



Study on tracing and recovery of debtor's assets by insolvency practitioners

Final Report

Written by Spark Legal Network
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Study on tracing and recovery of debtor's assets by insolvency practitioners

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Abstract

The report is the result of the 'Study on tracing and recovery of debtor's assets by insolvency practitioners' ('the Study') for the European Commission's Directorate-General for Justice and Consumers, conducted by Spark Legal Network, in cooperation with Tipik and a team of key legal experts. The Study aims to assist the European Commission with: i) identifying frameworks of tracing and recovering of different types of assets in 27 Member States, including the conditions of access of the insolvency practitioners to national registers containing information on those assets; (ii) identifying any specific rules in the asset tracing framework of the 27 Member States that address cross-border aspects of asset tracing and recovery, including tools of mutual assistance at the disposal of insolvency practitioners or judicial bodies or measures of repatriation applicable in the context of civil law; and (iii) identifying any general or particular requirements in civil, public administrative or international law that might restrict the access by insolvency practitioners to information on the assets and thereby pose a challenge to asset tracing or recovery. To meet this objective, the Study relied on data collected through national desk and field research, targeted consultations, and literature review. The report outlines the similarities and differences between Member States and provides policy suggestions in relation to the following streams of analysis: i) powers provided to insolvency practitioners under national laws to trace and preserve assets in the context of insolvency proceedings; ii) types of asset registers available across the Member States, including conditions to access said registers for insolvency practitioners; and iii) tools at the disposal of creditors to trace and preserve assets in the context of insolvency proceedings.

Résumé

Ce rapport est le résultat de l'« Étude sur la localisation et le recouvrement des actifs du débiteur par les praticiens de l'insolvabilité » (ci-après l'« Étude») menée par Spark Legal Network, en coopération avec Tipik et une équipe d'experts juridiques, pour la Direction générale de la Justice et des Consommateurs de la Commission européenne. L'Étude vise à aider la Commission européenne à : (i) identifier les cadres de localisation et de recouvrement de différents types d'actifs dans les 27 États membres, y compris les conditions d'accès des praticiens de l'insolvabilité aux registres nationaux contenant des informations sur ces actifs ; (ii) identifier toute règle spécifique dans le cadre de la localisation des actifs des 27 États membres qui traite des aspects transfrontaliers de la localisation et du recouvrement des actifs, y compris les outils d'assistance mutuelle à la disposition des praticiens de l'insolvabilité ou des organes judiciaires ou les mesures de rapatriement applicables dans le contexte du droit civil ; et (iii) identifier toute exigence générale ou particulière du droit civil, du droit administratif public ou du droit international qui pourrait restreindre l'accès des praticiens de l'insolvabilité aux informations sur les actifs et constituer ainsi un obstacle à la localisation ou au recouvrement des actifs. Pour atteindre cet objectif, l'Étude s'appuie sur des données recueillies dans le cadre de recherches documentaires et d'étude de terrain, de consultations ciblées et d'une analyse de la documentation disponible. Le rapport souligne les similitudes et différences entre les États membres et fournit des suggestions de politiques en relation avec les axes d'analyse suivants : i) les pouvoirs conférés aux praticiens de l'insolvabilité par les lois nationales pour localiser et préserver les actifs dans le contexte des procédures d'insolvabilité ; ii) les types de registres d'actifs disponibles dans les États membres, y compris les conditions d'accès à ces registres pour les praticiens de l'insolvabilité ; et iii) les outils à la disposition des créanciers pour localiser et préserver les actifs dans le contexte des procédures d'insolvabilité.

Executive Summary

Introduction

This document constitutes the Final Report for the 'Study on tracing and recovery of debtor's assets by insolvency practitioners' (the 'Study') conducted by Spark Legal Network and Tipik, with the support of key legal experts. The aim of the Study is to enable the European Commission to: (i) identify frameworks of tracing and recovering of different types of assets in 27 Member States, including the conditions of access of the insolvency practitioners to national registers containing information on those assets; (ii) identify any specific rules in the asset tracing framework of the 27 Member States that address cross-border aspects of asset tracing and recovery, including tools of mutual assistance at the disposal of insolvency practitioners or judicial bodies or measures of repatriation applicable in the context of civil law; and (iii) identify any general or particular requirements in civil, public administrative or international law that might restrict the access by insolvency practitioners to information on the assets and thereby pose a challenge to asset tracing or recovery.

Background and context

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ('EIR')¹ is the instrument of EU law that concerns the rules of jurisdiction for opening insolvency proceedings in the European Union. It does not harmonise the regimes for tracing and recovery in the context of insolvency proceedings.

At the outset, it is worth recalling that one might distinguish between bankruptcy law which applies to individuals, and corporate insolvency law which applies to legal persons. Bankruptcy law involves a process of collection and distribution of assets belonging to persons who cannot pay their debts and the subsequent distribution of these assets to creditors in full or partial satisfaction of debts owing to them. Alternatively, corporate insolvency law is divided between liquidation law and corporate rescue or restructuring law. Liquidation involves a process of collective execution, realisation and distribution against the assets of a legal person, while corporate rescue law involves consideration of the legal mechanisms in place to try to ensure the recovery and rehabilitation of viable but financially distressed businesses.

Despite the EIR not harmonising the regimes for tracing and recovery, Article 21 provides that an insolvency practitioner appointed by the court hearing the main insolvency proceedings may exercise all the powers conferred on it by the law of the Member State opening the proceedings, in any other Member State, so long as no other insolvency proceedings have been opened there and no preservation measures to the contrary have been taken further to a request for the opening of insolvency proceedings in that State. There is no provision made for the tracing of those assets.² Nonetheless, Article 24 EIR introduced the requirement for Member States to establish the insolvency registers, where key information regarding insolvency proceedings shall be published.³ Article 25 EIR

¹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ 141, 5.6.2016, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022).

² Ibid, Article 21.

³ European Parliament, New EU insolvency rules give troubled businesses a chance to start a new, p. 6-7, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623548/EPRS_BRI\(2018\)623548_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623548/EPRS_BRI(2018)623548_EN.pdf) (last accessed 7 April 2021). See also Ibid, Article 24.

introduces the system of interconnection via the European e-justice portal.⁴ Furthermore, it is worth highlighting that the EIR should be read in the context of the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on Cross-Border Insolvency.⁵ The UNCITRAL Legislative Guide on Insolvency⁶ points out that the insolvency practitioner has a central role in the effective and efficient implementation of insolvency law, with 'certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially.'⁷

In order to achieve a well-functioning Capital Markets Union,⁸ the main continuing discrepancies in national (insolvency) law need to be addressed.⁹ This is because, if successful, the Capital Markets Union will lead to increased capital flows across Member State borders, leading to more and more assets being held by legal and natural persons with their centre of main interest ('COMI') in a different Member State. Therefore, the difficulties that persist in tracing and preserving assets in cross-border situations may need to be addressed in order to achieve such aim.

Methodology

To meet the objectives presented above, with the support of a team of national experts, data was collected on existing national legislative insolvency frameworks (and their implementation) regarding tracing and recovering of different types of assets across 27 Member States. For this effect, a team of national legal experts carried out i) legal desk research on the insolvency law regimes in each Member State, and ii) legal field research via interviews with national stakeholders (i.e., lawyers or judges, cross-border litigants, insolvency consultants or insolvency practitioners). Additionally, an online survey was carried out, targeting national representatives of consumers, businesses, SMEs and entrepreneurs. The last step of the Study entailed carrying out a thorough legal and empirical analysis based on the assessment of the data collected, including existing literature and case-law on the matters at hand. In this respect, this task was carried out following three streams of analysis, in respect of which the findings are summarised below.

Powers of insolvency practitioners to trace and preserve assets

⁴ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L41, 5.6.2016, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022), Article 25.

⁵ UNCITRAL Model Law on Cross-Border Insolvency, 1997, available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last accessed 11 March 2022).

⁶ See UNCITRAL Legislative Guide on Insolvency Law, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf (last accessed 11 March 2022), p 174.

⁷ The EBRD suggests that an insolvency process cannot be imagined without the involvement of an insolvency practitioner who in many respects is the lynch pin of the process – the link between the court, creditors and the debtor – see EBRD, Assessment of Insolvency Office Holders: Review of the Profession in the EBRD Region, 2014, available at http://www.inppi.ro/arhiva/anunturi/download/196_1f89a9d9c30bb669c1a3020f0960c8da (last accessed 10 March 2022).

On the need for training and capacity building in the insolvency profession, see OECD, Asian Insolvency Systems: Closing the Implementation Gap, Paris, 2007.

⁸ European Commission 'Green Paper: Building a Capital Markets Union' SWD(2015) 13 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063&from=EN> (last accessed 19 March 2021) and European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Capital Markets Union for people and businesses-new action plan' COM(2020) 590 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF (last accessed 19 March 2021).

⁹ European Commission, 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment', available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws> (last accessed 19 March 2021).

Insolvency practitioners tend to have a broad range of powers under national law to trace and preserve assets, e.g., compel the production of books and records (including from lawyers, accountants and banks); conduct audits; request issuance of a search order; request issuance of freezing order; examine corporate officers; report suspicious transactions to law enforcement authorities; access registers of assets; launch any other civil or administrative proceedings for the purpose of tracing and preserving assets; and in the cross-border context, request mutual assistance or to turn to a judicial authority of their Member State to request mutual assistance in another Member State.

The Study provides an overview of the data collected via national desk research with regards to the powers that insolvency practitioners are vested with across a sample of Member States. It elaborates on the aforementioned enumerated powers, noting the similarities and differences across Member States' national rules concerning such powers provided to insolvency practitioners to trace and preserve assets. In general, it appears that insolvency practitioners across the EU generally have the benefit of broad powers to access information and to demand testimony from individuals such as directors or managers.

With regards to such similarities and differences, the Study touches upon the definition of insolvency practitioners and the powers and limits of insolvency practitioners. In terms of the definition of insolvency practitioners, it should be kept in mind how differences in the specific powers of insolvency practitioners may stem from the specific type of role that each country attributes to such professionals (independently of their 'name') across the different insolvency proceedings. Meanwhile, in terms of the powers and limits of insolvency practitioners, it was found that, in general, insolvency practitioners across the EU generally have the benefit of broad powers to access information and to demand testimony from individuals. Furthermore, they have the availability of a statutory mandate to investigate, are generally entitled to bring claims against a company's former directors for any wrongdoing in involving the company, and claims for restitution or damages can also be made against third parties dishonestly assisting with or participating in that wrongdoing. However, in terms of defendants or assets located in foreign jurisdictions, questions arise as to how far an insolvency practitioner's information gathering powers may be exercised outside of the insolvency practitioner's jurisdiction; for instance, whether there are any limitations, *inter alia*, regarding the costs associated with tracing and recovery procedures, language barriers, and the length of administrative routes to request and obtain information.

With regards to potential policy recommendations, which could improve the application of the powers used to trace and preserve assets, the Study finds that Article 21 of the EIR could be supplemented with an EU measure that requires each Member State to introduce a judicial mechanism that allows the 'freezing' or preservation of bank accounts in its jurisdiction in appropriate circumstances. The appropriate circumstances would include the support of substantive insolvency proceedings that have been opened either in that State or in another Member State. This measure could, for instance, take the form of a non-binding recommendation, or a Directive. It could also take the form of an express extension of the European Account Preservation Order ('EAPO') procedure to insolvency practitioners who are not currently and expressly designated as being potential beneficiaries of the procedure. There are other aspects of this procedure and its application to insolvency proceedings that might usefully be clarified. The EAPO procedure enables a court in one Member State to freeze funds that are held in the bank account of a debtor in another Member State (with the exception of Denmark).¹⁰ The mechanics for obtaining an EAPO are set out in Regulation (EU) No 655/2014.¹¹

¹⁰ Denmark is the subject of an opt out from the Regulation. This means that creditors based in Denmark may not apply for an EAPO and one may not obtain an EAPO in relation to a Danish bank account.

¹¹ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59 – 92, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0655> (last accessed 11 March 2022).

Access to asset registers and information

One of the main means for insolvency practitioners to identify relevant assets of the debtor in the context of insolvency proceedings is to research available official asset registers or databases that may contain useful information with regards to property or liens of the debtor. The EIR addresses the issue of publicity and transparency by requiring Member States to establish insolvency registers, interconnected via the European e-Justice portal, and to publish relevant court decisions.¹² While Article 24(2) EIR prescribes certain mandatory information to be included in the insolvency register, Article 24(3) EIR clarifies that Member States are free to include additional information.¹³ In addition to insolvency registers, there are various other registers in each Member State that an insolvency practitioner can use to trace different assets.

With regards to asset registers, the Study provides an overview of the data collected via the desk research at national level. In addition, it presents legal field research, which aimed at outlining if and to what extent insolvency practitioners have the powers to access asset registers in the context of insolvency proceedings, as well as providing a mapping of the asset registers in each Member State.

The analysis conducted on the basis of the desk research and mapping exercise found that there is a lack of diversity of registers, inconsistent information available in such registers, divergent conditions to access the information contained in such registers, and differing levels of availability and quality of information contained in such registers. Firstly, in terms of diversity of registers, it was found that there is a considerable lack of uniformity in this regard across the Member States, which may undermine cross-border tracing efforts of the insolvency practitioners. Secondly, with regard to the information contained in the registers, there is a lack of consistency as to which information is available; for instance, whether security rights attached to immovable property can be found in a land register or a separate register. Thirdly, the current system of registers provides a complex picture characterised by levels of diversity of registers and registration approaches among Member States with some Member States requiring, for instance, the payment of a fee or the authorisation of a judge to access such information. Finally, there are some issues concerning the availability and quality of the information contained in the registers or the books as some stakeholders highlighted that debtors may fail to provide accurate financial accounting documents or that even when the information is self-submitted by the debtor, it is not always available.¹⁴

At the EU level, there is already a pre-existing website that collects information concerning Member States' asset registers.¹⁵ Therefore, in terms of policy recommendations, it could be suggested that this website is updated and standardised. This is with particular regard to updating the pre-existing registers as well as including an overview and links to more types of register. It could also be recommended to provide an option to translate the registers into all of the languages of the European Union, and not only into English.

Tools at the disposal of creditors

¹² Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L141, 5.6.2016, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022), Recital 76.

¹³ It should be noted that Article 24(4) provides Member States shall not be obliged to include in the insolvency registers the information referred to in paragraph 1 of this Article in relation to individuals not exercising an independent business or professional activity, or to make such information publicly available through the system of interconnection of those registers, provided that known foreign creditors are informed, pursuant to Article 54, of the elements referred to under point (j) of paragraph 2 of this Article.

¹⁴ See Annex A, national country reports, RO interview report.

¹⁵ For example, e-Justice, Registers – business, insolvency & land, available at https://e-justice.europa.eu/514/EN/registers_business_insolvency_amp_land (last accessed 8 March 2022).

There are several types of transactions that a debtor can execute in relation to an asset that may be detrimental to the claims of the creditor, such as transactions at an undervalue, transactions intended to prejudice creditors, etc. As a consequence, there are a variety of tools at the disposal of creditors to allow them to obtain information on (the whereabouts of) assets; the preservation of assets; and the returning or repatriation of assets.

The data collection activity via the desk research at the national level aimed at identifying the tools under national law that allow creditors to trace and preserve assets in the context of insolvency proceedings. Using the information gathered, the Study maps the similarities and differences between the tools adopted in the 27 EU Member States, as well as considering their stage of application (i.e., before, before and during, and during the insolvency proceedings).

The analysis of the data collection via the desk research and the mapping of the legal frameworks found that the asset tracing and recovery tools available to creditors vary considerably and, amongst others, may be divided between those powers available before the opening of the proceedings and powers available after the opening of the proceedings. It was found, firstly, that the conditions for creditors accessing tools can display significant discrepancies among the Member States. Secondly, it was found that the powers available after the opening of the proceedings are more limited. Thirdly, in a significant number of Member States, it was noted how before the opening of insolvency proceedings, individual creditors may seek to trace and recover the debtor's assets through the so-called *actio pauliana*.¹⁶ Finally, in several countries, it was highlighted that creditors can also bring avoidance claims during insolvency proceedings; although, these are limited due to the collective principle.

