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AN OUTLINE OF CROSS-BORDER CONSUMER INSOLVENCY FROM THE PERSPECTIVE OF THE CURRENT LEGISLATION IN POLAND

Abstract. Increasing globalization and the growth of cross-border consumer activity make the issue of international consumer insolvency increasingly important. This paper focuses on an analysis of the legislation currently in force in Poland that applies to this issue. Therefore, its purpose is to identify a normative structure, relevant from the perspective of Polish legislation, that regulates, based on the provisions of both EU and national law, such issues as the conflict of jurisdiction, recognition of foreign insolvency proceedings, cooperation between the bodies involved in these proceedings, and protection of the rights of the insolvent person and creditors from other countries.

Keywords: consumer insolvency, cross-border proceedings, recognition of foreign proceedings, conflict of jurisdiction, insolvency.

1. Preliminary notes

In consumer insolvency proceedings that do not include a foreign element, which constitute the majority of cases adjudicated by Polish courts, the existence of national (Polish) jurisdiction – understood as the general competence of a court of a given country (Poland in this case) to handle certain cases[1] – is generally assumed by a Polish court implicitly, i.e. without closer examination (Marciniak, 2014, pp. 46–47).

However, some difficulties related to this matter occur in the case of international, or cross-border, consumer insolvency, which takes place when there is a "foreign element" in specific insolvency proceedings, linking these proceedings to the legal systems of other countries (e.g., Poland and Germany or Poland and Ukraine)[2]. At the outset, it should be clarified that the term "foreign element" is used in the Polish doctrine to include factual states that, in general, show ties with two or more countries, which occurs in particular when property belonging to the debtor is located in another country, the insolvent entity has a branch in that country, the insolvent entity or person is a party to a contract relating to property located in another country or has its domicile or habitual residence there, or when foreign creditors file their claims in insolvency proceedings (Gurgul, 2018, p. 806; Szydło, 2009, p. 59; Ereciński, 2012, p. 17). Given the freedom of movement of people and capital existing, in particular, in the European Union, cross-border insolvency is certainly not an abstract issue, but one whose practical significance is constantly increasing. Quite common in this context are cases where the debtor works, earns an income, and incurs a significant portion of his or her liabilities, which he or she will eventually not be able to fulfill, in another country, while his or her family lives in Poland, which is also where the debtor has a significant portion of his or her private or joint assets. Other configurations of foreign element are also possible, such as when the debtor, although he or she lives abroad with his entire family, invests a significant part of the wages he or she earns for investment in the his or her home country, which then becomes the source of his or her insolvency, etc. These examples can be considered as a starting point for addressing essential questions related to such cases, such as the determination of the national jurisdiction of a court of a certain country to declare and conduct insolvency proceedings for an individual who is not running a business, or the impact of such proceedings initiated in one country on the legal and financial situation of the insolvent person, which show ties to another country.

Therefore, the purpose of this paper is to analyze the current Polish legislation relating to cross-border consumer insolvency, with particular focus on those legal solutions that raise doubts and result in ambiguous opinions in the existing literature on the subject. Although cross-border insolvency of businesses, in particular, has already been the focus of considerable attention in the literature, the unique characteristics cross-border consumer insolvency warrant an analysis of the legislation applicable to the latter issue.

2. The normative model of cross-border consumer insolvency

The Polish legislation relating to this matter (like the legislation of all member states of the European Union except Denmark) is characterized by a duality: it consists of national legislation relating to international insolvency proceedings (Articles 378–417 of the Act of February 28, 2003, Bankruptcy Law, consolidated text of March 24, 2025, Journal of Laws of 2025, item 614, hereinafter referred to as "BL") and the provisions of Articles 1097–1153[25] of the Code of Civil Procedure (Act of November 17, 1964, Code of Civil Procedure, consolidated text of October 10, 2024, Journal of Laws of 2024, item 1568, hereinafter referred to as "CCP") used as appropriate pursuant to the reference provided in Article 381 of the BL, and the provisions of the directly applicable Regulation of the European Parliament and of the Council (EU) No. 2015/848 of May 20, 2015, on insolvency proceedings (OJ L 141, p. 19, as amended), which replaced, as of June 26, 2017, the Council Regulation (EC) No. 1364/2000 of May 29, 2000, on insolvency proceedings (OJ L 160, June 30, 2000, p. 1, as amended). Regulation No. 1364/2000 entered into force on May 31, 2002, and became, as of May 1, 2004, a law applicable in Poland, without the need for implementation by national law (Gurgul, 2018, pp. 805–806, Judgment of the Court (Fourth Chamber) of 11 July 2019, A, Case C-716/17, ECLI:EU:C:2019:598). It should be noted that Regulation No. 2015/848, although significantly expanded in the normative part, with regards to basic issues, i.e. national jurisdiction in cross-border insolvency proceedings, recognition of judgments on the opening of foreign insolvency proceedings, and the jurisdictional link, has retained the structural components of the provisions of Regulation No. 1364/2000, and therefore the extensive literature on these issues remains relevant to a significant extent also to the former of the two regulations.

