

## **CONFLICTS OF JURISDICTION IN THE EUROPEAN JUDICIAL AREA: WHERE BRUSSELS I BIS ENDS AND THE INSOLVENCY REGULATION BEGINS**

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### **Abstract**

Regulation (EU) no. 1215/2012 (known as the Brussels I bis Regulation) is the core of the mechanism for determining international jurisdiction at the level of the European Union, applicable, from a material point of view to all disputes in civil and commercial matters. However, the normative act excludes from its scope applications in the field of insolvency, which fall within the scope of Regulation (EU) no. 2015/848 (known as the Insolvency Regulation).

Although, at a first glance, the distinction between the spheres of incidence of the two normative acts is simple, in reality, not every request addressed to a court, related to insolvency, becomes an insolvency request excluded from the scope of the Brussels I bis Regulation and falling within the scope of the Insolvency Regulation.

To this end, the theoretical analysis of the provisions of the two regulations is to be complemented by an examination of the case law of the Court of Justice of the European Union (CJEU), in order to identify the criteria on the basis of which a request addressed to the court of a Member State must be qualified as being formulated in civil and commercial matters, so that international jurisdiction is determined on the basis of common law rules or, as the case may be, in insolvency matters, determining the incidence of the special jurisdiction rules contained in the Insolvency Regulation.

**Keywords:** *cross-border insolvency, international jurisdiction, civil and commercial matters, Brussels I bis Regulation, Insolvency Regulation*

## 1. Introduction

Usually, the legal concept of insolvency covers the situation in which a natural or legal person does not have the necessary funds to cover its overdue debts. Thus, insolvency does not relate to the content of the assets of the analyzed subject of law, but to the monetary funds that he has. It is therefore possible for that person's assets to exceed the assets where, for example, he owns immovable property of a value greater than that of his debts. However, since immovable property is not easily convertible into money or cannot be sold without affecting the performance of his activity (if, for example, it concerns a production hall), it is conceivable that a person may be in a state of insolvency even though his debts are significantly lower than his assets. That is why the state of non-solvency is not confused with that of insolvency, a subject of law being able to find himself in one of the situations, without necessarily being in the other (Stănescu, 2017, p. 17; Cărpenaru et al., 2017, p. 48). Thus, in the example given above, a person with numerous patrimonial assets, superior in value to his obligations, may find himself in the situation of not having money to cover the overdue debts. On the other hand, a person in a state of non-solvency (i.e. having a patrimonial asset lower than the patrimonial liabilities) may not yet be in a state of insolvency, as long as he has monetary funds to pay the due debts. Non-sovency therefore appears to us as an antechamber of insolvency, but insolvency can also occur independently of non-sovency when the patrimonial assets have low liquidity.

The legal mechanism of "insolvency" has a twofold purpose: on the one hand (and this is the main function) to ensure the best possible sufficiency of claims, and, on the other hand, as far as possible, to continue the debtor's activity. Therefore, the definition of insolvency is made by relating a person's debts to his or her funds, and not to his or her assets, only the former being able to be easily used to satisfy claims.

Once the concept of "insolvency" has been clarified, it is necessary to address its "cross-border" nature. From the perspective of private international law, this character is imprinted by the existence at the level of the legal relationship of an element of foreignness. Typically, an element of foreignness is understood as an element that is not related to the law of the forum and that we can find at the level of the subjects, the object or the content of a legal relationship (Predescu, 2025, pp. 30-33; Sitaru, 2013, pp. 1-2; Filipescu & Filipescu, 2008, pp. 21-23; Dariescu, 2023, pp. 11-12; Ungureanu et al., 2008, p. 2; Lupașcu & Ungureanu, 2012, pp. 13-14). Although, in principle, any such element allows the legal relationship to be classified as one of private international law, that is to say, a cross-border one, in some matters it is necessary to take into account qualified elements of foreign law. In such cases, the presence of qualified foreign elements determines the incidence of specialized regulations, while their absence does not change the "cross-border" nature of the legal relationship (if other foreign elements are present), but determines the application of general regulations. In the field of insolvency, as will be seen below, the cross-border nature is determined by the presence in a country other than that of the forum of the debtor's premises or assets or creditors. Obviously, the legal relationship can take on