The tools available to creditors in the Member States are especially varied, but the most popular tool provided to creditors is the *actio pauliana*. Therefore, the Study recommends developing a provision in the EIR concerning the creditor's power to use the *actio pauliana* during insolvency proceedings. Such provision could stipulate, for instance, that creditors would be allowed to bring the action forward only if the insolvency practitioner waives their right of action and is subject to the authorisation of the court opening the proceedings. Moreover, the EU could specify in a provision that the use of the *actio pauliana* within insolvency proceedings should display its effects towards all creditors and the proceedings for the action should be used for distribution among the creditors. Additionally, a preference over a percentage of the proceeds could be set aside for the creditors funding the *actio pauliana* when resources are not available within the insolvency estates.

¹⁶ See, for instance, Annex A, national country reports, AT, EL, ES, IT, NL, PL, RO legal desk research questionnaires.

Document de synthèse

Introduction

Ce document constitue le Rapport Final de l'« Étude sur la localisation et le recouvrement des actifs du débiteur par les praticiens de l'insolvabilité » (ci-après l'« Étude ») menée par Spark Legal Network et Tipik, avec le soutien d'experts juridiques. L'objectif de l'Étude est de permettre à la Commission européenne de : (i) identifier les cadres de localisation et de recouvrement de différents types d'actifs dans les 27 États membres, y compris les conditions d'accès des praticiens de l'insolvabilité aux registres nationaux contenant des informations sur ces actifs ; (ii) identifier toute règle spécifique dans le cadre de la localisation des actifs des 27 États membres qui traite des aspects transfrontaliers de la localisation et du recouvrement des actifs, y compris les outils d'assistance mutuelle à la disposition des praticiens de l'insolvabilité ou des organes judiciaires ou les mesures de rapatriement applicables dans le contexte du droit civil ; et (iii) identifier toute exigence générale ou particulière du droit civil, du droit administratif public ou du droit international qui pourrait restreindre l'accès des praticiens de l'insolvabilité aux informations sur les actifs et constituer ainsi un obstacle à la localisation ou au recouvrement des actifs.

Contexte

Le Règlement (UE) 2015/848 du Parlement européen et du Conseil du 20 mai 2015 relatif aux procédures d'insolvabilité (refonte) (« RIE »)¹⁷ est l'instrument du droit communautaire qui concerne les règles de compétence pour l'ouverture d'une procédure d'insolvabilité dans l'Union européenne. Il n'harmonise pas les régimes de localisation et de recouvrement dans le cadre des procédures d'insolvabilité.

Premièrement, il convient de rappeler qu'une distinction s'effectue entre le droit de la faillite, qui s'applique aux personnes physiques, et le droit de l'insolvabilité des entreprises, qui s'applique aux personnes morales. Le droit de la faillite implique un processus de collecte et de distribution des actifs appartenant à des personnes qui ne peuvent pas payer leurs dettes et la distribution ultérieure de ces actifs aux créanciers en règlement total ou partiel des dettes qui leur sont dues. Par ailleurs, le droit de l'insolvabilité des entreprises est divisé entre le droit de la liquidation et le droit du sauvetage ou de la restructuration des entreprises. La liquidation implique un processus d'exécution collective, de réalisation et de distribution des actifs d'une personne morale, tandis que le droit du sauvetage des entreprises implique l'examen des mécanismes juridiques en place pour tenter d'assurer le redressement et la réhabilitation d'entreprises viables mais en difficulté financière.

Bien que le RIE n'harmonise pas les régimes de localisation et de recouvrement, l'article 21 prévoit qu'un praticien de l'insolvabilité, désigné par la juridiction saisie de la procédure d'insolvabilité principale, peut exercer tous les pouvoirs qui lui sont conférés par la loi de l'État membre d'ouverture de la procédure, dans tout autre État membre, tant qu'aucune autre procédure d'insolvabilité n'y a été ouverte et qu'aucune mesure de conservation contraire n'a été prise à la suite d'une demande d'ouverture d'une procédure d'insolvabilité dans cet État. Aucune disposition n'est prévue pour la localisation de ces actifs.¹⁸ Néanmoins, l'article 24 RIE impose aux États membres d'établir des registres d'insolvabilité dans lesquels doivent être publiés les principales informations relatives aux procédures

¹⁷ Règlement (UE) 2015/848 du Parlement européen et du Conseil du 20 mai 2015 relatif aux procédures d'insolvabilité, JO L 141, 5.6.2015, p. 19-72, disponible à <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (dernière consultation le 11 mars 2022).

¹⁸ Ibid., Article 21.

d'insolvabilité.¹⁹ L'article 25 RIE introduit le système d'interconnexion via le portail européen e-Justice.²⁰ En outre, il convient de souligner que le RIE doit être lu dans le contexte de la Loi type sur l'insolvabilité internationale de la Commission des Nations unies pour le droit commercial international (« CNUDCI »).²¹ Le guide législatif de la CNUDCI sur l'insolvabilité²² souligne que le praticien de l'insolvabilité joue un rôle central dans la mise en œuvre effective et efficace de la loi sur l'insolvabilité, avec « certains pouvoirs sur les débiteurs et leurs actifs et le devoir de protéger ces actifs et leur valeur, ainsi que les intérêts des créanciers et des employés, et de veiller à ce que la loi soit appliquée de manière efficace et impartiale ».²³

Pour que l'Union des marchés de capitaux fonctionne correctement,²⁴ il convient de remédier aux principales divergences qui subsistent dans les législations nationales (en matière d'insolvabilité).²⁵ En effet, si elle réussit, l'Union des marchés de capitaux entraînera une augmentation des flux de capitaux à travers les frontières des États membres, ce qui fera que de plus en plus d'actifs seront détenus par des personnes morales et physiques dont le centre des intérêts principaux se trouve dans un autre État membre. Par conséquent, il pourrait être nécessaire d'aborder les difficultés qui persistent en matière de localisation et de préservation des actifs dans les situations transfrontalières afin d'atteindre cet objectif.

Méthodologie

Pour atteindre les objectifs présentés ci-dessus, avec le soutien d'une équipe d'experts nationaux, des données ont été recueillies dans 27 États membres sur les cadres législatifs nationaux existants en matière d'insolvabilité (et leur mise en œuvre) concernant la localisation et le recouvrement de différents types d'actifs. À cet effet, une équipe d'experts juridiques nationaux a effectué i) une recherche documentaire sur les régimes juridiques de l'insolvabilité dans chaque État membre, et ii) une recherche juridique sur le terrain par le biais d'entretiens menés avec des parties prenantes nationales (avocats ou juges, parties à des litiges transfrontaliers, consultants en insolvabilité ou praticiens de l'insolvabilité). En outre, une enquête en ligne a été réalisée, ciblant des représentants nationaux des consommateurs, des entreprises, des PME et des entrepreneurs. La dernière étape de

¹⁹ Parlement européen, *New EU insolvency rules give troubled businesses a chance to start a new*, p. 6-7, disponible à [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623548/EPRS_BRI\(2018\)623548_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623548/EPRS_BRI(2018)623548_EN.pdf) (dernière consultation le 7 avril 2021). Voir aussi *Ibid.*, Article 24.

²⁰ Règlement (UE) 2015/848 du Parlement européen et du Conseil du 20 mai 2015 relatif aux procédures d'insolvabilité, JO L 141, 5.6.2015, p. 19-72, disponible à <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (dernière consultation le 11 mars 2022), Article 25.

²¹ Loi type de la CNUDCI sur l'insolvabilité internationale, 1997, disponible à https://uncitral.un.org/fr/texts/insolvency/modellaw/cross-border_insolvency (dernière consultation le 11 mars 2022).

²² Voir Guide législatif de la CNUDCI sur l'insolvabilité, disponible à https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf (dernière consultation le 11 mars 2022), p 174.

²³ La Banque européenne pour la reconstruction et le développement suggère qu'un processus d'insolvabilité ne peut être imaginé sans la participation d'un PI qui, à bien des égards, est la cheville ouvrière du processus - le lien entre le tribunal, les créanciers et le débiteur - voir BERD, *Assessment of Insolvency Office Holders: Review of the Profession in the EBRD Region*, 2014, disponible à http://www.inppi.ro/arhiva/anunturi/download/196_1f89a9d9c30bb669c1a3020f0960c8da (dernière consultation le 10 mars 2022).

Sur la nécessité de former et de renforcer les capacités des professionnels de l'insolvabilité, voir OCDE, *Asian Insolvency Systems : Closing the Implementation Gap*, Paris, 2007.

²⁴ Commission européenne, « Green Paper: Building a Capital Markets Union », SWD(2015) 13 final, disponible <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063&from=EN> (dernière consultation le 19 mars 2021) et Commission européenne, 'Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions : Une Union des marchés de capitaux pour les citoyens et les entreprises - nouveau plan d'action' COM(2020) 590 final, disponible à https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF (dernière consultation le 19 mars 2021).

²⁵ Commission européenne, « Insolvency laws: increasing convergence of national laws to encourage cross-border investment », disponible à <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws> (dernière consultation le 19 mars 2021).

L'Étude a consisté à réaliser une analyse juridique et empirique approfondie sur la base de l'évaluation des données recueillies, comprenant également la documentation et jurisprudence existantes sur les problématiques en jeu. À cet égard, cette activité a été réalisée en suivant trois courants d'analyse, dont les résultats sont résumés ci-dessous.

Pouvoirs des praticiens de l'insolvabilité en matière de localisation et de préservation des actifs

Les praticiens de l'insolvabilité tendent à disposer d'un large éventail de pouvoirs en vertu du droit national pour rechercher et préserver les actifs, par exemple exiger la production de livres et de registres (y compris de la part d'avocats, de comptables et de banques) ; procéder à des audits ; demander la délivrance d'une ordonnance de perquisition ; demander la délivrance d'une ordonnance de gel ; interroger les dirigeants d'entreprise ; signaler les opérations suspectes aux autorités chargées de l'application des lois ; accéder aux registres des actifs ; engager toute autre procédure civile ou administrative aux fins de la localisation et de la préservation des actifs ; et, dans le contexte transfrontalier, demander l'entraide ou s'adresser à une autorité judiciaire de leur État membre pour demander assistance dans un autre État membre.

L'Étude donne une vue d'ensemble des données recueillies par le biais de recherches documentaires menées au niveau national dans un échantillon d'États membres concernant les pouvoirs dont sont investis les praticiens de l'insolvabilité. L'Étude détaille les pouvoirs conférés aux praticiens de l'insolvabilité en matière de localisation et de préservation des actifs énumérés ci-dessus et note les similitudes et différences entre les règles nationales des différents États membres. D'une manière générale, il apparaît qu'au sein de l'Union, les praticiens de l'insolvabilité bénéficient généralement de pouvoirs étendus pour accéder aux informations et demander le témoignage de personnes telles que les administrateurs ou les dirigeants.

Vis-à-vis des similitudes et différences observées, l'Étude aborde la définition de praticien de l'insolvabilité et les pouvoirs et limites de ces derniers. En ce qui concerne la définition de praticien de l'insolvabilité, il convient de noter que les différences dans les pouvoirs spécifiques des praticiens de l'insolvabilité peuvent découler du type de rôle que chaque pays attribue à ces professionnels (indépendamment de leur "nom") dans les différentes procédures d'insolvabilité. En ce qui concerne les pouvoirs et les limites des praticiens de l'insolvabilité, il a été constaté qu'en général, les praticiens de l'insolvabilité dans l'UE bénéficient de pouvoirs étendus pour accéder aux informations et exiger le témoignage des personnes. En outre, ils disposent d'un mandat légal pour enquêter, sont généralement habilités à intenter une action contre les anciens administrateurs d'une société pour tout acte répréhensible impliquant la société, et des demandes de restitution ou de dommages-intérêts peuvent également être formulées à l'encontre de tiers ayant malhonnêtement aidé ou participé à cet acte répréhensible. Toutefois, en ce qui concerne les défendeurs ou les actifs situés dans des juridictions étrangères, des questions se posent quant aux pouvoirs de collecte d'informations qu'un praticien de l'insolvabilité peut exercer en dehors de sa juridiction. Par exemple, des limitations aux pouvoirs de collecte d'informations peuvent apparaître, notamment en ce qui concerne les coûts associés aux procédures de recherche et de récupération, les barrières linguistiques et la longueur des voies administratives pour demander et obtenir des informations.

En ce qui concerne de potentielles recommandations politiques qui pourraient améliorer l'application des pouvoirs utilisés pour localiser et préserver les avoirs, l'Étude souligne que l'article 21 RIE pourrait être complété par une mesure européenne exigeant que chaque État membre introduise un mécanisme judiciaire permettant le "gel" ou la préservation des comptes bancaires dans sa juridiction dans des circonstances appropriées. Les circonstances appropriées incluraient le soutien d'une procédure d'insolvabilité substantielle qui a été ouverte soit dans cet État, soit dans un autre État membre. Cette mesure pourrait, par exemple, prendre la forme d'une recommandation non contraignante ou d'une directive. Elle pourrait également prendre la forme d'une extension expresse de la

procédure de l'ordonnance européenne de saisie conservatoire des comptes bancaires (« OESC ») aux praticiens de l'insolvabilité qui ne sont pas actuellement et expressément désignés comme bénéficiaires potentiels de cette procédure. D'autres aspects de cette procédure et de son application aux procédures d'insolvabilité pourraient utilement être clarifiés. La procédure OESC permet à un tribunal d'un État membre de geler des fonds qui sont détenus sur le compte bancaire d'un débiteur dans un autre État membre (à l'exception du Danemark).²⁶ Les mécanismes d'obtention d'une OESC sont définis dans le Règlement (UE) n° 655/2014.²⁷

Accès aux registres d'actifs et aux informations

L'un des principaux moyens dont disposent les praticiens de l'insolvabilité pour identifier les actifs du débiteur, pertinents dans le cadre d'une procédure d'insolvabilité, est de rechercher les registres d'actifs officiels disponibles ou les bases de données qui peuvent contenir des informations utiles concernant les biens ou les privilèges du débiteur. Le RIE aborde la question de la publicité et de la transparence en demandant aux États membres d'établir des registres d'insolvabilité, interconnectés via le portail européen e-Justice, et de publier les décisions judiciaires pertinentes.²⁸ Si l'article 24(2) RIE prescrit certaines informations obligatoires à inclure dans le registre d'insolvabilité, l'article 24(3) RIE précise que les États membres sont libres d'inclure des informations supplémentaires.²⁹ Outre les registres d'insolvabilité, il existe dans chaque État membre divers autres registres qu'un praticien de l'insolvabilité peut utiliser pour retrouver différents actifs.

En ce qui concerne les registres d'actifs, l'Étude donne une vue d'ensemble des données recueillies par le biais de la recherche documentaire au niveau national. En outre, l'Étude présente une recherche juridique sur le terrain, visant à déterminer si et dans quelle mesure les praticiens de l'insolvabilité ont le pouvoir d'accéder aux registres d'actifs dans le contexte des procédures d'insolvabilité, ainsi qu'à fournir une cartographie des registres d'actifs dans chaque État membre.

L'analyse menée sur la base des recherches documentaires et de l'exercice de cartographie a révélé un manque de diversité des registres, un manque de cohérence des informations disponibles dans ces registres, des conditions d'accès aux informations contenues dans ces registres divergentes, et des niveaux différents de disponibilité et de qualité des informations contenues dans ces registres. Premièrement, en ce qui concerne la diversité des registres, il a été constaté qu'il existe un manque considérable d'uniformité à cet égard dans les États membres, ce qui peut nuire aux efforts de recherche transfrontalière des praticiens de l'insolvabilité. Deuxièmement, en ce qui concerne les informations contenues dans les registres, il y a un manque de cohérence quant aux informations disponibles ; par exemple, les sûretés attachées aux biens immobiliers peuvent être trouvées dans un registre foncier ou dans un registre séparé. Troisièmement, le système actuel de registres offre une image complexe caractérisée par différents niveaux

²⁶ Le Danemark fait l'objet d'une dérogation au Règlement. Cela signifie que les créanciers basés au Danemark ne peuvent pas demander une OESC et que l'on ne peut pas obtenir une OESC en relation avec un compte bancaire danois.

²⁷ Règlement (UE) n° 655/2014 du Parlement européen et du Conseil du 15 mai 2014 portant création d'une procédure d'ordonnance européenne de saisie conservatoire des comptes bancaires, destinée à faciliter le recouvrement transfrontière de créances en matière civile et commerciale, JO L 189, 27.6.2014, p. 59–92, disponible à <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0655> (dernière consultation le 11 mars 2022).