3. General characteristics of Regulation (EU) No. 2015/848

At the outset, it should be mentioned that, according to the wording of Article 1 (1) of Regulation No. 2015/848, the Regulation covers public collective proceedings listed in Annex A (for Poland, these are insolvency proceedings and restructuring proceedings), in which, for the purpose of recovery, debt restructuring, reorganization, or liquidation:

a) the management of the assets is completely or partially taken away from the debtor and an administrator is appointed;
b) the debtor's assets and affairs have been subjected to judicial control or supervision;
c) by court order or by law itself, a temporary stop to individual enforcement proceedings is granted to allow negotiations between the debtor and the creditors.

In the context of the main consideration of this paper, it is also necessary to refer to Recitals 9 and 10 of the Preamble of this Regulation, according to the wording of which the Regulation applies, among other things, to insolvency proceedings against debtors who are individuals not engaged in business activities, as well as to proceedings providing for the cancellation or restructuring of the debt of consumers and self-employed persons, for example, by reducing the amount to be paid by the debtor or extending the repayment period granted to the debtor. It is essential, however, that such proceedings remain under the control or supervision of the court[3], which can mean even an intervention of the court only as a result of an appeal by the creditor or other interested parties. According to Recital 16 of the Preamble, however, the Regulation does not apply to proceedings in which the debt of an individual with a very low income and very low asset value is written off, if this type of proceedings does not provide for payments to creditors in any case. There is no doubt, therefore, that Regulation No. 2015/848 also covers the separate insolvency proceedings against individuals not engaged in business activity, referred to as "consumer insolvency" for short, provided for under Polish insolvency law by the provisions of Articles 491^1–491^{24} of the BL.

To supplement the brief characterization of the normative part of Regulation No. 2015/848, it should be mentioned that it governs issues of international insolvency law at the level of the European Union and applies only to such insolvency proceedings in which there is a Community foreign element. It should be emphasized, however, that if the main center of the debtor's core business is located in the EU and the debtor's assets are located in a non-EU country, we are still dealing with an EU insolvency.

The provisions of the Regulation focus on three main issues:

1. national jurisdiction of courts and other authorities of EU member states authorizing these courts and authorities to open insolvency proceedings;
2. the automatic and direct effect of rulings by courts or other authorities to open insolvency proceedings in other EU member states;
3. the establishment of uniform conflict-of-law rules indicating the applicable law for assessing the effects of insolvency on the legal relations and rights of the insolvent person and the creditors, as well as third parties (Hrycaj, Wiórek 2009, p. 69; Rosenkranz 2011, p. 517).

Thus, Regulation No. 2015/848 does not create uniform substantive or procedural rules for insolvency proceedings. Its provisions are therefore primarily intended to harmonize conflict-of-law rules, so that it becomes possible to "find" the law applicable to an EU-wide insolvency, and to extend the principle of universality to all EU member states by universally recognizing insolvency proceedings opened and conducted in one of the EU member states (Gurgul, 2005, p. 1001; Bagajewska, Hrycaj, 2008, p. 426; Kohutek, 2007, p. 23; Rosenkranz, 2011, p. 521). The purpose of the provisions of Regulation No. 2015/848 is therefore to establish uniform conflict-of-law rules that overrule in this area the rules set forth in the private international law of the member states (Adamus, 2004, p. 36). The EU legislator justifies such a scope of these provisions by the significant differences in substantive law (Recital 22 of the Preamble) that prevent the introduction of a universal insolvency procedure applicable throughout the European Union (Michalak-Abram, 2018, Legalis, chap. III, §3). At the same time, it should be emphasized that in accordance with the principle of primacy of Community law (Article 91(3) of the Constitution of the Republic of Poland in conjunction with Article 249 of the Treaty establishing the European Community), the provisions of Regulation No. 2015/848, within the scope of their application, take precedence over national law, which is also determined by the content of Article 378(1) of the BL. Against this background, however, a dispute has arisen both in the doctrine and in the case law as to whether the provisions of Regulation No. 2015/848 rule out at all the application of the provisions of Articles 378–417 of the BL to EU proceedings (Gurgul, 2018, p. 807; Janda, 2023, p. 825), or whether they do so only to the extent that they regulate the same issues differently (Filipiak, 2020, p. 1457; Hrycaj, 2011, pp. 35–36; Zimmerman, 2018, Legalis, com. to art. 379, arg. no. 7, Resolution of the Polish Supreme Court of January 20, 2010, III CZP 115/09, Legalis no. 183627; Decision of the Regional Court in Szczecin of April 27, 2018, VIII Gz 8/18, Lex no. 2492047). At present, it seems that the differences of opinion on the matter in question have significantly decreased, due to the expanded scope of the provisions of Regulation No. 2015/848, also to those issues that were previously not regulated in Regulation No. 1364/2000, such as cooperation between courts or administrators in different countries, which was one of the main arguments for applying to EU insolvency proceedings also the provisions of Articles 378–417 of the BL (Hrycaj, 2011, pp. 35–36). It can therefore be concluded that, even if one were to assume that the use of the phrase "the provisions of Part Two shall not apply if (...) the law of an international organization of which the Republic of Poland is a member provides otherwise" by the Polish legislature in Article 378 of the BL does not rule out the application of the provisions of Articles 378–417 of the BL to EU insolvency, it would be difficult to point to such provisions of the BL that regulate issues relating to international insolvency that are not at the same time regulated by Regulation No. 2015/848 (Popłonyk, 2010, p. 43).

