Member State empowered to open secondary insolvency proceedings should also be aware of the technicalities available in national laws of other Member States (for instance, whether judgements are considered to be final or not) to come up with a legally correct solution in its insolvency case in hand. I think that court-to-court communication is needed to clarify relevant circumstances before judgement is delivered. A positive example of court-to-court communication in cross-border insolvency proceedings is the case *BenQ Mobile Holding BV*, where the Munich court in Germany decided to agree with the Amsterdam court in the Netherlands to defer its decision to open insolvency proceedings to the Amsterdam's judge's ruling on the opening of insolvency proceedings.[174] Also, in my opinion, it

---

[170] Section 31 subsection 5 of the EBA. See: Explanatory Note of the amendments to the Estonian Bankruptcy Act made in Bailiffs Act (SE 462), p 39–40. Online available: http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=594370&u=20101110110605.

[171] Insolvency proceedings are opened from the day when the court judgement of the opening becomes effective, not from the time when the application to open insolvency proceedings was brought to court. See: Latvian Insolvency Act (in Latvian: *Maksatnespejas likums*), the Parliament (*Saeima*), 26.07.2010, Latvijas Vestnesis, 124 (4316), 06.08.201 ... Latvijas Vestnesis, 170 (4362), 27.10.2010. In force since 01.11.2010, hereinafter: LIA.

[172] For instance, Article 21 and 22 of the EIR refer to mandatory procedures for publication and registration in the Member States. These procedures tend not to be widely known in other jurisdictions. See different requirements available in the Member States at INSOL Europe. Technical Content. EIR Articles 21 & 22. Online. Available: http://www.insol-europe.org/technical-content/eir-articles-21-22/.

[173] Moss (2008). *Op. cit.*, p 33.

[174] See summary on decision 1503 IE 4371/06, Local Court of Munich, 5 February 2007 in: Marshall. European Cross Border Insolvency, London, Sweet & Maxwell, 2008, mn 2.083/3, p 2–137.

could be helpful if courts of the Member States indicate in their opening judgements when the judgement becomes effective (for instance, indicating the exact time) under the relevant national law. If such a statement in the judgements of the opening insolvency proceedings is not required under the national laws of the Member States, the national laws of the Member States should have at least relevant provisions stating when "judgement" becomes effective within the meaning of the Regulation.

Herchen is of the opinion that if the prior judgement opening insolvency proceedings does not contain an indication that the court was aware of the cross-border dimension of the insolvency case, nor that it intended to open main insolvency proceedings within the meaning of the Regulation, there must still be an assumption that main insolvency proceedings have been opened.[175] In my opinion, there cannot always be such an assumption that the main insolvency proceedings have been opened because priority in time does not necessarily mean that the main insolvency proceeding is always the first to be opened. There may be cases where insolvency proceedings provided for in Article 3 (4) of the EIR are opened prior to the main insolvency proceedings. Therefore, the domestic court, second in line in terms of timing, should always, in case the prior judgement opening insolvency proceedings does not contain an indication that the court was aware of the cross-border dimension of the insolvency case, nor that is intended to open main insolvency proceedings within the meaning of the Regulation, make sure what insolvency case (main or territorial) it has in hand. Indeed, in my opinion, there should definitely be an EU-wide register on insolvency cases to make it less burdensome and less complex for courts to identify what insolvency case it may have in hand.

Another potential problem, in my view, lies with the definition "the time of the opening of proceedings" in Article 2 (f) of the EIR. Procedural difficulties[176] faced by the courts of Member States have appeared mainly because of the existence of the last part of that definition, namely "*whether it is final judgment or not*". The court of the Member State empowered to open secondary insolvency proceedings is not allowed to open proceedings if main insolvency proceedings are not opened, i.e. judgement has not become effective. However, there may be situations where preliminary judgements are effective, applications or petitions in insolvency proceedings are still in process and insolvency proceedings are not "opened" finally or where negative or positive conflicts of jurisdictions appear because of annulment of relevant preliminary judgements during the process. Therefore, for procedural efficiency reasons Article 2 (f) of the EIR could be amended in a way that the last part "*whether it is final judgment of not*" would be deleted. Thus, Article 2 (f) of the EIR should

[175] Herchen in: Pannen. *Op. cit.*, Art 27 mn 21, p 405.

[176] See for instance: Tschauner. Desch. BenQ: the Importance of Making the First Strike. Corporate Rescue and Insolvency Journal, 2008 Volume 1, Issue 1.

be stated as follows: "*'The time of the opening of proceedings' shall mean the time at which the judgement opening proceedings becomes effective.*"

To summarize, some conclusions are provided below. The competent court of the Member State empowered to open secondary insolvency proceedings needs to examine whether the court of another Member State, empowered to open main insolvency proceedings, opened insolvency proceedings within the meaning of Article 2 (a) of the EIR as listed in Annex A of the EIR and whether its judgement is effective. In order to do that the competent court of the Member State which has jurisdiction to open main insolvency proceedings has to clearly express in the judgement that it has jurisdiction within the meaning of Article 3 (1) of the EIR, and that main insolvency proceedings listed in Annex A of the EIR have been opened. Such a provision to express clearly what set of insolvency proceedings are being opened by the competent court of Member State may be inserted into the national laws of the Member States. In order to state whether the judgement opening of insolvency proceedings concerns main or secondary insolvency proceedings, the national laws of the Member States should be amended accordingly, if the court has no legal grounds to clearly specify its international jurisdiction and type of the insolvency proceedings opened in a given case.

The concept of opening has to be clearly determined in national laws to give relevant guidance to the foreign court empowered to open secondary insolvency proceedings. To avoid conflicts of jurisdictions and to promote efficiency of the procedure, the "opening of insolvency proceedings" has to be brought in line with the Regulation by the legislators in the Member States by providing expressly in the laws of the Member States that giving certain court judgement is considered to be the "opening of a insolvency proceeding" within the meaning of the Regulation.

It could be helpful if courts of the Member States indicate in their opening judgements when the judgement becomes effective (for instance, indicating the exact time) under the relevant national law. If such a statement in the judgements of the opening insolvency proceedings is not required under the national laws of the Member States, the national laws of the Member States should have at least relevant provisions stating when "judgement" becomes effective within the meaning of the Regulation.

There should definitely be an EU-wide register on insolvency cases to make it less burdensome and less complex for courts to identify what insolvency case it may have in hand.

For procedural efficiency reasons Article 2 (f) of the EIR could be amended in a way that the last part "*whether it is final judgment of not*" would be deleted. Thus, Article 2 (f) of the EIR should be stated as follows: "*'The time of the opening of proceedings' shall mean the time at which the judgement opening proceedings becomes effective.*"

2.1.2. Establishment

In order to open secondary insolvency proceedings, there must be, as a second prerequisite besides main insolvency proceedings, an establishment within the meaning of Article 2 (h) of the EIR[177] in the Member State at whose courts a request is being made to open secondary insolvency proceedings.[178] This requirement derives directly from the Regulation.

According to the Virgós-Schmit Report the concept and definition of establishment was the subject of intensive debate from the very beginning of the territorial insolvency proceedings, because it is linked to the basis of international jurisdiction to open secondary insolvency proceedings.[179] The concept of establishment is an autonomous concept, defined in the Regulation itself. Virgós and Garcimartín state that this fact, together with the genesis of the provision, is very significant as it tells us that this definition is independent not only from definitions contained in national law, but also from any contained in other Community texts, and in particular, from the definition of the term "establishment" which the ECJ has been applying in its interpretation of Article 5 (5) of the 1968 Brussels Convention,[180] today Regulation 44/2001[181] on civil jurisdiction and enforcement.[182] The fact that the Regulation has its own definition of establishment entails an exception to any principle of "continuity of concepts" within EU law. The reasons for this exception are explained in the Virgós-Schmit Report.[183] Balz submits that the 1995 Convention on Insolvency Proceedings ended a long debate over whether jurisdiction for territorial proceedings should be based on the presence of assets or on the existence of an establishment in a given territory, by opting for the latter. This limitation on the basis of territorial jurisdiction was prompted by concerns of some Member States with strong universalist tendencies, who feared a burgeoning number of small bankruptcies concerning real estate, bank accounts or deposits in Member States.[184] Fletcher states that the key concept in relation to the opening of secondary insolvency proceedings is the existence of an "establishment"

[177] Article 2 (h) of the EIR defines establishment as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.
[178] Herchen in: Pannen. *Op. cit.*, Art 27 mn 23, p 406.
[179] Virgós-Schmit Report mn 70.
[180] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. 27 September 1968. Online available: http://curia.europa.eu/common/recdoc/convention/en/c-textes/_brux-textes.htm.
[181] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters- OJ L 012, 16.01.2001, p. 1–23, as amended.
[182] Virgós. Garcimartín. *Op. cit.*, mn 296, p 159.
[183] See Virgós-Schmit Report mn 70 and 71.
[184] Balz. *Op. cit.*, p 505.

belonging to the debtor.[185] According to the Virgós-Schmit Report the presence of an establishment can be determined from the following angles:

1) from the external point of view, an establishment must involve a distinct presence on the part of the debtor in the market of the Member State in question;[186]
2) from the internal point of view, the establishment must form part of or be an extension of the operational structure of the debtor.[187]
3) the external sphere prevails over the internal one – the decisive factor for these elements is how they are manifested externally and not the subjective intention of the debtor.[188]

Fletcher states that the exclusion of any possibility for proceedings to be opened on the basis of the mere presence of assets of a debtor without any functional activity to constitute "an establishment", is the result of a deliberate decision to restrict the number of opportunities for creditors to avail themselves of the personal and tactical advantages to be gained by means of secondary insolvency proceedings.[189] He submits that a contrast may be drawn between the "passive" quality of assets (even if of very substantial value), and the "active" quality of the concept of an establishment. Also, the requirement that the economic activity must be of a "non-transitory" nature, and be carried out with "human means and goods" should be emphasized.[190] According to the Virgós-Schmit Report the rationale behind the rule is that the same insolvency laws that apply to national market participants should also apply to foreign business participants who operate a national establishment, since both are operating on the same market.[191] For assessing their risks, it is therefore irrelevant for potential creditors whether an establishment is dependent on a national or on a foreign enterprise.[192] Potential creditors contracting through the local establishment should assess the insolvency risks they are assuming by reference to the national law only in relation to short-term transactions; once the establishment is closed, if insolvency proceedings have not been opened, the

[185] Fletcher. Insolvency in Private International Law. National and International Approaches, 2nd edn, Oxford University Press, 2005, mn 7.54, p 375.
[186] Virgós. Garcimartín. *Op. cit.*, mn 300, p 160.
[187] The Regulation states that the debtor must "possess" an establishment. It is immaterial whether the facilities are owned, or rented by, or are otherwise at the disposal of the debtor. What matters is that, the establishment must be subject to a certain degree of control and direction on the part of the debtor. Virgós. Garcimartín. *Op. cit.*, mn 301, p 162.
[188] Virgós-Schmit Report mn 70.
[189] Fletcher in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 3.23, p 52.
[190] The Istanbul Convention of the Council of Europe would permit the opening of secondary bankruptcy proceedings on the basis of a presence of assets alone. Fletcher (2005).*Op. cit.*, mn 6.20, p 329.
[191] Virgós-Schmit Report mn 71.
[192] Virgós-Schmit Report mn 70.

basis for jurisdiction disappears.[193] The Regulation requires the connection employed in Article 3 of the EIR as basis for jurisdiction to be genuine. The definition it gives for establishment is fact-oriented and the test to determine when there is an establishment, a "reality test". According to Virgós and Garcimartín the fictions that may exist in national laws are not applicable, e.g. the rule that a person is treated as continuing the business in the forum until he settles his business debts.[194] The Virgós-Schmit Report states that if there is no establishment within the meaning of Article 2 (h) of the EIR, no secondary insolvency proceedings can be opened and in this case, the main insolvency proceedings will produce their full effects on the territory where the debtor does not have an establishment, but has assets.[195] Balz states that a Member State cannot protect local interests through secondary insolvency proceedings in other situations, as, for instance, where the debtor owns only a bank account, a private home, or securities in its territory.[196] The fact that assets of the debtor are situated in the Member State where the request is being made does not suffice in general.[197] In addition, Virgós and Garcimartín state that courts of the Member States empowered to open secondary insolvency proceedings should follow that, the concept of establishment as enacted and used by the Regulation is neutral with regard to the nature of the debtor (e.g. whether the debtor is a legal or natural person) or the capacity in which the debtor may act.[198] According to the ECJ case *Susanne Staubitz-Schreiber* the relevant moment to establish international jurisdiction on the basis of the "establishment" is when the application for insolvency proceedings is filed.[199] It is at this moment that the insolvent debtor's establishment must be located in the forum. In case there are several "establishments" located in one Member State, the national law should give relevant guidance to the courts.[200] As the concept of the establishment is defined autonomously in the Regulation itself, it puts, in my

[193] Lightman in: Moss. Fletcher. Isaacs (eds). The EC Regulation on Insolvency Proceedings, Oxford University Press, 2002, mn 8.62, p 175.
[194] Virgós. Garcimartín. *Op. cit.*, mn 300, p 161.
[195] Virgós-Schmit Report mn 219.
[196] Balz. *Op. cit.*, p 522.
[197] Virgós-Schmit Report mn 70; Moss/Smith in: Moss. Fletcher. Isaacs (2002). *Op. cit.*, mn 8.61, p 175; OLG Vienna NZI 2005, 56, 60; Concurring: Paulus. Comments on OLG Vienna dated 09.11.2004 – 28 R 225/04w, NZI 2005, S 62; cited by Herchen in: Pannen. *Op. cit.*, Art 27 mn 23, p 406.
[198] Virgós. Garcimartín. *Op. cit.*, mn 297, p 160.
[199] ECJ case C-1/04 – Judgment of the Court (Grand Chamber) – Reference for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 27 November 2003, received at the Court on 2 January 2004, in the proceedings Susanne Staubitz-Schreiber – 17 January 2006.
[200] See also: Wimmer. Einpassung der EU-Insolvenzverordnung in das deutsche Recht durch das Gesetz zur Neuregelung des Internationalen Insolvenzrechts, FS Kirchof, 2003, S 521, 524; cited by Kolmann in: Gottwald. (ed.) Insolvenzechts-Handbuch. Verlag C.H. Beck München 2010, § 130, mn 67, S 2315.

opinion, extra responsibility on the courts of the Member States empowered to open secondary insolvency proceedings to evaluate whether they have international jurisdiction to open secondary insolvency proceedings.

Thus, what are the main problems which may be faced by the courts of the Member States empowered to open secondary insolvency proceedings implementing the concept of establishment, which is according to Article 2 (h) of the EIR based on the following criteria: any place of operations, non-transitory nature of economic activity and utilization of human means and goods. Further analysis of the individual elements of the definition is presented below.

1) Any place of operations

The Virgós-Schmit Report states that the place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.[201] According to literature, an office,[202] a shop from which the debtor carries on operations,[203] a large construction site (if the project management utilizes machines and employs persons on a permanent basis and a certain degree of organization can be determined),[204] doctor's medical practices, law firms or warehouses can be classified as establishments.[205] Wessels states that a lorry or truck, operated by a Belgian company and on its way through France to Belgium does not constitute a place; a mobile caravan belonging to the same company, which is placed for two months in Toulon to support merger negotiations with the management of a Spanish company would be considered a place, but probably not qualify as a place of operations.[206] In the case *Stojevic* the Austrian court held that the debtor's place of operations must have a certain level of organization and stability.[207] Accordingly, a purely occasional place of operations will not constitute an establishment. In addition, Wessels submits that raw material from the Belgian company, located/stored near Lyon for making end products by a French company, will not qualify as a place. Accordingly, if a debtor has goods held in a warehouse operated by a third party this will not be an establishment.[208] Mere possession of a bank account or

[201] Virgós-Schmit Report mn 71.

[202] Even an office with a secretary (one-man office) would do: *Re Stojevic* Court of Appeal in Vienna, 9 November 2004, 28 R 225/04w (not revised on this point by the Supreme Court). Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.35, p 241.

[203] Ibid.

[204] Carstens. Die internationale Zuständigkeit im europäischen Insolvenzrecht, 2005, S 77; cited by Riedemann in: Pannen. *Op. cit.*, Art 2, mn 53, p 62.

[205] Moss/Smith in: Moss. Fletcher. Isaacs (2002). *Op. cit.*, mn 8.27, p 165. Paulus. *Op. cit.*, Art 2 mn 36, p 114. Smid. Deutsches und Europäisches Internationales Insolvenzrecht, 2004, Art 2 mn 22; cited by Riedemann in: Pannen. *Op. cit.*, Art 2, mn 53, p 62.

[206] Wessels in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.38, p 242.

[207] *Re Stojevic* Court of Appeal in Vienna, 9 November 2004, 28 R 225/04w (not revised on this point by the Supreme Court. In: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.37, p 242.

[208] Wessels in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.38, p 242.

securities does not usually constitute having a place, or operations. In addition, possession of a holiday home operated by an individual debtor should not generally be considered an establishment since this is not usually a place where economic activity is carried on, at least not on a stable footing. In the case *Criss Cross s.r.l* the court held that the presence of a registered office located at the offices of the company's statutory auditors is not sufficient.[209] I think that in this case the court was correct. The external impression is therefore the decisive factor, rather than the subjective intentions of the debtor.[210] However, I also agree with Wessels, who states that the presence of a shop or other premises or the registration as a merchant in certain trade registers are not necessary requirements.[211] In my opinion, the place of operations of an insolvent debtor means a place from which economic activities are exercised on the open market (i.e. externally) and therefore this place should be ascertainable by the third parties.

2) Non-transitory nature of economic activity

The definition requires "economic activity" of the insolvent debtor and this activity must not be of mere transitory nature. Wessels submits that it is only when a debtor actively strives for proceeds or profit "with human means and goods" that the requirement of "economic activity" will be satisfied.[212] Therefore, the (passive) investment activity might not be seen as "economic activity". A purely occasional or temporary place of operations could not be classified as an establishment, although there is no indication within the Regulation (or in the Virgós-Schmit Report) as to the minimum length of time after which an activity ceases to be "transitory" for this purpose. The Virgós-Schmit Report states that the negative formula ("non-transitory") aims to avoid minimum time requirements.[213] Therefore, a certain degree of permanence is required.[214] However, the legislators did not stipulate a minimum time period.[215] It depends on the circumstances in the individual case. As the Virgós-Schmit Report states, the decisive factor is how the activity appears externally, and not the personal intentions of the debtor.[216] However, the Tallinn Court of Appeal in *SigMar Invest OÜ vs. Rapla Invest AB*[217] considered that if a debtor has had an

[209] See summary of case *Criss Cross s.r.l*, unreported, Tribunal of Milan, 18 March 2004 in: Marshall (2008). *Op. cit.*, mn 2.080, p 2–130.
[210] Fletcher (2005). *Op. cit.*, mn 7.55, p 377.
[211] Wessels (2006). *Op. cit.*, mn 10534, p 287.
[212] Wessels (2006). *Op. cit.*, mn 10535, p 287.
[213] Virgós-Schmit Report mn 71.
[214] Carstens. Die internationale Zuständigkeit im europäischen Insolvenzrecht, 2005, S 74; cited by Riedemann in: Pannen. *Op. cit.*, Art 2, mn 55, p 62.
[215] Virgós-Schmit Report mn 71.
[216] Ibid.
[217] Judgment of the Court of Appeal in Tallinn, dated 14 June 2006 no 2-05-530 – OÜ SigMar Invest appeal against judgment by Tallinn City Court of 25 May 2005 in bankruptcy matter *OÜ SigMar Invest vs. Rapla Invest AB*.

establishment defined by the Regulation in the past and there were still assets left in the relevant Member State from that activity, then that should be considered sufficient for opening secondary insolvency proceedings. In that case, the original economic activity of the Swedish company in Estonia – transporting oil – had ended in 2002, but the debtor had bought land in Estonia with intention to build a hunting cabin and develop hunting tourism, and had a contract to start construction on the land as well as employing a project manager under a contract of employment. Moss points to the summary of the facts in the case, which suggests that the debtor company had a branch office in Estonia and therefore the result may be justifiable on these facts even without resorting to the discontinued activity.[218] On the other hand, as Fletcher states, the fact that the debtor happens to have carried out one (or possibly several) business transactions within the territory of a Member State would not itself amount to the maintenance of the establishment there, unless there is further evidence to show that these activities were intended to mark the commencement of a more enduring economic operation in that jurisdiction. It will be a matter of judgement for the court, taken in the light of all relevant circumstances.[219] In my opinion, the establishment should exist in the relevant Member State when the petition to open secondary insolvency proceedings is filed and should continue to exist till at least the moment the court is about to decide the opening of the secondary insolvency proceedings. The mere fact that the debtor had the intention to start some economic activities is, in my view, a subjective criteria, and therefore not ascertainable to third persons as establishment although this is not requirement. Thus, in the matter of *SigMar Invest OÜ vs. Rapla Invest AB* the absence of establishment should have been determined by the Estonian court by disallowing the opening of secondary insolvency proceedings due to lack of jurisdiction.

3) Utilization of human means and goods

The requirement that human means and goods must be utilized means, in effect, that a minimum level of organisation must be present.[220] Prevailing opinion in literature is that both human means and goods must be utilized, i.e. the requirements are cumulative.[221] Wessels submits that the definition suggests a degree of organisation within which persons are assisting in the realization of

[218] See: Moss. Hunting "Establishment" in Estonia. Insolvency Intelligence 2007, 20 (3), p 44.

[219] Fletcher in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 3.23, p 52.

[220] Virgós-Schmit Report mn 71; Smid. Deutsches und Europäisches Internationales Insolvenzrecht, 2004, Art 2 mn 22; cited by Riedemann in: Pannen. *Op. cit.*, Art 2, mn 56, p 63.

[221] Paulus. *Op. cit.*, Art 2 mn 29, p 112; Carstens. Die internationale Zuständigkeit im europäischen Insolvenzrecht, 2005, S 75; cited by Riedemann in: Pannen. *Op. cit.*, Art 2, mn 53, p 62.

the respective economic activity of the debtor.[222] Pannen is of the opinion that sole distributors, commercial agents, or commercial brokers are not establishments within the meaning of Article 2 (h) of the EIR since they generally act independently of the debtor.[223] Wessels states that "human means" may be employees or other people who have the power to create legal relationship between a creditor and debtor, e.g. an employee or an agent.[224] In *Re Stojevic* the Austrian Court of Appeal held that the human means must be understood as referring to activities conducted by persons for whom the debtor is legally responsible, either as the employer or principal.[225] In the *BenQ* case in Germany,[226] where secondary insolvency proceedings were opened, the District Court of Munich held sufficient for the human means requirement that work was done for the debtor by employees of another group company, i.e. it was not necessary for the human means to be employees of the debtor itself.[227] In *Re Stojevic* the Austrian court also rejected the idea that if main insolvency proceedings had been opened previously in another Member State but the Austrian court thought that the COMI was really in Austria, this would be sufficient, even in absence of employees, to open secondary insolvency proceedings in Austria as a "countermeasure". It further held that the activity of a natural person (individual) as a debtor himself was not enough to constitute "human means" in this context, although an office with a secretary would suffice. Work done by an individual debtor for an Austrian corporation would also not suffice to constitute an establishment in Austria.[228] However, Marshall submits that in relation to an individual as the debtor, there appears to be no requirement in the Regulation that the economic activity with human means must be carried out by someone other than, or in addition to, the debtor.[229] Yet, based on case law, it seems to me that "human means" in case of the individual debtor may be other persons who have the power to create legal relationships between a creditor and a debtor. In addition, Fletcher states that a question may require judicial determination if the individual debtor as an owner of a holiday home, in addition to maintaining it for personal and/or family use, adopts a

[222] Wessels (2006). *Op. cit.*, mn 10534, p 287.
[223] Pannen: in Runkel. (ed.) Anwaltshandbuch – Insolvenzrecht. 2005, § 16 mn 114; cited by Riedemann in: Pannen. *Op. cit.*, Art 2, mn 57, p 63.
[224] Wessels (2006). *Op. cit.*, mn 10534, p 287.
[225] *Re Stojevic* Court of Appeal in Vienna, 9 November 2004, 28 R 225/04w In: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.42, p 244.
[226] ZIP 10/2007 p 495; District Court of Munich, 5 February 2007.
[227] See also: Paulus. The Aftermath of "Eurofood" – BenQ Holdings BV and the Deficiencies of the ECJ Decision. (2007) 20 Insolvency Intelligence, p 85–86; Wessels. BenQ Mobile Holding BV Battlefield leaves important questions unresolved. (2007) 20 Insolvency Intelligence p 103–105.
[228] *Re Stojevic* Court of Appeal in Vienna, 9 November 2004, 28 R 225/04w; cited by Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.43, p 244.
[229] Marshall (2008), mn 1.008, p 1–32.

practice of renting it out at other times to third parties on a commercial basis.[230] It is arguable that it would be different if the individual debtor also had a non-temporary interest-earning bank account in the Member State in which he also had a holiday home since this might be argued to be an economic activity.[231] However, the reference to economic activity being carried out with "human means" is according to Moss and Smith intended to distinguish between the situations where a debtor has a passive investment in a Member State from the situation where the debtor or a person or persons on his behalf are actively engaged in generating economic returns.[232] I agree. In my opinion, "human means" presumes a certain level of organisation within which persons are assisting in the realization of the respective economic activity of the debtor.

Wessels states that the word "goods" in the definition of the establishment in the Regulation should be interpreted in a broad sense, reflecting the meaning ascribed to goods in Article 2 (f) of the UNCITRAL Model Law,[233] where the only difference from Article 2 (h) of the Regulation is the latter additional part ("or services") in the definition of the establishment.[234]

Wessels also submits that "goods" may be of two types: a) goods, which facilitate the economic activity (e.g. office furnishings, laptops, cars, machinery, packing materials, a cash register, advertising materials) and b) goods, which are the result of the economic process (raw materials, semi-manufactured materials and end products).[235] In contrast, in the *SigMar Invest OÜ vs. Rapla Invest AB*[236] case, the Tallinn Court of Appeal in Estonia opened secondary insolvency proceedings in a case where the facts did not appear to disclose any goods in the narrow sense of personal movables but there was land belonging to the debtor company which was contracted to be developed into a hunting lodge for tourists. The Tallinn Court of Appeal referred to a requirement to have "assets" as part of the definition of establishment (i.e. rather than goods).[237] It must also be mentioned that the use of the word "goods" in Article 2 (h) of the EIR appears to be a mistranslation of "biens" in French or "Vermogenswerten" in German. Moss and Smith explain that those expressions would have been better rendered as "assets", since "goods" are strictly speaking restricted to tangible movables in English. In another EU legislative context, "biens" has

[230] Fletcher in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.35, p 241.
[231] See: Wessels (2006). *Op. cit.*, mn 10533, p 286.
[232] Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.36, p 241–242.
[233] United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, 30 May 1997. Online available: http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf.
[234] Wessels (2006). *Op. cit.*, mn 10534, p 287.
[235] Wessels (2006). *Op. cit.*, mn 10534, p 287.
[236] Judgment of the Court of Appeal in Tallinn, dated 14 June 2006 no 2-05-530 – OÜ SigMar Invest appeal against judgment by Tallinn City Court of 25 May 2005 in bankruptcy matter *OÜ SigMar Invest vs. Rapla Invest AB*.
[237] Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.47, p 245.

been held to refer to movable and immovable property. Since each language version of the Regulation is equally authoritative, UK courts should read the definition as referring to "assets" and not "goods".[238] In my opinion, there is no mistranslation of "human means and goods" in Estonian in Article 2 (h) of the Regulation.

During the deliberations of the 1995 Convention on Insolvency Proceedings, insolvency law for individuals was not well-developed in the Member States.[239] Therefore, there may be a problem how to determine "establishment" of an individual (natural person)[240] as the debtor.[241] The term "debtor" may involve persons other than legal corporate entities carrying out a non-transitory economic activity with human means and goods. In the case of individuals as debtors, there is a problem with meeting the latter requirement "carrying out a non-transitory economic activity with human means and goods" because individuals usually do not carry out economic activity with human means and goods. The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organisation,[242] which individuals do not have. Also it can be debatable whether the requirement "place of operations" laid down in the definition of establishment is covered, because according to the Virgós-Schmit Report the place of operations is also related to the person's economic activities, which are exercised on the market, i.e. externally, whether the said activities are commercial, industrial or professional.[243] Individuals are usually either employees of some legal corporate entities or self-employed. Thus, their activities may not be seen on the market, i.e. externally as their own, but as the employer's activity. That may be reason why some of the Member States have rejected individuals as subject being debtors in their national insolvency laws[244] or enacted other flexible legal mechanisms[245] to deal with individuals' insolvency in the Member States. Therefore, I think that the definition of establishment stipulated in Article 2 (h) of the EIR is not sufficient and fully applicable in the case of individuals as debtors. Court practice has confirmed my doubts.[246] I am inclined to the view

[238] Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.45, p 244–245.

[239] See further on history of the individuals' insolvency law: Viimsalu. The Over-Indebtedness Regulatory System in the Light of the Changing Economic Landscape. Juridica International 2010/XVII, p 217–226.

[240] E.g. non-merchant, non-trader, consumer.

[241] Viimsalu. Piiriülese maksejõuetusmenetluse õiguslikud küsimused. Juridica 2008/VI, lk 415–424.

[242] Virgós-Schmit Report mn 71.

[243] Ibid.

[244] For instance France, Italy, Belgium and Luxembourg. In Greece, Luxembourg and Italy only businessmen/merchants have insolvency capacity.

[245] Other than insolvency proceedings within the meaning of Article 2 (a) of the EIR.

[246] For instance see *Re Stojevic*, where after 3 years of insolvency proceedings under English law it was finally discovered that the COMI of the Mr Stojevic had actually been in Austria all along. Establishment of the debtor was not found. See also summary of Prague

that, the concept of establishment, developed and agreed between the Member States during the negotiations of the 1995 Convention on Insolvency Proceedings as laid down in Article 2 (h) of the EIR, does not take into account the possibility that there may exist different types of "debtors", whose definition within the meaning of the EIR has been left open to determination by the national laws of the Member States. However, there are several options to solve that problem:

a) The first alternative is not to enable secondary insolvency proceedings in the case of individuals as debtors at all by the Regulation, i.e. to exclude secondary insolvency proceedings. Main insolvency proceedings are available for these debtors in the Member State where the debtor has a COMI.[247] This approach favours one unified insolvency proceedings with EU-wide universal effects.
b) Secondly, the legislators of the Member States can choose whether to apply the Regulation to the individuals as debtors. As the determination of a "debtor" is left for a Member State to decide,[248] the insolvency proceedings of debtors who are individuals can be excluded from the application sphere of the Regulation.[249] However, this approach also requires the existence of transparent conflict of law provisions.
c) As the first alternative may be a too radical step, I am personally in favour of the third option, which is to limit applicability of Article 2 (h) of the EIR to non-individuals as debtors and to supplement Article 2 of the EIR with (i) in a such way that in the case of individuals as debtor the "establishment" means the place (a Member State) where the debtor's assets are situated within the meaning of Article 2 (g) of the EIR. As individuals do not carry out economic activities with human means and goods, the only possible ground left to enable opening of secondary insolvency proceedings is assets belonging to the debtor. As the definition of "establishment" is an autonomous concept deliberated between Member States, stipulated in the Regulation and must be interpreted independently from national laws, it is reasonable to make necessary amendments in the Regulation, not in the national laws of the Member States.

Upper Court decision no Ko 379/2005–210, 09.09.2005 and Supreme Court of Czech Republic, 31.01.2008 on that matter regarding establishment of an individual; also *Re Shierson vs. Vlieland-Boddy* in: Marshall (2008), mn 2.072/3 and 2.073, p 2–121 and 2–122.

[247] According to the Virgós-Schmit Report mn 75 the COMI for individuals will be their place of habitual residence. For different criteria determing the COMI of the individual see also: Viimsalu (2008). *Op.cit.*, lk 415–424.

[248] The term "debtor" is not defined in the Regulation.

[249] However, some authors doubt whether the Member States can restrict the definition of the debtor in national insolvency laws, because Recital 9 of the EIR might prohibit it. See: Marshall. European Cross Border Insolvency, London, Sweet & Maxwell, 2005, p 1–20.

It has been questioned whether a subsidiary company (with a separate legal personality) within the group of companies may be regarded as an establishment of the parent company within the meaning of Article 2 (h) of the EIR. According to the Virgós-Schmit Report the Regulation does not offer specific rules for groups of affiliated companies (parent-subsidiary schemes).[250] According to the ECJ in the *Eurofood/Parmalat* case, it follows from the Regulation's system of determining jurisdiction that independent judicial competence exists for every debtor that is an independent legal entity.[251] According to the Virgós-Schmit Report the implementation of a corporate insolvency by classifying one subsidiary as an establishment would also contradict the intentions of the drafters of the Regulation, which was to consciously refrain from regulating the issue of insolvencies of corporate groups.[252] Riedemann states that this intention is clearly demonstrated by the fact that the Member States expressly rejected the concept of establishment found in Article 5 (5) of the 1968 Brussels Convention – which allows a subsidiary to be classified as an establishment – and replaced this with a new, independent concept.[253] In *Telia AB vs. Hilcourt (Docklands) Ltd*[254] the court refused to qualify the English subsidiary of a Swedish parent company as an establishment of the parent company.[255] Furthermore, that each company in the group must be treated as a separate legal entity, there was therefore no "establishment" in England.[256] Thus, in the case of a group of companies, the subsidiary company will not automatically constitute an establishment of the parent company. Some authors, however, are of the opinion that the wording of Article 2 (h) of the EIR does not *a priori* preclude the conclusion that a subsidiary can be an establishment if the requirements of Article 2 (h) have been fulfilled.[257] This is because no inference can be drawn directly from the definition that an establishment cannot be an independent legal subject.[258] However, the consequences of classifying a subsidiary as an establishment are far more extensive than the benefits brought about by a better coordination of the insolvency proceedings. Such a classification would, in Riedemann's opinion, result in the consolidation of the various insolvency estates. According to the system of the Regulation, the main and secondary insolvency proceedings

[250] Virgós-Schmit Report mn 76.
[251] ECJ case C-1/04 – Judgment of the Court (Grand Chamber) – Reference for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 27 November 2003, received at the Court on 2 January 2004, in the proceedings Susanne Staubitz-Schreiber – 17 January 2006.
[252] Virgós-Schmit Report mn 76.
[253] Riedemann in: Pannen. *Op. cit.*, Art 2, mn 65, p 65.
[254] High Court of Justice, Chancery Division London (2003) B.C.C. 856 Ch D; cited in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.41, p 243.
[255] Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.41, p 244.
[256] Riedemann in: Pannen. *Op. cit.*, Art 2, mn 64, p 65.
[257] See several opinions in: Wessels (2006). *Op. cit.*, mn 10538 and 10539, p 290–291.
[258] Riedemann in: Pannen. *Op. cit.*, Art 2, mn 62, p 64.

actually involve one debtor only even though – for practical reasons – the insolvency estates are administrated separately for the duration of the secondary insolvency proceedings.[259] For those reasons, I think that a subsidiary company (with a separate legal personality) cannot constitute an establishment of the parent company.

However, another question is whether secondary insolvency proceedings may be opened against the debtor's branch (office)[260] by courts of Member States where the corporate debtor owns or possesses an establishment, i.e. where the debtor has a branch (office) without a separate legal personality. For instance, in the *SigMar Invest OÜ vs. Rapla Invest AB*[261] case the latter had a branch (office) in Estonia, which was not a separate legal entity with its own legal general and insolvency capacity, but was registered in the Estonian Commercial Register and Tax Board as a branch (*filiaal*). Thus, according to Estonian laws, Rapla Invest AB as the Swedish debtor was responsible for the branch (office's) responsibilities in Estonia. Secondary insolvency proceedings were correctly opened in respect of Rapla Invest AB as the debtor. In contrast, Marshall gives an example of the case *Nodtrade*, where the legal corporate debtor registered in Gibraltar had a branch (office) in Hungary. Similar to Estonian law, the branch (office) according to Hungarian law had no insolvency capacity. As the Hungarian branch (office) had failed to pay taxes to the Hungarian tax authorities, the tax authorities requested to open secondary insolvency proceedings. The Hungarian court held that the principles of the Regulation prevail over Hungarian national laws and the branch (office) should be treated as a separate legal entity as the debtor within the meaning of the Regulation. Thus, the secondary insolvency proceedings were opened.[262] Taking into account the ECJ judgement in the *Eurofood* case, I think that the Hungarian court was mistaken. Secondary insolvency proceedings may be opened in certain situations in respect of the debtor who owns or possesses an establishment, such as a branch (office), without a separate legal personality which meets all the criteria stipulated in Article 2 (h) of the EIR. The existence of a registered office in a relevant jurisdiction is not part of the test to determine whether a company has an establishment there, within the meaning of Article 2

[259] Riedemann in: Pannen. *Op. cit.*, Art 2, mn 63, p 64–65.

[260] By analogy I use this term meaning as any permanent presence of an undertaking in the territory of a Member State other than the home Member State which carries out business. The definition "branch" is used in Article 2 (b) of the Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, OJ L 110, 20.04.2001, p. 28–39.

[261] Judgment of the Court of Appeal in Tallinn, dated 14 June 2006 no 2-05-530 – OÜ SigMar Invest appeal against judgment by Tallinn City Court of 25 May 2005 in bankruptcy matter *OÜ SigMar Invest vs. Rapla Invest AB*.

[262] Marshall (2005). *Op. cit.*, p 2–45.

(h) of the EIR, and so there may not always be an establishment in the jurisdiction of the registered office.[263]

It has also been argued by Pannen whether it is allowed and possible after the opening of main insolvency proceedings (i.e. during these proceedings) to set up an "establishment" of the insolvent debtor in another Member State through some kind of corresponding activity. Pannen is of the opinion that since this would probably be done primarily for the purpose of forum shopping, it should not be allowed.[264] However, if it has been decided by the creditors in the main insolvency proceedings that the main liquidator continues to carry on the insolvent debtor's business as a going-concern with the aim of rehabilitation or restructuring enabling a better outcome for the creditors and on this purpose the main liquidator needs to establish a new "establishment" for a debtor, then, in my opinion, it would not be for the purpose of forum shopping and should be allowed. The activities of main liquidator should, of course, be aimed at maximum satisfaction of creditors' claims during insolvency proceedings and support efficient and effective administration of cross-border insolvency proceedings.

To summarize, some conclusions are provided below. In order to open secondary insolvency proceedings, there must be, as a second prerequisite besides main insolvency proceedings, an establishment within the meaning of Article 2 (h) of the EIR in the Member State at whose courts a request is being made to open secondary insolvency proceedings. This requirement derives directly from the Regulation. The Regulation requires the connection employed in Article 3 of the EIR as basis for jurisdiction to be genuine. The definition it gives for establishment is fact-oriented and the test to determine when there is an establishment, a "reality test". The Virgós-Schmit Report states that if there is no establishment within the meaning of Article 2 (h) of the EIR, no secondary insolvency proceedings can be opened and in this case, the main insolvency proceedings will produce their full effects on the territory where the debtor does not have an "establishment", but has assets.

The concept of establishment as enacted and used by the Regulation is neutral with regard to the nature of the debtor (e.g. whether the debtor is a legal or natural person) or the capacity in which the debtor may act. As the concept of the establishment is defined autonomously in the Regulation itself, it puts, in my opinion, extra responsibility on the courts of the Member States empowered to open secondary insolvency proceedings to evaluate whether they have international jurisdiction to open secondary insolvency proceedings. According to Article 2 (h) of the EIR the definition of establishment is based on the following criteria: any place of operations, non-transitory nature of economic

[263] This point is illustrated for instance by the English decision in *Hans Brochier Holdings Ltd* and the Italian decision in *Criss Cross s.r.l.* See: Marshall (2008). *Op. cit.*, mn 1.008, p 1–33.

[264] Pannen. *Op. cit.*, Art 3 mn 122, p 129.

activity and utilization of human means and goods. In my opinion, the place of operations of an insolvent debtor means a place from which economic activities are exercised on the open market (i.e. externally) and therefore this place should be ascertainable by the third parties. In addition, the establishment should exist in the relevant Member State when the petition to open secondary insolvency proceedings is filed and should continue to exist till at least the moment the court is about to decide the opening of the secondary insolvency proceedings. The mere fact that the debtor had the intention to start some economic activities is, in my view, a subjective criteria, and therefore not ascertainable to third persons as establishment although this is not requirement.

Based on case law, it seems to me that "human means" in case of the individual debtor may be other persons who have the power to create legal relationships between a creditor and a debtor. In my opinion, "human means" presumes a certain level of organisation within which persons are assisting in the realization of the respective economic activity of the debtor. Also, there is no mistranslation of "human means and goods" in Estonian in Article 2 (h) of the Regulation.

However, there may be a problem how to determine "establishment" of an individual (natural person) as the debtor. There are several options to solve that problem. I am personally in favour of the third option, which is to limit applicability of Article 2 (h) of the EIR to other debtors than individuals as debtors and to supplement Article 2 of the EIR with (i) in a such way that in the case of individuals as debtor the "establishment" means the place (a Member State) where the debtor's assets are situated within the meaning of Article 2 (g) of the EIR. As the definition of "establishment" is an autonomous concept deliberated between Member States, stipulated in the Regulation and must be interpreted independently from national laws, it is reasonable to make necessary amendments in the Regulation, not in the national laws of the Member States.

It has been argued whether a subsidiary company (with a separate legal personality) within the group of companies may be regarded as an establishment of the parent company within the meaning of Article 2 (h) of the EIR. I think that a subsidiary company (with a separate legal personality) cannot constitute an establishment of the parent company.

Another question is whether secondary insolvency proceedings may be opened against the debtor's branch (office) by courts of Member States where the corporate debtor owns or possesses an establishment, i.e. where the debtor has a branch (office) without a separate legal personality. I think that secondary insolvency proceedings may be opened in certain situations in respect of the debtor who owns or possesses an establishment, such as a branch (office), without a separate legal personality which meets all the criteria stipulated in Article 2 (h) of the EIR. The existence of a registered office in a relevant jurisdiction is not part of the test to determine whether a company has an establishment there, within the meaning of Article 2 (h) of the EIR, and so there may not always be an establishment in the jurisdiction of the registered office.

It has also been argued whether it is allowed and possible after the opening of main insolvency proceedings (i.e. during these proceedings) to set up an establishment in another Member State through some kind of corresponding activity. If it has been decided by the creditors in the main insolvency proceeding that the main liquidator continues to carry on the debtor's business as a going-concern with the aim of rehabilitation or restructuring enabling a better outcome for the creditors and on this purpose the main liquidator needs to establish a new "establishment" for a debtor, then, in my opinion, it would not be for the purpose of forum shopping and should be allowed. The activities of main liquidator should, of course, be aimed at maximum satisfaction of creditors' claims and efficient and effective administration of cross-border insolvency proceedings.

2.2. Request to Open Secondary Insolvency Proceedings

It should be stressed that by its nature, secondary insolvency proceedings are not a special type of proceedings. As Balz states, they are regular nationwide proceedings to which general national insolvency law applies unless the Regulation specifies otherwise.[265] The Regulation modifies conditions to open secondary insolvency proceedings laid down by the applicable national law in two aspects:

1) the requirement for the *de facto* insolvency of the debtor established by national law does not need to be satisfied; the recognition of the decision opening main insolvency proceedings makes any further examination of the debtor's insolvency in other Member States unnecessary;[266] and
2) the right to request the opening of secondary insolvency proceedings is vested directly to the liquidator of the main insolvency proceedings.[267]

The second modification directly empowers the liquidator of the main insolvency proceedings (not the temporary liquidator) to request the opening of secondary insolvency proceedings. Virgós and Garcimartín state that this rule also expresses the relationship of dependence of the secondary insolvency proceedings with regard to the main insolvency proceedings.[268] The liquidator of the main insolvency proceedings can take most of the possible advantages which the opening of secondary insolvency proceedings may present, as

[265] Balz. *Op. cit.*, p 522.
[266] Article 27 of the EIR. The debtor's insolvency must be taken for granted. See: Virgós. Garcimartín. *Op. cit.*, mn 321, p 173.
[267] It derives from Article 29 (a) of the EIR. Article 29 (b) of the EIR refers to persons empowered to request under the law of the Member State within the territory of which opening of secondary insolvency proceedings is requested.
[268] Virgós. Garcimartín. *Op. cit.*, mn 322, p 173.

evidenced by his appointment according to Article 19 of the EIR.[269] Moss and Smith submit that an important aspect is that Article 29 (a) of the EIR establishes a right of the liquidator, as defined by Article 2 (b) of the EIR, in the main insolvency proceedings to request the opening of secondary insolvency proceedings whether or not the national law gives him that right.[270] This may be a useful power, for example, where the liquidator intends to achieve the effects, which cannot be exercised simply by reason of his appointment in the main insolvency proceedings, such as "coercive measures" or the right to rule on legal proceedings or disputes.[271]

Indeed, to all other questions national law continues to apply.[272] In my opinion, this may be the fundamental essence of all problems related to secondary insolvency proceedings, because in general there is no specific simplified procedure in national laws of the Member States to open (and afterwards to conduct) secondary insolvency proceedings in parallel with main insolvency proceedings. The problem is that usually national insolvency or general procedural law in the relevant Member State does not distinguish the legal requirements to be fulfilled between the openings of the main or secondary insolvency proceedings. For instance, the Estonian Bankruptcy Act states that a bankruptcy petition may be filed by the debtor or a creditor.[273] Also, Koulu states that in Finland a petition to request the opening of secondary insolvency proceedings is an ordinary written application according to Chapter 7 Section 5 of the Finnish Bankruptcy Act.[274] In the event of the death of a debtor, a bankruptcy petition with respect to the debtor's property may also be filed by a successor of the debtor in Estonia, the executor of the will of the debtor or the administrator of the estate of the debtor. In such case, the provisions concerning bankruptcy petitions of debtors apply to the bankruptcy petition as appropriate.[275] In the cases provided by law, persons not specified in the relevant provision of the Estonian Bankruptcy Act may also file bankruptcy petitions. In such case, the provisions concerning creditors apply to the persons as appropriate unless otherwise provided by law.[276] In this context the words "*in the cases provided by law*" refers back to Article 29 (a) of the EIR, where the main liquidator is empowered to request the opening of secondary insolvency proceedings. Thus, the legislator in Estonia has solved the matter with cross-referring between national laws and the Regulation. However, the Member State may also solve this matter differently. Section 60 subsection 1 clause 3)

[269] See for example Virgós-Schmit Report mn 33.
[270] Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.349, p 328.
[271] Article 18 (3) of the EIR.
[272] See Articles 28 and 29 (b) of the EIR. The restrictions established in Article 3 (4) of the EIR do not apply in this case.
[273] Section 9 subsection 1 of the EBA.
[274] Koulu. Kansainvälinen konkurssioikeus pääpiirteittäin, WSOY, 2004, s 168.
[275] Section 9 subsection 2 of the EBA.
[276] Section 9 subsection 3 of the EBA.

and Section 133 subsection 1 clause 2) of the Latvian Insolvency Act stipulate precisely that the liquidator in the main insolvency proceedings has the right to submit an application to request the opening of secondary insolvency proceedings. Thus, it is clear that the main liquidator will be treated as himself in terms of capacity and procedural requirements, which differs from the Estonian law in that the main liquidator should be treated as the creditor by the court.[277] Therefore, the main liquidator may find himself in different legal positions under the national laws of different Member States where the debtor has an establishment in case of requesting the opening of secondary insolvency proceedings. I think that the Latvian legislator's clear approach in this question is correct. Considering the fact that Article 29 (a) of the EIR has a direct legal impact over national laws of the Member States, one could find that the second sentence in Section 9 subsection 3 of the EBA may be in breach with the Regulation, because the main liquidator cannot be treated as a creditor under national laws of the Member States. Although the petition of the main liquidator may be handled as a petition filed by the third person as prescribed in the first sentence in Section 9 subsection 3 of the Estonian Bankruptcy Act, e.g. as a petition of the third person without claim against the debtor because the main liquidator does not have a proprietary claim as such within the meaning of the *lex fori concursus secundarii* against the debtor, I am inclined to the view that transparent provision is needed in the Estonian Bankruptcy Act stating that the main liquidator will be treated as himself in terms of capacity and procedural requirements. It would facilitate efficient and effective administration of cross-border insolvency proceedings.

Indeed, different legal solutions by the legislators in different Member States may lead to problems in practice. For instance, this was the case in *OÜ SigMar Invest vs. Rapla Invest AB*[278] where the questions arose about the powers (capacity) of the main liquidator (Swedish liquidator) and the representative of the debtor (member of the management board or manager of the branch of the debtor in Estonia) in the situation where main insolvency proceedings were opened in Sweden and the request was made to open secondary insolvency proceedings in Estonia. The Supreme Court of Estonia held that according to Article 18 (3) of the EIR the main liquidator, in exercising his powers, shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. These powers do not include coercive measures or the right to rule on legal proceedings or disputes. Consequently, the Supreme Court of Estonia held

[277] See the second sentence in Section 9 subsection 3 of the EBA: "In such case, the provisions concerning creditors apply to the persons as appropriate unless otherwise provided by law."

[278] Judgment of the Supreme Court of Estonia (Civil Chamber), dated 06 March 2006 no 3-2-1-7-06 – OÜ SigMar Invest appeal against judgment by Tallinn Court of Appeal of 29 September 2005, no 2-2/1269/05 in bankruptcy matter *OÜ SigMar Invest vs. Rapla Invest AB* – RT III 2006, 9, 83.

that it should be determined according to the Estonian Bankruptcy Act, whether the main liquidator has powers to represent the debtor in the secondary insolvency proceedings. It continued that Article 29 of the Regulation allows the main liquidator (Swedish bankruptcy trustee) to request the opening of the secondary insolvency proceedings and thus the right to participate in these insolvency proceedings. However, these provisions do not, in the Supreme Court's opinion, give the right to represent the debtor in the secondary insolvency proceedings. I consent with the opinion of the Supreme Court of Estonia. In addition, I would like to point out several problems based on that case as a good example of requesting the opening of secondary insolvency proceedings under national laws.

First, as for Estonia, the petition of the main liquidator may have been handled as a petition filed by the third person (not by the creditor or debtor itself) as prescribed in the Estonian Bankruptcy Act, e.g. as a petition of the third person without claim against the debtor, because the main liquidator does not have a proprietary claim as such within the meaning of the *lex fori concursus secundarii* against the debtor. The main liquidator's purpose is to administer the debtor's insolvency estate, e.g. assets, which are located within the meaning of Article 2 (g) of the EIR in the territory of the Member State where the request to open secondary insolvency proceedings is made. Therefore, I think that a petition filed to open secondary insolvency proceedings by the main liquidator should be handled in a simplified procedure by the national courts of the Member States. If necessary, the national laws should be amended so that general grounds (for instance showing the existence of an undisputed claim to a certain amount) in national laws are not applicable. The main liquidator only has to show that there is an "establishment" of the insolvent debtor in the relevant jurisdiction where the petition to open secondary insolvency proceedings is being filed. That is why, for instance, Section 356 subsection 3 of the German Insolvency Code[279] stipulates that if main insolvency proceedings have been opened abroad which are recognized in Germany, the existence of reason (*Eröffnungsgrund)* does not have to be established.

In addition, in the *OÜ SigMar Invest vs. Rapla Invest AB* case, the court of the first instance in Estonia could have handled the petition without the debtor's (legal representative of the debtor) attendance[280] and even under given practical circumstances without appointing an interim trustee, because the *de facto* insolvency of the debtor was already determined in Sweden by the opening of main insolvency proceedings. According to the first sentence of Article 27 of

[279] German Insolvency Code (in German: *Insolvenzordnung*), the Parliament (*Bundestag*), 05.10.1994. BGBl I 1994, 2866...BGBl. I S. 1885. In force since 01.01.1999, hereinafter: GInsO.

[280] According to the EBA provisions in force until 31.12.2009 a court was not obliged to hold a hearing and could have applied the investigation principle according to Section 3 subsection 3 of the EBA. See Section 16 of the EBA.

the EIR, the court seized with the issue of opening secondary insolvency proceedings no longer examines whether there is a reason for opening insolvency proceedings pursuant to the *lex fori concursus secundarii*.[281] The *de facto* insolvency of the debtor has already been established by the opening of main insolvency proceedings whose recognition is mandatory pursuant to Article 16 et seq. of the EIR. Thus, I think that the appointment of a temporary liquidator is not needed in case of commencement of secondary insolvency proceedings in Estonia. In addition, it may be unnecessary and costly for the administration of cross-border insolvency proceedings if the court in the relevant Member State empowered to open the secondary insolvency proceedings also appoints an interim trustee (temporary, provisional liquidator) after the request is made and before the secondary insolvency proceedings are opened. The *de facto* insolvency of the debtor has already been determined in the main insolvency proceedings and the main liquidator may exercise all the powers conferred to him by the law of the Member State of the opening. If necessary, the court of the Member State requested to open the secondary insolvency proceedings can seek assistance in investigating the case from the main liquidator, who is already familiar with the case in hand. Consequently, I think that national laws of the relevant Member States should be amended accordingly so that an interim trustee (temporary, provisional liquidator) is not needed in that procedural stage where the request to open secondary insolvency proceedings has been made but the proceedings are not yet opened by the court. The gap may be filled by extra powers (such as the right to be heard during the court session) granted to the main liquidator, if needed.

Problems have also occurred in the simultaneous implementation of Article 29 (b) of the EIR and national laws, for instance, in the matter not to provide foreign non-EU creditors with the right to request the opening of secondary insolvency proceedings. In a case in Poland, the Polish courts refused to open secondary insolvency proceedings against Belvedere subsidiaries,[282] because of the ambiguous wording of the Polish version[283] of Article 29 (b) in the EIR,

[281] It is also acknowledged that Article 27 sentence 1 of the EIR does not constitute an evidentiary rule commanding an irrebuttable presumption, although such an interpretation could certainly be inferred from the wording. Speaking against such an inference is the fact that, in the court's examination of (*de facto*) insolvency, neither the assets and liabilities of the debtor's that have to be included nor the reasons for the opening main and secondary insolvency proceedings have to be identical. However, if the ascertainment of (*de facto*) insolvency in the main insolvency proceedings is to serve as evidence in secondary insolvency proceedings, an evidentiary rule must be presumed that logically presupposes that the actual issues and requirements are identical in both proceedings. See: Herchen in: Pannen. *Op. cit.*, Art 27 mn 32, p 410.

[282] Porzycki. Secondary Insolvency Proceedings against a Solvent Debtor: A Polish Case Highlights Weak Points of the European Insolvency Regulation. International Corporate Rescue, Volume 7, Issue 2, 2010, p 120.

[283] While the English version of Article 29 (b) of the EIR clearly states that "any (...) person (...) empowered to request the opening of insolvency proceedings under the law of the

which altogether with implementation of Article 407 of Polish Act on Bankruptcy and Rehabilitation led the courts to hold that the petitioner, a bank incorporated in the United States, has no right to file for secondary insolvency proceedings.[284] However, Article 29 (b) of the EIR refers to provisions in national law on the right to request the opening of insolvency proceedings in general, not in secondary insolvency proceedings in non-EU cases. This example shows in fact that regulation, according to which secondary insolvency proceedings are considered as regular nationwide proceedings to which the general national insolvency law applies unless the Regulation specifies otherwise, may not be sufficient to avoid practical problems. Some further regulative provisions may be needed in national laws of the Member States to put secondary insolvency proceedings to work in practice.

In the previous chapter I indicated that secondary insolvency proceedings may also serve the interests of the debtor in providing several protective intervention measures to work against the liquidators and the creditors. It is possible if the *lex fori concursus secundarii* enables the debtor to request the opening of secondary insolvency proceedings according to Article 29 (b) of the EIR. For instance, as far as I am aware of, in Estonia, Finland, Lithuania, Sweden, Hungary and Latvia, the debtor is granted such right. In reality it means there are no specific provisions available in national laws regulating cases where the debtor requests the opening of secondary insolvency proceedings. National law does not distinguish provisions on domestic and cross-border insolvency proceedings. On the contrary, in Germany, the debtor is not permitted to request territorial insolvency proceedings, although this requirement is applicable in the insolvency cases, where the Regulation is not applicable.[285] In my opinion, the German approach may be correct and should be considered as an option also in the insolvency cases administrated according to the Regulation, because main insolvency proceedings have been opened before and the debtor loses its/his powers as of opening of main insolvency proceedings if the *lex fori concursus* provides so. Also, I think that if the debtor is *de facto* insolvent, it/he cannot cover the costs of the secondary insolvency proceedings. If a debtor sees reason to apply for the opening of insolvency proceedings, it/he must do so in the Member State where the COMI is

---

Member State can request the opening of secondary insolvency proceedings", along with similarly worded German and French versions, the Polish version says only "person of authority empowered to file the request under the law of the Member State".

[284] See for instance the judgement of the District Court in Rzeszów, 5th Commercial Division for bankruptcy and reorganization cases, 22.05.2009, no V GU 17/09 *The Bank of New York Mellon in New York, USA vs. Fabryka Wódek Polmos Łańcut S.A. in Łańcut.* Unreported.

[285] Section 354 subsection 2 and Section 356 subsection 2 of the GInsO. See also: Braun (ed.). Commentary on the German Insolvency Code, 2006 IDW-Verlag GmbH, Düsseldorf, mn 2753 and 2755, p 594–595.

located.[286] Therefore, in my opinion, the transparent rule whether to grant the debtor the right to request the opening of secondary insolvency proceedings is welcome by legislators of the Member States to facilitate efficient and effective administration of cross-border insolvency proceedings. However, before making an ultimate conclusion on that question, legislators of the Member States should carefully consider the outcome, because there are different types of debtors (legal corporate entities, partnerships, individuals, consumers) whose rights may be influenced by that legislative decision.

The Regulation does not stipulate substantial requirements of the petition to request the opening of secondary insolvency proceedings. These requirements are left to be regulated in the national laws of the Member States. In the majority of cases I have been able to consider there are no specific separate substantial requirements on petitions to be filed for opening of secondary insolvency proceedings in the Member States. Can this constitute a problem? It depends on provisions laid down in national laws. For instance, Section 10 of the Estonian Bankruptcy Act stipulates the requirements for the creditor's petition and Section 13 stipulates the requirements for the debtor's petition, but in my opinion, the requirements laid down in these provisions in the Estonian Bankruptcy Act do not make sense in the case of requesting the opening of the secondary insolvency proceedings, because the provisions are related to grounds for reasoning the *de facto* insolvency of the debtor,[287] but the debtor is already *de facto* insolvent according to the *lex concursus universalis*, because the main insolvency proceeding has been opened in another Member State. The Latvian Civil Procedure Act[288] states the exact requirements for the content of insolvency petitions which are related to cross-border insolvency proceedings applicable under the EIR. According to Latvian law, if the creditor submits an application to open the secondary insolvency proceedings, a creditor shall specify the grounds for the application and attach the supporting evidence of the facts on which this application is based.[289] If the liquidator in the main insolvency proceedings submits such application, the application shall include following: the name of the debtor, registration number and location (legal address); information on the court, which opened main insolvency proceedings under the EIR, the court decision and effective date; the grounds on opening the

[286] BR-Drucksache 715/02, p 31 in: Veder. Cross-Border Insolvency Proceedings and Security Rights. A Comparison of Dutch and German Law, the EC Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency. Kluwer Legal Publishers, 2004, p 126.

[287] See for instance Section 10 subsection 1 of the EBA, which states that the bankruptcy petition of a creditor shall substantiate the debtor's insolvency and prove the existence of a claim. In addition, Section 13 subsection 1 of the EBA provides that a debtor shall substantiate the insolvency thereof in the bankruptcy petition.

[288] Latvian Civil Procedure Act (in Latvian: *Civilprocesa likums*), the Parliament (*Saeima*), 14.10.1998. Latvijas Vestnesis, 326/330 (1387/1391), 03.11.1998...Latvijas Vestnesis, 16 (4414), 28.01.2011. In force since 01.03.1999, hereinafter: LCPA.

[289] Section 363^2 subsection 6 of the LCPA.

secondary insolvency proceedings; and information on whether other secondary insolvency proceedings in another EU Member State are opened.[290] The following documents shall be enclosed to the main liquidator's application:

1) a court decision on the main insolvency proceeding and a certified copy of translation into Latvian;
2) a court decision or other proof of the appointment of a liquidator in main insolvency proceedings and a certified copy of translation into Latvian;
3) documents certifying that establishment of the debtor is located in Latvia;
4) documents confirming payment of the fee and other court costs as well as the payment of the insolvency of deposit.[291]

As for national laws, I find it appropriate and reasonable to supplement the substantial requirements of insolvency petitions in case of requesting the opening of secondary insolvency proceedings in such way that an applicant is obliged to refer to the "opening of main insolvency proceedings" in another Member State, give facts and information for the court to determine "establishment" of the debtor within the meaning of Article 2 (h) of the EIR, show reasons to open secondary insolvency proceedings and also give evidence to confirm his statements in the petition. It would accelerate handling of these petitions by the court and facilitate the efficient and effective administration of cross-border insolvency proceedings.

The request to open secondary insolvency proceedings is also related to the question of the debtor's insolvency capacity. Whether the debtor has insolvency capacity or not must be answered solely by the *lex fori concursus*. This follows from Article 4 (1), 4 (2) (a) and Article 28 of the EIR. A question may arise what happens if the debtor has insolvency capacity in the main insolvency proceedings according to the *lex fori concursus universalis*, but not in the secondary insolvency proceedings based on the *lex fori concursus secundarii*. Virgós and Garcimartín are of the opinion that the lack of a specific rule on national jurisdiction cannot be invoked to deny jurisdiction to open insolvency proceedings, as this would frustrate the "*effet utile*" on the Regulation.[292] The fact that main insolvency proceedings will still be recognized in compliance with Article 16 (1) of the EIR, even if the opening of insolvency proceedings in respect of the debtor's assets would be inadmissible pursuant to the laws of the respective Member State, does nothing to change this, as Herchen states.[293] Therefore, the effects of the *lex fori concursus universalis* prevail. Whether this approach is reasonable and justified is questionable. In my opinion, to enable effective and efficient administration of cross-border insolvency proceedings a revision of provisions in national laws is needed, at least in the question of opening secondary insolvency proceedings in relation to the capacity of

[290] Section 363^5 subsection 2 of the LCPA.
[291] Section 363^5 subsection 3 of the LCPA.
[292] Virgós. Garcimartín. *Op. cit.*, mn 295, p 159.
[293] Herchen in: Pannen. *Op. cit.*, Art 27 mn 43, p 412.

individuals (consumers) as debtors. In general, this type of debtor is considered to be a weaker participant in the insolvency proceedings. Therefore, extra attention is needed. Due to the rapid growth of over-indebtedness as a whole,[294] in light of the complex applicable provisions in the Regulation, some Member States have already excluded certain types of debtors from insolvency proceedings altogether, while in other Member States a natural person cannot be declared bankrupt unless he acted in the capacity of a merchant.[295] Different approaches, changing legislators' attitudes, do not make European and national insolvency systems transparent and easy to implement for individuals. Consumer over-indebtedness may raise wider socio-economic concerns[296] and these concerns may also have a cross-border affect on the enactment of the Regulation. This is obviously the case with regard to the EU-wide discharge of debts, because the creditors' rights after the closure of insolvency proceedings are to be determined by the *lex fori concursus* in accordance with Article 4 (2) (k). This question also relates to the costs and expenses of the cross-border insolvency proceedings. Who (which Member State, tax payers, financial institutions or the EU) bears the costs and expenses incurred in the insolvency proceedings of the individual debtor? At the moment, the *lex fori concursus* determines it according to Article 4 (2) (l) of the EIR. The effects of legal consequences may be EU-wide or national depending on whether the individual debtor has a cross-border insolvency capacity or not. In certain circumstances it may even concern juveniles inheriting their parents' debts. Virgós and Garcimartín correctly submit that nothing in the Regulation prevents only one set of main insolvency proceedings from being opened in the European Union against the same debtor, even with several establishments operating in multiple Member States; the plurality of proceedings is simply a possibility that the Regulation offers to those involved.[297] However, in my opinion, in question of individuals as debtors and their capacity in the secondary insolvency proceedings clear common understanding between the Member States is needed

[294] See about different attitudes and policies towards individuals' insolvencies Niemi-Kiesiläinen. Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankrutpcy in: Niemi-Kiesiläinen. Ramsay. Whitford (eds.). Consumer Bankruptcy in Global Perspective, Oxford and Portland Oregon, 2003, p 41–60.