an international (or "cross-border" character to preserve terminological uniformity), as if the debtor is a legal person or a creditor who is a legal person, although they are nationals of the State of the forum (their registered office being located in that State) have partners in another country. However, such foreign elements are not "qualified" and, as such, are not intended to lead to the application of legal rules specific to cross-border insolvency, but of the rules governing internal insolvency.

At European Union level, a first attempt to regulate cross-border insolvency was the Convention on Insolvency Proceedings, adopted in Brussels on 23 November 1995. It did not enter into force as a result of non-ratification by all 15 Member States since that date (and in particular due to opposition from the United Kingdom).<sup>1</sup> The provisions of the convention were taken over in Council Regulation (EU) No 1346/2000 of 29 May 2000 on insolvency proceedings, now replaced by Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)<sup>2</sup>. In the context of this study, Regulation (EU) No 2015/848 is to be referred to as the "Insolvency Regulation".

The Insolvency Regulation aims to regulate aspects regarding: the establishment of the international competence to open insolvency proceedings, the recognition in the Member States of insolvency proceedings opened in other Member States and, finally, the correlation of any insolvency proceedings taking place on the territory of several Member States of the European Union. The first two aspects mentioned, however, are included, at least in principle, and in the scope of Regulation (EU) no. Regulation (EC) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as the "Brussels I bis Regulation"). It constitutes, at the level of European Union law, the common law in the field of trial procedure with a foreign element (Stănescu, 2020, p. 1).

In principle, the Brussels I bis Regulation excludes from its scope the matter of insolvency, which is regulated by the Insolvency Regulation. However, since the concept of "insolvency" has an autonomous meaning at the level of the European Union, intended to facilitate a uniform application of that supra-State right, the delimitation of the scope of the two legislative acts is, in practice, not so easy.

The present study aims to contribute to setting the criteria for delimiting the scope of incidence of the two regulations.

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<sup>1</sup> An official commentary, *the Virgos-Schmit Report* ([https://aei.pitt.edu/952/1/insolvency\\_report\\_schmidt\\_1988.pdf](https://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf)), is relevant for the interpretation of the provisions of the insolvency regulations that had as their starting point the Brussels Convention (1995).

<sup>2</sup> At the national level, in Romania, the provisions of Title III regarding cross-border insolvency of Law No. 85/2014 (2014) are relevant in this matter.

## **2. Scope of the Brussels I bis Regulation. Elimination of the matter of insolvency**

I have already pointed out that the Brussels I bis Regulation represents, at the level of European Union law, the common law in the field of trial proceedings with a foreign element. In order for it to be incidental, it is necessary to meet certain criteria, quite general, meant to give the analyzed normative act the widest possible scope of application.

*From a spatial point of view*, the Brussels I bis Regulation applies to Member States with the exception of Denmark. According to recital 40 in the preamble, the Regulation also applies to the United Kingdom and Ireland, which have expressed their wish to participate in its adoption and application (in accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union). As regards the situation of the United Kingdom, art. 67 para. (1) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2020), the provisions of Regulation (EU) No 1215/2012 shall apply to legal proceedings brought before the end of the transition period<sup>3</sup>.

Territorial application implies a double conditionality. *First*, the court seised must belong to a Member State within the meaning defined above. As the case may be, this court may be seized in order to resolve the merits of a dispute or to analyze a possible impediment to the recognition or enforcement of a foreign judgment (since the effects of foreign judgments occur at the level of the European Union by operation of law, in the latter case the court will not be seized with an application for recognition or declaration of enforcement of the foreign judgment, but to refuse these effects or to facilitate their occurrence if there is opposition). *In the second place*, in order for the regulation to apply, it is necessary, as the case may be, to include the defendant's domicile (if the court is seised of the substance of a dispute) or the place where the foreign judgment is given (if the court is seised of an application concerning the effects of that judgment). By way of exception, in the first situation analysed, there are cases of application of the Brussels I bis Regulation, irrespective of the place of the defendant's domicile"<sup>4</sup>.