²⁸ Règlement (UE) 2015/848 du Parlement européen et du Conseil du 20 mai 2015 relatif aux procédures d'insolvabilité, JO L 141, 5.6.2015, p. 19-72, disponible à <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (dernière consultation le 11 mars 2022), considérant 76.

²⁹ Il convient de noter que l'article 24, paragraphe 4, prévoit que les États membres ne sont pas tenus d'inclure dans les registres d'insolvabilité les informations visées au paragraphe 1 du présent article en ce qui concerne les personnes physiques n'exerçant pas une activité commerciale ou professionnelle indépendante, ni de rendre ces informations accessibles au public par le biais du système d'interconnexion de ces registres, à condition que les créanciers étrangers connus soient informés, conformément à l'article 54, des éléments visés au paragraphe 2, point j), du présent article.

de registres et diverses approches d'enregistrement parmi les États membres, certains États membres exigeant, par exemple, le paiement d'une taxe ou l'autorisation d'un juge pour accéder à ces informations. Enfin, certains problèmes se posent quant à la disponibilité et à la qualité des informations contenues dans les registres ou les livres, car certaines parties prenantes ont souligné que les débiteurs peuvent ne pas fournir de documents comptables précis ou que même lorsque les informations sont fournies par le débiteur lui-même, elles ne sont pas toujours disponibles.³⁰

Au niveau de l'UE, il existe déjà un site web qui recueille des informations sur les registres d'actifs des États membres.³¹ Par conséquent, en termes de recommandations politiques, il pourrait être suggéré que ce site web soit mis à jour et standardisé. Il s'agit en particulier de mettre à jour les registres préexistants et d'inclure un aperçu et des liens vers d'autres types de registres. Il pourrait également être recommandé de proposer une option permettant de traduire les registres dans toutes les langues de l'Union européenne, et pas seulement en anglais.

Outils à la disposition des créanciers

Il existe plusieurs types d'opérations qu'un débiteur peut effectuer en relation avec un bien et qui peuvent porter préjudice aux créances du créancier, comme les opérations effectuées à une valeur inférieure de la valeur nominale, les opérations destinées à porter préjudice aux créanciers, etc. Par conséquent, les créanciers disposent d'une variété d'outils leur permettant d'obtenir des informations sur les actifs (et leur localisation), la conservation des actifs et la restitution ou le rapatriement des actifs.

La collecte de données via la recherche documentaire au niveau national vise à identifier les outils prévus par le droit national qui permettent aux créanciers de localiser et de préserver les actifs dans le contexte des procédures d'insolvabilité. À l'aide des informations recueillies, l'Étude cartographie les similitudes et différences entre les outils adoptés dans les 27 États membres de l'UE, tout en considérant leur stade d'application (c'est-à-dire avant, avant et pendant, et pendant la procédure d'insolvabilité).

L'analyse des données collectées par le biais de la recherche documentaire et de la cartographie des cadres juridiques a montré que les outils de localisation et de recouvrement des actifs mis à la disposition des créanciers varient considérablement et peuvent, entre autres, être divisés entre les pouvoirs disponibles avant l'ouverture de la procédure et les pouvoirs disponibles après l'ouverture de la procédure. Il a été constaté, premièrement, que les conditions d'accès des créanciers aux outils peuvent présenter des différences significatives entre les États membres. Deuxièmement, il a été constaté que les pouvoirs disponibles après l'ouverture de la procédure sont plus limités. Troisièmement, dans un nombre important d'États membres, il a été noté qu'avant l'ouverture de la procédure d'insolvabilité, les créanciers individuels peuvent chercher à localiser et à récupérer les actifs du débiteur par le biais de l'*actio pauliana*.³² Enfin, dans plusieurs pays, il a été souligné que les créanciers peuvent également tenter des actions en annulation pendant la procédure d'insolvabilité, bien que celles-ci soient limitées en raison du principe collectif.

Les outils dont disposent les créanciers dans les États membres sont particulièrement variés, mais l'outil le plus populaire mis à la disposition des créanciers est l'*actio pauliana*. Par conséquent, l'Étude recommande de développer une disposition dans le RIE concernant le pouvoir du créancier d'utiliser l'*actio pauliana* pendant la procédure

³⁰ Voir Annexe A, Rapports nationaux, Rapport d'entretien de la Roumanie.

³¹ Par exemple, e-Justice, Registres fonciers, du commerce et d'insolvabilité, disponible à https://e-justice.europa.eu/514/EN/registers_business_insolvency_amp_land (dernière consultation le 8 mars 2022).

³² Voir, par exemple, Annex A, Rapports nationaux, Rapports de recherche documentaire juridique de l'Autriche, Grèce, Espagne, Italie, Pays-Bas, Pologne et Roumanie.

d'insolvabilité. Cette disposition pourrait stipuler, par exemple, que les créanciers ne seraient autorisés à faire valoir l'*actio pauliana* que si le praticien de l'insolvabilité renonce à leur droit d'action et sous réserve de l'autorisation du tribunal qui ouvre la procédure. En outre, l'UE pourrait spécifier dans une disposition que l'utilisation de l'*actio pauliana* dans le cadre d'une procédure d'insolvabilité devrait manifester ses effets envers tous les créanciers et que la procédure de l'action devrait être utilisée pour la distribution entre les créanciers. De plus, une préférence sur un pourcentage du produit pourrait être réservée aux créanciers finançant l'*actio pauliana* lorsque les ressources ne sont pas disponibles au sein des masses d'insolvabilité.

1. Introduction and objectives of the assignment

1.1. Introduction

This document constitutes the Final Report for the ‘Study on tracing and recovery of debtor’s assets by insolvency practitioners’ JUST/2020/JCOO/FW/CIVI/0160 (the ‘Study’) for the European Commission – Directorate-General for Justice and Consumers (the ‘Commission’, or ‘DG JUST’), as conducted by Spark Legal Network and Tipik, with the support of our key legal experts (the ‘Study Team’, or ‘Management and Quality Assurance Team’) and our network of national experts.

As such, this report contains five chapters. The current **Chapter 1** presents the objectives and structure of this report, information on the context and objective of the Study, as well as an overview of the methodology applied.

Chapter 2 presents an overview of the data collected relating to the national rules set out across the Member States governing the powers of insolvency practitioners to trace and preserve assets in the context of insolvency proceedings (Section 2.2). It also provides an analysis of said powers in consideration of the application of Article 21 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceeding (the ‘EIR’),³³ leading to some policy recommendations exploring how to utilise such powers to improve the ability to trace and preserve assets in cross-border situations (Section 2.3). Section 2.4 also includes a case study in respect of the Netherlands providing an example of the exercise of insolvency practitioners’ powers related to asset tracing in cross-border situations.

In **Chapter 3**, attention is given to national asset registers, with a focus on both the types of asset registers available, as well as the access conditions to such registers across the Member States, as identified via the national data collection tasks (Section 3.2). An analysis on the matter at hand is also carried out in Section 3.3, where it also outlines some policy recommendations exploring how best to improve the operation of such registers in cross-border situations. Section 3.4 outlines a case study in respect of Spain, in order to provide an example of asset tracing in relation to third parties that might be held liable to creditors as part of the insolvency proceedings.

In **Chapter 4**, the focus shifts towards the tools at the disposal of creditors in respect of asset tracing and recovery across the Member States, as identified via the data collection tasks at national level, both before and after the commencement of insolvency proceedings (Section 4.2). An analysis of such tools is included, before outlining some policy recommendations exploring how best to improve the operation of the creditor’s power to use *actio pauliana* during insolvency proceedings in Section 4.3. Finally, a case study in respect of Poland is provided in Section 4.4 to offer an understanding of the functioning of the so-called *actio pauliana* in this country.

Finally, **Chapter 5** outlines the next steps of this Study.

The following annexes are provided alongside the Final Report:

- Annex A – National country reports;
- Annex B – Survey results;
- Annex C – Literature review.

³³ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L41, 5.6.2016, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022).

1.2. Legal context and background

Since 2015, the Commission has intended to form a Capital Market Union and as of 2020, this goal has been revived.³⁴ Furthermore, the Commission has recently published the initiative of 'Enhancing the convergence of insolvency laws'. This intends to address the main discrepancies in national corporate (non-bank) insolvency laws, which have been recognised as obstacles to a well-functioning Capital Markets Union.³⁵

In addition, in February 2021, Paolo Gentiloni, the current Commissioner for Economy, emphasised at a press conference the need 'to avoid the sharp rise in insolvencies in the future' and to organise an orderly exit for unviable firms, 'ensuring sound insolvency procedures'.³⁶ This necessity is linked to the COVID-19 crisis, which would have caused 23% of EU companies to experience liquidity distress by the end of 2020 if it was not for government support measures or new borrowing.³⁷ This same research reinforces Gentiloni's statement by maintaining that 'sound insolvency and pre-insolvency procedures will be key for dealing with a potential surge in corporate insolvencies'.³⁸

A key aspect of insolvency proceedings is the ability of insolvency practitioners to trace and recover assets. Certain difficulties present themselves in respect of assets located in another jurisdiction. The Capital Markets Union, if successful, will lead to increased capital flows across Member State borders, leading to more and more assets being held by legal and natural persons with their centre of main interest ('COMI') in a different Member State. Thus, the need to ensure effective systems for tracing and recovery of cross-border assets may become more acute.

1.2.1. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)

The EIR does not harmonise the regimes for tracing and recovery in the context of insolvency proceedings.

Article 21 EIR provides that an insolvency practitioner appointed by the court hearing the main insolvency proceedings may exercise all the powers conferred on it by the law of the Member State of proceedings, in any other Member State, so long as no other insolvency proceedings have been opened there and no preservation measures to the contrary have been taken further to a request for the opening of insolvency proceedings in that State. Subject to provisions on third party rights in rem (Article 10 EIR) and reservation of title

³⁴ European Commission 'Green Paper: Building a Capital Markets Union' SWD(2015) 13 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063&from=EN> (last accessed 19 March 2021) and European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Capital Markets Union for people and businesses-new action plan', COM(2020) 590 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF (last accessed 19 March 2021).

³⁵ European Commission, 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment', available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws> (last accessed 19 March 2021).

³⁶ European Commission Press Corner, 'Remarks by Commissioner Gentiloni at the Eurogroup press conference' SPEECH/21/624, 15 February 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/speech_21_624 (last accessed 18 March 2021).

³⁷ European Commission Directorate-General Economic and Financial Affairs, 'Corporate solvency of European enterprises: state of play', 1 February 2021, available at <https://www.consilium.europa.eu/media/48396/20210402-ewg-commission-note-on-corporate-solvency.pdf> (last accessed 18 March 2021), p.1.

³⁸ Ibid, p.4.

(Article 8 EIR), the insolvency practitioner may remove the debtor's assets from the Member State where they are situated. Article 21(2) makes provision for an insolvency practitioner appointed by a court with jurisdiction over secondary insolvency proceedings claiming that moveable property was removed from the Member State of the opening of proceedings after the opening of proceedings and bringing an action to set this aside in the interests of creditors.

Crucially, Article 21(3) provides that in exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures unless ordered by a court of that Member State, or the right to rule on legal proceedings or disputes.

Thus, the EIR provides for insolvency practitioners to act in relation to assets, with the exercise of their powers delimited by national laws. This means that to further understand the extent of the powers of insolvency practitioners in relation to assets in cross-border contexts, it is necessary to collect legal and empirical data concerning the national laws of all Member States governing these powers.

Furthermore, while Article 21 EIR deals primarily with the recovery of assets of which the whereabouts are known to the insolvency practitioner, no provision is made for the tracing of those assets. Nonetheless, Article 24 EIR introduced the requirement for Member States to establish the insolvency registers, where key information regarding insolvency proceedings shall be published.³⁹ Article 25 EIR introduces the system of interconnection via the European e-justice portal.

1.2.2. UNCITRAL on cross-border insolvency

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the 'EIR') should be seen in the context of the United Nations ('UN') Commission on International Trade Law ('UNCITRAL') Model Law on Cross-Border Insolvency.

The Model Law has been implemented by certain EU Member States - Greece, Poland, Romania and Slovenia, as well as the UK and other major common law jurisdictions including the US, Canada, and Australia.⁴⁰ The Model Law does not attempt a substantive unification of insolvency law and its scope is limited to some procedural aspects of cross-border insolvency cases.⁴¹

The UNICTRAL also developed the Legislative Guide on Insolvency Law⁴² in response to a proposal made to the UN Commission that UNCITRAL should undertake further work on insolvency law to foster and encourage the adoption of effective national corporate insolvency regimes. Ultimately, UNICTRAL was given the mandate to prepare a Legislative Guide that both provides a statement of key objectives and core features for strong insolvency and debtor-creditor regime, and articulation of flexible approaches to the implementation of such objectives and features.

³⁹ European Parliament, New EU insolvency rules give troubled businesses a chance to start a new, p. 6-7, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623548/EPRS_BRI\(2018\)623548_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623548/EPRS_BRI(2018)623548_EN.pdf) (last accessed 7 April 2021)

⁴⁰ UNCITRAL Model Law on Cross-Border Insolvency, 1997, available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last accessed 11 March 2022), and for a list of countries that have adopted the model law, see Status: UNCITRAL Model Law on Cross-Border Insolvency, 1997, available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last accessed 11 March 2022).

⁴¹ For comparisons between the UNCITRAL Model Law and the EIR, see Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 *International Insolvency Review* 246.

⁴² UNCITRAL Legislative Guide on Insolvency Law, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf (last accessed 11 March 2022).

The Legislative Guide was developed in various parts between 2004 and 2012, and reformulated in 2019. The Guide affirms that fundamental to insolvency proceedings is the need to identify, collect, preserve and dispose of the debtor's assets. In particular, it states that:

Irrespective of the applicable legal tradition, an insolvency law will need to clearly identify the assets that will be subject to the insolvency proceedings and therefore included within the concept of the estate as discussed in the Guide and indicate how they will be affected by those proceedings, including clarifying the relative powers of the various participants. Identification of assets and their treatment will determine the scope and conduct of the proceedings and, in particular in reorganization, will have a significant bearing on the likely success of those proceedings. The inclusion in an insolvency law of clear and comprehensive provisions on these issues will ensure transparency and predictability for both creditors and the debtor.⁴³

Therefore, EU Member States make available to insolvency practitioners a wide variety of tools to trace and recover assets for the benefit of the insolvency estate and the actual or potential creditors that may be owed money out of this estate. There may be certain gaps and omissions, however, in the extent of these powers at the national regulatory and legislative level. There is also the lack of harmonisation of best practices in this area at the European level, whether this enunciation of principles takes the form of a non-binding recommendation, such as a Recommendation or a legislative instrument. An EU measure might also incorporate important elements from further work done by UNCITRAL in tracing the beneficial ownership of assets through search and discovery orders, 'gag' and disclosure orders, and asset freezing orders. These initiatives are closely allied to possible measures on enhancing the powers of insolvency practitioners in respect of asset tracing and recovery.

1.2.3. The relationship between the EIR and UNICTRAL Model Law

The Model Law does not go nearly as far as the EIR. The EIR is an emanation from the EU whose Member States have agreed to pool their sovereignty and agreed to work towards an ever-closer Union. UNCITRAL, on the other hand, is a UN organ where the link between Member States is more diffuse and there is no commitment to work towards an ever-closer Union.

The EIR contains mandatory uniform rules on jurisdiction and conflict of laws and, to that extent, represents an encroachment on the sovereignty of individual Member States or rather a pooling or sharing of sovereignty between States. The Model Law is looser and more exhortatory in tone. It does not deal with applicable law issues and does not purport to say which law should govern insolvency proceedings that are opened in a particular State. The recognition of insolvency proceedings opened in another EU Member State is automatic whereas, under the Model Law, it is dependent upon an application to the court. By virtue of the EIR, insolvency proceedings have the same effect in other EU Member States as they have in the law of the insolvency forum, whereas under the Model Law the consequences of recognition depend on the law of the recognising State. The Model Law has, however, the same concept of COMI as the EIR and the COMI case law under the EU instrument has been used in the Model Law context.