[295] This is the case in France, Greece, Italy, Luxembourg, Portugal and Spain. See Pannen/Riedemann in: Pannen. *Op. cit.*, Art. 4, mn 40, p 223; also on debtor's insolvency capacity: Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Affairs. Harmonisation of Insolvency Law at EU Level, 2010, p 11.

[296] See possible outcomes of that problem: Kilborn. Behavioral Economics, Over-indebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions. Bankruptcy Developments Journal, Vol 22, 2005, p 13–47. McKenzie Skene, Walters. Consuming Passions: Benchmarking Consumer Bankruptcy Law Systems. In: Omar (2008). *Op. cit.*, p. 137.

[297] Virgós. Garcimartín. *Op. cit.*, mn 418, p 225.

to facilitate the effective and efficient administration of cross-border insolvency proceedings.

As already seen in this chapter, treatment of the petition to open the secondary insolvency proceedings as the petition to open regular nationwide insolvency proceedings may cause irrelevant bureaucracy in the Member States. Therefore, in my opinion, legislators in the Member States should amend national laws accordingly. Another (additional) option for future developments in the EU, to enable effective and efficient handling of petitions to request secondary insolvency proceedings, might be to create a form bearing the heading "Request the opening of secondary insolvency proceedings under Article 29 of the EIR" in all the official languages of the EU to avoid further complications with the petitions in the courts of the Member States. To do that, Article 29 of the EIR needs to be supplemented in a way that an applicant is obliged to refer to the "opening of main insolvency proceedings" in another Member State, give facts and information for the court to determine "establishment" of the debtor within the meaning of Article 2 (h) of the EIR, show reasons to open secondary insolvency proceedings and also give evidence to confirm his statements in the request. A liquidator in the main insolvency proceedings should request the opening of secondary insolvency proceedings in another Member State simply by producing a certified copy of the original decision appointing him (Article 19 of the EIR) together with a translation into one of the official languages of the Member State in which he wishes to request the opening of proceedings.

To summarize, some conclusions are provided below. By its nature, secondary insolvency proceedings are not a special type of proceedings. They are regular nationwide proceedings to which general national insolvency law applies unless the Regulation specifies otherwise. The Regulation modifies conditions to open secondary insolvency proceedings laid down by the applicable national law in two aspects: 1) the requirement for the *de facto* insolvency of the debtor established by national law does not need to be satisfied; and 2) the right to request the opening of secondary insolvency proceedings is vested directly to the liquidator of the main insolvency proceedings. Indeed, to all other questions national law continues to apply. In my opinion, this may be the fundamental essence of all problems related to secondary insolvency proceedings, because in general there is no specific simplified procedure in national laws of the Member States to open (and afterwards to conduct) secondary insolvency proceedings in parallel with main insolvency proceedings. The problem is that usually national insolvency or general procedural law in the relevant Member State does not distinguish the legal requirements to be fulfilled between the openings of the main or secondary insolvency proceedings. The main liquidator may find himself in different legal positions under the national laws of different Member States where the debtor has an establishment in case of requesting the opening of secondary insolvency proceedings.

Although the petition of the main liquidator may be handled as a petition filed by the third person as prescribed in the first sentence in Section 9 subsection 3 of the Estonian Bankruptcy Act, e.g. as a petition of the third person without claim against the debtor because the main liquidator does not have a proprietary claim as such within the meaning of the *lex fori concursus secundarii* against the debtor, I am inclined to the view that transparent provision is needed in the Estonian Bankruptcy Act stating that the main liquidator will be treated as himself in terms of capacity and procedural requirements. It would facilitate efficient and effective administration of cross-border insolvency proceedings.

I think that a petition filed to open secondary insolvency proceedings by the main liquidator should be handled in a simplified procedure by the national courts of the Member States. If necessary, the national laws should be amended so that general grounds (for instance showing the existence of an undisputed claim to a certain amount) in national laws are not applicable. The main liquidator only has to show that there is an "establishment" of the insolvent debtor in the relevant jurisdiction where the petition to open secondary insolvency proceedings is being filed.

In addition, I think that the appointment of a temporary liquidator is not needed in case of commencement of secondary insolvency proceedings in Estonia. I think that national laws of the relevant Member States should be amended accordingly so that an interim trustee (temporary, provisional liquidator) is not needed in that procedural stage where the request to open secondary insolvency proceedings has been made but the proceedings are not yet opened by the court. The gap may be filled by extra powers (such as the right to be heard during the court session) granted to the main liquidator, if needed.

In my opinion, the transparent rule whether to grant the debtor the right to request the opening of secondary insolvency proceedings is welcome by legislators of the Member States to facilitate efficient and effective administration of cross-border insolvency proceedings. However, before making an ultimate conclusion on that question, legislators of the Member States should carefully consider the outcome, because there are different types of debtors (legal corporate entities, partnerships, individuals, consumers) whose rights may be influenced by that legislative decision.

Also, I find it appropriate and reasonable to supplement the substantial requirements of insolvency petitions in case of requesting the opening of secondary insolvency proceedings in such way that an applicant is obliged to refer to the "opening of main insolvency proceedings" in another Member State, give facts and information for the court to determine "establishment" of the debtor within the meaning of Article 2 (h) of the EIR, show reasons to open secondary insolvency proceedings and also give evidence to confirm his statements in the petition. It would accelerate handling of these petitions by the

court and facilitate the efficient and effective administration of cross-border insolvency proceedings.

In my opinion, a revision of provisions in national laws is needed, at least in the question of opening secondary insolvency proceedings in relation to the capacity of individuals (consumers) as debtors. In general, this type of debtor is considered to be a weaker participant in the insolvency proceedings. Therefore, extra attention is needed. In my opinion, in question of individuals as debtors and their capacity in the secondary insolvency proceedings clear common understanding between the Member States is needed to facilitate the effective and efficient administration of cross-border insolvency proceedings. The treatment of the petition to open the secondary insolvency proceedings as the petition to open regular nationwide insolvency proceedings may cause irrelevant bureaucracy in the Member States. Therefore, in my opinion, legislators in the Member States should amend national laws accordingly.

Another (additional) option for future developments in the EU, to enable effective and efficient handling of petitions to request secondary insolvency proceedings, might be to create a form bearing the heading "Request the opening of secondary insolvency proceedings under Article 29 of the EIR" in all the official languages of the EU to avoid further complications with the petitions in the courts of the Member States. To do that, Article 29 of the EIR needs to be supplemented in a way that an applicant is obliged to refer to the "opening of main insolvency proceedings" in another Member State, give facts and information for the court to determine "establishment" of the debtor within the meaning of Article 2 (h) of the EIR, show reasons to open secondary insolvency proceedings and also give evidence to confirm his statements in the request.

2.3. Reasons and Decision to Open Secondary Insolvency Proceedings

According to national insolvency laws, the opening of insolvency proceedings usually require the existence of a reason to open such proceedings. There may be commonly known reasons such as illiquidity, imminent illiquidity and over-indebtedness or specific reasons in the national laws. For instance, in the Netherlands a bankruptcy ruling may also be issued for reasons of public interest upon the requisition of the Public Prosecution Service.[298] The question arises whether reasons for opening of secondary insolvency proceedings within the meaning of Regulation set aside reasons stipulated by national laws of the Member State on that aspect. Some German scholars hold the opinion that the

[298] Section 1 subsection 2 of the Dutch Bankruptcy Act (hereinafter: DBA) Dutch Bankruptcy Act (in Dutch: *Faillissementswet*), the Parliament (*Parlement*), 30.09.1893. Staadblad 1893–140. In force since 01.09.1896.

ascertainment of *de facto* insolvency through the opening of main insolvency proceedings, whose recognition is mandatory, is in itself an independent reason for opening secondary insolvency proceedings.[299] Other German scholars state that the proceedings shall be opened without the need to determine a reason[300] for opening of secondary insolvency proceedings such as required in non-EU cases according to Section 356 of German InsO where the foreign main liquidator is entitled to request such opening. It is irrelevant whether the reasons for opening insolvency proceedings according to the *lex fori concursus universalis* are comparable to those of the *lex fori concursus secundarii*.[301] Duursma-Kepplinger states that if the *de facto* insolvency based on the opening of the main insolvency proceedings, the recognition of which is imperative, is understood to be an independent reason for opening secondary insolvency proceedings, then this amounts to a modification of the substantive insolvency law regulations of the *lex fori concursus secundarii*: the reasons for opening insolvency proceedings under national law are replaced by the opening of the main insolvency proceedings under EU law, the recognition of which is mandatory. This is the same reasoning behind the opinion held by some, that the recognition of foreign main insolvency proceedings replaces the reason for opening insolvency proceedings under the provisions of the *lex fori concursus secundarii*.[302] I agree with the statement that *de facto* insolvency through the opening of main insolvency proceedings is in itself an independent reason for opening secondary insolvency proceedings, but whether it is the single reason, is doubtful.

For instance, should the court automatically open secondary insolvency proceedings if the prerequisites provided for in the EIR, such as existence of establishment and main insolvency proceedings, are met and the request made by an applicant? In addition, the question arises whether the court empowered to open secondary insolvency proceedings has the capacity to evaluate the

---

[299] Haβ. Huber. Gruber. Heiderhoff. EU-Insolvenzverordnung. Kommentar. Beck, Munich 2005, Art 27 EuInsVO mn 6; Morcher. Die europäische Insolvenzverordnung (2002), S 49; obvious dissenting opinion: Beutler/Debus. EWiR Art 3 EuInsVO 3/2005, S 217 et seq.; cited by Herchen in: Pannen. *Op. cit.*, Art 27 mn 30, p 409.

[300] There is no need to show a special interest. Lüke. Das europäische internationale Insolvenzrecht, ZZP 111, 1998, S 275, 282 et seq.; cited by Kolmann in: Gottwald. (ed.) Insolvenzechts-Handbuch. Verlag C.H. Beck München 2010, § 130, mn 66, S 2315.

[301] Concurring: Smid. Europäisches Internationales Insolvenzrecht, 2002, Art 27 mn 18; see also: Lüke (1998). *Op.cit*., S 275, 302 et seq.; critical on this: Kolmann. Kooperationsmodelle im Internationalen Insolvenzrecht. Empflielt sich für das Deutsche internationale Insolvenzrecht eine Neuorientierung? Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht, Bielefeld: Verlag Ernst und Werner Gieseking, 2001, S 336 et seq.; Wimmer. Die Besonderheiten von Sekundärinsolvenzverfahren unter besonderer Berücksichtigung des Europäischen Insolvenzübereinkommens, ZIP 1998, S 982, 986; cited by Herchen in: Pannen. *Op. cit.*, Art 27 mn 30, p 409.

[302] Duursma-Kepplinger in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 27 mn 33, S 469.

reasons to request the opening of secondary insolvency proceedings. As for reasons, the opening of secondary insolvency proceedings can be used as a defence against encroachments of foreign (corporate) group proceedings,[303] or such a move may also be justified if the debtor's assets are so interlocked that a unified liquidation appears too difficult.[304] This, however, does not resolve the issue as to whether such proceedings are useful from the decisive point of view of the joint and several creditors, which is what really counts.[305] As Herchen states, there are probably pragmatic reasons for allowing territorial insolvency proceedings.[306] Different opinions and court practice on that question are available. The capacity of the court to evaluate the reasons is determined by the *lex fori concursus secundarii*. In the case *Collins & Aikman* the UK administrators in the main insolvency proceedings managed to prevent opening of secondary insolvency proceedings by representing that they would respect local priorities and treat local creditors as if secondary insolvency proceedings were opened. The liquidators in the main insolvency proceedings were of the opinion that the opening of secondary insolvency proceedings and the engaging of local liquidators necessitated by this would hinder their goals and would thwart the success of their plans to – on a group-wide basis – negotiate with the companies, to transact sales, and to finance the administration. The English court determined that the administrators were allowed to make such representation.[307] However, this approach will not necessarily be allowed in other national laws of Member States, such as Germany.[308] In the case *MG Rover* the French Court of Appeal[309] took the view that in order to open secondary insolvency proceedings there should be some advantage to those proceedings. The court denied the request to open secondary insolvency proceedings following the argument of the UK administrators that secondary insolvency proceedings could negatively impact realizations and would provide no advantage.[310] The Ghent Commercial Court in Belgium also held in the case *NV Interstore vs. Megapool BV* that there must be some purpose in opening secondary insolvency proceedings. In that case the court held that secondary insolvency proceedings could no longer be opened in Belgium because, at the

[303] cf. Oberhammer. Europäisches Insolvenzrecht in praxi – „Was bisher geschah", ZinsO 2004, S 761, 770; cited by Pannen in: Pannen. *Op. cit.*, Art 3 mn 124, p 129.
[304] Recital 19 of the EIR. See also: Haβ. Huber. Gruber. Heiderhoff. EU-Insolvenzverordnung. Kommentar. Beck, Munich 2005, Art 3EuInsVO mn 45; cited by Pannen in: Pannen. *Op. cit.*, Art 3 mn 124, p 129. It also makes sense if there are a large number of creditors, see: Virgós. Garcimartín. *Op. cit.*, p 156.
[305] Herchen in: Pannen. *Op. cit.*, Art 27 mn 2, p 400.
[306] Ibid.
[307] *Re Collins & Aikman Europe SA*, [2006] EWHC (Ch) 1343, [2006] B.C.C. 861; similar types of orders were also made in *Re MG Rover Benelux SA/NV* [2006] EWHC 3426.
[308] Collins & Aikman. Landesgericht Leoben dated 31 August 2005 – 17 S 56/05 ZinsO 2005, 1176.
[309] [2006] I.L.Pr. 32.
[310] See summary in: Marshall (2008). *Op. cit.*, mn 2.099, p 2–156.

time of the request to open secondary insolvency proceedings, the main liquidators in the Netherlands had already liquidated the assets and activities of the Belgian establishment (which therefore no longer existed).[311] On similar grounds the petition to open secondary insolvency proceedings was dismissed by the Latvian court in the case *SIA Allando Trailways vs. AS GLASKEK*.[312] In the case *Nortel Networks* the UK administrators in the main insolvency proceedings tried to prevent secondary insolvency proceedings by sending letters to the national courts of the Member States in the jurisdictions of the subsidiaries requesting to be heard before any petition to open secondary insolvency proceedings is to be decided by the court.[313] In the *EMTec* matter was decided that secondary insolvency proceedings would be opened with respect to the foreign subsidiaries after the envisaged global sale had been concluded.[314] Despite the somewhat ambiguous wording of Article 27 of the EIR,[315] it is generally understood that the court hearing the case on opening secondary insolvency proceedings is actually required[316] to open proceedings if the national law provides for no further conditions.[317] Indeed, usually national law does not. This automatism of opening has been criticised by Porzycki, for instance, in allowing secondary insolvency proceedings as winding-up proceedings against solvent debtors as in the *Belvedere* cases in Poland.[318] However, Duursma-Kepplinger states that such criticism does not permit opening secondary insolvency proceedings, because Article 33 of the EIR (stay of liquidation) is applicable to coordinate the secondary insolvency proceedings with main (restructuring) insolvency proceeding.[319] In order to clarify the capacity of the national court to open secondary insolvency proceedings the reference for a preliminary ruling from the Sąd Rejonowy Poznań, in Poland was lodged on 7 March 2011 in the case *Bank Handlowy, Ryszard Adamiak, Christianapol sp. z o. o.* which is now pending in the ECJ.[320] Consequently, it

[311] See summary in: Marshall (2008). *Op. cit.*, mn 2.083/1, p 2–133; District Court of Ghent, 21 February 2006, JOR 2006/164, *Megapool*.
[312] Daugavpils Court, dated 06. December 2010, C12279010 2790/10. Unreported.
[313] *Re Nortel Networks* [2009] EWHC 206 (Ch).
[314] See: Mennjucq. Damman. Regulation No 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon, Business Law International, Vol. 9, No 2, 2008, p 145–158.
[315] In English "shall permit the opening of secondary proceedings", French "permet d'ouvrir", German "kann... ein Gericht ....eröffen".
[316] It can be seen as automatism of opening "Eröffnungsautomatik", see Kolmann. *Op. cit.*, S 337.
[317] Heiderhoff in: Haβ. Huber. Gruber. Heiderhoff. *Op. cit.*, Art 27 mn 10, S 225.
[318] Porzycki. *Op. cit.*, p 122.
[319] Duursma-Kepplinger in: Duursma-Kepplinger, Duursma, Chalupsky. *Op. cit.*, Art 27 mn 34–35, S 469–470.
[320] ECJ case C-116/11 – Reference for a preliminary ruling from the Sąd Rejonowy Poznań (Republic of Poland) lodged on 7 March 2011 — Bank Handlowy, Ryszard Adamiak,

seems to me that the *de facto* insolvency is not the only reason to open secondary insolvency proceedings. There should be some further justification to open secondary insolvency proceedings, as a protective or assisting measure to the main insolvency proceedings. Therefore, the court empowered to open secondary insolvency proceedings has to evaluate whether the further reason besides *de facto* insolvency is sufficiently grounded. In my opinion, these reasons have to support the functions of the secondary insolvency proceedings as determined by the Regulation. If the court empowered to open secondary insolvency proceedings does not have the capacity to evaluate the reasons for opening, national laws should be supplemented accordingly to give the court such power.

Before making a relevant decision, a court empowered to open secondary insolvency proceedings is usually also bound to several requirements stipulated in the *lex fori concursus secundarii* if national law provides so. The problem, in my opinion, lies with the fact that the prerequisites stipulated in the Regulation and requirements in the national laws may not "match", causing difficulties for the court in implementing law. When the court examines the petition to open the secondary insolvency proceedings, it usually faces, according to the *lex fori concursus secundarii*, some alternatives in several[321] procedural stages before making final decision whether to open secondary insolvency proceedings:

1) to accept the petition or to dismiss the petition;
2) to examine the petition and open, or refuse to open, secondary insolvency proceedings.

According to national laws there is usually an interim period of time before the final judgement on the opening of secondary insolvency proceedings is made, at least in cases where the creditor has submitted the petition. In this interim period certain activities should be followed by the court (and interim trustee where applicable), if the *lex fori concursus secundarii* provides so. When the court examines the case, there may be various procedural routes possible in national laws to come up with the final conclusion. For example, the court (of first instance) in Estonia may or may not hold the court hearing[322] and if the debtor is invited to the court hearing and it/he is absent, then the court can still hear the case without the debtor being present.[323] A similar system is applied in Sweden,[324] Lithuania[325] and Germany.[326] In the Netherlands, the

---

Christianapol sp. z o. o. Pending. Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:152:0014:0014:EN:PDF.

[321] Note: as far as courts in civil law systems are concerned.

[322] Section 16 subsection 1 of the EBA.

[323] Section 16 subsection 3 of the EBA.

[324] Chapter 2, Sections 14 and 16 of the Swedish Bankruptcy Act. Swedish Bankruptcy Act (in Swedish: *konkurslag*), the Parliament (*Riksdag*), 11.06.1987. SFS 1987:672. In force since 01.01.1988, hereinafter: SBA.

[325] Section 9 and 10 of the Lithuanian Enterprise Bankruptcy Act. Lithuanian Enterprise Bankruptcy Act (in Lithuanian: *Lietuvos Respublikos įmonių bankroto įstatymas*), the

district court may order[327] the debtor to be summoned to be heard either in person or by proxy. If the debtor is married or has entered into a registered partnership, his/her spouse or registered partner (as the case may be) may also appear in person or by proxy in the Netherlands.[328] It follows from the given examples of the national laws that if *de facto* insolvency is found by the opening of main insolvency proceedings, the debtor may have lost its/his powers and administration of the insolvency estate has passed to main liquidator, the court is still bound to narrower rules laid down in national laws of the Member States. However, as procedural peculiarities, it is possible to take into account letters and e-mails sent to the court, or the judge may organise conversations via electronic means such as Skype, Windows Messenger Live if the judge considers it to be an appropriate method to handle the insolvency petition in Estonia.[329] I think this approach should be welcomed because of the lower costs and efficient time-management. The petitions submitted to the Dutch court should be lodged only by a member of the Dutch Bar.[330] The latter means that costs of the insolvency proceedings will usually rise. Taking into account the dimension of cross-border insolvency proceedings, where main insolvency proceedings have been opened earlier, I think that national laws of the Member States should be reviewed from the aspect of procedural efficiency, for instance, whether the hearing of the debtor is possible or can it be substituted by the evidence received from the main liquidator. This revision of procedural requirements should be done in consideration of reasons to open the secondary insolvency proceedings derived from the Regulation. At the moment, the court empowered to open secondary insolvency proceedings has to treat the petition filed in accordance with the requirements laid down in the *lex fori concursus secundarii*. These requirements may not facilitate the efficient and effective administration of cross-border insolvency proceedings.

An additional question arises whether the court is obliged to open secondary insolvency proceedings upon prerequisites derived from the Regulation, such as existence of the main insolvency proceedings and presence of the establishment of the insolvent debtor in the relevant Member State, when the requirements provided for in the *lex fori concursus secundarii* are not fulfilled, or in case the requirements provided for in the *lex fori concursus secundarii* have ceased to

---

Parliament (*Seima*) 20.03.2001, Valstybės žinios, 2001. Nr. IX-216. In force since 01.07.2001, hereinafter: LEBA.

[326] Section 4 and 10 of the GInsO.

[327] If the debtor has not been heard, it/he has the right to appeal the court order afterwards within 14 days as of the date of the order; usually the deadline is 8 days. See Section 8 subsections 1 and 2 of the DBA.

[328] Section 6 subsections 1 and 2 of the DBA.

[329] Section 477 subsection 4 of Civil Code of Procedure of Estonia. Estonian Civil Code of Procedure (in Estonian: *tsiviilkohtumenetluse seadustik*), the Parliament (*Riigikogu*), 20.04.2005. RT I 2005, 26, 197... RT I, 30.12.2010, 16. In force since 01.01.2006, hereinafter: ECCP.

[330] Section 5 subsections 1 and 3 of the DBA.

exist after the request to open secondary insolvency proceedings is made but before the final decision-making to open secondary insolvency proceedings by the court? For instance, in case of the request to open secondary insolvency proceedings made by the creditor, national laws of the Member States may provide that insolvency proceedings can be opened only upon certain amount of claim against the debtor.[331] Section 15 subsection 3 of the EBA stipulates that the court shall refuse to appoint an interim trustee on the basis of a bankruptcy petition of a creditor if, for example, the debtor objects to the claim on a reasoned basis and the court finds that the dispute over the claim must be adjudicated outside bankruptcy proceedings, the claim is entirely secured by a pledge or the creditor has failed to substantiate the bankruptcy petition sufficiently or prove the existence of the claim. As there are no specific provisions in the national laws of the Member States giving guidance to how to handle the request to open the secondary insolvency proceedings made by the persons empowered to make request upon Article 29 (b) of the EIR, courts of the Member States may treat secondary insolvency proceedings not as a special type of proceeding, but as regular nationwide proceedings to which the general national insolvency law provisions apply, unless the Regulation specifies otherwise. The Regulation is silent on these questions. Therefore, it seems to me that in case of non-fulfilment or lack of requirements provided for in the *lex fori concursus secundarii*, secondary insolvency proceedings may not be opened in practice. Whether this solution would be correct, is rather doubtful. The Regulation is legally directly binding to the Member States and prevails over the national laws of the Member States. If the prerequisites, such as existence of the main insolvency proceedings and presence of the establishment of the insolvent debtor in the relevant Member State, to open secondary insolvency proceedings laid down in the Regulation are fulfilled, then the court empowered to open secondary insolvency proceedings should discard additional requirements, which may be stipulated in the *lex fori concursus secundarii*. The main insolvency proceedings have been opened earlier, i.e. the debtor is *de facto* insolvent. Consequently, I submit that the additional national requirements provided for in the *lex fori concursus secundarii* should not restrict the opening of secondary insolvency proceedings if an establishment is found in the relevant Member State and main insolvency proceedings opened in another Member State. I think that national laws of the relevant Member States should be amended accordingly so that the additional national requirements provided for in the *lex fori concursus secundarii* in nationwide insolvency cases would not be applicable in case of the request to open secondary insolvency proceedings if an establishment is found in the relevant Member State and main insolvency

[331] According to Section 15 subsection 3 clause 3) of the EBA, the total amount of the claims which are the basis for the bankruptcy petition of the creditor has to exceed 12,500 euro in the case of a public limited company, except if unsuccessful execution proceedings have been conducted with respect to the aforementioned claims within one year before filing of the bankruptcy petition.

proceedings opened in another Member State. It would facilitate the efficient and effective administration of cross-border insolvency proceedings.

Additional questions relate to the possibility of change or withdrawal of the petition by the applicant, e.g. main liquidator or other person or authority empowered to file the petition to request the opening of secondary insolvency proceedings. A substantial problem lies with the question whether the court is allowed to accept the application to change or withdraw the petition during the process handling the request to open secondary insolvency proceedings. For instance, in the case *NSCB Hoiu-Laenuühistu* the Dutch district court considered that an Estonian company, with a registered office in Tallinn, had its COMI in the Netherlands. On the contrary, in appeal[332] it was decided that the presumption that the company's COMI is in Estonia had not been rebutted and that the arguments based on the mind of management being in Tallinn had not been contradicted. As the COMI was in Estonia, the Dutch courts lacked international jurisdiction. During the court hearing the applicants requested to treat the petition as one requesting the opening of secondary insolvency proceedings. The Court of Appeal observed that it is against good procedural order to change the legal entity as debtor (from "company" to "establishment") in appeal and considered that such an action would need a new request. Thus, it was not possible to change the petition during the court procedure. In my opinion, the Dutch court judgement was correct. I think it is not justified to make a shift in applicant during the process. However, in the case where main insolvency proceedings have been terminated at the same time when the court examines the petition to open the secondary insolvency proceedings based on prerequisites stipulated in the EIR, I find it should be allowed to change the petition from requesting the opening of secondary insolvency proceedings to requesting to open main insolvency proceedings. If relevant assisting provisions for the court are not established in the national laws of Member States, then the court may discard the national law and implement the Regulation directly. As for withdrawal, an example can be also taken. According to Sections 429 and 477 of the Code of Civil Procedure of Estonia, the court is not entitled to accept the petition of withdrawal by the applicant, if this withdrawal would cause a substantive breach of public interest. Insolvency proceedings in Estonia are of public interest. Depending on the person who filed and who wants to withdraw the petition, the Estonian court has to examine whether this action could cause a breach of public interest as well. Consequently, it seems to me that national laws also influence the possibilities to change or withdraw the petitions to open secondary insolvency proceedings. However, in my opinion, there is also the dimension of the Regulation involved, because the Regulation prevails over national laws of the Member States. The reasons for withdrawal may derive from the Regulation itself, especially taking into account the fact that secondary

[332] Judgment of the Court of Appeal in Leeuwarden, dated 02 April 2009, no. 200.025.083, *NSCB Hoiu-Laenuühistu*. Unreported.

insolvency proceedings may serve different purposes. I am inclined to the view that if the applicant was the main insolvency liquidator, the reason for withdrawal may be based on the facts, which benefit the conduct of the main insolvency proceedings. If the applicant was the creditor, then the reason for withdrawal may be based on fact that the claim has been fulfilled (set-off or other measure) and protection of local creditors is not needed anymore. If the applicant was the debtor or other authority, then the reasons to withdraw may vary. The court has to find a balanced solution to the reasons (either derived from the Regulation and/or from the national laws of the Member States) presented to it, and make a decision. To facilitate the efficient and effective administration of cross-border insolvency proceedings, it may be also reasonable for the legislators of the Member States to amend or supplement national laws accordingly to prevent problems which courts may face then deciding whether to accept the application to change or withdraw the petition during the process handling the request to open secondary insolvency proceedings.

As far as predictability and cost-efficiency of the secondary insolvency proceedings are concerned, Article 30 of the EIR provides a solution for the fact that in certain jurisdictions insolvency proceedings cannot be commenced in relation to a debtor unless the debtor has sufficient assets to cover the costs and expenses of the proceedings. At this point the odd aspect relates to the fact that before the opening of secondary insolvency proceedings all the debtor's assets are already included in the main insolvency proceedings. As Herchen correctly states, the inclusion of the insolvency estate situated in the Member State of the pending secondary insolvency proceedings has already taken place at the time of the opening of the main insolvency proceedings in another Member State.[333] Thus, it can be said that there are never assets sufficient to cover in whole or in part the costs and expenses of the secondary insolvency proceedings because the inclusion of the insolvency estate situated in the Member State of the pending secondary insolvency proceedings has already taken place at the time of the opening of the main insolvency proceedings in another Member State. Also, it is important to note that any such requirement to make an advance payment of costs or to provide appropriate security must be part of the general insolvency law of the Member State concerned and cannot be introduced specifically for secondary insolvency proceedings commenced pursuant to the Regulation. The terms "may require" do not confer a power on the court but mean that national legislation continues to apply.[334] Several questions may arise. For example, if this requirement to make an advance payment of costs and expenses or to provide appropriate security exists in the general insolvency law of the Member States whether this requirement is justified in case of secondary insolvency proceedings? In other words, if *de facto* insolvency and other

[333] Herchen in: Pannen. *Op. cit.*, Art 27 mn 34, p 410.
[334] Virgós-Schmit Report mn 228.

important circumstances are already determined in the course of the main insolvency proceedings, and secondary insolvency proceedings are by nature ancillary proceedings whose purpose is to support the efficient course of main insolvency proceedings, then the requirement to make an advance payment or provide security in national laws seems to be superfluous, in particular if there is no need to appoint interim or provisional liquidator according to the *lex fori concursus secundarii*. As there could be an option in national laws of the Member State to apply a simplified (general civil) procedure[335] for the opening of secondary insolvency proceedings without additional costs, the ground for requirement in national laws seems unjust, especially if the purpose of the secondary insolvency proceedings is to protect local creditors. Therefore, Article 30 of the EIR should actually be aimed at avoiding the requirement of advance payment or providing security in the Member State in which the opening of secondary insolvency proceedings is requested. Another question relates to the actual person who should make the advance payment of costs and expenses or provide appropriate security if such requirement exists in the national laws of the Member States and it is necessary to follow. Article 30 of the EIR puts the obligation on the applicant, who is determined by Article 29 of the EIR and the *lex fori concursus secundarii*. I think that whoever requests to open the secondary insolvency proceedings should cover the advance payments and costs (for example, the main liquidator; authorities of the relevant Member State empowered to file a petition; creditor or debtor), because the secondary insolvency proceedings should be exceptional besides the main insolvency proceedings.

As national laws between the Member States vary, there may be different approaches available to the question whether it is allowed to appeal against the judgement of the opening the secondary insolvency proceedings. The Regulation is silent on that aspect, but maybe it should not be. The rationale behind the secondary insolvency proceedings states that appeals should be restricted, because secondary insolvency proceedings are aimed at assisting main insolvency proceedings and serve an ancillary purpose. Therefore, the efficient and effective functioning of the parallel insolvency proceedings is very important. Appeals tend not to facilitate the quick course of proceedings, usually take time and cause additional costs. On the other hand, the subjective rights of the other participants in the insolvency proceedings may be restricted if an appeal against the opening of secondary insolvency proceedings is not permitted. However, it depends on the role of the participants. In my opinion, the question whether an appeal against the judgement of the opening of secondary insolvency proceedings should be permitted or not is a matter of common public interest and to be decided between the Member States during the revision of the Regulation. I am inclined to the view that appeals against judgements to open secondary insolvency proceedings should be limited. I find

[335] This option is available, for instance, in Estonia. See Chapter 43 of the ECCP.

it unjustified if the debtor and/or the liquidator in the main insolvency proceedings are entitled to appeal against that judgement, because the debtor is *de facto* insolvent as of opening of main insolvency proceedings and should not have the possibility to interrupt the course of the proceedings. The main purpose of the main liquidator is to administer insolvency proceedings with EU-wide universal effects and not to litigate causing extra expenses to the insolvency estate. To facilitate the efficient and effective administration of cross-border insolvency proceedings, the powers of the debtor and the main liquidator to appeal against the judgement opening the secondary insolvency proceedings should be prohibited.

To summarize, some conclusions are provided below. Secondary insolvency proceedings require the existence of a reason to open such proceedings. I agree with the statement that *de facto* insolvency through the opening of main insolvency proceedings is in itself an independent reason for opening secondary insolvency proceedings, but whether it is the single reason, is doubtful. It seems to me that the *de facto* insolvency is not the only reason to open secondary insolvency proceedings. There should be some further justification to open secondary insolvency proceedings, as a protective or assisting measure to the main insolvency proceedings. Therefore, the court empowered to open secondary insolvency proceedings has to evaluate whether the further reason besides *de facto* insolvency is sufficiently grounded. In my opinion, these reasons have to support the functions of the secondary insolvency proceedings as determined by the Regulation. If the court empowered to open secondary insolvency proceedings does not have the capacity to evaluate the reasons for opening, national laws should be supplemented accordingly to give the court such power.

Before making a relevant decision to open secondary insolvency proceedings, a court empowered to open such proceedings is usually also bound to several requirements stipulated in the *lex fori concursus secundarii* if national law provides so. The problem, in my opinion, lies with the fact that the prerequisites stipulated in the Regulation and requirements in the national laws may not "match", causing difficulties for the court in implementing law. I think that national laws of the Member States should be reviewed from the aspect of procedural efficiency, for instance, whether the hearing of the debtor is possible or can it be substituted by the evidence received from the main liquidator. This revision of procedural requirements should be done in consideration of reasons to open the secondary insolvency proceedings derived from the Regulation. At the moment, the court empowered to open secondary insolvency proceedings has to treat the petition filed in accordance with the requirements laid down in the *lex fori concursus secundarii*. These requirements may not facilitate the efficient and effective administration of cross-border insolvency proceedings. I think that national laws of the relevant Member States should be amended accordingly so that the additional national requirements provided for in the *lex fori concursus secundarii* in nationwide insolvency cases would not be applicable in case of the request to open secondary insolvency proceedings if an

establishment is found in the relevant Member State and main insolvency proceedings opened in another Member State. It would facilitate the efficient and effective administration of cross-border insolvency proceedings.

I think it is not justified to make a shift in applicant during the court process. However, in case, where main insolvency proceedings have been terminated at the same time when the court examines petition to open the secondary insolvency proceedings based on prerequisites stipulated in the EIR, I find it should be allowed to change the petition from requesting the opening of secondary insolvency proceedings to requesting to open main insolvency proceedings. If relevant assisting provisions for the court are not established in the national laws of Member States, then the court may discard the national law and implement the Regulation directly.

It seems to me that national laws also influence the possibilities to change or withdraw the petitions to open secondary insolvency proceedings. However, in my opinion, there is also the dimension of the Regulation involved, because the Regulation prevails over national laws of the Member States. The reasons for withdrawal may derive from the Regulation itself, especially taking into account the fact that secondary insolvency proceedings may serve different purposes. To facilitate the efficient and effective administration of cross-border insolvency proceedings, it may be also reasonable for the legislators of the Member States to amend or supplement national laws accordingly to prevent problems which courts may face then deciding whether to accept the application to change or withdraw the petition during the process handling the request to open secondary insolvency proceedings.

As for implementation of Article 30 of the EIR, it can be said that there are never assets sufficient to cover in whole or in part the costs and expenses of the secondary insolvency proceedings because the inclusion of the insolvency estate situated in the Member State of the pending secondary insolvency proceedings has already taken place at the time of the opening of the main insolvency proceedings in another Member State. If *de facto* insolvency and other important circumstances are already determined in the course of the main insolvency proceedings, and secondary insolvency proceedings are by nature ancillary proceedings whose purpose is to support the efficient course of main insolvency proceedings, then the requirement to make an advance payment or provide security in national laws seems to be superfluous, in particular if there is no need to appoint interim or provisional liquidator according to the *lex fori concursus secundarii*. Article 30 of the EIR puts the obligation to make an advance payment or provide security on the applicant, who is determined by Article 29 of the EIR and the *lex fori concursus secundarii*. I think that whoever requests to open the secondary insolvency proceedings should cover the advance payments and costs (for example, the main liquidator; authorities of the relevant Member State empowered to file a petition; creditor or debtor), because the secondary insolvency proceedings should be exceptional besides the main insolvency proceedings.

As national laws between the Member States vary, there may be different approaches available to the question whether it is allowed to appeal against the judgement of the opening the secondary insolvency proceedings. I am inclined to the view that appeals against judgements to open secondary insolvency proceedings should be limited. I find it unjustified if the debtor and/or the liquidator in the main insolvency proceedings are entitled to appeal against that judgement, because the debtor is *de facto* insolvent as of opening of main insolvency proceedings and should not have the possibility to interrupt the course of the proceedings. The main purpose of the main liquidator is to administer insolvency proceedings with EU-wide universal effects and not to litigate causing extra expenses to the insolvency estate. To facilitate the efficient and effective administration of cross-border insolvency proceedings, the powers of the debtor and the main liquidator to appeal against the judgement opening the secondary insolvency proceedings should be prohibited.

2.4. Recognition of Secondary Insolvency Proceedings

The general principle of recognition is valid for all insolvency proceedings, including secondary insolvency proceedings, opened in the Member State under Article 3 of the EIR.[336] Recognition of secondary insolvency proceedings takes place automatically from the time when the judgement, as defined in Article 2 (e) of the EIR, becomes effective in the Member State of the opening of these insolvency proceedings.[337] According to the Virgós-Schmit Report the effects of a judgement opening insolvency proceedings (either main or secondary) would appear to include the divestment of the debtor, the appointment of a liquidator, the prohibition of individual executions, the inclusion of the debtor's assets in the insolvency estate, and the obligation on individual creditors to return what they have received after proceedings have been commenced.[338] Upon the opening of main insolvency proceedings, a unified and universal insolvency estate (assets) comes into existence. The opening of secondary insolvency proceedings causes a reduction of these assets in the amount of the debtor's assets situated[339] in the territory of the Member State where secondary insolvency proceedings are opened. The Virgós-Schmit Report states that

[336] Virgós-Schmit Report mn 146.
[337] Article 16 of the EIR.
[338] Virgós-Schmit Report mn 154.
[339] In order to resolve the uncertainties presented by the territorial location of certain assets, the Regulation establishes a series of uniform rules of location (*situs*) – Article 2 (g) of the EIR. These rules constitute a mechanism for preventing conflicts and respond to a "logic of enforcement". The relevant point of time for determining the location of the assets is the time the insolvency proceedings are opened. See: Virgós. Garcimartín. *Op. cit.*, mn 306–308, p 163–164; Virgós-Schmit Report mn 224.

recognition of secondary insolvency proceedings means admitting the validity of the opening of the secondary insolvency proceedings and of the effects which they produce over the assets located in the territory of the Member State of the opening.[340] In the case *MG Probud Gdynia sp. z o.o.* the ECJ held that only the opening of secondary insolvency proceedings is capable of restricting the universal effect of the main insolvency proceedings.[341] However, Herchen states that the unified insolvency estate is virtually divided amongst the main and the secondary insolvency proceedings, because the inclusion of the insolvency estate situated in the Member State of the secondary insolvency proceedings in insolvency proceedings, be these main or secondary insolvency proceedings, has already taken place at the time of the opening of the main insolvency proceedings, i.e. already before the opening of secondary insolvency proceedings.[342] Israël states that the effects of the secondary insolvency proceedings could be described as being "superimposed" on those of the main insolvency proceedings.[343] Secondary insolvency proceedings constrain the universal effects of the main insolvency proceedings.[344] Fletcher states that their primary value is to enable local expectations with regard to such matters as the priority of entitlement to dividend to be met, to the extent that the locally situated assets are sufficient for this purpose, or to ensure that a locally perfected security interest retains full validity and priority as conferred under the local law.[345] Once the secondary insolvency proceedings are opened, the effects of these proceedings may not be challenged in other Member States.[346] This means, for instance, that a creditor may not be denied participation in secondary insolvency proceedings[347] or the secondary liquidator may claim that moveable property was returned.[348]

The problem with automatic recognition and its effects relates to the range of legal consequences of the opening of insolvency proceedings (either main or secondary), save as otherwise provided by the EIR,[349] which shall be automatically imposed to the parallel insolvency proceedings by the *lex fori*

[340] Virgós-Schmit Report mn 156.

[341] ECJ case C-444/07 – Judgment of the Court (First Chamber) – Reference for a preliminary ruling under Article 234 EC from the Sąd Rejonowy Gdańsk-Północ w Gdańsku (Poland), made by decision of 27 June 2007, received at the Court on 27 September 2007, in the insolvency proceedings opened against MG Probud Gdynia sp. z o.o. – 21 January 2010.

[342] Herchen in: Pannen. *Op. cit.*, Art 27 mn 34, p 410.

[343] Israël. *Op. cit.*, p 264.

[344] Smid. Deutsches und Europäisches Internationales Insolvenzrecht, 2004, Art 17 mn 12; cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Art 17 mn 12, p 320.

[345] Fletcher. The Law of Insolvency. London, Sweet & Maxwell, 2002, mn 31–029, p 840.

[346] Article 17 (2) of the EIR.

[347] See Article 32–39 of the EIR which apply both to main and secondary insolvency proceedings.

[348] Article 18 (2) of the EIR.

[349] See several exceptions in Articles 5–15, 24, 32 and 39–42 of the EIR.

concursus[350] with no further formalities, and producing all the effects which it has under national law. Koulu correctly submits that a judgement handed down by national court on the opening of secondary insolvency proceedings usually does not stipulate the scope and effects of recognition.[351] Thus, legislators of the Member States have to be especially diligent and attentive in formulating relevant provisions regulating cross-border insolvency proceedings in national laws of the Member States. Wessels correctly states that the effects of the automatic recognition may be both procedural and substantive in nature.[352] In my opinion, the legal consequences provided for in the *lex fori concursus secundarii* definitely affect main insolvency proceedings opened under the *lex fori concursus universalis*, and their intervention may cause problems in the administration of parallel insolvency proceedings[353] because of possible contradictory of consequences in the laws of the different Member States. For instance, a debtor, debtor's assets and the creditors are affected by the appeals against the court decisions which opened the insolvency proceedings (either main or secondary). As a result of the judicial appeal procedure, the legal position (e.g. whether to apply the *lex fori concursus universalis* or the *lex fori concursus secundarii* at a certain point of time) of the assets, the debtor and the creditors may change from time to time between the *lex fori concursus universalis* and the *lex fori concursus secundarii*. As I indicated earlier in this chapter, Article 2 (f) of the EIR which defines the time of the opening of proceedings does not require the judgement to be final. Another problem relates to the fact that the judgement to open insolvency proceedings shall usually be subject to immediate execution under national laws of Member States. For instance, in Estonia, execution of a judgement shall not be suspended or postponed, and the manner or procedure provided by law for the execution of the decision shall not be changed.[354] This aspect also influences the position of the assets, a debtor and the creditors in parallel insolvency proceedings. For instance, the annulment of a court decision by a higher court, which opened the insolvency proceedings, shall not affect the validity of the legal acts performed by or with respect of the temporary liquidator (interim bankruptcy trustee) in Estonia.[355] If the superior court in Sweden revokes a bankruptcy, the property in the insolvency estate shall be restored to a debtor to the extent that it/he is not required to pay the expenses and other debts that the insolvency estate has incurred.[356] Furthermore, there may be a catalogue of automatic legal

[350] Article 4 (1) and 4 (2) of the EIR.
[351] Koulu. *Op. cit.*, s 183.
[352] Wessels in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.266, p 306.
[353] See the consequences for the Dutch insolvency practice in: Declercq. Netherlands Insolvency Law. The Netherlands Bankruptcy Act and the Most Important Legal Concepts. T.M.C. Asser Press, The Hague, the Netherlands, 2002, p 25–30.
[354] Section 31 subsection 7 of the EBA.
[355] Section 31 subsection 8 of the EBA.
[356] Chapter 2 Section 25 of the SBA.

consequences provided by national insolvency laws with the opening of insolvency proceedings (which are applicable either main or secondary or both without special provision in national laws to indicate that). For instance, in Estonia, they are the following:

a) calculation of interest and fines for a delay on claims against the debtor shall be terminated;
b) the right to administer the debtor's assets and the right to be a participant in litigation proceedings of the debtor with regard to a dispute relating to the insolvency estate or the assets which may be included in the insolvency estate is transferred to the liquidator;
c) if the debtor is a natural person, he or she is deprived of the right to enter into transactions relating to the insolvency estate;
d) if the debtor is a legal person, the debtor is deprived of the right to enter into any transactions;
e) the term for challenging the administrative act against the debtor is suspended.[357]

In Finland, taxes, public charges and other comparable claims shall be imposed regardless of the beginning of bankruptcy, in accordance with the specific provisions in Finnish law on the same.[358] In Sweden, upon a decision on bankruptcy made, the court shall:

a) immediately decide the date for the meeting at which the debtor shall make an estate inventory oath;
b) appoint a liquidator as soon as possible;
c) and invite the debtor, liquidator, supervisory authority and the creditor, who presented the bankruptcy petition to the meeting for the administration of oaths.[359]

There may exist a court session over some claim or asset where the debtor is considered to be a party to litigation and where several liquidators (both from main and secondary insolvency proceedings) simultaneously claim to have necessary capacity under national laws to represent the debtor (or insolvency estate), because automatic legal consequences under national insolvency laws of the Member States provide such a result in parallel pending insolvency proceedings. For instance, in Finland, if, at the beginning of the bankruptcy, court proceedings are pending between the debtor and a third party concerning assets of the insolvency estate, the insolvency estate[360] shall be reserved the opportunity to resume the proceedings. If the insolvency estate does not avail itself of this opportunity, the debtor may resume the proceedings. The

[357] Section 35 subsection 1 of the EBA.
[358] Chapter 3 Section 4 (3) of the Finnish Bankruptcy Act. Finnish Bankruptcy Act (in Finnish: *konkurssilaki*), the Parliament (*Eduskunta*), 20.02.2004/120. In force since 01.09.2004, hereinafter FBA.
[359] Chapter 2 Section 24 of the SBA.
[360] Note: in Finland, the insolvency estate is considered to be a separate legal entity with its own legal capacity.

insolvency estate may be rendered liable for the legal costs of the opposing party only in so far as these have arisen from the exercise of the right of the estate to be heard.[361] In addition, the debtor's right to manage and dispose of the insolvency estate transfers to the liquidator whether partially or to full extent. This may lead to obstacles or overlapping. In general, dispositions effected by the debtor with regard to objects belonging to the insolvency estate after the opening of insolvency proceedings are void in Estonia.[362] In Finland, the legal effects of the beginning of bankruptcy remain valid even if an appeal is filed against the court order of bankruptcy. The legal effects shall cease if the court order of bankruptcy is quashed. However, when quashing the order, the court may for a special reason order that the legal effects remain valid until the quashing order has become *res judicata* or until it is otherwise ordered.[363] As seen from these few examples in national insolvency laws it follows, in my opinion, that it is crucial that legislators of the Member States formulate provisions regulating the conduct of secondary insolvency proceedings in national insolvency laws, diligently taking into account that these provisions have EU-wide effects.

The range of recognition is also influenced by the Regulation and by the court activities in the insolvency proceedings. Article 17 (2) of the EIR provides creditors a special legal position in secondary insolvency proceedings stating that any restrictions of creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated[364] within the territory of another Member State only in the case of those creditors who have given their consent.[365] Thus, local creditors are protected by the Regulation. The Virgós-Schmit Report states and a majority of scholars hold the opinion that an extension of the effects of a stay or a discharge of debt to assets situated in a foreign Member State is only possible when this is consented to by the individual creditors.[366] Although, on the one hand, the creditors are entitled to satisfy their claims out of the debtor's assets that are situated in another Member State,[367] they are not prevented, on the other hand, from waiving their rights completely by granting their consent to a stay or a discharge of debt according to the Virgós-Schmit Report.[368] However, it is only when all[369] of the

[361] Chapter 3 Section 3 subsection 1 of the FBA.
[362] Section 36 subsections 1 and 2 of the EBA.
[363] Chapter 3 Section 11 subsection 1 of the FBA.
[364] Note: should be read in conjuction of Article 2 (g) of the EIR.
[365] Article 17 (2) of the EIR.
[366] Virgós-Schmit Report mn 157; Eidenmüller. Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches internationales Insolvenzrecht, IPRax 2001, S 2, 9; Wimmer. Die Verordnung (EG) Nr 1346/2000 über Insolvenzverfahren, ZinsO 2001, S 96, 99; cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Art 17 mn 18, p 322.
[367] Duursma-Kepplinger/Chalupsky in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 17 mn 18, S 373; Paulus. *Op. cit.*, Art 17 mn 8, S 199–200.
[368] Virgós-Schmit Report mn 157.
[369] For several dissenting opinions see: Wessels (2006). *Op. cit.*, mn 10753, p 431.

creditors consent to the discharge of residual debt or to a stay of payment will this have a universal effect and therefore apply outside of the territory of the territorial insolvency proceedings.[370] A majority decision will not suffice.[371] Silence cannot be deemed as consent.[372] However, in my opinion, another problem is that the "stay or discharge" set out in Article 17 (2) of the EIR are only examples of restrictions of the creditors' rights. Other restrictions imposed by the courts of the Member States are conceivable and are also governed by this provision.[373] Other restrictions that have been suggested by German authors here are agreements to an insolvency plan, or a composition,[374] but in my opinion, not only substantial, but also procedural restrictions may fit under this provision causing further problems in the efficient and effective administration of parallel cross-border insolvency proceedings. This again leads to the legislators of the Member States who should formulate provisions regulating the conduct of secondary insolvency proceedings in national insolvency laws diligently enough, taking into account that these provisions have EU-wide effects.

To summarize, some conclusions are provided below. Recognition of secondary insolvency proceedings takes place automatically from the time when the judgement, as defined in Article 2 (e) of the EIR, becomes effective in the Member State of the opening of these insolvency proceedings. Once the secondary insolvency proceedings are opened, the effects of these proceedings may not be challenged in other Member States. This means, for instance, that a creditor may not be denied participation in secondary insolvency proceedings or the secondary liquidator may claim that moveable property was returned.

The problem with automatic recognition and its effects relates to the range of legal consequences of the opening of insolvency proceedings (either main or secondary), save as otherwise provided by the EIR, which shall be automatically imposed to the parallel insolvency proceedings by the *lex fori concursus* with no further formalities, and producing all the effects which it has under national law. In my opinion, the legal consequences provided for in the *lex fori concursus secundarii* definitely affect main insolvency proceedings

[370] Paulus. *Op. cit.*, Art 17 mn 8, S 199–200; Duursma-Kepplinger/Chalupsky in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 17 mn 18, S 373; Haβ. Huber. Gruber. Heiderhoff. EU-Insolvenzverordnung. Kommentar. Beck, Munich 2005, Art 17 EuInsVO mn 10; cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Art 17 mn 19, p 322.

[371] Smid. Deutsches und Europäisches Internationales Insolvenzrecht, 2004, Art 17 mn 12; cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Art 17 mn 19, p 322.

[372] Haβ. Huber. Gruber. Heiderhoff. EU-Insolvenzverordnung. Kommentar. Beck, Munich 2005, Art 17 EuInsVO mn 10; cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Art 17 mn 19, p 322.

[373] Paulus. *Op. cit.*, Art 17 mn 8, p 199–200.

[374] Balz. Das neue Europäische Insolvenzübereinkommen, ZIP 1996, S 948, 951; on this and in particular on the insolvency plan, see also: Eidenmüller. Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches internationales Insolvenzrecht, IPRax 2001, S 2, 9; cited by Pannen/Riedemann in: Pannen. *Op. cit.*, Art 17 mn 20, p 322.

opened under the *lex fori concursus universalis*, and their intervention causes problems in the administration of parallel insolvency proceedings because of possible contradictory of consequences in the laws of the different Member States. As seen from these few examples in national insolvency laws it follows, in my opinion, that it is crucial that legislators of the Member States formulate provisions regulating the conduct of secondary insolvency proceedings in national insolvency laws, diligently taking into account that these provisions have EU-wide effects.

Article 17 (2) of the EIR provides creditors a special legal position in secondary insolvency proceedings. In my opinion, a problem is that the "stay or discharge" set out in Article 17 (2) of the EIR are only examples of restrictions of the creditors' rights. Other restrictions imposed by the courts of the Member States are conceivable and are also governed by this provision. In my opinion, not only substantial, but also procedural restrictions may fit under this provision causing further problems in the efficient and effective administration of parallel cross-border insolvency proceedings. This again leads to the legislators of the Member States who should formulate provisions regulating the conduct of secondary insolvency proceedings in national insolvency laws diligently enough. Therefore, the work of the legislators of the Member States who should formulate provisions regulating the conduct of secondary insolvency proceedings in national insolvency laws is extremely important taking into account that these provisions have EU-wide effects.

However, it may be debatable whether the Member States are allowed to or should improve their national laws because the Regulation has according to EU law direct legal effects in the Member States. I am inclined to the view that as far as there are no relevant provisions stipulated in the Regulation, the improvement of national laws of the Member States to put the Regulation under operation and facilitate the efficient and effective administration of cross-border insolvency proceedings seems the right step to do.

3. PARTICIPATION IN AND MANAGEMENT OF SECONDARY INSOLVENCY PROCEEDINGS

3.1. Participants Involved in Secondary Insolvency Proceedings

3.1.1. The Debtor's Position in Secondary Insolvency Proceedings

Participation in the parallel insolvency proceedings which run according to the *lex fori concursus universalis* and the *lex fori concursus secundarii* can be troublesome for the debtor. As of the opening of main insolvency proceedings relevant provisions laid down in the *lex fori concursus universalis* influence the rights, obligations and liability of the debtor and as of the opening of secondary insolvency proceedings relevant provisions of the *lex fori concursus secundarii* also will apply.[375] Problems may occur if provisions directed to the debtor between the *lex fori concursus universalis* and the *lex fori concursus secundarii* contradict, especially when national laws of the Member States do not have special provisions applicable to the debtor's position only in the case of secondary insolvency proceedings. Some problems are analysed below.

As for debtor's duties, for instance, according to the laws of some Member States, members of the management board may be liable if they have failed to file for insolvency in a timely manner, whereas other Member States do not have such provisions. There are different requirements for the timescales within which the debtor is obliged to commence the insolvency proceedings under national laws of the Member States. According to research conducted by INSOL Europe for the European Parliament,[376] under Polish law the debtor has two weeks after he becomes insolvent in which to file for bankruptcy. Under Spanish law, the debtor must file for insolvency within two months from the date he becomes aware or should have become aware of the insolvency situation. This two month obligation to file can be extended by a further three months if the debtor puts the competent court on notice that he has commenced negotiations towards an anticipated composition agreement.[377] Under French law, the debtor must file for bankruptcy at the latest forty five days following its "cessation de payments" – a term which is defined by law but which amounts to knowledge of insolvency.[378] Defaulting on these deadlines may cause liability to

[375] Article 28 and Article 4 (2) (c) of the EIR.
[376] Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Affairs. Harmonisation of Insolvency Law at EU Level, 2010, p 11.
[377] Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Affairs. Harmonisation of Insolvency Law at EU Level, 2010, p 11.
[378] Ibid.

the debtor according to the national laws of the Member States. For instance, in Lithuania, failure to file for bankruptcy in time may result in civil and administrative liability, including prohibition for up to five years to be a managing director of a company.[379] I submit that in the case the main insolvency proceedings have already been opened, the obligation stipulated in national laws to file a petition to open secondary insolvency proceedings by the debtor upon reason of *de facto* insolvency is a surplus requirement. The debtor is already found *de facto* insolvent as of the opening of main insolvency proceedings. Thus, there should not be an obligation to file for secondary insolvency proceedings upon reason of *de facto* insolvency in the relevant laws of the Member States. Therefore, I find it correct that the German court in the case *Collins & Aikman*[380] held that by lodging the request in England, the management board of the company had already fulfilled its duty pursuant to Section 64 (1) of the German Limited Liability Company Act (*GmbHG)*, and there was no need to make a further request in Germany.[381] Thus, I think that national laws of the Member States should be amended accordingly if the court is not in a position to interpret provisions in national laws of the Member States flexibly enough so that these would meet the requirements established by the Regulation. There should not be an obligation to file for the secondary insolvency proceedings by the debtor upon reason of *de facto* insolvency in the relevant laws of the Member States.

According to the *lex fori concursus secundarii*, the opening of secondary insolvency proceedings may "reproduce" or give some powers to the debtor, although the debtor has probably partially or fully lost his powers under the *lex fori concursus universalis* as of opening the main insolvency proceedings. For instance, in Estonia, a debtor usually has the right to examine the liquidator's file and the court file of the insolvency matter. However, a liquidator may, for justified reasons, deny a debtor's request to examine a document included in the liquidator's file if this is detrimental to the conduct of insolvency proceedings.[382] In Latvia, a debtor's representative has a right to require and receive the information about the sale of the debtor's property.[383] In Finland, the

[379] Section 20 of the LEBA.

[380] The Collins & Aikman Cooperation Group operated as a supplier of interior fixtures in the automotive sector. The company's head office was in the USA, it operated throughout the world in 17 countries, and employed approximately 23,000 persons. The European group of companies operated in 10 different countries, employing around 4,000 employees at 24 locations. Chapter 11 proceedings pursuant to the US Bankruptcy Code were opened in respect of the US corporate group. On 15 July 2005, the High Court of Justice in London opened main insolvency proceedings (*administration*) in respect of all the European companies in the group. See: High Court of Justice, dated 15 July 2005 – 4697–4712/05 and 4717–4725/05.

[381] Local Court in Cologne, dated 10 August 2005- 71 IN 416/05 ZIP 2005, 1566. Summary available in: Marshall. *Op. cit.*, mn 2.116, p 2–184.

[382] Section 91[1] of the EBA.

[383] Section 66 of the LIA.

debtor has the same rights as a creditor to receive information from the liquidator on the insolvency estate and its administration, as well as on the matters to be dealt with in a creditors' meeting or in alternative decision-making procedure.[384] In Finland, similar to Estonia, the liquidator may restrict the debtor's right to information and the right to be heard, if a restriction is deemed necessary so as to protect the interests of the insolvency estate or a third party or for some other special reason. The information shall, however, be given to the debtor once the impediment has passed.[385] For instance, in the case of parallel insolvency proceedings pending in Estonia and Latvia, there may exist a situation where the liquidator appointed in Estonia has denied the debtor's request to examine documents on the sale of the business as a going concern, to keep business secrets in order to get the best price, although the debtor has still access to that information according to Latvian insolvency law. Under certain circumstances and without close cooperation between the liquidators, the outcome of the sale influenced by the debtor (e.g. no purchaser – no deal, or still a deal – but with a lower price) may be harmful for the creditors. Thus, if the rights of the debtor stipulated by national laws of the Member States vary and even contradict, the result may also influence the outcome of cross-border insolvency proceedings as a whole. Therefore, I am inclined to the view that a provision stipulated either in the Regulation[386] or in the national laws of the Member States enabling the liquidator to deny the request of information by the debtor under certain circumstances may be necessary to ensure efficient and effective administration of cross-border insolvency proceedings.

In addition, some extra obligations can be imposed on the debtor upon the *lex fori concursus secundarii*. For instance, in Estonia, a debtor is required to provide the liquidator with the balance sheet and an inventory of assets, including obligations, as of the date of the opening of secondary insolvency proceedings.[387] In my opinion, this information can only be received from the main liquidator, because the debtor may have[388] already lost his powers and probably given all the data, documents and information to the main liquidator during the main insolvency proceedings. Thus, I think that it a superfluous requirement in national laws of Member States in the case of the opening of secondary insolvency proceedings. Furthermore, a court empowered to open secondary insolvency proceedings may require[389] a debtor to swear in court that the information submitted to the court concerning its/his assets, debts and business or professional activities is correct to the debtor's knowledge. For instance, in Sweden, directors of a company which has been declared bankrupt may not, without the court's permission, travel abroad before having sworn the

[384] Chapter 4 Section 2 of the FBA.
[385] Chapter 4 Section 2 of the FBA.
[386] For instance, it could be added in Article 18 and/or in Article 31 of the EIR.
[387] Section 85 subsection 1 of the EBA.
[388] Note: if the *lex fori concursus universalis* provides so.
[389] Note: if the *lex fori concursus secundarii* provides so.

oath at the district court.[390] In Estonia, if a court requires a debtor to take an oath, the debtor shall take the oath before the first general meeting of creditors[391] unless the court determines a different date for taking the oath.[392] As the debtor is already declared *de facto* insolvent and has partially or fully lost his powers in the main insolvency proceedings and the main liquidator manages the debtor's accounting, it is practically impossible to fulfil that obligation to take the oath by the debtor in the secondary insolvency proceedings. The debtor does not have sufficient information about its/his assets, debts and business or professional activities after the opening of main insolvency proceedings, especially when the debtor does not have access to the information according to the *lex fori concursus universalis*. Therefore, these excessive requirements to give an oath or to provide the court with detailed accounting information in national laws of the Member States in the context of the secondary insolvency proceedings can be considered to be overburdening for the debtor and not in conformity with the principle that cross-border insolvency proceedings should operate efficiently and effectively. I think that it is also possible to get all the relevant information for the conduct of secondary insolvency proceedings from the liquidator of the main insolvency proceedings. Thus, in my opinion, the national laws of the Member States should provide a relevant exception to that debtor's obligation and not require to give an oath or to provide the court with detailed accounting information by the debtor in the case of secondary insolvency proceedings.