*From a material point of view*, the provisions of Regulation (EU) No 1215/2012 become applicable in the case of disputes in civil and commercial matters. The concept

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<sup>3</sup> That period ended, according to Article 126 of the Agreement, on 31 December 2020.

<sup>4</sup> The courts of a Member State have jurisdiction to settle disputes even if the defendant is not domiciled in the territory of a Member State in the following situations: in the case of exclusive jurisdiction (Art. 24), voluntary prorogation of jurisdiction in favour of the courts of a Member State (Art. 25), claims made by a consumer against a seller or supplier (Art. 18 para. (1)) or by an employee against the employer (art. 21 para. (2)).

is an autonomous one and is interpreted in a broad sense by the Court of Justice of the European Union (CJEU), so as to cover in principle the legal relations between subjects of private law, but also between a subject of private law and one of public law (a public authority), if the latter does not act in the exercise of public power<sup>5</sup>.

Although they comply with that requirement and, in principle, are included in the autonomous concept of civil and commercial matters, some legal relationships are, however, excluded from the scope of the Brussels I bis Regulation, either because of the existence of distinct, specialised rules or because of their "sensitive" nature, closely linked to the status of natural persons, the optimal protection of which is considered to be ensured by national rules (with regard to the latter category of legal relations, however, there is a tendency to restrict the scope traditionally reserved to the exclusive competence of national law). Thus, according to Article 1 of the Brussels I bis Regulation, this normative act does not regulate:

- a) the marital status and capacity of natural persons<sup>6</sup>, the patrimonial rights resulting from the matrimonial regimes or from the ties considered, by the law applicable to them, as having effects comparable to marriage;
- b) bankruptcies, proceedings relating to the liquidation of insolvent companies or other legal persons, mutual agreements, compositions or similar proceedings<sup>7</sup>;
- c) social security;
- d) arbitration<sup>8</sup>;
- e) maintenance obligations arising from a family, kinship, marriage or alliance relationship<sup>9</sup>;
- f) wills and estates, including maintenance obligations resulting from a death<sup>10</sup>.

In conclusion, from the perspective of the field of interest of the present investigation, the Brussels I bis Regulation excludes from its regulatory scope

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<sup>5</sup> The concept of civil and commercial matters has been consistently defined through the autonomous interpretation of the Court of Justice of the European Union (*Eirini Lechouritou and Others v. Germany*, 2007; *LTU v. Eurocontrol*, 1976; *Netherlands v. Rüffer*, 1980; *Volker Sonntag v. Waidmann*, 1993).

<sup>6</sup> These matters are partially regulated (specifically regarding divorce, legal separation, nullity of marriage, and parental responsibility) by Regulation (EU) 2019/1111 (2019).

<sup>7</sup> Subject exempted in view of the existence of a special regulation, namely Regulation (EU) 848/2015.

<sup>8</sup> A matter exempted from this scope in view of the existence of regulations that enjoy wide acceptance at the international level, namely the European Convention on International Commercial Arbitration (1961) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

<sup>9</sup> Matter exempted in view of the existence of a special regulation, namely Regulation (EC) 4/2009.

<sup>10</sup> Subject exempted in view of the existence of a special regulation, namely Regulation (EU) 650/2012.

insolvency claims (which by their nature concern civil and commercial matters), even if they are addressed to courts belonging to Member States of the European Union and the defendant (the insolvent person) is domiciled in the territory of a Member State.

### **3. Scope of Regulation 2105/848. Regulation of insolvency matters**

*From a spatial point of view*, the regulation applies to cross-border insolvency, as is apparent from the preamble to the legislative act<sup>11</sup>, but this concept is not defined in its content.