Types of cross-border proceedings under Regulation No. 2015/848

The dualism in the regulation of international insolvency, described above (Community "conflict-of-laws" regulations and the internal laws of member states) requires, in fact, three categories of insolvency proceedings:
a) main proceedings;
b) territorial proceedings; and
c) secondary proceedings.

Main proceedings

According to the wording of Article 3(1) of Regulation No. 2015/848, main proceedings are to be initiated by a court of the country in which the center of the debtor's main interests (COMI) is located. The jurisdictional link is thus defined in the same way as the Polish legislature defined it when formulating the structure of the court's territorial jurisdiction link in Article 19 of the BL. Also, Article 3(1) of Regulation No. 2015/848 clarifies that "the center of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties." It is presumed that in the case of an individual, in the absence of proof to the contrary, the main center of his or her main interests is the place the individual's habitual residence. The relevant criteria for determining the centre of the main interests of individuals not exercising an independent business or professional activity are therefore those connected with their financial and economic situation which corresponds to the place where they conduct the administration of their economic interests or the majority of their revenue is earned and spent, or the place where the greater part of their assets is located. According to the CJEU's case-law, the first and fourth subparagraphs of Article 3(1) of Regulation 2015/848 must be interpreted as meaning that the presumption established in that provision for determining international jurisdiction for the purposes of opening insolvency proceedings, according to which the centre of the main interests of an individual not exercising an independent business or professional activity is his or her habitual residence, is not rebutted solely because the only immovable property of that person is located outside the Member State of habitual residence (Judgment of the Court (Ninth Chamber) of 16 July 2020, MH, NI v OJ, Novo Banco SA, Case C-253/19, ECLI:EU:C:2020:585, Judgment of the Court (Eighth Chamber) 19 September 2024, DL v Land Berlin, Case C-501/23, ECLI:EU:C:2024:76). However, in order to counteract the undesirable phenomenon of *forum shopping*, this presumption does not apply when the place of habitual residence has been moved to another member state within the 6-month period prior to the request for the opening of insolvency proceedings (Article 3(1) of the Regulation). If this negative prerequisite for the application of the said presumption is not met, the court is nevertheless not relieved of the obligation to examine in each case the location of the debtor's COMI (Article 4(1) of the Regulation). For this purpose, the court has the right to request additional evidence from the debtor to support his or her claims. Also, where permitted by the law applicable to the opening of insolvency proceedings, the court should also allow the debtor's creditors to present their opinion regarding the issue of jurisdiction (Recital 32 of the Preamble).

Thus, in a nutshell, if the debtor's COMI is located in the territory of a member state, the court of that state is competent to initiate the main proceedings, but if it is located outside the Community, the provisions of Regulation No. 2015/848 do not apply at all.

However, since the determination of a debtor's center of main interests is not always obvious, that the main proceedings may be simultaneously opened by courts in several countries (e.g., at the request of a debtor in Poland and at the request of a creditor in Germany). In such a situation, the principle, expressed in Recital 65 of the Preamble to Regulation No. 2015/848 and in Article 19 thereof, of priority of the proceedings opened first applies (Studziński, Żytny, 2010, p. 189; Porzycki, 2008, pp. 248, 251). Priority is therefore determined by the date of the first ruling opening insolvency proceedings (Rosenkranz, 2011, p. 580). Consequently, the court that first issued a ruling (e.g., the Polish court) on the opening of the main insolvency proceedings becomes the competent court to conduct these proceedings, and the German court is bound by its ruling. The proceedings initiated in this example by the German court can continue, but only as secondary territorial proceedings. This is a manifestation of the Regulation's setting of the principle of universality of the main bankruptcy proceedings, according to which there should be only one main bankruptcy proceedings, covering essentially all of the debtor's assets including those located abroad (Glicz, 2003, pp. 29–30; Rosenkranz, 2011, p. 580; Adamus, 2004, p. 35; Szydło, 2009, p. 57). The main insolvency proceedings, therefore, have effects not only in the country where the debtor's center of main interests is located, but also in other member states (Adamus, 2004, p. 39; Kohutek, 2007, p. 27). The seizure of the debtor's assets, which is fundamental effect of insolvency, and the resulting loss of the debtor's right to manage and dispose of them in favor of the administrator appointed in the proceedings, is thus extended to all states of the Community in which the assets are located (Szydło, 2009, p. 277; Rosenkranz, 2011, p. 580). Due to the universality of the main insolvency proceedings, all creditors of the debtor (including foreign ones) have the ability to assert their claims.