Indeed, the most troublesome problem for the debtor is the question of liability under various national laws of the Member States applicable to the parallel insolvency proceedings. The underlying fundamental question is, whether a debtor (and its related persons) can be held liable and sanctioned in insolvency proceedings for the (same) offence connected to the main and secondary insolvency proceedings, as an outcome of different national laws applicable to the parallel insolvency proceedings pending in several Member States? For instance, in Sweden, if there is a reason to fear that the debtor will avoid his obligations by leaving the country, he may be prohibited from travelling abroad. He may also be required to surrender his passport to the supervisory authority in Sweden.[393] If according to Estonian law, the verification meeting of the claims cannot be held without debtor's attendance,[394] then the question of debtor's liability is topical. According to Swedish law the debtor is not allowed to travel to Estonia, but according to Estonian law his presence is mandatory. What should debtor do in that situation? He will probably contact the Swedish supervisory authority and ask for permission to

[390] Chapter 6 section 6 of the SBA.
[391] Which usually takes place within two weeks as of the opening of secondary insolvency proceedings.
[392] Section 86 subsection 1 and 2 of the EBA.
[393] Chapter 6 section 6 of the SBA.
[394] Section 100 subsection 6 of the EBA.

travel to Estonia. If the supervisory authority does not give permission then the debtor will probably contact the Estonian liquidator, who might interpret the relevant provision in Estonian insolvency law in such way that it is possible to attend in the verification meeting via video conference. This simple example shows that relevant provisions in the Regulation and in the national laws of the Member States, at least from a procedural point of view, may be needed to facilitate effective and efficient administration of cross-border insolvency proceedings. In addition, the extent of the liability and the persons possibly held liable also differ from jurisdiction to jurisdiction. Most national laws of the Member States contain provisions on the liability not only of directors of a company, but also of *de facto* or shadow directors, that is, those in accordance with whose direction the directors are accustomed to act. Under Swedish law shareholders may, under certain circumstances, be liable for the continuation of the business of a company if it has lost more than half of its share capital.[395] As for Estonia, if the insolvency of the debtor was caused by a grave error in management,[396] the liquidator is required to file a claim for compensation for damages against the person liable for the error immediately after sufficient basis for filing a claim has become evident.[397] Prohibition on business[398] is often applied in Estonia,[399] also to foreign citizens.[400] Under English law, only a director (in the wide sense) may be liable for wrongful trading (i.e. if the directors continued the company's trading and knew or should have known at the time that there was no reasonable prospect that the company would avoid going into liquidation), but both directors and outsiders may be liable for fraudulent trading (trading with the purpose to defraud the company or its creditors).[401] On the other hand, under Italian law liability for the acts or

[395] Section 19 of the Swedish Companies Act (2005:551). Swedish Companies Act (in Swedish: *aktiebolagslag*), the Parliament (*Riksdag*), 16.06.2005. SFS 2005:551. In force since 01.01.2007.

[396] Based on the definition laid down in Section 28 subsection 2 second sentence of the EBA.

[397] Section 55 subsection 3^3 of the EBA.

[398] Defined in Section 91 subsections 1 and 2 of the EBA.

[399] Section 91 subsection 5 of the EBA stipulates that the Minister of Justice may establish, by a regulation, a list of foreign states the prohibitions on business imposed under whose legislation are recognised in Estonia. The recognised prohibitions on business shall have been ordered by court and the preconditions and content thereof shall be similar to the prohibitions on business imposed on the basis of Estonian law. The duration of recognised prohibitions on business is determined by the law of the corresponding foreign state, the scope of application thereof in Estonia is determined by Estonian law.

[400] See: Judgment of the Supreme Court of Estonia (Civil Chamber), dated 22 February 2010 no 3-2-1-124-09 – Stasys Brilis appeal against judgment by Tartu Court of Appeal of 25 June 2009 to apply prohibition on business to Stasys Brilis in OÜ STAR EHITUS bankruptcy proceedings.

[401] Part III Chapter X Sections 213–215 of the Insolvency Act 1986. The Insolvency Act 1986, the Parliament of the United Kingdom. Statute Book 1986, Chapter 45. Online available: http://www.legislation.gov.uk/ukpga/1986/45/contents.

omissions of directors does not extend to a director who, being without fault, had expressed dissent in the resolutions of the board of directors and has immediately given written notice of this dissent to the chairman of the board of directors.[402] The laws of the Member States contain a wide variety of provisions on liability related to such issues as transfers at undervalue, the preparation and adoption of incorrect accounts, the failure to make necessary provisions for the payment of taxes or disguising financial distress. They also contain different rules as to the disqualification of directors. A survey conducted by INSOL Europe revealed there are no general rules as to when a director is civilly and criminally liable in the matters mentioned above.[403] Further questions may arise in connection to the liability of the debtor. For instance, who can bring claims against the debtor (and its related persons) – the main or secondary insolvency liquidator or both, courts of several *forum*, supervisory authorities, prosecutors – and under which substantial and procedural law of the Member States? At present, there are no restrictions in the national laws of the Member States stating, for instance, that the liquidator in secondary insolvency proceedings cannot bring claims against the debtor or that the liquidator in secondary insolvency proceedings should require the consent of the main insolvency liquidator before starting proceedings against the debtor (and its related persons). Taking into account the nature of the secondary insolvency proceedings as preventive or assisting, it seems logical and necessary that the secondary insolvency liquidator should not initiate legal proceedings against the debtor without the consent of the main liquidator. Thus, in my opinion, relevant provision could be inserted in the Regulation[404] stating that the secondary insolvency liquidator is not entitled to initiate legal proceedings against the debtor without the consent of the main liquidator.

The debtor's rights may be restricted also with other preventing measures such as special prohibitions of disposition and transfer, temporary interception of mail, subpoena or arrestment applied according to the *lex fori concursus secundarii* before the opening of secondary insolvency proceedings, which can remain in force unless the court decides otherwise. However, the debtor is *de facto* insolvent based on the judgement which opened main insolvency proceedings. The enforcement in practice and the sanctions (length, level of difficulty) also vary between the different Member States. There may even be exceptional cases where liquidators in the parallel insolvency proceedings agree between themselves to apply certain *lex fori concursus* to gain a more preferable outcome for the insolvency estate, which could, at the same time, cause rather harsh consequences for the debtor (and its related persons). For instance, in Lithuania, in the case of fraudulent bankruptcy, legal documents

[402] Directorate General for Internal Policies (2010). *Op.cit*., p 22.
[403] Ibid.
[404] For instance, in Article 31 of the EIR.

such as contracts or agreements are examined five years previously.[405] The same maximum time period applies in Estonia[406] and Sweden.[407] In Latvia, the inspection period is limited to three years.[408] As main insolvency proceedings have an EU-wide effect I am inclined to the view that it would be sufficient if the main insolvency proceedings lead the way and the *lex concursus universalis* would determine questions related to the debtor's liability. Thus, extra preventive measures which would cause extra liability imposed on the debtor by the *lex fori concursus secundarii* are not needed. On the other hand, contra arguments can be made that if the main liquidator does not find it necessary to sanction the debtor or there are no grounds for doing so according to the *lex fori concursus universalis*, the liquidator in the secondary insolvency proceedings should have the opportunity to sanction the debtor under the *lex fori concursus secundarii*, if it provides so. Therefore, I think that national laws of the Member States should be flexible enough to provide provisions enabling coordination between the liquidators to the maximum extent as Article 31 of the EIR requires. Undoubtedly, the legal solution where provisions in the national laws of the several Member State are simultaneously applicable to the debtor's position and his/its liability seems unpredictable, unjust and burdensome for the debtor, especially in the case of individuals as debtors. In addition, this parallel system of *lex fori concursus* may be too ambiguous to implement for the liquidators and courts as well. Thus, to find an appropriate solution for the question of the debtor's liability as a whole in cross-border insolvency proceedings, a survey between the Member States should be undertaken before making any radical amendments to the Regulation or to national laws of Member States. It may be desirable that the rules on liability are approximated to avoid forum shopping and enhance the efficient and effective administration of cross-border insolvency proceedings. Meanwhile, it is crucial that liquidators follow the duties to cooperate and communicate as stipulated in Article 31 of the Regulation.

Another question relates to the debtor's right of representation and participation in secondary insolvency proceedings. In general, depending on the jurisdiction and the actual insolvency procedure chosen, the management board of the debtor may continue to play a leading or limited role in the insolvency proceedings pursuant to the *lex fori concursus secundarii*. In general, there are no specific provisions in the laws of the Member States stating that in the case of secondary insolvency proceedings there are distinctions available. Therefore, ordinary nationwide provisions apply. For example, under Spanish law, the liquidator has the right to assist and participate in the management board and shareholders' meetings of the debtor, although not to vote.[409] Under Polish law

[405] Section 20 of the LEBA.
[406] Section 110 subsection 1 clause 4 of the EBA.
[407] Chapter 4 section 5 of the SBA.
[408] Section 96 of the LIA.
[409] Directorate General for Internal Policies (2010). *Op.cit*., p 14.

in liquidation proceedings, the management board is not dismissed, but its role is limited to representing the debtor in the course of the insolvency proceedings, supporting the liquidator as regards information on the business and exercising corporate rights in related companies.[410] According to the German Insolvency Code, the management of a legal entity remains formally in place until the final liquidation of the legal entity. In addition, the management still represents the legal entity with regard to specific legal rights granted to the legal entity as debtor in the proceedings.[411] Under English Law, whilst the administrator is in office he displaces the board of directors and is responsible solely for the management of the company.[412] The right to administer the debtor's assets and the right to be a participant in court proceedings in lieu of the debtor with regard to a dispute relating to the insolvency estate or the assets which may be included in the insolvency estate is, in Estonia, transferred to the liquidator.[413] The shareholders' rights are not always acknowledged in insolvency proceedings. Under German law shareholders are generally treated as subordinated creditors and therefore have nearly no influence in the insolvency proceedings. As a consequence of the subordination of any loans they have made to the debtor, they are not even admitted as creditors to any creditors' assembly.[414] In UK liquidation proceedings, the shareholders of the company have little, if any, control or say over or in respect of the actions of the administrator. It is the creditors acting in the general meeting or by means of a duly elected committee who control the actions and functions of the administrator.[415] In Estonia, if the debtor is a natural person, he or she is deprived of the right to enter into transactions relating to the insolvency estate, but if the debtor is a legal person, the debtor is deprived of the right to enter into any transactions.[416] Therefore, the approaches between laws of the Member States vary in question of the debtor's right of representation and participation in secondary insolvency proceedings. There may exist situations where the debtor is entitled to continue to represent himself in court proceedings (for instance, in the division of joint property in the case of family law) or the debtor has the right to accept or waive the receipt of certain property (for instance, a legacy in the case of inheritance matters or donation)[417] under the *lex fori concursus secundarii*. At the same time, it is possible that under the *lex fori universalis* the liquidator is entitled to represent the debtor in the same legal transactions. Undoubtedly, the conflict of national laws, for instance, between the *lex fori concursus universalis* and the *lex fori secundarii* may cause problems in administration of parallel insolvency

[410] Ibid..
[411] Section 80 of the GInsO.
[412] Directorate General for Internal Policies (2010). *Op.cit*., p 14.
[413] Section 35 subsection 1 of the EBA.
[414] Directorate General for Internal Policies (2010). *Op.cit*., p 14.
[415] Ibid.
[416] Section 35 subsection 1 of the EBA.
[417] Section 120 subsection 1 of the EBA.

proceedings, because in practice participants involved should be aware of the technicalities in other national laws of the Member States as well. Consequently, as main insolvency proceedings have an EU-wide effect I am inclined to the view that main insolvency proceedings should lead the way and the *lex concursus universalis* would have to determine questions related to the debtor's right of representation and participation in secondary insolvency proceedings as well, because secondary insolvency proceedings are opened later and the debtor is already *de facto* insolvent as of the opening of main insolvency proceedings. Thus, to avoid conflict of laws between the laws of the Member States and to facilitate efficient and effective administration of cross-border insolvency proceedings, the provisions applicable to the debtor's representation and participation in secondary insolvency proceedings should follow the same line as the *lex fori concursus universalis*. At present, I think that the legislators of the Member States should amend national laws accordingly stating that the respective powers of the debtor in the case of secondary insolvency proceedings are determined by the law of the Member State where main insolvency proceedings were opened (*lex fori universalis*). In the future, Article 4 (2) (c) of the EIR could be amended accordingly as well.

To summarize, some conclusions are provided below. Participation in the parallel insolvency proceedings which run according to the *lex fori concursus universalis* and the *lex fori concursus secundarii* can be troublesome for the debtor. There should not be an obligation for the debtor to file for the secondary insolvency proceedings upon reason of *de facto* insolvency in the relevant laws of the Member States. I think that national laws of the Member States should be amended accordingly if the court is not in a position to interpret provisions in national laws of the Member States flexibly enough so that these would meet the requirements established by the Regulation.

I am inclined to the view that a provision stipulated either in the Regulation or in the national laws of the Member States enabling the liquidator to deny the request of information by the debtor under certain circumstances may be necessary to ensure efficient and effective administration of cross-border insolvency proceedings.

As for the debtor's obligation to give information, I think that it is also possible to get all the relevant information for the conduct of secondary insolvency proceedings from the liquidator of the main insolvency proceedings. Thus, in my opinion, the national laws of the Member States should provide a relevant exception to that debtor's obligation and not require to give an oath or to provide the court with detailed accounting information by the debtor in the case of secondary insolvency proceedings.

The most troublesome problem for the debtor is the question of liability under various national laws of the Member States applicable to the parallel insolvency proceedings. At present, there are no restrictions in the national laws of the Member States stating, for instance, that the liquidator in secondary insolvency proceedings cannot bring claims against the debtor or that the

liquidator in secondary insolvency proceedings should require the consent of the main insolvency liquidator before starting proceedings against the debtor (and its related persons). Taking into account the nature of the secondary insolvency proceedings as preventive or assisting, it seems logical and necessary that the secondary insolvency liquidator should not initiate legal proceedings against the debtor without the consent of the main liquidator. Thus, in my opinion, relevant provision could be inserted in the Regulation stating that the secondary insolvency liquidator is not entitled to initiate legal proceedings against the debtor without the consent of the main liquidator. To find an appropriate solution for the question of the debtor's liability as a whole in cross-border insolvency proceedings, a survey between the Member States should be undertaken before making any radical amendments to the Regulation or to national laws of Member States. It may be desirable that the rules on liability are approximated to avoid forum shopping and enhance the efficient and effective administration of cross-border insolvency proceedings. Meanwhile, it is crucial that liquidators follow the duty to cooperate and communicate as stipulated in Article 31 of the Regulation.

I am inclined to the view that main insolvency proceedings should lead the way and the *lex concursus universalis* would have to determine questions related to the debtor's right of representation and participation in secondary insolvency proceedings, because secondary insolvency proceedings are opened later and the debtor is already *de facto* insolvent as of the opening of main insolvency proceedings. Thus, to avoid conflict of laws between the laws of the Member States and to facilitate efficient and effective administration of cross-border insolvency proceedings, the provisions applicable to the debtor's representation and participation in secondary insolvency proceedings should follow the same line as the *lex fori concursus universalis*. At present, I think that the legislators of the Member States should amend national laws accordingly stating that the respective powers of the debtor in the case of secondary insolvency proceedings are determined by the law of the Member State where main insolvency proceedings were opened (*lex fori universalis*). In the future, Article 4 (2) (c) of the EIR could be amended accordingly as well.

3.1.2. Appointment of the Liquidator in Secondary Insolvency Proceedings

One of the consequences of the opening of secondary insolvency proceeding is the appointment of the liquidator as defined in Article 2 (b) of the EIR. The Member States have listed those persons and bodies in Annex C of the EIR. The problem is that allowing secondary insolvency proceedings as separate proceedings under the Regulation by the Member States during the deliberations of the 1995 Convention on Insolvency Proceedings and Regulation, has led to a duplicated system of liquidators, which might not facilitate the effective and

efficient administration of cross-border insolvency proceedings. First, the laws of Member States have different rules on the qualifications and eligibility for the appointment,[418] approval,[419] licensing,[420] regulation,[421] supervision[422] and professional ethics and conduct of liquidators.[423] Secondly, in some Member States, such as Estonia, it is even possible to appoint several persons acting as main or secondary insolvency liquidators (due to the complexity of the case in hand) and indeed, national laws usually give provisions on the possible hiring of representatives or assistants to these appointed liquidators.[424] Thus, there may

[418] For instance the right to act as the liquidator in Estonia according to Section 57 of the EBA is granted to a person with active legal capacity who: 1) has acquired officially recognised Bachelor's degree or a qualification equal thereto within the meaning of Section 28 subsection 2^2 of the Republic of Estonia Education Act and who has at least two years' professional experience in the field of finance, law, management or accounting or who has acquired officially recognised Master's degree or a qualification equal thereto within the meaning of Section 28 subsection 2^2 of the Republic of Estonia Education Act; 2) is honest and of high moral character; 3) has oral and written proficiency in Estonian; 4) has passed the examination of trustees pursuant to the procedure provided for in Section 95 of the Bailiffs Act; 5) has undergone the training of trustees pursuant to the procedure provided for in Section 96 of the Bailiffs Act.

[419] For instance, approval of a liquidator appointed by a judgment shall be decided by the first general meeting of creditors. If a liquidator appointed by a judgment is not approved, the creditors shall elect a new liquidator whose approval shall be decided by a corresponding court decision within 5 days after receipt of the decision of the general meeting. If a court does not approve a liquidator elected at a general meeting, the court shall appoint a new liquidator by a judgment and the liquidator need not be approved by a general meeting of creditors. Section 61 of the EBA.

[420] For instance requirements for liquidators in Estonia according to Section 56 subsection 1 of the EBA: the following members of the professional union of the Chamber of Bailiffs and Bankruptcy Trustees may be liquidators: 1) natural persons to whom the Chamber has granted the right to act as trustees; 2) sworn advocates and the senior clerks of sworn advocates; 3) auditors; 4) bailiffs whose level of education complies with Section 47 subsection 1 clause 1 of the Courts Act.

[421] For instance self-regulated bodies or public legal entities.

[422] For instance, Office of Bankruptcy Ombudsman in Finland, Enforcement Service Offices in Sweden.

[423] See summary in Annex II of survey conducted by INSOL Europe in: Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Affairs. Harmonisation of Insolvency Law at EU Level, 2010, p 11; See also Verrill. The INSOL-Europe Guidelines for Communication and Co-Operation; in: Wessels. Omar. (ed.) Crossing (Dutch) Borders in Insolvency. INSOL Europe, 2009, p 44–46; Csizmazia. Deficiencies in the Hungarian Insolvency Act and Possible Remedies; in: Wessels. Omar. (ed.) The Intersection of Insolvency and Company Laws. INSOL Europe, 2009, p 23.

[424] For instance, a liquidator may use the assistance of third persons in performing specific acts relating to the insolvency proceedings. A liquidator may conduct transactions relating to the insolvency proceedings through a representative. A liquidator may use a representative and an assistant in performing acts and entering into transactions relating to the insolvency proceedings with the prior consent of the creditors' committee. A person connected with the judge hearing the matter, the assistant judge or the debtor shall not be a representative or an

be an insolvency estate, which is administered by the several persons representing and assisting either the main or secondary insolvency liquidator at the expense of the insolvency estate, i.e. a debtor and creditors. One might ask whether that system justified in regard to efficient and effective administration of cross-border insolvency proceedings. As I already indicated in the previous chapter there is no practical need to appoint an interim trustee in the case of the filing request before the opening of secondary insolvency proceedings, because the main insolvency proceedings have already been opened and *de facto* insolvency of the debtor has been determined in those proceedings. To take this one step forward, I might say that in practice, in certain circumstances even the appointment of the secondary liquidator is not always needed to administer the insolvency estate, because the main liquidator usually hires a local[425] lawyer (who can be an insolvency practitioner according to national law of another Member State), accountant, representative, assistant, etc. to administer the insolvency proceedings, because these persons are familiar with national laws of another Member State. If the liquidator in the main insolvency proceedings needs the assistance of knowledgeable persons in the pertinent legal fields in another Member State, such persons need not necessarily be liquidators of secondary insolvency proceedings. Local advisors may equally be consulted. This applies even more where – as in the case of German secondary insolvency proceedings – the liquidators of main insolvency proceedings have virtually no way of influencing which liquidator the court is going to appoint.[426] Nevertheless, Herchen states that it may make sense to request the assistance of both – local advisors and a liquidator of secondary insolvency proceedings – should the cooperation between the liquidator of the main insolvency proceedings and local creditors, institutions, government authorities, etc. prove difficult, where the liquidator's status is not being given the respect theoretically envisioned by Article 18 (1) of the Regulation.[427] However, according to Article 19 of the EIR the liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction. No legalisation or other similar formality shall be required. Consequently, I think that for practical reasons it could be efficient and effective not to appoint a new person as the

---

assistant of a liquidator and a representative or an assistant of a liquidator shall be independent of the debtor and the creditors. A liquidator shall be liable for the activities of a third person, representative or assistant in the insolvency proceedings as for his or her own activities. A liquidator pays remuneration to a third person, representative or assistant out of his or her own remuneration according to the agreement between them. If using a representative is clearly necessary due to the complexity of the matter, remuneration may be paid to a representative out of the insolvency estate with the consent of the creditors' committee. Section 62 of the EBA.

[425] From the Member State, where the assets are situated or where he intends to take action.

[426] Herchen in: Pannen. *Op. cit.*, Art 27 mn 13, p 403.

[427] Ibid.

secondary liquidator, but to appoint the main liquidator as the secondary liquidator. The main insolvency liquidator is familiar with the insolvency case under the management. Indeed, at the moment national laws of the Member States generally do not provide such an option for appointment as there are still special local requirements for liquidators such as knowledge of the local language and obligatory membership of the local insolvency practitioner's association, etc. The fact that certain functions are reserved to lawyers admitted to the local court, of course, has put a practical restriction on the free movement of services in the EU.[428] In my opinion, if there is a (political) will between the Member States towards a more efficient, effective and unified system of insolvency proceedings in the EU, the Regulation should be amended and supplemented in a way that there is only one EU-wide liquidator responsible for administering both the main and secondary insolvency estates. In addition to that, restrictions on the qualifications and eligibility for the appointment of foreign liquidators in the case of secondary insolvency proceedings in national laws of the Member States should be abolished.

3.1.3. Creditors' Choices

After the opening of secondary insolvency proceedings, creditors are usually faced with the questions whether to participate[429] in insolvency proceedings and if so, in which one – secondary, main or several proceedings simultaneously. In answering these questions the creditor should consider the information available on the following: information available on the insolvent debtor, predictability of the course of the process and costs of the insolvency proceedings – circumstances, which may be unforeseeable before filing a claim in cross-border insolvency proceedings under legal regulation currently in force in the EU.

In general, after the opening of secondary insolvency proceedings, judgment of the court empowered to open the proceedings will be made publicly available (immediately) in the relevant Member State.[430] Although, according to the Virgós-Schmit Report, the publication of the opening of insolvency proceedings in another Member State and registration in a public register in another Member State is not a precondition for the recognition of those insolvency proceedings or for the recognition and exercise of the powers of the liquidator appointed in

[428] On that topic see: Inacio. Regulating the Profession of Insolvency Practitioner in the European Union; in: Wessels. Omar. (ed.) The European Insolvency Regulation: An Update. INSOL Europe, 2010, p 95–107.

[429] Note: in the case of an individual's bankruptcy it might be useful not to participate in the insolvency proceedings because a natural person does not cease to exist upon termination of the insolvency proceedings and it is possible to satisfy the claim after the closure of the insolvency proceedings if so provided by the law.

[430] For instance very detailed list of information to be published is stipulated in Section 58 of the LIA.

such insolvency proceedings,[431] the publication and registration may produce significant legal effects in relation to the evaluation of the behaviour of the persons concerned and for the trade security.[432] For instance, according to Section 93 subsection 1 of the Estonian Bankruptcy Act, the creditors are required to notify the liquidator of all their claims against the debtor which arose prior to the opening of insolvency proceedings, regardless of the basis or the due dates for fulfilment of the claims, not later than within 2 (two) months as of the date of publication of the notice in the official publication *Ametlikud Teadaanded*. If the creditor misses the deadline for lodging a claim, it usually misses its rank of claim as well.[433] In contrast, under English law there is no statutory time limit fixed until the liquidator is in a position to declare a dividend.[434] In Germany, lower-ranking creditors shall file their claims only if specifically requested by the insolvency court to do so.[435] To file a claim, some of the national laws of the Member States require paying a fee, for instance Finland[436] and Hungary.[437] Thus, it is essential for the creditors to obtain relevant information on the insolvent debtor. According to Article 21 (1) of the EIR a liquidator (either main or secondary) may request that notice of the judgment opening insolvency proceedings, and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that Member State.[438] In addition, the main liquidator may request that the judgement opening the main insolvency proceedings be registered in a register kept in the other Member States.[439] However, the problem is that a secondary insolvency liquidator is not granted the same powers, i.e. to request registration in the public register in the other Member States, since by definition the territorial proceedings cannot affect assets situated outside the Member State of the opening of secondary insolvency proceedings.[440] I think that the limitation of the secondary liquidator's powers in this question is not justified, because publication and registration also influences third persons involved, such as suppliers and supervisory authorities with the

[431] Virgós-Schmit Report mn 177 and 182.
[432] Virgós-Schmit Report mn 178 and 182.
[433] According to Section 102 subsection 1 of the EBA the general meeting of creditors may restore the term for filing the claim on the request of the creditor. A claim cannot be filed after the distribution proposal has been submitted to the court for approval.
[434] Directorate General for Internal Policies (2010). Op.cit., p 15.
[435] Section 174 subsection 3 of the GInsO.
[436] Chapter 12 Section 16 subsection 1 of the FBA.
[437] According to Section 46 subsection 7 of the Hungarian Insolvency Act, a creditor has to pay 1 per cent of its/his claim (minimum 5,000 forints and maximum 200,000 forints) to the special account of the courts Financial Administration Office, in order to be inserted to the creditors' list. Hungarian Insolvency Act XLIX of 1991 (in Hungarian: *a csődeljárásról és a felszámolási eljárásról szóló 1991 évi XLIX törvény*). In force since 01.01.1992.
[438] Article 21 (1) of the EIR.
[439] Article 22 (1) of the EIR.
[440] Virgós-Schmit Report mn 184.

right to be informed about the insolvency proceedings. Apart from Article 40 of the EIR, the registration can be an appropriate informative measure as well. Articles 21 and 22 of the EIR refer to national procedures for publication and registration. These procedures, and the extent to which publication or registration is mandatory, tend not to be widely known in other jurisdictions of the Member States.[441] In particular, there is no EU-wide register for insolvency cases or centrally coordinated reference network enabling insolvency practitioners and creditors to check national requirements. Nevertheless, the registers play a significant role in for the international trade as well. Apart from Article 24 of the EIR, the trust of third parties acting in good faith has to be protected in all Member States. Information on the insolvency fact and on the insolvent debtor should be available to all persons interested in it. In case the Member State does not require mandatory registration in its territory,[442] the relevant powers to require mandatory registration should be given to the secondary insolvency liquidator, especially in the case where individuals as insolvent debtors are not usually recorded in the public register. Thus, mandatory registration is needed. In order to facilitate effective and efficient administration of cross-border insolvency proceedings, Article 22 (1) of the EIR and national laws should be supplemented accordingly.

As for predictability, another aspect for creditors to consider is that the decision to participate in the secondary insolvency proceedings will only make sense when the expected value of creditor's claim in the secondary insolvency proceedings is greater than in the main insolvency proceedings,[443] or, as Virgós and Garcimartín correctly state, in situations in which it is not possible to open main insolvency proceedings,[444] or, as Fletcher correctly points out, if local law priorities in respect of dividends and the validity of locally perfected security will be met.[445] According to Virgós and Garcimartín it is useful for creditors to know that liquidation of assets can easily be organised on a territorial basis, but this is not true of the discharge of liabilities, as liabilities are assignable to the capital as a whole, not to specific assets.[446] Any restriction of creditors' rights, in particular a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets situated within the territory of another Member State without the creditors' consent, whether individual or of all the creditors

[441] See for instance INSOL Europe initiative on this matter: http://www.insol-europe.org/technical-content/eir-articles-21-22/. A very detailed and informative list of obligations for liquidators is available in Latvia. See Section 66 of the LIA.

[442] Article 21 (2) and Article 22 (2) of the EIR indicate the wording "may require".

[443] It seems logical because the effects of secondary proceedings are restricted to assets only located in the Member State of the opening of secondary proceedings from which claims may be satisfied.

[444] Virgós. Garcimartín. *Op. cit.*, mn 418, p 225.

[445] Fletcher (2002). *Op. cit.*, mn 31-029, p 840.

[446] Virgós. Garcimartín. *Op. cit.*, mn 335, p 179.

having interest.[447] Therefore the proceedings and its costs should be to some extent foreseeable beforehand for the creditors. Although Articles 40 and 41 of the EIR require informing creditors, it seems to me that the creditor may find him/herself in trouble gaining such detailed information needed to evaluate his or her position in the parallel proceedings and to decide whether to participate or not in one or several of those at the beginning of these parallel proceedings. Often linguistic problems may occur. According to national laws sometimes the creditor is required to show a special interest for obtaining relevant information, sometimes the liquidator is simply too busy or not available. Thus, he does not respond to creditor's inquiries. Indeed, to be a successful creditor in participation of cross-border insolvency proceedings, the creditor should be able to predict the progress of the proceedings (either main or secondary) within the possible changeable applicable law in these insolvency proceedings as well. In practice, it seems difficult to achieve. I agree with Eidenmüller, who refers to the predictability of the *forum* and applicable law as crucial aspects enabling speedy and simple procedures avoiding additional costs. Relevant rules in insolvency laws should also strive to protect involuntary and other "non-adjusting"[448] creditors. Involuntary creditors such as tort creditors do not bargain for a claim and hence cannot protect themselves.[449] The Regulation and laws of the Member States should prevent legal uncertainty, which can be translated into additional costs for creditors. In order to facilitate efficient and effective administration of cross-border insolvency proceedings, an EU-wide register for insolvency cases is needed, which could provide all necessary information.

To summarize, some conclusions are provided below. After the opening of secondary insolvency proceedings, creditors are usually faced with the questions whether to participate in insolvency proceedings and if so, in which one – secondary, main or several proceedings simultaneously. In answering these questions the creditor should consider the information available on the following: information available on the insolvent debtor, predictability of the course of the process and costs of the insolvency proceedings – circumstances, which may be unforeseeable before filing a claim in cross-border insolvency proceedings under legal regulation currently in force in EU.

In case the Member State does not require mandatory registration in its territory, the relevant powers to require mandatory registration should be given

[447] Articles 17 (2) and 34 (2) of the EIR.

[448] "Non-adjusting" creditors are creditors that, in principle, could bargain for protection but fail to do so because they lack the skills, the information, or other resources, or who abstain from self-protection because they consider it to be uneconomical to invest resources to achieve that aim, e.g. because they only have very small claims. Employees may be classified here as well depending on level of protection in national laws of the Member States; in: Eidenmüller. Abuse of Law in the Context of European Insolvency Law. European Company and Financial Law Review, April 2009, Vol 6, No 1, p 5–6.

[449] Eidenmüller. *Op. cit.*, p 5–6.

to the secondary insolvency liquidator, especially in the case where individuals as insolvent debtors are not usually recorded in the public register. Thus, mandatory registration is needed. In order to facilitate effective and efficient administration of cross-border insolvency proceedings, Article 22 (1) of the EIR and national laws should be supplemented accordingly. The Regulation and laws of the Member States should prevent legal uncertainty, which can be translated into additional costs for creditors.

In order to facilitate efficient and effective administration of cross-border insolvency proceedings, an EU-wide register for insolvency cases is needed, which could provide all necessary information.

3.1.4. The Role of State Supervisory Authorities

It follows from the system of the Regulation that national laws determine the state supervision of relevant insolvency proceedings in the relevant Member State where the proceedings have been opened. As far as I am aware of there is no different regulation on state supervision available for main and secondary insolvency proceedings under the *lex fori concursus*. Supervision *per s*e is not regulated by the Regulation. The Regulation itself is silent on the issue what law applies to the state supervision, enforcement and possible sanctioning of the participants involved, especially liquidators, in the cross-border insolvency proceedings. The Virgós-Schmit Report, for instance, only observes that the consequences of a breach of any of the obligations of Article 31 of the EIR in question of liability of the liquidator are to be determined in accordance with the applicable national law.[450] However, no choice of law rule to determine the applicable national law is provided. Wessels is, based on principles of private international law, of the opinion that the liquidator's liability could be determined by the place in which the effect of the damage occurs.[451] Yet, national laws of the Member States of supervision vary and do not take into account secondary insolvency proceedings with extra-territorial effects. For instance, in Finland the Bankruptcy Ombudsman, attached to the Ministry of Justice, supervises the administration of insolvency estates.[452] Among other powers vested to it, the Bankruptcy Ombudsman may request a reduction in the liquidator's remuneration decided by the creditors, if the liquidator has significantly failed to perform his duty or comply with his obligations, or if the remuneration clearly exceeds what can be deemed reasonable.[453] In Estonia, the

[450] Virgós-Schmit Report mn 234.
[451] Wessels (2006). *Op. cit.*, mn 10626, p 357.
[452] See: Finnish Act on the Supervision of the Administration of Bankrupt Estates (in Finnish: *laki konkurssipesien hallinnon valvonnasta*), the Parliament (*Eduskunta*), 31.01.1995/109. In force since 01.03.1995.
[453] Chapter 7 section 3 of the Act on the Supervision of the Administration of Bankruptcy Estates, 109/1995.

Ministry of Justice shall exercise supervision over the activities of liquidator to the extent provided by law.[454] In doing so, the Ministry of Justice has the right to verify whether the professional activities of the liquidator are in conformity with the requirements of the law. The Ministry of Justice may involve an auditor or the Chamber of Bailiffs and Bankruptcy Trustees in the exercise of state supervision. Under certain circumstances the Minister of Justice may impose a disciplinary penalty for violation of the obligations arising from legislation regulating the professional activities of liquidators.[455] In England and Wales, The Insolvency Service conducts confidential fact-finding investigations into companies where it is in the public interest to do so and investigates the affairs of bankrupts, of companies and partnerships wound up by the court. It also deals with the disqualification of unfit directors in all corporate failures and regulates the insolvency profession.[456] A similar state-founded agency is active in Latvia.[457] In Sweden, enforcement services are the supervisory authorities.[458] In general, state supervision is considered to be an execution of administrative powers by the state, because insolvency proceedings have public interest as well. Secondary insolvency proceedings are usually considered to be ordinary nation-wide proceedings. The problem, in my opinion, is that in case of cross-border insolvency proceedings with extra-national effects in the EU, the state supervisory authorities do not have sufficient power to supervise these proceedings especially in the part that concerns management and administration over the territory of relevant Member State (i.e. the Member State where insolvency proceedings where opened). In practice, lack of supervision may lead to misuse of powers vested to the liquidators. Israël is, based on ECJ practice, of the opinion that EU law requires the sanctions chosen by the Member States to be effective.[459] Certainly this is a correct statement, but Member States cannot extend their powers to enforce sanctions on liquidators appointed in another Member State, but acting wrongfully in their territory. One could argue that there should be a legal measure (or separate legal entity) for allowing extra-national supervision under EU law itself. Others could ask whether supervision by state authorities can be substituted or supplemented by the supervision or cooperation by the courts of the Member States,[460] because some authors[461] have pointed out that the Regulation should be interpreted

[454] Section 70 of the EBA.
[455] Section 71 subsection 1 of the EBA.
[456] See further: The Insolvency Service website http://www.insolvency.gov.uk/index.htm.
[457] See further: Maksātnespējas administrācija website http://www.mna.gov.lv/.
[458] Chapter 7 Section 25 of the SBA.
[459] Israël. *Op. cit*., p 333.
[460] Article 31 of the EIR does not expressly place a duty of cooperation on the courts of Member States. In contrast see: *Re Stojevic*, Court of Appeal in Vienna, 9 November 2004, 28 R 225/04w.
[461] See several opinions in: Wessels (2006). *Op. cit.*, mn 10854-10855, p 477–478; and in: Pannen. *Op. cit.*, mn 13–16, p 455–456; Hrycaj. The Cooperation of Court Bodies of International Insolvency Proceedings. International Insolvency Law Review, 1/2011, p 7–22;

widely and Article 31 of the EIR should also cover the courts,[462] because the Regulation itself refers[463] to judicial cooperation in civil matters within the meaning of the EC Treaty. I think that state supervision in cross-border insolvency proceedings with extra-national territorial effects is an important aspect and not sufficiently regulated at the moment. This topic should be focused on and regulated in the Regulation as well as in national laws of the Member States. The Regulation definitely should give initiative guidance on that aspect, namely at least that Article 31 of the EIR should be supplemented in a way that courts of the Member States should communicate and cooperate with each other. Supervisory authorities of the Member States should have the power to supervise the relevant liquidator responsible taking actions in a territory of the Member State where the state supervisory authority is situated. The powers of the state supervisory authorities should not only be limited to the territory of the Member State where the liquidators were appointed by the court of that Member State. These measures facilitate effective and efficient administration of cross-border insolvency proceedings.

3.2. Administration of the Insolvency Estate in Secondary Insolvency Proceedings

3.2.1. Assets Belonging to the Insolvency Estate

Administration of an insolvency estate faced by the secondary insolvency liquidator relates to the question how to determine the assets belonging to the insolvency estate of the secondary insolvency proceedings. In the case of secondary insolvency proceedings, only assets which are situated, within the meaning of Article 2 (g) of the EIR as a uniform rule, in the territory of the Member State at the time of the opening of secondary insolvency proceedings, are included in the insolvency estate of latter proceedings.[464] However, it may be difficult for the secondary liquidator to determine these assets (at least, intangible), because after the opening of the main insolvency proceedings, the debtor and its assets are managed, administered and coordinated by the main liquidator, court and creditors in the main insolvency proceedings. Thus, before

---

Omar. (reporters Viimsalu. Weber). On the Origins and Challenges of Court-to-Court Communication in International Insolvency Law in: Verweij. Wessels. *Op. cit.*, p 70–76.; Farley. (reporters Viimsalu. Weber). A Practical Approach to Court-to-Court Communication in International Insolvency Law in: Verweij. Wessels. *Op. cit.*, p 76–82.

[462] See also: Wessels. Virgos, European Communication and Cooperation Guidelines for Cross-border Insolvency, Academic Wing of INSOL Europe, July 2007, Guideline 16, p 13; Vallender. Judicial Co-operation within the EC Insolvency Regulation. Eurofenix, Issue 30, Winter 2007/8, p 8–10; Ehricke. The Role of Courts in Cross-Border Insolvency Cases in: Verweij. Wessels. *Op. cit.*, p 83–87.

[463] Recital 2 of the EIR.

[464] Article 27 third sentence of the EIR.

starting to administrate the insolvency estate of the secondary insolvency proceedings, the liquidator in the latter proceedings will usually have to ask for information from the main liquidator, whose interest may in exceptional cases be against the spirit of Article 31 of the EIR and to hold the information and the assets under his control, because his plans in the course of insolvency estate and his remuneration (which usually depends on administration of insolvency estate) will be threatened by the secondary insolvency liquidator, whose activities serve other purposes, e.g. winding-up. Although Article 31 (1) of the EIR requires immediate communication of any information which may be relevant to other insolvency proceedings, the secondary liquidator may find himself in a weaker position. His subordinated position is also emphasised in Article 31 (3) of the EIR, which requires him to inform the main liquidator beforehand, not *vice versa*. In addition, the debtor may not always be cooperative in providing information to the liquidator. Therefore, the task how to determine relevant assets which should belong to the insolvency estate of the secondary insolvency proceedings in the beginning of administration by the secondary liquidator may be complex due to the lack of information. However, the scope of the powers of the liquidator in secondary insolvency proceedings to administrate the insolvency estate is determined by the assets of insolvency estate in the latter proceedings.

Therefore, how should the assets belonging to the insolvency estate in the secondary insolvency proceedings be determined? Firstly, the secondary insolvency liquidator has to be certain in which Member State the asset is situated. The location rule is given in Article 2 (g) of the EIR as a uniform provision. Virgós and Garcimartín state that this provision determines the territorial location of the assets and is therefore decisive in respect of the question whether these assets belong to the secondary insolvency proceedings, as such proceedings can only affect the assets located in the Member State in which the proceedings are opened. The relevant point in time to determine the location of assets is the time at which secondary insolvency proceedings are opened.[465] Establishing the physical location of tangible property is generally possible. I agree with Veder, who states that establishing where a particular asset was located at the time when the insolvency proceedings was opened, i.e. the moment that the judgement opening the secondary insolvency proceedings became effective, may prove to be problematic.[466] He states that the presence of a particular asset in a particular Member State can be accidental, e.g. in the case of transport materials and goods that are being transported from one country to another.[467] Several authors have already indicated the problems in determining location of certain types of assets, such as claims,[468] certain type of intellectual

[465] Virgós. Garcimartín. *Op. cit.*, mn 307, p 163.
[466] Veder. *Op. cit.*, p 118.
[467] Ibid.
[468] Article 2 (g) of the EIR as a uniform rule does not necessarily lead to a uniform assessment regarding the localisation of claims by the various Member States.

property rights[469] or shares of the companies according to the criteria laid down in Article 2 (g) of the EIR.[470] Thus, even determining the Member State in which assets are situated may be troublesome for the liquidator in secondary insolvency proceedings.

Secondly, even if the secondary liquidator manages to determine the relevant Member State, there exists another aspect to consider – the impact from the *lex fori concursus*, which stipulates what assets are included or excluded from the insolvency estate. As for national laws, in general, assets of a debtor automatically become the insolvency estate on the basis of the judgment opening the secondary insolvency proceedings and are used as assets designated for satisfying the claims of the creditors and conducting the secondary insolvency proceedings. However the assets, which can be included into insolvency estate under the *lex fori concursus*, vary between national laws of the Member States. For instance, in Estonia, the insolvency estate means the assets[471] of the debtor at the time of the opening of insolvency proceedings, the assets reclaimed or recovered and the assets acquired by the debtor during the insolvency proceedings.[472] In Germany, if the debtor is self-employed or if he intends to become self-employed in the near future, the liquidator shall declare to him whether the assets from the non-dependent employment are part of the insolvency estate and whether claims resulting from this business activity may be inserted in the insolvency proceedings.[473] Thus, in Germany, the liquidator can influence the amount of assets to be included in insolvency estate. In contrast, in Finland, the assets acquired or the income earned by a (private) individual after the opening of insolvency proceedings shall not be assets of his

[469] For instance the localisation of a Benelux trademark is complicated. See: Veder. *Op. cit.*, p 117–118. The localisation of unregistered intellectual property such as copyright is also complicated. See: Torremans. *Op. cit.*, p 156–157.

[470] See several opinions in: Wessels (2006). *Op. cit.*, mn 10526–10530, p 280–284. There is also a global project pending for which localization rules will be drafted. See: Van Der Weide. Wessels. Where to locate assets, subject to certain security rights? Journal of International Banking Law & Regulation. *(forthcoming)*.

[471] According to the Estonian Accounting Act ((in Estonian: *raamatupidamise seadus*), the Parliament (*Riigikogu*), 20.11.2002, RT I 102, 600... RT I, 16.11.2010, 12. In force since 01.01.2003) assets consist of the following components in the balance sheet of the debtor: 1) Current Assets = cash; short-term investments; receivables and prepayments (trade receivables, prepaid and deferred taxes, other short-term receivables, prepayments for services); inventories (raw materials, work in progress, finished goods, goods for resale, prepayments for inventories) 2) Fixed Assets = long-term investments (shares in subsidiaries, shares in associated undertakings, other shares and securities, long-term receivables); investment properties; tangible assets (land, buildings, machinery and equipment, other tangible assets, construction-in-progress and prepayments); intangible fixed assets (goodwill, development costs, other intangible assets, prepayments for intangible assets).

[472] Section 108 subsection 2 of the EBA. The debtor's assets which pursuant to law are not subject to a claim shall not be included in the bankruptcy estate.

[473] Section 35 of the GInsO.

or her insolvency estate.[474] In Germany, assets forming part of the debtor's usual household and used in his household shall not form part of the insolvency estate if their disposition would obviously yield not more than proceeds largely disproportionate to their value.[475] Usually, assets belonging to third persons shall not be included in an insolvency estate. In Germany, in case of any doubts, the insolvency court is competent for decisions as to whether an asset is subject to execution.[476] In Estonia, if a third person has a claim for the return of an asset belonging to the person, the liquidator shall return the object.[477] Therefore, under certain circumstances prescribed under national laws of the Member States, the inclusion, returning and dividing of the assets between third persons or main and secondary insolvency proceedings may alter the insolvency estate as a whole and it is rather difficult to determine, what assets are and what assets should be under management of one or the other liquidator at certain point of time. If liquidators are not cooperative, this also may cause problems in administration of the insolvency estate by the liquidator in secondary insolvency proceedings. As an example, a Community patent, a Community trade mark or any other similar right established by the Community law may be included only in the main insolvency proceedings,[478] but there may exist situations where the right established by the Community law is closely connected to the asset (such as an ICT solution like a computer programme[479] for client relations management running on a server), which is situated in the Member State where secondary insolvency proceedings were opened. The main liquidator desires to sell the rights with the product, but the product itself is under administration and management of the liquidator in secondary insolvency proceedings, who is also determined to sell it with rights which should be included to main insolvency estate according to Article 12 of the EIR. Veder correctly states that the allocation of assets in accordance with criteria laid down in the Regulation to one or the other insolvency proceeding is not quite clear and may have potentially far reaching and undesirable effects on the continuation of a sale of parts of the debtor's business that is carried out in more than one Member State through establishments (instead of legal persons under local law).[480] The opening of secondary insolvency proceeding in a Member State leads to the liquidator in another main (or territorial) insolvency proceedings losing the power over assets that, even though initially included in

[474] Chapter 5 Section 1 of the FBA.
[475] Section 36 of the GInsO.
[476] Section 35 of the GInsO.
[477] In Estonia, the person claiming the exclusion of the property is not deemed to be a creditor in the insolvency proceedings as regards the claim for exclusion. See: Section 123 subsection 1 of the EBA.
[478] Article 12 of the EIR.
[479] Not defendable by rights established by the Community law, therefore not covered by Article 12 of the EIR.
[480] Veder. *Op. cit.*, p 118.

"his" insolvency proceedings at the time of the opening of secondary insolvency proceedings, were present in that Member State.

Thirdly, under certain circumstances, the dividing of the assets may alter the insolvency estate as a whole. Herchen states that the insolvency estate in the secondary insolvency proceedings may increase if the *lex fori concursus universalis* excludes certain asset from the insolvency estate,[481] (that is, however, situated in the territory of the Member State of the secondary insolvency proceedings), then this asset will become part of the insolvency estate of the secondary insolvency proceedings as long as is permissible according to the *lex fori concursus secundarii*.[482] I think that in this example, this asset should have been situated in the territory of the Member State of the secondary insolvency proceedings when the latter proceedings were opened. On the other hand, Herchen states that where the *lex fori concursus secundarii* stipulates that, although the asset is situated in the territory of the Member State of the secondary insolvency proceedings as understood in Article 2 (g) of the EIR, a certain asset of the debtor's assets is to be excluded from the insolvency estate although such asset was part of the assets of the main insolvency proceedings, then the effects from the main insolvency proceedings continue despite the opening of secondary insolvency proceedings.[483] Therefore, the asset is still not excluded from the insolvency estate as a whole. It follows that the *lex fori concursus secundarii* only determines which asset is to form part of the insolvency estate,[484] it does not determine which asset is to be excluded from the effects of the attachment ensuing from the judgement opening the main insolvency proceedings.[485] Duursma-Kepplinger states that Articles 35 and 20 (2) of the EIR, as well as the universal nature of the liabilities of the secondary insolvency proceedings, all speak in favour of upholding the effects of the attachment emanating from the main insolvency proceedings; they clearly illustrate that, despite a territorial division of the assets, the debtor's worldwide or Community assets constitute a common fund from which claims can be satisfied.[486] However, taking into account the possibility that Article 4 (2) of the EIR prescribes a non-closed list of topics which are covered by the *lex fori concursus*, by which the *lex fori concursus universalis* regulates questions of main insolvency proceedings only and cannot be extended to the questions of secondary insolvency proceedings, this means that the aforementioned approach to the question of exemption of assets from secondary insolvency proceedings and their automatic inclusion to main insolvency proceedings may not be

[481] Article 4 (2) (b) of the EIR.
[482] Herchen in: Pannen. *Op. cit.*, Art 27 mn 48, p 413.
[483] Herchen in: Pannen. *Op. cit.*, Art 27 mn 49, p 413.
[484] Article 4 (2) (b) of the EIR.
[485] Herchen in: Pannen. *Op. cit.*, Art 27 mn 49, p 414.
[486] Duursma-Kepplinger in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 27 mn 56, S 477–478.

correct after all. For instance, Koulu has a dissenting opinion.[487] Wessels states that the effects of the secondary insolvency proceedings, based on that Member State's *lex fori* must be recognized in other Member States.[488] It seems to me that a third persons' legitimate expectations would be damaged if certain assets exempted by the court in the Member State of the secondary insolvency proceedings would not be considered exempted from the main insolvency proceedings. The legal meaning of exemption prescribed under national laws of the Member States in case of the secondary insolvency proceedings would seem jejune and pointless. This could be unjust in the case that individuals as debtors are involved in secondary insolvency proceedings, because assets forming part of the debtor's usual household and used in his household shall not usually form part of the insolvency estate. Consequently, it is demonstrated above that according to current legal regulation the determination of which assets should be part of the insolvency estate in the secondary insolvency proceedings and which should be excluded from the insolvency estate as a whole is troublesome. Therefore, current legal regulation on these topics which relate to determination of insolvency estate in case of secondary insolvency proceedings is not sufficient. To facilitate efficient and effective administration of cross-border insolvency proceedings Article 2 (g) of the EIR should be improved giving localization rules. The Regulation should also specify whether the rules of exemption of assets are to be decided by the legislators in the national laws of the Member States or this topic is a subject to the Regulation itself. In my opinion, provisions on exemption of assets should be similar in the Member States. Therefore approximation of national laws in the Member States is also needed in the future.

To summarize, some conclusions are presented below. Administration of an insolvency estate faced by the secondary insolvency liquidator relates to the question how to determine the assets belonging to the insolvency estate of the secondary insolvency proceedings. It may be difficult for the secondary liquidator to determine these assets (at least, intangible), because after the opening of the main insolvency proceedings, the debtor and its assets are managed, administered and coordinated by the main liquidator, court and creditors in the main insolvency proceedings.

In addition, the secondary insolvency liquidator has to be certain in which Member State the asset is situated. The location rule is given in Article 2 (g) of the EIR as a uniform provision. According to that provision, determining the Member State in which assets are situated may be troublesome for the liquidator in secondary insolvency proceedings.

Even if the secondary liquidator manages to determine the relevant Member State, there exists another aspect to consider – the impact from the *lex fori concursus*, which stipulates what assets are included or excluded from the

[487] Koulu. *Op. cit.*, s 179.
[488] Wessels in: Moss. Fletcher. Isaacs. (2009). *Op. cit.*, mn 8.138, p 272.

insolvency estate. Under certain circumstances prescribed under national laws of the Member States, the inclusion, returning and dividing of the assets between third persons or main and secondary insolvency proceedings may alter the insolvency estate as a whole and it is rather difficult to determine, what assets are and what assets should be under management of one or the other liquidator at certain point of time. Under certain circumstances, the dividing of the assets may alter the insolvency estate as a whole. It follows that the *lex fori concursus secundarii* only determines which asset is to form part of the insolvency estate, it does not determine which asset is to be excluded from the effects of the attachment ensuing from the judgement opening the main insolvency proceedings. However, taking into account the possibility that Article 4 (2) of the EIR prescribes a non-closed list of topics which are covered by the *lex fori concursus*, by which the *lex fori concursus universalis* regulates questions of main insolvency proceedings only and cannot be extended to the questions of secondary insolvency proceedings, this means that aforementioned approach to the question of exemption of assets from secondary insolvency proceedings and their automatic inclusion to main insolvency proceedings may not be correct after all. It seems to me that a third persons' legitimate expectations would be damaged if certain assets exempted by the court in the Member State of the secondary insolvency proceedings would not be considered exempted from the main insolvency proceedings. The legal meaning of exemption prescribed under national laws of the Member States in case of the secondary insolvency proceedings would seem jejune and pointless. This could be unjust in the case that individuals as debtors are involved in secondary insolvency proceedings, because assets forming part of the debtor's usual household and used in his household shall not usually form part of the insolvency estate. Therefore, current legal regulation on these topics which relate to determination of insolvency estate in case of secondary insolvency proceedings is not sufficient. To facilitate efficient and effective administration of cross-border insolvency proceedings Article 2 (g) of the EIR should be improved giving localization rules.

The Regulation should also specify whether the rules of exemption of assets are to be decided by the legislators in the national laws of the Member States or this topic is a subject to the Regulation itself. In my opinion, provisions on exemption of assets should be similar in the Member States. Therefore approximation of national laws in the Member States is also needed in the future.

3.2.2. Powers of the Secondary Liquidator in Administrating the Insolvency Estate

The powers of the liquidator in administrating the insolvency estate in secondary insolvency proceedings are determined by the *lex fori concursus*

secundarii[489] and Article 18 (2) and (3) of the EIR. In accordance with Article 3(2) of the EIR, secondary insolvency proceedings produce effects with regard to debtor's assets situated in the territory of the opening Member State, where the establishment was found. A liquidator of the secondary insolvency proceedings within the meaning of Article 2 (b) of the EIR has, however, the right according to Article 18 (2) of the EIR to act outside[490] his Member State in order to recover an asset moved out of the Member State after the opening of secondary insolvency proceedings or in fraud against the creditors of those proceedings. The Virgós-Schmit Report states that upon the *lex fori concursus secundarii*, the liquidator shall reclaim the assets of the debtor which are in the possession of third persons and is also entitled to challenge the acts detrimental to creditors so that assets will be recovered to the insolvency estate as a whole. The action of the secondary liquidator in the matter of the return of assets which are actually situated in another Member State but which should normally be included in the secondary insolvency proceedings, is to be assessed on the basis of the *lex fori concursus secundarii*, pursuant in particular to Article 4 (2) (m) of the EIR, subject to Article 13 of the EIR.[491] As indicated in the previous subchapter, there are certainly some doubts about what assets should be normally included in the secondary insolvency proceedings. I am not aware of the special provisions in national laws of the Member States which differentiate actions or assets to be recovered to the insolvency estate of the main insolvency proceedings or secondary insolvency proceedings. The question arises as to how the scope of powers of the liquidators in parallel insolvency proceedings should be defined and aligned. Namely, can the liquidator in the secondary insolvency proceedings set aside any detrimental act which satisfies the requirements in the *lex fori concursus secundarii*? Moss and Smith state that the expression "action to set aside" in Article 18 (2) of the EIR is said to encompass all actions for a declaration that an act or contract, entered into prior to the commencement of insolvency proceedings, is void or enforceable on the ground that the act or contract was for the benefit of one creditor and prejudiced the collective interests of the other creditors as a whole.[492] The Virgós-Schmit Report states that the purpose of these actions is the return of assets which were legally situated in the territory of the proceedings at the time of the opening.[493] Moss and Smith state that this protects the integrity of the secondary insolvency proceedings and conforms to the policy against forum shopping which is embodied in the Regulation.[494] On the other hand, there also exist opinions that the secondary insolvency liquidator still has limited powers and that he may

[489] Article 4 (2) (c) of the EIR.
[490] In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action. See Article 18 (3) of the EIR.
[491] Virgós-Schmit Report mn 224.
[492] Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.289, p 311–312.
[493] Virgós-Schmit Report mn 224.
[494] Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.288, p 311.

annul detrimental acts only when such acts are at the expense of the insolvency estate of the secondary insolvency proceedings or detrimental to the creditors in the secondary insolvency proceedings.[495] These opinions may be based on the fact that before the opening of secondary insolvency proceedings, the main insolvency liquidator has EU-wide powers under the *lex fori concursus universalis* to set aside all the acts detrimental to all creditors to protect insolvency estate as a whole. It also follows from the case law of the European Union Court of Justice that pursuant to Article 3 (1) of the EIR, the courts of the Member State within the territory of which insolvency proceedings have been opened, have jurisdiction to decide to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State. The court concluded this in the Case C-339/07 *Frick Teppichboden Supermärkte GmbH vs. Deko Marty Belgium N.V.* on 12 February 2009, upon a reference for a preliminary ruling from the Bundesgerichtshof of Germany.[496] It followed the opinion given by Advocate General Ruiz-Jarabo Colomer and held that Article 3 (1) of the EIR must be interpreted as meaning that the courts of the Member State, within the territory of which insolvency proceedings have been opened, have jurisdiction to decide an action to set a transaction aside, by virtue of insolvency, that is brought against a person whose registered office is in another Member State. In addition, the CJEU concluded that "*concentrating all the actions directly related to the insolvency of an undertaking before the courts of a Member State with jurisdiction to open the insolvency proceedings*" is "*consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects*." Although Article 3 (1) of the EIR literally only relates to "opening", the courts of the Member State, within the territory of which the insolvency proceedings have been opened, are also competent to entertain and adjudicate upon lawsuits entered into and instituted, which seek to revoke the debtor's pre-insolvency detrimental transactions against any person being in another

[495] See several opinions in: Wessels (2006). *Op. cit.*, mn 10726, p 416–418.

[496] ECJ Case C-339/07 – Judgment of the Court (First Chamber) – (reference for a preliminary ruling from the Bundesgerichtshof (Germany)) – Christopher Seagon in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH vs. Deko Marty Belgium NV – February 12, 2009. The facts of the case were the following: The reference was made in the course of proceedings between Mr. Seagon, in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH ('Frick'), and Deko Marty Belgium NV (Deko) concerning repayment by the latter of €50,000. On 14 March 2002, Frick, which has its seat in Germany, transferred €50,000 to an account with the KBC bank in Düsseldorf in the name of Deko, a company with its registered seat in Belgium. Pursuant to an application made by Frick on 15 March 2002, the Amtsgericht Marburg (Local Court, Marburg) (Germany) opened insolvency proceedings on 1 June 2002 in respect of Frick's assets. By application to the Landsgericht Marburg (Regional Court, Marburg), Mr Seagon, in his capacity as liquidator in respect to Frick's assets, requested that the court, by way of an action to set a transaction aside by virtue of the debtor's insolvency, ordered Deko to repay the money.

Member State who has received the benefit. Such lawsuits are deemed to be closely linked with the insolvency proceedings themselves. Yet, secondary insolvency proceedings as separate insolvency proceedings are possible under the Regulation and the opening of secondary insolvency proceedings limits the EU-wide effects of the main insolvency proceedings and restricts powers of the main liquidator to some extent.[497] The *lex fori concursus secundarii* will automatically become applicable, which requires the liquidator in the secondary insolvency proceedings to take all necessary legal measures for safeguarding the insolvency estate and act in the benefit of the creditors accordingly. The Virgós-Schmit Report states that the liquidator in the territorial proceedings has exclusive powers over those assets. However, this does not imply that the main liquidator loses all influences over the debtor's insolvency estate situated in the other Member State, but that this influence must be exercised through the coordination of the proceedings.[498] On the other hand, as indicated before in the previous sub-chapter, it is quite difficult even to define the assets belonging to the insolvency estate of the secondary insolvency proceedings and in addition, categorize creditors as "locals" or "non-locals" between the parallel insolvency proceedings, because creditors are entitled to submit their claims to both insolvency proceedings simultaneously. Therefore, in my opinion, the underlying principle in formulating relevant law provisions for the recovery should be that liquidator is entitled to challenge the acts detrimental to creditors concerning these assets which should be included in "his" insolvency estate under "his" management at the time of the opening of the insolvency proceedings save as otherwise provided for in an agreement between the liquidators. I find no harm done to the creditors if, for instance, the liquidators agree on dividing their duties due to special skills or competence in administrating the insolvency estate if it aims at more efficient and effective administration of cross-border insolvency proceedings.

Furthermore, should the liquidator in secondary insolvency proceedings be empowered to release an asset from the insolvency estate, because it is debateable whether this act would have full legal effect? For instance, under German law the suspension of the attachment of assets in the main insolvency proceedings has practical significance in the case of a release of assets from the insolvency estate. According to some authors, the powers of administration and disposal in respect of assets that have been released by the liquidator in secondary insolvency proceedings do not revert back to the debtor but are transferred to the liquidator in main insolvency proceedings.[499] Herchen states that the obligation prescribed by Article 35 of the EIR to transfer any surplus in the secondary insolvency proceedings to the main insolvency proceedings

[497] See Article 18 (1) of the EIR.
[498] Virgós-Schmit Report mn 163.
[499] Duursma-Kepplinger in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 27 mn 62 et seq., S 480 ff; Lüke. Das europäische internationale Insolvenzrecht, ZZP 111, 1998, S 275, 307; cited by Herchen in: Pannen. *Op. cit.*, Art 27 mn 81, p 421.

illustrates that any of the debtor's assets not required in secondary insolvency proceedings must first be used for the benefit of the main insolvency proceedings.[500] If, for example, a German liquidator in secondary insolvency proceedings were to release a contaminated asset in order to prevent the insolvency estate being made liable under public law for the costs of cleaning up the polluted soil, the asset would, in the opinion of Herchen, become part of the insolvency estate of the main insolvency proceedings. In such a case, it is a matter for the *lex fori concursus universalis* to decide whether, and to what extent, a claim for reimbursement of the clean-up costs may be asserted in the insolvency proceedings, i.e. in this constellation, in the main insolvency proceedings.[501] However, according to Section 122 subsection 1 of the Estonian Bankruptcy Act, if a liquidator (whether main or secondary, Estonian law does not differentiate) has included assets which are in the joint ownership of the debtor and his or her spouse in the insolvency estate, the spouse of the debtor may file an action for dividing the joint property and excluding his or her share from the insolvency estate.[502] In my opinion, it would seem contrary to the aim of the law provision laid down in the Estonian Bankruptcy Act if the spouse's part would still be considered part of the main insolvency proceedings upon exclusion from the insolvency estate by effective court decision, which in principle should be recognized according to Article 25 of the EIR in other Member States as well. Thus, relevant provisions in national laws of the Member States also play a significant role in determining what assets can be excluded from the insolvency estate, although it is questionable whether the act of release of assets from insolvency estate by the secondary liquidator actually affects the insolvency estate at all. If the prevalent opinion supports interpretation of the Regulation in a way that the legal act conducted by the secondary liquidator to release the asset from the insolvency estate does not have legal meaning, then national laws of the Member States should be amended accordingly, especially in the case of individuals as debtors. Otherwise, a false impression of the aims of the provisions in the relevant laws of the Member States can be given to third persons, whose rights are affected by the effects of the insolvency proceedings.

To summarize, some conclusions are presented below. The powers of the liquidator in administrating the insolvency estate in secondary insolvency proceedings are determined by the *lex fori concursus secundarii* and Article 18 (2) and (3) of the EIR. It is rather ambivalent to define what powers the secondary insolvency liquidator has or should have in terms of administering the insolvency estate (or part of it), because under the *lex concursus* of both (or more) Member States, the liquidator (both or even several) usually has powers

[500] Herchen in: Pannen. *Op. cit.*, Art 27 mn 81, p 421.
[501] Herchen in: Pannen. *Op. cit.*, Art 27 mn 81, p 421.
[502] The debtor has the right to participate in the court proceedings together with the liquidator. As a party to the court proceedings, the debtor has the right to give only statements. See: Section 122 subsections 1 and 4 of the EBA.

to represent the debtor (in court proceedings or transactions), to perform acts with the insolvency estate which are necessary for preserving the insolvency estate, to manage the debtor's (business) activities, to take possession of the debtor's assets and commence administration of the insolvency estate immediately. At the same time, the rationale behind the Regulation affects these ordinary nation-wide insolvency proceedings, as secondary insolvency proceedings are considered to be extensive so that secondary insolvency proceedings are not properly manageable by the secondary liquidator.

In my opinion, the underlying principle in formulating relevant law provisions for the recovery should be that the liquidator is entitled to challenge the acts detrimental to creditors concerning these assets which should be included in "his" insolvency estate under "his" management at the time of the opening of the insolvency proceedings save as otherwise provided for in an agreement between the liquidators. I find no harm done to the creditors if, for instance, liquidators agree on dividing their duties due to special skills or competence in administrating the insolvency estate if it aims at more efficient and effective administration of cross-border insolvency proceedings.