However, it follows from an analysis of the content of the regulation that the cross-border nature of the insolvency is influenced by the existence of an element of foreignness in relation to the State in whose territory the centre of the debtor's main interests is located<sup>12</sup>. Such extraneous elements may concern: the existence of a secondary establishment or assets of the debtor, the presence of creditors or the place where certain measures or certain procedural acts are to be taken. In addition, both the State in whose territory the centre of the debtor's main interests is located and the State to which the foreign element is linked must be Member States of the European Union. As regards the concept of "Member State", as in the case of the Brussels I bis Regulation, the Insolvency Regulation does not apply to Denmark either.

*From a material point of view*, in order for the provisions of the Insolvency Regulation to be applicable, it is necessary to meet certain conditions concerning, on the one hand, the person of the debtor, and, on the other hand, the nature of the procedure.

As regards the person of the debtor, in the first place, the impact of the regulation is not influenced by his status as a private individual. Thus, according to recital 9 of the preamble, "this Regulation should apply to insolvency proceedings which meet the conditions laid down therein, irrespective of whether the debtor is a natural or legal person, a trader or an individual". However, that text cannot lead to the conclusion that, under the Regulation, a mere individual is liable to be subject to insolvency proceedings, but only that, if the proceedings are admissible under national law, the mechanisms applicable to cross-border insolvency provided for by the Regulation are also applicable to that individual. Therefore, Article 3 of the Regulation also establishes criteria for determining its international jurisdiction to open the main insolvency proceedings applicable to non-professional debtors. Secondly, the Regulation expressly exempts from its regulatory scope certain categories of professional debtors, whose specific features make it necessary to regulate separately (art. 1 para. (2)): (a) insurance undertakings, (b) credit institutions,

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<sup>11</sup> See, to that effect, recitals 1, 3, 4, 8, 48, 49, 76 and 86 of the preamble to the Regulation.

<sup>12</sup> In principle, according to Article 3 of the Regulation, the centre of the debtor's main interests is determined by the registered office of the legal person, the main place of activity of the natural person professional and, respectively, by the habitual residence of the natural person who does not carry out a professional activity (the private individual).

(c) investment firms and other firms, institutions and undertakings, in so far as they are covered by Directive 2001/24/EC, (d) collective investment undertakings.

Regarding the nature of the procedure, starting from the provisions of art. 1 para. (1) of the Regulation<sup>13</sup>, four conditions can be identified whose cumulative fulfilment is necessary in order to attract the application of the analyzed normative act (see also: Virgos & Schmit, 1988, p. 32; Van Calster, 2024, p. 379):

**a) collective proceedings**

The concept of "collective proceedings" has an autonomous meaning set out in Article 2(1) of the Regulation as "proceedings comprising all or a substantial part of the debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors who are not involved in those proceedings".

It should be noted, however, that, although the regulation establishes a synthetic criterion on the basis of which proceedings against a debtor may be classified as collective (that is to say, whether it includes all or a significant part of its creditors), the regulatory act does not allow the court to carry out a direct verification of its fulfilment. Thus, according to art. 1 para. (1) para. (3), it is sufficient for a procedure to be listed in Annex A for it to be classified as collective. *On the other hand*, a procedure not included in Annex A cannot be considered as collective, even if it meets the requirements of Article 2(1) and, as such, will not fall within the scope of the Regulation<sup>14</sup>. In the case of Romania, Annex A mentions: the insolvency

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<sup>13</sup> "1. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on insolvency law and in which, for the purpose of rescue, debt adjustment, reorganisation or liquidation:

(a) a debtor's assets are freaked up in whole or in part and an insolvency practitioner is appointed;

(b) the assets and activity of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of an individual enforcement proceeding is granted by a court or by operation of law, in order to allow negotiations to take place between the debtor and his creditors, provided that the procedure in which the stay is ordered: provides for appropriate measures to protect the indebtedness and, if no agreement is reached, precede one of the procedures referred to in point (a) or (b).