The institutional framework is crucial in the operation of a properly functioning insolvency system and the role played by insolvency practitioners is fundamental in this regard. The UNCITRAL Legislative Guide on Insolvency points out that the insolvency practitioner has

⁴³ Ibid, p. 75.

a central role in the effective and efficient implementation of insolvency law, with 'certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially.'⁴⁴

1.2.4. Factors that may impact the tracing and recovery of assets across borders in the context of insolvency proceedings

Various factors may impact the tracing and recovery of assets across borders in the context of insolvency proceedings. This study will focus on the following 3 issues:

- i. The powers of insolvency practitioners to trace and preserve assets of debtors;
- ii. The access of insolvency practitioners to asset registers in its own and other Member States; and
- iii. The civil law measures or tools that creditors can rely on to trace and recover the assets of their debtors.

Each of these 3 issues is considered below.

1.2.5. The powers of insolvency practitioners to trace and preserve assets of debtors

A successful cross-border asset tracing and recovery process contain the following steps: firstly, tracing and identifying; secondly, freezing; and lastly, taking possession and returning of assets. As legal literature points out, each one of these steps heavily depends on the previous one.⁴⁵ However, executing all these steps can be challenging when dealing with two or more jurisdictions.

Insolvency practitioners tend to have a broad range of powers under national law to trace and preserve assets, e.g. compel the production of books and records (including from lawyers, accountants and banks); conduct audits; request issuance of a search order; request issuance of freezing order; examine corporate officers; report suspicious transactions to law enforcement authorities; access registers of assets; launch any other civil or administrative proceedings for the purpose of tracing and preserving assets; and in the cross-border context, request mutual assistance or to turn to a judicial authority of their Member State to request mutual assistance in another Member State.

Nonetheless, there may be obstacles to the effective exercise of such powers. For example, an insolvency practitioner can compel the production of books and records from lawyers, accountants, and banks, and conduct audits. However, banking secrecy laws can prevent disclosure of account information that would help to identify the accounts that hold those assets.⁴⁶ In terms of cross-border cases, when seeking mutual assistance in another Member State, the requested jurisdiction may consider that a request is not supported by

⁴⁴ The EBRD suggests that an insolvency process cannot be imagined without the involvement of an insolvency practitioner who in many respects is the lynch pin of the process – the link between the court, creditors and the debtor – see EBRD, Assessment of Insolvency Office Holders: Review of the Profession in the EBRD Region, 2014, available at http://www.inppi.ro/arhiva/anunturi/download/196_1f89a9d9c30bb669c1a3020f0960c8da (last accessed 21 January 2022). On the need for training and capacity building in the insolvency profession, see OECD, Asian Insolvency Systems: Closing the Implementation Gap, Paris, 2007.

⁴⁵ The International Who's Who of Commercial Litigators, B. Knoetzi, P. Marsch, Challenges of asset tracing/recovery, p. 3, available at https://knoetzi.com/wp-content/uploads/Who_s-Who-Challenges-of-Asset-Tracing--Recovery.pdf (last accessed 21 January 2022).

⁴⁶ World Bank, 2011, Barriers to Asset Recovery, p. 59-60, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/2320/632580PUB0Barr01D0186600BOX361512B0.pdf?sequence=1&isAllowed=y> (last accessed 21 January 2022).

enough information or evidence to justify the order sought.⁴⁷ Furthermore, as noted in legal literature, differences in legal traditions, legal processes, and legal terminology often make it hard to communicate effectively between and among jurisdictions. For example, the 'Mareva injunction'⁴⁸ (a staple freezing order in common law countries) has been traditionally difficult to enforce in certain civil law jurisdictions.

An important aspect of the present study will be to investigate the powers of insolvency practitioners under national law, any differences amongst Member States, and any practical limitations arising from the practical application of such rules.

1.2.6. Access to Registers

As noted above, the EIR addressed the issue of publicity and transparency by requiring Member States to establish insolvency registers, interconnected via the European e-Justice portal, and to publish relevant court decisions.⁴⁹ While Article 24(2) EIR prescribes certain mandatory information to be included in the insolvency register, Article 24(3) EIR clarifies that Member States are free to include additional information.⁵⁰ In addition to insolvency registers, there are various other registers in each Member State that an insolvency practitioner can use to trace different assets.

In relation to real estate, for example, EU Member States have their own public Land Registers, where it is possible to trace and search properties. Such registers usually provide information on the legal owner(s) of property, their interest in the property, any charges registered against the property – in some cases, the insolvent company may not have any property, but its more valuable assets may be charges registered against other properties. It may be that certain third-party interests are registered against the property (such as usufruct). Thus, an insolvency practitioner can gain a wealth of information from such registers, provided they are up-to-date and accurate. However, certain things might not be reflected in the register. For example, where the legal owner of the property holds it on trust for a third party, this beneficial interest might not be recorded on the register. Furthermore, if the current legal owner has acquired the property by means of undue influence, the party from whom he acquired it (or its estate, in the case of a vulnerable elderly person) may have a claim to the property.⁵¹

Other registers which can be used to trace assets include the company registration office, where information on shared ownership of companies can be found. A practical cross-border difficulty may arise where there are a series of companies in different Member States (and even outside the EU) leading to a convoluted ownership structure. For example, if upon searching the Irish companies register, one finds that 50% of ABC Ireland Ltd is owned by ABC France SPRL, which is in turn wholly owned by ABC Deutschland GmbH etc, it will be necessary to have access to registers in several Member States in order to trace the ultimate legal and beneficial ownership.

⁴⁷ Ibid.

⁴⁸ *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

⁴⁹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L141, 5.6.2016, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022), Recital 76

⁵⁰ It should be noted that Article 24(4) Member States shall not be obliged to include in the insolvency registers the information referred to in paragraph 1 of this Article in relation to individuals not exercising an independent business or professional activity, or to make such information publicly available through the system of interconnection of those registers, provided that known foreign creditors are informed, pursuant to Article 54, of the elements referred to under point (j) of paragraph 2 of this Article.

⁵¹ Furthermore, there is also a possibility to use the European Land Registry Network that is an initiative from the European Land Registry Association, which enables access to Land Registry services at European level, particularly for legal professionals. This is available at <https://www.elra.eu/european-land-registry-network/> (last accessed 21 January 2022).

Other searchable registers contain details of car registration, or other vehicles such as planes, ships or rolling stock. A further problem may arise due to leasing arrangements (aircraft are often leased for long periods, such that the residual value of the asset for the 'owner' of the aircraft is somewhat reduced by the fact that he cannot use it for that period). Similarly, registers can be checked for bank account holders.

In general, beneficial interests can be more difficult to trace than legal interests, as they are not always recorded on registers. Furthermore, the development of blockchain technology, digitalisation of assets that encompasses anonymity makes it more difficult to trace the assets online.⁵²

1.2.7. Civil law measures open to creditors to minimise loss of value of the debtor's estate

There are several types of transactions that a debtor can execute in relation to an asset that may be detrimental to the claim of the creditor, such as transactions at an undervalue, transactions intended to prejudice creditors, etc.

When there is a possibility that the debtor intends to initiate an unlawful transfer of assets to the third party to claim insolvency and avoid responsibility towards the creditor, an example of a civil law measure the latter can rely on is *actio pauliana*. This is a challenge to the activities carried out by the debtor and the third party that caused damage to the creditor.⁵³ In many civil law jurisdictions in the EU, the *actio pauliana* can be relied on and it exists alongside specific avoidance rules contained in insolvency legislation. In jurisdictions where the *actio pauliana* is not operative, other similar avoidance rules often apply.⁵⁴ However, there are discrepancies that may create a challenge for using the abovementioned civil measure in cross-border cases. In Germany, the regulation of the bankruptcy of debtors has had a decisive influence on the ineffectiveness of acts detrimental to creditors. In France and Spain, the *actio pauliana* has been constituted as a typical remedy under civil law to contest acts to the detriment of creditors, requiring them to be fraudulent. Hence, the existence of various regulations on the same civil law measure has generated a normative framework that is difficult to harmonise. Therefore, in cross-border contexts related to asset tracing and recovery, problems of legal qualification may appear. These challenges have arisen when determining, depending on their material scope of application, the competent instruments to settle lawsuits. That can lead to lengthy proceedings and a lower recovery rate as a result, if creditors will consider the whole process as too financially and institutionally burdensome.⁵⁵

1.3. Objectives of the study

The main objective of the Study is to conduct a thorough legal and empirical analysis to enable the Commission to:

⁵² UNCITRAL Colloquium on Civil Asset Tracing and Recovery, Vienna, 6 December 2019, Concept Note, p. 2, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/concept_note_20191127.pdf (last accessed 21 January 2022).

⁵³ Ilaria Pretelli, 'Cross-border Credit protection against fraudulent transfers of assets: Actio Pauliana in the Conflict of Laws', Yearbook of Private International Law, vol. 13, 2011, pp. 589-640.

⁵⁴ J. Dahlgreen, S. Brown, A. Keay, G. McCormack, Directorate-General for Justice and Consumers (European Commission), University of Leeds, Study on a new approach to business failure and insolvency, 2016, p. 164-166, available at <https://op.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1/language-en> (last accessed 7 April 2021)

⁵⁵ P. Corral, Actio Pauliana in EU Private International Law: A matter relating to a contract?, p.31, 2021, available at <https://scripties.uba.uva.nl/download?fid=c3948303> (last accessed 21 January 2022).

- identify frameworks of tracing and recovering different types of assets in 27 Member States, including the conditions of access of insolvency practitioners to national registers containing information on those assets;
- identify any specific rules in the asset tracing framework of the 27 Member States that address cross-border aspects of asset tracing and recovery, including tools of mutual assistance at the disposal of insolvency practitioners or judicial bodies or measures of repatriation applicable in the context of civil law; and
- identify any general or particular requirements in civil, public administrative or international law that might restrict the access by insolvency practitioners to information on the assets and thereby pose a challenge to asset tracing or recovery (e.g. due process, protection of property, data protection, national sovereignty, treaty obligations).

In particular, the Study shall include an analysis of (a) provisions of substantive Member State law relating to powers of insolvency practitioners to perform asset tracing and recovery at the national level and in the cross-border context from a comparative perspective; (b) access conditions for insolvency practitioners to asset registers in its own Member State and other Member States, both when the latter is accessed directly or when accessed through interconnection platforms where such interconnection platforms have been established; and (c) any type of civil law measures or tools that creditors may use in the context of insolvency or even before the opening of insolvency proceedings (for the prevention of insolvency or for minimising the loss of value of the estate of the debtor for upcoming insolvency) in order to trace or recover the assets of their debtors, including the situations of commercial fraud.

1.4. Methodology and tasks

In order to meet the objectives of the Study, our methodology includes 4 tasks (in addition to the Inception task):

Task 0 – Inception: Task 0 comprised the inception of the Study, where the Study Team conducted preparatory activities for the data collection and analysis tasks. This task commenced with a kick-off meeting with DG JUST, which was held on 30 July 2021 and culminated with the production of an Inception Report, which was approved by DG JUST.

Task 1 - Legal desk and field research at national level: Task 1 focused on the data collection exercise carried out by the national legal experts. In this data collection exercise, data was collected on the existing national legal frameworks (and their implementation) regarding the framework for asset tracing and recovery in the 27 Member States.⁵⁶ For the research at the national level, national legal experts carried out the following activities:

- i. Legal desk research: this activity entailed the completion of a standardised questionnaire with targeted questions on the national legal framework for asset tracing and recovery in each Member State, based on desk research;
- ii. Legal field research: in addition to the desk research, the national legal experts carried out a number of interviews with national stakeholders, identified amongst lawyers or judges, cross-border litigants, insolvency consultants, or insolvency practitioners.

⁵⁶ It should be noted that, though desk and field research on the national framework for asset tracing and recovery in insolvency proceedings was conducted also in Denmark, however the EIR does not apply in said country due to Denmark's opt-out from EU Justice and Home Affairs cooperation.

The outcomes of this data collection informed the drafting of Sections 2.2, 3.2 and 4.2 of this report. The output of Task 1 is a set of country reports (one for each Member State), each one of which includes:

- A completed legal desk research questionnaire;
- A number of completed interview reports;⁵⁷
- A number of completed case reports.⁵⁸

The completed national country reports can be found in Annex A.

Task 2 - Centrally organised survey and interviews: Task 2 consisted of a centrally organised survey and interviews. Under Task 2, the Study Team aimed at collecting additional data on the national rules of asset tracing and recovery in insolvency proceedings through a survey among national stakeholders and interviews with EU stakeholders, to be centrally carried out by the Study Team. The main aim of the survey was to collect data from stakeholders at national level (i.e., representatives of businesses, SMEs or entrepreneurs, and consumers) as identified by the National Legal Experts. The tool used for this step was the EUSurvey tool (available at <https://ec.europa.eu/eusurvey>). The survey, drafted based on the template included in the Inception Report (and approved by DG JUST before being uploaded to the survey tool), was dispatched to the relevant national stakeholders, and reminders were sent after approximately 2 and 4 weeks. Additionally, following an agreement between the Study Team and DG JUST, the survey was also sent to additional contacts from the European Judicial Network (EJN) as provided by DG JUST.

Out of the 107 stakeholders contacted, however, only 15 answered the survey at the time of the present report. The survey findings can be found in Annex B.

In parallel, the Study Team contacted EU stakeholders via email to invite them to conduct interviews in view of collecting additional knowledge and data regarding the framework of asset tracing and recovery in insolvency proceedings across the Member States.⁵⁹ However, the Study Team did not receive any expression of interest and/or indication of availability to conduct an interview from the contacted stakeholders.⁶⁰

Task 3 - Legal analysis and evaluation: Task 3 encompassed the legal analysis to be carried out on the basis of the assessment and the synthesis of all the information, data and views gathered through the legal desk and field research (Task 1 and Task 2). The legal analysis was kicked-off with an internal workshop which was held (virtually) by the Study Team to take stock of the data collected and decide on a strategy and planning for the analysis. It was further refined upon following the meeting with the Advisory Board, consisting of top experts in the field, whose relevant feedback informed the drafting and finalisation of the analysis contained in the present report. The analysis of the data collected, as well as some relevant policy recommendations, followed three streams which are reflected respectively in Chapters 2, 3 and 4 of this report:

- **Stream 1:** The first stream of analysis focuses on the national frameworks governing the powers of insolvency practitioners to trace and recover assets across the

⁵⁷ The number of interview reports varies for each country, depending on the stakeholders' availability and willingness to conduct interviews across the Member States.

⁵⁸ The number of case reports varies for each country, depending on if and to what extent relevant case-law was identified and selected by national legal experts in their respective Member State.

⁵⁹ The following seven EU level organisations were contacted: i) Council of Bars and Law Societies of Europe (CCBE); ii) Association of European Administrative Judges (AEAJ); iii) Business Europe; iv) SME Europe; v) European Small Business Alliance; vi) BEUC (European Consumer Organisation); vii) UNIDROIT (in particular, Professor Ignacio Tirado - Secretary General, a specialist in insolvency law).

⁶⁰ Out of seven stakeholders contacted, two expressly turned down the interview request, two stakeholders answered the original request but failed to follow up, and no answer was received from the remainder stakeholders.

Member States. An overview of the data collected and an analysis in relation to this stream is provided in Chapter 2.

- **Stream 2:** The second stream of the legal analysis focuses on domestic asset registers available across the Member States, including information on the conditions for insolvency practitioners to access information contained in said registers. An overview of the data collected and an analysis in relation to this stream is provided in Chapter 3.
- **Stream 3:** The third stream of analysis looks into the tools available to creditors, before and after the opening of insolvency proceedings across the Member States. An overview of the data collected and an analysis in relation to this stream is provided in Chapter 4.

The streams of analysis are supported by case studies selected amongst the relevant case-law identified across the Member States during the data collection tasks (Task 1). The case studies can be found respectively in Sections 2.3, 3.3, and 4.4.

Task 4 - Meetings and Reports: Under Task 4, the main outputs of the Study were submitted to DG JUST, and meetings were held to discuss the deliverable and the progress of the Study.

2. Powers of insolvency practitioners to trace and preserve assets

2.1. Introduction

This Chapter sets out the findings of the Study in relation to the powers of insolvency practitioners to trace and preserve assets in insolvency proceedings. In particular, Section 2.2 describes the main findings of the data collected during this Study by means of desk research questionnaires and interviews completed with national stakeholders across the Member States, in view of gathering information on the extent and limitations of insolvency practitioners' powers. Section 2.3 provides for an analysis of these powers, before delving into some policy recommendations exploring how to utilise such powers to improve the ability to trace and preserve assets in cross-border situations. Finally, Section 2.4 includes a case study in respect of the Netherlands (and England and Wales) as an illustrative example of cross-border asset tracing.