The relevant provisions in national laws of the Member States also play a significant role in determining what assets can be excluded from the insolvency estate, although it is questionable whether the act of release of assets from insolvency estate by the secondary liquidator actually affects the insolvency estate at all. If the prevalent opinion supports interpretation of the Regulation in a way that the legal act conducted by the secondary liquidator to release the asset from the insolvency estate does not have legal meaning, then national laws of the Member States should be amended accordingly, especially in the case of individuals as debtors. Otherwise, a false impression of the aims of the provisions in the relevant laws of the Member States can be given to third persons, whose rights are affected by the effects of the insolvency proceedings.

3.2.3. Coordination of Administration of the Insolvency Estate

Coordination of administration of the insolvency estate is based on Article 31 of the EIR. A fundamental question is how the coordination between liquidators should be attained. The Virgós-Schmit Report states that the main and secondary insolvency proceedings are interdependent proceedings which concern a debtor with several centres of activities and assets spread over several territories.[503] When the main and secondary insolvency proceedings are pending at the same time, cooperation and information sharing between liquidators is vital to ensure efficient insolvency administration across the Member States and

[503] Virgós-Schmit Report mn 229.

to avoid conflicts or wasteful duplication.[504] As the Virgós-Schmit Report states, co-operation between the various liquidators is necessary to ensure the smooth course of operations in the proceedings.[505] Furthermore, the Virgós-Schmit Report itself gives more detail about the type of information which is envisaged to be provided and exchanged.[506] However, it seems to me that the sharing of information is not the only requirement for good cooperation in administering the insolvency estate. In practice, there will undoubtedly be circumstances where there is a tension between the aims of a liquidator in secondary insolvency proceedings and the aims of a liquidator in the main insolvency proceedings. For example, there may be a dispute as to whether or not a particular asset is a *local* asset (so falling under the secondary insolvency proceedings)[507] or an asset in relation to which the main insolvency proceedings takes effect. By whom (main or secondary liquidator or both), in which manner and to whom should this asset or set of assets be sold at a certain point of time to get the best price? What is actually the best price, taking into account the fact that the liquidators' remuneration depends on it? In giving their answers, liquidators usually rely on provisions stipulated in the national laws of the Member States. Relevant provision in the Regulation refers to national laws of the Member States as well. The problem is that although Article 18 (3) of the EIR regulates the procedures for realizing assets, it does not give answers to the questions concerning powers of liquidators and subordination of these powers in case of possible conflicts or disputes. Furthermore, extra requirements may be imposed on liquidators by national laws which they should follow in their insolvency proceedings under management. For instance, in Sweden, if the debtor has appealed against the judgement to open insolvency proceedings, no property of the insolvency estate shall be sold against the debtor's will before the court of appeal has considered the appeal.[508] A similar provision is also laid down in the Estonian Bankruptcy Act.[509] Sometimes cross-references to other laws, besides insolvency laws, in the Member States are made. For instance, in Finland, assets of the insolvency estate may be also sold in accordance with the provisions of the Enforcement Act, if the bailiff consents to the same.[510] In contrast, in Estonia it is presumed, as a general rule, that assets shall be sold by the liquidator according to the Code of Enforcement Procedure taking into

[504] Moss/Bayfield/Peters in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 5.119, p 114.
[505] Virgós-Schmit Report mn 229.
[506] This includes information relating to: the debtor's assets; any actions planned or under way to recover assets or to obtain payment or to set aside transactions; the liquidation of assets; the lodging of claims; the verification of claims and any disputes arising; the ranking of creditors; planned reorganization measures; proposed compositions; allocation and payment of dividends; the progress of the proceedings. See: Virgós-Schmit Report mn 230.
[507] For instance, the localisation of claim and resulting allocation to a particular insolvency proceeding determines which liquidator has the power to demand payment.
[508] Chapter 8 section 3 of the SBA.
[509] Section 133 subsection 2 of the EBA.
[510] Chapter 17 section 3 subsection 2 of the FBA.

account the specifications prescribed by the Bankruptcy Act.[511] Therefore, it is obvious that national laws produce additional requirements which liquidators should follow in administration of the insolvency estate. However, it might make sense if liquidators for practical cost-efficiency and time-consuming reasons would organize the sale of assets of the whole insolvency estate together. Taking into account different national laws on that topic, it seems to me that it is rather complicated to organize a common auction under different *lex fori concursus* at the same time in the electronic auction format, for instance. If this challenge is somehow overcome, then the next will be faced. Provisions on bookkeeping of the insolvency estate or the debtor may vary. For instance, according to Section 128 of the Estonian Bankruptcy Act, if a debtor is an accounting entity, the liquidator shall be liable for organising the accounting of the debtor. As of the opening of insolvency proceedings (either main or secondary), a new financial year of an accounting entity (the debtor) begins in Estonia. In addition, the term for submitting the annual report for the previous financial year to the registrar commences as of the opening of insolvency proceedings.[512] Therefore, under Estonian insolvency law the liquidator in secondary insolvency proceedings is responsible for the whole debtor's accounting, not just for the part of the insolvency estate under his management in secondary insolvency proceedings. To follow that legal requirement under the *lex fori concursus secundarii*, the main liquidator should assist the secondary insolvency liquidator which could be seen as contradicting the rationale of the Regulation, where the liquidator in secondary insolvency proceedings is usually obliged to do so. Consequently, the Estonian Bankruptcy Act should be amended in such way that the liquidator in secondary insolvency proceedings would not be responsible for the whole debtor's accounting, but just for the part of the insolvency estate under his management in secondary insolvency proceedings.

In exceptional cases parallel administration of the insolvency estate may, in practice, also lead to some competition between the liquidators. There is no fixed time limit to open secondary insolvency proceedings. Therefore, the liquidator in the main insolvency proceedings continuously runs the risk that important assets may be taken over by secondary insolvency proceedings if the latter are opened some day. In order to avoid this, the liquidator in the main insolvency proceedings may have to move, as soon as possible, all assets to his own Member State at the expense of the insolvency estate, e.g. the creditors.[513] Bogdan is of the opinion that regardless of the main liquidator's choice of action, he will find it difficult to negotiate the sale of a whole enterprise, with

[511] Section 135 subsection 1 of the EBA.

[512] An auditor may be appointed for auditing the annual report of the financial year preceeding the opening of insolvency proceedings by the court on the proposal of the liquidator. The costs of the audit are deemed to be a consolidated obligation.

[513] See for instance several options in: Koulu. *Op. cit.*, s 179–181.

establishments and assets in several Member States, as a going concern.[514] The question arises whether the transactions detrimental to the *local* creditors in secondary insolvency proceedings that are performed by the main liquidator or by the debtor (with the consent of the main liquidator) just prior to the opening of the secondary insolvency proceedings can be subject to recovery. Another question related to this topic is whether the physical movement of the assets is justified. Herchen correctly states that it is doubtful whether the various national laws on the avoidance of transactions detrimental to the creditors (that are made insolvent prior to the opening of the proceedings) cover the actual elements of such cases. In Germany, the elements of Section 129 et seq. of the German Insolvency Code allowing such avoidance would not cover such cases where there is an intentional change of the governing legal regime to the detriment of the creditors of secondary insolvency proceedings for the purposes of benefiting creditors of other secondary or main insolvency proceedings.[515] This result would be the same under Estonian,[516] Finnish,[517] Swedish,[518] and Lithuanian[519] law. Herchen is of the opinion that the relevant interests, which should be involved in avoidance cases, are missing and an application by way of analogy cannot be considered. There is no detriment to the creditors because every creditor is entitled to participate in all other insolvency proceedings, i.e. in proceedings in another Member State to which assets have been removed.[520] I agree. However, I think that it is inconsistent with the aim of effective and efficient administration of cross-border insolvency proceedings that assets are being moved from one Member State to another on the expense of the insolvency estate, because of the fear of the latter opening of secondary insolvency proceedings. Competition between liquidators should not be provoked by the legislators. This example on the movement of debtor's assets between and out of the several types of insolvency proceedings illustrates that although Member States wanted to protect local creditors' interests by including secondary insolvency proceedings as separate proceedings in the Regulation, these proceedings may have failed to work in practice. As transactions detrimental to the *local* creditors in secondary insolvency proceedings, that are performed by main liquidator or by the debtor (with the consent of main liquidator) just prior to the opening of the secondary insolvency proceedings, cannot be subject to recovery according to provisions in national laws on the avoidance of transactions detrimental to the creditors, and inclusion of these

[514] Bogdan in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.264, p 305.
[515] Herchen in: Pannen. *Op. cit.*, Art 27 mn 65, p 417.
[516] See Section 110 et seq. of the EBA.
[517] See Chapter 2 Section 5 et seq. of the Finnish Act on the Recovery of Assets to a Bankruptcy Estate (in Finnish: *laki takaisinsaannista konkurssipesään*), the Parliament (*Eduskunta*), 26.04.1991/758. In force since 01.01.1992.
[518] See Chapter 4 Section 5 et seq. of the SBA.
[519] See Section 11 subsection 3 clause 8 of the LEBA.
[520] Herchen in: Pannen. *Op. cit.*, Art 27 mn 65, p 417–418.

provisions would provoke competition rather than enhance the coordination between the liquidators, I am inclined to the view that the main liquidator should not have the legal opportunity to move assets under his management, but located in another Member State, to the Member State where main insolvency proceedings were opened. I think that the physical movement of assets from one Member State to another Member State increases the costs of the insolvency proceedings. Therefore, I think that it also inappropriate if the secondary liquidator physically moves assets from one Member State to another Member State. For instance, to avoid such actions by the liquidators, Article 11 (1) of the 1990 Istanbul Convention stipulates that the liquidator's powers will be suspended during a two-month period commencing the day after the publication of the notice of the opening of proceedings. If, during this period or at any later stage, any request for bankruptcy or for proceedings to prevent bankruptcy has been made against the debtor in the Member State where the assets are located, the powers of the liquidator shall be suspended until any such requests are rejected.[521] It is also possible to administer the insolvency estate without necessarily moving assets between Member States. To facilitate efficient and effective administration of cross-border insolvency proceedings, it might be worth evaluating whether to include provision on the prohibition of the physical movement of the insolvency estate or particular assets in it during administration of cross-border insolvency proceedings into the Regulation.

Article 31 (3) of the EIR develops one particular aspect of the duty to cooperate by imposing a duty on the liquidator in secondary insolvency proceedings to permit the liquidator in the main insolvency proceedings an early opportunity to submit proposals on the secondary liquidation and the use of the debtor's assets in those proceedings. The Virgós-Schmit Report states that this mechanism might enable the liquidator in the main insolvency proceedings to prevent, for example, the sale of assets in the secondary insolvency proceedings.[522] However, there is no indication in Article 31 (3) of the EIR that the liquidator in the secondary insolvency proceedings is bound to comply with any proposals submitted to him by the main liquidator. Under certain circumstances in which for instance, the main insolvency proceedings are directed to restructuring and the secondary insolvency proceedings to winding-up, the liquidator in charge of secondary insolvency proceedings may find himself in trouble to meet the requirements of the *lex fori concursus secundarii* and proposals from the main insolvency liquidator simultaneously. In case national laws and suggestions from the main liquidator contradict, what then is the appropriate way of acting? The Regulation lacks procedural provisions regarding objections to the exercise of powers by the liquidator and procedural provisions requiring the liquidator to act or prevent from acting accordingly.

[521] European Convention on Certain International Aspects on Bankruptcy. 05.06.1990. Online available: http://conventions.coe.int/treaty/en/Treaties/Html/136.htm.
[522] Virgós-Schmit Report mn 233.

The liquidator's powers, their nature and scope are determined by the law of the Member State of the opening of the insolvency proceedings in respect of which he was appointed. The Virgós-Schmit Report states that this law also establishes the liquidator's obligations.[523] Presumably the liquidator in the main insolvency proceedings could challenge any decision made by the liquidator in the secondary insolvency proceedings upon submitted proposals.[524] In contrast, the Virgós-Schmit Report states that the obligation in Article 31 (3) of the EIR refers to important assets or decisions (such as continuation or cessation of the activities of the establishment) in the secondary proceedings and this provision should not be interpreted in such a broad way as to paralyse the work of the liquidator in the secondary insolvency proceedings. Thus, the secondary liquidator may also object. However, does such behaviour to challenge reciprocal decisions by the liquidators serve the aims of the Regulation? How should the secondary insolvency liquidator act if the *lex fori concursus secundarii* and suggestions from the main liquidator made according to Article 31 (3) of the EIR contradict? In my view, disputes between liquidators over one unified insolvency estate should not be acceptable. There are only a few court cases, such as *Sendo International*,[525] available on functional cooperation between liquidators. In practice, the prevailing opinion amongst the liquidators seems to be that the insolvency estate covers the costs of the any disputes between the liquidators anyway, although compromise should be reached somehow[526] to move on with the insolvency proceedings. In other words, they believe that harm is not done. Whether this approach is ethical and serves the aim of maximizing the value of the insolvency estate for the creditors is doubtful, although it certainly facilitates efficient and effective administration of cross-border insolvency proceedings.

Guideline 12 of the European Communication and Cooperation Guidelines for Cross-border Insolvency (CoCo Guidelines) states that liquidators are required to cooperate in all aspects of the case.[527] Indeed, cooperation between

---

[523] Virgós-Schmit Report mn 159.

[524] Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.358, p 331.

[525] Unreported. Ordinance of the Commercial Court of Nanterre, June 26, 2006. In that case liquidators in the main (England) and secondary (France) insolvency proceedings agreed a detailed protocol relating to the coordination of the parallel insolvency proceedings due to lack of clarity regarding several provisions in the Regulation. Amongst other issues, the protocol dealt with the treatment of Sendo's assets in France. The liquidators in the secondary proceedings agreed to submit a list of the assets in "their" proceedings to the liquidators in the main proceedings. The liquidators in the main proceedings would then submit proposals, which would need to comply with French law, on the use of those assets in the secondary proceedings. In return, the liquidators in the main proceedings agreed, for a 3-month period (starting from the opening of the secondary proceedings), not to exercise their power under Article 33 (1) of the EIR to request a stay of the process of liquidation in the secondary proceedings.

[526] Koulu. *Op. cit.*, s 186.

[527] Wessels. Virgos. *Op. cit.*, p 11.

liquidators should be attained somehow, but how? Moss is of the opinion that a positive outcome in practice could be that unnecessary duplication and costs in parallel insolvency proceedings may be avoided with separate coordination tools, e.g. protocols approved by the courts.[528] CoCo Guidelines state that cooperation may be best attained by way of an agreement or "protocol" that establishes decision-making procedures.[529] This could also be useful guidance to the question, how should the secondary insolvency liquidator act if the *lex fori concursus secundarii* and suggestions from the main liquidator made according to Article 31 (3) of the EIR contradict. Indeed, the preparation and negotiations over the content of the protocol takes time and this means additional procedural costs in the insolvency proceedings, but in some Member States the liquidators of the main and secondary insolvency proceedings may enter into agreements with each other "as representatives of their respective insolvency estates".[530] Some German authors are of the opinion that such a transaction does not constitute a transaction concluded by someone with himself as a representative of another,[531] which under certain circumstances may be prohibited pursuant to the *lex fori concursus*. This follows from the recognition provisions of Article 16 et seq. of the EIR, which make it clear that, although the identity of the insolvent legal entity continues to exist, the particular insolvency proceedings are legally independent. The individual liquidator represents the interests of "his creditors" *vis-à-vis* all the other liquidators as well.[532] There is therefore no danger of "transacting with himself". Herchen is of the opinion that the cooperation contemplated by Article 31 et seq. of the EIR between the liquidator in the main and secondary insolvency proceedings would be virtually impossible if agreements between the individual insolvency estates were prohibited, or if the *lex fori concursus* demanded that such agreements had to be approved by the insolvency court, the creditors, or by a creditors' committee.[533] However, according to some national laws, for instance, in Estonia, the conclusion of agreement by the liquidator appointed under Estonian insolvency law is doubtful. Article 31 (2) of the EIR states: "*Subject to the rules*

[528] See cases *Nortel Networks SA*, *Collins & Aikman* and *Eurodis Electron Plc* referred to in: Moss. A Practitioner's Perspective on the Possible Evolution of European Insolvency Law; in: INSOL Europe. Insolvency Law in the United Kingdom: The Cork Report at 30 Years, 2010, p 110.

[529] Wessels. Virgos. *Op. cit.*, Guideline 12.4, p 11.

[530] The use of the so-called "protocols" may be a practical solution for dealing with cross-border insolvency; see Paulus. "Protokolle" – ein anderer Zugang zur Abwicklung grenzüberschreitender Insolvenzen, ZIP 1998, S 977 et seq.; cited by Herchen in: Pannen. *Op. cit.*, Art 27 mn 74, p 419.

[531] Reinhart. Sanierungsverfahren im internationalen Insolvenzrecht, 1995, S 296 et seq.; Lüke. Das europäische internationale Insolvenzrecht, ZZP 111, 1998, S 275, 306, cited by Herchen in: Pannen. *Op. cit.*, Art 27 mn 74, p 419.

[532] Duursma-Kepplinger in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 27 mn 83, S 489.

[533] Herchen in: Pannen. *Op. cit.*, Art 27 mn 74, p 419.

applicable to each of the proceedings...", which means reference to the *lex fori concursus* applicable to insolvency proceedings. For instance, in the *Alitalia Linee Aeree Italiane S.p.A*[534] case the High Court of Justice in London held that duty of co-operation is expressly subject "*to the rules applicable to each of the proceedings*". Wessels submits that this is a very wide interpretation of these latter words, as the proviso limits the core duty to cooperate.[535] Virgós and Garcimartín state that the duty to cooperate must be carried out without entering into conflict with the functions and duties imposed on the liquidators by the national law applicable to each of the insolvency proceedings and that, in turn, national laws have to respect the "*effet utile*" of the Regulation. These "rules applicable" should be seen only as to prevent conflicting functions and duties imposed by national law applicable to each of the insolvency proceedings, e.g. certain approvals of creditors or a supervisory judge which relates to cross-border cooperation.[536] Nevertheless, Section 125 of the EBA stipulates that a liquidator shall not conclude transactions with himself or with persons related to him or her using the insolvency estate or a part thereof or conclude any other transactions of similar nature or involving a conflict of interest or request reimbursement of the expenses incurred in such transactions.[537] A liquidator under Estonian insolvency law may conclude transactions with special relevance to the insolvency proceedings only with the consent of the creditor's committee.[538] Borrowing, above all, is deemed to be a transaction with special relevance. If the insolvency estate includes an enterprise the activities of which continue after the opening of insolvency proceedings, all transactions outside the regular business activities of the enterprise are also deemed to be transactions with special relevance. Thus, the *lex fori concursus* requires creditors' involvement, also in secondary insolvency proceedings, where the interest of local creditors and protection of local assets is required. In my opinion, it is not definitely clear whether the liquidator in secondary insolvency proceedings is always allowed, under the legal framework of EIR and relevant national law, to enter into agreements with other liquidators. If the liquidators in the main and secondary insolvency proceedings are representing their respective

[534] [2011] EWCH 15 (Ch).

[535] Wessels. Greek and Italian Airlines Test the Strength of a Secondary Proceeding. *(forthcoming)*

[536] Virgós. Garcimartín. *Op. cit.*, mn 440, p 234.

[537] Persons related to a liquidator include: the spouse of the liquidator, and the former spouse of the liquidator if the marriage was divorced within one year before the conclusion of the transaction; persons who live in a shared household with the liquidator or who lived in a shared household with the liquidator during the year preceding the conclusion of the transaction; ascendants and descendants of the liquidator and their spouses, sisters, brothers of the liquidator, the ascendants and descendants and sisters and brothers of the liquidator's spouse; a legal person the shares of which belong either wholly or partially to the liquidator or to whose management body the liquidator belongs or with whom the liquidator has entered into an employment contract. Section 125 subsection 2 of the EBA.

[538] Section 125 subsection 3 of the EBA.

insolvency estate, which has its own legal capacity (personality) and liquidators are empowered to represent these estates according to the *lex fori concursus*, there could be the legal possibility to enter into agreements such as protocols to coordinate administration of the insolvency estates. However, if the respective insolvency estate of the debtor is being treated as unified universal unity it has no legal capacity (personality), then a liquidator may act under relevant national law as the legal representative of the insolvent debtor (if the *lex fori concursus* provides so). In such case it is rather doubtful whether the liquidator can enter into agreements with other liquidators, because it may be considered a transaction with himself and therefore seen as conflict of interest. Thus, the liquidator may be held liable under the *lex fori concursus*. It must be noted that on the one hand, the Regulation confers the dominant role upon the liquidator in the main insolvency proceedings, who will enjoy special powers to intervene in and influence the course of secondary insolvency proceedings, but on the other hand, the Regulation requires the liquidator in the secondary insolvency proceedings to follow the legal requirements stipulated by the *lex fori concursus secundarii*. Thus, it seems to me that having secondary insolvency proceedings regulated as ordinary nation-wide insolvency proceedings in the national laws of the Member States is not fully sufficient. I think that national laws of the Member States should be amended to facilitate effective and efficient administration of cross-border insolvency proceedings. Therefore, to enhance the cooperation under the Regulation, relevant restricting provisions (such as prohibition of agreements between liquidators in charge of insolvency estate) in the national laws of Member States should be abolished.

To summarize, some conclusions are presented below. Coordination of administration of the insolvency estate is based on Article 31 of the EIR. A fundamental question is how the coordination between liquidators should be attained. It seems to me that the sharing of information is not the only requirement for good cooperation in administering the insolvency estate. In practice, there will undoubtedly be circumstances where there is a tension between the aims of a liquidator in secondary insolvency proceedings and the aims of a liquidator in the main insolvency proceedings.

It is obvious that national laws produce additional requirements which liquidators should follow in administration of the insolvency estate. However, it might make sense if liquidators, for practical cost-efficiency and time-consuming reasons, would organize the sale of assets of the whole insolvency estate together. Taking into account different national laws on that topic, it seems to me that it is rather complicated to organize a common auction under different *lex fori concursus* at the same time in the electronic auction format, for instance. If this challenge is somehow overcome, then the next will be faced. Provisions on bookkeeping of the insolvency estate or the debtor may vary between the national laws of Member States. Consequently, the Estonian Bankruptcy Act should be amended in such way that the liquidator in secondary insolvency proceedings would not be responsible for the whole debtor's

accounting, but just for the part of the insolvency estate under his management in secondary insolvency proceedings.

I think that it is inconsistent with the aim of effective and efficient administration of cross-border insolvency proceedings that assets are being moved from one Member State to another on the expense of insolvency estate, because of the fear of the latter opening of secondary insolvency proceedings. To facilitate efficient and effective administration of cross-border insolvency proceedings, it might be worth evaluating whether to include provision on the prohibition of the physical movement of the insolvency estate or particular assets in it during administration of cross-border insolvency proceedings into the Regulation. In my view, disputes between liquidators over one unified insolvency estate should not be acceptable.

CoCo Guidelines state that cooperation may be best attained by way of an agreement or "protocol" that establishes decision-making procedures. This could also be useful guidance to the question, how should the secondary insolvency liquidator act if the *lex fori concursus secundarii* and suggestions from the main liquidator made according to Article 31 (3) of the EIR contradict. The Regulation confers the dominant role upon the liquidator in the main insolvency proceedings, who will enjoy special powers to intervene in and influence the course of secondary insolvency proceedings. On the other hand, the Regulation requires the liquidator in the secondary insolvency proceedings to follow the legal requirements stipulated by the *lex fori concursus secundarii*. Thus, it seems to me that having secondary insolvency proceedings regulated as ordinary nation-wide insolvency proceedings in the national laws of the Member States is not fully sufficient. I think that national laws of the Member States should be amended to facilitate effective and efficient administration of cross-border insolvency proceedings. Therefore, to enhance the cooperation under the Regulation relevant restricting provisions (such as prohibition of agreements between liquidators in charge of insolvency estate) in the national laws of Member States should be abolished.

3.3. Exercising Creditors Rights in Secondary Insolvency Proceedings

3.3.1. Creditors' Rights and its Exercise by the Creditors

The most important right for the creditors is the right, through the lodging of claims, to participate in insolvency proceedings. Article 32 (1) of the EIR allows any creditor located in the EU[539] to lodge claims and participate in the main and several secondary insolvency proceedings simultaneously. However,

[539] Article 39 of the EIR as the rule of substantive law specifies who is to be understood as creditor within the meaning of the EIR.

in the case of parallel insolvency proceedings in different Member States, several questions may arise in exercising creditors' rights.

First, does lodging a claim by a creditor in simultaneous insolvency proceedings which have been opened upon the *lex fori concursus universalis* and some time later upon the *lex fori concursus secundarii* against the same debtor require inactive or active participation by a creditor in all these proceedings in order to successfully exercise creditors' rights? The answer to this question can be found in relevant insolvency laws of the Member States, which according to Article 4 (2) of the EIR determine the conditions for the opening of those proceedings, their conduct and closure, in particular the rules governing the lodging, verification and admission of claims.[540] Some national laws presume active participation of the creditors, some do not. It may be the case that there are no specific provisions available for secondary insolvency proceedings in the Member States. In such case, general provisions apply. For example, in Estonia creditors (including, for instance, employees and tax authorities) are required to notify the liquidator of all their claims against the debtor which arose before the opening of the insolvency proceedings, regardless of the basis or the due dates for fulfilment of the claims, not later than within 2 (two) months as of the date of publication of the notice in the official publication *Ametlikud Teadaanded*.[541] Estonian insolvency law requires some activity from the creditors. A different scenario is applicable in Finland, where the liquidator may take a claim in insolvency into account in the draft disbursement list without lodgement, if there is no dispute about the basis and amount of the claim. In this event, the liquidator shall, well in advance of the lodgement date, send to the creditor a notice of the amount to which the claim is being entered in the draft disbursement list. If a large number of claims with the same or a similar basis can be deemed undisputed in the said manner, the liquidator may, instead of separate notifications, publish an announcement in a suitable manner to the effect that no lodgements of claim are required. However, these provisions shall not prevent the creditor from lodging a claim.[542] In addition, a claim lodged by the creditor after the lodgement date can be taking into account under the preconditions provided for in Finnish insolvency law. In Finland, a creditor may lodge a claim or make an additional claim also after the lodgement date (*retroactive lodgement*), if the creditor pays in the insolvency estate a charge amounting to one per cent of the amount of the lodged claim or additional claim.[543] By contrast, it is not permissible according to Estonian insolvency law.

---

[540] Article 4 (2) (h) of the EIR.

[541] Section 93 subsection 1 of the EBA. If a notice is published in the official publication *Ametlikud Teadaanded* several times, the 2 (two) month term commences as of the date of publication of the first notice.

[542] Chapter 12 Section 8 subsection 1 and 3 of the FBA.

[543] In any event, the charge shall not be less than EUR 600 and more than EUR 6,000. If the creditor has not been notified of the lodgements or there has been a valid excuse for not lodging the claim, the charge shall not be collected.

The charge in Finland shall likewise not be collected, if the creditor is a private individual and the collection of the charge would be unreasonable in view of the creditor's circumstances. If it has become necessary for the creditor to lodge a claim owing to a recovery action or if the claim for some other reason was not known nor ought to have been known to the creditor before the lodgement date, the liquidator shall reserve the creditor a reasonable time for lodging the claim. In this event, the charge for retroactive lodgement shall not be collected. The liquidator may waive the creditor's duty of retroactive lodgement if there is no need for such a lodgement. A retroactive lodgement shall no longer be taken into account when the disbursement list has been certified.[544] Therefore, the execution of creditors' rights can be different, which in practice may result in causing a disadvantage to foreign (unknown) creditors (including employees and tax authorities) who are less likely to be aware of requirements (such as time limits for lodging claims or paying fees) established by national laws of another Member States. In my opinion, relevant provisions in the Regulation do not assist creditors either. Although Article 40 (1) of the EIR provides the duty to inform creditors it is not clear who should do that, because the relevant provision states that as soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction *or* the liquidator appointed by it shall inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States. Thus, the creditors should know first of all who is that person responsible under relevant national laws of the Member States who will provide them with relevant information – the court or the liquidator? Second, the creditor should be *known*, but to whom? Should the creditor be known to the court, to the liquidator(s), to the debtor or to the other creditors? Article 40 (1) of the EIR is ambiguous. Furthermore, the Regulation and national laws do not stipulate what the consequences are if individual notice has not been sent to the creditor (or not sent in time) and the creditor fails to comply with obligatory deadlines stipulated in the *lex fori concursus secundarii* for lodgement of claim. Also linguistic problems in communication may occur. In the case *Jung GmbH vs. SIFA SA*[545] the Court of Appeal in Orléans[546] allowed the claim of the German creditor Jung on the basis that there had been a failure to comply with Article 42 of the EIR, where the invitation to make

[544] Chapter 12 Section 16 of the FBA.

[545] The German creditor Jung had lodged a claim on 10 November 2003. The time for lodging the claim expired on 5 April 2004. On 12 May 2004 the creditors' representative informed Jung he would be recommending rejection of the claim as not being valid under French law because of a failure to prove the authority of the person lodging the claim. On 24 May 2004 Jung's claim was lodged again signed by an officer of Jung and in a subsequent letter it was explained that this officer was the managing director (*Geschäftsführer*) of Jung. Although Jung's claim was not contested on its merits, the Tribunal de Commerce d'Orléans rejected the claim. Jung appealed against that decision. See: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.419, p 347.

[546] (2006) BCC 678.

claims had only been in French, and the heading "*Invitation to lodge a claim. Time limits to be observed*" required by Article 42 of the EIR had not been supplied in the official languages of the EU, in particular not in the language of the creditor, that is, in German. The Court of Appeal held that in these circumstances the only remedy which would give effect to Articles 40 (1) and Article 42 of the EIR was to extend the time allowed by French law for the lodging of the German creditor's claim. Jung's claim was thus accepted as being valid. In consideration of that court decision, I am inclined to the view that a better solution for legislators in the Member States would be not to fix strict time limits for lodging claims under national laws at all. In my opinion, if liquidators discover during management of the insolvency proceedings that there will be dividends to distribute between creditors then at that point of time they should notify the creditors that claims should be lodged. In cross-border insolvency proceedings the first step for liquidators should be tracing and administration of assets and then in the later point of the proceedings the second step would be handling of the claims and distribution. In the later stage of the proceedings there is also more information for creditors to evaluate whether to submit the claim at all. It seems to me that according to the national laws of some Member States it is currently required that the proceedings should be managed *vice versa* or even simultaneously, which could cause mismanagement in the context of cross-border insolvency proceedings.

The next question relates to the creditor's capacity to participate in the secondary insolvency proceedings. Are there changes needed in the national laws of the Member States? A creditor can exercise his/her voting right in creditors' general meetings and/or creditors' committee meetings determining the faith of the debtor and influence the progress of the simultaneous insolvency proceedings (not necessarily to the same direction if the *lex fori concursus* provides so). Indeed, as far as I have been able to determine, there are no special substantial or procedural provisions laid down in the national laws of the Member States in the case of secondary insolvency proceedings. Thus, general domestic provisions apply. Under Italian law the committee of creditors, appointed by the judge, has the power of authorization and control over the liquidator's activity. Polish law provides for a creditors' council with a controlling right and a creditors' meeting. Under French law, the creditors are grouped into two committees of creditors.[547] In Estonia, a creditors' general meeting has the power to: 1) approve the liquidator and elect the creditors' committee; 2) decide on the continuation or termination of the activities of the debtor; 3) decide on termination of the debtor if the debtor is a legal person; 4) make a compromise; 5) decide, to the extent provided by law, on issues relating to the sale of the insolvency estate; 6) defend claims; 7) resolve

[547] Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Affairs. Harmonisation of Insolvency Law at EU Level, 2010, p 14.

complaints against the activities of the liquidator; 8) decide on the remuneration of the members of the creditors' committee; 9) resolve other issues which are within the competence of creditors' general meetings pursuant to law.[548] In Latvia, related persons of the debtor as creditors, or creditors who have obtained claims from the related persons of the debtor not more than one year before the opening of insolvency proceedings, are not granted voting rights in creditors' general meeting.[549] There are usually different (voting) rights granted to secured and unsecured creditors in insolvency proceedings aimed at restructuring the debtor's business. Thus, there may exist situations where the creditor in one creditors' general meetings and/or creditors' committee meetings (which has been convened by the liquidator of the main insolvency proceedings) votes in favour of selling the assets in a certain manner at a certain minimum price and at the same time in another creditors' general meetings and/or creditors' committee meetings (which has been convened by the liquidator of the secondary insolvency proceedings) votes in favour of continuation of the business or not to sell the assets. This means that creditors (such as suppliers, employees, banks, tax authorities) can influence the progress of the simultaneous insolvency proceedings quite by surprise if needed. Therefore, depending on the total value of the claims in favour or against in certain insolvency proceedings on a particular decision, it is obvious that the results of the execution of the creditors' rights by the creditors themselves upon the *lex fori concursus universalis* and the *lex fori concursus secundarii* in parallel insolvency proceedings may differ significantly. The problem which the liquidator appointed according to the *lex fori concursus* usually faces is that he/she is not allowed to decide these questions which are in the capacity of creditors provided for in the *lex fori concursus*.[550] In my opinion, this is another aspect which Member States did not foresee during the deliberations of the Regulation, but which causes extra administrative burden for the liquidators to manage the proceedings and solve the insolvency as such. It is obvious that in general, creditors in secondary insolvency proceedings cannot influence the overall result decided in the main insolvency proceedings. Therefore, to facilitate efficient and effective administration of cross-border insolvency proceedings it might be pointless to convene creditors in the secondary insolvency proceedings to vote for certain decisions which could be taken anyway in the main insolvency proceedings. Thus, I think that legislators of the national laws of the Member States should examine what are the occasions when creditors' general meetings are held and whether some of the assemblies

[548] Section 77 subsection 1 of the EBA.
[549] Section 87 subsection 5 of the LIA.
[550] For instance, at the first creditors' general meeting, the creditors shall elect the creditors' committee and decide on the approval of the liquidator and continuation of the activities of the undertaking of the debtor or termination of the debtor if the debtor is a legal person. The creditors may decide on other issues within the competence of the creditors' general meeting. Section 78 subsection 2 of the EBA.

are necessary in the case of secondary insolvency proceedings. I submit that there is no point for creditors in secondary insolvency proceedings to decide on the continuation of the activities of the debtor, because secondary insolvency proceedings are aimed at winding-up according to the EIR. In addition, there may be situations where it is unnecessary or too costly for the benefit of the creditors to appoint a creditors' committee in the secondary insolvency proceedings.

To summarize, some conclusions are presented below. The most important right for the creditors is the right, through the lodging of claims, to participate in insolvency proceedings. The execution of creditors' rights can be different, which in practice may result in causing a disadvantage to foreign (unknown) creditors (including employees, tax authorities) who are less likely to be aware of requirements (such as time limits for lodging claims or paying fees) established by national laws of another Member States.

I am inclined to the view that a better solution for legislators in the Member States would be not to fix strict time limits for lodging claims under national laws at all. In my opinion, if liquidators discover during management of the insolvency proceedings that there will be dividends to distribute between creditors, then at that point of time they should notify the creditors that claims should be lodged. In cross-border insolvency proceedings the first step for liquidators should be the tracing and administration of assets and then at a later point of the proceedings the second step would be handling of the claims and distribution. In the later stage of the proceedings there is also more information for creditors to evaluate whether to submit the claim at all. It seems to me that according to the national laws of some Member States it is currently required that the proceedings should be managed *vice versa* or even simultaneously, which could cause mismanagement in the context of cross-border insolvency proceedings.

A creditor can exercise his/her voting right in creditors' general meetings and/or creditors' committee meetings determining the faith of the debtor and influence the progress of the simultaneous insolvency proceedings (not necessarily to the same direction if the *lex fori concursus* provides so). The problem which the liquidator appointed according to the *lex fori concursus* usually faces is that he/she is not allowed to decide these questions which are in the capacity of creditors provided for in the *lex fori concursus*. To facilitate efficient and effective administration of cross-border insolvency proceedings it might be pointless to convene creditors in the secondary insolvency proceedings to vote for certain decisions which could be taken anyway in the main insolvency proceedings. Thus, I think that legislators of the national laws of the Member States should examine what are the occasions when creditors' general meetings are held and whether some of the assemblies are necessary in the case of secondary insolvency proceedings. I submit that there is no point for creditors in secondary insolvency proceedings to decide on the continuation of the activities of the debtor, because secondary insolvency proceedings are

aimed at winding-up according to the EIR. In addition, there may be situations where it is unnecessary or too costly for the benefit of the creditors to appoint a creditors' committee in the secondary insolvency proceedings.

3.3.2. Role of Liquidators Exercising Creditors' Rights

Virgós and Garcimartín have stated that the principle of participation envisaged in Article 32 of the EIR is very important from the point of view of coordinating proceedings, because it permits the creditors' majority reached in the main insolvency proceedings to be reproduced in all of the other proceedings; and if the liquidator files those claims according to Article 32 (2) of the EIR, this permits the main liquidator to "impose" this majority in the secondary insolvency proceedings, thereby clearly strengthening his power to influence the latter. Of course, the reverse situation can also be possible, when the majority of creditors originate from the secondary insolvency proceedings, although in their opinion this is less likely.[551] Taking into account the fact that usually decisions adopted in the main insolvency proceedings should be followed by the liquidator in the secondary insolvency proceedings, it raises the question what is actually the role of the secondary liquidator in exercising creditors' rights? De Boer and Wessels state that the concept of one debtor with one single unified insolvency estate to satisfy creditors' claims is reflected by the powers assigned to the liquidator in the main insolvency proceedings by the Regulation,[552] these rights and powers can be exercised in conformity with the *lex fori concursus*, which may require creditors' consent and approval of the liquidator's decision on certain aspects in simultaneous main and secondary insolvency proceedings. Currently, in general, there is no simplified procedure envisaged especially for the secondary insolvency proceedings in the national laws of the Member States. Therefore, usual procedural requirements are prescribed by national insolvency laws, for instance, meeting of creditors or approval by the creditors' committee. The court or other judicial authority usually supervises the course of actions according to its national insolvency laws. De Boer and Wessels state that the powers that a liquidator may have, the nature of such powers and their legal effects are all determined by the *lex fori concursus* as well as his legal tasks, duties, scope of his power and the grounds and procedure for his removal.[553] Thus, the role of the secondary liquidator exercising creditors' rights in secondary insolvency proceedings derives from the national laws of the Member States if provided so. The Regulation provides the liquidator appointed in the main insolvency proceedings with several powers to change the character of the secondary insolvency proceedings and to align the proceedings in accordance with developments in the main insolvency

[551] Virgós. Garcimartín. *Op. cit.*, mn 425, p 229.
[552] de Boer and Wessels. *Op. cit.*, p 187.
[553] de Boer and Wessels. *Op. cit.*, p 189.

proceedings. However, the main liquidator should act in accordance with the *lex fori concursus secundarii*, which may require participation of the secondary liquidator or creditors. Indeed, there may be situations where the secondary liquidator does not agree with or local creditors do not vote in favour of the main liquidator's proposal. Thus, in this case the role of the secondary liquidator is probably to protect local interests. Whether an appeal process is available in this case is provided for in the *lex fori concursus secundarii*.

Another question is what is the role of the liquidators in lodging claims? Article 32 (2) of the EIR establishes the liquidator's right to lodge in other insolvency proceedings claims that have already been lodged in his insolvency proceedings provided that the interests of creditors in the latter proceedings are served. In the case *Sendo International*[554] it was decided by the liquidators in a signed protocol that as the assets available in the secondary insolvency proceedings were not sufficient to result in the payment of a dividend, it was agreed that the creditors in the main insolvency proceedings had no interest in lodging their claims in the secondary insolvency proceedings. Accordingly, the liquidators in the main insolvency proceedings agreed not to lodge claims in the secondary insolvency proceedings. The right to withdraw a lodged claim is subject to the provisions found in the *lex fori concursus*, which has jurisdiction regarding the form (content) of creditors' rights.[555] Every creditor is afforded the right to oppose the lodging of his claim by the liquidators in other insolvency proceedings. According to Virgós and Garcimartín the purpose of this provision on cross-filing is to facilitate the exercise of the rights of the creditors by permitting the liquidator to substitute them in the filing of their claims, and to strengthen the influence of the liquidators in the other insolvency proceedings.[556] Moss and Smith are of the opinion that Article 32 (2) of the EIR avoids the need for individual creditors in main or secondary insolvency proceedings to come to grips with the linguistic and legal difficulties that may be found in trying to claim in the other type of proceeding.[557] I am inclined to the view that duplicate filing of claims on the one hand produces additional costs in simultaneous insolvency proceedings and on the other hand requires extra coordination between main and secondary liquidators before creditors' general meeting required by the *lex fori concursus*. This is because the voting rights of creditors' depend on the amount and value of the claims determined by the relevant *lex fori concursus* at the certain point of time before creditors' general meeting in relevant insolvency proceedings. It can be rather troublesome for liquidators to handle lodgement[558] (and withdrawal) of the

[554] Ordinance of the Commercial Court of Nanterre, June 26, 2006. Unreported; in: Marshall (2008). *Op. cit.*, mn 2.116/1, p 2–185.
[555] Article 4 (2) (h) of the EIR.
[556] Virgós. Garcimartín. *Op. cit.*, mn 428, p 229.
[557] Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.367, p 332.
[558] See also: Csöke. Cross-border communication & cooperation – what happens in practice? Eurofenix, Issue 32, Summer 2008, p 22–24.

claims and consequences of these actions in several insolvency proceedings simultaneously. For instance, in Latvia, relevant detailed procedure for handling claims is stipulated in Section 73 subsection 8 of the Latvian Insolvency Act stating that the liquidator is obliged to acquire consent from the every creditor individually before lodging claims to insolvency proceedings opened in another Member State. If a creditor does not respond to the liquidator within 3 weeks, then it is deemed that consent is not granted. If creditor submits the application to withdraw its claim from the proceedings, the liquidator is obliged to submit relevant application to withdraw the claim from another insolvency proceedings pending in another Member State within 2 weeks. Thus, as Virgós and Garcimartín state, the liquidator is usually not obliged to evaluate the interest of each creditor. The specific assessment of each claim would be an impossible task. It is a personal matter for each creditor to make this assessment, as each individual is better placed to assess his own interests. The liquidator is therefore only obliged to deal with the interests of the creditor as part of the body of creditors as a whole or as a member of an insolvency "class".[559] In my opinion, this solution may be unjust to individual creditors (with tort claims, for instance) and not in accordance with the provisions laid down in the *lex fori concursus* upon which the liquidator was appointed and may be liable for. Indeed, the costs incurred by the filing of claims and the person responsible for bearing these costs are questions governed by the *lex fori concursus*, also avoidance of costs by the creditor may be a reason to oppose the filing of claims by the liquidator into other insolvency proceedings, but the most well-informed person in insolvency proceedings is a liquidator and he/she should take into account all the circumstances of the individual creditor and act accordingly, especially when there are local non-adjusting creditors with small claims involved. Sarra correctly submits that employees are generally major participants in insolvency proceedings, yet they suffer from information asymmetries in terms of lack of information in respect to the debtor and its financial affairs and in many jurisdictions there is no strong union present to offer them assistance and to bargain of their behalf.[560] On the other hand, duplicate filing of claims by the liquidators in other pending insolvency proceedings is also costly (especially when electronic means of submitting claims are not provided by law) and time-consuming process (linguistic problems, checking every claim and its supporting evidence). As there is an enormous amount of work to do and liquidators may be liable only under the *lex fori concursus*, there may be a tendency to protect only local creditors and their interests. Therefore, the creditors may be forced, although indirectly, to lodge their claims on their own behalf no matter the costs. This approach should not be tolerated by the legislators of the Member States who should set flexible procedural provisions, such as the possibility to use more electronic means in

[559] Virgós. Garcimartín. *Op. cit.*, mn 428, p 230.
[560] Sarra. Employees' Rights in Insolvency Matters; in: Verweij. Wessels. *Op. cit.*, p 59.

handling claims and use less duplication in coordination of parallel insolvency proceedings by the liquidators under national laws of the Member States.

Another troublesome aspect in connection with the liquidators' role is that a liquidator is authorized to participate[561] in the other insolvency proceedings on the same basis as a creditor, in particular by attending creditors' meetings.[562] Virgós and Garcimartín state that Article 32 (3) of the EIR confers on the liquidators a direct right to participate on their own behalf in other insolvency proceedings.[563] The Virgós-Schmit Report states that participation by the liquidator may be regulated in detail by national law.[564] For instance, in England, participation "on the same basis as a creditor" will include a right to inspect the court file, an excellent source of information about the proceedings.[565] Moss and Smith submit that it might be thought from the wording of Article 32 (3) that this would include a liquidator being entitled to exercise the voting rights attached to the claims that he lodges in proceedings on behalf of creditors who have lodged claims in his proceedings[566], but it is debatable whether and under which conditions the participation in other insolvency proceedings includes exercise of the voting rights and decision-making by the liquidator (on behalf of the creditors).[567] The Virgós-Schmit Report indicates that such a proposal was specifically rejected during the negotiations leading up to the agreement of the Regulation.[568] Virgós and Garcimartín have noted that

[561] The English, French and Dutch texts refer to "participate". The German text, however, has "*mitzuwirken*" (to cooperate). The latter wording suggests that the power vested in the liquidator by Article 32 (3) only exists when he has lodged the creditor's claims pursuant to Article 32 (2). According to Wessels this limitation does not make sense given the central principle of cooperation and communication, in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.368, p 333.

[562] Article 32 (3) of the EIR.

[563] The specific content of this right to participate and the exercise thereof are subject to the national law of the proceedings in which a liquidator seeks to act: if he has been appointed liquidator in proceedings opened in State 1 and he seeks to exercise this right in proceedings opened in State 2, the law of State 2 will be applied. The aim of this provision is to better guarantee the expression, in other insolvency proceedings, of the interests which each liquidator is responsible for safeguarding, by offering him a channel of direct participation in the proceedings opened in other Member States, above all in the deliberations of the creditors. See: Virgós. Garcimartín. *Op. cit.*, mn 431, p 231.

[564] Virgós-Schmit Report mn 240.

[565] Insolvency Rule 7.64, introduced by the Insolvency (Amendment) Rules 2002; cited by Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.370, p 333.

[566] This assumption appears to have been made in the amendments to the Insolvency Rules in England. In: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.368, p 333.

[567] For instance, the number of votes given to the liquidator should be determined in accordance with the *lex fori concursus.* The calculation rules provided for in national laws may lead to different results in simultaneous insolvency proceedings. See also different opinions referred to in: Wessels (2006). *Op. cit.*, mn 10867, p 483; and in: Pannen. *Op. cit.*, Article 32 mn 45, p 473.

[568] Virgós-Schmit Report mn 240.

the reason for this referral to national law lies in the diversity of conceptions of the national laws of the Member States with regard to the role and functions of liquidators.[569] In my opinion, this legislative solution (not to solve the matter during deliberations of drafting the EIR) is not acceptable, because it puts extra responsibility on the legislators in the Member States in determining and formulating appropriate provisions. For instance, Section 55 subsection 1 of the Estonian Bankruptcy Act provides that a liquidator shall defend the rights and interests of all the creditors and the debtor and ensure a lawful, prompt and financially reasonable insolvency procedure. A liquidator must be independent of the debtor and the creditors in Estonia.[570] Therefore, I am inclined to the view that exercise of the voting rights on behalf of the creditors by the liquidator could create a conflict of interest. A creditors' committee shall protect the interests of all the creditors, monitor the activities of the liquidator and perform other duties provided by law in insolvency proceedings in Estonia.[571] The liquidator acting on behalf of the creditors cannot supervise himself. Thus, the liquidators and creditors participating in cross-border insolvency proceedings may find themselves facing the different legal solutions in implementing Article 32 (3) of the EIR and the *lex fori concursus* simultaneously. The current situation which derives from the different national laws of the Member States, indeed, does not serve the aim of the Regulation which is the effective and efficient administration of cross-border insolvency proceedings. Therefore, the national laws of the Member States should be amended accordingly. If the topic of liquidators' liability and state supervision would have been regulated in the Regulation, i.e. at EU level, then I would have been in favour of the solution that liquidators may exercise creditors' rights on behalf of them during the cross-border insolvency proceedings. If the question of liquidator's liability is regulated at national level, then exercise of creditors' rights should still be regulated at national level as well.

To summarize, some conclusions are presented below. The role of the secondary liquidator in exercising creditors' rights is rather vague. The role of the secondary liquidator exercising creditors' rights in secondary insolvency proceedings derives from the national laws of the Member States. The Regulation provides the liquidator appointed in the main insolvency proceedings with several powers to change the character of the secondary insolvency proceedings and to align the proceedings in accordance with developments in the main insolvency proceedings. However, the main liquidator should act in accordance with the *lex fori concursus secundarii*, which may require participation of the secondary liquidator or creditors. Indeed, there may be situations where the secondary liquidator does not agree with or local creditors

[569] Virgós. Garcimartín. *Op. cit.*, mn 429, p 230.

[570] When giving consent to the court to act as a liquidator, the person shall confirm in writing that he or she is independent of the debtor and the creditors. See section 56 subsection 3 of the EBA.

[571] Section 73 subsection 2 of the EBA.

do not vote in favour of the main liquidator's proposal. Thus, in this case the role of the secondary liquidator is probably to protect local interests.

Article 32 (2) of the EIR establishes the liquidator's right to lodge in other insolvency proceedings claims that have already been lodged in his insolvency proceedings provided that the interests of creditors in the latter proceedings are served. I am inclined to the view that duplicate filing of claims on the one hand produces additional costs in simultaneous insolvency proceedings and on the other hand requires extra coordination between main and secondary liquidators before creditors' general meeting required by the *lex fori concursus*. This is because the voting rights of creditors' depend on the amount and value of the claims determined by the relevant *lex fori concursus* at the certain point of time before creditors' general meeting in relevant insolvency proceedings. It can be rather troublesome for liquidators to handle lodgement (and withdrawal) of the claims and consequences of these actions in several insolvency proceedings simultaneously. Thus, the legislators of the Member States should formulate and determine flexible procedural provisions, such as the possibility to use more electronic means in handling claims and use less duplication in coordination of parallel insolvency proceedings by the liquidators under national laws of the Member States.

A liquidator is authorized to participate in the other insolvency proceedings on the same basis as a creditor, in particular by attending creditors' meetings. It is debatable whether and under which conditions the participation in other insolvency proceedings includes exercise of the voting rights and decision-making by the liquidator (on behalf of the creditors). In my opinion, this legislative solution (not to solve the matter during deliberations of drafting the EIR) is not acceptable, because it puts extra responsibility on the legislators in the Member States in determining and formulating appropriate provisions. As for Estonia, I am inclined to the view that exercise of the voting rights on behalf of the creditors by the liquidator could create a conflict of interest. Thus, the liquidators and creditors participating in cross-border insolvency proceedings may find themselves facing the different legal solutions in implementing Article 32 (3) of the EIR and the *lex fori concursus* simultaneously. The current situation which derives from the different national laws of the Member States, may not serve the aim of the Regulation which is the effective and efficient administration of cross-border insolvency proceedings. Therefore, the national laws of the Member States should be amended accordingly. If the topic of liquidators' liability and state supervision would have been regulated in the Regulation, i.e. at EU level, then I would have been in favour of the solution that liquidators may exercise creditors' rights on behalf of them during the cross-border insolvency proceedings. If the question of liquidator's liability is regulated at national level, then exercise of creditors' rights should still be regulated at national level as well.

3.3.3. Coordination in Exercising Creditors' Rights in Parallel Insolvency Proceedings

In the case of simultaneous insolvency proceedings opened in accordance with the *lex fori concursus universalis* and the *lex fori concursus secundarii* against the same debtor a multiple set of authorized bodies of creditors (creditors' general meetings and committees) should be elected and put into operation if so provided by the *lex fori concursus*.[572] In order to facilitate efficient and effective administration of cross-border insolvency proceedings one could ask whether this system is justified. How to coordinate exercise of creditors' rights in parallel insolvency proceedings? The procedural requirements of assembly, quorum and adoption of decisions of creditors' meetings and committees usually vary between the national laws in Member States. To exercise voting rights by the creditors in these assemblies, the number of votes should be determined in accordance with the *lex fori concursus universalis* and the *lex fori concursus secundarii*. For instance, in the Netherlands, each creditor may cast one vote per 45 euro. One vote is also cast for claims or fractions of claims of less than 45 euro.[573] In Latvia, one vote is not cast for a claim worth less than 1 lat.[574] In Latvia all the votes shall be determined by the liquidator.[575] In Estonia, at a creditors' general meeting, the number of votes of each creditor is proportional to the amount of the creditor's claim.[576] A creditors' general meeting has a quorum regardless of the number of votes represented if the creditors were notified of the time and place of the meeting within the specified term and in the manner specified in the Estonian Bankruptcy Act.[577] The value of the creditor's claim upon which votes will be given in certain insolvency proceedings depends on the date of the opening of that proceeding (e.g. day 1 in case of main insolvency proceedings or day 1+N in the case of secondary insolvency proceedings) and relevant provisions stipulating the legal consequences of the opening of insolvency proceedings according to the *lex fori concursus*. For example, whether the calculation of interests and fines on claims will be suspended or terminated. Indeed, an estimated value of the claim may vary in each simultaneous insolvency proceeding and it is difficult to evaluate the total value of the claims and total foreseeable outcome of proceeds, which is required according to Article 20 (2) of the EIR as a dividend equalization rule to regulate the duties between the liquidators and the creditors who have lodged claims in simultaneously pending insolvency proceedings. Due to wide

[572] Section 74 subsection 7 of the EBA prescribes that on the basis of a decision of a creditors' general meeting, a bankruptcy committee need not be formed. In such case, the duties of the bankruptcy committee shall be performed by the creditors' general meeting.
[573] Section 81 subsection 1 of the DBA.
[574] Section 87 subsection 3 of the LIA.
[575] Section 87 subsection 1 of the LIA.
[576] Section 82 subsection 1 of the EBA.
[577] Section 81 subsection 2 of the EBA.

substantial and procedural differences between national laws, the outcome of the parallel insolvency proceedings may not be predictable for the creditors. For instance, the Regulation does not specify the nature of the claims of the tax authorities and social security authorities, especially whether certain fines or financial penalties are to be included in the claims or not. Wessels correctly submits that in case of possible disputes, it is not clear which court has international jurisdiction to decide on the validity of the tax claim.[578] The tax claims are excluded from the Brussels I Regulation as well.[579] In my opinion, it should not be overlooked that the decisions made by the multiple set of different bodies of the creditors under different jurisdictions concern the same debtor and one unified insolvency estate although the legal status of the assets (location, registration, amount, value, etc.) in the insolvency estate may change from time to time between the *lex fori concursus universalis* and the *lex fori concursus secundarii* due to the result of recovery or other activities in administrating the insolvency estate. Creditors and liquidators should acknowledge that their decisions influence the insolvency estate, the debtor and society (through taxes for instance). According to some national laws of the Member States, a debtor, the creditors and the liquidator may request that the court revoke a decision by a creditors' general meeting or creditors' committee if the decision is contrary to law, or was made in violation of the procedure provided by law, or if the right to contest the decision is directly prescribed by the *lex fori concursus*. In Estonia, revocation of a decision by a creditors' general meeting may be requested if the decision damages the common interests of the creditors.[580] The question whether a liquidator could request the court to revoke a decision made by the creditors' general meeting (or creditors' committee) of insolvency proceedings pending in another Member State, even though it concerns and influences the same debtor and its single unified insolvency estate, still remains unanswered. I think that this option should not be allowed, because it would be against the aim of the Regulation and could lead to unreasonable administrative costs in cross-border insolvency proceedings against the same debtor (insolvency estate). Therefore, national laws of the Member States should be amended accordingly so that a liquidator shall not be entitled to request the court to revoke a decision made by the creditors' general meeting (or creditors' committee) of insolvency proceedings pending in another Member State.

---

[578] Wessels. Tax Claims: Lodging and Enforcing in Cross-Border Insolvencies in Europe. International Insolvency Law Review, 2/2011, p 137.

[579] Wessels (2011). *Op. cit.*, p 138.

[580] Requests for revocation of a decision by a creditors' general meeting may be filed with the court within 10 (ten) days as of becoming aware of the decision, but not later than within 30 (thirty) days as of the adoption of the decision. The chair of a bankruptcy committee shall participate in court hearings of actions concerning revocation of a decision of the debtor in bankruptcy proceedings on behalf of the debtor in bankruptcy proceedings. If a bankruptcy committee has not been elected, the person appointed for such purpose at a general meeting shall participate in the court hearing. See Section 83 subsections 1, 2 and 5 of the EBA.

Another question related to coordination of exercising creditors' rights is verification and admission of creditors' claims in parallel insolvency proceedings. Article 25 of the Regulation extends recognition in all Member States of the decisions handed down by the courts of the Member States in which the main insolvency proceedings have been opened, also to the decisions concerning the conduct (and the closure) of insolvency proceedings. Rordorf states that this could mean that claims admission decided in main insolvency proceedings can no longer be challenged in secondary insolvency proceedings, regardless of the law of the Member States in which the latter proceedings are opened.[581] In his opinion a different answer, however, could be suggested by Article 32 of the EIR that seems to always require a specific judge's decision when lodging claims even in secondary insolvency proceedings, and that such a decision should be bound by the *lex fori concursus*. If the latter solution prevails, a certain degree of incongruity is implied, in so much as it allows the admission of the same credit in main insolvency proceedings but not in secondary insolvency proceedings, or *vice versa*.[582] As for other peculiarities derived from the national laws of the Member States applicable to cross-border insolvency proceedings, verification and admission of claims will take place separately in each of the insolvency proceedings under the conditions established by the respective *lex fori concursus*. For this reason, admission in one set of insolvency proceedings does not entail, *by itself*, admission in other insolvency proceedings: the conditions and the persons who may oppose such admission are different in each of the insolvency proceedings. Thus, there may be situations where the creditor (such as a tax authority) has defended his/her claim, for instance, in secondary insolvency proceedings, but had not been successful in the main insolvency proceedings. The overall outcome could be that there are not enough assets in the secondary insolvency proceedings to pay dividends to local creditors; still, there are assets for distribution of dividends in the main insolvency proceedings, but as the creditor's claim is not admitted in the latter proceedings, the creditor will not receive dividends. This result seems unjust. However, Virgós and Garcimartín are of the opinion that the decision admitting the claim may be used as a means of proof of the claim in other proceedings[583] if the *lex fori concursus* provides so. I think that if the underlying idea is to have one unified insolvency estate, then the decision admitting the claim should be used as a means of proof of the claim in other insolvency proceedings as well. I think that in order to facilitate effective and efficient administration of cross-border insolvency proceedings, the relevant provision about admission of the claim only one time in case of the parallel cross-border insolvency proceedings may be worth inserting into the Regulation. At the moment, national laws of the Member States could be amended accordingly so

[581] Rordorf. Cross Border Insolvency. International Insolvency Law Review 1/2010, p 22.
[582] Rordorf. *Op. cit.*, p 22.
[583] Virgós. Garcimartín. *Op. cit.*, mn 430, p 231.

that a decision admitting the claim may be used as a means of proof of the claim in other insolvency proceedings.

Apart from the aforementioned, the legal framework provided for in the EIR which refers to national laws may also cause administrative complexity in accounting,[584] auditing requirements[585] and balance sheet[586] preparation in the same debtor, because different substantial and procedural requirements apply to the debtor as an accounting entity and insolvency estate according to the *lex fori concursus universalis* and the *lex fori concursus secundarii*. Duplicate accounting of the same debtor may cause an increase of costs in the administration of proceedings and insolvency estate. On the one hand, it might be in the interest of liquidator to make "his part" of the insolvency estate in certain Member State as valuable as possible in the balance sheet, because the remuneration payable to the liquidator in general depends on it.[587] On the other hand, if necessary, the creditors' decisions may influence the sale of assets of the debtor.[588] In Estonia, the creditors' committee has the right to monitor the liquidator's economic activities related to the management of the insolvency estate.[589] Therefore, not only the liquidators, but also the creditors may influence effective and efficient administration of cross-border insolvency proceedings of the debtor.

To summarize, some conclusions are presented below. In the case of simultaneous insolvency proceedings opened in accordance with the *lex fori concursus universalis* and the *lex fori concursus secundarii* against the same debtor a multiple set of authorized bodies of creditors (creditors' general meetings and committees) should be elected and put into operation if so provided by the *lex fori concursus*. In my opinion, it should not be overlooked that the decisions made by the multiple set of different bodies of the creditors under different jurisdictions concern the same debtor and one unified insolvency estate although the legal status of the assets (location, registration, amount, value, etc.) in the insolvency estate may change from time to time between the *lex fori concursus universalis* and the *lex fori concursus secundarii*

[584] For example, whether and to what extent to include the off-balance sheet liabilities of the debtor.

[585] For example, according to Section 128 of the EBA, if a debtor is an accounting entity, the trustee shall be liable for organising the accounting of the debtor. As of declaration of bankruptcy, a new financial year begins. The term for submitting the annual report for the previous financial year to the registrar commences as of the declaration of bankruptcy.

[586] For example, different layouts of balance sheet and its contents are applicable in the Member States.

[587] The amount of the remuneration shall not be less than 1 per cent of the money which has been received and included in the insolvency estate as a result of the sale and recovery of the insolvency estate and other activities of the liquidator. See Section 65 of the EBA.

[588] For instance, as a basic rule, a liquidator may commence the sale of assets in the insolvency estate after the first creditors' general meeting unless the creditors have decided otherwise at that meeting. Section 133 subsection 1 of the EBA.

[589] Section 73 subsection 2 of the EBA.

due to the result of recovery or other activities in administrating the insolvency estate.

The question whether a liquidator could request the court to revoke a decision made by the creditors' general meeting (or creditors' committee) of insolvency proceedings pending in another Member State, even though it concerns and influences the same debtor and its single unified insolvency estate, still remains unanswered. I think that this option should not be allowed, because it would be against the aim of the Regulation and could lead to unreasonable administrative costs in cross-border insolvency proceedings against the same debtor (insolvency estate). Therefore, national laws of the Member States should be amended accordingly so that a liquidator shall not be entitled to request the court to revoke a decision made by the creditors' general meeting (or creditors' committee) of insolvency proceedings pending in another Member State.

I think that if the underlying idea is to have one unified insolvency estate, then the decision admitting the claim should be used as a means of proof of the claim in other insolvency proceedings as well. I think that in order to facilitate effective and efficient administration of cross-border insolvency proceedings the relevant provision about admission of the claim only one time in case of the parallel cross-border insolvency proceedings may be worth inserting into the Regulation. At the moment, national laws of the Member States could be amended accordingly so that decision admitting the claim may be used as a means of proof of the claim in other insolvency proceedings.

The legal framework provided for in the EIR which refers to national laws may also cause administrative complexity in accounting, auditing requirements and balance sheet preparation in the same debtor, because different substantial and procedural requirements apply to the debtor as an accounting entity and insolvency estate according to the *lex fori concursus universalis* and the *lex fori concursus secundarii*. It is found that not only the liquidators, but also the creditors may influence effective and efficient administration of cross-border insolvency proceedings of the debtor.