Where the proceedings referred to in this paragraph may be opened where insolvency is only presumed, the objective of the proceedings shall be to avoid the insolvency of the debtor or the cessation of its business

The procedures referred to in this paragraph are listed in Annex A."

<sup>14</sup> According to recital 9 of the preamble to the Regulation, "This Regulation should apply to insolvency proceedings which meet the conditions set out therein, irrespective of whether the debtor is a natural or legal person, a trader or an individual. Those insolvency proceedings appear on an exhaustive list in Annex A. With respect to a national procedure in Annex A, this Regulation should apply without any further examination by a court of another Member State as to whether the conditions laid down in this Regulation are met. National insolvency proceedings not listed in Annex A should not fall within the scope of this Regulation."

procedure, the judicial reorganization, the bankruptcy procedure and the composition with creditors.

In conclusion, from the correlation of the provisions of art. 2 item 1 with those of art. 1 para. (1)(3) of the Regulation, it follows that the autonomous definition of the concept of "collective proceedings" is intended to establish a uniform criterion at EU level which the Member States should take into account when communicating the procedures to which the Regulation is to apply. Once the communication has been made, the respective procedures will be governed by the regulation, until the next update, without it being possible to analyze them from the perspective of the criteria provided by art. 2 point 1.

**b) proceedings are based on insolvency law**

The scope of the Regulation covers only procedures based on the debtor's insolvency. However, the legislative act does not define the concept of insolvency, which is justified by the fact that for the concept of "insolvency proceedings" it refers to the national legal systems of the Member States.

Consequently, there is no autonomous concept of "insolvency", but a plurality of such concepts, as governed by the law of the Member States. Of these, the meaning retained by the law of the state in which the insolvency procedure is opened will be relevant (Van Calster, 2024, p. 380).

To the extent that the procedure is opened in Romania, according to art. 5 item 28 of Law no. 85/2014, "insolvency is that state of the debtor's assets that is characterized by the insufficiency of the funds available for the payment of certain, liquid and payable debts and which is presumed when the debtor, after 60 days from the maturity, has not paid his debt to the creditor; the presumption is relative".

**c) The procedures involve a total or partial divestment of the debtor**

The procedures governed by the regulation imply the elimination or at least the diminishing of the debtor's prerogatives with regard to his assets or activity, such as:

- placing the debtor's assets or business under the supervision or control of a court, or
- the transfer to another person of the right to administer and dispose of the debtor's assets and business.

**d) designation of a person/authority to exercise the prerogatives of which the debtor has been deprived**

Correlative to the aforementioned condition, this requirement envisages the existence of a person who manages the debtor's assets and activity or, as the case may be, supervises or controls his activity.

In this regard, the regulation envisages, as the case may be, an insolvency practitioner or a court. As in relation to "insolvency proceedings", the legislative act contains a definition of those concepts, coupled with the inclusion in its annexes of the corresponding entities indicated by the Member States.

Thus, according to Article 2 para. (5), "<<insolvency practitioner>>" means any person or body whose function, including provisional, is to:

- (i) verify and admit claims submitted in the insolvency proceedings;
- (ii) represented the collective interest of creditors;
- (iii) administer, either in whole or in part, the debtor's assets that have been seized;
- (iv) liquidate the assets referred to in point (iii); or
- (v) supervise the administration of the debtor's business.

The persons and bodies referred to in the first subparagraph are listed in Annex B."

In Romania, the persons indicated by Annex B are: the insolvency practitioner, the composition administrator, the judicial administrator and the judicial liquidator.

Similarly, according to Article 2 para. (6), "court" means the judicial body or, as the case may be, another authority of a Member State, having jurisdiction in insolvency proceedings.