A consequence of the aforementioned principle of universality, as well as of the content of the provision of Article 19 of the Regulation, is the automatic recognition of the ruling to open main insolvency proceedings in all member states, from the moment such a ruling takes effect in the state where the proceedings are opened. Therefore, a ruling of a foreign court to open insolvency proceedings becomes effective in other countries by operation of law (*ex lege*) without the need for a decision in this regard or for the completion of any formalities by the authorities of other member states (principle of automatic recognition) (Kruczalak-Jankowska, 2007, p. 103; Szydło, 2009, pp. 280–281; Judgment of the Provincial Administrative Court in Bydgoszcz of October 5, 2016, I SA/Bd 422/16, Central Database of Administrative Court Rulings, Judgment of the Court (Fifth Chamber) of 24 March 2022, Galapagos Bidco. Sarl v DE, Hauck Aufhäuser Fund Services SA, Prime Capital SA, Case C-723/20, ECLI:EU:C:2022:209). Also, the effect of automatic recognition does not depend on either the judgment opening the main proceedings being final, or, even more so, the examination of the jurisdiction by courts of other states, or even the debtor's possession of insolvency capacity under the laws of the recognizing state (Glicz, 2003, p. 31; Rosenkranz, 2011, p. 582; Szydło, 2009, pp. 280, 283). The only prerequisites for a ruling to qualify for automatic recognition are that it must be issued by a "court" within the meaning of Article 2(6) of the Regulation, within the framework of Annex A to Regulation No. 2015/848. However, recognition of such a ruling must not contradict the public order of the recognizing state (Article 33 of the Regulation) (Szydło, 2009, p. 283).

This is intended to eliminate the phenomenon known as *forum shopping* (Recital 29 of the Preamble), which is the illegal or dishonest selection of a court with the aim of obtaining a more favorable legal situation. In practice, this generally boils down to debtors moving their COMI, or their assets, from one member state to another in order to improve their legal situation (Kohutek, 2007, p. 27; Kruczalak-Jankowska, 2007; p. 103–104). However, the Regulation contains other legal instruments to counteract *forum shopping*; specifically, Article 3(1) of the Regulation and Recital 31 of the Preamble stipulate that the presumption that the debtor's COMI is at the place of his or her habitual residence does not apply if the debtor has moved his or her habitual residence to another member state during the six months preceding the filing of the request to open insolvency proceedings. On the other hand, Recital 30 of the Preamble indicates that the presumption set forth in Article 3(1) of the Regulation can be rebutted if, for example, most of the debtor's assets are located outside the member state of his or her habitual residence, or if it can be shown that the main motive for his or her move to another state was to apply for insolvency proceedings in the new jurisdiction, and that such an action would materially harm the interests of the creditors who had transactions with the debtor prior to the move.

However, the doctrine rightly points out that the primacy of the priority of the opening of proceedings over the actual location of the debtor's COMI, as set forth in the Regulation, does not at all effectively eliminate the risk of *forum shopping*. This is because when the location of the debtor's COMI is obvious, both the debtor and the creditors are able, to a certain extent, to choose a jurisdiction that is convenient to them. This is because since insolvency proceedings are opened upon request, the actual jurisdiction is acquired by the court that first declares insolvency (Porzycki, 2008, p. 248).

The opening of the main insolvency proceedings, as mentioned earlier, in fact indicates the law applicable to the conduct of these proceedings within the European Union (*lex consursus*). That law specifically defines the conditions for opening, conducting and closing insolvency proceedings, as well as all the consequences of the proceedings, both procedural and material, to persons and legal relations (see Article 7(1) and (2) of the Regulation and Recital 66 of the Preamble) (Kohutek, 2007, p. 27). It should be noted that the administrator appointed by the ruling of the court opening the main insolvency proceedings is authorized to take actions in the territory of another member state and to exercise the powers that the law of the state where the proceedings are opened gives him or her (Kohutek, 2007, p. 30). Thus, in particular, the administrator may move the debtor's assets outside the territory of the member state where they are located, as well as monetize them (Article 21 (1) of the Regulation). In this regard, however, the administrator should follow the procedures in force in the host country, especially when the seizure of the debtor's assets requires the support of officials of that country (Article 21(3) of the Regulation). These powers of the administrator become limited only when secondary territorial proceedings are opened. This is because then the power to manage the assets located in the state where the secondary proceedings are opened is assumed by the administrator in the secondary proceedings, who carries out the procedure based on national law. However, according to the wording of Article 21 (2) of the Regulation, that administrator may judicially or extrajudicially demand to move the debtor's movable assets from the territory of the state where the proceedings – either the main proceedings or other secondary proceedings – were initiated to the territory of the state where the secondary proceedings in which he or she was appointed are conducted (Kohutek, 2007, p. 30; Rosenkranz, 2011, p. 582).