4. STAY AND CLOSURE OF SECONDARY INSOLVENCY PROCEEDINGS

4.1. Stay

4.1.1. Meaning of the Stay of Liquidation

Article 33 (1) of the EIR, which demonstrates the primacy of the main insolvency proceedings, provides that the main liquidator may apply to the court of the Member State where secondary insolvency proceedings have been opened to stay the process of liquidation in whole or in part up to 3 (three) months,[590] provided that in that the event the court may require the main liquidator to take any suitable measure to guarantee the interests of the creditors in the secondary insolvency proceedings and of individual classes of creditors. Such a request from the main liquidator may be rejected only if it is manifestly of no interest to the creditors in the main insolvency proceedings. Several questions arise. Before analysing how the court should proceed the request of stay under the Regulation and the *lex fori concursus secundarii* I will examine what the "stay of liquidation"[591] means.

In the context of the court cases involving the *Collins & Aikman* group of companies, the Austrian Higher Regional Court in Graz[592] held that Article 33 of the EIR only stays the process of liquidating assets and not the secondary insolvency proceedings as a whole. This is definitely a correct statement, because the Virgós-Schmit Report indicates that "*the process in liquidation in the secondary insolvency proceedings may be stayed in whole or in part*."[593] Virgós and Garcimartín are of the opinion that the stay does not put an end to the secondary insolvency proceedings: all it does is paralyse the winding-up operations.[594] The stay of the secondary insolvency proceedings themselves cannot be requested pursuant to Article 33 of the EIR. It should be noted that the legal consequences of the secondary insolvency proceedings are determined by the *lex fori concursus secundarii* upon Article 4 (2) of the EIR. Herchen is of the opinion that liquidation in this context means the disposal (sale) of all or individual parts of the insolvency estate of the secondary insolvency proceedings. However, Paulus also includes reorganization measures, but only if

[590] Note: it can be continued or renewed for similar periods.
[591] Note: official translation of Article 33 of the EIR in Estonian might be misleading. It has been translated as "likvideerimine" or "likvideerimisprotsess", in terminology used mostly in Estonian company law.
[592] Oberlandesgericht, 20 October 2005, 3 R 149/05, NZI (Neue Zeitschrift fur Insolvenz und Sanierung) 2006, vol 11, 660 on appeal from the Landesgericht Leoben, 31 August 2005, 17 S 56/05, NZI 2005, vol 11, 646; cited by Moss/Bayfield/Peters in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 5.130, p 117.
[593] Virgós-Schmit Report mn 241.
[594] Virgós. Garcimartín. *Op. cit.*, mn 448, p 238.

the reorganization is to take place pursuant to a reorganization plan.[595] Bogdan is of the opinion that a stay stops the liquidation of assets in the secondary insolvency proceedings, but it does not entitle the liquidator in the main insolvency proceedings to dispose of the same assets.[596] Wessels states that for the time being the liquidation activities within the secondary insolvency proceedings should be totally or partially discontinued and certain actions remain in a preparatory or initial phase of execution.[597] In the case *Collins & Aikman Products GmbH*, the Austrian court in Leoben held that a stay of the process of liquidation should not be considered when liquidation has not been entered into in the secondary insolvency proceedings.[598] I think that the liquidator in the secondary insolvency proceedings does not lose his powers to administer the insolvency estate. He stays in control of "his" proceedings and may sell the assets, such as goods, in the normal course of the business of the "establishment". However, he is not entitled to sell the significant part or the whole business. From a procedural point of view, it seems to me that the stay of liquidation is another process (the so-called "sub-process") in the secondary insolvency proceedings to which relevant rules in national laws of the Member States are applicable.

4.1.2. Procedural Aspects to Be Solved by the Court

In general, there is no specific simplified procedure in national laws of the Member States to conduct secondary insolvency proceedings in parallel with main insolvency proceedings. Usually national insolvency law or general procedural law in relevant Member State does not distinguish legal requirements to be fulfilled between ordinary nation-wide insolvency proceedings or secondary insolvency proceedings within the meaning of the Regulation. Indeed, to all questions national law, i.e. the *lex fori concursus secundarii*, continues to apply if the Regulation provides no other rules.

The first question to be dealt with by the court is the content of the request submitted by the main liquidator. Wessels correctly states that the Regulation does not provide rules concerning the form or the specific content of the request.[599] As far as I have been able to define, there are no special or simplified requirements for the content of the request submitted by the liquidator in main insolvency proceedings to the stay of liquidation stipulated in national laws of the Member States. Therefore, various solutions depending on how the term "request" can be interpreted in national laws of the Member States may be available, which might not be transparent for the liquidator in main insolvency

[595] Herchen in: Pannen. *Op. cit.*, Art 33, mn 1, p 475.
[596] Bogdan in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.378, p 335.
[597] Wessels (2006). *Op. cit.*, mn 10870, p 485.
[598] de Boer and Wessels. *Op. cit.*, p 196.
[599] Wessels (2006). *Op. cit.*, mn 10873, p 486.

proceedings. I think that the request to the stay of liquidation should consist of at least the following components: information on the debtor and main liquidator; information on the court which opened main insolvency proceedings under the EIR; the court judgement and effective date; the grounds and reasons for the stay of liquidation in the secondary insolvency proceedings; and information on whether other secondary insolvency proceedings in another EU Member State are opened. At the very least, the following documents should be enclosed to the main liquidator's request:

1) a court judgement on the opening of main insolvency proceedings and a certified copy of translation into the language of the relevant Member State;
2) a court judgement or other proof of the appointment of a liquidator in main insolvency proceedings and a certified copy of translation into the language of the relevant Member State;
3) documents certifying the grounds and reasons for the stay of liquidation in the secondary insolvency proceedings;
4) documents confirming payment of the fee and other court costs (if applicable).

I think that these documents reflect the minimum information necessary for the court to handle the request made by the main liquidator in the secondary insolvency proceedings. For instance, a court judgement on the opening of main insolvency proceedings might provide solid information about the debtor and its insolvency. To facilitate efficient and effective administration of cross-border insolvency proceedings, I think that it is appropriate and reasonable to supplement the substantial requirements of petitions in national insolvency laws of Member States in the case of requesting a stay of liquidation in secondary insolvency proceedings. It would simplify and accelerate handling of these petitions by the court.

In addition, there may be the question of whether the court is bound to formal requirements (for instance, if the request should be digitally signed) stipulated in the *lex fori concursus secundarii* imposed on the request made or can the court drop these requirements? For instance, if the request has been sent to the court in another language than the official language of the Member State where the secondary insolvency proceedings were opened, will the request be denied on formal grounds? These questions are also left to be decided upon the *lex fori concursus secundarii*.

The second question is how should the request made by the main liquidator be treated by the court in the secondary insolvency proceedings? Although the form of the decisions made, as well as the permissible means of appealing decisions, is governed by the procedural rules of the deciding court, in general, procedural questions of a stay of liquidation as a sub-process in the secondary insolvency proceedings are not differently regulated by the laws of the Member States. Thus, it might be difficult for courts to find relevant procedural provisions contained in the *lex fori concursus secundarii* to proceed the request made by the main liquidator. For instance, Section 475 subsection 1 clause 12²

of the Code of Civil Procedure in Estonia states amongst other civil matters that matters of petition (*hagita asjad*) are the opening of insolvency proceedings, declaration of bankruptcy and other matters related to insolvency proceedings, which cannot be solved in an action (*hagimenetlus*). Thus, the request made by the liquidator in main insolvency proceedings will probably be treated as a matter of petition which provides the court with legitimate grounds for application of judicial investigation principle and sufficient discretionary powers to make decisions under Estonian law as the *lex fori concursus secundarii*. In Estonia, relevant provisions are found in the Code of Civil Procedure, not in the Bankruptcy Act. In the case of German secondary insolvency proceedings, the insolvency court decides this matter by way of an order (*Beschluss*) as contemplated by Section 233 sentence 1 of the German Insolvency Code.[600] In Germany, the relevant provision is stipulated in the Insolvency Code. Thus, different approaches are available in the laws of the Member States. I am inclined to the view that provisions which should be implemented by the main liquidator coming from abroad should be incorporated into insolvency laws (not into general procedural laws) of the Member States to the maximum extent possible. As the request to the stay of liquidation in secondary insolvency proceedings should be proceed as quickly as possible without extra burden to participants in the insolvency proceedings, I think that it is reasonable, if the liquidator of the main insolvency proceedings could find relevant provisions from the insolvency laws of the Member States.

The third problem relates to the national laws of these Member States, where the court of the secondary insolvency proceedings can (or should) in addition to the stay of liquidation, also stay the secondary insolvency proceedings in whole or in part according to relevant provisions stipulated in the *lex fori concursus secundarii*. There may be situations where the court has to stay the secondary insolvency proceedings because the (private) individual as the debtor (and a party to proceedings) has fallen seriously ill or died during the proceedings.[601] Stay of secondary insolvency proceedings due to another proceedings is also possible, for instance the court usually suspends secondary insolvency proceedings during the time when the constitutional review matter is adjudicated in the proceedings of the Supreme Court or relevant questions are submitted to the Court of Justice of the European Union for preliminary decision if this may affect the validity of legislation of general application subject to application in the matter. Therefore, in some Member States the court must *ex officio* examine, if the law provides so, whether the request to stay concerns the stay in the meaning of Article 33 of the EIR or stay in the meaning of the *lex fori*

[600] Herchen in: Pannen. *Op. cit.*, Art 33, mn 32, p 482. Note: Section 357 of the GInsO, used in non-EU cases, provides no option for stay. Delzant in: Braun. (ed). Commentary on the German Insolvency Code. IDW-Verlag GmbH, Düsseldorf, 2006, p 603.

[601] Section 353 and 355 of the ECCP. Note: A successor is not required to continue the proceedings before acceptance of the succession or the expiry of the term for renunciation of the succession.

concursus secundarii or even both, which makes judicial proceeding on that question more time-consuming. Therefore, the legislators of Member States should clarify (procedural) questions on the topic of the stay in national laws of the Member States.

The fourth question is whether the court, before making a decision on a stay, should hear the opinion of the liquidator, several liquidators (main and secondary), the debtor or the representative of the creditors' concerned or contact the court of another Member State to evaluate the interests of the creditors both in the main and secondary insolvency proceedings in case protective measures in favour of the creditors are needed to be evaluated? The Regulation is silent on that question. I think that the court should hear the opinions and contact the court of another Member State, although, it depends on the *lex fori concurus secundarii* whether relevant powers are granted to the court to do so. If not, the legislators of the Member States should amend their national laws accordingly. For instance, some of the provisions on hearing an opinion are already stipulated in the Dutch Bankruptcy Act.[602] In addition, I think that examining the request from the main liquidator demands sufficient economic, financial and managerial knowledge and skills from the court. The judge should be able to evaluate and define what (which transactions prepared or pending by the liquidator in the secondary insolvency proceedings or by the debtor) exactly should be stayed in part or in total, especially when taking into account the fact that laws regulating parallel insolvency proceedings under management probably differ between the Member States, but "the stay of liquidation" should be understood and interpreted identically to all participants in these cross-border insolvency proceedings.

Although the powers of the secondary court in considering a request for a stay are limited, the court does have the power, to require the liquidator in the main insolvency proceedings to ensure that the interests of the creditors in the secondary insolvency proceedings (and individual classes of them) are protected.[603] Referring to the case law, this test may involve setting up a mechanism to ensure that the local creditors as a whole and each class of local creditors are better off than they would have been in liquidation.[604] However, a debatable question is whether the court can seek *all* suitable measures, not only these protective guarantee measures, which are laid down in the *lex fori concursus secundarii*? Several German authors have adversative opinions.[605] According to Virgós and Garcimartín this guarantee *may* refer, for instance, to the preservation of the value of the insolvency estate (or specific assets), if there is a risk of devaluation, or to the payment of interest to those creditors who have

[602] Section 6 of the DBA.
[603] Article 33 (1) of the EIR.
[604] The measures could be analogous to those used in *Re Collins & Aikman Europe SA* (2006) BCC 861, HCJ; *Re MG Rover Espana SA* (2006) BCC 599, High Court, Birmingham, and *Re MG Rover Belux SA/NV* (2007) BCC 446, High Court, Birmingham.
[605] Cited by Herchen in: Pannen. *Op. cit.*, Art 33, mn 37, p 483.

a legal right to continue receiving it during the proceedings.[606] Therefore, in practice, it is not quite clear what kind of measures the court empowered to grant a stay of liquidation may decide. For instance, in Germany, if the stay of liquidation covers assets to which preferential rights (*Absonderungsrechte*) are attached, Article 102 Section 10 of the EGInsO[607] prescribes, in the case of secondary insolvency proceedings governed by the German law, the payment of the interest owed out of the insolvency estate. Herchen states that if the preferred creditor and the debtor have not agreed on the interest rate, then the statutory interest for defaulted payment owes.[608] In Sweden, the common principle is that the liquidator is under a duty to ensure without delay that money received by the insolvency estate in bankruptcy earns interest.[609] By contrast, paying out interest from the insolvency estate is not known to Estonian insolvency law. Thus, there are different approaches to the possible protective measures under national laws of the Member States. However, the ordering of protective measures is generally not necessary when insolvency claims lodged in the secondary insolvency proceedings are also lodged in the main insolvency proceedings. Therefore, the court should be aware of the facts whether a certain claim has been lodged to the main insolvency proceedings or not, evaluate the potential effects to certain creditors and find several protective measures on certain creditors' claims. However, this investigation process makes the handling of the request to stay the liquidation made by the main liquidator a more complicated and time-consuming judicial procedure, which may be contrary to the aim of efficient and effective administration of cross-border insolvency proceedings.

Another question for the legislators of the Member States to consider is jurisdiction. Herchen is correctly of the opinion that the court which opened the secondary insolvency proceedings has jurisdiction to handle the request made by the liquidator in the main insolvency proceedings,[610] but Herchen does not explain whether this jurisdiction is international or domestic. I think that Article 33 of the EIR refers to the international jurisdiction and the *lex fori concursus secundarii* should be followed to find the relevant court to handle the case under the domestic jurisdiction. Wessels is of the opinion that the request must be filed with the court which is competent according to the general procedural rules.[611] The problem is that this may not necessarily lead to the same national (insolvency) court that actually opened the secondary insolvency proceedings in the first place and supervises the proceedings. If the request submitted by the

[606] Virgós. Garcimartín. *Op. cit.*, mn 447, p 238.
[607] Extract of the Introductory Act to the Insolvency Code (in German: *Auszug aus dem Einführungsgesetz zur Insolvenzordnung – EGInsO*) the Parliament (*Bundestag*), 05.10.1994. BGBl I 1994, 2866...BGBl. I S. 1885. In force since 01.01.1999.
[608] Herchen in: Pannen. *Op. cit.*, Art 33, mn 43, p 484.
[609] Chapter 7 section 18 of the SBA.
[610] Herchen in: Pannen. *Op. cit.*, Art 33, mn 7, p 477.
[611] Wessels (2006). *Op. cit.*, mn 10873, p 486.

liquidator in the main insolvency proceedings is proceeded by another domestic court, there would definitely be extra complications and more time spent on handling the request of stay. Thus, I am inclined to the view that insolvency proceedings of the debtor within one Member State should be concentrated on one (supervisory) insolvency court to the maximum extent possible, especially taking into account the fact that the stay can be continued or renewed and the number of stays which may be requested is not limited.[612]

The stay has to be terminated if it is no longer justified in accordance with the interests of the creditors in the main insolvency proceedings *or* the interests of the creditors in the secondary insolvency proceedings. This test was held to be satisfied in the case of the Austrian insolvency proceedings relating to the *Collins & Aikman* group of companies on the grounds that the creditors in the main and secondary insolvency proceedings were the same, the creditors would be paid in full by the proposed sale in the secondary insolvency proceedings, and the purchaser had good economic reasons for saying it could not keep its offer open until a later date and therefore any delay would threaten the ability to pay creditors of this company in full.[613] In my opinion, all these grounds were justified. However, it should be noted that the procedure to terminate the stay of the liquidation is not less sophisticated and time-consuming. First, as Wessels correctly states, the Regulation does not lay down rules regarding the form or the specific content of the request to terminate a stay. Rules concerning hearing opinions are also lacking.[614] Second, under Article 33 (2) of the EIR the test on an application by a creditor or by the liquidator in the secondary insolvency proceedings for the termination of the stay is different from the approach to granting the stay. The list of applicants empowered to propose the termination of stay is wider, causing some questions in legal literature,[615] although no one has paid attention to the fact that the list of applicants does not consist of third persons such as any other person or authority empowered to request the opening of secondary insolvency proceedings, for instance, as stipulated in Article 29 of the EIR. I think that in the case of (private) individual insolvency proceedings there may be a need for that option as well. Another reason is that not all national laws of the Member States empower the court to terminate the stay of the liquidation at its own motion. Thus, Article 33 (2) of the EIR should be supplemented accordingly. To facilitate efficient and effective administration of cross-border insolvency proceedings, I think that it is appropriate and reasonable to supplement the substantial requirements of petitions in national insolvency laws of Member States in the case of requesting a termination of a stay of liquidation in secondary insolvency proceedings. It would simplify and accelerate handling of these petitions by the court.

---

[612] Article 33 (1) of the EIR; Virgós-Schmit Report, mn 245.

[613] Leoben Landesgericht, 1 December 2005 17 p 56/05m, NZI 2006, vol 11, 663.

[614] Wessels (2006). *Op. cit.*, mn 10881, p 489.

[615] See, for instance, the discussion on lifting the stay of liquidation in: Pannen. *Op. cit.*, Art 33, mn 50–57, p 485–487.

The scope of the stay provided for by Article 33 of the EIR may also raise another question, i.e. whether the stay may, generally or under specific circumstances, also operate in respect of third party rights *in rem*. Israël submits that, if the process of the liquidation in the secondary insolvency proceedings leaves the exercise of security rights unaffected, then staying the process would not affect those creditors. However, under the *lex fori concursus secundarii* holders of the security rights may be affected by the opening of secondary insolvency proceedings, as the stay of the liquidation process under the Regulation could perhaps also affect those creditors.[616] He also gives an example of Dutch liquidation proceedings (*faillissement*), according to which a Dutch judge may order a general stay (the so-called "cooling-off period", in Dutch *afkoelingsperiode*[617]), suspending all actions with regard to assets of the insolvency estate of third party assets in the hands of the debtor or liquidator.[618] Such an order, in Israël's view, also stays the exercise of rights of the secured creditor with regard to the collateral. Assume that in Dutch secondary insolvency proceedings a general stay were ordered also staying the foreclosure by secured creditors. If, subsequently, the liquidator in the main insolvency proceedings would request a stay of the Dutch liquidation, would the stay on the basis of the Regulation stay the Dutch moratorium and thus extend over security rights? Israël states that this in itself would not be contrary to the limits on the extraterritorial effect of the *lex fori concursus universalis* imposed by Article 5 of the EIR. Secondary insolvency proceedings have been opened and may affect third party rights *in rem*. On the other hand, the stay of Article 33 of the EIR may exceed the time provided by Dutch insolvency law (a maximum of one month, once renewable).[619] However, Berends holds the opinion that Article 5 of the EIR does not preclude that the stay ordered by the Dutch judge has consequences in another Member State if the position of the secured creditor is not adversely affected by the cooling-off period.[620] In my opinion, other Member States may face similar problems whether the "stay" in the national insolvency laws of the Member States affects creditors with rights *in rem* as well. For instance, similar legal instrument as in the Netherlands is available in Latvia called legal protection proceedings *(tiesiskas aizsardzibas process)*, according to which one of the legal consequence is prohibition of secured creditor to require the sale of mortgaged property of the debtor.[621] I think that

[616] Israël. *Op. cit.*, p 306.
[617] It was first introduced in 1992 in the DBA. See further Raaijmakers in: Vriesendorp. McCahery. Verstijlen. (eds.) Comparative and international perspectives on bankruptcy law reform in the Netherlands. Schoordijk Instituut, Center for Company Law, Tilburg University, 2001, p 4.
[618] Article 63 (a) of the DBA.
[619] Israël. *Op. cit.*, p 307.
[620] Berends. The EU Insolvency Regulation: some capita selecta. Netherlands International Law Review, LVII: 2010, p 423–442.
[621] Section 37 subsection 1 clause 2 of the LIA.

the Regulation must retain the same meaning within the different national systems. Therefore, it puts responsibility on the Member States through formulating, amending and supplementing their national laws accordingly and on participants in the insolvency proceedings through choosing appropriate measures to solve the problems through relevant insolvency proceedings chosen. I am inclined to the view that provisions formulating secondary insolvency proceedings in national laws of the Member States should be well-deliberated and in conformity with the Regulation to enable effective and efficient administration of the cross-border insolvency proceedings in EU.

To summarize, some conclusions are presented below. In general, there is no specific simplified procedure in national laws of the Member States to conduct secondary insolvency proceedings in parallel with main insolvency proceedings. Usually national insolvency law or general procedural law in relevant Member State does not distinguish legal requirements to be fulfilled between ordinary nation-wide insolvency proceedings or secondary insolvency proceedings within the meaning of the Regulation. Indeed, to all questions national law, i.e. the *lex fori concursus secundarii* continues to apply if the Regulation provides no other rules.

To facilitate efficient and effective administration of cross-border insolvency proceedings, I think that it is appropriate and reasonable to supplement the substantial requirements of petitions in national insolvency laws of Member States in the case of requesting a stay of liquidation in secondary insolvency proceedings. It would simplify and accelerate handling of these petitions by the court. I am inclined to the view that provisions which should be implemented by the main liquidator coming from abroad should be incorporated into insolvency laws (not into general procedural laws) of the Member States to the maximum extent possible. As the request to the stay of liquidation in secondary insolvency proceedings should be proceed as quickly as possible without extra burden to participants in the insolvency proceedings, I think that it is reasonable, if the liquidator of the main insolvency proceedings could find relevant provisions from the insolvency laws of the Member States.

In some Member States the court must *ex officio* examine whether the request to stay concerns the stay in the meaning of Article 33 of the EIR or stay in the meaning of the *lex fori concursus secundarii* or even both, which makes judicial proceeding on that question more time-consuming. I think that the court should hear the opinions and contact the court of another Member State when deciding a stay, although, it depends on the *lex fori concurus secundarii* whether relevant powers are granted to the court to do so. If not, the legislators of the Member States should amend their national laws accordingly.

In addition, I think that examining the request from the main liquidator demands sufficient economic, financial and managerial knowledge and skills from the court. The judge should be able to evaluate and define what (which transactions prepared or pending by the liquidator in the secondary insolvency proceedings or by the debtor) exactly should be stayed in part or in total,

especially when taking into account the fact that laws regulating parallel insolvency proceedings under management probably differ between the Member States, but "the stay of liquidation" should be understood and interpreted identically to all participants in these cross-border insolvency proceedings.

Under national laws of the Member States, there are different approaches to the possible protective measures to be implemented by the court when granting a stay. The ordering of protective measures is generally not necessary when insolvency claims lodged in the secondary insolvency proceedings are also lodged in the main insolvency proceedings. Therefore, the court should be aware of the facts whether a certain claim has been lodged to the main insolvency proceedings or not, evaluate the potential effects to certain creditors and find several protective measures on certain creditors' claims. This investigation process makes the handling of the request to stay the liquidation made by the main liquidator a more complicated and time-consuming judicial procedure, which may be contrary to the aim of efficient and effective administration of cross-border insolvency proceedings. If the request submitted by the liquidator in the main insolvency proceedings is proceed by another domestic court,[622] there would definitely be extra complications and more time spent on handling the request of stay. Thus, I am inclined to the view that insolvency proceedings of the debtor within one Member State should be concentrated on one (supervisory) insolvency court to the maximum extent possible, especially taking into account the fact that the stay can be continued or renewed and the number of stays, which may be requested, is not limited.

It should be noted that the procedure to terminate the stay of the liquidation is not less sophisticated and time-consuming. The list of applicants empowered to propose the termination of stay is wider, but it does not consist of third persons such as any other person or authority empowered to request the opening of secondary insolvency proceedings, for instance, as stipulated in Article 29 of the EIR. I think that in the case of (private) individual insolvency proceedings there may be a need for that option as well. Another reason is that not all national laws of the Member States empower the court to terminate the stay of the liquidation at its own motion. Thus, Article 33 (2) of the EIR should be supplemented accordingly.

To facilitate efficient and effective administration of cross-border insolvency proceedings, I think that it is appropriate and reasonable to supplement the substantial requirements of petitions in national insolvency laws of Member States in the case of requesting a termination of a stay of liquidation in secondary insolvency proceedings. It would simplify and accelerate handling of these petitions by the court.

[622] Note: not the same domestic court, which opened the secondary insolvency proceedings at first place.

The scope of the stay provided for by Article 33 of the EIR may also raise a question, i.e. whether the stay may, generally or under specific circumstances, also operate in respect of third party rights *in rem*. I think that the Regulation must retain the same meaning within the different national systems. Therefore, it puts responsibility on the Member States through formulating, amending and supplementing their national laws accordingly and on participants in the insolvency proceedings through choosing appropriate measures to solve the problems through relevant insolvency proceedings chosen. I am inclined to the view that provisions formulating secondary insolvency proceedings in national laws of the Member States should be well-deliberated and in conformity with the Regulation to enable effective and efficient administration of the cross-border insolvency proceedings in EU.

4.1.3. The Necessity of Article 33 of the EIR

It is possible to identify two overall objectives in insolvency laws: the allocation of risk among participants in a market economy in a predictable, equitable and transparent manner; and protection and maximization value for the benefit of all interested parties and the economy in general.[623] Taking into account the amount of problems analysed in the previous sub-chapter it might seem that Article 33 of the EIR as a legal instrument and the *lex fori concursus secundarii* implemented simultaneously do not support these general aims. The following question may be raised: whether the coordination measure as laid down currently in Article 33 of the EIR about the stay may serve efficient and effective management of cross-border insolvency proceedings? According to Recital 20 of the EIR the main and secondary insolvency proceedings can contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The Virgós-Schmit Report states that the goal of Article 33 of the EIR is to establish the primacy of the main insolvency proceedings, but this provision equally takes into account the interests of the creditors in the secondary insolvency proceedings. I disagree with the last part of the statement, because the definition of "stay of liquidation" is widely interpreted based on the *lex fori concursus* leading to different outcomes, the procedure for a request of stay by the main liquidator in the courts is a time-consuming process and to put Article 33 of the EIR into operation additional securing measures are needed at the expense of the insolvency estate, thus reducing the distributions to the creditors.[624] Taking into account several requirements stipulated by the *lex fori concursus secundarii*, in evaluating interests of the participants involved in the parallel insolvency proceedings the court is usually not able to proceed that request within several working days or

[623] International Monetary Fund. Orderly and effective insolvency procedures: key issues. 1999, p 5–7.
[624] See also Torremans. *Op. cit.*, p 163–166.

a week; in most better cases the decision can takeup to one month. A similar judicial procedure has to be followed upon the continuation or renewal or termination of the stay of the process of liquidation. It all takes time, especially when appeals[625] against court decisions are allowed by the *lex fori concursus secundarii*. In addition, taking into account that Article 33 of the EIR actually regulates the internal relationship (coordination) in the insolvency estate (within the same debtor) between case-handlers (liquidators) responsible for the best result, I think that the overall cost of this judicial procedure is too high compared to the real outcome or benefit to the creditors. Hence, I argue that if Article 31 (2) of the EIR already establishes the obligation to cooperate between the liquidators and Article 31 (3) of the EIR grants the main liquidator an early opportunity to submit proposals on the liquidation or use of the assets in the secondary insolvency proceedings, then why is Article 33 of the EIR needed after all? In my opinion, the same result, i.e. a stay of certain activities or transactions in secondary insolvency proceedings, could be achieved in a more simplified procedure with fewer resources spent. If the main liquidator could send a letter of request to the secondary insolvency liquidator or combine it with a (creditors' general) meeting summoned by the liquidator in secondary insolvency proceedings and representatives of the creditors' stating appropriate necessary means and measures to protect creditors as a whole, the outcome would probably be less costly and time-consuming. As Israël states, a stay may give the time and opportunity to assess the situation of the entire cross-border estate as well as time to negotiate settlements which would allow "buying out" the creditors and freeing the assets for consolidation with the main estate.[626] Indeed, there may exist extraordinary situations where the liquidator in secondary insolvency proceedings cannot agree with all the proposals from the main liquidator (immediately), but this disagreement could be subject to judicial procedure, e.g. to be solved in a procedure involving the court within the meaning of Article 2 (d) of the EIR. The expenses of that latter procedure (state fee, court costs) should be the expenses of the liquidators and therefore covered by the liquidators themselves, not by the insolvency estate, because if the court is involved it means that the liquidators have breached the ultimate duty to cooperate as stipulated in Article 31 of the EIR. Whatever mean and measure of the stay of liquidation is agreed should be in the interests of the creditors as a whole, and allow carrying out a (global) restructuring if it is in the benefit of the creditors as a whole. Therefore, I think that if the implementation of Article 31 of the EIR would be sanctioned, for instance, by penalties which should be paid by the liquidators to the insolvency estate,[627] then Article 33 of the EIR might not be necessary.

---

[625] The Regulation is silent with regard to requests for reconsideration or an appeal against the (affirmative or negative) decision on a stay. National law should fill in this gap.

[626] Israël. *Op. cit.*, p 305.

[627] Thus avoiding competition between the Member States, because usually penalties should be paid to the state budget of the relevant Member State.

4.2. Closure of Secondary Insolvency Proceedings

4.2.1. Interaction of Article 34 of the EIR and *Lex Fori Concursus Secundarii*

The Regulation stipulates certain rules concerning the closure of secondary insolvency proceedings. The liquidator in main insolvency proceedings has the right by virtue of Article 34 (1) of the EIR to propose a comparable measure (avoiding winding-up) where the *lex fori concursus secundarii* allows for such measure to close the secondary insolvency proceedings. Moss and Smith state that this rule ensures that he has standing (*locus standi*) to make such an application, which he might otherwise not have under law governing the secondary insolvency proceedings.[628] Virgós and Garcimartín are of the opinion that although the secondary insolvency proceedings are winding-up proceedings,[629] it does not mean that they must necessarily result in winding-up,[630] because the parties involved may agree otherwise: a rescue plan, a composition or a comparable measure.[631] However, Herchen is of the opinion that Article 34 of the EIR is not directed at the so-called "asset deals", i.e. reorganization by means of a sale of the business enterprise to an acquiring party.[632] Conditions for and the effects of closure of the secondary insolvency proceedings, in particular by composition are determined by the *lex fori concursus secundarii*.[633] Yet, further questions arise, because several aspects are not sufficiently regulated either by the Regulation or national laws of the Member States.

The first question is to whom should the liquidator address his proposal in the main insolvency proceedings and what are the formal and substantial requirements for a proposal to close secondary insolvency proceedings made by

---

[628] Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.382, p 336.

[629] Note: defined in quite broad terms in Article 2 (c) of the EIR. This definition includes "one track" insolvency proceedings which may end by either realising the assets, composition or restructuring the debtor, such as Estonian *pankrotimenetlus* or German *Insolvenzverfahren* or Spanish *Concurso* (see Annex B of the EIR), provided that they are not pre-established as restructuring proceedings and that, in the event of no agreement is reached, they are automatically converted into winding-up proceedings.

[630] For instance in the case of English law, it is possible to "close" secondary proceedings commenced in England (i.e. winding-up by the court, creditors' voluntary liquidation with confirmation by the court, and bankruptcy) by various means without liquidation. The phrase "a rescue plan, a composition or a comparable measure" seems to fit a compromise or reorganization by means of a "scheme" (plan) under Part 26 of the Companies Act 2006. Such an exit would be recognized under Article 25 in other Member States as a composition approved by the court which opened the secondary proceedings. See: Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.386, p 337.

[631] Virgós. Garcimartín. *Op. cit.*, mn 327, p 176.

[632] This type of reorganization constitutes a winding-up for the purposes of insolvency law, at least for German law. Herchen in: Pannen. *Op. cit.*, Art 34, mn 3, p 489.

[633] Article 4 (2) (j) of the EIR.

the main liquidator? As the Regulation does not provide these rules, the rules should be stipulated in the *lex fori concursus secundarii*. In general, one cannot find specific provisions regulating that aspect in most national laws of the Member States, except in the Netherlands, where Article 172a of the Dutch Bankruptcy Act, has been introduced as a specific provision.[634] In principle, this provision only refers to the relevant provisions applicable to scheme of arrangement in the national insolvency law. I think that the proposal submitted by the main liquidator to close secondary insolvency proceedings should have specific requirements compared to these used for ordinary nation-wide proceedings. I am inclined to the view that this proposal should proceed in a simplified manner, because according to the Virgós-Schmit Report the right to initiative by the main liquidators demonstrates the principle that the secondary insolvency proceedings are subordinate to the main insolvency proceedings. The proposal should be addressed to the same court, within the meaning of Article 2 (d) of the EIR, which opened the secondary insolvency proceedings and supervises the case. It should consist of at least the following components: information on the debtor and main liquidator; information on the court which opened main insolvency proceedings under the EIR; the court judgement and effective date; the appropriate measure, grounds and reasons for the closure of the secondary insolvency proceedings; and information on whether other secondary insolvency proceedings in another EU Member State are opened. At the very least, the following documents should be enclosed to the main liquidator's proposal:

1) a court judgement on the opening of main insolvency proceedings and a certified copy of translation into the language of the relevant Member State;
2) a court judgement or other proof of the appointment of a liquidator in main insolvency proceedings and a certified copy of translation into the language of the relevant Member State;
3) documents certifying the appropriate measure, grounds and reasons for the closure of the secondary insolvency proceedings;
4) documents confirming payment of the fee and other court costs (if applicable).

I think that these documents reflect the minimum information necessary for the court to handle the proposal made by the main liquidator in the secondary insolvency proceedings. For instance, a court judgement on the opening of main insolvency proceedings might provide solid information about the debtor and its insolvency. To accelerate handling of the proposal and to avoid unnecessary further questions, the reasons for the closure of the secondary insolvency proceedings should be presented with the proposal. To facilitate efficient and effective administration of cross-border insolvency proceedings, I think that it is appropriate and reasonable to supplement the substantial requirements of petitions in national insolvency laws of Member States in the case of requesting

[634] Wessels (2006). *Op. cit.*, mn 10888 and 10889, p 491–492.

the closure of the liquidation in secondary insolvency proceedings. It would simplify and accelerate handling of these petitions by the court.

In addition, there may be the question of whether the court is bound to formal requirements (for instance, if the request should be digitally signed) stipulated in the *lex fori concursus secundarii* imposed on the request made or can the court drop these requirements? For instance, if the request has been sent to the court in another language than the official language of the Member State where the secondary insolvency proceedings were opened, will the request be denied on formal grounds? These questions are also left to be decided upon the *lex fori concursus secundarii*.

The second question is whether there is a fixed time-limit for the main liquidator to propose such measure as a rescue plan, composition or comparable measure to end secondary insolvency proceedings? The Regulation does not regulate that aspect, thus the *lex fori concursus secundarii* is applicable. However, the first aspect is that national laws of the Member States in this case usually stipulate the duties of the liquidator, who has been appointed under relevant law, e.g. in the case of ending secondary insolvency proceedings, the rights and duties of the liquidator in secondary insolvency proceedings appointed under the *lex fori concursus secundarii* and not the rights and duties of the main liquidator appointed under the *lex fori concursus universalis*. Thus, it can be said that this question may be not regulated under the national laws of Member States as well. The second aspect, in my view, lies with a need for extra provision with no legally fixed time-limit for such a proposal made by the main liquidator. As an example of current insolvency laws in the Member States, in general, a liquidator shall present the rescue plan for approval or the proposal for terminating the activities of the legal entity to the first general meeting of creditors in Estonia.[635] In Estonia, a proposal of composition may be filed until approval of a distribution proposal by the court.[636] In Sweden, if a lodging of proof procedure takes place in bankruptcy proceedings, the decision to end bankruptcy proceedings shall not be issued before the expiry of the period for lodging of proofs[637] and a composition proposal may be only dealt with if it is delivered to the court before the date when the public notice of the distribution proposal in the bankruptcy is included in the Official Gazette.[638] In the Netherlands, a proposed scheme of arrangement has to be lodged not less than eight days prior to the meeting for verification of claims.[639] Thus, there are various fixed time-limits for submission of a proposal stipulated by the national laws of the Member States. In Lithuania, the composition with the creditors may be concluded at any stage of the bankruptcy process until the court order to

[635] Section 129 subsection 3 of the EBA.
[636] Section 179 subsection 2 of the EBA.
[637] Chapter 12 section 1 of the SBA.
[638] Chapter 12 section 6 of the SBA.
[639] Section 139 subsection 1 of the DBA.

liquidate the enterprise by reason of bankruptcy becomes effective.[640] In Finland, the law stipulates the prerequisites for composition, but does not specify the time-limit for submission of the proposal.[641] On the one hand, it would seem justified that the main liquidator may submit his proposal in whatever stage of the secondary insolvency proceedings, because the secondary insolvency proceedings are aimed at assisting the main insolvency proceedings and Article 34 of the EIR does not contain limits, but on the other hand secondary insolvency proceedings also serve local interests as a protective measure. Taking into account the fact that usually claims of the creditors are lodged to all insolvency proceedings pending and the main liquidator should protect all the creditors' interests as a whole, it could be reasonable not to fix a time-limit for proposals made by the main liquidator to close the secondary insolvency proceedings. Therefore, I am inclined to the view that national laws of the Member States should be amended and supplemented in a way that the proposal made by the main liquidator would proceed in a more simplified procedure without setting fixed time-limits for submission of a proposal to close secondary insolvency proceedings. A related question is what can happen if there would be a fixed deadline and the main liquidator fails to meet that deadline to propose such a measure fixed by the national laws of the Member States. Would it be an appropriate measure to solve the situation by giving the main liquidator the right to appeal under the *lex fori concursus secundarii*? Probably not, because it would prolong the course of proceedings and increase the costs of administration, which could harm creditors' interests as a whole. Thus, it is probably reasonable not to fix time-limits for a proposal made by the liquidator in main insolvency proceedings to close secondary insolvency proceedings.

The third problem relates to the position of the debtor and possibly to other liquidators in other secondary insolvency proceedings (if applicable) in the case of the proposal for a rescue plan, a composition or a comparable measure made by the main liquidator. What are the powers of the debtor in the case of proposing a potential rescue plan or composition or a comparable measure in secondary insolvency proceedings? If the debtor has lost his powers as of the opening of the main insolvency proceedings, does the main liquidator have the capacity to represent the debtor in the secondary insolvency proceedings on that matter? How is the situation different if the debtor has not lost his powers? Can the debtor himself object to the proposal made by the main liquidator in the secondary insolvency proceedings if the debtor has still powers according to the *lex fori concursus secundarii*? No answers can be found to these questions in the Regulation. Answers to these questions should be found in the *lex fori concursus secundarii*. Under current legislation in force in the Member States on that topic, the situation may be turn out to be rather complex because, for

[640] Section 28 subsection 3 of the LEBA.
[641] Chapter 21 of the FBA.

instance, in Estonia, a composition is made in bankruptcy proceedings on the proposal of the debtor or the liquidator after the declaration of bankruptcy. It means several proposals with several different views can be made at the same time to the creditors in the secondary insolvency proceedings. Article 34 (1) of the EIR grants the main liquidator to propose appropriate measures for closure and at the same time national laws of the Member States may allow additional proposals, if they do not provide specific provisions to differentiate the situation in the case of cross-border insolvency proceedings. Thus, a conflict of laws may occur. In Estonia, a general meeting of creditors or the creditors' committee may even assign the liquidator (not specified whether main or secondary) with the duty to draft the composition proposal.[642] The creditors in secondary insolvency proceedings might not be aware of the fact that the main liquidator is about to make a proposal to close the secondary insolvency proceedings. Although Article 31 of the EIR stipulates the duty to cooperate and communicate between the liquidators, what is the appropriate position for other secondary liquidators in this situation? Can the liquidator appointed in the secondary insolvency proceedings object to the proposal made by the main liquidator in the secondary insolvency proceedings? It should probably not be allowed, but the outcome of the applicability of the EIR and national laws of the Member States simultaneously may lead to that result if national laws of the Member States have granted liquidators the right to vote on behalf of creditors. If both or several liquidators (on behalf of the debtor) have made a proposal, whose proposal shall prevail, if at all? Corno is of the opinion that if competing closing measures are proposed in secondary insolvency proceedings, assuming this is to be permissible according to the *lex fori concursus secundarii*,[643] the liquidator in the main proceedings may be required, together with other competent bodies, to approve the most convenient measure in accordance with the criteria set out by the *lex fori concursus secundarii*.[644] Corno does not explain who can require the main liquidator to approve the closing measure and why it should be the most convenient. Should all the proposals be voted on creditors' meeting (where creditors may overlap and liquidators act on behalf of the creditors upon Article 32 (3) of the EIR? What happens if creditors in the secondary insolvency proceedings reject the main liquidator's proposal? Virgós and Garcimartín have indicated that such behaviour would be inconsistent with the aims of the secondary insolvency proceedings and contrary to the requirements of good faith.[645] Corno states that where the benefit of such closing measure is greater than the one resulting from the debtor's asset liquidation,

[642] Section 178 subsection 2 of the EBA.
[643] Article 125 of Italian Insolvency Act entitles one or more creditors or a third party to propose a composition (i.e. *concordato fallimentare*).
[644] Corno. Regulation (EC) n. 1346/2000 Rules on Closure and Measures Closing Insolvency Proceedings: A Commentary. International Insolvency Law Review, 2/2011, p 154–155.
[645] Virgós. Garcimartín. *Op. cit.*, mn 454, p 240.

such refusal shall be irrelevant, when it is made against good faith.[646] Herchen is of the opinion that the practical significance of Article 34 of the EIR lies in its facilitation of an inter-proceeding reorganization of the debtor enterprise through coordinated reorganization plans made on the initiative of the main liquidator.[647] Taking into account all the potential obstacles and possibility that according to Article 31 of the EIR only liquidators are duty bound to cooperate and communicate information to each other (which leaves out the debtor, the creditors and third parties), I am inclined to the view that a proposal made by the liquidator in main insolvency proceedings should be automatically legally binding in secondary insolvency proceedings. Herchen is of the opinion as to whether the proposal of an insolvency plan made by the liquidator in the main insolvency proceedings is binding, is determined solely pursuant to the *lex fori concursus secundarii*.[648] In that case, to prevent potential problems in cooperation and conflicts of laws I think that national laws of the Member States should be amended in such way that the proposal made by liquidator in the main insolvency proceedings would be legally binding, because it would facilitate efficient and effective administration of cross-border insolvency proceedings. Article 34 of the EIR could be amended accordingly as well.

The fourth problem relates to the consent of the liquidator in the main insolvency proceedings which is necessary before the closure of secondary insolvency proceedings becomes final, unless the financial interests of the creditors in the main insolvency proceedings are not affected by the proposed measure.[649] De Boer and Wessels state that this requirement for consent confirms the dominance of main insolvency proceedings over secondary insolvency proceedings.[650] What does it exactly mean that the closure of the secondary insolvency proceedings shall not become final without the consent of the liquidator in the main insolvency proceedings? Koulu is of the opinion that the consent from the main liquidator is not prerequisite to conclude the composition in the insolvency proceedings in Finland.[651] Yet, if the rescue plan or composition is subject to confirmation, authorisation or approval by the court in accordance with the *lex fori concursus secundarii*, the judge must act accordingly. Does the phrase "shall not become final" mean that court of the *lex fori concursus secundarii* is not empowered to approve or confirm the decision on rescue plan or composition voted in favour by the creditors in the secondary insolvency proceedings upon the *lex fori concursus secundarii* without the "exclusive" consent of the main liquidator? The phrase might indicate that the court should wait for consent from the main liquidator. If the court has

[646] Corno. *Op. cit.*, p 154.
[647] See Recital 20 of the EIR; Herchen in: Pannen. *Op. cit.*, Art 34, mn 4, p 489.
[648] Herchen in: Pannen. *Op. cit.*, Art 34, mn 18, p 492.
[649] Article 34 (1) first part of the second sentence.
[650] de Boer. Wessels. *Op. cit.*, p 195.
[651] Koulu in: Koulu. Havansi. Korkea-Aho. Lindfors. Niemi. Insolvenssioikeus. WSOYpro Helsinki, 2009, s 1150.

confirmed the decision under the *lex fori concursus secundarii*, does it mean that this confirmation or approval is still pending or considered legally ineffective because of not asking consent from the main liquidator even if the *lex fori concursus secundarii* does not provide such provisions? Corno submits that in order to express its consent, the main liquidator needs to exercise control and make its comments on the proposal made by other entitled parties.[652] Koulu submits that in Finland, the main liquidator with "his" claims could be "attached" to the secondary insolvency proceedings in order to close the secondary insolvency proceedings with comparable measure.[653] Herchen is of the opinion that consent must be sought in respect of both the plan proposed by the party entitled to make a proposal pursuant to the *lex fori concursus secundarii*, as well as the plan proposed by the liquidator in the main insolvency proceedings himself, although the latter one is generally a mere formality.[654] Herchen states that if the consent is withheld, the insolvency court in Germany is not entitled to approve the plan unless it is a situation in which the court is allowed, as an exception, to substitute its consent.[655] In case of no consent with the main liquidator (which means that at least there has been communication with him) the closure of the secondary insolvency proceedings may become final if the financial interests of the creditors in the main insolvency proceedings are not affected by the measure proposed.[656] I wonder whether there exist any situations where creditors in the main insolvency proceedings are not actually affected by ending measures other than liquidation in the secondary insolvency proceedings, because the existence of the principle "one debtor with one unified insolvency estate, which should satisfy all the creditors' claims" shows that the financial interests of all creditors are influenced.[657] In particular, if creditors' claims will be lodged in all insolvency proceedings pending in several Member States. Virgós and Garcimartín advocate that it must be taken into account that a measure of this type of closure is normally associated with a restructuring of the debt.[658] However, the Virgós-Schmit Report indicates that the concept of financial interests is more restrictive than that of the interests of the creditors in the main insolvency proceedings.[659] The Regulation does not provide any criteria how to assess the financial interests. Several authors have advocated a narrow interpretation of the phrase "financial interests".[660] The Virgós-Schmit Report states that the financial interests are estimated by evaluating the effects which the rescue plan or the composition has

[652] Corno. *Op. cit.*, p 153.
[653] Koulu in: Koulu. Havansi. Korkea-Aho. Lindfors. Niemi. *Op. cit.*, s 1150.
[654] Herchen in: Pannen. *Op. cit.*, Art 34, mn 25–26, p 494.
[655] Herchen in: Pannen. *Op. cit.*, Art 34, mn 30, p 494.
[656] Article 34 (1) second part of the second sentence.
[657] For possible cases of non-influence of the creditors see Article 17 (2) of the EIR.
[658] Virgós. Garcimartín. *Op. cit.*, mn 453, p 239.
[659] Virgós-Schmit Report mn 249.
[660] See: Pannen. *Op. cit.*, Art 34, mn 35, p 495; Wessels (2006). *Op. cit.*, mn 10886, p 491.

on the dividend to be paid to the creditors in the main insolvency proceedings. If those creditors could not reasonably have expected to receive more, after the transfer of any surplus of the assets remaining in the secondary insolvency proceedings (Article 35 of the EIR), in the absence of a rescue plan or a composition, their interests are not thereby affected.[661] Virgós and Garcimartín are of the opinion that the dividends receivable by the creditors in the main insolvency proceedings, if the composition or rescue plan is approved, must be compared with the hypothetical dividends they would receive in the absence of such measure. Considering the constantly changing various costs and expenses in the parallel insolvency proceedings to be paid before the distribution of dividends to any creditor, I doubt how anyone can predict the outcome of the rescue plan or composition before it has even been confirmed by the court and to foresee the real outcome at the end to evaluate the hypothetical dividend paid to the creditors in the main insolvency proceedings (especially when main insolvency proceedings last longer than secondary insolvency proceedings). Therefore, I submit that the concept of financial interests of the creditors in the main insolvency proceedings by predicting the future does not lead to a better result in the end, because there is lack of sufficient information. Another related question to this topic is how the court will be informed of such financial interests affecting creditors in the first place. The Regulation does not provide for cross-border communication between courts in different Member States. Wessels is of the opinion that the information before the court will arise from the secondary insolvency liquidator's duty to inform the court (if and insofar as this duty exists in the *lex fori concursus secundarii*).[662] I agree. However, what information can be received from the secondary insolvency liquidator, who has a weaker position and probably protects only local interests? Wessels states that the information from the secondary insolvency liquidator will consist of any data the secondary insolvency liquidator has collected as a result of his duty in relation to cross-border communication and cooperation.[663] Indeed, but is that enough to evaluate the financial interests of the creditors in the main insolvency proceedings? Probably it is not. Therefore, I submit that the court should hear the main and secondary insolvency liquidator before closing the secondary insolvency proceedings. A provision of this kind would have to be included in the Regulation.

To summarize, some conclusions are presented below. The Regulation stipulates certain rules concerning the closure of secondary insolvency proceedings in Article 34 of the EIR. I think that a proposal submitted by the main liquidator to close secondary insolvency proceedings should have specific requirements compared to these used for ordinary nation-wide proceedings. I am inclined to the view that this proposal should proceed in a simplified

[661] Virgós-Schmit Report mn 249.
[662] Wessels (2006). *Op. cit.*, mn 10886, p 491.
[663] Wessels (2006). *Op. cit.*, mn 10886, p 491.

manner, because the right to initiative by the main liquidators demonstrates the principle that the secondary insolvency proceedings are subordinate to the main insolvency proceedings. The proposal should be addressed to the same court, within the meaning of Article 2 (d) of the EIR, which opened the secondary insolvency proceedings and supervises the case. To accelerate handling of the proposal and to avoid unnecessary further questions the reasons for closure of the secondary insolvency proceedings should be presented with the proposal.

To facilitate efficient and effective administration of cross-border insolvency proceedings, I think that it is appropriate and reasonable to supplement the substantial requirements of petitions in national insolvency laws of Member States in the case of requesting the closure of the liquidation in secondary insolvency proceedings. I am inclined to the view that national laws of the Member States should be amended and supplemented in a way that the proposal made by the main liquidator would proceed in a more simplified procedure without setting fixed time-limits for submission of a proposal to close secondary insolvency proceedings.

To prevent potential problems in cooperation and conflicts of laws I think that national laws of the Member States should be amended in such way that the proposal made by liquidator in the main insolvency proceedings to close secondary insolvency proceedings would be legally binding, because it would facilitate efficient and effective administration of cross-border insolvency proceedings.

Considering the constantly changing various costs and expenses in the parallel insolvency proceedings to be paid before the distribution of dividends to any creditor, I doubt how anyone can predict the outcome of the rescue plan or composition before it has even been confirmed by the court and to foresee the real outcome at the end to evaluate the hypothetical dividend paid to the creditors in the main insolvency proceedings (especially when main insolvency proceedings last longer than secondary insolvency proceedings). Therefore, I submit that the concept of financial interests of the creditors in the main insolvency proceedings by predicting the future does not lead to a better result in the end, because there is lack of sufficient information. I submit that the court should hear the main and secondary insolvency liquidator before closing the secondary insolvency proceedings. A provision of this kind would have to be included in the Regulation.

4.2.2. Costs and Expenses

Before making distributions to the creditors from the (local) insolvency estate and before closure of the secondary insolvency proceedings, it is necessary to deal with costs and expenses of the proceedings. Before the appointment of the liquidator to the certain insolvency proceedings, the liquidator usually already

predicts fees[664] paid to him – expenses potentially incurred in dealing with the insolvency estate – and requires some certainty for dealing with estate liabilities, such as contractual liabilities arising during the administration of insolvency proceedings. Appropriate accounting on income and costs during insolvency proceedings is needed as well. In general, pre-insolvency costs and expenses cannot be funded in insolvency proceedings.[665] In the case of cross-border insolvency proceedings, the costs and expenses of the insolvency proceedings are usually higher, because of the duplicated activities in several jurisdictions by the participants involved in the several proceedings over the same insolvency estate.

The fundamental problem related to the costs and expenses of the secondary insolvency proceedings is that these are not actually transparent and predictable for participants involved. The secondary insolvency liquidator(s) and creditors in these proceedings may not be able to affect the amount of costs and expenses in the case of parallel insolvency proceedings pending in several Member States, because the relevant provisions in the national laws of the Member States vary. For instance, in Lithuania, the fee payable to the liquidator and procedure of payment is established in the contract concluded between the liquidator appointed by the court and insolvent enterprise represented by the head of creditors' meeting.[666] In contrast, in England the remuneration is determined by reference to the time spent by the liquidator, or, more rarely, as a percentage of the value of the debtor's assets. In Estonia and Latvia, the latter approach is stipulated in the insolvency laws. This leads to the question whether this system of costs and expenses, prescribed by the EIR which refers[667] to applicable national laws of the Member States, is justified? McBryde and Flessner correctly submit that it is usual for the liquidator to be paid before creditors in the insolvency proceedings. They add that otherwise it would be difficult to find anyone to act as the liquidator. In most European legal systems, while the judicial system may be a charge for the taxpayer, the costs of the administration of the insolvency estate are not paid out of public funds.[668] The debtor's assets have to meet the costs of the insolvency proceedings. However, there are also exceptions, such as in Estonia, where the court may order to pay the fee and expenses of the interim trustee (*ajutine haldur*) from state funds.[669]

---

[664] For several examples of the fees in several Member States, see: Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Affairs. Harmonisation of Insolvency Law at EU Level, 2010, Annex 2.

[665] Costs and expenses arisen before the opening of insolvency proceedings are usually considered as claims against the insolvency estate.

[666] Section 11 subsection 5 of the LEBA.

[667] Article 4 (2) (l) of the EIR.

[668] McBryde/Flessner in: McBryde, Flessner, Kortmann. (eds.) Principles of European Insolvency Law. Kluwer Legal Publishers 2003, p 43.

[669] The amount of the fee and the expenses of an interim trustee reimbursed from state funds shall not exceed 397 euros (including the taxes prescribed by law, except social tax). See Section 23 subsection 4 of the EBA.

Thus, there is also a tendency to fund liquidators' activities from state funds, mainly because the state is interested in the reason or main cause of the insolvency as such, so that it would be possible to make relevant changes in legislation for the future.

In the case of cross-border insolvency proceedings, the Member States have chosen the rule laid down in Article 4 (2) of the EIR, which contains a non-exhaustive list of questions that are governed by the *lex fori concursus secundarii*, including the question who is the one to bear the costs and expenses incurred in the insolvency proceedings.[670] The first question is what exactly should be considered costs and expenses of secondary insolvency proceedings and why did the Member States during the deliberations of enacting the Regulation (or even the 1995 Convention on Insolvency Proceedings) vote in favour of such an important rule on costs and expenses to be determined by the *lex fori concursus*? There are no interpretative guidelines such as Recitals found in the Regulation. The Virgós-Schmit Report is also silent on these questions. In the 1995 Convention on Insolvency Proceedings only the word "costs" has been used.[671] Similarly, Virgós and Garcimartín refer to the term "costs" of the proceedings, leaving out the "expenses".[672] None of these authors describe what is to be understood as "costs" and "expenses", let alone in secondary insolvency proceedings. I think that the content of these terms have been left to be interpreted only by the national laws of the Member States, which may lead to distinctive solutions. For instance, should the costs and expenses to close a branch office during insolvency proceedings be covered by the secondary or in main insolvency proceedings? In the case of *Rapla Invest AB* (a Swedish company as the debtor) having a branch office (without separate legal capacity) in Estonia, the costs and expenses of its closure were included into the secondary insolvency proceedings,[673] but these related to the same debtor. However, a better solution probably would have been to include these costs and expenses in the main insolvency proceedings because the Swedish company was responsible for economic activities in Estonia,[674] including whether to establish a branch office in Estonia or not. Thus, there may be situations where according to a purely legal point of view one solution is correct, but taking into account the essence of the matter, a different solution may be more just. However, this is the case probably only in the occasions when the main

[670] Article 4 (2) (l) of the EIR.
[671] Article 4 (2) of the 1995 Convention on Insolvency Proceedings.
[672] Virgós. Garcimartín. *Op. cit.*, mn 121, p 80.
[673] Judgment of the Harju County Court in Tallinn, dated 30 September 2009, no. 2-05-530 –termination of bankruptcy proceedings, approval of final report, determination of bankruptcy trustee's fee, deposit of documents and release of bankruptcy trustee from the duties in the matter of *Rapla Invest AB (bankrupt)*.
[674] See also Section 384 subsection 2 of the Estonian Commercial Code. Estonian Commercial Code (in Estonian: *äriseadustik*), the Parliament (Riigikogu), 15.02.1995, RT 1995, 26, 355 ... RT I, 31.12.2010, 19. In force since 01.09.1995.

liquidator has not lodged all his claims in the secondary insolvency proceedings. I think that the question of costs and expenses is one of the crucial topics ensuring efficient and effective administration of cross-border insolvency proceedings. If the interpretation and implementation in the question of costs and expenses between the Member States differs to a large extent in principle, then this may be difficult to achieve. The outcome from the implementation of various laws of the Member States may be contradictory and not necessarily lead to cost-effective solutions. For instance, Article 21 of the EIR states that costs of the publication and registration provided for in Articles 21 and 22 of the EIR shall be regarded as costs and expenses incurred in the proceedings. The related question arises, in which proceedings – main, secondary or both? The Member States may require mandatory publication and registration[675] and also decide, for instance, that the main insolvency estate or any other appropriate person should cover these costs and expenses occurred in relation to the secondary insolvency proceedings.[676] There is no further guidance or restrictions provided in the Regulation. It is left to be regulated by the laws of the Member States. On the other hand, opposite situations may also exist considering the fact that the Regulation grants liquidators with extra powers and procedural capacity to be heard before the court, to exercise all his rights, to participate and to act on behalf of the creditors in other insolvency proceedings pending in another Member State. For example, in the *Daisytek* case the English main liquidators in main insolvency proceedings appealed against the French court decision to open main insolvency proceedings in France. The liquidators appointed in France were interpreted as defendants and secondary insolvency liquidators in that court proceeding. Eventually, they were forced to compensate the costs and expenses of the main insolvency liquidators.[677] One could ask whether that judicial result was justified. Probably not, but it was decided by the court empowered to do so under relevant law, i.e. the *lex fori concursus*. Thus, there may be situations where the intervention of the main liquidator in the secondary insolvency proceedings, the costs and expenses of the secondary insolvency proceedings may be higher than expected or predicted.

The next question is who should bear the costs and expenses incurred in the secondary insolvency proceedings? In German legal literature the following cases are undisputed so far: the insolvency estate of the secondary insolvency proceedings is solely liable for insolvency-estate liabilities established in opening proceedings prior to the secondary insolvency proceedings or after the opening of secondary insolvency proceedings.[678] If insolvency estate liabilities are established by the liquidator in the main insolvency proceedings after the

[675] Article 21(2) and Article 22(2) of the EIR.
[676] For instance in Sweden, the government may issue separate regulations about the notice of publication and registration with relevant fees to be paid. See also liquidators' duties on publication and registration in Section 66 of the Latvian Insolvency Act.
[677] Koulu. *Op. cit.*, s 122.
[678] Paulus. *Op. cit.*, Art 28 mn 5–7, S 245.

opening of secondary insolvency proceedings, the insolvency estate of the secondary insolvency proceedings is not liable.[679] Thus, in Germany, the decisive point is the time when the request to open secondary insolvency proceedings has been accepted by the court and secondary insolvency proceedings opened. The same applies to the costs of proceedings: for the costs of the secondary insolvency proceedings, its insolvency estate alone is liable. If costs are incurred by the main insolvency proceedings subsequent to the opening of secondary insolvency proceedings, the part of the insolvency estate of the secondary insolvency proceedings that has been separated in the interim from the estate of the main insolvency proceedings is not liable for these costs.[680] However, some German authors find it problematic how to treat insolvency estate liabilities and the procedural costs of the main insolvency proceedings when such liabilities are established prior to the opening of secondary insolvency proceedings and before the separation of the insolvency estate of secondary insolvency proceedings from that of the main insolvency proceedings.[681] The favoured solution to this question by several authors is the formation of partial estates, especially a third (fictitious) partial estate.[682] However, the inter-relationship of main insolvency proceedings and secondary insolvency proceedings opened subsequently concerning the same debtor may cause uncertainty. As the CoCo Guidelines provide certain obligations incurred or certain costs or fees in the main insolvency proceedings, it may relate to the assets or the interests of the secondary insolvency proceedings and its creditors.[683] Thus, it seems to me that in determining who should cover the costs and expenses of the proceedings, not only the time of the request made to open (and opening by judgement of the court) is a decisive criterion, but also the timing of appointed person's (trans) actions, which influence a certain insolvency estate (main and/or secondary) and interests of creditors (main and/or secondary) should be taken into account. For instance, if the main insolvency liquidator exercises his powers to remove assets from another Member State according to Article 18 of the EIR before the opening of secondary insolvency proceedings, in his actions he must take into account the

[679] Ibid.

[680] Herchen in: Pannen. *Op. cit.*, Art 27 mn 51, p 414.

[681] cf. Beck. Verwertungsfragen im Verhältnis von Haupt- und Sekundärinsolvenzverfahren nach der EuInsVO, NZI 2007, S 1, 2 et seq., in: Pannen. *Op. cit.*, Art 27 mn 52, p 414.

[682] Several authors are in favour of the (fictitious) third estate, which comprises the debtor's worldwide assets. Next to this is the insolvency estate of the main insolvency proceedings after the opening of secondary insolvency proceedings and the insolvency estate of the secondary proceedings. See: Duursma-Kepplinger in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 28 mn 57 S 478; Reinhart. Sanierungsverfahren im internationalen Insolvenzrecht, 1995, p 295 et seq.; similar: Ringstmeier/Hohmann. Masseverbindlichkeiten als Prüfstein des internationalen Insolvenzrechts, NZI 2004, S 354 et seq.; Paulus. *Op. cit.*, Art 28 mn 5–7, S 245; Lüke. Das europäische internationale Insolvenzrecht, ZZP 111, 1998, S 275, 306; in: Pannen. *Op. cit.*, Art 27 mn 53, p 415.