2.2. Summary of the main findings of the data collected

The following Section 2.2.1 provides an overview of the data collected via national desk research with regards to the powers that insolvency practitioners are vested with across a sample of Member States. This is in view of tracing and preserving assets, in order to identify similarities and differences in the rules governing these powers, including with regards to the assets such powers relate to and in cross-border situations. Moreover, Section 2.2.2 offers an overview of the input received by national stakeholders interviewed in the context of this Study with regards to the functioning, effectiveness, and limitations of the insolvency practitioners' powers to trace and preserve assets, as well as on the functioning of Article 21 of the EIR. As a preliminary note, and as will be further described in Section 2.3, it should be mentioned that different terminology is used across the Member States to cover the notion of 'insolvency practitioner' and, therefore, English translations may hence not always be comparable across the countries.

2.2.1. Desk research findings

The desk research conducted across the Member States aimed at identifying the national rules governing (where available) a number of powers of insolvency practitioners in the context of asset tracing and recovery, namely the powers to i) compel the production of books and records; ii) conduct audits; iii) request the issuance of a search order; iv) requests the issuance of a freezing order; v) examine corporate officers; vi) report suspicious transactions to law enforcement authorities; vii) access registers of assets; viii) launch any other civil or administrative proceedings for the purpose of tracing and preserving assets; and ix) in the cross-border context, request mutual assistance or to turn to a judicial authority of their Member State to request mutual assistance in another Member State. The paragraphs below offer insight on the existence and extent of such powers across the Member States, whilst also outlining examples of differences, where they exist, in relation to the types of assets which the relevant powers apply, as well as any peculiarities which may have been identified with regards to their functioning in cross-border situations.

Compel the production of books and records

Throughout the EU, diligent business administration obligations require directors and companies to maintain updated books and records on all the assets of the company, as well as the financial statements.⁶¹ The importance of these books and records does not extinguish itself once a company becomes insolvent. On the contrary, insolvency practitioners and courts rely on books and records kept by companies to analyse the businesses, assess the issues that need to be addressed during the insolvency proceeding, and identify the existing assets of the company, their location, and legal status.

It is common among the Member States that insolvency practitioners are given access to the relevant books and records once appointed by the court. Accordingly, the desk research conducted in several Member States reported the existence of this. It is important to note that this is legislated differently across the EU. Some Member States, such as Estonia,⁶² explicitly mention in their national legislative sources that experts have access to books and records. Whilst, other Member States inverse the burden and impose on the debtor the obligation to provide the books and records.⁶³ There are also cases in which a general provision states that insolvency practitioners have access to all the relevant information and documents necessary during the insolvency proceedings.⁶⁴ It follows that books are amongst the documents that may be accessed.

The great majority of the Member States allow the insolvency practitioner to access all the relevant information, the scope of the right to access the books and records, or the way in which this is incorporated in national law varies across the countries. In some countries, such as Finland, general rules exist by which the insolvency practitioner has the same access as the debtor to, inter alia, information on the debtor's bank accounts, payments, financing arrangements and commitments, assets, taxation, notwithstanding any provision relating to secrecy.⁶⁵ Different approaches appear with regards to restructuring proceedings, i.e., proceedings that aim at salvaging a troubled company instead of aiming at the liquidation of the estate.⁶⁶ It should be considered that when these proceedings are at stake, insolvency practitioners need not be appointed but instead administrators will be responsible for ensuring efforts are made to safeguard the business. Accordingly, it is common that the management of the company undergoing insolvency proceedings remains at the head of such company. This may impact the existence of the obligation to provide administrators access to books and records. In Poland, the obligation to hand over the books and records in restructuring proceedings only exists when the management is not allowed to conduct activities that stretch further beyond the ordinary management of the

⁶¹ See e.g. Annex A, national country reports, FI desk research questionnaire.

⁶² Pankrotiseadus (Bankruptcy Act), RT I 2003, 17, 95, available at <https://www.riigiteataja.ee/akt/106052020023> and available (in English) at <https://www.riigiteataja.ee/en/eli/519052020005/consolide> (last accessed 22 December 2021), Article 55(4) and 22(3)(1).

⁶³ See, for example, Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung - IO) (Austrian Insolvency Code), available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001736> (last accessed 19 November 2021), Section 99.

⁶⁴ See, for example, Ibid.

⁶⁵ Konkurssilaki 20.2.2004/120 (Bankruptcy Act 20.2.2004), available at <https://www.finlex.fi/fi/laki/ajantasa/2004/20040120> (last accessed 30 November 2021), Chapter 8 Section 9(1).

⁶⁶ In line with Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L 172, 26.6.2019, p. 18-55, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=EN> (last accessed 10 January 2022), Article 2(1)(1).

company. The fulfilment of this obligation, in Poland, needs to be confirmed by the debtor through a written statement that the debtor shall submit to the judge-commissioner.⁶⁷

Despite the general acceptance of the notion that companies must keep updated books and records, it may happen that a debtor is not the holder of the books and records. In such cases, the question arises of whether the insolvency practitioner has the power to impose the obligation to produce such books and records on the debtor.

In relation to this, Member States are found to adopt different approaches. For instance, some Member States (i) attribute to insolvency practitioners the power to compel the production of books and records; (ii) do not attribute insolvency practitioners with the power to impose such duty and; (iii) have a general provision stipulating that insolvency practitioners must be provided with the relevant information to conduct their work. Before delving further into each of these categories, it should be noted that the line between each approach is blurred and may depend on the interpretation of the legal provisions in each Member State. Consequently, similar provisions in different Member States may have diverging interpretations meaning their applicability may also produce different effects.

Examples of the Member States that (i) provide insolvency practitioners with the power to compel the production of books and records can be found in Belgium, Greece, and Ireland.

In Belgium, Article XX.147 of the Economic Law Code⁶⁸ imposes on the trustee the duty to ask the bankrupt person to complete and close the books and records in his presence. This can be asked to the enterprise and to any of its directors that were dismissed from duties as a consequence of the ongoing insolvency proceedings. This provision is interpreted in the sense that it stretches to encompass the power to require the production of books and records. In Greece,⁶⁹ the insolvency practitioner is explicitly vested with the authority to compel the production of the debtor's books and records. If the debtor refuses to collaborate with the insolvency practitioner, the latter may apply to the judge asking for the necessary measures to be adopted. Furthermore, in Ireland, upon the appointment of a liquidator to a company, the liquidator shall take into custody the seal, books, and records of the company, as well as all the property to which the company is or appears to be entitled.⁷⁰ This imposes a duty on persons in possession of such property to surrender immediately to the liquidators such books, records, or property.⁷¹ In addition, no person is entitled to withhold from a liquidator (or provisional liquidator) the possession of books or records; therefore, indicating that there is a duty on the bankrupt person to produce books or records to the insolvency practitioner.

On the other end of the spectrum, there are Member States in which (ii) the insolvency practitioners do not have the power to compel the production of books. This seems to be the case in Denmark and Poland. Similar to most Member States, a Danish debtor (or its management) is obliged to provide the insolvency practitioner with all the relevant

⁶⁷ Ustawa z dnia 15 maja 2015 Prawo restrukturyzacyjne (Restructuring Law, 15 May 2015 with later amendments), Official Journal 2015 Item 978, available at <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20150000978/U/D20150978Lj.pdf> (last accessed 19 November 2021), Article 291(1) and (2).

⁶⁸ Livre XX du Code de droit économique, inséré par la loi du 11.08.2017, publié au Moniteur belge le 11.09.2017, entrée en vigueur le 1.05.2018 (Economic Law Code), available at http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=2013022819&table_name=loi&&caller=list&fromtab=loi&tri=dd+AS+RANK#LNK0725 (last accessed 27 December 2021).

⁶⁹ Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις (Law No. 4738/2020, Debt Settlement and Facilitation of a Second Chance and further provisions), 27 October 2020, Government Gazette volume A, no. 207, available at http://www.et.gr/docs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoCrlrL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWYJWelDvWS_18kAEhATUkJb0x1LldQ163nV9K--td6SluSSytwnti2tlfFWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz_207 (last accessed 18 November 2021).

⁷⁰ Companies Act 2014, available at <https://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/html> (last accessed 8 February 2022). s. 596 (2).

⁷¹ Ibid, s. 632(1)(a).

information on assets and bookkeeping, amongst others.⁷² The failure to comply with this imposition is met with the same consequences as those applicable to a witness who does not fulfil witness duty.⁷³ The court can, accordingly, enforce compliance with the above-mentioned obligation and ensure the insolvency practitioner is in possession of the books and records. Nevertheless, the debtor cannot be forced to produce the books and records. In this scenario, the insolvency practitioner is vested with the power to require producing the books and can rely on qualified external assistance to do so. This should only be done if the production of books is of financial value to the estate.⁷⁴ Whereas, in Poland, the trustee cannot force the bankrupt to produce the books. This is despite the fact that the debtor remains under the obligation to answer all questions concerning his assets.⁷⁵

Some scenarios are, however, not as straightforward as Denmark's legislation in relation to the power of the insolvency practitioner to compel the production of books and records. In some instances, such as in Latvia,⁷⁶ the legislation provides the possibility of debtors being compelled to produce the books and records through a court order. As such, insolvency practitioners alone cannot enforce such obligation, but they may do so through an interim court order.

Most Member States (iii) have in place a general provision in accordance with which insolvency practitioners must be provided with the relevant information to conduct their work. While in (ii) the provisions were interpreted in the sense that insolvency practitioners were not directly and explicitly awarded with the power to compel the production of books, under (iii) interpretation of legislation may vary. Such is the case, for instance, in Austria, Estonia, Lithuania, and the Netherlands.

In Austria,⁷⁷ this power appears as a manifestation of the obligation of the debtor's management to provide the insolvency practitioner with all the required information. In Estonia,⁷⁸ a debtor shall provide the court, the trustee and the bankruptcy committee with the necessary information to conduct the bankruptcy proceedings, particularly concerning the assets, including obligations, and the business or professional activities of the debtor. A debtor is required to provide the trustee with the balance sheet together with an inventory of the debtor's assets, including obligations, as of the date of the declaration of bankruptcy. Accordingly, even though the measure does not directly attribute power to the insolvency practitioner, the fact that the debtor is obliged to provide the information (and seemingly the books and records), provides a scenario where the insolvency practitioner may request the books, therefore, binding the debtor to their production. In Lithuania,⁷⁹ the insolvency practitioner has the right to receive any necessary information from the debtor in order to

⁷² Konkursloven (Bankruptcy Act), Lovbekendtgørelse nr. 775 af 5. marts 2021, Danish Official Gazette n^o775, 03/05/2021, available at <https://www.retsinformation.dk/eli/ta/2021/775> (last accessed 27 December 2021), § 100 and § 105.

⁷³ Ibid, § 103.

⁷⁴ Ibid, § 110.

⁷⁵ Ustawa z dnia 28 lutego 2003 Prawo upadłościowe (Bankruptcy Law, 28 February 2003 with later amendments), Official Journal 2003 No 60 Item 535, available at <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20030600535/U/D20030535Lj.pdf> (last accessed 19 November 2021), Article 57.

⁷⁶ Maksātnespējas likums (Insolvency Law), 1 November 2010, available at <https://likumi.lv/ta/id/214590-maksatnespejas-likums> (last accessed 6 December 2021), Article 65.2.

⁷⁷ Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO) (Austrian Insolvency Code), available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001736> (last accessed 19 November 2021), Section 99.

⁷⁸ Pankrotiseadus (Bankruptcy Act), RT I 2003, 17, 95, available at <https://www.riigiteataja.ee/akt/106052020023> and available (in English) at <https://www.riigiteataja.ee/en/eli/519052020005/consolide> (last accessed 22 December 2021), Article 85(1).

⁷⁹ Lietuvos Respublikos juridinių asmenų nemokumo įstatymas of 13 June 2019 No XIII-2221 (The Law on Insolvency of Legal Entities of the Republic of Lithuania), available at <https://www.e-tar.lt/portal/lt/legalAct/68f2cad098b711e9ae2e9d61b1f977b3/asr> (last accessed 4 November 2021), Article 66(2)(2).

perform his functions. Lastly, in the Netherlands,⁸⁰ a debtor has to provide the insolvency practitioner with all books and records, including the means to make the contents legible within a reasonable amount of time. All the above-mentioned provisions allow for the interpretation that insolvency practitioners may compel the production of books. This is, however, dependent on the interpretation adopted by the Member States.

In order to obtain a broader picture of the scope of the insolvency practitioners' powers in relation to the access to information, it should be noted that the obligation to provide information is not exclusive to debtors. For example, in Lithuania, the insolvency practitioner has the right to receive information from state and municipal institutions and companies, as well as from other natural and legal persons.⁸¹ In Estonia, the trustee has the right to obtain information and documents from the state and local government agencies, credit institutions, and other persons that is considered necessary for determining the financial status of the debtor.⁸² Similarly, in Slovenia, banks, investment firms, central securities clearing corporations, courts, tax administration, and other database controllers are required to provide the administrator (upon request and free of charge) with all data relevant for determining the legal status and financial position of the debtor and transactions which may have the characteristics of rebuttable legal acts.⁸³

As regards the question of whether cross-border situations result in the application of different or specific rules, the national desk research conducted in most Member States consistently reported that under national legal frameworks, there seems to be no such differentiation or specification in these scenarios. Accordingly, and as noted, for instance, in Romania, foreign insolvency practitioners would have equal access to financial information.⁸⁴

Additional clarifications in this regard were also provided in some countries, such as Croatia, Denmark, Slovenia, and Spain. According to Croatian insolvency law, the foreign insolvency practitioner has the same right to information regarding the insolvency debtor's assets as the national insolvency practitioner, regardless of whether the assets are located in Croatia or abroad as it is the debtor's duty to provide the practitioner with all relevant information. Furthermore, the reference to the application of Article 21 of the EIR sustained the conclusions according to which in Croatia, foreign insolvency practitioners should have the same powers as national insolvency practitioners.⁸⁵ The same reasoning was provided with regard to Latvia.⁸⁶ Alternatively, as Denmark is not bound by the EIR, the same solution does not necessarily apply. In fact, national law does not distinguish between national and cross-border situations if the debtor has opened insolvency proceedings in Denmark.⁸⁷

⁸⁰ Wet van 30 september 1893 op het faillissement en de surséance van betaling (Faillissementswet) (Law of 30 September 1893 regarding bankruptcy and suspension of payments (Dutch Bankruptcy Act)), available at <https://wetten.overheid.nl/BWBR0001860/2021-01-01> (last accessed 8 December 2021), Article 105a.

⁸¹ Lietuvos Respublikos juridinių asmenų nemokumo įstatymas of 13 June 2019 No XIII-2221 (The Law on Insolvency of Legal Entities of the Republic of Lithuania), available at <https://www.e-tar.lt/portal/lt/legalAct/68f2cad098b711e9ae2e9d61b1f977b3/asr> (last accessed 4 November 2021), Article 66(2)(2).

⁸² Pankrotiseadus (Bankruptcy Act), RT I 2003, 17, 95, available at <https://www.riigiteataja.ee/akt/106052020023> and available (in English) at <https://www.riigiteataja.ee/en/eli/519052020005/consolide> (last accessed 22 December 2021), Article 55(4) and 22(3).

⁸³ Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju - ZFPPIPP (Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act) (Official Gazette of the Republic of Slovenia, no. 176/21, as amended), available at http://pisrs.si/Pis_web/pregledPredpisa?id=ZAKO4735 (last accessed 17 December 2021), Article 291(4).

⁸⁴ See Annex A, national country reports, RO desk research questionnaire.

⁸⁵ See Annex A, national country reports, HR desk research questionnaire.

⁸⁶ See Annex A, national country reports, LV desk research questionnaire.

⁸⁷ See Annex A, national country reports, DK desk research questionnaire.