Territorial proceedings

Where a debtor has an establishment of its business (as defined in Article 2(10) of the Regulation) in a country other than the country competent for the opening of the main insolvency proceedings, it is possible to open territorial proceedings, even before the opening of the main proceedings, if one of the following three conditions provided for in Article 3(4) of the Regulation has been met:

1) the main proceedings cannot be opened for reasons provided for by the law of the member state in whose territory the debtor's COMI is located – such proceedings replace the main proceedings, performing a subsidiary function to them (Adamus, 2004, p. 39); or
2) a request has been filed for the opening of territorial insolvency proceedings by a creditor whose claims arise out of or are related to the activities of an establishment located in the territory of the member State where the opening of the territorial proceedings is requested; or
3) the request for the opening of the territorial proceedings has been filed by a public authority that, under the law of the member state in the territory of which the establishment is located, has the right to request for the opening of insolvency proceedings.

It should be noted that the Polish translation of Regulation No. 2015/848 defines the concept of an "establishment" as any place of activity where the debtor performs or, in the last three months before the filing of the request for the opening of the main insolvency proceedings, performed an economic activity with human means and assets. However, it has been pointed out in the doctrine that the Polish translation of the term "establishment" is unfortunate, as it refers to the concept of "business activity," whose meaning is strictly defined in Article 3 of the Polish Act of March 6, 2018, Entrepreneurs' Law (Act of March 6, 2018, Entrepreneurs' Law, Journal of Laws of 2018, item 646), and which is closely related to the concept of entrepreneur (Article 4(1) of the Entrepreneurs' Law and Article 43^1 of the Civil Code) (Hrycaj, 2011, pp. 55–56; Filipiak, 2020, pp. 1543–1545). This has prompted some commentators to assume that the opening of territorial insolvency proceedings, but also secondary insolvency proceedings, is only possible in relation to entrepreneurs (Chilarski, 2008, p. 93; Tim, 2018, p. 61). However, given the objectives indicated in the Preamble to Regulation No. 2015/848 that this legal act is intended to achieve, there is no doubt that a restrictive interpretation of the terms used by the EU legislature would contradict the assumption that the Regulation covers both entities engaged in business activity and individuals not engaged in such activity (Recitals 9 and 10 of the Preamble). The Regulation thus seeks to treat businesses and consumers, as well as – and especially – their creditors. In this context, according to the view prevailing in the doctrine, it would be correct to refer the concept of "establishment" and the "economic activity performed with human means and assets" that characterizes it to the place where the debtor performs economic activities that does not need to be profit-oriented. It can therefore be a consumer activity. However, it is important that this activity is based on human resources and assets and, in particular, that it is not temporary. In the case of a consumer, such criteria may be met by a relationship whose legal basis is, for example, contracts for the provision of services to the consumer or a contract for specific work. Thus, in order to establish that a debtor has an "establishment" in a specific country, it is sufficient to establish that the debtor's assets, however significant in value, are located in that country; what matters is only whether, based on these assets and with the involvement of other persons, the debtor performs economic activity (understood in general as an exchange of goods) and whether this activity is visible and recognizable to his or her creditors. Consequently, assuming that the view indicated above and prevailing in the doctrine is correct, it should be considered that territorial consumer insolvency proceedings may be opened in relation to a debtor who is an individual not running a business.

As for the nature of territorial proceedings, it should be mentioned that they may be conducted in either a liquidation or an arrangement mode. However, they are limited only to the assets of a debtor located in the territory of the country where such proceedings are opened. On the other hand, if territorial proceeding are followed by main proceedings, the territorial proceedings then become secondary proceedings (Article 3(4) of the Regulation) (Glicz, 2007, p. 30; Adamus, 2004, p. 39; Rosenkranz, 2011, pp. 579–580).

Secondary proceedings

The principle of universal coverage of main insolvency proceedings does not rule out the possibility of opening and conducting parallel territorial proceedings (according to the principle of controlled universality) (Kruczalak-Jankowska, 2010, p. 35), which cover only assets located in the country where such proceedings (secondary proceedings) are opened (Kruczalak-Jankowska, 2007, p. 104). Opening of secondary insolvency proceedings may be justified by the special protection of the local creditors in a country, such as those secured in rem, or by the complex structure of the insolvency estate, which makes its management as a whole difficult (Rosenkranz, 2011, p. 522; Szydło, 2009, p. 306). Another possible justification for opening secondary insolvency proceedings is that the differences in the relevant legal systems are so severe that difficulties would arise in extending the effects under the law of the state where the proceedings are opened to other member states where the assets are located, although, as indicated in Recital 40, secondary proceedings may also serve other purposes.