[683] Wessels. Virgós. *Op. cit.*, mn 80, p 57.

fact that he is acting on behalf of the whole (EU-wide) insolvency estate and all creditors. One debtor with one unified insolvency estate is the general approach to follow. However, Guideline 11.2 of the CoCo Guidelines[684] provides that obligations and fees incurred by the liquidator in the main insolvency proceedings prior to the opening of any secondary insolvency proceedings but concerning assets to be included in the insolvency estate in principle will be funded by the insolvency estate corresponding to the secondary insolvency proceedings. Taking into account the complexity in determining what assets should be included in the estate of the secondary insolvency proceedings, I doubt whether it is possible to make such division within the assets. If the main liquidator already knows that there is a strong probability based on the creditor's request to open secondary insolvency proceedings, by which he automatically loses part of his powers and certain amount of assets to secondary the liquidator, he might be tempted to burden the secondary insolvency estate with extra financial obligations (and fees), especially if he is not likely to be appointed as the secondary insolvency liquidator. Thus, I am inclined to the view that Guideline 11.2 of the CoCo Guidelines does not take into account various applicants and potential reasons to open the secondary insolvency proceedings. It seems unjustified to apply that guideline in all situations. Indeed, the CoCo Guidelines stress that Guideline 11.2 is expressed as a principle and liquidators may agree another division based on the availability of assets in a certain estate and the interests of creditors concerned.[685] However, the latter means that parallel insolvency proceedings are opened, liquidators are appointed and agreement between them is concluded. If, for instance, the judgement to open secondary insolvency proceedings is annulled, who should cover costs and expenses in that situation? *De facto* insolvency of the debtor exists, because the main insolvency proceedings are opened prior to the secondary insolvency proceedings, but because of some (procedural) reasons existing in the *lex fori concursus secundarii* the judgement to open secondary insolvency proceedings is annulled. Indeed, the costs and expenses are determined by the *lex fori concursus secundarii*, although the outcome may not always be righteous and justified. Furthermore, who should cover the costs and expenses if there are insufficient assets in the secondary insolvency proceedings caused by the sale contract of the debtor's enterprise and foreign establishments (where secondary insolvency proceedings are pending), which is concluded by the main liquidator? Most probably the Member States have not regulated this situation in their national laws, which in practice may cause extra burden for the courts (at least in civil law systems) to find a solution. Who is to bear costs and expenses if the main insolvency liquidator has agreed with the creditors in the secondary insolvency proceedings to close the secondary insolvency proceedings based on a mutual agreement (the promise that creditors will serve

[684] Wessels. Virgós. *Op. cit.*, p 11.
[685] Wessels. Virgós. *Op. cit.*, mn 80, p 57.

better ranking in the main insolvency proceedings)? Some ordinary nation-wide guiding provisions are probably laid down in the *lex fori concursus secundarii*, but these provisions are generally addressed to the secondary liquidator. However, the application to close the secondary insolvency proceedings was initially requested by the main liquidator and done to serve his (creditors') interests. Herchen is of the opinion that even though there is a territorial restriction of the assets of the secondary insolvency proceedings, the liabilities linked to it are universal in nature.[686] I agree, because the division of the insolvency estate caused by the opening of secondary insolvency proceedings may lead to an insufficiency of the insolvency estate in the main insolvency proceedings as well. Indeed, the manner in which insufficiency of assets in the main insolvency proceedings is dealt with is determined by the *lex fori concursus universalis*.[687] However, Herchen correctly states that when examining whether the procedural costs can be covered, the liquidator in main insolvency proceedings is not obliged to take into account the possibility that the main insolvency estate may be diminished by the insolvency estate of subsequent secondary insolvency proceedings, the fact still remains that not only is there a latent risk that the insolvency estate will be diminished by the opening of secondary insolvency proceedings, but that the opening of such proceedings is even condoned by the system.[688] Some authors are of the opinion that the liabilities of the insolvency estate must be satisfied out of that insolvency estate in which the liquidator who established the liabilities had powers of disposition.[689] They think that any contrary view, for example, that the debtor's worldwide assets constitute a fund from which the insolvency-estate liabilities and the procedural costs of all insolvency proceedings opened pursuant to the Regulation are to be satisfied, thwarts an efficient handling of insolvency proceedings when there is a multiplicity of proceedings; the liquidator would hardly be in a position to decide whether the total insolvency estate was sufficient to cover additional insolvency estate liabilities, for example the liabilities related to a continuance of business operations.[690] Taking into account, for instance, the practical restructuring possibilities of the debtor by the main liquidator, which may include certain national or local interests in a restructuring plan with certain treatment of certain creditors, I think that liquidators themselves in the relevant insolvency proceedings are not able to

[686] Herchen in: Pannen. *Op. cit.*, Art 27 mn 6, p 401.
[687] Herchen in: Pannen. *Op. cit.*, Art 27 mn 60, p 417.
[688] Herchen in: Pannen. *Op. cit.*, Art 27 mn 56, p 416.
[689] Duursma-Kepplinger in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 27 mn 57 et seq. S 478 ff; Ringstmeier/Hohmann. Masseverbindlichkeiten als Prüfstein des internationalen Insolvenzrechts, NZI 2004, S 354 et seq., in: Pannen. *Op. cit.*, Art 27 mn 50, p 414.
[690] Duursma-Kepplinger in: Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 27 mn 57, S 478; Herchen. Das Übereinkommen über Insolvenzverfahren der Mitgliedstaaten der Europäischen Union vom 23.11.1995, 2000, S 51; in: Pannen. *Op. cit.*, Art 27 mn 50, p 414.

decide whether they have enough funds to cover the costs and expenses in their own insolvency proceedings at certain point of time, because the situation depends on plenty of unpredictable circumstances. It takes extra efforts to clarify the certain situation. For instance, realization of the debtor's assets, raising extra capital, taking a convertible loan or issuing options to employees in cross-border insolvency proceedings usually involves dealing with complex matters in tax law as well.[691] To exercise the liquidator's duties in a proper manner, it is necessary to know what is cost-effective and the best solution for creditors, but the paradox is that to gain that goal, extra time and costs are needed to find the best solution as well. Herchen states that because of the recognition of the insolvency law effects of the main insolvency proceedings, the classification as insolvency estate liabilities or as procedural costs pursuant to the *lex fori concursus universalis* must also be recognised in the secondary insolvency proceedings. The liability of the insolvency estate of the secondary insolvency proceedings is affected by ranking the insolvency estate liabilities and the procedural costs established pursuant to the *lex fori concursus universalis* in the ranking system of the *lex fori secundarii*. The liabilities are to be allocated the same priority that would be allocated to insolvency-estate liabilities and to procedural costs in the secondary insolvency proceedings. Should the assets of the secondary insolvency proceedings be insufficient to satisfy all of the insolvency estate liabilities and all of the procedural costs, then satisfaction will be affected in equal shares. However, this too must be permitted by the *lex fori concursus secundarii*.[692] Consequently, I think that the question of costs and expenses in Article 4 (2) (l) of the Regulation relating to the laws of the Member States may not be an appropriate and sufficient rule to serve the ultimate goal of the Regulation which is the efficient and effective administration of cross-border insolvency proceedings, because this rule leads to uncertainty and unpredictability of costs and expenses in the parallel insolvency proceedings. This could also damage creditors' interests, because they do not know whether, when and to which insolvency proceeding to lodge their claims for satisfaction. As there have been very few comparative surveys regarding this question in the Member States, then the first step would be to benchmark what is stipulated and understood as "costs and expenses of the insolvency proceedings" in the Member States and the second step would be to find a common understanding between the Member States on the appropriate rules to enact within the Regulation in that aspect.

---

[691] For instance, problems related to the value added tax calculated on real estate sold during insolvency proceedings in Estonia. See: judgment of the Supreme Court of Estonia (Civil Chamber), dated 02 December 2010, no. 3-2-1-92-10 – Swedbank AS appeal against judgment by Tallinn Court of Appeal of 17 May 2010, no 2-08-83245 in the matter of the distribution proposal to be approved in *OÜ Deljuan Ehitus* bankruptcy proceedings.

[692] As for German law, see Section 209 of the GInsO. Herchen in: Pannen. *Op. cit.*, Art 27 mn 59, p 416.

To summarize, some conclusions are presented below. The fundamental problem related to the costs and expenses of the secondary insolvency proceedings is that these are not transparent and predictable for participants involved. The secondary insolvency liquidator(s) and creditors in these proceedings may not be able to affect the amount of costs and expenses in the case of parallel insolvency proceedings pending in several Member States, because the relevant provisions in the national laws of the Member States vary.

There are no interpretative guidelines such as Recitals found in the Regulation defining terms "costs" and "expenses". The Virgós-Schmit Report is also silent on these questions. I think that the content of these terms has been left to be interpreted only by the national laws of the Member States, which may lead to distinctive solutions.

I think that the question of costs and expenses is one of the crucial topics ensuring efficient and effective administration of cross-border insolvency proceedings. If the interpretation and implementation in the question of costs and expenses between the Member States differs to a large extent in principle, then this may be difficult to achieve. The outcome from implementation of various laws of the Member States may be contradictory and not necessarily lead to cost-effective solutions. There may be situations where by the intervention of the main liquidator in the secondary insolvency proceedings, the costs and expenses of the secondary insolvency proceedings may be higher than expected or predicted.

Taking into account the practical restructuring possibilities of the debtor by the main liquidator, which may include certain national or local interests in a restructuring plan with certain treatment of certain creditors, I think that liquidators themselves in the relevant insolvency proceedings are not able to decide whether they have enough funds to cover the costs and expenses in their own insolvency proceedings at certain point of time, because the situation depends on plenty of unpredictable circumstances. It takes extra efforts to clarify the certain situation. For instance, realization of the debtor's assets, raising extra capital, taking a convertible loan or issuing options to employees in cross-border insolvency proceedings usually involves dealing with complex matters in tax law as well.

To exercise the liquidator's duties in a proper manner, it is necessary to know what is cost-effective and the best solution for creditors, but the paradox is that to gain that goal, extra time and costs are needed to find the best solution as well. Consequently, I think that the question of costs and expenses in Article 4 (2) (l) of the Regulation relating to the laws of the Member States may not be an appropriate and sufficient rule to serve the ultimate goal of the Regulation which is the efficient and effective administration of cross-border insolvency proceedings, because this rule leads to uncertainty and unpredictability of costs and expenses in the parallel insolvency proceedings. This could also damage creditors' interests, because they do not know whether, when and to which insolvency proceeding to lodge their claims for satisfaction. As there have been

very few comparative surveys regarding this question in the Member States, then the first step would be to benchmark what is stipulated and understood as "costs and expenses of the insolvency proceedings" in the Member States and the second step would be to find a common understanding between the Member States on the appropriate rules to enact within the Regulation in that aspect.

4.2.3. Rules Regarding Distribution

It is often said that the most fundamental principle of insolvency is the *pari passu* or *pro rata* payment of creditors – each proportionately out of the pool of the insolvent's estate *pro rata* according to his debt.[693] Virgós and Garcimartín state that the fundamental objective of Article 20 (2) of the EIR is to attempt to ensure a principle of equal treatment for all creditors.[694] In practice, even the most cursory examination of insolvency shows that the *pari passu* rule is nowhere honoured.[695] Virgós and Garcimartín submit that full equality is impossible and the aim of Article 20 of the EIR is the implementation of the principle of equality as far as this is compatible with basic diversity.[696] According to Recital 21 of the EIR, the distribution of the proceeds must be coordinated in order to ensure an equal treatment of the creditors. The Virgós-Schmit Report states that the aim of Article 20 of the EIR is to guarantee the equal treatment of all the creditors of a single debtor.[697] Wessels states that this provision in combination with Articles 32, 35 and 39 of the EIR provides for the equal treatment of creditors (*par conditio creditorum*).[698] Virgós and Garcimartín submit that objective "equality" must serve as a guide to interpretation, i.e. to establish an appropriate order of calculation for the purposes of maximising overall value and require a common term of comparison.[699] They think that it is justifiable to take the scheme of distribution of the main insolvency proceedings as the parameter for calculating this equal treatment.[700] Article 35 of the EIR indicates, although indirectly, an order for liquidating and distributing dividends. Virgós and Garcimartín state that this provision presupposes that distribution will occur firstly in the secondary insolvency proceedings and afterwards in the main insolvency proceedings.[701]

The question is whether such synchronization in distribution between several pending insolvency proceedings is possible in every case, because Article 4 (2)

---

[693] Wood. Principles of International Insolvency. London Sweet & Maxwell, 1995, mn 1–14, p 10.
[694] Virgós. Garcimartín. *Op. cit.*, mn 466, p 245.
[695] Wood. *Op. cit.*, mn 1–14, p 10.
[696] Virgós. Garcimartín. *Op. cit.*, mn 466, p 245.
[697] Virgós-Schmit Report mn 171.
[698] Wessels (2004). *Op cit.*, p 139.
[699] Virgós. Garcimartín. *Op. cit.*, mn 466–467, p 245.
[700] Virgós. Garcimartín. *Op. cit.*, mn 467, p 246.
[701] Virgós. Garcimartín. *Op. cit.*, mn 460, p 243.

(g), (h) and (i) of the EIR refer to the national laws of the Member States, which may vary significantly. Taken logically, the normal course of activities in parallel insolvency proceedings differ, because one of the proceedings, e.g. main insolvency proceedings, has begun earlier than the secondary insolvency proceedings. The realisation of assets and litigation over admission of claims not verified in parallel insolvency proceedings influences the costs and expenses of such proceedings, and thus the timing of possible distribution. Indeed, the liquidators need to communicate intensively and co-ordinate their work done according to the *lex fori concursus* and the Regulation. Duplication of activities increases costs and expenses which affects the distribution in the parallel proceedings as a whole. For instance, in Estonia, national rules which the liquidator has to follow, stipulate that claims shall always be defended (verified) at a general meeting of creditors.[702] The liquidator of another insolvency proceeding may be present. In Estonia, the rights of security (rights *in rem*) shall be defended together with the claims which they secure.[703] In some Member States, such as the Netherlands, secured creditors and their rights *in rem* are not influenced by the insolvency proceedings at all. In Estonia, the time and place of a verification meeting shall be determined by the liquidator. Usually, the meeting shall be held not earlier than 1 (one) month and not later than 3 (three) months after the expiry of the term publicly announced to submit claims.[704] Thus, the liquidator in Estonia has the information about the claims submitted beforehand. The liquidator shall announce a verification meeting in the official publication *Ametlikud Teadaanded* at least 15 (fifteen) days in advance indicating the time and place for examination of the proofs of claim and objections.[705] In contrast, in the Netherlands, the supervisory judge has to determine within no more than 14 (fourteen) days after the date that the declaration of the bankruptcy has become final and binding the latest possible date for the submission of claims by the creditors and the date, hour and place of the verification meeting.[706] Thus, this should be decided by the judge already in the beginning of the insolvency proceedings. A verification meeting in Estonia shall be held regardless of the number of the participating creditors if the creditors were notified of the time and place of the meeting on time. The liquidator and the debtor are required to participate in the verification meeting. If the debtor is absent in Estonia, the meeting shall decide whether the defence of claims is possible. The absence of a creditor who filed a claim or an objection shall not hinder the hearing of the claim.[707] In the Netherlands, in practice, the verification meeting is not scheduled by the supervisory judge within 14 days after the opening judgment. Harmsen and Jitta state that the

[702] If necessary, several verification meetings may be held.
[703] Section 100 subsection 1 of the EBA.
[704] Section 100 subsection 2 of the EBA.
[705] Section 100 subsection 4 of the EBA.
[706] Section 108 of the DBA.
[707] Section 100 subsection 5 and 6 of the EBA.

reason for this is that a verification meeting is only useful in the event that the insolvency estate has so many proceeds that a (partial) payment can be made to the unsecured creditors. Since this is only the case in about 10–15% of all insolvency proceedings, the scheduling of a verification meeting is in most instances not needed. Secured creditors are not affected by the insolvency proceedings in the Netherlands, unless the court orders a general stay ("cooling-off period"). Although the practice differs substantially from the Dutch Bankruptcy Act, the normal course of events, as described by Harmsen and Jitta, is that the liquidator asks the supervisory judge to schedule a verification meeting as soon as the liquidator establishes that the insolvency estate contains so many dividends that a (partial) payment can be made to the unsecured creditors. Once the liquidator has requested the supervisory judge to set a date for this verification meeting, the supervisory judge will determine the latest possible date for the submission of the claims by the creditors as well as the date, hour and place for the verification meeting. A period at least 14 days must lapse between both dates. The liquidator in the Netherlands is under a statutory obligation to inform all known creditors of the aforementioned dates and also has to place advertisements in newspapers in order to inform the unknown creditors.[708] Therefore, in theory, a verification meeting has to take place in each insolvency proceeding. In practice, a verification meeting in the Netherlands is only held in the event that there are sufficient proceeds to pay out a certain percentage to the unsecured creditors. Although not inconsistent with the laws, the Dutch approach seems more reasonable and cost-effective in the case of secondary insolvency proceedings compared to the Estonian approach, where the verification meeting has to take place in any case.

The next problem, which relates to the possibility to synchronize the order of the distribution procedure in the parallel insolvency proceedings, is the different treatment of the distribution proposal (list) according to the national laws of the Member States. The question is whether it is possible to prepare one common distribution proposal (list) to facilitate the effective and efficient administration in cross-border insolvency proceedings? Although Article 31 of the EIR provides the duty to cooperate and communicate information between the liquidators, the detailed answer to this question is to be found in the national laws of the Member States.[709] As for distribution, in general, the liquidator appointed in Estonia is not entitled to submit a distribution proposal (list) prepared in detail[710] to the court before the last verification meeting.[711] It should

[708] Harmsen. Jitta. The Insolvency Laws of the Netherlands. Juris Publishing, Inc. 2006, p 127.

[709] Articles 28 and 4 (2) (i) of the EIR.

[710] The distribution proposal shall set out, for instance: the accepted claims, their rankings and the distribution ratios; information concerning the claims the acceptance of which is disputed in court, setting out the estimated distribution ratios taking into account the size and ranking of each creditor's claim according to the statement of claim; information concerning the costs and expenses of the insolvency proceedings and concerning deposits of money in

be submitted to the court and to the creditors' committee within 60 (sixty) days as of the last verification meeting.[712] However, if a claim secured by a pledge is accepted in proceedings, the liquidator shall not prepare the distribution proposal before the pledged object has been sold.[713] Depending on the pledged object and market conditions, it may take years. Thus, there may be a situation where the liquidator cannot prepare the distribution proposal for years. At the same time, it is possible that the liquidator in other insolvency proceedings is entitled to prepare the distribution proposal if the national law provides so. In Estonia, a liquidator shall publish a notice in the official publication *Ametlikud Teadaanded* setting out the information concerning the time and place for examining the distribution proposal and indicating that the debtor or a creditor may file objections with the court within 10 (ten) days after publication of the notice.[714] Thus, the court has to solve objections, which also takes time. In the Netherlands, once the claims of the creditors have been verified, the proceeds of the insolvency estate can be distributed among the creditors, according to their ranking. However, the provisions regarding the ranking of a claim are not to be found in the Dutch Bankruptcy Act, but rather in the Dutch Civil Code.[715] According to German insolvency law, the creditors are satisfied through advance distributions,[716] final distributions[717] and delayed distributions.[718] The distribution procedure is even more detailed in Germany. However, if different arrangements have been made in an insolvency plan, the aforementioned distribution provisions do not apply. If the continued distribution jeopardises the insolvency plan, the insolvency court is empowered to order the suspension of the distributions.[719] Satisfaction of the creditors' claims of the insolvency proceedings may be initiated only after the general verification meeting in Germany.[720] However, the dividends may be distributed among the creditors of the insolvency proceedings as soon as sufficient cash is available in the insolvency estate. Distributions shall be carried out by the liquidator. Before each distribution he shall obtain the consent of the creditor's committee, if

---

credit institutions; information concerning the proceeds of the sale of each pledged object; information concerning the assets which have been received for the insolvency estate and are subject to distribution; information concerning the unsold part of the insolvency estate and the assets which the debtor is to receive from other persons. See Section 143 subsection 1 of the EBA.

[711] However, under exeptional circumstances laid down in Section 144 of the EBA, it is also possible to submit a preliminary distribution proposal (list).

[712] Section 143 subsection 2 of the EBA.

[713] Section 143 subsection 4 of the EBA.

[714] Section 143 subsection 5 of the EBA.

[715] Section 136 of the DBA.

[716] Section 187 subsection 2 of the GInsO.

[717] Section 196 subsection 1 of the GInsO.

[718] Section 203 subsection 1of the GInsO.

[719] Section 233 of the GInsO.

[720] Section 187 subsection 1 of the GInsO.

appointed.[721] Before advance distributions are made to the creditors, the insolvency estate liabilities to be satisfied first should be either be paid or their satisfaction should be assured by the liquidator. The rights of separation and preferential treatment to be satisfied outside the distribution procedure should also be assured at the least. Beyond that, it is within the liquidator's good judgment whether he needs further liquid funds, for instance, to allow him to continue the business, and for this reason is currently unable to make advance distributions.[722] Yet, the final distribution shall require the consent of the insolvency court.[723] As soon as the final distribution has been carried out, the insolvency court shall decide on termination of the insolvency proceedings.[724] It follows that it is rather difficult to synchronize the order of the distribution procedure in the parallel insolvency proceedings, because there is different treatment of the distribution proposal (list) according to the national laws of the Member States. In addition, it seems to me that it is rather impossible to prepare one common distribution proposal (list) to facilitate the effective and efficient administration in cross-border insolvency proceedings. It is not clear whether the German supervisory judge may suspend the termination in order to comply with Article 35 of the EIR so that main insolvency proceedings are last to be terminated. A similar situation also prevails in Estonia. Under German law, the liquidator is liable for the accuracy of the distribution record. An incorrect distribution record may result in claims for damages against the liquidator.[725] Taking into account the various rules on distribution procedure in national laws of the Member States, I think it may be rather complex to synchronize the activities in parallel insolvency proceedings so that distribution will always occur firstly in the secondary insolvency proceedings. There are too many factors which influence the proceedings and it would be too demanding from participants to consider all of these at the same time. Therefore, I think that in order to facilitate the effective and efficient administration in cross-border insolvency proceedings further approximation of national laws is needed on that question. It would make sense for national legislators to simplify insolvency proceedings by establishing abbreviated or fast-track procedures for secondary insolvency proceedings.

In order to ensure the equal treatment of creditors Article 20 (2) of the EIR provides that a creditor who has, in the course of insolvency proceedings, obtained a payment on his claim, shall share in the distribution made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent payment. Wessels states that this rule

[721] Section 187 subsection 3 of the GInsO.
[722] Kieβner in: Braun. (ed.) Commentary on the German Insolvency Code. IDW-Verlag GmbH, Düsseldorf, 2006, mn 1536, p 374.
[723] Section 196 subsection 2 of the GInsO.
[724] Section 200 subsection 1 of the GInsO.
[725] Kieβner in: Braun. *Op.cit.,* mn 1549, p 376.

is commonly known as the "Hotchpot"– a rule originating from common law.[726] The Virgós-Schmit Report describes the basic methodology of equalization rules, which should be relatively simple. Yet, some problems in this system exist. I will explain these below.

The first rule in the Virgós-Schmit Report states that nobody may obtain more than 100% of his claims.[727] Indeed, it seems a very clear rule, but the question arises, which creditor's claim(s) should the liquidators take into account and in what amount when implementing the distribution procedure in parallel insolvency proceedings pending in several Member States? If main insolvency proceedings were opened for example in day 1 and secondary insolvency proceedings later, for instance, in day 61 and a creditor used his right (Article 32 of the EIR) to lodge his claim in the both insolvency proceedings, which amount varies because the relevant time of the opening of relevant insolvency proceedings also varies, then what is understood by "100% of his claims"? I will explain it based on a simple hypothetical example. A creditor has a claim which is based on monthly rental payments due originating from a rental agreement. Rent should be paid by the debtor to the creditor every month – 10 euro per month. As of the opening of main insolvency proceeding, the debtor owed to the creditor 100 euro (10 months' payment due) and as of the opening of secondary insolvency proceeding (61 days later), the debtor owed to the creditor 120 euro (+ 2 months). Another secondary insolvency proceeding was opened in day 73 (+1 month). A creditor calculated his claim (single claim from one rental contract) according to the *lex fori concursus* of the relevant proceedings opened, whether main or several secondary insolvency proceedings. Assume that calculation of the amount of the claim is correct based on the *lex fori concursus universalis* and *secundarii*. What is the fundamental calculation rule for liquidators to determine "100% of creditor's claim(s)" to which other distribution rules, as laid down in the Virgós-Schmit Report marginal note no 175, lean upon? Is 100% of the creditor's claim 100 euro, 120 euro or 130 euro?

The answer is in the following table:

Main insolvency proceeding pending in Member State 1	*Lex fori concursus universalis*	Opening of proceedings= day 1	100% claim = 100 euro
Secondary insolvency proceeding 1 pending in Member State 2	*Lex fori concursus secundarii 1*	Opening of proceedings= day 61	100% claim= 120 euro
Secondary insolvency proceeding 2 pending in Member State 3	*Lex fori concursus secundarii 2*	Opening of proceedings= day 73	100% claim = 130 euro

[726] Wessels (2006). *Op. cit.*, mn 10773, p 440.
[727] Virgós-Schmit Report, mn 175.

Thus, the *lex fori concursus* is applicable. The related question is whether the term "100% of creditors claim(s)" remains constant in practice? If the main liquidator, for instance, decides not to terminate the rental agreement and thus continues to fulfil it, then in the main insolvency proceedings the continuously arising debt which exceeds the submitted claim (100 euro) will probably be considered a liability of the insolvency estate. Therefore, the exceeding amount will be paid before the other creditors. At least, this is the case under insolvency law in Estonia,[728] Germany[729] and the Netherlands.[730] However, if one of the liquidators in the secondary insolvency proceedings decides to terminate the rental agreement (and according to the *lex fori concursus* he is entitled to do so) what is the "100% of creditor's claim" after that event? Does the amount of the claim change? Are damages suffered due to the early termination of the rental agreement in the insolvency proceedings included or excluded from that claim, or are they considered a new claim? Unfortunately, on that aspect there are no rules as to what should be understood as "100% of creditors claim" in the Virgós-Schmit Report. Upon laws of the Member States various interpretations are possible. To facilitate the efficient and effective administration of cross-border insolvency proceedings I think that "100% of creditor's claim" should be calculated once, i.e. as of opening of the main insolvency proceedings, because the debtor is *de facto* insolvent based on that court judgement.

As for the second rule laid down in the Virgós-Schmit Report, the total original amount of the claim, being 100% of its initial value, shall be taking into account, and not the remaining amount, because satisfaction obtained in other proceedings is not deducted.[731] The terms "total original amount" and "100% of its initial value" are vague terms, especially taking into account that these are interpreted according to the *lex fori concursus* of the different Member States in pending parallel insolvency proceedings. The problem is that the *lex fori concursus*[732] determines whether the aforementioned creditor shall share in the full amount of the distributions or whether the creditor may only participate in the distribution for the outstanding amount. Virgós and Garcimartín correctly state that the Regulation does not establish any rule whatsoever as to whether claims secured by a right *in rem* or through a set-off may be filed, when the guarantee or set-off does not cover the whole of value, for the original amount of the claim or for only the remaining part of the claim once the secured part has been deducted.[733] As Wessels states, in the Netherlands, Section 132 of the Dutch Bankruptcy Act will be applicable, thus creditors whose claims are secured by a mortgage or pledge or lien or who have a priority interest in an object and can prove that it is likely that a part of their claim will not be

[728] Section 46 and 51 of the EBA.
[729] Section 87 of the GInsO.
[730] Section 39 of the DBA.
[731] Virgós-Schmit Report mn 175.
[732] Article 4 (2) (i) of the EIR.
[733] Virgós. Garcimartín. *Op. cit.*, mn 468, p 246.

recovered for the sum admitted from the proceeds of the goods subject to the security interest, may require that the rights of an unsecured creditor are conferred on them for that part, while they retain priority to the extent of their security interest.[734] In Estonia, if a claim secured by a pledge is not satisfied in full out of the money received from the sale of the pledged object, the rest of the claim shall be satisfied together with the other unsecured claims. This, however, does not apply if a debtor has pledged the assets thereof in order to secure a debt of a third person.[735] Thus, there may be different solutions in various Member States, which influence the outcome of the distribution system for the creditors. The liquidators should be cooperative in order to avoid the satisfaction of the same claim twice.

The third rule in the Virgós-Schmit Report states that a claim is not taken into account in the distribution until such time as the creditors with the same ranking (or category) have obtained an equal percentage of satisfaction in these proceedings as that obtained by its holder in the first proceedings. The part "*in the first proceedings*" is misleading, especially when several secondary insolvency proceedings are opened. The interpretation is more complex, because of the differences available in laws of the Member States. For instance, creditors A and B may share the same ranking (or category) in the secondary insolvency proceedings, but be in a different ranking (or category) in the main insolvency proceedings or other secondary insolvency proceedings. The problem is that the similarity or difference of the ranking (or category) has been evaluated by the *lex fori concursus*. The *lex fori concursus universalis* or the *lex fori concursus secundarii* determine which creditors are compared with which creditors (Article 4 (2) (i) of the EIR). Also, the ranking or category of each claim is determined for each of the proceedings by the *lex fori concursus*. Thus, the outcome of interpretation may be different causing extra troubles in communication and coordination for the liquidators (and courts) in administering parallel insolvency proceedings. As there are no rules stating that the outcome of the interpretation in one insolvency proceeding should prevail over the interpretation in another insolvency proceeding, a conflict of laws may occur.

Nevertheless, according to the fourth rule in the Virgós-Schmit Report, for the calculation of the dividend only the percentage of satisfaction obtained in other proceedings, not the rank or category which the claim enjoyed in those other proceedings is taken into account.[736] The different ranking of the claims in the different proceedings means that the order of liquidation (i.e. the fact that one set of proceedings ends before the other) may affect the dividends finally received.[737] That is why Virgós and Garcimartín state that it is important for the

[734] Wessels (2006). *Op. cit.*, mn 10774, p 441.
[735] Section 153 subsection 4 of the EBA.
[736] Virgós-Schmit Report, mn 175.
[737] Rammeskow Bang-Pedersen in: Virgós. Garcimartín. *Op. cit.*, mn 468, p 247–248.

main insolvency proceedings to always act as the vertex for calculation (i.e. in the last instance), in such a way that the differences arising from the different order of closure of the territorial proceedings can, up to a point, be "compensated for" in the final distribution resulting from the main insolvency proceedings.[738]

As the distribution system may seem rather complex, the related question arises whether this system is justified. Moss and Smith state that the principle underlying Article 20 (2) of the EIR is familiar to lawyers in England set out in detail in the case *Cleaver vs. Delta American Reinsurance*.[739] Therefore, for English lawyers this system is known. Paulus is of the opinion that in implementing the distribution procedure, the liquidator is advised to proceed step-by-step for each ranking in case claims have been lodged and partially satisfied in another Member State:

1) The first step involves checking whether the creditor concerned is "of the same ranking or category";
2) If this is the case, then the second step involves determining whether the creditor has participated and obtained a dividend in another proceeding;
3) In the third step, the liquidator must determine the dividend in his own proceedings. The creditors of the same ranking who have already obtained a dividend are excluded from the dividend distribution procedure as long as the dividend to be distributed does not exceed the dividend distributed in the other proceedings.[740]

The complexity of the distribution system is also illustrated by Beck, who suggests that the liquidator should, within the classes of creditors of the same ranking, even form sub-classes according to the specific dividends already obtained, and should only take further claims into consideration once the dividends have attained the levels of the other claims with the same ranking.[741] Virgós and Garcimartín state that the calculation method applies both to winding-up and to restructuring proceedings, although in the latter case it seems appropriate for the composition or insolvency plan itself to deal with this question.[742] Wessels is of the opinion that the examples of calculation in the Virgós-Schmit Report are of a theoretical nature as Article 32 (2) of the EIR obliges the liquidators in the main and in any secondary insolvency proceedings to lodge in other proceedings claims which have already been lodged in proceedings for which they are appointed.[743] I agree, but before lodging the claims the liquidator should consider whether the lodgement is in the best interests of his creditors in his insolvency proceedings after all. For instance, if the dividends are almost paid out in the main insolvency proceedings, then the

[738] Virgós. Garcimartín. *Op. cit.*, mn 467, p 248.
[739] Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.296, p 313.
[740] Paulus. *Op. cit.*, Art 20, mn 11, p 212–213.
[741] Beck NZI 2007, 1, 6; cited in: Pannen. *Op. cit.*, Art 20, mn 32 p 356.
[742] Virgós. Garcimartín. *Op. cit.*, mn 468, p 246.
[743] Wessels (2006). *Op. cit.*, mn 10774, p 441.

lodgement of the claims by the secondary insolvency liquidator is not useful anymore. Another aspect to consider is that Article 20 (2) of the EIR does not require in order to be applicable that second proceedings be opened before the creditor receives the dividends of the first proceedings.[744] Duursma-Kepplinger advocates that the attempt made by Article 20 of the EIR to ensure an equal treatment of creditors is not quite perfect: creditors who have rightfully obtained a higher dividend in an insolvency proceeding are not obliged to transfer the difference to those creditors who have been forced to accept a lower dividend in another insolvency proceeding.[745] Riedemann explains that in the early stages of development of the EIR, some criticized the fact that proceeds from a dividend obtained in foreign insolvency proceedings were not to be paid over.[746] Others argue that the multiple lodgements sanctioned by Articles 32 and 39 of the Regulation make little sense if the advantages resulting from them are ultimately beneficial to the creditors as a whole but not to the creditor who took the initiative to make the lodgement.[747] However, Recital 21 of the EIR also provides that a creditor should be able to keep what he has received in the course of an insolvency proceeding. Beck correctly states that what must be taken into account here, however, is the fact that major creditors in particular are able to take advantage of their right to lodge their claims in every insolvency proceedings, but small creditors will hardly be in a position to afford the costs of foreign legal representation. What is clear is that on account of the different distribution procedures, separate distributions are made to the creditors of the secondary and those of the main insolvency proceedings.[748] It is debatable whether Article 20 (2) of the EIR is applicable to insolvency proceedings conducted in non-EU countries and whether dividends obtained in non-EU countries must also be taken into account in the equalization of dividends. Virgós and Garcimartín are of the opinion that Article 20 (2) of the EIR does not expressly limit its action to the Member States and it appears more logical to apply Article 20 (2) of the EIR to insolvency proceedings opened in non-EU countries.[749] Riedemann states that an equalization of the dividends obtained in a non-EU country could certainly be provided for through the respective *lex fori concursus* if legislators of the Member States have been notified on that aspect.[750] In addition, it is debatable whether distribution rules of the EIR are applicable only to these insolvency proceedings, which are listed in the Annexes of the EIR. Consequently, the equalization of dividends commands a thorough knowledge of the distribution rules of the EIR, the claims that have

[744] Virgós. Garcimartín. *Op. cit.*, mn 465, p 245.
[745] Duursma-Kepplinger in Duursma-Kepplinger. Duursma. Chalupsky. *Op. cit.*, Art 20, mn 3; in: Pannen. *Op. cit.*, Article 20, mn 34, p 357.
[746] Riedemann in: Pannen. *Op. cit.*, Article 20, mn 36, p 357.
[747] Kolmann. *Op. cit.*, S 355.
[748] Beck. NZI 2007, 1, 6; cited in: Pannen. *Op. cit.*, Article 20, mn 25, p 354.
[749] Virgós. Garcimartín. *Op. cit.*, mn 469, p 248.
[750] Riedemann in: Pannen. *Op. cit.*, Article 20, mn 36, p 357.

been lodged in the other proceedings, and the dividends already attained. Beck correctly states that how this is to take place is not defined in the Regulation.[751] I agree that the general duty to cooperate and communicate found in Article 31 of the EIR will certainly be applicable here.[752] Consequently, although Article 32 (1) of the EIR presupposes a corrective mechanism to prevent the multiple satisfactions of claims, I doubt whether this is accomplished through the system of equalization of dividends found in Article 20 (2) of the EIR. Thus, I think that there are times ahead of us where European Court of Human Rights will determine, for instance, that civil rights of creditors in filing, examination and distribution of proceeds under the Regulation in combination with the *lex fori concursus* of certain Member States will be affected or even found violated according to the European Convention on Human Rights and Fundamental Liberties (ECHR).[753] It is well established that a "claim" can constitute a "possession" within the meaning of Article 1 of Protocol No 1 ECHR if it is sufficiently established to be enforceable.[754] If civil rights of a creditor are actually at stake, such as in litigation concerning the validity of his claim, the guarantees of Article 6 of ECHR apply in full.[755]

To facilitate the effective and efficient administration of cross-border insolvency proceedings, it is crucial to find a solution to the currently existing situation regarding rules of distribution. Sometimes, it is necessary to look at historical sources to find possible solutions to complicated situations. Hence, I suggest the reviewers of the Regulation take a look at the Convention between Denmark, Finland, Iceland, Norway and Sweden regarding bankruptcy of 7 November 1933 (the Nordic Bankruptcy Convention).[756] The Convention only comprises 15 substantive articles altogether. Bogdan submits that there are almost no published court decisions concerning the interpretation or application

---

[751] Beck. NZI 2007, 1, 6; cited in: Pannen. *Op. cit.*, Article 20, mn 25, p 354.

[752] Ibid.

[753] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14. 04 November 1950. Online available: http://conventions.coe.int/treaty/en/treaties/html/005.htm.

[754] *Stran Greek Refineries and Stratis Andreadis vs. Greece*, judgment of 9 December 1994; *Immobiliare Saffi vs. Italy*, judgment of 28 July 1999; in: Kodek. The Impact of the European Convention on Human Rights and Fundamental Liberties on Insolvency Proceedings; in: Peter. Jeandin. Kilborn (eds.) The Challenges of Insolvency Law Reform in the 21st Century. Facilitating Investment and Recovery to Enhance Economic Growth. Schulthess Juristische Medien AG, Zürich Basel Genf, 2006 p 573. See also *Bíró vs. Hungary*, judgment of 18 July 2006 and *Hilti vs. Hungary*, judgment of 09 October 2007; in: Csizmazia. Deficiencies in the Hungarian Insolvency Act and Possible Remedies; in: Wessels. Omar. (ed.) The Intersection of Insolvency and Company Laws. INSOL Europe, 2009, p 20.

[755] Kodek. *Op. cit.*, p 583.

[756] See League of Nations Treaty Series, vol 155, pp 133–9 (1935). The Convention was amended in 1977 and 1982. Online available: http://untreaty.un.org/unts/1_60000/30/28/00059385.pdf; and http://untreaty.un.org/unts/60001_120000/22/9/00042440.pdf.

of the Convention or of the national statutory provisions that have been enacted for its implementation. This "silence" of the case law, far from indicating that the Convention is a dead letter, is evidence that it works smoothly and without legal difficulties.[757] For instance, the Nordic Bankruptcy Convention is based on the principle that general preferences and their ranking shall be determined by the law of the state in which the insolvency proceeding is opened. The application of the *lex fori concursus* follows from the main rule in Article 1, paragraph 2. Bodgan states that this means that all of the assets situated anywhere in the Nordic area can be treated as one single mass and can be distributed in accordance with the same rules. This of course makes the liquidator's task much simpler.[758] An exception is made, however, for general preferences for tax claims. Although such claims of a Nordic state are in principle enforceable in the other Nordic states (due to the special treaty on assistance in tax matters), the contracting states were not willing to go further and confer a general preferential status for tax claims in relation to assets situated outside the state asserting the claim in the 1930s. As Bogdan states, this means that, as far as general preferences for tax claims are concerned, the assets in each Nordic country have to be treated as a special sub-estate. As could be expected, this has resulted in rather complicated calculations.[759] In Article 7, paragraph 3 (as amended in 1982) the procedure to be followed is described as follows: "*If a tax claim enjoys a general preferential right under the law of the country by which it is imposed, it shall be paid with such priority from the assets situate in that country, but only after a portion of other claims enjoying general preferences has been deducted from these assets. The portion to be deducted is determined in such a way that it corresponds to the relation between the property in the country where the tax is imposed and the total assets of the estate.*" The meaning of this complex formula can be illustrated by means of the following fictitious example given by Bogdan:[760] assume that a domiciliary bankruptcy has been opened in Denmark and the total value of the assets is 200,000 – from which 50,000 represents assets situated in Iceland. The total amount of claims enjoying general preferences is 180,000, including an Icelandic tax claim of 100,000. Since one quarter of the estate consists of assets in Iceland, the sum of 20,000 (one-quarter of 180,000–100,000) will be deducted from the Icelandic assets before the rest of those assets (30,000) can be used to pay the privileged Icelandic tax claim. The unpaid reminder of the Icelandic tax claim (70,000) is treated as an ordinary claim against the whole estate.

[757] Bogdan. The Nordic Bankruptcy Convention in: Ziegel. Cantlie. (eds.) Current Developments in International and Comparative Corporate Insolvency Law, Clarendon Press, Oxford, 1994, p 704.
[758] Bogdan. *Op. cit.*, p 704.
[759] Ibid.
[760] Ibid.

Consequently, it seems to me that the overall distribution system in the Nordic Bankruptcy Convention is rather simple compared to the rules regarding distribution in force in combination with the Regulation, the *lex fori concursus universalis* and the *lex fori concursus secundarii* nowadays. According to the Nordic Bankruptcy Convention general preferences and their ranking are determined by the law of the state in which the insolvency proceedings are opened. This means that all of the assets situated anywhere in the Nordic area can be treated as one single mass and can be distributed in accordance with the same rules. Indeed, this makes the liquidator's task much simpler. It is noteworthy that in spite of its age, the Convention is fully compatible with principles of modern international bankruptcy law.[761] Therefore, I am inclined to the view that if the Nordic Bankruptcy Convention has worked smoothly so far, i.e. almost 80 years, it should definitely be considered a strong source of information and guidance when reviewing rules regarding distribution of the Regulation in the future to facilitate the efficient and effective administration of cross-border insolvency proceedings.

To summarize, some conclusions are presented below. According to Recital 21 of the EIR, the distribution of the proceeds must be coordinated in order to ensure an equal treatment of the creditors. Article 35 of the EIR presupposes that distribution will occur firstly in the secondary insolvency proceedings and afterwards in the main insolvency proceedings. In theory, a verification meeting has to take place in each insolvency proceedings if provided so by the *lex fori concursus*. In practice, a verification meeting in the Netherlands is only held in the event that there are sufficient proceeds to pay out a certain percentage to the unsecured creditors. Although not inconsistent with the laws, the Dutch approach seems more reasonable and cost-effective in the case of secondary insolvency proceedings compared to the Estonian approach, where the verification meeting has to take place in any case. Taking into account the various rules on distribution procedure in national laws of the Member States, I think that it may be rather complex to synchronize the activities in parallel insolvency proceedings so that distribution will always occur firstly in the secondary insolvency proceedings. There are too many factors which influence the proceedings and it would be too demanding from participants to consider all of these at the same time. Therefore, I think that in order to facilitate the effective and efficient administration in cross-border insolvency proceedings further approximation of national laws is needed on that question. It would make sense for national legislators to simplify insolvency proceedings by establishing abbreviated or fast-track procedures for secondary insolvency proceedings.

In order to ensure the equal treatment of creditors Article 20 (2) of the EIR provides that a creditor who has, in the course of insolvency proceedings, obtained a payment on his claim, shall share in the distribution made in other

[761] Bogdan. *Op. cit.*, p 706.

proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent payment. The Virgós-Schmit Report describes the basic methodology of equalization rules, which should be relatively simple, but some fundamental problems in this system exist. I think that "100% of creditor's claim" should be calculated once, i.e. as of opening of the main insolvency proceedings, because the debtor is *de facto* insolvent based on that court judgement. Although Article 32 (1) of the EIR presupposes a corrective mechanism to prevent the multiple satisfactions of claims, I doubt whether this is accomplished through the system of equalization of dividends found in Article 20 (2) of the EIR. I think that there are times ahead of us where European Court of Human Rights will determine, for instance, that civil rights of creditors in filing, examination and distribution of proceeds under the Regulation in combination with the *lex fori concursus* of certain Member States will be affected or even found violated according to the European Convention on Human Rights and Fundamental Liberties. To facilitate the effective and efficient administration of cross-border insolvency proceedings, it is crucial to find a solution to the currently existing situation regarding rules of distribution. I am inclined to the view that if the Nordic Bankruptcy Convention has worked smoothly so far, i.e. almost 80 years, it should definitely be considered a strong source of information and guidance when reviewing rules regarding distribution of the Regulation in the future to facilitate the efficient and effective administration of cross-border insolvency proceedings.

4.2.4. The Transfer of Remaining Assets

Article 35 of the EIR states that if by the liquidation of assets in the secondary insolvency proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main insolvency proceedings. In practice, there is no doubt that the limited pool of assets comprising the available estate in the secondary insolvency proceedings will in most cases be exhausted.[762] Moss and Smith are of the opinion that since the liquidator in the main insolvency proceedings has lodged in the secondary insolvency proceedings the claims of creditors in the main insolvency proceedings, there may not often be a surplus in the secondary insolvency proceedings to be passed over to the main insolvency proceedings. However, the law governing the secondary insolvency proceedings may be more restrictive as to the types and amounts of claims admissible in those proceedings and that may lead to a surplus.[763] Wessels states that Article 35 of the EIR also applies in the event when the main liquidator has not lodged his claims in the secondary

[762] Moss/Bayfield/Peters in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 5.135, p 118.
[763] Moss/Smith in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.388, p 338.

insolvency proceedings.[764] Virgós and Garcimartín state that Article 35 of the EIR is important for various reasons, regardless of how often it is applied in practice. The first reason is that it is one of the rules which reflect the primacy of the main insolvency proceedings within the model of mitigated universalism provided by the Regulation. The second reason is that it indicates an order for liquidating and distributing dividends.[765]

Although several authors indicate that Article 35 of the EIR deals with a rather theoretical situation, there may be problems which are also related to property and tax law to be solved during parallel insolvency proceedings. This aspect was probably not considered when the Regulation was drafted. The first question is whether the transfer of the remaining assets is possible, because in addition to monies, a surplus may also comprise other assets of the debtor.[766] Lüke is of the opinion that transfers of ownership between the various insolvency estates are not possible[767] if the seizure/attachment ensuing from the opening of insolvency proceedings does not change the legal status of the debtor entity with respect to its assets.[768] Legally possible, however, are in Herchen's view transfers of ownership (of surplus) where the opening of insolvency proceedings in effect clothes the debtor's assets with legal proprietary rights of their own, the insolvency estate itself acquiring legal capacity and thus becoming the legal entity with respect to the assets[769] – as is the case in Finnish and Swedish insolvency law. Herchen is of the opinion that where such transfers of ownership are not legally possible, one potential way of transferring the asset from the insolvency estate of the secondary insolvency proceedings to that of the main insolvency proceedings may be for the liquidator of the secondary insolvency proceedings to release (*Freigabe*) the asset.[770] The object becomes a part of the insolvency estate of the main insolvency proceedings at the moment of its release, provided that the *lex fori concursus universalis* condones the inclusion of these kinds of objects in the insolvency estate.[771] Thus, Herchen holds the view that national laws of the Member States should provide such substantive provision to enable the release of the assets from secondary insolvency proceedings and their inclusion to the main insolvency proceedings. Whether a transfer of assets from one insolvency estate to another is permitted pursuant to insolvency law, and whether and under

[764] Wessels (2006). *Op. cit.*, mn 10895, p 494.
[765] Virgós. Garcimartín. *Op. cit.*, mn 460, p 243.
[766] Moss/Bayfield/Peters in: Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 5.135, p 118.
[767] Lüke. Das europäische internationale Insolvenzrecht, ZZP 111, 1998, S 275, 306 et seq.; cited by Herchen in: Pannen. *Op. cit.*, Art 27 mn 69, p 418.
[768] As is the case in German law in Section 80 subsection 1 of GInsO, which merely provides for a transfer of the powers of administration and disposal to the liquidator; cited by Herchen in: Pannen. *Op. cit.*, Art 27 mn 69, p 418.
[769] Herchen in: Pannen. *Op. cit.*, Art 27 mn 70, p 418.
[770] Herchen in: Pannen. *Op. cit.*, Art 27 mn 71, p 418.
[771] Ibid.

which conditions a transfer of assets complies with the insolvency law obligations of the respective liquidators, is a decision for the respective *lex fori concursus*,[772] which may relate to property and tax law[773] as well. Virgós and Garcimartín state that the expression "shall transfer" in Article 35 of the EIR must be understood in the legal sense, not as transfer in the sense of a change of position.[774] They explain that the liquidator must perform all of those acts which are necessary in order to place the assets which comprise the said surplus under the power of the liquidator in the main insolvency proceedings.[775] Article 35 of the EIR is inspired by Article 22 of the 1990 Istanbul Convention where the expression "transfer of the remaining assets" means precisely that: "*by transfer the committee of experts means a purely administrative transaction in connection with the management of the bankruptcy*."[776] Consequently, it seems to me that national laws of the Member States should be reviewed and improved (if needed) in order to put Article 35 of the EIR into operation and enable transfers of assets from the secondary insolvency proceedings to the main insolvency proceedings without additional taxes, costs and expenses imposed on the insolvency estate, because it would decrease the dividends payable to the creditors.

Another problem relates to the term "immediately" in Article 35 of the EIR. As Koulu correctly states the question is whether the transfer of assets should be done once it is clear for the secondary insolvency liquidator during the proceedings that the creditors in the secondary insolvency proceedings may not receive (any or more) dividends or only after all the distributions are made to the creditors in the secondary insolvency proceedings.[777] Koulu is of the opinion that all the dividends must be paid out and after that it is possible to transfer any remaining assets to the main insolvency proceedings. He submits that the *lex fori concursus secundarii* stipulates what is the exact moment to transfer the remaining assets to the main insolvency proceedings.[778] I agree, because Articles 28 and 4 (2) (j) of the EIR provide so. Koulu states that in Finland, the transfer of the remaining assets from the secondary insolvency proceedings should be done after the final[779] settlement of the accounts approved by the creditors' meeting,[780] because insolvency proceedings shall end once the final

---

[772] Herchen in: Pannen. *Op. cit.*, Art 27 mn 73, p 419.

[773] The release or transfer of the assets from one proceedings to another may be considered as an donation or gift according to the tax law, which could increase the costs of the administration of the cross-border insolvency proceedings.

[774] Virgós. Garcimartín. *Op. cit.*, mn 458, p 242.

[775] Ibid.

[776] Explanatory Report to the European Convention on Certain Aspects of Bankruptcy, Art 22, mn 115.

[777] Koulu in: Koulu. Havansi. Korkea-Aho. Lindfors. Niemi. *Op. cit.*, s 1151.

[778] Ibid.

[779] Koulu in: Koulu. Havansi. Korkea-Aho. Lindfors. Niemi. *Op. cit.*, s 1151–1152.

[780] Chapter 19 Section 4 subsection 1 of the FBA.

settlement of the accounts have been approved.[781] Herchen states that in Germany, it means that transfer should be done immediately after the termination of the insolvency proceedings subsequent to a completed final distribution.[782] In Estonia, the bases for termination of insolvency proceedings are stipulated in Section 157 of the EBA. In the normal course of proceedings, a court shall decide on the approval of a final report and termination of the insolvency proceedings.[783] In Sweden, the final report submitted by the liquidator may subject to appeal by the supervisory authority, the creditor and the debtor.[784] In general, the hearing of the appeals tends to take time in the court. Thus, it seems to me that implementation of the term "immediately" in Article 35 of the EIR is rather flexible according to the national laws of the Member States.

Moss and Smith state that it is consistent with the primacy of the main insolvency proceedings that the surplus in the secondary insolvency proceedings should be paid for claims admissible in the main insolvency proceedings rather to go to the debtor.[785] By contrast, they correctly state that there is no provision for any surplus in the main insolvency proceedings to go to creditors in any secondary insolvency proceedings. In certain cases this may cause injustice: for example, if the main insolvency proceedings exclude the claims of certain creditors or part of the quantum of such claims, and they can only claim in the secondary insolvency proceedings, the surplus in the main insolvency proceedings will go to the debtor or its shareholders and not to the creditors in the secondary insolvency proceedings.[786] I think that the Regulation should be amended in such way that the remaining assets in the main insolvency proceedings should be distributed to the creditors in the secondary insolvency proceedings whose claims have not been satisfied in the latter proceedings, not to the debtor or its shareholders.

To conclude, I submit that it would be reasonable to amend Article 35 of the EIR and determine it in the following wording: "*If by liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately upon the request from the liquidator in the main proceedings transfer any monies remaining to the creditors in the main proceedings*." Thus, the liquidator in secondary insolvency proceedings transfers monies directly to the creditors, which is probably allowed without extra expenses or other legal complications from the tax or property law of the Member States.

---

[781] Chapter 19 Section 7 of the FBA.
[782] Section 200 subsection 1 of the GInsO. Herchen in: Pannen. *Op. cit.*, Art 35 mn 6, p 503.
[783] Section 163 subsection 3 of the EBA.
[784] Chapter 13 Section 7 of the SBA.
[785] Although several insolvency laws in the Member States, such as Germany, Estonia and Finland stipulate in principle that if the claims of all creditors can be satisfied, the liquidator shall transfer any remaining surplus to the debtor or to the shareholders of the debtor.
[786] Moss. Fletcher. Isaacs (2009). *Op. cit.*, mn 8.389, p 338.

SUMMARY

The main purpose of the current thesis was to find answers to the following questions: whether secondary insolvency proceedings are justified and necessary; and if so, what changes are needed in the national laws of the Member States and in the Regulation to facilitate efficient and effective administration of several cross-border insolvency proceedings pending simultaneously in the European Union. The hypothesis of the current thesis was the following: secondary insolvency proceedings may be justified and necessary although several changes are needed in the national laws of the Member States and in the Regulation to facilitate efficient and effective administration of several cross-border insolvency proceedings pending simultaneously in the European Union. The main findings of the research are presented below.

As a result of the analysis of the theoretical literature, the Regulation, insolvency law regulations of the Member States, explanatory reports and judicial practice I have reached the following main conclusions:

1. The introduction of the concept of secondary insolvency proceedings has been one of the most far-reaching innovations in the EU from the draft conventions in the light of the history of the Regulation. The years up to 1980 were dominated by a desire to establish a regime approaching the situation of unity of law and proceedings as closely as possible. However, this regime would have been too complex to administer for the Member States at that time. With the Istanbul Convention as an intermediate measure, the European effort moved from the elusive goal of universality and unity of insolvency proceedings to a regime in which European cross-border insolvency proceedings are to be achieved through coordination and cooperation between main and secondary proceedings.
2. The possibility of secondary insolvency proceedings has been viewed, in a European environment with widely different views on rehabilitation policies, as a necessary precondition for the inclusion of rehabilitation and reorganisation proceedings in the scope of application of the Regulation and their recognition by other Member States. The choice to enable Member States (and their creditors) to protect their interests under local law must be regarded as one of the main reasons why Member States have been willing to adopt the Regulation. The basic principle is the universality of the proceedings: a single insolvency procedure in the Member State where the debtor has his centre of main interests (COMI), encompassing all of the debtor's assets, and in which all of the creditors can participate. This solution permits the maximum advantages associated with centralized collective insolvency proceedings. However, the possibility of opening territorial insolvency proceedings can be justified for different reasons and this has lead to its admission by the Regulation. Thus, it should be viewed as a compromise between the Member States at that time to come up with

the concept of secondary insolvency proceedings finally enacted in the Regulation.

3. During the negotiations leading up to the 1995 Convention, also reflected in the Regulation later, there were two types of arguments put forward in favour of enabling secondary insolvency proceedings as territorially restricted proceedings, each serving different functions: a protective or defensive function; and an assisting or auxiliary function. The secondary insolvency proceedings can serve rather contradictory purposes, depending on whether they should protect local interests or assist main insolvency proceedings at the same time. In my opinion, it is also possible that under certain circumstances secondary insolvency proceedings may serve the interests of the debtor and provide several protective intervention measures to work against the liquidators and the creditors if the *lex fori concursus secundarii* provides so.
4. During the drafting of the Regulation the universal model was modified by three measures, e.g. allowing subordinated territorial insolvency proceedings to run in parallel with the main insolvency process; by allowing, under certain conditions, the opening of territorial insolvency proceedings without the need to open proceedings with universal scope; and by establishing exceptions to the application of the *lex fori concursus*. Thus, it may be said that the concept of secondary insolvency proceedings definitely has grown gradually and has an important role in the Regulation.
5. The principle of mutual trust has a central role in the Regulation, because the Regulation has been enacted having regard to the Treaty establishing the European Community. However, the Regulation may not be directly based on Article 81 of the TFEU, which establishes judicial cooperation in civil matters having cross-border implications based on the principle of mutual recognition of judgements and of decisions in extrajudicial cases in EU, it is crucial for the participants (especially for the courts and the liquidators) in the insolvency proceedings to follow the principle of mutual trust, otherwise the effective and efficient administration of cross-border insolvency proceedings may not be achieved.
6. The principle of mutual trust is a dynamic principle because it must be taken into account when interpreting the Regulation. The Regulation must retain the same meaning within the different national systems. It puts extra responsibility on Member States in formulating and determining the most appropriate national insolvency proceedings to be included in Annex B of the EIR. Once a national procedure is included in Annex B of the EIR, other Member States must recognise it and its effects. In addition, it also makes participants in the insolvency proceedings responsible for choosing an appropriate manner and methods for solving the debtor's insolvency situation, i.e. whether to request the opening of secondary insolvency proceedings or not. It requires mutual trust and efficient coordination of

both (or several) insolvency proceedings simultaneously once they are opened.

7. In order to open secondary insolvency proceedings, it is imperative that main insolvency proceedings have been opened in another Member State. The competent court of the Member State which has jurisdiction to open main insolvency proceedings has to clearly express in the judgement that it has jurisdiction within the meaning of Article 3 (1) of the EIR, and main insolvency proceedings listed in Annex A of the EIR have been opened. Such a provision to express clearly what set of insolvency proceedings are being opened by the competent court of Member State may be inserted into the national laws of the Member States. In order to state whether the judgement opening of insolvency proceedings concerns main or secondary insolvency proceedings, the national laws of the Member States should be amended accordingly, if the court has no legal grounds to clearly specify its international jurisdiction and type of the insolvency proceedings opened in a given case.
8. To avoid conflicts of jurisdictions and to promote efficiency of the procedure, the "opening of insolvency proceedings" has to be brought in line with the Regulation by the legislators in the Member States by providing expressly in the laws of the Member States that giving certain court judgement is considered to be the "opening of a insolvency proceeding" within the meaning of the Regulation. It could be helpful if courts of the Member States indicate in their opening judgements when the judgement becomes effective (for instance, indicating the exact time) under the relevant national law. If such a statement in the judgements of the opening insolvency proceedings is not required under the national laws of the Member States, the national laws of the Member States should have at least relevant provisions stating when "judgement" becomes effective within the meaning of the Regulation.
9. It was found that one of the potential problem lies with the definition "the time of the opening of proceedings" in Article 2 (f) of the Regulation. For procedural efficiency reasons Article 2 (f) of the EIR could be amended in a way that the last part "*whether it is final judgment of not*" would be deleted. Thus, Article 2 (f) of the EIR should be stated as follows: "'*The time of the opening of proceedings' shall mean the time at which the judgement opening proceedings becomes effective.*"
10. To facilitate effective and efficient administration of cross-border insolvency proceedings, there should definitely be an EU-wide register on insolvency cases to make it less burdensome and less complex for courts to identify what insolvency case it may have in hand.
11. In order to open secondary insolvency proceedings, there must be, as a second prerequisite besides main insolvency proceedings, an establishment within the meaning of Article 2 (h) of the EIR in the Member State at whose courts a request is being made to open secondary insolvency proceedings.

This requirement derives directly from the Regulation. The Regulation requires the connection employed in Article 3 of the EIR as basis for jurisdiction to be genuine. The definition it gives for establishment is fact-oriented and the test to determine when there is an establishment, a "reality test". If there is no establishment within the meaning of Article 2 (h) of the EIR, no secondary insolvency proceedings can be opened and in this case, the main insolvency proceedings will produce their full effects on the territory where the debtor does not have an "establishment", but has assets.

12. The concept of establishment as enacted and used by the Regulation is neutral with regard to the nature of the debtor (e.g. whether the debtor is a legal or natural person) or the capacity in which the debtor may act. As the concept of the establishment is defined autonomously in the Regulation itself, it puts, in my opinion, extra responsibility on the courts of the Member States empowered to open secondary insolvency proceedings to evaluate whether they have international jurisdiction to open secondary insolvency proceedings. According to Article 2 (h) of the EIR the definition of establishment is based on the following criteria: any place of operations, non-transitory nature of economic activity and utilization of human means and goods. In my opinion, the place of operations of an insolvent debtor means a place from which economic activities are exercised on the open market (i.e. externally) and therefore this place should be ascertainable by the third parties. In addition, the establishment should exist in the relevant Member State when the petition to open secondary insolvency proceedings is filed and should continue to exist till at least the moment the court is about to decide the opening of the secondary insolvency proceedings. The mere fact that the debtor had the intention to start some economic activities is, in my view, a subjective criteria, and therefore not ascertainable to third persons as establishment although this is not requirement. Based on case law, it seems to me that "human means" in case of the individual debtor may be other persons who have the power to create legal relationships between a creditor and a debtor. In my opinion, "human means" presumes a certain level of organisation within which persons are assisting in the realization of the respective economic activity of the debtor.
13. In current thesis it was found that there may be a problem how to determine "establishment" of an individual (natural person) as the debtor. There are several options to solve that problem. I am personally in favour of the option, which is to limit applicability of Article 2 (h) of the EIR to other debtors than individuals as debtors and to supplement Article 2 of the EIR with (i) in a such way that in the case of individuals as debtor the "establishment" means the place (a Member State) where the debtor's assets are situated within the meaning of Article 2 (g) of the EIR. As the definition of "establishment" is an autonomous concept deliberated between Member States, stipulated in the Regulation and must be interpreted independently

from national laws, it is reasonable to make necessary amendments in the Regulation, not in the national laws of the Member States.

14. By its nature, secondary insolvency proceedings are not a special type of proceedings. They are regular nationwide proceedings to which general national insolvency law applies unless the Regulation specifies otherwise. The Regulation modifies conditions to open secondary insolvency proceedings laid down by the applicable national law in two aspects: 1) the requirement for the *de facto* insolvency of the debtor established by national law does not need to be satisfied; and 2) the right to request the opening of secondary insolvency proceedings is vested directly to the liquidator of the main insolvency proceedings. Indeed, to all other questions national law continues to apply. In my opinion, this may be the fundamental essence of all problems related to secondary insolvency proceedings, because in general there is no specific simplified procedure in national laws of the Member States to open (and afterwards to conduct) secondary insolvency proceedings in parallel with main insolvency proceedings. The problem is that usually national insolvency or general procedural law in the relevant Member State does not distinguish the legal requirements to be fulfilled between the openings of the main or secondary insolvency proceedings.
15. The main liquidator may find himself in different legal positions under the national laws of different Member States where the debtor has an establishment in case of requesting the opening of secondary insolvency proceedings. Although the petition of the main liquidator may be handled as a petition filed by the third person as prescribed in the first sentence in Section 9 subsection 3 of the Estonian Bankruptcy Act, e.g. as a petition of the third person without claim against the debtor, because the main liquidator does not have a proprietary claim as such within the meaning of the *lex fori concursus secundarii* against the debtor, I am inclined to the view that transparent provision is needed in the Estonian Bankruptcy Act stating that the main liquidator will be treated as himself in terms of capacity and procedural requirements. It would facilitate efficient and effective administration of cross-border insolvency proceedings. In addition, I think that a petition filed to open secondary insolvency proceedings by the main liquidator should be handled in a simplified procedure by the national courts of the Member States. If necessary, the national laws should be amended so that general grounds (for instance showing the existence of an undisputed claim to a certain amount) in national laws are not applicable. The main liquidator only has to show that there is an "establishment" of the insolvent debtor in the relevant jurisdiction where the petition to open secondary insolvency proceedings is being filed.
16. To facilitate the effective and efficient administration of cross-border insolvency proceedings I found that the appointment of a temporary liquidator is not needed in case of commencement of secondary insolvency proceedings in Estonia. I think that national laws of the relevant Member

States should be amended accordingly so that an interim trustee (temporary, provisional liquidator) is not needed in that procedural stage where the request to open secondary insolvency proceedings has been made but the proceedings are not yet opened by the court. The gap may be filled by extra powers (such as the right to be heard during the court session) granted to the main liquidator, if needed.