In relation to Slovenia, as will be also explained in Chapter 3, it was noted how the foreign insolvency practitioner may access most information in the registers due to their open and free access. Moreover, a foreign insolvency practitioner may, on behalf of the property of a foreign debtor or a foreign insolvency proceeding, directly file any application or execute other procedural acts in a domestic insolvency proceeding.⁸⁸ Furthermore, if a foreign insolvency proceeding is recognised under Slovenian law, and the same debtor is at the same time subject to domestic insolvency proceedings,⁸⁹ the foreign insolvency practitioner shall be entitled to participate in domestic insolvency proceedings and execute procedural acts to protect, realise, and distribute the debtor's assets, and harmonise the domestic and foreign insolvency proceedings.⁹⁰ The request for the recognition of a foreign court's insolvency proceedings may be filed by the insolvency practitioner appointed in the foreign proceedings. If and once a Slovenian court recognises foreign insolvency proceedings as the main proceedings: i) enforcement and security proceedings can no longer be commenced and ii) the debtor's representation shall be transferred to the foreign insolvency practitioner.⁹¹ In line with this, the national court may also impose that all business information and documentation necessary for the foreign insolvency proceedings is provided to the foreign insolvency practitioner,⁹² and iii) the foreign insolvency practitioner is entitled to avoidance actions (against rebuttable debtor's transactions). It was, nonetheless, noted that Slovenian courts may refuse the recognition of foreign insolvency proceedings or a foreign court's request for legal aid/cooperation if such action were a threat to Slovenia's sovereignty, security, or public interest.⁹³

Lastly, in Spain, it was underlined how the insolvency practitioners obligation to produce documents also includes assets located in other countries. Hence, when the debtor has not complied with his duty to collaborate and provide information, the insolvency practitioner may try reach those assets that are registered by acceding to the information available to the public (e.g., if there is a register that has public information in another Member State, the insolvency practitioner can request such information). In case this information is not publicly available, the insolvency practitioner may request assistance from the Court, which can ask for mutual assistance from a court of another Member State.⁹⁴

As can be seen, the approach to booking and granting access to such books to insolvency practitioners varies amongst Member States. Any possible conclusion and classification will depend on the subjective interpretation and practical application of the relevant legal provisions. Nevertheless, it can be said that the incidence of Member States that directly and explicitly attribute the power to compel the production of books to insolvency practitioners is low. Most Member States rely on general provisions that confer on debtors the obligation to share all relevant information and documents with the insolvency practitioners or confer on the insolvency practitioners the right to be provided with such information. In relation to cross-border specifications/differentiation, the majority of experts reported that their national law is silent in this regard and pointed out the existing supranational rules, namely the EIR.

⁸⁸ Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju - ZFPPIPP (Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act) (Official Gazette of the Republic of Slovenia, no. 176/21, as amended), available at http://pisrs.si/Pis_web/pregledPredpisa?id=ZAKO4735 (last accessed 17 December 2021), Article 454(1).

⁸⁹ Ibid, Article 465.

⁹⁰ Ibid, Chapter 8.3.

⁹¹ Ibid, Article 466.

⁹² Ibid.

⁹³ Ibid, Article 469.

⁹⁴ Ibid, Article 452.

Conduct audits

Throughout the EU, insolvency practitioners are asked to present reports on the course of insolvency proceedings. These reports/statements ought to assess the status of the debtor's estate, mentioning the existing assets, their location, amongst other things. As such, in order to complete such reports, insolvency practitioners may benefit from the access to registers, the right to receive information and documentation,⁹⁵ and may even be empowered to conduct audits to the debtor. The performance of audits in the context of asset tracing and recovery in insolvency proceedings may be generally understood as the inspection of financial statements and (suspicious) transactions aimed at the identification of information that can lead to recoverable assets. These audits are generally the starting point of an investigation when specific actions or transactions that resulted in the transfer of valuable assets out of the company are identified.

This section will focus on the different approaches identified across the Member States in relation to the carrying out of audits during insolvency proceedings by the insolvency practitioner. It will be seen in particular how certain Member States either (i) confer insolvency practitioners with the power to conduct audits (either directly or through general provisions); or (ii) do not grant insolvency practitioners the power to conduct audits. Before delving deeper into each of these categories, it must be noted that the majority of Member States have no specific provisions in relation to the power of insolvency practitioners to conduct audits; this was mentioned, for example, with regard to Belgium, the Czech Republic, and Luxembourg.⁹⁶

Members States where (i) insolvency practitioners have the power to conduct audits are, amongst others, Austria, Denmark, Finland, Greece, Lithuania, and Slovenia. Not all of the aforementioned Member States provide this power in an explicit legal provision. As will be seen, in most cases, such powers derive from the interpretation of general national provisions.

In Austria, the insolvency practitioner is required to inventory the assets of the insolvency estate by adopting the necessary means.⁹⁷ In order to do this, the insolvency practitioner is entitled to access all the relevant information on the debtor which seems to include the possibility to conduct audits.⁹⁸ A limit to this potential power is the fact that if the insolvency practitioner considers that external expertise would be required in order to conduct the audit and that this should be paid by the estate, then a court order may be necessary.⁹⁹ Similarly, Lithuanian law does not explicitly provide such power to the insolvency practitioner. However, conducting audits may be covered by the right of the insolvency practitioner to receive all information required in order to perform their functions.¹⁰⁰ This follows from the fact that the insolvency practitioner, by exercising the right to receive information, could be provided with relevant information to verify any data in the company accounts that may raise doubts. Even though it is not explicitly mentioned in the legislation, the interpretation of Slovenian law appears to go further by establishing that the insolvency practitioner not only has the power to conduct audits but is obliged to do so.¹⁰¹ This results from the requirement that the insolvency practitioner must act diligently, in good faith and by securing the interests

⁹⁵ See the above subsection on the power to compel the production of books and records.

⁹⁶ See Annex A, national country reports, BE, CZ, LU desk research questionnaires.

⁹⁷ Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO) (Austrian Insolvency Code), available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001736> (last accessed 19 November 2021), Section 96.

⁹⁸ Ibid. See also Annex A, national country reports, AT desk research questionnaire.

⁹⁹ Ibid, Section 81.

¹⁰⁰ See Annex A, national country reports, LT desk research questionnaire.

¹⁰¹ See Annex A, national country reports, SI desk research questionnaire.

of all creditors. To fulfil such duty, the insolvency practitioner may also rely on external parties.¹⁰² In Finland, it was also reported that insolvency practitioners, as estate administrators, must conduct audits of the debtor's books and operations when necessary.¹⁰³ Under Finnish law, there is also the possibility to conduct special audits, if the books or other circumstances warrant so, if requested by the insolvency practitioner.¹⁰⁴ In Greece, in order to compile an inventory on the debtor's estate, audits shall be carried out, as well as onsite checks by the insolvency practitioner.¹⁰⁵ Nevertheless, the insolvency practitioner may appoint external assistance to help draw up the evaluation of the assets.¹⁰⁶ Lastly, in Denmark, the insolvency practitioner has the power to conduct audits when such will bring added financial value to the estate, and relies on qualified assistance to do so.¹⁰⁷

In summary, most Member States, where the power of insolvency practitioners to conduct audits can be identified, have passed general provisions granting the insolvency practitioner various rights to access information from which it can be inferred that the power to conduct audits exists. In some Member States, the case may be that there is a duty to conduct audits. Despite these discrepancies, it is generally accepted that insolvency practitioners may rely on external experts to aid with the conducting of audits.

Subsequently, regarding (ii) Member States where the power to conduct audits has not been specifically recognised, it was noted in Poland that the trustee did not have the power to conduct audits but,¹⁰⁸ in parallel, the administrator is obliged to ensure audits are conducted in relation to annual financial statements.¹⁰⁹ The lack of power of the insolvency practitioner to conduct audits follows from the fact that audits are only conducted on businesses continuing their operation.¹¹⁰

In other countries, such as the Netherlands, Romania, Spain, and Sweden, even though the insolvency practitioners do not have the power to conduct audits, they may appoint an external professional to do so. In Romania, in certain instances, the insolvency practitioner must obtain the approval of the so-called 'Creditor's Committee' to nominate someone to conduct audits, unless such committee fails to reach an agreement.¹¹¹ In Spain, the conduct of insolvency practitioners, in relation to audits, varies depending on the regime of limitation on the debtor's powers adopted by the court.¹¹² In the so-called 'intervention regime', where the debtors maintain management and disposal powers over their assets but are subject to

¹⁰² Ibid.

¹⁰³ Tilintarkastuslaki 18.9.2015/1141 (Auditing Act 18.9.2015/1141), available at <https://finlex.fi/fi/laki/ajantasa/2015/20151141#L2P2> (last accessed 30 November 2021), Chapter 1 Section 1.

¹⁰⁴ Konkurssilaki 20.2.2004/120 (Bankruptcy Act 20.2.2004), available at <https://www.finlex.fi/fi/laki/ajantasa/2004/20040120> (last accessed 30 November 2021), Chapter 9 Section 5.

¹⁰⁵ See Annex A, national country reports, EL desk research questionnaire.

¹⁰⁶ Ibid.

¹⁰⁷ Konkursloven (Bankruptcy Act), Lovbekendtgørelse nr. 775 af 5. marts 2021, Danish Official Gazette n^o775, 03/05/2021, available at <https://www.retsinformation.dk/eli/ta/2021/775> (last accessed 27 December 2021), § 100.

¹⁰⁸ Ustawa z dnia 29 września 1994 r. o rachunkowości (Accounting Act, 29 September 1999 with later amendments), Official Journal 1994 No 121 Item 591, available at <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19941210591/U/D19940591Lj.pdf> (last accessed 19 November 2021), Article 64(1).

¹⁰⁹ Ibid, Article 64 and 3(1)(6).

¹¹⁰ See Annex A, national country reports, PL desk research questionnaire.

¹¹¹ Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2014) Official Gazette of Romania, No. 466, 25.06.2014, available at <http://legislatie.just.ro/Public/DetaliiDocument/159286> (last accessed 8 November 2021), Article 62(6).

¹¹² Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Act 1/2020, of May 5) (Spanish Recast Insolvency Act) Spanish Official Journal 2020, No 127, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859> (last accessed 27 October 2021), Articles 115.1 and 116.

intervention, the insolvency practitioner is required to ensure that the debtor complies with its obligations regarding audits. If, however, the court opts for a so-called 'suspension regime', where the debtor's powers are suspended, the insolvency practitioner must issue the financial statements and submit them to audits. As such, even though the insolvency practitioner does not seem to be empowered to conduct audits on the business of the debtor, their work throughout the insolvency proceedings is subject to audits.¹¹³ Another Member State where the power to conduct audits has not directly been recognised in relation to insolvency practitioners is France. Here, insolvency practitioners do not seem to have the standing to conduct legal audits themselves and, contrarily to the Member States mentioned above, seem to have no power to order an audit without the judge's order.¹¹⁴

In summary, countries such as Poland and France fall within the realm of Member States that seem not to grant the power to conduct audits to insolvency practitioners, whilst the other aforementioned Member States, albeit not recognising this power, confer on the insolvency practitioners the option to appoint a third-party to perform such audits, where necessary.

Besides the two main categories described above, it is worth noting that other Member States, such as the Czech Republic, Latvia, and Slovakia, seem to have adopted other approaches. In the Czech Republic, insolvency practitioners may have the power to conduct audits;¹¹⁵ however, this does not stem from their role as an insolvency practitioner but from their role as the auditor.¹¹⁶ As such, the insolvency practitioner may be also an auditor which would subsequently empower them to conduct audits. Furthermore, Latvian law adopts a similar approach to that upheld in the Czech Republic. In Latvia, an insolvency practitioner would normally hire specialists to conduct any necessary audits.¹¹⁷ Therefore, similarly to the Czech Republic, it is possible for the insolvency practitioner to constitute such specialist and have the ability and resources to conduct audits.¹¹⁸ Once again, this does not seem to be a power specifically attributed to the insolvency practitioner as such but instead follows from the variety of possible roles for the insolvency practitioner. In Slovakia, there is no specific law granting the insolvency practitioner the power to conduct audits. However, interim trustees can conduct an audit¹¹⁹ through the application *mutatis mutandis* of the provisions to determine the debtor's assets.¹²⁰

As was ascertained, some Member States have adopted hybrid approaches where there is no explicit legal provision concerning the power to conduct audits by insolvency practitioners but this does not necessarily mean that an audit could not be conducted by other means. Accordingly, there are some situations where the role of an insolvency practitioner and an auditor can be concentrated in the same person, indirectly allowing the insolvency practitioners to conduct audits.

¹¹³ Ibid.

¹¹⁴ Code de Commerce (Commercial Code), available at <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000005634379/> (last accessed 21 December 2021), Articles L.621-4 and L.621-9. See also Annex A, national country reports, FR desk research questionnaire.

¹¹⁵ Zákon o auditorech a o změně některých zákonů (zákon o auditorech) (Act on Auditors and on Amendments to Certain Acts (Act on Auditors)), 14 April 2009, Official Journal 2009, No. 93, available at <https://www.zakonyprolidi.cz/cs/2009-93> (last accessed 6 December 2021), Section 23 par. 2 let. E.

¹¹⁶ See Annex A, national country reports, CZ desk research questionnaire.

¹¹⁷ Maksātne spējas likums (Insolvency Law), 1 November 2010, available at <https://likumi.lv/ta/id/214590-maksatnespejas-likums> (last accessed 6 December 2021), Article 67.13.

¹¹⁸ See Annex A, national country reports, LV desk research questionnaire.

¹¹⁹ Zákon č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov (Act no. 7/2005 Coll. on Bankruptcy and Restructuring and on Amendments to Certain Laws), available at <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/7/20210301?ucinost=25.12.2021> (last accessed 25 December 2021), Section 21.

¹²⁰ See Annex A, national country reports, SK desk research questionnaire.

Request issuance of a search order

In some Member States, the legislative framework does not contain particular rules granting the right or power to request the issuance of a search order specifically to insolvency practitioners *per se*. This appears to be the case, for instance, in Austria, Bulgaria, and Romania. In Austria, such a specification in national law was not considered necessary, as it was noted that insolvency practitioners are already granted the power to access the debtor's premises, hence leading to the consideration that it is not necessary to request the issuance of such orders. A similar situation appears in Bulgaria, where after the opening of the insolvency proceedings and the appointment of an insolvency practitioner, the latter represents the company in its relationship with third parties¹²¹ and manages the company.¹²² Practically, the insolvency practitioner has full access to the premises of the debtor, its commercial books, bank accounts, etc. Similarly, in Romania, the law¹²³ does not expressly state the possibility to request a search order, given that, during the insolvency procedure, the practitioner supervises or directly conducts the activity of the debtor (depending on whether or not the right to self-administrate has been lifted).

In the Czech Republic, with regards to real estate, it was noted how the philosophy behind the asset tracing rules in national legislation is based mostly on the compliance and cooperation of the debtor, not on an active search of the estate *per se*.¹²⁴ In accordance with the Insolvency Act,¹²⁵ the debtor is obliged to provide the insolvency practitioner with all-round cooperation while searching for the assets,¹²⁶ and the debtor must allow the insolvency practitioner access to where the assets are located.¹²⁷ Should the cooperation not be provided by the debtor, the court may, at the insolvency practitioner's request, order a search of the debtor's flat, residence and other rooms, as well as the debtor's cupboards or other boxes located therein, where the debtor might keep his assets; as such, the insolvency practitioner is entitled to gain access to such places.¹²⁸

In some other Member States, rather than requesting the issuance of search orders, in order to duly perform their tasks and duties, insolvency practitioners are granted a more general authorisation to request other bodies to provide the relevant information regarding different assets of the debtor. This has been noted, for instance, in Croatia,¹²⁹ where differentiation, depending on the type of assets searched for, only appears in terms of the administrative offices to which the requests have to be filed. For example, for real estate, the request is

¹²¹ Търговски закон (Commerce Act of 18 June 1991 with later amendments), available at <https://lex.bg/laws/ldoc/-14917630> (last accessed 13 January 2022), Article 658(1)(1).

¹²² Ibid, Article 658(1)(2).

¹²³ Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2014) Official Gazette of Romania, No. 466, 25.06.2014, available at <http://legislatie.just.ro/Public/DetaliiDocument/159286> (last accessed 8 November 2021).

¹²⁴ The starting point for tracing of the assets is the list of assets, which the debtor is obliged to submit together with the insolvency petition or on the basis of a decision issued by the insolvency court. – sec. 211 par. 1 of the Insolvency Act. On the other hand, as resulting from the academic literature (Petr Sprinz, 'Insolvenční zákon: komentář'(2019), Prague, C. H. Beck, Velké komentáře. ISBN isbn978-80-7400-753-8, p. 581) et se), insolvency law does not anticipate only a passive role of the practitioner and reliance on his proper cooperation but presupposes an activity that depends on the form and intensity of the circumstances of the case.