However, not in every case where there is a foreign element in specific insolvency proceedings is it possible to open secondary proceedings. This is because the basic prerequisite for doing so is that the debtor has an establishment in a country other than the country in which the main insolvency proceedings were opened. The concept of an establishment within the meaning of Regulation No. 2015/848 has already been mentioned earlier, so it is now reasonable only to note that the debtor's assets alone do not meet this criterion. What remains to be resolved, therefore, is the question of who is authorized to open secondary insolvency proceedings. According to the wording of Article 37(1)(a) of the Regulation, there is no doubt that the administrator in the main proceedings has such an authority. Problems of an interpretative nature, especially with regard to consumer insolvency proceedings, which under Polish insolvency law may be initiated in principle by the debtor (Article 491^2 (3) of the BL) and, exceptionally under the conditions set forth in Articles 8 and 9 of the Bankruptcy Law, by the creditor, arise from the wording of Article 37(1)(b) of the Regulation. This is because the EU legislator has also indicated in that provision, as entities entitled to open secondary proceedings, any other person or body entitled to file a request for opening insolvency proceedings under the law of the member state in whose territory the opening of secondary insolvency proceedings is requested. Since, after all, ruling out the opening of insolvency proceedings ex officio, the question that remains unanswered is: Who else (besides the administrator from the main proceedings) is authorized to open secondary consumer insolvency proceedings before a Polish court. The issue is not obvious, but taking into account especially the purpose of secondary proceedings indicated in Recital 40 of the Preamble (protection of local interests), the lack of authorization of creditors to open such proceedings would contradict the assumptions underlying the structure of secondary insolvency proceedings. All the more so since it is intended, among other things, to facilitate the participation of local creditors in the insolvency proceedings of their debtor who has the his or her COMI abroad (Decision of the District Court Gdańsk-Południe of May 14, 2018, file ref. XII 1 Co 551/17).

If, at the same time, one takes into account that Article 37(1)(b) refers to anyone who, according to local law, is entitled to file a insolvency request, without distinguishing whether it is the insolvency of an entrepreneur or a consumer, it seems that the group of entities entitled to file a request for opening secondary consumer insolvency proceedings should be determined on the basis of the general provisions of Article 20 of the BL (Filipiak, 2020, p. 1458). Consequently, one would have to conclude that a request to open secondary insolvency proceedings against an individual who does not run a business could be filed by the debtor himself or herself, as well as any of his or her creditors. These proceedings, in accordance with the wording of Article 35 of the Regulation, would be conducted in Poland according to the provisions of Articles 491^{1}–491^{24} of the BL (Decision of the Regional Court in Szczecin of April 27, 2018, VIII Gz 8/18, LEX no. 2492047).

Secondary proceedings – as the name implies – can be opened only after main insolvency proceedings have been opened and recognized in other member states, they perform a complementary function to main proceedings, and are subordinated to them in a certain way (Adamus, 2004, p. 39; Szydło, 2009, p. 305). One of the consequences is that a debtor's insolvency does not have to be re-examined in the member state where the secondary insolvency proceedings are to be opened, as long as the insolvency was a premise for the opening of the main insolvency proceedings (Article 34 of the Regulation).

The nature of this relationship between these two types of proceedings – main and secondary – is well reflected, among others, in the provisions of Article 36 (1) of the Regulation. According to its wording, in order to avoid the opening of secondary insolvency proceedings, the administrator in the main proceedings may present an undertaking to local creditors assuring them that they will be treated in the same way as if secondary insolvency proceedings were opened. This undertaking, if it meets the requirements indicated in Regulation No. 2015/848 and, in particular, if it is approved by a qualified majority of local creditors, becomes the basis for the rejection by the (competent) court of a request to open secondary insolvency proceedings filed with that court, if it determines that the undertaking of the administrator in the main proceedings will adequately protect the fundamental interests of the local creditors (Recital 42 of the Preamble) (Filipiak, 2020, p. 1506).

If secondary proceedings are opened, even though the method of filing claims will be determined by *lex consursus*, in accordance with the principle of equal treatment of creditors expressed in Article 45 of the Regulation, any creditor of the insolvent person is entitled to file its claim in both the main and secondary insolvency proceedings. In addition, administrators appointed in the main and secondary insolvency proceedings are also entitled to file a claim in any other proceedings if this benefits the creditors in those proceedings.

The principle of equal treatment of creditors also applies to tax authorities and social security institutions (Judgment of the Provincial Administrative Court in Bydgoszcz of October 5, 2016, I SA/Bd 422/16, Central Database of Administrative Court Judgments) (Glicz, 2003, p. 31). However, in order to enforce this principle, a creditor who has already been party satisfied in one of the pending insolvency proceedings may participate in the distribution of the funds of the bankruptcy estate in other proceedings as long as creditors of the same category in the other proceedings have been satisfied to the same extent (Article 23(2) of the Regulation).