17. It was found that the transparent rule whether to grant the debtor the right to request the opening of secondary insolvency proceedings is welcome by legislators of the Member States to facilitate efficient and effective administration of cross-border insolvency proceedings. However, before making an ultimate conclusion on that question, legislators of the Member States should carefully consider the outcome, because there are different types of debtors (legal corporate entities, partnerships, individuals, consumers) whose rights may be influenced by that legislative decision.
18. I found that it is appropriate and reasonable to supplement the substantial requirements of insolvency petitions in case of requesting the opening of secondary insolvency proceedings in such way that an applicant is obliged to refer to the "opening of main insolvency proceedings" in another Member State, give facts and information for the court to determine "establishment" of the debtor within the meaning of Article 2 (h) of the EIR, show reasons to open secondary insolvency proceedings and also give evidence to confirm his statements in the petition. It would accelerate handling of these petitions by the court and facilitate the efficient and effective administration of cross-border insolvency proceedings.
19. It was found that the *de facto* insolvency is not the only reason to open secondary insolvency proceedings. There should be some further justification to open secondary insolvency proceedings, as a protective or assisting measure to the main insolvency proceedings. Therefore, the court empowered to open secondary insolvency proceedings has to evaluate whether the further reason besides *de facto* insolvency is sufficiently grounded. In my opinion, these reasons have to support the functions of the secondary insolvency proceedings as determined by the Regulation. If the court empowered to open secondary insolvency proceedings does not have the capacity to evaluate the reasons for opening, national laws should be supplemented accordingly to give the court such power.
20. As secondary insolvency proceedings are considered to be regular nationwide insolvency proceedings, the methods and procedure to deal with the petition to open secondary proceedings usually vary between the laws of the Member States. I think that national laws of the Member States should be reviewed from the aspect of procedural efficiency, for instance, whether the hearing of the debtor is possible or can it be substituted by the evidence received from the main liquidator. I think that national laws of the relevant Member States should be amended accordingly so that the additional national requirements provided for in the *lex fori concursus secundarii* in

nationwide insolvency cases would not be applicable in case of the request to open secondary insolvency proceedings if an establishment is found in the relevant Member State and main insolvency proceedings opened in another Member State.

21. It was found that the possibility to appeal against judgements to open secondary insolvency proceedings should be limited. I think it is unjustified if the debtor and/or the liquidator in the main insolvency proceedings are entitled to appeal against that judgement, because the debtor is *de facto* insolvent as of opening of main insolvency proceedings and should not have the possibility to interrupt the normal course of the insolvency proceedings. The main purpose of the main liquidator is to administer insolvency proceedings with EU-wide universal effects and not to litigate causing extra expenses to the insolvency estate. To facilitate the efficient and effective administration of cross-border insolvency proceedings, the powers of the debtor and the main liquidator to appeal against the judgement opening the secondary insolvency proceedings should be prohibited.
22. Recognition of secondary insolvency proceedings takes place automatically from the time when the judgement, as defined in Article 2 (e) of the EIR, becomes effective in the Member State of the opening of these insolvency proceedings. Once the secondary insolvency proceedings are opened, the effects of these proceedings may not be challenged in other Member States. It was found that the problem with automatic recognition and its effects relates to the range of legal consequences of the opening of insolvency proceedings (either main or secondary), save as otherwise provided by the EIR, which shall be automatically imposed to the parallel insolvency proceedings by the *lex fori concursus* with no further formalities, and producing all the effects which it has under national law. In my opinion, the legal consequences provided for in the *lex fori concursus secundarii* definitely affect main insolvency proceedings opened under the *lex fori concursus universalis*, and their intervention causes problems in the administration of parallel insolvency proceedings because of possible contradictory of consequences in the laws of the different Member States. Therefore, the work of the legislators of the Member States who should formulate provisions regulating the conduct of secondary insolvency proceedings in national insolvency laws is extremely important taking into account that these provisions have EU-wide effects.
23. However, it may be debatable whether the Member States are allowed to or should improve their national laws because the Regulation has according to EU law direct legal effects in the Member States. I am inclined to the view that as far as there are no relevant provisions stipulated in the Regulation, the improvement of national laws of the Member States to put the Regulation under operation and facilitate the efficient and effective administration of cross-border insolvency proceedings seems the right step to do.

24. Participation in the parallel insolvency proceedings which run according to the *lex fori concursus universalis* and the *lex fori concursus secundarii* can be troublesome for the debtor. There should not be an obligation for the debtor to file for the secondary insolvency proceedings upon reason of *de facto* insolvency in the relevant laws of the Member States. I think that national laws of the Member States should be amended accordingly if the court is not in a position to interpret provisions in national laws of the Member States flexibly enough so that these would meet the requirements established by the Regulation. In addition, I am inclined to the view that a provision stipulated either in the Regulation or in the national laws of the Member States enabling the liquidator to deny the request of information by the debtor under certain circumstances may be necessary to ensure efficient and effective administration of cross-border insolvency proceedings. As for the debtor's obligation to give information, I think that it is also possible to get all the relevant information for the conduct of secondary insolvency proceedings from the liquidator of the main insolvency proceedings. Thus, in my opinion, the national laws of the Member States should provide a relevant exception to that debtor's obligation and not require to give an oath or to provide the court with detailed accounting information by the debtor in the case of secondary insolvency proceedings.
25. It was found that the most troublesome problem for the debtor is the question of liability under various national laws of the Member States applicable to the parallel insolvency proceedings. At present, there are no restrictions in the national laws of the Member States stating, for instance, that the liquidator in secondary insolvency proceedings cannot bring claims against the debtor or that the liquidator in secondary insolvency proceedings should require the consent of the main insolvency liquidator before starting proceedings against the debtor (and its related persons). Taking into account the nature of the secondary insolvency proceedings as preventive or assisting, it seems logical and necessary that the secondary insolvency liquidator should not initiate legal proceedings against the debtor without the consent of the main liquidator. Thus, in my opinion, relevant provision could be inserted in the Regulation stating that the secondary insolvency liquidator is not entitled to initiate legal proceedings against the debtor without the consent of the main liquidator. To find an appropriate solution for the question of the debtor's liability as a whole in cross-border insolvency proceedings, a survey between the Member States should be undertaken before making any radical amendments to the Regulation or to national laws of Member States. It may be desirable that the rules on liability are approximated to avoid forum shopping and enhance the efficient and effective administration of cross-border insolvency proceedings. Meanwhile, it is crucial that liquidators follow the duty to cooperate and communicate as stipulated in Article 31 of the Regulation.

26. It was found that another area which might need special provisions in national laws of the Member States relates to the debtor's right of representation and participation in secondary insolvency proceedings. I am inclined to the view that main insolvency proceedings should lead the way and the *lex concursus universalis* would have to determine questions related to the debtor's right of representation and participation in secondary insolvency proceedings, because secondary insolvency proceedings are opened later and the debtor is already *de facto* insolvent as of the opening of main insolvency proceedings. Thus, to avoid conflict of laws between the laws of the Member States and to facilitate efficient and effective administration of cross-border insolvency proceedings, the provisions applicable to the debtor's representation and participation in secondary insolvency proceedings should follow the same line as the *lex fori concursus universalis*. At present, I think that the legislators of the Member States should amend national laws accordingly stating that the respective powers of the debtor in the case of secondary insolvency proceedings are determined by the law of the Member State where main insolvency proceedings were opened (*lex fori universalis)*. In the future, Article 4 (2) (c) of the EIR could be amended accordingly as well.
27. One of the consequences of the opening of secondary insolvency proceeding is the appointment of the liquidator as defined in Article 2 (b) of the EIR. I was found that for practical reasons it could be efficient and effective not to appoint new person as the secondary liquidator, but to appoint the main liquidator as the secondary liquidator. The main insolvency liquidator is familiar with the insolvency case under the management. Indeed, at the moment national laws of the Member States generally do not provide such an option for appointment as there are still special local requirements for liquidators such as knowledge of the local language and obligatory membership of the local insolvency practitioner's association, etc. The fact that certain functions are reserved to lawyers admitted to the local court, of course, has put a practical restriction on the free movement of services in the European Union. In my opinion, if there is a (political) will between the Member States towards a more efficient, effective and unified system of insolvency proceedings in the European Union, the Regulation should be amended and supplemented in a way that there is only one EU-wide liquidator responsible for administering both the main and secondary insolvency estates. In addition to that, restrictions on the qualifications and eligibility for the appointment of foreign liquidators in the case of secondary insolvency proceedings in national laws of the Member States should be abolished.
28. After the opening of secondary insolvency proceedings, creditors are usually faced with the questions whether to participate in insolvency proceedings and if so, in which one – secondary, main or several proceedings simultaneously. In answering these questions the creditor should

consider the information available on the following: information available on the insolvent debtor, predictability of the course of the process and costs of the insolvency proceedings – circumstances, which may be unforeseeable before filing a claim in cross-border insolvency proceedings under legal regulation currently in force in EU. It was found in current thesis that in case the Member State does not require mandatory registration in its territory, the relevant powers to require mandatory registration should be given to the secondary insolvency liquidator, especially in the case where individuals as insolvent debtors are not usually recorded in the public register. Thus, mandatory registration is needed. In order to facilitate effective and efficient administration of cross-border insolvency proceedings, Article 22 (1) of the EIR and national laws should be supplemented accordingly. In addition, an EU-wide register for insolvency cases is needed, which could provide all necessary information.

29. It was found that the question of state supervision in the case of cross-border insolvency proceedings is not regulated by the Regulation and thus, has been left to national laws of the Member States to determine. I think that state supervision in cross-border insolvency proceedings with extra-national territorial effects is an important aspect and not sufficiently regulated at the moment. This topic should be focused on and regulated in the Regulation as well as in national laws of the Member States. The Regulation definitely should give initiative guidance on that aspect, namely at least that Article 31 of the EIR should be supplemented in a way that courts of the Member States should communicate and cooperate with each other. Supervisory authorities of the Member States should have the power to supervise the relevant liquidator responsible taking actions in a territory of the Member State where the state supervisory authority is situated. The powers of the state supervisory authorities should not only be limited to the territory of the Member State where the liquidators were appointed by the court of that Member State. These measures facilitate effective and efficient administration of cross-border insolvency proceedings.
30. It was found that administration of an insolvency estate by the secondary insolvency liquidator may be troublesome, because current legal regulation on the topics which relate to determination of insolvency estate in case of secondary insolvency proceedings is not sufficient. To facilitate efficient and effective administration of cross-border insolvency proceedings Article 2 (g) of the EIR should be improved giving localization rules. The Regulation should also specify whether the rules of exemption of assets are to be decided by the legislators in the national laws of the Member States or this topic is a subject to the Regulation. In my opinion, provisions on exemption of assets should be similar in the Member States. Therefore approximation of national laws in the Member States is also needed in the future.
31. The powers of the liquidator in administrating the insolvency estate in secondary insolvency proceedings are determined by the *lex fori concursus*

secundarii and Article 18 (2) and (3) of the EIR. It was found that it is rather ambivalent to define what powers the secondary insolvency liquidator has or should have in terms of administering the insolvency estate (or part of it), because under the *lex concursus* of both (or more) Member States, the liquidator (both or even several) usually has powers to represent the debtor (in court proceedings or transactions), to perform acts with the insolvency estate which are necessary for preserving the insolvency estate, to manage the debtor's (business) activities, to take possession of the debtor's assets and commence administration of the insolvency estate immediately. At the same time, the rationale behind the Regulation affects these ordinary nation-wide insolvency proceedings, as secondary insolvency proceedings are considered to be extensive so that secondary insolvency proceedings are not properly manageable by the secondary liquidator.

32. Coordination of administration of the insolvency estate is based on Article 31 of the EIR. A fundamental question in that aspect is how the coordination between liquidators should be attained. It was found that the sharing of information is not the only requirement for good cooperation in administering the insolvency estate. In practice, there will undoubtedly be circumstances where there is a tension between the aims of a liquidator in secondary insolvency proceedings and the aims of a liquidator in the main insolvency proceedings. It is obvious that national laws produce additional requirements which liquidators should follow in administration of the insolvency estate. Consequently, for instance, the Estonian Bankruptcy Act should be amended in such way that the liquidator in secondary insolvency proceedings would not be responsible for the whole debtor's accounting, but just for the part of the insolvency estate under his management in secondary insolvency proceedings.
33. It is inconsistent with the aim of effective and efficient administration of cross-border insolvency proceedings that assets are being moved from one Member State to another on the expense of insolvency estate, because of the fear of the latter opening of secondary insolvency proceedings. To facilitate efficient and effective administration of cross-border insolvency proceedings, it might be worth evaluating whether to include provision on the prohibition of the physical movement of the insolvency estate or particular assets in it during administration of cross-border insolvency proceedings into the Regulation. In my view, disputes between liquidators over one unified insolvency estate should not be acceptable.
34. CoCo Guidelines state that cooperation between the liquidators may be best attained by way of an agreement or "protocol" that establishes decision-making procedures. This could also be useful guidance to the question, how should the secondary insolvency liquidator act if the *lex fori concursus secundarii* and suggestions from the main liquidator made according to Article 31 (3) of the EIR contradict. I think that national laws of the Member States should be amended to facilitate effective and efficient

administration of cross-border insolvency proceedings. Therefore, to enhance the cooperation under the Regulation relevant restricting provisions (such as prohibition of agreements between liquidators in charge of insolvency estate) in the national laws of Member States should be abolished.

35. The most important right for the creditors is the right, through the lodging of claims, to participate in insolvency proceedings. It was found that the execution of creditors' rights can be different, which in practice may result in causing a disadvantage to foreign (unknown) creditors (including employees, tax authorities) who are less likely to be aware of requirements (such as time limits for lodging claims or paying fees) established by national laws of another Member States. I am inclined to the view that a better solution for legislators in the Member States would be not to fix strict time limits for lodging claims under national laws at all. In my opinion, if the liquidators discover during management of the insolvency proceedings that there will be dividends to distribute between creditors then at that point of time they should notify the creditors that claims should be lodged. In cross-border insolvency proceedings the first step for the liquidators should be tracing and administration of assets and then in the later point of the proceedings the second step would be handling of the claims and distribution. In the later stage of the proceedings there is also more information for creditors to evaluate whether to submit the claim at all.
36. To facilitate efficient and effective administration of cross-border insolvency proceedings it might be pointless to convene creditors in the secondary insolvency proceedings to vote for certain decisions which could be taken anyway in the main insolvency proceedings. Thus, I think that legislators of the national laws of the Member States should examine what are the occasions when creditors' general meetings are held and whether some of the assemblies are necessary in the case of secondary insolvency proceedings. There may be situations where it is unnecessary or too costly for the benefit of the creditors to appoint a creditors' committee in the secondary insolvency proceedings.
37. Article 32 (2) of the EIR establishes the liquidator's right to lodge in other insolvency proceedings claims that have already been lodged in his insolvency proceedings provided that the interests of creditors in the latter proceedings are served. I am inclined to the view that duplicate filing of claims on the one hand produces additional costs in simultaneous insolvency proceedings and on the other hand requires extra coordination between main and secondary liquidators before creditors' general meeting required by the *lex fori concursus*. This is because the voting rights of creditors' depend on the amount and value of the claims determined by the relevant *lex fori concursus* at the certain point of time before creditors' general meeting in relevant insolvency proceedings. It can be rather troublesome for liquidators to handle lodgement (and withdrawal) of the

claims and consequences of these actions in several insolvency proceedings simultaneously. The legislators of the Member States should formulate and determine flexible procedural provisions, such as the possibility to use more electronic means in handling claims and use less duplication in coordination of parallel insolvency proceedings by the liquidators under national laws of the Member States.

38. In the case of simultaneous insolvency proceedings opened in accordance with the *lex fori concursus universalis* and the *lex fori concursus secundarii* against the same debtor a multiple set of authorized bodies of creditors (creditors' general meetings and committees) should be elected and put into operation if so provided by the *lex fori concursus*. In my opinion, it should not be overlooked that the decisions made by the multiple set of different bodies of the creditors under different jurisdictions concern the same debtor and one unified insolvency estate although the legal status of the assets (location, registration, amount, value, etc.) in the insolvency estate may change from time to time between the *lex fori concursus universalis* and the *lex fori concursus secundarii* due to the result of recovery or other activities in administrating the insolvency estate. The legal framework provided for in the EIR which refers to national laws may also cause administrative complexity in accounting, auditing requirements and balance sheet preparation in the same debtor, because different substantial and procedural requirements apply to the debtor as an accounting entity and insolvency estate according to the *lex fori concursus universalis* and the *lex fori concursus secundarii*. Thus, not only the liquidators, but the creditors may also influence effective and efficient administration of cross-border insolvency proceedings of the debtor.
39. If the underlying idea is to have one unified insolvency estate of the debtor, then the decision admitting the claim should be used as a means of proof of the claim in other insolvency proceedings as well. I think that in order to facilitate effective and efficient administration of cross-border insolvency proceedings the relevant provision about admission of the claim only one time in case of the parallel cross-border insolvency proceedings may be worth inserting into the Regulation. At the moment, national laws of the Member States could be amended accordingly so that decision admitting the claim may be used as a means of proof of the claim in other insolvency proceedings.
40. Another complex question in the current thesis was the stay of liquidation and its termination procedure in secondary insolvency proceedings. Several substantial and procedural aspects to be dealt with the court in the secondary insolvency proceedings were analysed in this part of the thesis. It was found that the stay of liquidation is another process (the so-called "sub-process") in the secondary insolvency proceedings to which relevant rules in national laws of the Member States are applicable. I found that it would be appropriate and reasonable to supplement the substantial requirements of

petitions in national insolvency laws of Member States in case of requesting the stay of liquidation in secondary insolvency proceedings. It would simplify and accelerate handling of these petitions by the court.

41. It was found that the procedure to terminate the stay of the liquidation is not a less sophisticated and time-consuming procedure than granting the stay of the liquidation. Furthermore, it is doubtful whether this coordination measure as laid down in Article 33 of the EIR serves efficient and effective management of cross-border insolvency proceedings. If Article 31 (2) of the EIR establishes the obligation to cooperate between the liquidators and Article 31 (3) of the EIR grants the main liquidator an early opportunity to submit proposals on the liquidation or use of the assets in the secondary insolvency proceedings, then Article 33 of the EIR may not be needed after all. Thus, I found that if the implementation of Article 31 of the EIR would be sanctioned, for instance, by penalties which should be paid by the liquidators to the insolvency estate, then Article 33 of the EIR might not be necessary.
42. The Regulation stipulates certain rules concerning the closure of secondary insolvency proceedings in Article 34 of the EIR. I found that proposal submitted by the main liquidator to close secondary insolvency proceedings should have specific requirements compared to these used for ordinary nation-wide proceedings. I am inclined to the view that this proposal should proceed in a simplified manner, because the right to initiative by the main liquidators demonstrates the principle that the secondary insolvency proceedings are subordinate to the main insolvency proceedings. The proposal should be addressed to the same court, within the meaning of Article 2 (d) of the EIR, which opened the secondary insolvency proceedings and supervises the case. To accelerate handling of the proposal and to avoid unnecessary further questions the reasons for closure of the secondary insolvency proceedings should be presented with the proposal. To facilitate efficient and effective administration of cross-border insolvency proceedings, I think that it is appropriate and reasonable to supplement the substantial requirements of petitions in national insolvency laws of Member States in the case of requesting the closure of the liquidation in secondary insolvency proceedings. In addition, I am inclined to the view that national laws of the Member States should be amended and supplemented in a way that the proposal made by the main liquidator would proceed in a more simplified procedure without setting fixed time-limits for submission of a proposal to close secondary insolvency proceedings. To prevent potential problems in cooperation and conflicts of laws I think that national laws of the Member States should be amended in such way that the proposal made by liquidator in the main insolvency proceedings to close secondary insolvency proceedings would be legally binding, because it would facilitate efficient and effective administration of cross-border insolvency proceedings. I submit that the court should hear the main and

secondary insolvency liquidator before closing the secondary insolvency proceedings. A provision of this kind would have to be included in the Regulation.

43. In the case of cross-border insolvency proceedings, the costs and expenses of the insolvency proceedings are usually higher. In general, the secondary insolvency liquidator and creditors in these proceedings cannot affect the amount of costs and expenses in the case of parallel insolvency proceedings pending in several Member States. It was analysed whether the system of costs and expenses prescribed by the EIR, which refers to national laws of the Member States applicable, is justified. First of all it was found that it is not clear what exactly should be considered as costs and expenses of secondary insolvency proceedings. Another finding was that it is also not clear who should bear the costs and expenses of secondary insolvency proceedings. I think that the question of costs and expenses in Article 4 (2) (l) of the Regulation relating to the laws of the Member States may not be an appropriate and sufficient rule to serve the ultimate goal of the Regulation which is the efficient and effective administration of cross-border insolvency proceedings, because this rule leads to uncertainty and unpredictability of costs and expenses in the parallel insolvency proceedings. This could also damage creditors' interests, because they do not know whether, when and to which insolvency proceeding to lodge their claims for satisfaction. As there have been very few comparative surveys regarding this question in the Member States, then the first step would be to benchmark what is stipulated and understood as "costs and expenses of the insolvency proceedings" in the Member States and the second step would be to find a common understanding between the Member States on the appropriate rules to enact within the Regulation in that aspect.
44. According to Recital 21 of the EIR, the distribution of the proceeds must be coordinated in order to ensure an equal treatment of the creditors. Article 35 of the EIR presupposes that distribution will occur firstly in the secondary insolvency proceedings and afterwards in the main insolvency proceedings. Taking into account the various rules on distribution procedure in national laws of the Member States, I think that it may be rather complex to synchronize the activities in parallel insolvency proceedings so that distribution will always occur firstly in the secondary insolvency proceedings. There are too many factors which influence the proceedings and it would be too demanding from participants to consider all of these at the same time. Therefore I think that in order to facilitate the effective and efficient administration in cross-border insolvency proceedings further approximation of national laws is needed on that question. It would make sense for national legislators to simplify insolvency proceedings by establishing abbreviated or fast-track procedures for secondary insolvency proceedings.

45. In order to ensure the equal treatment of creditors Article 20 (2) of the EIR provides that a creditor who has, in the course of insolvency proceedings, obtained a payment on his claim, shall share in the distribution made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent payment. The Virgós-Schmit Report describes the basic methodology of equalization rules, which should be relatively simple, but some fundamental problems in this system exist. I think that "100% of creditor's claim" should be calculated once, i.e. as of opening of the main insolvency proceedings, because the debtor is *de facto* insolvent based on that court judgement. Although Article 32 (1) of the EIR presupposes a corrective mechanism to prevent the multiple satisfactions of claims, I doubt whether this is accomplished through the system of equalization of dividends found in Article 20 (2) of the EIR. To facilitate the effective and efficient administration of cross-border insolvency proceedings, it is crucial to find a solution to the currently existing situation regarding rules of distribution. I am inclined to the view that if the Nordic Bankruptcy Convention has worked smoothly so far, i.e. almost 80 years, it should definitely be considered a strong source of information and guidance when reviewing rules regarding distribution of the Regulation in the future to facilitate the efficient and effective administration of cross-border insolvency proceedings.
46. Although Article 35 of the EIR deals with the rather theoretical situation there may be problems which are also related to property and tax law to be solved during parallel insolvency proceedings. It seems to me that national laws of the Member States should be reviewed and improved (if needed) in order to put Article 35 of the EIR into operation and enable transfers of assets from the secondary insolvency proceedings to the main insolvency proceedings without additional taxes, costs and expenses imposed on the insolvency estate, because it would decrease the dividends payable to the creditors. The implementation of the term "immediately" in Article 35 of the EIR is rather flexible according to the national laws of the Member States. I think that the Regulation should be amended in such way that the remaining assets in the main insolvency proceedings should be distributed to the creditors in the secondary insolvency proceedings whose claims have not been satisfied in the latter proceedings, not to the debtor or its shareholders. I submit that it would be reasonable to amend Article 35 of the EIR and determine it in the following wording: "*If by liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately upon the request from the liquidator in the main proceedings transfer any monies remaining to the creditors in the main proceedings*." Thus, to facilitate the efficient and effective administration of cross-border insolvency proceedings, the liquidator in secondary insolvency

proceedings delivers monies directly to the creditors, which is probably allowed without extra expenses or other legal complications from the tax or property law of the Member States.

The conclusion of the thesis is that secondary insolvency proceedings may be justified and necessary although several changes are needed in the national laws of the Member States and in the Regulation to facilitate efficient and effective administration of several cross-border insolvency proceedings pending simultaneously in the European Union.

As a practical result of the Regulation, a distinction should be made to the national insolvency proceedings of the Member States, namely national proceedings unrelated to the Regulation and national proceedings related to the Regulation. Amendments to national laws should be made in as far as national laws may give rise to questions as to the supremacy of the Regulation or when amendments are certain to contribute to the working of the text and aim of the Regulation, provided those amendments are certain to be of a pure facilitating nature and are certain not to give rise to any discrepancies. Therefore, I am also inclined to the view that further approximation of insolvency laws of the Member States is needed in the future.

SUMMARY IN ESTONIAN

Teiseste maksejõuetusmenetluste mõiste, tähendus ja funktsioneerimine

Seoses majanduse globaliseerumise ja äri rahvusvahelistumisega omab isikute tegevus üha enam piiriülest mõju. Ettevõtete rahvusvahelistumisega kaasneb äritegevuse mobiilsuse kasv. Äriühingute jaoks muutub geograafiline kaugus vähem oluliseks ja paljud ettevõtjad tegutsevad ühtaegu erinevates riikides mitmetel maailma mandritel. Sama kehtib füüsiliste isikute kohta. Rahvusvaheline ehk piiriülene maksejõuetusõigus on mõiste, mida kasutatakse nende maksejõuetuskaasuste puhul, kus võlgniku varad või kohustused asuvad mitmes riigis ja kus võlgniku või talle kuuluva vara või kohustustega seotud küsimused kuuluvad lahendamisele mitme riigi maksejõuetusõiguse alusel. Piiriüleseseid maksejõuetusmenetlusi reguleerivad õigusnormid omavad väga suurt praktilist tähtsust nii võlgnike kui kui võlausaldajate jaoks. Samaaegselt omavad need õigusnormid märkimisväärset huvi ka õigusteoreetilisest vaatenurgast lähtuvalt.

31. mail 2002. aastal jõustus Euroopa Liidu Nõukogu (EÜ) määrus nr 1346/2000, 29.05.2000 maksejõuetusmenetluse kohta[787] (edaspidi nimetatud „Maksejõuetusmenetlusmäärus“ või „Määrus“), mida kohaldatakse kõigis Euroopa Liidu liikmesriikides, v.a. Taani. Maksejõuetusmenetlusmääruse eesmärgiks on reguleerida piiriüleste maksejõuetusmenetluste puhul rahvusvahelise kohtualluvuse, kohaldatava õiguse ja tunnustamisega seotud küsimusi Euroopa Liidus, et võimaldada piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist.

Maksejõuetusmenetlusmäärus on muutnud piiriülest maksejõuetusõigust Euroopas rohkem kui kõik rahvusvahelised konventsioonid, kohtupraktika või akadeemilised kirjutised, mis on olnud maksejõuetusõiguse valdkonna arengule aluseks lugematuid aastakümneid enne Määruse jõustumist. Maksejõuetusmenetlusmäärus on saanud ülemaailmse tähelepanu osaliseks ning selle arengud, tõlgendused ja reeglid kohaldatava õiguse kohta on saanud õigusloomes trendide seadjaks kogu maailmas. Käesoleval ajal on Euroopa Liidu Kohtu otsus võlgniku põhihuvide keskme kohta taustaks või raamistikuks kogu ülejäänud maailma kohtute praktikale antud valdkonnas. See kõik on vastupidine olukorrale enne Maksejõuetusmenetlusmääruse jõustumist, mil Euroopas piiriüleseid maksejõuetuskaasusi jälgiti, uuriti ja kommenteeriti üldiselt harva ning sedagi väheste asjatundjate ringis omamata mingit erilist mõju teiste riikide õigusele.[788] Seetõttu on Maksejõuetusmenetlusmäärust õigustatult peetud üheks

[787] EÜT L 160 30.06.2000 p 1–18.

[788] Paulus in: Moss. Fletcher. Isaacs. (eds.) The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide. 2nd ed. Oxford University Press, 2009, p v.

„verstapostiks“ või oluliseks pöördepunktiks Euroopas äriõiguse ühtlustamise teel.[789]

Käesolev töö keskendub Maksejõuetusmenetlusmääruses reguleeritud erandlikule nähtusele, milleks on üks konkreetne liik piiriüleseid maksejõuetusmenetlusi s.o teisesed maksejõuetusmenetlused. Teiseseid maksejõuetusmenetlusi saab vastavalt Määrusele algatatada üksnes peale põhimaksejõuetusmenetluse väljakuulutamist. Teiseste maksejõuetusmenetluste kontseptsioon on erandlik, sest Maksejõuetusmenetlusmäärus ei sea teiseste maksejõuetusmenetluste arvule mingeid piire. Teiseseid maksejõuetusmenetlusi saab võlgniku suhtes algatada liikmesriigis, kus asub võlgniku tegevuskoht Määruse artikli 2 (h) tähenduses. Juhul, kui võlgnikul on Määruse artikli 2 (h) mõistes tegevuskohti mitmes liikmesriigis, on võimalik mitme teisese maksejõuetusmenetluse algatamine kõigis vastavates liikmesriikides. Maksejõuetusmenetlusmäärus baseerub printsiibil, et liikmesriikide siseriiklikku õigust tuleb austada, seega iga liikmesriik säilitab oma maksejõuetusõigusalase regulatsiooni. See tuleneb muuhulgas asjaolust, et kui liikmesriikide maksejõuetusõigust omavahel võrrelda, siis leiame, et valdkonda puudutavad õigusnormid erinevad väga suurel määral tulenevalt liikmesriigi ajaloolisest taustast, sotsiaal-poliitilisest tasemest ja majandusarengust. Maksejõuetusmenetlusmäärus on seetõttu igati sobilik uurimisobjekt, eriti olukorras, kus erinevates liikmesriikides on võlgniku suhtes algatatud nii põhimaksejõuetusmenetlus kui ka teisene maksejõuetusmenetlus. Selles situatsioonis tuleb uurida ka vastavate liikmesriikide maksejõuetusõigust, et teha kindlaks nende vastastikuse toime ja mõju ulatus suhestatult Maksejõuetusmenetlusmäärusega.

Käesoleva töö teema on aktuaalne ka seetõttu, et tegemist on esimese doktoritööga Eestis, mis keskendub piiriülesele maksejõuetusõigusele. Samuti on võimalik, et tegemist on seni esimese doktoritööga Euroopa Liidus, mis keskendub üksnes teiseste maksejõuetusmenetluste uurimisele, mistõttu võib tegemist olla esimese püüdlusega anda süsteemne ülevaade antud teemast.

Käesoleva uurimustöö peamiseks eesmärgiks on leida vastus küsimusele, kas teisesed maksejõuetusmenetlused on põhjendatud ja vajalikud ning juhul kui on, siis kas on vaja liikmesriikide siseriiklikku õigust ja Maksejõuetusmenetlusmäärust muuta, et soodustada samaaegselt menetlemisel olevate piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist Euroopa Liidus.

Töö koostamisel tõstatasin ma järgmise hüpoteesi: teisesed maksejõuetusmenetlused võivad olla põhjendatud ja vajalikud, kuid liikmesriikide siseriiklikku õigust ja Maksejõuetusmenetlusmäärust on vaja muuta, et soodustada

[789] Eidenmüller. Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches internationales Insolvenzrecht, IPRax 2001, p 2 in: Pannen (Ed.) European Insolvency Regulation. De Gruyter Commentaries on European Law. De Gruyter Recht. Berlin, 2007, Introduction, mn 1, p 8.

samaaegselt menetlemisel olevate piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist Euroopa Liidus.

Uurimustöö peamisele küsimusele vastamiseks uurin ma järgmisi põhiprobleeme:

f) Mis on teiseste maksejõuetusmenetluste mõiste ja olemus?
g) Kas teisesed maksejõuetusmenetlused on põhjendatud ja vajalikud?
h) Kuidas teisesed maksejõuetusmenetlused funktsioneerivad?
i) Millised tegurid ja meetodid võiksid soodustada samaaegselt menetlemisel olevate piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist Euroopa Liidus?
j) Kas ja kuidas peaksid seadusandjad muutma liikmesriikide siseriiklikku õigust ja Maksejõuetusmenetlusmäärust?

Nimetatud probleemide ring ja nende omavahelised suhted on aluseks käesoleva doktoritöö struktuurile. Uurimustöö on jaotatud neljaks peatükiks.

Doktoritöö esimeses peatükis keskendutakse teiseste maksejõuetusmenetluste olemusele. Selles peatükis uurin ma kõigepealt teisteste maksejõuetusmenetluste tekkelugu ja ajaloolisi aspekte, et kindlaks teha, miks teisesed maksejõuetusmenetlused loodi ja Maksejõuetusmenetlusmäärusesse lisati. Lisaks sellele analüüsin ma milliseid funktsioone teisesed maksejõuetusmenetlused täidavad ja mis eesmärke nad teenida võivad. Ma uurin printsiipe, mille alusel teisesed maksejõuetusmenetlused peaksid funktsioneerima ning mis on neile kohaldatavad tulenevalt Maksejõuetusmenetlusmäärusest. Üks probleem, millele võib osundada liikmesriikide praktikas, seisneb menetlusosaliste ebakompetentsuses ja oskamatuses piiriüleseid maksejõuetusmenetlusi tõhusalt ja tulemuslikult läbi viia, mis võib olla põhjustatud asjaolust, et ei tunta selle valdkonna teoreetilisi aluseid. Kuivõrd Maksejõuetusmenetlusmäärus on liikmesriikide siseriikliku õiguse üheks osaks, pean vajalikuks käesolevas uurimustöös käsitleda ka seadusandja mõtet Määruse väljatöötamisel ja rakendamisel, et Maksejõuetusmenetlusmäärust kohaldataks piiriüleste maksejõuetusmenetluste korral liikmesriikides õigesti. Esimese peatüki eesmärgiks on leida vastus küsimusele, mis on teiseste maksejõuetusmenetluste mõiste ja olemus ning kas teisesed maksejõuetusmenetlused on põhjendatud ja vajalikud.

Leidmaks vastuseid kõigile järgnevatele uurimisküsimustele analüüsin ma läbi kogu teiseste maksejõuetusmenetluste „elutsükli“ alustades nende menetluste algatamisest ja tunnustamisest ning lõpetades teiseste maksejõuetusmenetluste läbiviimise, peatamise ja lõpetamisega seotud küsimustega. Seega on käesoleva doktoritöö teine peatükk keskendunud teisteste maksejõuetusmenetluste algatamise ja tunnustamisega seotud küsimuste analüüsimisele. Ma uurin milliste eelduste olemasolu korral on võimalik teiseseid maksejõuetusmenetlusi algatada tulenevalt Maksejõuetusmenetlusmääruses toodust ja kuidas need eeldused mõjutavad liikmesriikide siseriiklikku õigust. Ma analüüsin, kuidas liikmesriigi kohus peaks menetlema avaldust teisese maksejõuetusmenetluse algatamiseks ning mis võivad olla kohtu jaoks peamised probleemid selles küsimuses. Samuti käsitlen ma põhjalikult Määruse artiklis 2 (h) toodud võlg-

niku tegevuskoha mõistega seotud küsimusi. Ma keskendun teisese maksejõuetusmenetluse tõhususega seotud küsimustele algatavas menetlusetapis ning analüüsin, kas ajutise likvideerija (Eestis ajutise halduri) nimetamine ja nõue teostada menetluse kulude katteks ettemaks või anda sobiv tagatis on põhjendatud ja vajalik teiseste maksejõuetusmenetluste korral. Samuti käsitlen ma küsimusi, mis seonduvad avaldaja ja võlgniku pädevusega, avaldusele esitatavate nõuetega ning avalduse muutmise ja tagasivõtmisega. Ma analüüsin, millised peaksid olema põhjused teiseste maksejõuetusmenetluste algatamiseks. Näiteks, kas *de facto* maksejõuetus, mis on tuvastatud põhimaksejõuetusmenetluses, on tõesti ainus põhjus teiseste maksejõuetusmenetluste algatamiseks või mitte. Analüüsimisele kuulub ka küsimus, kas kohtulahendit, millega teisene maksejõuetusmenetlus algatati, peaks olema võimalik edasi kaevata järgmises kohtuastmes. Lõpetuseks uurin teiseste maksejõuetusmenetluste automaatset tunnustamist ja tunnustamisest tingitud mõju. Teise peatüki eesmärgiks on leida vastused küsimustele, kuidas teisesed maksejõuetusmenetlused funktsioneerivad, millised tegurid ja meetodid võiksid soodustada samaaegselt menetlemisel olevate piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist Euroopa Liidus ning kas ja kuidas peaksid seadusandjad muutma liikmesriikide siseriiklikku õigust ja Maksejõuetusmenetlusmäärust.

Doktoritöö kolmas peatükk keskendub teisestest maksejõuetusmenetlustest osavõtmisele ja nende läbiviimisele. Esiteks analüüsin ma, kuidas teisesed maksejõuetusmenetlused mõjutavad erinevate (menetlus)osaliste positsiooni neis menetlustes. Näiteks, kas teiseste maksejõuetusmenetluste algatamine muudab kuidagi võlgniku õigusi, kohustustusi ja vastutust. Samuti analüüsin küsimust likvideerija nimetamisest teiseses maksejõuetusmenetluses. Ma uurin, kuidas võlausaldajad peaksid teadma, kas neil on (majanduslikult) otstarbekas ja mõttekas üldse osaleda piiriülestes maksejõuetusmenetlustes. Tõstatatud saab ka küsimus riiklike järelevalveorganite rollist piiriülestes maksejõuetusmenetlustes. Teiseks käsitlen ma küsimusi ja analüüsin probleeme, mis on seotud teiseses maksejõuetusmenetluses oleva võlgniku varaga. Ma analüüsin küsimust, kuidas on võimalik kindlaks määrata, milline võlgnikule kuuluv vara peaks kuuluma teisesesse maksejõuetusmenetlusse. Ma uurin teisese maksejõuetusmenetluse likvideerija (Eestis pankrotihalduri) rolli tema kohustuste täitmisel, mis tulenevad Maksejõuetusmenetlusmäärusest ja liikmesriikide siseriiklikust õigusest. Ma uurin, kuidas peaks esmase ja teisese maksejõuetusmenetluse likvideerija pädevuse ulatus olema piiritletud ja kehtestatud. Näiteks, kas teisesel maksejõuetusmenetluse likvideerijal on õigus tagasi võita võlgniku tehing või toiming, millega kahjustati võlausaldajate huve ning kas teisesel maksejõuetusmenetluse likvideerijal on õigus välistada vara. Ma käsitlen küsimusi, mis puudutavad piiriüleselt paralleelselt läbiviidavate maksejõuetusmenetluste korral võlgniku vara valitsemise koordineerimist esmase ja teisese maksejõuetusmenetluse likvideerija vahel. Kolmandana antud peatükis käsitlen ma küsimusi, mis seonduvad võlausaldajate õiguste realiseerimisega piiriüleselt paralleelselt läbiviidavate maksejõuetusmenetluste korral nii võlausaldajate endi

kui ka likvideerijate kaudu. Lõpetuseks uurin, kas koordineerimist võlausaldajate õiguste realiseerimise küsimuses on võimalik saavutada piiriüleselt paralleelselt läbiviidavate maksejõuetusmenetluste korral. Kolmanda peatüki eesmärgiks on leida vastused küsimustele, kuidas teisesed maksejõuetusmenetlused funktsioneerivad, millised tegurid ja meetodid võiksid soodustada samaaegselt menetlemisel olevate piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist Euroopa Liidus ning kas ja kuidas peaksid seadusandjad muutma liikmesriikide siseriiklikku õigust ja Maksejõuetusmenetlusmäärust.

Doktoritöö neljas peatükk keskendub teiseste maksejõuetusmenetluste peatamise ja lõpetamisega seotud küsimustele. Enne teemasse süviti laskumist on vajalik välja selgitada, mida tähendab „likvideerimise peatamine“ (inglise keeles “stay of liquidation“) Maksejõuetusmenetlusmääruse artikli 33 tähenduses. Edasi keskendun ma protseduurilistele aspektidele, mida liikmesriigi kohus lahendama peab hakkama, kui esmase maksejõuetusmenetlue likvideerija esitab avalduse likvideerimise peatamiseks teiseses maksejõuetusmenetluses. Näiteks, mis on avaldusele esitatavad nõuded ning kuhu ja kellele peaks esmase maksejõuetusmenetluse likvideerija vastava avalduse esitama. Samuti analüüsin kas liikmesriigi kohus peab või võib lisaks likvideerimise peatamisele peatada osaliselt või tervikuna teisese maksejõuetusmenetluse ning milliseid meetmeid võib liikmesriigi kohus kasutada kaitsmaks võlausaldajate huve teiseses maksejõuetusmenetluses likvideerimise peatamise korral. Ma tõstatan muuhulgas küsimuse, kas Määruse artikkel 33 kui koordineerimise abinõu hetkel kehtivas sõnastuses teenib lõppkokkuvõttes Maksejõuetusmenetlusmääruse eesmärki, milleks on tõhus ja tulemuslik piiriüleste maksejõuetusmenetluste toimimine. Samuti analüüsin ma küsimusi, mis on seotud teiseste maksejõuetusmenetluste lõpetamisega. Ma tegelen eelkõige protseduuridiliste küsimustega näiteks teisese maksejõuetusmenetluse lõpetamise avaldusele esitatavate nõuetega. Samuti uurin, kas peaks olema kehtestatud mingisugune tähtaeg, mille raames esmase maksejõuetusmenetluse likvideerija peab esitama avalduse, millega lõpetataks teisene maksejõuetusmenetlus saneerimiskavaga, kompromissiga või muu samalaadse meetmega. Ma analüüsin võlgniku ja teisese maksejõuetusmenetluse likvideerija positsiooni olukorras, kus esmase maksejõuetusmenetluse likvideerija teeb ettepaneku lõpetada teisene maksejõuetusmenetlus saneerimiskavaga, kompromissiga või muu samalaadse meetmega. Ma uurin, mida tähendab, kui „teisese maksejõuetusmenetluse lõpetamine osutatud meetmete abil on võimalik ainult esmase maksejõuetusmenetluse likvideerija nõusolekul“ (inglise keeles “shall not become final without the consent of the liquidator in the main insolvency proceedings”). Ühtlasi uurin ma, mida kujutavad endast teisese maksejõuetusmenetluse kulud ja kulutused ning kes teisese maksejõuetusmenetlusega seotud kulusid ja kulutusi peaks kandma. Lisaks analüüsin ma Maksejõuetusmenetlusmääruse artiklis 20 (2) sätestatud võlausaldajate nõuete rahuldamise reegleid ja nende reeglite põhjendatust paralleelselt läbiviidavates piiriülestes maksejõuetusmenetlustes. Lõpetuseks käsitlen küsimust, mis puudutab teiseses maksejõuetusmenetluses peale kõigi

nõuete rahuldamist järelejäänud vara üleandmist esmasesse maksejõuetusmenetlusse. Neljanda peatüki eesmärgiks on leida vastused küsimustele, kuidas teisesed maksejõuetusmenetlused funktsioneerivad, millised tegurid ja meetodid võiksid soodustada samaaegselt menetlemisel olevate piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist Euroopa Liidus ning kas ja kuidas peaksid seadusandjad muutma liikmesriikide siseriiklikku õigust ja Maksejõuetusmenetlusmäärust.

Doktoritöö koostamisel olen kasutanud nii ajaloolist, süstemaatilist, analüütilist kui ka võrdlevat meetodit. Võrdlusobjektina on kasutatud Eesti maksejõuetusõiguse regulatsiooni Maksejõuetusmenetlusmääruse ja Euroopa Liidu liikmesriikide nagu näiteks Soome, Rootsi, Läti, Leedu, Hollandi ja Saksamaa maksejõuetusõiguse regulatsioonidega.

Doktoritöö kirjutamisel olen peamiselt kasutanud välismaise päritoluga teoreetilist kirjandust. Pean vajalikuks siinkohal märkida, et antud teemal on allikmaterjale väga vähe. Kuivõrd Euroopa Liidus on teiseseid maksejõuetusmenetlusi seni algatatud võrreldes esmaste maksejõuetusmenetlustega tunduvalt harvemini, siis on sel teemal arvamusi vähem avaldatud. Põhiliselt on kasutatud rahvusvaheliselt tuntud õigusteadlaste nagu näiteks Herchen, Fletcher, Garcimartín, Goode, Isaacs, Koulu, Moss, Omar, Pannen, Paulus, Riedemann, Schmit, Smith, Wessels, Virgós, jt teoseid. Ühtlasi on kasutatud teemat puudutavaid artikleid, sh Eesti ajakirjades Juridica ja Juridica International ilmunuid. Samuti on kasutamist leidnud rahvusvaheliste koostööorganite ja ekspertgruppide koostatud raportid. Õiguslike probleemide selgitamisel on autor tuginenud Määrust selgitavale raportile, samuti erinevate Euroopa Liidu liikmesriikide kohtute ja Euroopa Liidu Kohtu lahenditele uurimistöö valdkonnas. Kahjuks tuleb tõdeda, et ligipääs doktoritöö teemaga seotud kohtulahenditele oli praktiliselt võimatu, kuivõrd Euroopa Liidus puudub siiani piiriüleste maksejõuetuskaasuste register.

Tulenevalt doktoritöö mahulistest raamidest, olemusest ja seatud eesmärgist ei ole olnud võimalik töös käsitleda kõiki teiseste maksejõuetusmenetlustega seotud probleeme, sh ei ole antud uurimustöös käsitletud näiteks kohtute piiriülest koostööd Euroopa Liidus ja Määruse artiklites 5–15 sätestatud eranditega seotud küsimusi. Doktoritöös kajastamist leidnud põhiprobleemid on valitud Määruse reguleerimisalast lähtuvalt. Uurimustöös on kasutatud õigusakte seisuga 1. aprill 2011.a.

Uurimustöös olen jõudnud tõdemuseni, et teisesed maksejõuetusmenetlused võivad olla põhjendatud ja vajalikud, kuid liikmesriikide siseriiklikku õigust ja Maksejõuetusmenetlusmäärust on vaja kohati muuta, et soodustada samaaegselt menetlemisel olevate piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist Euroopa Liidus. Seetõttu tegin doktoritöös ka ettepanekuid nii Maksejõuetusmenetlusmääruse kui ka siseriikliku õigusliku regulatsiooni parendamiseks.

Alljärgnevalt on toodud doktoritöös esitatud peamised uurimistulemused.

1. Maksejõuetusmenetlusmääruse tekke ja ajaloo valguses võib teiseseid maksejõuetusmenetlusi pidada üheks vägagi innovaatiliseks nähtuseks Euroopa Liidu õigusmaastikul. Kuni aastani 1980 oli liikmesriikide tegevus suunatud sellele, et luua piiriüleste maksejõuetusmenetluste jaoks võimalikult ühtne ja ühetaoline õiguslik regulatsioon Euroopa Liidus. Siiski leiti tol ajal, et ühtne ja ühetaoline õiguslik regulatsioon oleks liikmesriikide jaoks liiga keeruline rakendamiseks. Alates Istanbuli konventsiooni vastuvõtmisest on liikmesriikide püüdlused muutunud. Ühtse ja ühetaolise õigusliku korra loomine on pigem asendunud püüdlusega leida õiguslik regulatsioon, kus piiriülesed maksejõuetusmenetlused koordineerimise ja koostööga toimima panna.
2. Teiseste maksejõuetusmenetluste olemasolu Maksejõuetusmenetlusmääruses võib ennekõike vaadelda liikmesriikide vahelise kokkuleppena. Teiseste maksejõuetusmenetluste olemasolu on peetud üheks oluliseks eeltingimuseks, miks liikmesriigid nõustusid omal ajal automaatselt tunnustama erinevaid restruktureeriva iseloomuga siseriiklikke maksejõuetusmenetluste liike, mis sooviti lisada Maksejõuetusmääruse kohaldamisalasse. Samuti peeti Maksejõuetusmenetlusmääruse vastuvõtmise peamiseks eeltingimuseks liikmesriikide poolt nähtuna kohalike võlausaldajate huvide kaitset liikmesriikide siseriikliku õiguse alusel. Kui üldisest printsiibist lähtuvalt peaks liikmesriikide nägemuses eksisteerima võlgniku suhtes vaid üks ja ainus piiriülene maksejõuetusmenetlus, mis oleks algatatud liikmesriigis, kus asub võlgniku põhihuvide kese, hõlmates kõiki võlgniku varasid ning milles võlausaldajad saaksid osaleda, siis territoriaalsete (sh teiseste) maksejõuetusmenetluste olemasolu võib olla õigustatud mitmetel põhjustel, mis viisid lõppkokkuvõttes Maksejõuetusmenetlusmääruse vastuvõtmiseni.
3. Teiseste maksejõuetusmenetluste kui territoriaalsete maksejõuetusmenetluste olemasolu õigustamiseks esitasid liikmesriigid 1995. aasta konventsiooni läbirääkimiste käigus omal ajal mitmeid argumente, millest tulenevalt peaksid teisesed maksejõuetusmenetlused täitma kaht funktsiooni: kaitsefunktsioon ja abistav funktsioon. Tööst järeldub, et teisesed maksejõuetusmenetlused võivad teenida üsnagi vastuolulisi eesmärke olenevalt sellest, kas nad peaksid samaaegselt kaitsma kohalikke huve või abistama esmast maksejõuetusmenetlust. Minu arvates on võimalik, et teatud asjaoludel võivad teisesed maksejõuetusmenetlused teenida hoopis võlgniku huve ja omades teatud sekkumisvõimalusi töötada likvideerijate ja võlausaldajate vastu, juhul kui *lex fori concursus secundarii* seda võimaldab.
4. Maksejõuetusmenetlusmääruse koostamisel on moonutatud universaalsuspõhimõtet kõiki kolme tuntud meetodit kasutades, st: a) lubades allutatud territoriaalseid maksejõuetusmenetlusi paralleelselt esmase maksejõuetusmenetlusega; b) lubades teatud teatud tingimustel territoriaalseid maksejõuetusmenetlusi ilma universaalse toimega esmast maksejõuetusmenetlust algatamata; ja c) luues erandid *lex fori concursus* kohaldamisalasse. Seega

võib väita, et teiseste maksejõuetusmenetluste osatähtsus on kasvanud ning teisesed maksejõuetusmenetlused omavad olulist rolli Maksejõuetusmenetlusmääruses.

5. Vastastikuse usalduse printsiip on keskne printsiip Maksejõuetusmenetlusmääruses, mille järgimisega püütakse tagada piiriüleste maksejõuetusmenetluste tõhus ja tulemuslik toimimine. Seda printsiipi tuleb muuhulgas arvestada ka Maksejõuetusmenetlusmääruse tõlgendamisel. Maksejõuetusmenetlusmääruse tõlgendamise tulemus peab andma identse tulemuse erinevates liikmesriikides tõlgendatuna. Vastastikuse usalduse printsiip paneb liikmesriikide seadusandjatele erilise vastutuse formuleerimaks ja kehtestamaks sobivamaid siseriiklikud maksejõuetusmenetluste liigid, mis võiksid kuuluda Määruse lisasse B. Hetkest, mil konkreetne siseriiklik maksejõuetusmenetluse liik on lisatud Määruse lisasse B, peavad teised liikmesriigid seda menetluse liiki ja selle võimalikku mõju automaatselt tunnustama. Lisaks paneb see põhimõte menetlusosalistele vastutuse olukorras, kus tuleb valida sobivaim käitumisviis ja meetod lahendamaks võlgniku maksejõuetuse situatsioon, st kui on valida, kas algatada võlgniku suhtes teisene maksejõuetusmenetlus või mitte. Juhul, kui nii esmane kui ka teisene maksejõuetusmenetlus on algatatud, eeldab see kõigilt (menetlus)osalistelt mõlemas (või mitmes) paralleelselt toimuvas maksejõuetusmenetluses vastastikkust usaldust ja tõhusat koostööd.
6. Teisese maksejõuetusmenetluse algatamise kohustuslikeks eeltingimusteks on esmase maksejõuetusmenetluse olemasolu teises liikmesriigis ja võlgniku tegevuskoht Määruse artikli 2 (h) mõistes liikmesriigis, kus teisese maksejõuetusmenetluse algatamist taotletakse. Liikmesriigi kohus, kelle pädevusse kuulub esmase maksejõuetusmenetluse algatamine, peab selgelt oma kohtulahendis märkima, et ta omab pädevust esmast maksejõuetusmenetlust algatada ning et konkreetne esmase maksejõuetusmenetluse liik, mida algatatakse, on sätestatud Määruse lisas A. Juhul, kui siseriiklikus õiguses vastav säte puudub, millise maksejõuetusmenetluse algatamisega Määruse mõistes tegemist on ja kohtul ei ole omaalgatuslikult õigust kohtulahendis vastavat märget teha, siis oleks mõistlik siseriiklikku õigust muuta.
7. Tööst nähtub, et teiseste maksejõuetusmenetluste algatamisega on praktikas mitmeid probleeme. Seetõttu oleks mõistlik, kui liikmesriikide seadusandjad sätestaksid siseriiklikus õiguses, millise kohtulahendiga loetakse maksejõuetusmenetlus algatatuks Maksejõuetusmenetlusmääruse tähenduses. Samuti oleks abistav, kui maksejõuetusmenetlust algatavas kohtulahendis oleks sätestatud, millal nimetatud kohtulahend jõustub. Juhul, kui siseriiklikus õiguses vastav säte puudub, millal kohtulahend Määruse tähenduses jõustub ja kohtul ei ole omaalgatuslikult õigust kohtulahendis vastavat märget teha, siis oleks mõistlik siseriiklikku õigust muuta.
8. Üks võimalik probleem, mis leidis töös teisese maksejõuetusmenetluse algatamise etapi juures käsitlust, puudutas Määruse artiklis 2 (f) toodud mõistet „maksejõuetusmenetluse algatamise aeg“ (inglise keeles: “the time

of the opening of proceedings"). Analüüsi tulemusena leidsin, et Määruse artiklit 2 (f) võiks muuta selliselt, et mõiste viimane osa, nimelt „olenemata sellest, kas otsus on lõplik või mitte" (inglise keeles: "*whether it is final judgment of not*") võiks tunnistada kehtetuks.

9. Hõlbustamaks piiriüleste maksejõuetusmenetluste läbiviimist peaks Euroopa Liidus olema piiriüleste maksejõuetuskaasuste register, mis teeks kogu protsessi haldamise vähem koormavamaks ja lihtsamaks, seda eriti just liikmesriikide kohtutele, kellel tihtipeale puudub informatsioon, millise maksejõuetuskaasusega parasjagu tegemist on.
10. Teisese maksejõuetusmenetluse algatamise teiseks kohustuslikuks eeltingimuseks peale esmase maksejõuetusmenetluse olemasolu teises liikmesriigis on võlgniku tegevuskoha olemasolu liikmesriigis, kus teisese maksejõuetusmenetluse algatamist taotletakse. Tööst nähtub, et tegevuskoha olemasolu kindlaksmääramine võib olla praktikas väga problemaatiline, kuivõrd see sõltub mitmetest teguritest. Teisest maksejõuetusmenetlust ei tohi algatada, kui võlgnikul vastavas liikmesriigis tegevuskohta Määruse artikli 2 (h) mõistes ei ole. Sellisel juhul jääb kestma esmase maksejõuetusmenetluse universaalne mõju.
11. Määrus ei tee võlgniku tegevuskoha mõiste osas vahet, kas tegemist on füüsilisest või juriidilisest isikust võlgnikuga. Tööst järeldub, et füüsilisest isikust võlgniku tegevuskoha määratlemisel ei ole Määruse artiklis 2 (h) toodud definitsioon piisav ja tegelikult täielikult kohaldatav. Seetõttu olen ma pigem arvamusel, et oleks mõttekas täiendada Määrust eraldi artikliga 2 (i) selliselt, et füüsilisest isikust võlgniku puhul tähendaks mõiste „tegevuskoht" kohta (liikmesriiki), kus asuvad füüsilisest isikust võlgniku varad Määruse artikli 2 (g) tähenduses. Kuivõrd mõiste „tegevuskoht" on peab olema autonoomselt tõlgendatav kõigis liikmesriikides, siis on mõistlik teha vastav muudatus Määruses, mitte muuta siseriiklikku õigust.
12. Maksejõuetusmenetlusmäärus muudab liikmesriikide siseriiklikku õigust teiseste maksejõuetusmenetluste algatamise tingimuste osas alljärgnevalt: a) tingimus, mille kohaselt võlgnik, peab siseriikliku õiguse kohaselt olema maksejõuetu, ei pea olema täidetud, kuna esmases maksejõuetusmenetluses on vastav asjaolu juba tuvastatud ning esmast maksejõuetusmenetlust algatav kohtulahend kuulub automaatselt tunnustamisele kõigis liikmesriikides; ja b) teisese maksejõuetusmenetluse algatamist on õigustatud taotlema esmase maksejõuetusmenetluse likvideerija. Kõigile teistele küsimustele antud menetlusetapis kohaldub liikmesriigi siseriiklik õigus, mis tööst johtuvalt võib olla problemaatiline, sest liikmesriikide seadusandjad ei ole üldjuhul ette näinud eraldi (abistavaid) sätteid esmase ja teiseste maksejõuetusmenetluste algatamiseks siseriiklikus õiguses. Nimetatud küsimuses on töös tehtud ka mitmeid ettepanekuid.
13. Esmase maksejõuetusmenetluse likvideerija võib end teisese maksejõuetusmenetluse algatamise avalduse esitamisel leida erinevatest õiguslikest positsioonidest erinevates liikmesriikides, kus asub võlgniku tegevuskoht,

sest liikmesriikide siseriiklik õigus avaldaja isiku ja avaldusele esitatavate nõuete osas varieerub. Tööst järeldub, et esmase maksejõuetusmenetluse likvideerija avaldusele tuleks kohaldada lihtsustatud nõudeid ning vajadusel tuleks muuta siseriiklikku õigust, et esmase likvideerija avaldusele ei kohaldataks üldisi siseriiklikule pankrotiavaldusele esitatavaid nõudeid nagu näiteks nõue, mille kohaselt peaks likvideerijal olema võlgniku vastu nõue. Määrusest tulenevalt peab esmane likvideerija üksnes näitama, et võlgnikul on tegevuskoht vastavas liikmesriigis, kus ta teisese maksejõuetusmenetluse algatamist taotleb.

14. Fakt, kas võlgnik on maksejõuetu, tuvastatakse esmase maksejõuetusmenetluse algatamise käigus. Sellest tulenevalt leiti käesolevas uurimustöös, et juhul, kui võlgniku maksejõuetus on juba teises liikmesriigis esmase maksejõuetusmenetluse algatamisel tuvastatud, esmane maksejõuetusmenetlus on algatatud ning vastava kohtulahendi tunnustamine on Euroopa Liidus automaatne ja kohustuslik tulenevalt Määruse artiklist 16, siis puudub vajadus ajutise likvideerija (Eestis: ajutise halduri) määramiseks teisese maksejõuetusmenetluse algatamise etapis enne lõpliku kohtulahendi tegemist. Vajaliku informatsiooni teisese maksejõuetusmenetluse algatamise küsimustes saab kohtunik vajadusel esmase maksejõuetusmenetluse likvideerijalt, kelle ta võib soovi korral kohtuistungile kutsuda.
15. Töös nähtub, et võlgniku maksejõuetus ei ole ainus põhjus, miks peaks kohus teisese maksejõuetusmenetluse algatama. Töös toodud kohtupraktika pinnalt järeldub, et lisaks võlgniku maksejõuetuse faktile peavad esinema veel mingid täiendavad põhjused, miks teisest maksejõuetusmenetlust kui kaitsva ja abistava iseloomuga menetlust esmase maksejõuetusmenetluse kõrval paralleelselt vaja oleks. Liikmesriigi kohus, kes on õigustatud algatama teisest maksejõuestusmenetlust, peaks siseriiklikust õigusest tulenevalt omama pädevust hinnata, kas täiendav põhjus on piisav ja põhistatud. Juhul, kui liikmesriigi kohtul, kes on õigustatud algatama teisest maksejõuetusmenetlust, puudub siseriiklikust õigusest tulenevalt vastav pädevus hinnata ja arvestada täiendavaid põhjusi teisese maksejõuetusmenetluse algatamiseks, tuleb siseriiklikku õigust vastavalt muuta või täiendada, et kohtul selline pädevus oleks tagatud.
16. Kuivõrd teiseseid maksejõuetusmenetlusi peetakse üldjuhul tavalisteks maksejõuetusmenetlusteks liikmesriikide siseriiklikus õiguse kontekstis, siis meetodid ja protseduur teiseste maksejõuetusmenetluste avalduste menetlemiseks ja nende menetluste algatamiseks erinevate liikmesriikide siseriiklikus õiguses varieeruvad. Lisaks algatamise eeltingimustele, mis tulenevad otse Maksejõuetusmenetlusmäärusest, on liikmesriikide kohtud hetkel silmitsi ka liikmesriikide siseriiklikus õiguses sätestatud mitmesuguste (protseduuriliste) täiendavate nõuetega, mille rakendamine praktikas võib olla problemaatiline. Minu arvates võiks teiseste maksejõuetusmenetluste algatamise avalduste menetlemise etapi osas siseriikliku õiguse üle vaadata ja vajadusel seda muuta näiteks küsimuses, kas võlgniku kohale

kutsumine ja ülekuulamine on alati vajalik või saab vastavat informatsiooni ja tõendeid ka esmase maksejõuetusmenetluse likvideerija kaudu, sest esmane maksejõuetusmenetlus on juba eelnevalt algatatud. Samuti võiks minu hinnangul kaaluda Määruse artikli 30 kehtetuks tunnistamist, sest minu arvates ei ole ettemaksu või deposiiti tasumist teiseste maksejõuetusmenetluste algatamise eeldusena vajalik nõuda, kui võlgniku suhtes on juba esmane maksejõuetusmenetlus algatatud.