In conclusion, from the perspective of the field of interest of the present research, the Insolvency Regulation includes from its regulatory scope collective claims in insolvency matters (i.e. based on its specific legislation) of a cross-border nature, which concern a professional debtor (with some exceptions) or a non-professional debtor (if the law of the forum regulates its insolvency), having the main centre of interests in a Member State and which involve a divestment total or partial of the debtor and, correlatively, the designation of a person/authority to exercise the prerogatives of which the debtor has been dispossessed.

#### **4. Qualification criteria. Not every insolvency application is an insolvency application**

In the light of the foregoing, it follows that interference by the Insolvency Regulation and the Brussels I bis Regulation is possible in the case of an insolvency application concerning a debtor whose centre of main interests is both the centre of the main interests and domiciled in the territory of a Member State<sup>15</sup>. It is therefore necessary to clarify the autonomous notions of "bankruptcies, proceedings concerning the liquidation of insolvent companies or other legal persons, amicable agreements, compositions or similar procedures", exempted from the material scope of the Brussels I bis Regulation pursuant to Article 1 para. (2) letter b). To that end, the case-law of the Court of Justice of the European Union is relevant, according to which, in order for that exception to be relevant, the claim derives directly from insolvency

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<sup>15</sup> According to Article 62 of the Brussels I bis Regulation, the domicile of the natural person is determined according to the law of the State in whose territory he is claimed to be located (i.e. the qualification is not an autonomous one). According to Article 63, the domicile of the legal person qualifies as autonomous, being considered to exist in the Member State where the registered office, central administration or main point of activity is located, alternatively.

proceedings and is closely linked to it<sup>16</sup>. That condition is satisfied where the legal basis of the action is the derogating legal rules in insolvency<sup>17</sup> matters or where the action is based on the prerogatives which the law applicable to the insolvency proceedings confers on a subject of law intervening only in the context of such proceedings<sup>18</sup>.

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<sup>16</sup> The Court of Justice of the European Union ruled that a lawsuit brought by an assignee of a liquidator's right to terminate a contract is not classified as an insolvency application. This is because the assignee is under no obligation to exercise this right, the right does not expire upon the closure of the insolvency proceedings, and its exercise does not aim to reconstitute the debtor's assets. Consequently, despite being rooted in a right that presupposes insolvency, the dispute lacks a close connection to those proceedings (*F-Tex SIA v Lietuvos-Anglijos UAB "Jadeccloud-Vilma"*, 2012, paras. 29, 43–47).

Similarly, the Court held in *German Graphics Graphische Maschinen GmbH v. van der Schree* (2009) that an action relating to a reservation of ownership clause constitutes an independent action. This type of claim has no basis in the law governing insolvency proceedings, nor does it require the opening of such procedures or the intervention of a liquidator. In those circumstances, the mere fact that the liquidator is a party to the dispute is insufficient to classify the proceedings as arising directly from bankruptcy or being closely linked to asset liquidation (paras. 29–34).

<sup>17</sup> The Court of Justice of the European Union established that the decisive criterion for determining the scope of an action is its legal basis rather than its procedural context. Specifically, courts must evaluate whether the underlying right or obligation stems from ordinary civil and commercial law or from special derogating rules unique to insolvency. For instance, a claim for payment under a carriage contract could have been initiated by the creditor prior to insolvency under general jurisdiction rules. The subsequent appointment of a liquidator who pursues this claim in the interest of creditors does not alter the fundamental nature of the debt, which remains governed by the same legal framework; thus, the action lacks a direct link to the insolvency proceedings (*Nickel & Goeldner Spedition GmbH v "Kintra" UAB*, 2014, paras. 27–30).

Applying the same criterion, the Court determined that a lawsuit seeking to declare the existence of claims for registration in insolvency proceedings falls outside the scope of Regulation (EU) No 1215/2012. Such an action is inherently designed to be brought within insolvency proceedings by participating creditors when disputes arise regarding the accuracy or priority rank of their registered claims. Given these specific characteristics, this type of action stems directly from, is closely linked to, and originates from insolvency law (*Skarb Państwa v Riel*, 2019, paras. 37–38).