Optimal protection of creditors of both proceedings, main and secondary, requires the coordination of the actions taken by receivers or administrators in both proceedings and close cooperation between them. This cooperation generally involves the exchange of legally and economically important information that may be relevant to each of the proceedings – this is especially true of information on reported claims. However, due to the aforementioned peculiar subordination of secondary insolvency proceedings to main insolvency proceedings, the receiver/administrator of the latter may intervene in secondary proceedings to a certain extent. In particular, at his or her request, the court that opened the secondary insolvency proceedings is required to suspend the liquidation of the debtor's assets in whole or in part for a period of no more than three months (Article 46 of the Regulation). During this suspension of liquidation, the receiver/administrator of the main proceedings is obliged to take all appropriate steps to ensure that the interests of the creditors in the secondary insolvency proceedings are protected. If, on the other hand, pursuant to the law applicable to the secondary insolvency proceedings, these proceedings can be terminated without liquidation by way of a recovery plan, arrangement, or other comparable means, the administrator in the main insolvency proceedings is authorized to propose such a termination in accordance with the procedure of that member state[4]. It should be emphasized, however, that while the effects of the opened secondary proceedings may not be challenged in another country, any limitation of creditors' rights, in particular those involving payment deferment or debt forgiveness, resulting from the method proposed in the secondary insolvency proceedings for the termination of those proceedings (including through the adoption of a repayment plan), may not have effects with respect to the debtor's assets not covered by these proceedings (and located in the territory of another country), unless this has been agreed to by the creditors concerned (Article 47(2) of the Regulation).

The close relationship between secondary and main proceedings, as discussed here, also manifests itself in the obligation of the receiver/administrator of the secondary proceedings to transfer to the receiver/administrator in the main proceedings any surplus obtained in the secondary proceedings after satisfying the participating creditors (Article 49 of the Regulation).

4. International insolvency on the basis of the provisions of Articles 378–417 of the BL

As noted above in the very general analysis of the provisions of Regulation No. 2015/848, the national provisions regarding international insolvency proceedings contained in Articles 378–417 of the Bankruptcy Law generally apply only if the foreign element involves a connection between Poland and countries outside the European Union or Denmark[5].

With regard to the national jurisdiction of Polish courts in insolvency cases, two types of jurisdiction have been adopted under the Polish Bankruptcy Law: exclusive and optional. Pursuant to Article 382 (1) of the BL, exclusive jurisdiction is conditional on the debtor having its center of main interest in Poland – the jurisdictional link here is therefore the same as that adopted under Regulation No. 2015/848. At the same time, it should be emphasized that the assessment of whether there is exclusive jurisdiction of Polish courts in a particular case is left to the Polish court to which the request to open consumer insolvency has been filed. Therefore, this court makes the relevant assessment solely on the basis of the laws in force in Poland (Gurgul, 2018, p. 814). However, if a court of another country deemed itself exclusively competent, the Polish court could not enforce its jurisdiction, but according to the wording of Article 392 of the BL, the foreign proceedings could not be recognized in Poland (Grzejszczak, Chilarski, 2004, p. 14).

Optional jurisdiction of Polish courts, on the other hand, arises when the debtor does not have its COMI in the territory of Poland, but has a place of residence, or assets there. In the case of entrepreneurs, which is an important side note, it is also important whether they conduct business activity in Polish territory. Optional jurisdiction allows insolvency proceedings to be conducted in Poland, while not ruling out recognition of foreign insolvency proceedings (Zedler, 2010, pp. 39–40).

As for the institution of "recognition" of foreign insolvency proceedings under Polish bankruptcy law, it can be said that it is of fundamental importance for the streamlining of international insolvency. Indeed, the main consequence of its application is the extension of the effects of declaration of insolvency to the territory of the recognizing state. As a result of the recognition, the receiver established in foreign proceedings, among other persons and entities, gains the right to act in the territory of the country that has made the recognition. The manner in which recognition occurs, however, has been regulated fundamentally differently in national international insolvency laws and in Regulation No. 2015/848. This is because, as mentioned earlier, in the case of EU insolvency, recognition occurs automatically, *ex lege*, in all member states, simultaneously with the issuance by a court in one of the member states of a ruling to open insolvency proceedings. national law, on the other hand, provides in this regard for a special, formalized judicial procedure for the recognition of foreign insolvency proceedings, which is initiated at the request of a foreign administrator, or a debtor who has been left in charge of his or her own assets (Articles 386–404 of the Bankruptcy Law) (Gerus, Jański, 2003, p. 102).

Depending on whether the recognized proceeding was initiated in the country where the debtor has his or her center of main interest or only his or her place of residence or assets, the recognition applies to the main or territorial foreign insolvency proceedings, respectively. However, regardless of which proceedings are recognized by a Polish court – main or territorial – the debtor's assets located in Poland are be part of the insolvency estate, and the foreign receiver is entitled to conduct so-called auxiliary proceedings before the Polish court, the purpose of which will be to liquidate the assets located in Poland (Articles 400a–404 of the BL) and satisfy creditors from the funds of the estate obtained as a result.