17. Maksejõuetusmenetlus peaks oma olemuselt olema kiire, tõhus ja tulemuslik menetlus. Seetõttu leiti töös, et edasikaebamine kohtulahendite peale, millega algatatakse teisene maksejõuetusmenetlus, võiks olla piiratud. Minu arvates ei ole põhjendatud, kui võlgnik, kelle maksejõuetus on tuvastatud esmases maksejõuetusmenetluses ning esmase maksejõuetusmenetluse likvideerija, kelle põhieesmärk on menetlus tõhusalt ja tulemuslikult kiiresti läbi viia, mitte võlgniku vara arvel menetluskulusid juurde tekitada, saaksid antud kohtulahendi peale edasi kaevata.
18. Teisese maksejõuetusmenetluse tunnustamine teistes liikmesriikides leiab aset automaatselt hetkest, mil kohtulahend Määruse artikli 2 (e) tähenduses jõustub liikmesriigis, kus teisene maksejõuetusmenetlus algatatakse. Tööst nähtub, et automaatse tunnustamisega seondub rida küsimusi, mis puudutavad algatatud ja paralleelselt toimivate maksejõuetusmenetluste vastastikust tegelikku mõju, juriidilisi tagajärgi ja nende tagajärgede täpsemat ulatust. On selge, et *lex fori concursus* printsiibist lähtuvalt mõjutavad teisesed maksejõuetusmenetlused esmast maksejõuetusmenetlust ja vastupidi, tekitades omakorda menetluste läbiviimisel probleeme. Seetõttu on ülioluline, et liikmesriikide siseriiklik õigus teiseste maksejõuetusmenetluste küsimuses oleks hoolikalt formuleeritud, kuivõrd need normid omavad rakendamise korral Euroopa Liidu ülest mõju.
19. Võib küll olla vaieldav, kas liikmesriikidel on õigus muuta oma siseriiklikku õigust, sest Maksejõuetusmenetlusmäärus on liikmesriikide õigusliku korra üheks osaks ja otsekohaldatav liikmesriikides. Siiski järeldub tööst, et nii kaua kui vastavaid teemat käsitlevaid fundamentaalseid küsimusi ei ole reguleeritud Maksejõuetusmenetlusmääruses, oleks siiski mõistlik samm siseriikliku õiguse parendamine, et panna Maksejõuetusmenetlusmäärus liikmesriikide ja menetlusosaliste jaoks tööle ning piiriülesed maksejõuetusmenetlused tulemuslikult ja tõhusalt toimima.
20. Osalemine paralleelselt läbiviidavates piiriülestes maksejõuetusmenetlustes, millele kohaldatakse vastavalt kas *lex fori concursus universalis* või *lex fori concursus secundarii*, võib osutuda problemaatiliseks võlgniku jaoks. Tööst nähtub, et võlgnikul ei peaks olema kohustust esitada teisese maksejõuetusmenetluse algatamiseks avaldust maksejõuetuse tekkimise põhjusel, kuivõrd võlgnik on juba maksejõuetu esmase maksejõuetusmenetluse algatamise tulemusena. Seetõttu võiks siseriiklikku õigust vajadusel muuta, et oleks selge, et võlgnikul ei ole vastavat kohustust ning ei teki vastutust, juhul, kui ta avaldust teisese maksejõuetusmenetluse algatamiseks ei esita.

Samas olen arvamusel, et teatud juhtudel peaks olema likvideerijal õigus keelduda informatsiooni andmisest võlgnikule, sest võlgnik võib olla pahatahtlik ja takistada piiriüleste maksejõuetusmenetluste normaalset kulgu. Seetõttu võiks kaaluda informatsiooni keeldumise sätte lisamist kas Määrusesse või siseriiklikku õigusesse. Mis puutub võlgniku kohustust anda informatsiooni teisese maksejõuetusmenetluse likvideerijatele, siis tihtipeale on mõistlikum ja kiirem lahendus seda infot küsida esmase maksejõuetusmenetluse likvideerija käest, sest võlgniku suhtes esmane maksejõuetusmenetlus käib juba varasemast ajast ning võlgnikul ei pruugi õiget infot olla. Seetõttu võiks siseriiklikus õiguses mõningatel juhtudel teha erandi ja mitte nõuda võlgnikult detailset (raamatupidamisalast) informatsiooni või vande andmist teiseste maksejõuetusmenetluste korral.

21. Tööst nähtub, et võlgniku jaoks suurim problem on vastutus mitme liikmesriigi õiguse alusel paralleelselt läbiviidavate maksejõuetusmenetluste korral. Näiteks ei ole siseriiklikus õiguses sätteid selle kohta, et teisese maksejõuetusmenetluse likvideerija ei tohiks esitada nõudeid võlgniku vastu või et enne nõuete esitamist peaks teisese maksejõuetusmenetluse likvideerija küsima esmase maksejõuetusmenetluse likvideerija käest nõusolekut. Teisene maksejõuetusmenetlus on assisteeriva iseloomuga ja käib üldjuhul esmase maksejõuetusmenetuse likvideerija suuniste kohaselt. Seetõttu leidsin, et säte nõusoleku kohta võiks olla kehtestatud Määruses. Samas leidsin ka, et võlgniku vastutus on väga lai eraldi teema, mistõttu võiks nimetatud küsimuses enne ulatuslike otsuste ja õigusloomes muudatuste tegemist läbi viia liikmesriikides uuringu. Ei ole välistatud, et õigusnormid võlgniku vastutuse osas võiksid olla ühtlustatud. Seni on aga oluline, et likvideerijad järgiksid Määruse artiklis 31 toodud koostöö ja informeerimiskohustust, et piiriülesed maksejõuetusmenetlused toimiksid tõhusalt ja tulemuslikult.
22. Töös leidis käsitlust ka küsimus võlgniku volitustest teisestes maksejõuetusmenetlustes. Tööst nähtub, et võlgnikul võivad olla *lex fori concursus universalis* ja *lex fori concursus secundarii* alusel erineva mahuga volitused erinevates menetlustes, mis tekitavad praktikas probleeme ja võivad takistada piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist. Seetõttu leidsin, et teisestes maksejõuetusmenetlustes võiks võlgnikul olla samad volitused, mis esmases maksejõuetusmenetluses. Selleks, et seda saavutada tuleks siseriiklikku õigust muuta ja sätestada, et teisestes maksejõuetusmenetlustes kohaldatakse võlgniku volitustele esmase maksejõuetusmenetluse algatanud riigi õigust.
23. Teisest maksejõuetusmenetlust juhib üks või mitu likvideerijat Maksejõuetusmenetlusmääruse artikli 2 (b) tähenduses. Kuivõrd teisese maksejõuetusmenetluse algatamisest alates on võlgniku vara valitseda vähemalt kahe (st esmase ja teisese) likvideerija poolt, siis tekkis töös küsimus, kas selline süsteem on õigustatud. Analüüsi tulemusena leidsin, et märksa kuluefektiivsem oleks mitte määrata uut isikut teisese maksejõuetus-

menetluse likvideerijaks, vaid määrata teisese maksejõuetusmenetluse likvideerijaks sama isik st esmase maksejõuetusmenetluse likvideerija. Ta on alates esmase maksejõuetusmenetluse algatamisest võlgniku maksejõuetuskaasuse asjaoludest teadlik. Samas hetkel teadaolevalt liikmesriikide siseriiklik õigus ei sätesta sellist võimalust, kuivõrd tavapäraselt esinevad siseriiklikus õiguses spetsiifilised kohalikke kandidaate soosivad nõuded nt kohaliku keele valdamine ja kohustuslik liikmelisus kohalikus maksejõuetuspraktikuid koondavas organisatsioonis jms. Asjaolu, et teatud funktsioone saab täita vaid kohalik jurist, kelle kinnitab kohalik kohus, on tekitanud piirangu teenuste vaba liikumise osas Euroopa Liidus. Minu arvamuse kohaselt, juhul, kui liikmesriikidel on poliitilist tahet suunduda tõhusama, tulemuslikuma ja ühtsema piiriüleste maksejõuetusmenetluste süsteemi poole, siis Maksejõuetusmenetlusmäärust võiks muuta ja täiendada selliselt, et piiriülestes maksejõuetusmenetlustes määrataks üks Euroopa Liidus volitusi omav likvideerija, kes vastutaks nii esmase kui teiseste maksejõuetusmenetluste juhtimise ja võlgniku vara valitsemise eest. Samuti võiksid liikmesriigid siseriiklikus õiguses tühistada teise liikmesriigi likvideerijate suhtes hetkel kehtivad ebamõistlikud kvalifikatsiooni- ja sobivuspiirangud.

24. Peale teisese maksejõuetusmenetluse algatamist on võlausaldajad tavaliselt silmitsi järgmiste küsimustega: kas ja kui jah, siis millises – teiseses, esmas(t)es või kõigis – maksejõuetusmenetluses osaleda. Selleks, et võlausaldaja teaks, mida ta tegema peaks, on vajalik järgnev info: teadaolev informatsioon võlgniku kohta, protsessi kulgemise prognoositavus ja maksejõuetusmenetluse kulud. Analüüsi tulemusena leidsin ma, et kõik need asjaolud on piiriüleste maksejõuetusmenetluste osas kehtivat õiguslikku raamistikku silmas pidades võlausaldaja jaoks ette prognoosimatud enne nõude esitamist piiriülesesse maksejõuetusmenetlusse. Tööst nähtub, et piiriüleste maksejõuetuskaasuste register oleks info kättesaadavuse osas hädavajalik meede. Samuti leidsin, et Määruse artiklit 22 (1) võiks täiendada ja anda teisesele maksejõuetusmenetluse likvideerijale õiguse nõuda kohtulahendi registreerimist teiste liikmesriikide avalikes registrites.
25. Käesolevast uurimustööst nähtub, et küsimus riiklikust järelevalvest piiriülestes maksejõuetusmenetlustes ei ole reguleeritud Maksejõuetusmenetlusmäärusega. Seega on see küsimus jäetud reguleerida liikmesriikidele siseriikliku õiguse kaudu. Töös leiti, et nimetatud teema peaks olema reguleeritud nii Määruses kui siseriiklikus õiguses. Määrus andma selles riikliku järelevalve küsimuses liikmesriikidele suunised, minimaalselt selles ulatuses, et Määruse artikli 31 tuleks täiendamise kaudu antaks kohtutele võimalus omavahel koostööd teha ja informatsiooni vahetada. Liikmesriikide riikliku järelevalveorganid peaksid omama õigust teostada järelevalvet likvideerija üle, kes tegutseb järelevalveorgani asukohariigis. Riikliku järelevalve organi volitused järelevalvet teostada ei peaks olema

piiritletud üksnes liikmesriigi territooriumiga, kus likvideerija konkreetset maksejõuetusmenetlust juhtima määrati.

26. Käesolevas töös analüüsiti mitmeid küsimusi, mis puudutavad võlgniku vara valitsemist teisese maksejõuetusmenetluse likvideerija poolt. Tööst nähtub, et teiseses maksejõuetusmenetluses valitsemisele kuuluva võlgniku vara asukoha ja vara hulka kuuluvate esemete kindlaks tegemine on praktikas problemaatiline. Seetõttu tuleks tulevikus üle vaadata Määruse artiklis 2 (g) toodud reeglid. Samuti tuleks leida õige koht (kas Määrus või siseriiklik õigus) õigusnormidele, mis sätestavad, millised esemed kuuluvad võlgniku vara hulka piiriülestes maksejõuetusmenetlustes ja millised esemed on neist välistatud. Võlgniku vara hulka kuuluvate ja mittekuuluvate esemete küsimuses võib kõne alla tulla ka liikmesriikide õiguse ühtlustamine nimetatud küsimuses. Samuti leiti, et teisese maksejõuetusmenetluse likvideerija volitused võlgniku vara valitsemisel on üsna ebamäärased, sest nii esmase kui teisese maksejõuetusmenetluse likvideerija võib *lex fori concursus* alusel üldiselt esindada võlgnikku (sh kohtumenetlustes), teha võlgniku varaga tehinguid, korraldada võlgniku majandustegevust ja valitseda võlgniku vara. Samal ajal mõjutab teiseste menetluste läbiviimist ning likvideerija volitusi ka Määruses sätestatu.
27. Võlgniku vara valitsemise koordineerimist reguleerib Määruses artikkel 31, mis kehtestab likvideerijatele kohustuse infot vahetada ja igakülgselt koostööd teha. Fundamentaalne küsimus, mis töös analüüsimist leidis, seisnes jätkuvalt selles, kuidas esmase ja teiseste maksejõuetusmenetluste likvideerijate vahelist koostööd saavutada. Tööst nähtub, et üksnes informatsiooni vahetamine ei aita kaasa koostöö tõhustamisele. Samuti ilmneb tööst, et praktikas esineb olukordi, kus likvideerijate eesmärgid ja soovid ei kattu. On ilmne, et nimetatud olukorras peaksid koostöö tõhustamisele kaasa aitama siseriiklikud õigusnormid. Ühe näitena leiti töös, et Eesti pankrotiseadust võiks muuta selliselt, et teisese maksejõuetusmenetluse likvideerija ei oleks vastutav kogu võlgniku raamatupidamise eest, vaid üksnes selle osa eest, mis on tema valitsemise all. Lisaks leiti, et likvideerijate vahelised vaidlused võlgniku vara üle on lubamatud. Vaidlusi saaks mõne võrra ära hoida näiteks sellisel viisil, et võlgniku vara ei transporditaks ühest liikmesriigist teise maksejõuetusmenetluse kestel. Selleks tasuks kaaluda vastava sätte lisamist Määrusesse, sest hetkel on tavapärased olukorrad, kus esmase maksejõuetusmenetluse likvideerija hakkab kohe peale esmase maksejõuetusmenetluse algatamist teisese maksejõuetusmenetluse algatamise hirmus võlgniku vara teistest liikmesriikidest ära vedama tehes seda võlgniku vara arvel.
28. *CoCo Guidelines*[790] sätestab, et likvideerijate vahelist koostööd on võimalik kõige paremini saavutada kasutades selleks likvideerijate vahelisi kokku-

[790] Wessels. Virgos. European Communication and Cooperation Guidelines for Cross-border Insolvency, Academic Wing of INSOL Europe, July 2007.

leppeid või koostööprotokolle (inglise keeles “protocols”), milles saab määratleda olulisemad otsustusprotsessid maksejõuetusmenetlustes. Selline kokkulepe võib olla teisesele maksejõuetusmenetluse likvideerijale abiks näiteks olukorras, kus *lex fori concursus secundarii* ja Määruse artikli 31 (3) alusel tehtud esmase maksejõuetusmenetluse likvideerija ettepanek on vastuoluline. Analüüsi tulemusena leiti kokkuvõtteks, et likvideerijate koostöö tõhustamiseks on vajalik liikmesriikide siseriiklikus õiguses tunnistada kehtetuks need sätted, mis puudutavad likvideerijate omavaheliste kokkulepete sõlmimise keeldu võlgniku vara nimel ja/või selle huvides.

29. Võlausaldajate jaoks on kõige olulisem õigus läbi nõude esitamise osaleda maksejõuetusmenetlustes. Tööst nähtub, et võlausaldajate õiguste realiseerimine varieerub ja võib praktikas kohati ebameeldivusi tekitada, juhul kui ei olda teadlik siseriiklikult kehtestatud spetsiifilistest reeglitest nõuete esitamise osas nagu näiteks nõuete esitamise tähtaeg või tasu maksmine nõude esitamise eest. Seetõttu olen ma arvamusel, et mõistlikum oleks, kui piiriüleste maksejõuetusmenetluste korral siseriiklikus õiguses nõuete esitamiseks tähtaegu ei seataks. Juhul, kui likvideerijad menetlemise käigus leiavad, et võlausaldajatele on võimalik väljamakseid teha, siis tuleks võlausaldajaid teavitada ja pärast seda võiksid võlausaldajad esitada oma nõuded. Kõigepealt peaksid likvideerijad tegelema võlgniku vara tagasisaamise ja tehingute tagasivõitmisega ning alles seejärel tegelema nõuete määratlemisega, vastasel juhul tekitatakse mõttetult täiendavaid menetluskulusid. Samuti peaksid liikmesriigid siseriikliku õiguse üle vaatama ja läbi analüüsima, millistel juhtudel on teiseses maksejõuetusmenetluses mõttekas ja kuluefektiivne võlausaldajate üldkoosolekuid ja võlausaldajate toimkondi ette näha, kui vastavad organid on samaaegselt olemas esmases maksejõuetusmenetluses.
30. Üks küsimus, mida käesolevas töös uuriti, seondub likvideerijate rolliga võlausaldajate õiguste teostamisel ja likvideerijate osalemisel nende nimel maksejõuetusmenetlustes. Määruse kohaselt on likvideerijatel õigus esitada teistesse maksejõuetusmenetlustesse kõigi „enda menetluse“ võlausaldajate nõuded ja osaleda seeläbi maksejõuetusmenetlustes samas ulatuses kui võlausaldajad ise, sh on likvideerijatel õigus osaleda võlausaldajate koosolekutel. Likvideerijate osalemine teistes maksejõuetusmenetlustes võib olla detailselt reguleeritud liikmesriikide siseriiklikus õiguses. Tööst nähtub, et esineda võib ka huvide konflikte. Ühtlasi leidsin, et nõudeid võiks kaitsta piiriülestes maksejõuetusmenetlustes üks kord, st juhul, kui nõue on ühes menetluses kaitstud ja tunnustatud, ei peaks teda uuesti kaitsma ja tunnustama teises maksejõuetusmenetluses. Selline säte võiks minu meelest sisalduda tulevikus Määruses. Hetkel saaks muuta ka siseriiklikku õigust sätestades, et juhul, kui nõue on teise liikmesriigi maksejõuetusmenetluses tunnustatud, siis see uuesti tunnustamist ei vaja.
31. Üks problemaatilisemaid teemasid, mida käesolevas töös uuriti, puudutas likvideerimisprotsessi peatamist ja selle lõpetamist teiseses maksejõuetus-

menetluses. Iseenesest peaks olema tegemist kiire protseduuriga. Selles osas analüüsiti mitmeid küsimusi, mida liikmesriigi kohus teiseses maksejõuetusmenetluses peatamisega seonduvalt lahendama peab. Tööst nähtub, et likvideerimisprotsess on üks eraldi alaprotsess (inglise keeles: the so-called „sub-process“) teiseses maksejõuetusmenetluses, millele kohalduvad vastavad siseriikliku õiguse sätted. Likvideerimisprotsessi peatamine teiseses maksejõuetusmenetluses võib liiga keeruline ja aeganõudev. Seetõttu tegin ettepaneku liikmesriikide siseriiklikus õiguses täiendada esmase likvideerija avaldusele esitatavaid nõudeid likvideerimisprotsessi peatamiseks teiseses maksejõuetusmenetluses, mis lihtsustaks ja kiirendaks vastavate esmase maksejõuetusmenetluse likvideerija avalduste menetlemist kohtus.

32. Tööst järeldub, et protseduur likvideerimisprotsessi peatamise lõpetamiseks ei ole vähem keerulisem ja aeganõudvam, kui peatamise taotlemine. Lisaks on minu meelest kaheldav, kas Määruse artikkel 33 kui koordineerimismeetod teenib piiriüleste maksejõuetusmenetluste tõhusa ja tulemusliku toimimise eesmärki. Esmase maksejõuetusmenetluse likvideerija avalduse menetlemine, millega soovitakse likvideerimisprotsessi peatada, pikendada või lõpetada, on aeganõudev kohtumenetlus. Maksejõuetusmenetlusmääruse artikli 33 „tööle panemiseks“ võivad olla vajalikud kohtu poolt kohaldatavad kaitsemeetmed võlgniku vara kulul vähendades sellega võlausaldajatele hiljem väljamakstavat jaotist. Juhul, kui Maksejõuetusmenetlusmääruse artikkel 31 (2) sätestab juba koostöö- ja informatsiooni vahetamise kohustuse likvideerijatele ning Määruse artikkel 31 (3) annab esmase maksejõuetusmenetluse likvideerijale õiguse esitada ettepanekuid teisesele maksejõuetusmenetluse likvideerijale teisese maksejõuetusmenetluse juhtimise või võlgniku vara kasutamise kohta teiseses maksejõuetusmenetluses, siis Määruse artiklit 33 ei pruugi üldse vaja olla. Seega, juhul, kui Maksejõuetusmääruse artikli 31 mittejärgimine oleks sanktsioneeritud näiteks likvideerijate poolt trahvide tasumise näol võlgniku vara kogumisse, siis on võimalik, et Määruse artiklit 33 poleks enam vaja.

33. Määruse artiklis 34 on sätestatud erireeglid teiseste maksejõuetusmenetluste lõpetamiseks esmase maksejõuetusmenetluse likvideerija taotlusel. Tööst nähtub, et esmase maksejõuetusmenetluse likvideerija poolt esitatud avaldusele teisese maksejõuetusmenetluse lõpetamiseks tuleks siseriiklikus õiguses sätestada nõuded. Seetõttu tegin ettepaneku liikmesriikide siseriiklikus õiguses täiendada esmase maksejõuetusmenetluse likvideerija avaldusele esitatavaid nõudeid teisese maksejõuetusmenetluse lõpetamiseks, mis lihtsustaks ja kiirendaks vastavate esmase avalduste menetlemist kohtus. Samuti leidsin, et lõpetamise avaldus tuleks esitada samale kohtule, kes teisese maksejõuetusemenetluse algatas ja selles likvideerija üle järelevalvet teostab. Analüüsi tulemusena jõudsin järeldusele, et esmase maksejõuetusmenetluse likvideerija avalduse esitamisele ei tuleks siseriiklikus õiguses sätestada tähtaega ning oleks mõistlik muuta siseriiklikku

õigust selliselt, et esmase maksejõuetusmenetluse likvideerija avaldus teisese maksejõuetusmenetluse lõpetamiseks oleks õiguslikult koheselt siduv. Samuti leidsin, et enne teiseste maksejõuetusmenetluste lõpetamist peaks kohus ära kuulama likvideerijate seisukohad. Kõik need meetmed aitaksid kaasa piiriüleste maksejõuetusmenetluste tõhusale ja tulemuslikule toimimisele.

34. Piiriüleste maksejõuetusmenetluste läbiviimine on tavalise siseriikliku maksejõuetusmenetluse läbiviimisest üldjuhul kulukam. Üldiselt ei saa teisese maksejõuetusmenetluse likvideerija ja selle menetluse võlausaldajad mõjutada kulude taset teistes maksejõuetusmenetlustes. Seetõttu uuriti töös, kas selline kulude süsteem, mis Määruses on sätestatud viitena *lex fori concursus* rakendamisele, võiks olla põhjendatud. Tööst nähtub, et piiriüleste maksejõuetusmenetlustega, sh teiseste maksejõuetusmenetlustega seotud kulude mõiste pole üheselt mõistetav ega selge. Samuti ei ole üheselt selge, kes peaks teiseste maksejõuetusmenetlusega seotud kulusid kandma. Seetõttu leidsin, et Määruse artiklis 4 (2) (l) sätestatud reegel ei pruugi olla piisav Määruse eesmärgi, milleks on menetluste tõhus ja tulemuslik toimimine, täitmiseks. Selleks, et leida sobivad reeglid, tuleks kõigepealt liikmesriikides kaardistada, mida mõistetakse menetlusega seotud kulude all liikmesriikide siseriiklikust õigusest tulenevalt ja seejärel analüüsi tulemusena kujundada ühine seisukoht reeglite osas, mille võiks kehtestada Määruse tasandil ning mida rakendataks piiriüleste maksejõuetusmenetluse korral.
35. Üheks küsimuseks, mida töös käsitleti, oli väljamaksete tegemine võlausaldajatele. Määruse artikkel 35 eeldab kaudselt, et väljamaksed tuleks enne teha teiseses maksejõuetusmenetluses ja seejärjel esmases maksejõuetusmenetluses. Tööst järeldub, et praktikas on selles järjekorras väljamaksete tegemine raskendatud. Selleks, et oleks võimalik väljamakseid teha teisestes maksejõuetusmenetlustes ajaliselt varem kui esmases maksejõuetusmenetluses (mis sest, et teisesed maksejõuetusmenetlused algatatakse tegelikult hiljem kui esmane maksejõuetusmenetlus), peaksid liikmesriigid siseriiklikus õiguses ette nägema lihtsustatud protseduuri teiseste maksejõuetusmenetluste läbiviimiseks.
36. Töös leidis käsitlust ka võlausaldajate võrdse kohtlemise teema. Maksejõuetusmenetlusmäärus näeb selleks reeglid ette artiklis 20 (2). Määrust selgitav Virgós-Schmit'i raport[791] sisaldab täpsemalt arvutusmeetodit, kuidas peaks võlausaldajatele väljamakseid tegema, et tagada võrdne kohtlemine piiriülestes maksejõuetusmenetlustes. Tööst järeldub, et kuigi arvutusreeglid peaksid olema lihtsad ja arusaadavad, eksisteerib siiski reeglite tõlgendamisel ja võimalikul rakendamisel probleeme, mis võivad mõjutada võlausaldajatele tehtavate väljamaksete tegemise õigsust. Selline olukord ei saa olla aktsepteeritav. Piiriüleste maksejõuetusmenetluste

[791] Virgós. Schmit. Report on the Convention on Insolvency Proceedings, 3 May 1996.

tõhusaks ja tulemuslikuks toimimiseks on vajalik leida korrektne terviklik lahendus võlausaldajate võrdse kohtlemise tagamiseks. Töös pakkusin ühe lahendusena välja, et reeglite väljatöötamisel Euroopa Liidus võiks allikmaterjalina eeskujuks võtta 7. novembril 1933 Kopenhaagenis allakirjutatud Taani, Soome, Norra, Rootsi ja Islandi vahelise konventsiooni pankrotimenetluse kohta, mida on suuremate probleemideta rakendatud nüüdseks peaaegu 80 aastat.

37. Kuigi Maksejõuetusmenetlusmääruse artikkel 35 tegeleb suhteliselt teoreetilise küsimusega, nimelt võlgniku vara ülejäägiga, leidsid töös siiski kajastamist mõned küsimused, sh asja- ja maksuõigusega seonduvalt. Tööst nähtub, et siseriiklik õigus tuleks üle vaadata ja vajadusel muuta küsimuses, mis puudutab võlgniku ülejäänud vara liigutamist teisesest maksejõuetusmenetlusest esmasesse maksejõuetusmenetlusse. Seda just sellest aspektist lähtuvalt, et nimetatud vara liigutamisega ei kaasneks täiendavaid menetluskulusid või makse, sest kulud mõjutavad võlausaldajatele tehtavaid väljamakseid. Töös leiti, et Määruse artiklis 35 sätestatud termin „koheselt“ on praktikas siseriikliku õiguse tasandil suhteliselt paindlikult käsitletav. Töös jõudsin tõdemuseni, et esmasest maksejõuetusmenetlusest ülejääv võlgniku vara tuleks jaotada teisese maksejõuetusmenetluse võlausaldajate vahel, mitte tagastada võlgnikule või selle omanikele juriidiliste isikute puhul. Selleks oleks vaja siseriiklikku õigust muuta. Samuti võiks menetluse efektiivsuse huvides Määruse artiklit 35 muuta ja kehtestada see sellises sõnastuses, et esmase maksejõuetusmenetluse likvideerija nõudel kannab teisese maksejõuetusmenetluse likvideerija võlgniku vara ülejäägi esmase maksejõuetusmenetluse likvideerija poolt näidatud võlausaldajatele esmases maksejõuetusmenetluses. Inglise keeles oleks säte alljärgnevas sõnastuses: “*If by liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately upon the request from the liquidator in the main proceedings transfer any monies remaining to the creditors in the main proceedings*.” Selliselt käitudes ei tohiks üldjuhul ka teisese maksejõuetusmenetluse likvideerijal tekkida probleeme liikmesriigi siseriiklikust õigusest tulenevates asja- või maksuõiguslikes küsimustes.

Tööst järeldub kokkuvõttes, et teisesed maksejõuetusmenetlused võivad olla põhjendatud ja vajalikud, kuid liikmesriikide siseriiklikku õigust ja Maksejõuetusmenetlusmäärust on vaja kohati muuta, et võimaldada samaaegselt menetlemisel olevate piiriüleste maksejõuetusmenetluste tõhusat ja tulemuslikku toimimist Euroopa Liidus. Seega võib öelda, et doktoritöös püstitatud hüpotees leidis kinnitust.

BIBLIOGRAPHY

1. Balz, M. The European Union Convention on Insolvency Proceedings. American Bankruptcy Law Journal, Vol 70, 1996, p 485–531.
2. Berends. A. J. The EU Insolvency Regulation: some capita selecta. Netherlands International Law Review, LVII: 2010, p 423–442.
3. Braun. E. (ed.) Commentary on the German Insolvency Code. IDW-Verlag GmbH, Düsseldorf, 2006.
4. Burbidge, P. Cross border insolvency within the European Union: dawn of a new era. – European Law Review 2002, vol 27, N 5 (Oct), p 589–609.
5. Corno, G. Regulation (EC) n. 1346/2000 Rules on Closure and Measures Closing Insolvency Proceedings: A Commentary. International Insolvency Law Review, 2/2011, p 148–156.
6. Csöke, A. Cross-border communication & cooperation – what happens in practice? Eurofenix, Issue 32, Summer 2008, p 22–24.
7. Declercq, P. J. M. Netherlands Insolvency Law. The Netherlands Bankruptcy Act and the Most Important Legal Concepts. T.M.C. Asser Press, The Hague, the Netherlands, 2002.
8. Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Affairs. Harmonisation of Insolvency Law at EU Level, 2010.
9. Duursma-Kepplinger, H.-Ch. Duursma, D. Chalupsky. E. Europäische Insolvenzverordnung. Kommentar. Springer Wien NewYork 2002.
10. Eidenmüller, H. Abuse of Law in the Context of European Insolvency Law. European Company and Financial Law Review, April 2009, Vol 6, No 1, p 1–28.
11. Fletcher, I.F. Insolvency in Private International Law. National and International Approaches. Clarendon Press Oxford, 1999.
12. Fletcher, I.F. Insolvency in Private International Law. National and International Approaches, 2nd edn, Oxford University Press, 2005.
13. Fletcher, I.F. The Law of Insolvency. 3rd edn, London, Sweet & Maxwell, 2002.
14. Goode, R. M. Principles of Corporate Insolvency Law, Sweet and Maxwell, 2002.
15. Gottwald, P. (ed.) Insolvenzechts-Handbuch. Verlag C.H. Beck München 2010.
16. Harmsen. K. Jitta. M. W. J. The Insolvency Laws of the Netherlands. Juris Publishing, Inc. 2006.
17. Haβ, D. Huber, P. Gruber, U. Heiderhoff, B. EU-Insolvenzverordnung. Beck, Munich 2005.
18. Hrycaj, A. The Cooperation of Court Bodies of International Insolvency Proceedings. International Insolvency Law Review, 1/2011, p 7–22.
19. INSOL Europe. Technical Content. EIR Articles 21 & 22. Online. Available: http://www.insol-europe.org/technical-content/eir-articles-21-22/.
20. International Monetary Fund. Orderly and Effective Insolvency Procedures: Key Issues. Legal Department, International Monetary Fund, 1999.
21. Israël, J. European Cross-Border Insolvency Regulation. A Study of Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitas Europaea. Intersentia. Antwerpen-Oxford, 2005.
22. Janger, E.J. Universal Proceduralism. Brooklyn Journal of International Law, 819, 830, 2007.

23. Janger, E.J. Virtual Territoriality. Columbia Journal of Transnational Law, Forthcoming; Brooklyn Law School, Legal Studies Paper No. 169. Available at SSRN: http://ssrn.com/abstract=1468615.
24. Kilborn, J. Behavioral Economics, Overindebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions. Bankruptcy Developments Journal, Vol 22, 2005, p 13–47.
25. Kilppi, J. The Ethics of Bankruptcy. Routledge London and New York, 1997.
26. Kolmann, S. Kooperationsmodelle im Internationalen Insolvenzrecht. Empflielt sich für das Deutsche internationale Insolvenzrecht eine Neuorientierung? Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht, Bielefeld: Verlag Ernst und Werner Gieseking, 2001.
27. Koulu, R. Havansi, E. Korkea-Aho, E. Lindfors, H. Niemi, J. Insolvenssioikeus. WSOYpro Helsinki, 2009.
28. Koulu, R. Kansainvälinen konkurssioikeus pääpiirteittäin. WSOY 2004.
29. Lasok, D. Stone, P.A. Conflicts of Laws in the European Community, Professional Books Limited, Abigdon, Oxon, 1987.
30. Marshall, J. (ed.) European Cross Border Insolvency. London, Sweet & Maxwell, 2008.
31. Marshall, J. (ed.) European Cross Border Insolvency. London, Sweet & Maxwell, 2005.
32. McBryde, W.W. Flessner, A. Kortmann S. C. J. J. (eds.) Principles of European Insolvency Law. Kluwer Legal Publishers 2003.
33. Mennjucq, M. Damman, R. Regulation No 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon, Business Law International, Vol. 9, No 2, 2008, p 145–158.
34. Moss, G. Fletcher I. F. Isaacs. S. (eds.) The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide. 2nd ed. Oxford University Press, 2009.
35. Moss, G. Fletcher, I.F. Isaacs, S. (eds.) The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide. Oxford University Press 2002.
36. Moss, G. Hunting "Establishment" in Estonia. Insolvency Intelligence 2007, 20 (3), p 43–45.
37. Moss, G. When is a proceeding opened? Insolvency International, 2008, 21(3), p 33.
38. Niemi-Kiesiläinen, J. Ramsay, I. Whitford, W. (eds.). Consumer Bankruptcy in Global Perspective, Oxford and Portland Oregon, 2003.
39. Omar, P. (ed.) International Insolvency Law. Themes and Perspectives. Ashgate, 2008.
40. Omar, P. European Insolvency Law. Ashgate, 2004.
41. Pannen, K. (ed.) European Insolvency Regulation. De Gruyter Commentaries on European Law. De Gruyter Recht. Berlin, 2007.
42. Paulus, C. Europäische Insolvenzverordnung, Kommentar, Verlag Recht und Wirtchaft GmbH, Frankfurt am Main, 2006.
43. Paulus, C. The Aftermath of „Eurofood" – BenQ Holdings BV and the Deficiencies of the ECJ Decision. (2007) 20 Insolvency Intelligence p 85–86.
44. Perem, J. Rahvusvahelised pankrotid ja Euroopa Liidu maksejõuetuskonventsiooni ettevalmistamine. Juridica, V/1998, lk 226–234.

45. Peter, H. Jeandin, N. Kilborn, J. (eds.) The Challenges of Insolvency Law Reform in the 21st Century. Facilitating Investment and Recovery to Enhance Economic Growth. Schulthess Juristische Medien AG, Zürich Basel Genf, 2006.
46. Porzycki, M. Secondary Insolvency Proceedings against a Solvent Debtor: A Polish Case Highlights Weak Points of the European Insolvency Regulation. International Corporate Rescue, Volume 7, Issue 2, 2010, p 118–124.
47. Rordorf, R. Cross Border Insolvency. International Insolvency Law Review 1/2010, p 16–22.
48. Torremans, P. L. C. Cross Border Insolvencies in EU, English and Belgian Law. Kluwer Law International, The Hague, London, New York, 2002.
49. Tschauner, H. Desch, W. BenQ: the Importance of Making the First Strike. Corporate Rescue and Insolvency Journal, 2008 Volume 1, Issue 1.
50. Vallender, H. Judicial Co-operation within the EC Insolvency Regulation. Eurofenix, Issue 30, Winter 2007/8, p 8–10.
51. Van Der Weide, J. A. Wessels, B. Where to locate assets, subject to certain security rights? Journal of International Banking Law & Regulation. *(forthcoming)*
52. Varul, P, Tohvri, H, Laarmaa, M. Piiriülene pankrotimenetlus. – Juridica 2004/IV, lk 243–251.
53. Veder, M. Cross-Border Insolvency Proceedings and Security Rights. A Comparison of Dutch and German Law, the EC Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency. Kluwer Legal Publishers, 2004.
54. Verweij, A. Wessels, B. (eds.) Comparative and International Insolvency Law. Central Themes and Thoughts, INSOL Europe, 2010
55. Viimsalu, S. Piiriülese maksejõuetusmenetluse õiguslikud küsimused. Juridica 2008/VI, lk 415–424.
56. Viimsalu, S. The Over-Indebtedness Regulatory System in the Light of the Changing Economic Landscape. Juridica International, 2010/XVII, p 217–226.
57. Virgós M. Garcimartín, F. The European Insolvency Regulation: Law and Practice, 2004.
58. Vriesendorp, R. D. McCahery, J. A. Verstijlen, F. M. J. (eds.) Comparative and international perspectives on bankruptcy law reform in the Netherlands. Schoordijk Instituut, Center for Company Law, Tilburg University, 2001.
59. Wessels, B. BenQ Mobile Holding BV Battlefield leaves important questions unresolved. (2007) 20 Insolvency Intelligence p 103–105.
60. Wessels, B. Current Topics of International Insolvency Law. Kluwer BV, Deventer 2004.
61. Wessels, B. European Union Regulation on Insolvency Proceedings: An Introductory Analysis – American Bankruptcy Institute, Va USA 2003.
62. Wessels, B. Greek and Italian Airlines Test the Strength of a Secondary Proceeding. *(forthcoming*)
63. Wessels, B. International Insolvency Law, Kluwer 2006.
64. Wessels, B. Omar, P. (ed.) Crossing (Dutch) Borders in Insolvency. INSOL Europe, 2009.
65. Wessels, B. Omar, P. (ed.) Insolvency Law in the United Kingdom: The Cork Report at 30 Years. INSOL Europe, 2010.
66. Wessels, B. Omar, P. (ed.) The European Insolvency Regulation: An Update. INSOL Europe, 2010.

67. Wessels, B. Omar, P. (ed.) The Intersection of Insolvency and Company Laws. INSOL Europe, 2009.
68. Wessels, B. Tax Claims: Lodging and Enforcing in Cross-Border Insolvencies in Europe. International Insolvency Law Review, 2/2011, p 131–141.
69. Wessels, B. Virgos, M. European Communication and Cooperation Guidelines for Cross-border Insolvency, Academic Wing of INSOL Europe, July 2007.
70. Westbrook, J. Multinational Enterprises in General Default: Chapter 15, the ALI Principles and the EU Insolvency Regulation, American Bankruptcy Law Journal, Winter 2002, vol 76, p 1–42.
71. Wood. P. R. Principles of International Insolvency. London Sweet & Maxwell, 1995.
72. Ziegel, J. S. Cantlie S. I. (eds.) Current Developments in International and Comparative Corporate Insolvency Law, Clarendon Press, Oxford, 1994.

List of Court Cases

73. ECJ case C-1/04 – Judgment of the Court (Grand Chamber) – Reference for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 27 November 2003, received at the Court on 2 January 2004, in the proceedings Susanne Staubitz-Schreiber – 17 January 2006.
74. ECJ case C-116/11 – Reference for a preliminary ruling from the Sąd Rejonowy Poznań (Republic of Poland) lodged on 7 March 2011 — Bank Handlowy, Ryszard Adamiak, Christianapol sp. z o. o. Pending. Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:152:0014:0014:EN:PDF.
75. ECJ case C-339/07 – Judgment of the Court (First Chamber) – Reference for a preliminary ruling under Article 234 EC, from the Bundesgerichtshof (Germany), made by decision of 21 June 2007, received at the Court on 20 July 2007, in the proceedings Christopher Seagon, in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH *vs*. Deko Marty Belgium NV – 12 February 2009.
76. ECJ case C-341/04 – Judgment of the Court (Grand Chamber) – Reference for a preliminary ruling under Articles 68 EC and 234 EC from the Supreme Court (Ireland), made by decision of 27 July 2004, received at the Court on 9 August 2004, in the proceedings Eurofood IFSC Ltd – 2 May 2006.
77. ECJ case C-444/07 – Judgment of the Court (First Chamber) – Reference for a preliminary ruling under Article 234 EC from the Sąd Rejonowy Gdańsk-Północ w Gdańsku (Poland), made by decision of 27 June 2007, received at the Court on 27 September 2007, in the insolvency proceedings opened against MG Probud Gdynia sp. z o.o. – 21 January 2010.
78. Judgment of the Commercial Court in Ghent, 21 February 2006, JOR 2006/164 – *NV Interstore vs. Megapool BV*.
79. Judgment of the Court of Appeal in Leeuwarden, 02 April 2009, no. 200.025.083 – *NSCB Hoiu-Laenuühistu*. Unreported.
80. Judgment of the Court of Appeal in Orleans, (2006) BCC 678 – *Jung GmbH vs. SIFA SA*.
81. Judgment of the Court of Appeal in Tallinn, 14 June 2006, no. 2-05-530 – OÜ SigMar Invest appeal against judgment by Tallinn City Court of 25 May 2005 in bankruptcy matter *OÜ SigMar Invest vs. Rapla Invest AB*.

82. Judgment of the Court of Appeal in Vienna, 9 November 2004, no. 28 R 225/04w – *Re Stojevic*.
83. Judgment of the District Court in Daugavpils, 06. December 2010, no. C12279010 2790/10 – *SIA Allando Trailways vs. AS GLASKEK*. Unreported.
84. Judgment of the District Court in Leoben, 31 August 2005, 17 S 56/05 – *Collins & Aikman.*
85. Judgment of the District Court in Rzeszów, Poland, 5th Commercial Division for bankruptcy and reorganization cases, 22 May 2009, no. V GU 17/09 *The Bank of New York Mellon in New York, USA vs. Fabryka Wódek Polmos Łańcut S.A. in Łańcut*. Unreported.
86. Judgment of the European Court of Human Rights, 18 July 2006, no. 15652/04 – *Bíró vs. Hungary*.
87. Judgment of the European Court of Human Rights, 28 July 1999, no. 22774/93 – *Immobiliare Saffi vs. Italy*.
88. Judgment of the European Court of Human Rights, 9 December 1994, no. 13427/87 – *Stran Greek Refineries and Stratis Andreadis vs. Greece*.
89. Judgment of the European Court of Human Rights, 9 October 2007, no. 25709/04 – *Hilti vs. Hungary*.
90. Judgment of the Harju County Court in Tallinn, 30 September 2009, no. 2-05-530 – termination of bankruptcy proceedings, approval of final report, determination of bankruptcy trustee's fee, deposit of documents and release of bankruptcy trustee from the duties in the matter of *Rapla Invest AB (bankrupt)*.
91. Judgment of the High Court of Justice of England and Wales [2006] EWHC 3426 – *Re MG Rover Benelux SA/NV*.
92. Judgment of the High Court of Justice of England and Wales, 09 June 2006, no 4697, 4698, 4700, 4705, 4711, 4717–4719, 4721, 4722 of 2005, [2006] EWHC 1343 (Ch) – *Collins & Aikman group of companies*.
93. Judgment of the High Court of Justice of England and Wales, 11 February 2009, no 539, 550, 553, 535, 537, 540, 551, 542, 552, 554, 549, 538, 547, 544, 545, 546 of 2009, [2009] EWHC 206 (Ch) **–** *Nortel Networks group of companies*.
94. Judgment of the High Court of Justice of England and Wales, 18 January 2011, no 11695/2009, [2011] EWHC 15 (Ch) – *Connock & Boyden vs. Fantozzi*, *Re Alitalia Linee Aeree Italiane S.p.A*.
95. Judgment of the High Court of Justice of England and Wales, 20 December 2006, no. 9849/2002 – *Zvonko Stojevic vs. Komercni Banka A.S., Yvonne Venvil and The Official Receiver*.
96. Judgment of the Local Court in Cologne, 10 August 2005, no 71 IN 416/05 ZIP 2005, 1566 – *Collins & Aikman*.
97. Judgment of the Local Court in Munich, 5 February 2007, no 1503 IE 4371/06 – *BenQ Mobile Holding BV*.
98. Judgment of the Ordinance of the Commercial Court of Nanterre, 26 June 2006 – *Sendo International*. Unreported.
99. Judgment of the Supreme Court of Estonia (Civil Chamber), dated 06 March 2006 no 3-2-1-7-06 – OÜ SigMar Invest appeal against judgment by Tallinn Court of Appeal of 29 September 2005, no 2-2/1269/05 in bankruptcy matter *OÜ SigMar Invest vs. Rapla Invest AB* – RT III 2006, 9, 83.
100. Judgment of the Supreme Court of Estonia (Civil Chamber), dated 02 December 2010 no 3-2-1-92-10 – Swedbank AS appeal against judgment by Tallinn Court of

Appeal of 17 May 2010, no 2-08-83245 in the matter of the distribution proposal to be approved in OÜ *Deljuan Ehitus* bankruptcy proceedings.
101. Judgment of the Supreme Court of Estonia (Civil Chamber), dated 22 February 2010 no 3-2-1-124-09 – Stasys Brilis appeal against judgment by Tartu Court of Appeal of 25 June 2009 to apply prohibition on business to Stasys Brilis in OÜ STAR EHITUS bankruptcy proceedings.
102. Judgment of the Tribunal of Milan, 18 March 2004 – *Criss Cross s.r.l.* Unreported.

List of Normative Laws and Explanatory Reports

103. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. 27 September 1968. Online available: http://curia.europa.eu/common/recdoc/convention/en/c-textes/_brux-textes.htm.
104. Commission Opinion of 10 December 1981, no 81/1068/EEC on the draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings, OJ L 391, 31.12.1981, p. 23–28; Online available: http://eur-lex.europa.eu/Notice.do?val=89227:cs&lang=nl&list=89227:cs,&pos=1&page=1&nbl=1&pgs=10&hwords.
105. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 183, 30.03.2010, p 47–199. Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF.
106. Council of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14. 04 November 1950. Online available: http://conventions.coe.int/treaty/en/treaties/html/005.htm.
107. Convention on Insolvency Proceedings. 23 November 1995. Online available: http://aei.pitt.edu/2840/01/070.pdf.
108. Council of Europe. European Convention on Certain Aspects of Bankruptcy, Istanbul, 5 June, 1990. Online available: http://conventions.coe.int/treaty/en/Treaties/Html/136.htm.
109. Council Regulation (EC) No 1346/2000 of 29 May 2000 of Insolvency Proceedings – OJ L 160, 30.06.2000 p. 1–18.
110. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – OJ L 012, 16.01.2001, p. 1–23.
111. Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, OJ L 110, 20.04.2001, p. 28–39.
112. Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings. Report on the draft Convention. Bulletin of the European Communities, Supplement 2/82. Online available: http://aei.pitt.edu/5480/01/001994_1.pdf.
113. Dutch Bankruptcy Act (in Dutch: *Faillissementswet*), the Parliament (*Parlement*), 30.09.1893. *Staadblad* 1893–140. In force since 01.09.1896.
114. Estonian Accounting Act (in Estonian: *raamatupidamise seadus*), the Parliament (*Riigikogu*), 20.11.2002, RT I 102, 600... RT I, 16.11.2010, 12. In force since 01.01.2003.

115. Estonian Bankruptcy Act (in Estonian: *pankrotiseadus*), the Parliament (*Riigikogu*), 22.01.2003, RT I 2003, 17, 95...RT I, 14.03.2011. In force since 01.01.2004.
116. Estonian Civil Code of Procedure (in Estonian: *tsiviilkohtumenetluse seadustik*), the Parliament (*Riigikogu*), 20.04.2005. RT I 2005, 26, 197... RT I, 30.12.2010, 16. In force since 01.01.2006.
117. Estonian Commercial Code (in Estonian: *äriseadustik*), the Parliament (Riigikogu), 15.02.1995, RT 1995, 26, 355 ... RT I, 31.12.2010, 19. In force since 01.09.1995.
118. European Convention on Certain International aspects of Bankruptcy (Istanbul Convention), 05 June 1990. Online available: http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=136&CM=0&CL=ENG.
119. European Parliament Resolution on the Convention on Insolvency Proceedings of 23 November 1995. A4-0234/99, C 279/499, 01.10.1999. Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:279:0499:0500:EN:PDF
120. European Parliament Report Committee on Legal Affairs and the Internal Market, on the proposal for a Council regulation on insolvency proceedings (9178/1999 – C5-0069/1999 – 1999/0806(CNS)), 23 February 2000. Online available: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2000-0039+0+DOC+PDF+V0//EN&language=EN.
121. Explanatory Note of the amendments to the Estonian Bankruptcy Act made in Bailiffs' Act (SE 462). Online available: http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=594370&u=20101110110605.
122. Explanatory Report on the Draft Convention (Lemontey Report) Online available: http://aei.pitt.edu/5480/.
123. Explanatory Report to the European Convention on Certain Aspects of Bankruptcy. Online available: http://conventions.coe.int/Treaty/EN/Reports/Html/136.htm.
124. Extract of the Introductory Act to the Insolvency Code (in German: *Auszug aus dem Einführungsgesetz zur Insolvenzordnung – EGInsO*) the Parliament (*Bundestag*), 05.10.1994. BGBl I 1994, 2866...BGBl. I S. 1885. In force since 01.01.1999.
125. Finnish Act on the Recovery of Assets to a Bankruptcy Estate (in Finnish: *laki takaisinsaannista konkurssipesään*), the Parliament (*Eduskunta*), 26.04.1991/758. In force since 01.01.1992.
126. Finnish Act on the Supervision of the Administration of Bankrupt Estates (in Finnish: *laki konkurssipesien hallinnon valvonnasta*), the Parliament (*Eduskunta*), 31.01.1995/109. In force since 01.03.1995.
127. Finnish Bankruptcy Act (in Finnish: *konkurssilaki*), the Parliament (*Eduskunta*), 20.02.2004/120. In force since 01.09.2004.
128. German Insolvency Code (in German: *Insolvenzordnung*), the Parliament (*Bundestag*), 05.10.1994. BGBl I 1994, 2866...BGBl. I S. 1885. In force since 01.01.1999.
129. Hungarian Insolvency Act XLIX of 1991 (in Hungarian: *a csődeljárásról és a felszámolási eljárásról szóló 1991 évi XLIX törvény*), 24.09.1991. In force since 01.01.1992.
130. Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings,

submitted to the Council on 26 May 1999, OJ 1999/C221/6. Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:221:0008:0023:EN:PDF.
131. Latvian Civil Procedure Act (in Latvian: *Civilprocesa likums*), the Parliament (*Saeima*), 14.10.1998. Latvijas Vestnesis, 326/330 (1387/1391), 03.11.1998... Latvijas Vestnesis, 16 (4414), 28.01.2011. In force since 01.03.1999.
132. Latvian Insolvency Act (in Latvian: *Maksatnespejas likums*), the Parliament (*Saeima*), 26.07.2010, Latvijas Vestnesis, 124 (4316), 06.08.201 ... Latvijas Vestnesis, 170 (4362), 27.10.2010. In force since 01.11.2010.
133. Lithuanian Enterprise Bankruptcy Act (in Lithuanian: *Lietuvos Respublikos įmonių bankroto įstatymas*), the Parliament (*Seima*) 20.03.2001, Valstybės žinios, 2001. Nr. IX-216. In force since 01.07.2001.
134. Opinion of the Economic and Social Committee on the Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999. 15 March 2000, 2000/C 75/01. Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:075:0001:0004:EN:PDF.
135. Preliminary Draft of the Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings, document 3.327/1/XIV/70, translation 4 June 1973. Online available: http://aei.pitt.edu/5612/01/002316_1.pdf.
136. Report on the proposal for a Council regulation on insolvency proceedings (9178/1999 – C5-0069/1999 – 1999/0806(CNS)), 23 February 2000.
137. Resolution of the European Parliament, A5-0039/2000, 02. March 2000, Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:346:0080:0081:EN:PDF.
138. Resolution on the Convention on Insolvency Proceedings of 23 November 1995, 7 May 1999, OJ 1999/C279/499. Online available: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:279:0499:0500:EN:PDF.
139. Swedish Bankruptcy Act (in Swedish: *konkurslag*), the Parliament (*Riksdag*), 11.06.1987. SFS 1987:672. In force since 01.01.1988.
140. Swedish Companies Act (in Swedish: *aktiebolagslag*), the Parliament (*Riksdag*), 16.06.2005. SFS 2005:551. In force since 01.01.2007.
141. The Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933, as amended in 1977 and 1982. Online available: http://untreaty.un.org/unts/1_60000/30/28/00059385.pdf; and http://untreaty.un.org/unts/60001_120000/22/9/00042440.pdf
142. The Insolvency Act 1986, the Parliament of the United Kingdom. Statute Book 1986, Chapter 45. Online available: http://www.legislation.gov.uk/ukpga/1986/45/contents.
143. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, 10. November 1997, OJ 1997/C340.
144. United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, 30 May 1997. Online available: http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf.
145. Virgós, M. Schmit, E. Report on the Convention on Insolvency Proceedings, 3 May 1996. Online available: http://aei.pitt.edu/952/01/insolvency_report_schmidt_1988.pdf.

LIST OF ABBREVIATIONS

AG	Amtsgericht
ALI	American Law Institute
Art	Article
cf.	confer (compare)
COMI	centre of a debtor's main interests
CVA	company voluntary arrangement
DBA	Dutch Bankruptcy Act
EBA	Estonian Bankruptcy Act
EC	European Community
ECCP	Estonian Civil Code of Procedure
ECJ	European Court of Justice
ed.	editor
edn	edition
eds.	editors
EGInsO	Einführungsgesetz zur Insolvenzordnung
EIR	EC Regulation on Insolvency Proceedings
et al.	et alii (and others)
Et seq.	et sequens (and the following)
etc.	et cetera (and the rest)
EU	European Union
EWCA or CA	Court of Appeal of England and Wales
EWHC (Ch)	Chancery Division of the High Court of Justice of England and Wales
EWHC (Com)	Commercial Court, part of the Queen's Bench Division of the High Court of Justice of England and Wales
EWHC	High Court of Justice of England and Wales
FBA	Finnish Bankruptcy Act
fn	footnote
GInsO	German Insolvency Code
GmbH	Gesellschaft mit beschränkter Haftung
ibid	ibidem (the same place)
INSOL	International Federation of Insolvency Professionals
IPR	Internationales Privatrecht
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
Komm	Kommentar
KTS	Zeitschrift für Insolvenzrecht
LEBA	Lithuanian Enterprise Bankruptcy Act
LG	Landgericht
LIA	Latvian Insolvency Act
Ltd	Private Limited Company
mn	marginal note
No	number

NZI	Neue Zeitschrift für Insolvenzrecht
OJ	Official Journal of the European Community
OLG	Oberlandesgericht
Op. cit.	opere citato (the cited work)
p	page
S	Seite
Sec	section
s	sivu
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States
viz.	videlicet (that is to say)
vol.	volume
vs.	versus
ZInsO	Zeitschrift für das gesamte Insolvenzrecht
ZIP	Zeitschrift für Wirtschaftsrecht

CURRICULUM VITAE

Signe Viimsalu

Date and place of birth:	30.07.1978, Kuressaare
Citizenship:	Estonian
Marital status:	single
Contact:	info@sign9.ee, tel +3725130434
Institution:	SiGN9
Position:	managing partner
Languages:	Estonian, English, Russian, French, Finnish, German

Education

2008–2011	University of Tartu, doctorate studies, research at Leiden University, the Netherlands
2004–2007	University of Tartu, *Magister Iuris* (mag.iur)
1999–2004	University of Tartu, *Baccalaureus Articum*
1996–1999	Tallinn School of Economics, *Certificate in Law*
1993–1996	Kuressaare Gymnasium, class with special interest in economics
1984–1993	Kaali Secondary School

Professional experience

Since 2011	SiGN9, managing partner
2007–2011	Estonian Development Fund, lawyer and head of administrative division
2006–2007	Estonian Ministry of Justice, counsellor in insolvency matters and head of legal division
2001–2006	Enterprise Estonia, lawyer and head of legal department
1998–2000	Intrum Iustitia, lawyer

Areas of research

Insolvency law, EU (competition) law, private international law, contract law, civil procedural law

Publications

S.Viimsalu. Konverents „Maksejõuetus – kas üksnes pankrot?“ Juridica IX/2007 (in Estonian).

S.Viimsalu. Piiriülese maksejõuetusmenetluse õiguslikud küsimused. Juridica VI/ 2008 (in Estonian).

S.Viimsalu. Estonia: All You Need to Know About Becoming an Insolvency Practitioner. Eurofenix Winter 2008.

S.Viimsalu. CoCo & IPs in Estonia. Eurofenix Spring 2009.

S. Viimsalu. New Trends in Estonian Insolvency Law. Eurofenix Spring 2010.
P. Omar, reporters S. Viimsalu, J. Weber. On the Origins and Challenges of Court-to-Court Communication in International Insolvency Law in: A. Verweij. B. Wessels (eds.) Comparative and International Insolvency Law Central Themes and Thoughts. INSOL Europe, 2010.
J. Farley, reporters S. Viimsalu, J. Weber. A Practical Approach to Court-to-Court Communication in International Insolvency Law in: A. Verweij. B. Wessels (eds.) Comparative and International Insolvency Law Central Themes and Thoughts. INSOL Europe, 2010.
S. Viimsalu. The Over-Indebtedness Regulatory System in the Light of the Changing Economic Landscape. Juridica International XVII/2010.

CURRICULUM VITAE

Signe Viimsalu

Sünniaeg ja -koht:	30.07.1978, Kuressaare
Kodakondsus:	Eesti
Perekonnaseis:	vallaline
Kontakt:	info@sign9.ee, tel +3725130434
Töökoht:	SiGN9
Amet:	juhtivpartner
Keelteoskus:	eesti, inglise, vene, prantsuse, soome, saksa

Hariduskäik

2008–2011	Tartu Ülikooli doktoriõpe, teadustöö tegemine Leideni Ülikooli juures Hollandis
2004–2007	Tartu Ülikool, *Magister Iuris* (mag.iur) teaduskraad õigusteaduses
1999–2004	Tartu Ülikool, *Baccalaureus Articum* õigusteaduses
1996–1999	Tallinna Majanduskool, õigus
1993–1996	Kuressaare Gümnaasium, majanduse eriklass
1984–1993	Kaali Põhikool

Ametikäik

Alates 2011	SiGN9, juhtivpartner
2007–2011	Eesti Arengufond, ülddivisjoni juht ja jurist
2006–2007	Justiitsministeerium, maksejõuetusõiguse nõunik ja õigustalituse juhataja
2001–2006	Ettevõtluse Arendamise Sihtasutus, jurist ja õigusüksuse juht
1998–2000	Intrum Iustitia, jurist

Peamised uurimisvaldkonnad

Maksejõuetusõigus, Euroopa Liidu (konkurentsi-) õigus, rahvusvaheline eraõigus, lepinguõigus, tsiviilprotsess

Avaldatud teadustööd

S.Viimsalu. Konverents „Maksejõuetus – kas üksnes pankrot?“ Juridica IX/2007.

S.Viimsalu. Piiriülese maksejõuetusmenetluse õiguslikud küsimused. Juridica VI/ 2008.

S.Viimsalu. Estonia: All You Need to Know About Becoming an Insolvency Practitioner. Eurofenix Winter 2008.

S.Viimsalu. CoCo & IPs in Estonia. Eurofenix Spring 2009.

S. Viimsalu. New Trends in Estonian Insolvency Law. Eurofenix Spring 2010.
P. Omar, reporters S. Viimsalu, J. Weber. On the Origins and Challenges of Court-to-Court Communication in International Insolvency Law in: A. Verweij. B. Wessels (eds.) Comparative and International Insolvency Law Central Themes and Thoughts. INSOL Europe, 2010.
J. Farley, reporters S. Viimsalu, J. Weber. A Practical Approach to Court-to-Court Communication in International Insolvency Law in: A. Verweij. B. Wessels (eds.) Comparative and International Insolvency Law Central Themes and Thoughts. INSOL Europe, 2010.
S. Viimsalu. The Over-Indebtedness Regulatory System in the Light of the Changing Economic Landscape. Juridica International XVII/2010.

DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS

1. **Херберт Линдмяэ.** Управление проведением судебных экспертиз и его эффективность в уголовном судопроизводстве. Тарту, 1991.
2. **Peep Pruks.** Strafprozesse: Wissenschaftliche "Lügendetektion". (Instrumentaldiagnostik der emotionalen Spannung und ihre Anwendungsmöglichkeiten in Strafprozess). Tartu, 1991.
3 **Marju Luts.** Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus. Tartu, 2000.
4. **Gaabriel Tavits.** Tööõiguse rakendusala määratlemine töötaja, tööandja ja töölepingu mõistete abil. Tartu, 2001.
5. **Merle Muda.** Töötajate õiguste kaitse tööandja tegevuse ümberkorraldamisel. Tartu, 2001.
6. **Margus Kingisepp.** Kahjuhüvitis postmodernses deliktiõiguses. Tartu, 2002.
7. **Vallo Olle.** Kohaliku omavalitsuse teostamine vahetu demokraatia vormis: kohalik rahvaalgatus ja rahvahääletus. Tartu, 2002.
8. **Irene Kull.** Hea usu põhimõte kaasaegses lepinguõiguses. Tartu, 2002.
9. **Jüri Saar.** Õigusvastane käitumine alaealisena ja kriminaalsed karjäärid (Eesti 1985–1999 longituuduurimuse andmetel). Tartu, 2003.
10. **Julia Laffranque.** Kohtuniku eriarvamus. Selle võimalikkus ja vajalikkus Eesti Vabariigi Riigikohtus ja Euroopa Kohtus. Tartu, 2003.
11. **Hannes Veinla.** Ettevaatusprintsiip keskkonnaõiguses. Tartu, 2004.
12. **Kalev Saare.** Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine. Tartu, 2004.
13. **Meris Sillaots.** Kokkuleppemenetlus kriminaalmenetluses. Tartu, 2004.
14. **Mario Rosentau.** Õiguse olemus: sotsiaalse käitumise funktsionaalne programm. Tartu, 2004.
15. **Ants Nõmper.** Open consent – a new form of informed consent for population genetic databases. Tartu, 2005.
16. **Janno Lahe.** Süü deliktiõiguses. Tartu, 2005.
17. **Priit Pikamäe.** Tahtluse struktuur. Tahtlus kui koosseisupäraste asjaolude teadmine. Tartu, 2006.
18. **Ivo Pilving.** Haldusakti siduvus. Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel. Tartu, 2006.
19. **Karin Sein.** Ettenähtavus ja rikutud kohustuse eesmärk kui lepingulise kahjuhüvitise piiramise alused. Tartu, 2007.
20. **Mart Susi.** Õigus tõhusale menetlusele enda kaitseks – Euroopa Inimõiguste ja Põhivabaduste Kaitse Konventsiooni artikkel 13 Euroopa Inimõiguste Kohtu dünaamilises käsitluses. Tartu, 2008.
21. **Carri Ginter.** Application of principles of European Law in the supreme court of Estonia. Tartu, 2008.
22. **Villu Kõve.** Varaliste tehingute süsteem Eestis. Tartu, 2009.

23. **Katri Paas.** Implications of Smallness of an Economy on Merger Control. Tartu, 2009.
24. **Anneli Alekand.** Proportsionaalsuse printsiip põhiõiguste riive mõõdupuuna täitemenetluses. Tartu, 2009.
25. **Aleksei Kelli.** Developments of the Estonian Intellectual Property System to Meet the Challenges of the Knowledge-based Economy. Tartu, 2009.
26. **Merike Ristikivi**. Latin terms in the Estonian legal language: form, meaning and influences. Tartu, 2009.
27. **Mari Ann Simovart.** Lepinguvabaduse piirid riigihankes: Euroopa Liidu hankeõiguse mõju Eesti eraõigusele. Tartu, 2010.
28. **Priidu Pärna.** Korteriomanike ühisus: piiritlemine, õigusvõime, vastutus**.** Tartu, 2010.
29. **René Värk.** Riikide enesekaitse ja kollektiivse julgeolekusüsteemi võimalikkusest mitteriiklike terroristlike rühmituste kontekstis. Tartu, 2011.
30. **Paavo Randma.** Organisatsiooniline teovalitsemine – *täideviija täideviija taga* kontseptsioon teoorias ja selle rakendamine praktikas. Tartu, 2011.
31. **Urmas Volens.** Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid. Tartu, 2011.
32. **Margit Vutt.** Aktsionäri derivatiivnõue kui õiguskaitsevahend ja ühingujuhtimise abinõu. Tartu, 2011.
33. **Hesi Siimets-Gross.** Das „Liv-, Est- und Curlaendische Privatrecht" (1864/65) und das römische Recht im Baltikum. Tartu, 2011.
34. **Andres Vutt.** Legal capital rules as a measure for creditor and shareholder protection. Tartu, 2011.
35. **Eneken Tikk.** Comprehensive legal approach to cyber security. Tartu, 2011.
36. **Silvia Kaugia.** Õigusteadvuse olemus ja arengudeterminandid. Tartu, 2011.
37. **Kadri Siibak.** Pangandussüsteemi usaldusväärsuse tagamine ja teabekohustuste määratlemine finantsteenuste lepingutes. Tartu, 2011.