<sup>18</sup> In that regard, the Court held in *Skarb Państwa v. Riel* (2019) that an action relating exclusively to the ownership of shares transferred by a liquidator within the context of insolvency proceedings derives directly from and is closely linked to those proceedings. Consequently, such an action does not fall within the scope of Regulation No. 44/2001 (now Regulation [EU] No. 1215/2012). This exclusion applies because the transfer is executed on the basis of provisions derogating from the general rules of civil law, particularly those concerning property rights. Specifically, these provisions dictate that upon insolvency, the debtor loses the right to dispose of assets freely, vesting the liquidator with the sole power to administer the estate on behalf of creditors, including performing necessary assignment operations. Such an action cannot be dissociated from the liquidator's exercise of a specific

Finally, although the aim of the European legislature is to correlate the scope of the two regulations in such a way that they do not overlap, they must not, however, be regarded as being perfectly complementary in the sense that a procedure which is not governed by one of them automatically falls within the scope of the other. Thus, according to recital 7 of the preamble to Regulation (EU) 2105/848: "*Bankruptcies, proceedings relating to the liquidation of insolvent companies or other legal persons, mutual agreements, compositions or similar proceedings, as well as actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council* <sup>(4)</sup>. Those procedures should be governed by this Regulation. The interpretation of this Regulation should, as far as possible, avoid regulatory gaps between the two instruments. However, the mere fact that a national proceeding is not listed in Annex A to this Regulation should not lead to its entry under Regulation (EU) No 1215/2012".

Unlike Recital 7 of the preamble to the former Regulation<sup>19</sup>, Recital 7 of the preamble to the current Regulation. is therefore no longer limited to stating the exclusion of insolvency matters from the scope of Regulation (EU) 1215/2012, but, incorporating the case-law of the Court of Justice of the European Union, also rules on the relationship between the fields of application of the two regulations. In that regard, reference should be made to *German Graphics Graphische Maschinen GmbH v. van der Schee* (2009), according to which: "it is not inconceivable that, ... to include judgments that do not fall within the scope of Regulation no. 1346/2000 (now Regulation (EU) No 2015/848), nor in that of Regulation No 44/2001 (now Regulation (EU) No 1215/2012)" (para. 17).

## 5. Conclusions

Without calling into question the complementarity of the two rules, the inclusion of a national procedure within the scope of one of them is subject to the verification of its scope, which does not preclude, at least in principle, the possibility that such a national procedure may not fall within the scope of either of those legislative acts.

I consider that this solution is not invalidated by the subsequent jurisprudence of the Court of Justice of the European Union. Specifically, in *Skarb Państwa v. Riel* (2019), the Court noted that: "the excluded actions, pursuant to Article 1(2)(b) of

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prerogative—arising exclusively from national collective proceedings law—by a subject of law whose very existence results from the opening of those proceedings (paras. 27–28).

<sup>19</sup> According to recital 7 of the preamble to Regulation (EC) 1346/2000 (precursor to Regulation (EU) 2015/848), "Insolvency proceedings concerning the bankruptcy of insolvent undertakings or other legal persons, compositions and similar proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the conventions of accession to that Convention".

Regulation No 1215/2012, [from] the scope of the latter, as [they fall] under 'bankruptcies, proceedings regarding the liquidation of insolvent companies or other legal persons, amicable agreements, compositions or similar procedures', fall within the scope of Regulation No 1346/2000. Symmetrically, actions that do not fall within the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 1215/2012. (para. 33)"

This approach is applicable since, according to Article 33(1) [of the Insolvency Regulation], "the recognition and enforcement of judgments other than those referred to in paragraph 1 of this Article shall be subject to Regulation (EU) No 1215/2012, provided that that regulation is applicable." Consequently, this wording explicitly allows for a procedure to be governed neither by the provisions of the Insolvency Regulation nor by those of the Brussels I bis Regulation—a principle also upheld in *Tünkers France v. Expert France* (2017, para. 17).

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