At the same time, it should be emphasized that the recognition of foreign insolvency proceedings does not prevent the Polish court from initiating internal "territorial" insolvency proceedings, the primary purpose of which is to ensure the protection of local creditors (Klyta, 2014, com. to Article 405, chap. 1). This is confirmed, for example, by Article 407 of the BL which, when indicating the entities authorized to file a request for the opening of secondary proceedings, omits the debtor, and lists the following: creditors who have their place of residence, registered office or center of main interest in Poland, creditors whose claims arise out of the debtor's economic activity conducted in Poland, and creditors who have claims against the debtor secured on the debtor's assets located in Poland by mortgage, pledge, registered pledge, maritime mortgage or transfer by way of security of items, receivables or other property rights. However, in the case of individuals not running a business, since the application of Article 407 of the BL has not been ruled out by Article 491^2 (1) of the BL, the latter article identifies the entities authorized to file a request to open secondary insolvency proceedings against an individual not running a business. In the insolvent individuals not running a business, secondary insolvency proceedings are conducted in accordance with the provisions of Articles 491^1–491^{24} of the BL, with modifications introduced by the provisions of articles 405–412 of the BL, but the effects that these proceedings have on the debtor are limited to assets located in Poland (Zedler, 2011, com. to article 410, chap. 2). However, if a surplus remains from the monetization of the bankruptcy estate in the secondary insolvency proceedings, it is transferred to the main insolvency proceedings conducted abroad (Article 412 of the BL). As a side note, it should also be noted that secondary insolvency proceedings include proceedings opened by a Polish court prior to the recognition of a foreign main insolvency proceedings. In such a case, the court that declared the debtor insolvent in Poland changes the decision to declare insolvency to a decision to open secondary insolvency proceedings.

5. Conclusions

As can be seen from the above discussion concerning fundamental institutions and concepts, the provisions of Regulation No. 2015/848 and the Polish legislation on international insolvency proceedings are similar. In both cases, there are main and secondary proceedings. The criteria for determining national jurisdiction – the debtor's center of main interest – are also formulated in an identical manner. The differences regarding, in particular, the recognition of the main insolvency proceedings conducted abroad, are primarily due to the peculiarities of cross-border relations between the member states of the EU. Most importantly, however, both European and Polish laws in this area create conditions for the achievement of the goals of consumer insolvency envisaged by national legislators while guaranteeing the necessary protection, especially for local creditors of insolvent debtors.

NOTES

[1] It is worth noting that the concept of national jurisdiction is broader than the territorial jurisdiction of a court. "National jurisdiction" refers to the competence of the courts of a country in general, while the concept of territorial jurisdiction is limited to indicating which of the courts in a country is competent to decide in a particular case. See: Ereciński,

Tadeusz (2012). In T. Ereciński (ed.), Kodeks postępowania cywilnego. Komentarz [Code of civil procedure. A commentary], vol. V. Warsaw: LexisNexis, pp. 46–47; as part of his deliberations, this author also cites the content of the ruling of the Supreme Court of March 12, 1957, I CO 43/56 (OSN 1957, no. IV, item 91), in which the court stated that "jurisdiction is an attribute of the state as the holder of sovereign power and is exercised by courts only through statutory delegation," and that "territorial jurisdiction means nothing more than the distribution of cases among courts endowed with the same jurisdictional power according to territorial criteria."

[2] Excerpts from the following articles were used in the preparation of this text: Pannert, Maciej, Konik, Piotr (2013). Szkic "unijnej" upadłości transgranicznej [A sketch of the "union" cross-border insolvency]. In J. Kruczalak-Jankowska (ed.), Wpływ europeizacji prawa na instytucje prawa handlowego [The impact of the Europeanization of law on the institutions of commercial law], Warsaw: LexisNexis, pp. 525–533; Pannert, Maciej (2014), Upadłość międzynarodowa na gruncie prawa polskiego [International insolvency under Polish law]. In Pravotvorchestvo i pravoprimeneniye w usloviach innovacionnogo razvitia obshchestva, Grodno, pp. 393–399.

[3] The legal definition of the term "court" under Regulation No. 2015/848 is contained in Article 2 (6) and includes a judicial or other competent authority of a member state with the power to open insolvency proceedings, to confirm such opening, or to issue rulings in the course of such proceedings.

[4] It is worth noting at this point that Regulation No. 2015/848 abandoned the requirement, provided for by Regulation No. 1364/2000, that secondary proceedings must be liquidation proceedings; as a result, such proceedings may now be conducted with the possibility of reaching an arrangement as soon as they are opened against an individual not running a business.

[5] Polish legal solutions (Articles 378–417 of the BL) relating to international insolvency proceedings are based on the Model Law on Cross-Border Insolvency prepared by the United Nations Commission on International Trade Law and approved by the UN General Assembly in Resolution 52/158 of December 15, 1997, recommended for adoption by UN members.

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