¹²⁵ Zákon č. 182/2006 Sb. Zákon o úpadku a způsobech jeho řešení (insolvenční zákon) (Act on Bankruptcy and Methods of its Resolution (Insolvency Act)), 9 May 2006 with later amendments, Official Journal 2005, No. 182, available at <https://www.zakonyprolidi.cz/cs/2006-182> (last accessed 6 December 2021).

¹²⁶ Ibid, Section 210.

¹²⁷ Ibid, Section 212 par. 1.

¹²⁸ Ibid, Section 212 par. 2.

¹²⁹ Stečajni zakon na snazi od 02.11.2017. godine (Insolvency Law of 2 November 2017 with latter amendments), available at <https://www.zakon.hr/z/160/Ste%C4%8Dajni-zakon> (last accessed 3 November 2021), Article 89, Paragraph 1.

filed to State Geodetic Administration¹³⁰ in general, or to the specific court that is geographically competent for the real estate, whilst for bank accounts, the request is filed to the specific bank where the account is opened, etc. Similarly, in Poland, the insolvency trustee shall request a search of the bankrupt's assets by the court bailiff.¹³¹ This search is also limited to a search in records to which the bailiff has access (i.e., the so-called bailiff's asset tracing procedure). Polish literature also points out that any bailiff may be competent to search for assets, as the search generally takes place in the bailiff's office, using systems the bailiff has access to.¹³² Once again, differences appear in terms of registers that may be consulted by bailiffs for different types of asset tracing: for instance, for real estate and mortgages established on real estates, the Central Database of Land and Mortgage Registers (*Centralna Baza Danych Ksiąg Wieczystych*) makes it possible to determine the numbers of land and mortgage registers and, thus, to identify the real estate in respect of which the debtor is registered as the owner, co-owner, or perpetual usufructuary.¹³³ The register of pledges may be used to find assets in relation to which the debtor has been registered as a pledgee or pledgor, whilst for searches concerning bank accounts, bailiffs have access to the so-called OGNIVO system, operated by the National Clearing House (*Krajowa Izba Rozliczeniowa*) (i.e., the entity responsible for settling transfers between banks). The system provides information on which bank accounts a given entity has with a certain bank at the moment of submitting the query. Additionally, the bailiff may also request information from the tax office regarding the tax on legal transactions (this applies, for example, to sales, exchanges, loans, and donation agreements). These actions are subject to notification to the tax office and, in principle, to taxation. Finally, it should be noted that the powers described do not, however, seem to apply to other assets, such as direct corporate interests in legal persons and trusts, beneficial ownership interest, and claims.

Different mechanisms are provided in other countries. For instance, according to the legislative framework in Greece, the insolvency administrator cooperates with the judge introducing the case throughout the insolvency process.¹³⁴ As derived from the national legislation,¹³⁵ the above judge may issue orders with regards to the estate of the debtor upon the request of the insolvency administrator, who is, in principle, solely vested with the authority to manage such estate.¹³⁶ In Malta, despite no explicit power for requesting the issuance of a search order being identified, this may be considered to be covered by the broader rule according to which liquidators shall carry out the necessary activities for winding up the affairs of the company and distributing its assets.¹³⁷ However, it is the so-

¹³⁰ Zakon o zemljišnim knjigama (Land Registry Law) of 6 of July 2019, available at <https://www.zakon.hr/z/103/Zakon-o-zemlji%C5%A1nim-knjigama> (last accessed 11 March 2022), Article 7.

¹³¹ Ustawa z dnia 28 lutego 2003 Prawo upadłościowe (Bankruptcy Law, 28 February 2003 with later amendments), Official Journal 2003 No 60 Item 535, available at <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20030600535/U/D20030535Lj.pdf> (last accessed 19 November 2021), Article 178 (2).

¹³² Dawid Poleczny, 'Bailiff's search for bankruptcy assets' in Restructuring Advisor quarterly, number 22, pp. 91-93 (PL. 'Poszukiwanie majątku upadłego przez komornika sądowego' w kwartalniku Doradca Restrukturyzacyjny numer 22, s. 91-93), publisher: National Chamber of Restructuring Advisers (PL. Krajowa Izba Doradców Restrukturyzacyjnych).

¹³³ More detailed information on asset registries is provided in Chapter 3 of this report.

¹³⁴ Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις (Law No. 4738/2020, Debt Settlement and Facilitation of a Second Chance and further provisions), 27 October 2020, Government Gazette volume A, no. 207, available at http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8ga89WekpFQd5MXD0LzQLWPU9yLzB8V68knBzLcmTXKaO6fpVZ6Lx3UnKI3nP8NxdnJ5r9cmWyJWeiDvWS_18kAEhATUkJb0x1LldQ163nV9K--td6SluSSytwnti2tIfFWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz_207 (last accessed 18 November 2021), Articles 128 and 133.

¹³⁵ Ibid, Article 134.

¹³⁶ Ibid, Article 93 par. 1.

¹³⁷ Companies Act, Cap. 386 of the Laws of Malta, available at <https://legislation.mt/eli/cap/386/eng/pdf> (last accessed 24 December 2021), Article 238(1)(f).

called 'Registrar of Companies' who has the right to enter and search premises suspected of having such records or documents.¹³⁸

In some Member States, the rules governing the issuance of search orders and their mechanisms are not directly incorporated in the specific insolvency regulations, but rather in other more general acts of civil or criminal procedure. In Spain, for instance, the insolvency practitioner must create an inventory of the estate within two months from the date of the insolvency declaration in ordinary proceedings or less in summary proceedings, which must include all debtor's assets, both in Spain and abroad, as well as their location, characteristics and estimated value.¹³⁹ In order to do so (and comply with the rest of its duties), the insolvency practitioner may request the debtor and its representatives to provide relevant information. In turn, the debtor and its representatives (directors in the case of corporate entities) are obliged to collaborate with the insolvency practitioner or otherwise be considered guilty of generating or aggravating the insolvency.¹⁴⁰ In this context, the judge can use the research mechanisms provided by civil procedural laws and, in particular, those of the Judicial Neutral Point.¹⁴¹ The court may also take part in the direct examination of places, objects or people (in particular, those people unable to attend court to provide testimony).¹⁴² These rules seem to apply to assets with no particular differentiation, including any kind of economic or financial information which may be of use by the insolvency practitioner to verify the correctness of the data provided by the insolvent debtor. Similarly, in Lithuania, it is possible to request the court to issue a search order and seek its enforcement. The performance of search orders, however, is not directly regulated under the insolvency framework, but is regulated by the Code of Criminal Procedure. Article 145(1) of the Code of Criminal Procedure states that when there is a ground to believe that, in certain premises or locations, there are (or that some person has) instruments of criminal activity, items or valuables acquired in a criminal manner, as well as items and documents that may be of importance for the investigation of criminal activities, a pre-trial investigation officer or prosecutor may perform a search in order to find and collect them. The legal provisions further state that a search can be conducted on the basis of a motivated decision of the judge of pre-trial investigation. For the avoidance of doubt, the data collected for the purposes of this Study noted that there appears to be no regular practice for insolvency administrators to rely on search orders.

In other countries, such as Sweden, the administrator may, if necessary, request summary assistance to the Enforcement Authority¹⁴³ for the return of property to assume care and control or otherwise obtain access to the estate of the debtor together with the accounting material and other documents concerning the estate.¹⁴⁴ Where such assistance is sought, the Enforcement Authority may then search a building, room, or place for storage and, if

¹³⁸ Ibid, Article 419.

¹³⁹ Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Act 1/2020, of May 5) (Spanish Recast Insolvency Act) Spanish Official Journal 2020, No 127, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859> (last accessed 27 October 2021), Article 198.

¹⁴⁰ Ibid, Articles 135 and 444.2.

¹⁴¹ Punto Neutro Judicial (Judicial Neutral Point), available at <https://www.poderjudicial.es/cgpi/es/Temas/e-Justicia/Servicios-informaticos/Punto-Neutro-Judicial/#:~:text=El%20Punto%20Neutro%20Judicial%20es,con%20objeto%20de%20facilitar%20y> (last accessed 13 January 2022).

¹⁴² Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Act 1/2000, of January 5, on Civil Procedure), Official State Gazette of Spain 2000, No 7, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2000-323> (last accessed 7 December 2021), Articles 353 to 359.

¹⁴³ See, the website for the Kronofogden (Enforcement Authority), available at <https://kronofogden.se/other-languages/english-engelska> (last accessed 13 January 2022).

¹⁴⁴ Konkurslagen (1987:672) (Bankruptcy Act (BA)), with later amendments, available at www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/konkurslag-1987672_sfs-1987-672 (last accessed 14 December 2021), Chapter 7, Section 14.

access is required to some other place that is sealed, they may allow locks to be opened or gain entry by other means. In the Netherlands, in bankruptcy proceedings, the supervisory judge is entitled to grant permission to a bankruptcy trustee to enter into any place insofar as this is reasonably necessary for the bankruptcy trustee to properly fulfil its duty.¹⁴⁵ However, it should be noted that the bankruptcy trustee is in any case entitled to open all mail and telegrams addressed to a debtor.¹⁴⁶

In turn, in Slovenia, it was noted that judicial administrators are not vested with powers to request search orders. Search orders are a legal instrument reserved to criminal procedure and, therefore, can only be requested by a state prosecutor and issued by a judge.¹⁴⁷

When looking at the extent of these powers, in terms of whether they only apply nationally or whether any differences appear in cross-border situations, in most cases, no particular differences were identified (besides, of course, noting the limits and applicability of the rules contained in the EIR). Examples of countries where no differentiation was noted are Austria, the Czech Republic, Lithuania, Poland, and Sweden. For instance, in Austria, it was observed that the obligations and powers of insolvency practitioners in foreign proceedings are governed by the law of the country where the proceedings were opened. Consequently, whether or not a 'foreign' insolvency practitioner has the same rights as an Austrian insolvency practitioner depends on the specific provisions of the law of the country where the proceedings were opened. An example of the contrary, however, appears to be the Netherlands, for instance, where it was noted that the powers of insolvency practitioners with regards to search orders mentioned above seem to be limited to the national insolvency trustee.

Request issuance of a freezing order

With regards to the possibility of insolvency practitioners to request freezing orders, in many jurisdictions, it was noted that such powers are not directly contemplated by national rules, due to the fact that the appointment of an insolvency administrator or trustee and/or the opening of insolvency proceedings, in any event, brings along consequences and duties on debtors that may be assimilable to those following the issuance and enforcement of a freezing order. For instance, in Austria, it was noted that requesting freezing orders in insolvency proceedings is not required, since only the insolvency practitioner is entitled to represent the debtor and, as such, any asset transfer would require the consent of the insolvency practitioner. Similarly, no specific legal provisions on the request of issuance of a freezing order were identified in Luxembourg where, in practice, a consequence of a bankruptcy ruling is that managers are no longer in charge of the company,¹⁴⁸ and only the insolvency receiver can dispose of the assets. For example, in filing a letter to the banks, the insolvency receiver will request all accounts to be blocked. The same was noted in Belgium also for natural persons, where the bankrupt person, as of the day of the judgment declaring bankruptcy, is divested by operation of the law of the administration of all his assets, including those that may devolve to him as long as he is in a state of bankruptcy

¹⁴⁵ Wet van 30 september 1893 op het faillissement en de surséance van betaling (Faillissementswet) (Law of 30 September 1893 regarding bankruptcy and suspension of payments (Dutch Bankruptcy Act)), available at <https://wetten.overheid.nl/BWBR0001860/2021-01-01> (last accessed 8 December 2021), Article 93a.

¹⁴⁶ Ibid, Article 14 (1).

¹⁴⁷ Zakon o kazenskem postopku – ZKP (Criminal Procedure Act), Official Gazette of the Republic of Slovenia, no. 176/21, available at <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO362> (last accessed 17 December 2021), Article 215(1). However, police officers can perform a search without a priorly issued search order in exceptional circumstances (Article 218 of the Criminal Procedure Act).

¹⁴⁸ Code de Commerce published on 8 January 1807 (Commercial Code), available at <https://legilux.public.lu/eli/etat/leg/code/commerce/20160101> (last accessed 10 December 2021), Article 444: 'Le failli, à compter du jugement déclaratif de la faillite, est dessaisi de plein droit de l'administration de tous ses biens, même de ceux qui peuvent lui échoir tant qu'il est en état de faillite. Tous paiements, opérations et actes faits par le failli, et tous paiements faits au failli depuis ce jugement sont nuls de droit.'

because of a cause that occurred before the opening of the bankruptcy.¹⁴⁹ Another example is Greece where, as explained for search orders, the insolvency administrator cooperates with the judge, who issues orders with regards to the estate of the debtor upon the request of the insolvency administrator. The latter is, in principle, solely vested with the authority to manage such estate.¹⁵⁰ In this context, it was noted that the standpoint status of the estate of the debtor is, in any event, deemed to freeze, in the sense that the debtor has no powers to exploit the same assets as of the date of issuance of the court decision ruling on their insolvency.¹⁵¹ In Slovenia, it was also observed that after the appointment of the administrator in the bankruptcy proceedings, freezing orders are no longer necessary. The same appears to be true in Poland,¹⁵² where in bankruptcy proceedings, the trustee shall immediately take possession of the debtor's assets, manage them, protect them against destruction, damage, or removal by unauthorised persons, and proceed to their liquidation.¹⁵³ After a declaration of bankruptcy, judicial, administrative, or administrative proceedings concerning the bankruptcy estate may be instituted and conducted only by or against the trustee.¹⁵⁴ The trustee can use civil action to declare a debtor's action ineffective against the bankruptcy estate.¹⁵⁵ The court hearing such a case may prohibit transferring or encumbering assets covered by the trustee's lawsuit.

In other countries, certain powers to request specific freezing orders were identified in national legislation. For instance, in Bulgaria, where at the request of the insolvency practitioner, the debtor or a creditor, the competent court may admit the security measures prescribed by law (e.g., freezing orders or foreclosure), which secure the debtor's available property.¹⁵⁶ The national provision does not specify the type of assets to which such power applies. However, since the possible security measures under Bulgarian law are practically *numerus clausus* and they concern specific types of assets, it may be concluded that real estate, moveable property, direct corporate interest in legal persons, and bank accounts are concerned.

In other Member States, freezing orders may only be issued in criminal proceedings. For instance, in the Czech Republic, it was noted that the insolvency court may issue an interim decision order even without a petition unless otherwise provided by law,¹⁵⁷ but a freezing

¹⁴⁹ Livre XX du Code de droit économique, inséré par la loi du 11.08.2017, publié au Moniteur belge le 11.09.2017, entrée en vigueur le 1.05.2018 (Economic Law Code), available at http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=2013022819&table_name=loi&&caller=list&fromtab=loi&tri=dd+AS+RANK#LNK0725 (last accessed 27 December 2021), Article XX.10.

¹⁵⁰ Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις (Law No. 4738/2020, Debt Settlement and Facilitation of a Second Chance and further provisions), 27 October 2020, Government Gazette volume A, no. 207, available at <http://www.et.gr/docs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWeIdvWS 18kAEhATUkJb0x1LldQ163nV9K--td6SluSSYtwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz 207> (last accessed 18 November 2021), Article 93 par. 1.

¹⁵¹ Ibid, Article 93 par. 1.

¹⁵² Ustawa z dnia 28 lutego 2003 Prawo upadłościowe (Bankruptcy Law, 28 February 2003 with later amendments), Official Journal 2003 No 60 Item 535, available at <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20030600535/U/D20030535Lj.pdf> (last accessed 19 November 2021), Article 75(1).

¹⁵³ Ibid, Article 173. Moreover, according to Article 174(1) of the Bankruptcy law, if the trustee is prevented by the debtor from taking possession of its assets, the introduction of the trustee into the possession of the debtor's assets shall be carried out by a bailiff. In addition, pursuant to the article 765(1) of the Code of Civil Procedure, if there is resistance, the bailiff may call for assistance from the police authorities.

¹⁵⁴ Ibid, Article 144(1).

¹⁵⁵ Ibid, Article 132(1).

¹⁵⁶ Търговски закон (Commerce Act of 18 June 1991 with later amendments), available at <https://lex.bg/laws/ldoc/-14917630> (last accessed 11 March 2022), Article 642.

¹⁵⁷ Zákon č. 182/2006 Sb. Zákon o úpadku a způsobech jeho řešení (insolvenční zákon) (Act on Bankruptcy and Methods of its Resolution (Insolvency Act)), 9 May 2006 with later amendments, Official Journal 2005, No. 182, available at <https://www.zakonyprolidi.cz/cs/2006-182> (last accessed 6 December 2021), Section 113.

order is not issued in civil proceedings. However, in the application of Regulation (EU) No. 2018/1805¹⁵⁸ on the mutual recognition of freezing and confiscations orders, it is not excluded that even within insolvency proceedings, an already existing and recognised freezing order might be acknowledged. In sum, a freezing order *per se* can, therefore, only be issued in criminal proceedings should the facts established indicate that a particular item:¹⁵⁹ a) may be used for evidentiary purposes; b) is an instrument of crime; c) is the proceeds of crime;¹⁶⁰ or d) represents a replacement value of such an item. In such cases, the public prosecutor or a police authority may decide to seize such item. Nor the insolvency practitioner nor the insolvency court have jurisdiction in this matter and in case of necessity to issue a freezing order, the criminal charges might be pressed either by the judge or by the practitioner. However, similar results as from issuing a freezing order can be achieved through appointing a provisional insolvency practitioner by issuing an interim measure by which the debtor is ordered not to dispose of certain assets or rights belonging to the debtor's estate. The insolvency court may appoint a provisional insolvency practitioner even if a moratorium has been declared at the debtor's request or if this is necessary to ensure the protection of the assets.¹⁶¹ The aforementioned rules appear to apply to all assets analysed under the present Study, with no particular differentiation.

In Spain, within the framework of the insolvency proceedings, a regime of limitations of the debtor's powers is established¹⁶² depending on whether the insolvency proceedings are voluntary or involuntary. In fact, in the so-called 'intervention regime', the debtor retains its management powers but is subject to the insolvency practitioner's supervision, this being the default rule in voluntary proceedings. In turn, in the so-called 'suspension regime', the insolvency practitioner replaces the debtor in the exercise of its management powers, this being the default rule in involuntary proceedings. At the request of the insolvency practitioner, the judge may change the debtor's intervention status and suspend the debtor's powers.¹⁶³ Regardless of the intervention or suspension regime, the default rule is the continuation of the ordinary course of business (the law assumes that corporations are financially, but not economically, distressed). Unless authorised by the judge, there is also a prohibition to sell or encumber the debtor's assets and rights until a composition agreement is approved or a liquidation plan is judicially approved. No authorisation is needed to sell assets that fall within the debtor's ordinary course of business. However, from the date a legal entity is declared insolvent, the insolvency judge, *ex officio* or upon a reasoned request by the insolvency practitioner, may order, as a precautionary measure, the seizure of the assets of directors (both *de jure* and *de facto*), liquidators, or general managers, as well as the assets of those who were vested with such status within two years before the insolvency declaration, if wilful or grossly negligent causation or aggravation of insolvency is found.¹⁶⁴ With regards to the types of assets covered by the aforementioned Spanish provisions, beneficial ownership interests seem to be excluded from the scope of

¹⁵⁸ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28.11.2018, p. 1–38, available at <http://data.europa.eu/eli/reg/2018/1805/oj> (last accessed 13 January 2022).

¹⁵⁹ Zákon o trestním řízení soudním, trestní řád (Criminal Procedure Act), 9 December 1961, with later amendments), Official Journal 1961, No. 141, available at <https://www.zakonyprolidi.cz/cs/1961-141> (last accessed 6 December 2021), Section 77b par. 1.

¹⁶⁰ *Ibid*, Section 79a.

¹⁶¹ Zákon č. 182/2006 Sb. Zákon o úpadku a způsobech jeho řešení (insolvenční zákon) (Act on Bankruptcy and Methods of its Resolution (Insolvency Act)), 9 May 2006 with later amendments, Official Journal 2005, No. 182, available at <https://www.zakonyprolidi.cz/cs/2006-182> (last accessed 6 December 2021), Section 112, paragraph 3. See also C. H. Beck: Beck-online (online legal information system), available at <https://www.beck-online.cz/bo/> (last accessed 11 March 2022).

¹⁶² Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Act 1/2020, of May 5) (Spanish Recast Insolvency Act) Spanish Official Journal 2020, No 127, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859> (last accessed 27 October 2021), Articles 106 and 107.

¹⁶³ *Ibid*, Article 108.

¹⁶⁴ *Ibid*, Article 133.

application, whilst for claims it was noted that from the declaration of insolvency, until a composition agreement is approved or the insolvency proceedings end, no enforcement proceedings may be initiated against the debtor.¹⁶⁵ Another differentiation was indicated for security interests related to certain assets. In fact, according to Article 145 of the Spanish Recast Insolvency Act, as from the insolvency declaration, an *in rem* (secured) creditor cannot initiate the enforcement over its collateral and from the date of the insolvency declaration, all enforcement proceedings must be halted. With regards to holders of security interests over assets or rights of the estate not necessary for continuing the insolvent party's professional or business activity, if they intend to start enforcement proceedings over those assets or rights, or if they decide to lift the stay, they must accompany the claim or incorporate the suspended judicial or administrative proceedings and the testimony of the insolvency judge's resolution, declaring that the assets or rights are not necessary for continuing the professional or business activity. Once this requirement has been fulfilled, the enforcement or forced realisation proceedings may be started or resumed before the court or administrative body originally competent to carry out the enforcement proceedings.¹⁶⁶

In Romania, the insolvency legislation specifically stipulates the right to request the issuance of a freezing order. In particular, after the commencement of the proceedings, during the observation period, the debtor's current activity, as well as payments towards known creditors can fall in one of the following circumstances.¹⁶⁷ Firstly, the situation in which the debtor's right to manage its activity has not been lifted: in this case, the insolvency practitioner only supervises the debtor's activity, which is still coordinated mainly by the so-called special administrator. Alternatively, and secondly, the situation in which the debtor's right to manage its own activity has been lifted by the court (mandatory in the case of bankruptcy): in this hypothesis, the insolvency practitioner conducts the company's activity, and the special administrator only remains with residual prerogatives. In case a transaction falls outside the current activity of the debtor, the special administrator has to file a request to the insolvency practitioner. Thus, given the prerogatives of the insolvency practitioner, requesting the issuance of a freezing order would be inefficient. The only indication of a somewhat similar mechanism is mentioned by provisions¹⁶⁸ that deal with the main prerogatives of the judiciary liquidator. According to this provision, the judiciary liquidator can seal certain assets and take other measures necessary to preserve them. Secondly, when discussing the preliminary steps of liquidation, Article 151(1) of the same measure states that assets such as stores, storage, warehouses, offices, data processing of storing equipment, merchandise, or other movable assets will be sealed in order to conclude the inventory of the company's assets. Such mechanisms apply to real estate and movable assets.

In Croatia, the insolvency practitioner is obliged to act conscientiously and properly,¹⁶⁹ and in particular: i) with the due (care and) diligence of a prudent businessman,¹⁷⁰ take care of the completion of the started and unfinished business of the debtor and carry out the necessary activities to prevent the occurrence of damage to the debtor's funds; ii) take care of the realisation of the debtor's claim; and iii) conscientiously manage the business of the

¹⁶⁵ Ibid, Articles 52 to 136.

¹⁶⁶ Ibid, Article 146.

¹⁶⁷ Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2014) Official Gazette of Romania, No. 466, 25.06.2014, available at <http://legislatie.just.ro/Public/DetaliiDocument/159286> (last accessed 8 November 2021), Article 87.

¹⁶⁸ Ibid, Article 64(1).

¹⁶⁹ Stečajni zakon na snazi od 02.11.2017. godine (Insolvency Law of 2 November 2017 with latter amendments), available at <https://www.zakon.hr/z/160/Ste%C4%8Dajni-zakon> (last accessed 3 November 2021), Article 89, Paragraph 1.

¹⁷⁰ Due professional care, Due care and diligence of a prudent businessman = the attention of the participants is compared to the behaviour of other people, to determine whether the participant used due diligence that is regular and common in the appropriate type of legal relationship.

debtor. These points authorise the insolvency practitioners to request the court to freeze the assets of the debtor, though the final decision is to be taken by the judge, as per Article 118 of the Insolvency Law according to which:

The court shall, by a decision on initiating preliminary proceedings or a subsequent decision, at the request of the applicant or ex officio, determine all measures it deems necessary to prevent the decision on the request to open insolvency proceedings from changes in the assets of the debtor that could be unfavourable for creditors;

The court may in particular [...] prohibit the disposal of the debtor's property or determine that the debtor may dispose of his property only with the prior consent of the court or the temporary insolvency practitioner; prohibit or temporarily postpone the determination or enforcement of enforcement or security against the debtor; prohibit payments from the debtor's account;

The court may if there are justified reasons, determine the measures referred to in paragraphs 1 and 2, even before issuing a decision on initiating preliminary proceedings; [...]

The court may, at the proposal of the creditor, the temporary insolvency practitioner or ex officio, order temporary insurance measures according to the general rules of the insurance procedure and against the individual debtor, against the person otherwise liable for the debtor's obligations and against the debtor's debtors.

This is necessary to protect the assets of the insolvency debtor. No particular differentiation was identified with respect to the types of assets to which such rules are applicable.

In the Netherlands, once again it was observed how bankruptcy leads to a general freeze of the debtor's estate, as creditors cannot seek recourse against the debtor once a bankruptcy proceeding has been opened.¹⁷¹ However, secured creditors may enforce their security interests as if there was no bankruptcy.¹⁷² The Court can order a temporary cooling-off period with a maximum duration of four months, during which period secured creditors cannot seek recourse against assets of the estate or assets that are under the control of the debtor or the bankruptcy trustee.¹⁷³ All assets of the debtor are affected by the freezing effects of the opening of a bankruptcy proceeding.

In Malta, the liquidator enjoys the legal representation of the company in dissolution and has the right to bring or to defend any action or other legal proceeding in the name and on behalf of the company.¹⁷⁴ This includes the right to apply for a precautionary or executive garnishee order, warrant of seizure, or warrant of prohibitory injunction, as well as other precautionary and executive measures.

Finally, in the majority of countries, no particularities of national legislation or differences were indicated with regards to cross-border situations. This was particularly true for those countries mentioned above, where requesting a freezing order is not specifically foreseen by national laws, but equivalent effects are notable as a direct consequence of the opening of the insolvency proceedings and the appointment of an insolvency administrator as such. In the Czech Republic, in turn, it was noted that given that freezing orders are only relevant in criminal proceedings, cross-border cases would be dealt with according to the Act on

¹⁷¹ Wet van 30 september 1893 op het faillissement en de surséance van betaling (Faillissementswet) (Law of 30 September 1893 regarding bankruptcy and suspension of payments (Dutch Bankruptcy Act)), available at <https://wetten.overheid.nl/BWBR0001860/2021-01-01> (last accessed 8 December 2021), Article 26.

¹⁷² Ibid, Article 57.

¹⁷³ Ibid, Article 63a.

¹⁷⁴ Companies Act, Cap. 386 of the Laws of Malta, available at <https://legislation.mt/eli/cap/386/eng/pdf> (last accessed 24 December 2021), Article 238(1)(a)

International Judicial Cooperation in Criminal Matters,¹⁷⁵ which determines possible cross-border investigations.

Examine corporate officers

The power to examine corporate officers can assist the creditor by compelling those officers to disclose their assets. In many Member States, national rules were identified that could, in principle, cover the examination of corporate officers.

For instance, in several Member States, such as Austria, Belgium, Croatia, Italy, Luxembourg, the Netherlands, or Slovenia, the existence of a broader provision that allows creditors to access whatever information is necessary for the purposes of insolvency proceedings was noted. This does not explicitly refer to the examination of corporate officers but, in principle, covers such duty. For example, in Austria, the insolvency practitioner is required to determine the assets of the insolvency estate essentially by any means necessary.¹⁷⁶ As such, they are entitled to access any information of the debtor, including the examination of corporate officers. Furthermore, in Croatia, the debtor is obliged to provide the court, the board of creditors and, according to the court order, the creditors with all the necessary information on the circumstances relating to the proceedings.¹⁷⁷ They must assist the insolvency practitioner in fulfilling their tasks, giving information and cooperating, at any time, along with refraining from making it difficult to fulfil such obligations.¹⁷⁸

Alternatively, in Bulgaria, there is a codified list of things that the debtor is obliged to provide the court for the purposes of aiding insolvency proceedings. There is a general cooperation obligation for the debtor. Where the debtor would be a company, represented by its registered corporate officers, Article 640 of the Commerce Act provides that within 14 days from the opening of insolvency proceedings, the debtor is obliged to provide the court and the insolvency practitioner with the following: the necessary information in relation to the activity of the enterprise and for its property; a list of payments in cash or by bank transfer which exceed BGN 1,200 (equiv. EUR 615) and were made within 6 months before the initial date of the insolvency; a list of the payments made by the debtor to persons related to them for a period of one year before the initial date of the insolvency; and a notarised declaration in which the debtor shall indicate the individual items, rights *in rem* and receivables, as well as the names and addresses of the debtors. Furthermore, the debtor shall provide the court or the insolvency practitioner with information on the condition of their property and commercial activity as of the date of the request.¹⁷⁹

In some Member States, such as Belgium, Greece or Romania, it was underlined that criminal liability is attached to the failure of corporate officers to cooperate and provide the necessary information for insolvency practitioners. For instance, in Greece, the judge introducing the insolvency proceeding may examine the debtor and their representatives and copies of solemn statements may also be transmitted by the same judge to the

¹⁷⁵ Act no. 104/2013 Coll on International Judicial Cooperation in Criminal Matters: This law is not particularly relevant to the powers of insolvency practitioners though, as it applies only to procedures of judicial, central and other authorities in the field of international judicial cooperation in criminal matters (sec. 1). The law incorporates mainly EU directives in this area and specifies the conditions under which information may be transmitted, in what form, through which bodies active in criminal proceedings, etc. None of this is relevant for the competence of an insolvency practitioner who is not a body in criminal proceedings (orgán činný v trestním řízení).

¹⁷⁶ Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO) (Austrian Insolvency Code), available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001736> (last accessed 19 November 2021).

¹⁷⁷ Stečajni zakon na snazi od 02.11.2017. godine (Insolvency Law of 2 November 2017 with latter amendments), available at <https://www.zakon.hr/z/160/Ste%C4%8Dajni-zakon> (last accessed 3 November 2021), Article 177(1).

¹⁷⁸ Ibid, Article 177(2).

¹⁷⁹ Ibid, Article 640(2).

competent public prosecutor if there is a case of criminal liability. In particular, the judge may assign special investigating officers of the Financial Crime Prosecution Body or to other auditing bodies in order to determine the financial situation and the property of the debtor.¹⁸⁰ Furthermore, in Romania, the insolvency practitioner has to file a detailed report that aims to reveal who is responsible for the debtor's insolvency.¹⁸¹ This report entails the examination of corporate conduct based on the company's financial registries. Where corporate officers are identified as totally or partially liable for the company's passive, any civil consequences surrounding this does not preclude the possibility of criminal liability.¹⁸²

As to which types of assets the power of examining corporate officers applies to, in Spain, for instance, it was noted that different rules are provided for different types of assets. For real estate, as previously mentioned, Spanish insolvency law stipulates when it is possible that the persons affected by the declaration of so-called 'guilty' insolvency will be ordered to cover all or part of the deficit under Article 133 of the Spanish Recast Insolvency Act, the insolvency judge, *ex officio* or at the reasoned request of the insolvency practitioner, may order, as a precautionary measure, the seizure of the assets and rights of (i) the insolvent legal entity's corporate officers; (ii) individuals who have been corporate officers of the insolvent legal entity within two years before it was declared insolvent; (iii) general directors of the insolvent legal entity; and (iv) individuals who have been general directors of the insolvent legal entity within two years before it was declared insolvent. Furthermore, for direct corporate interest, the insolvency judge may disqualify corporate officers from administering the assets of other legal entities for 2 to 15 years, as well as from representing any legal person during that same period. The judge will set the duration of the disqualification period according to the seriousness of the facts and the extent of the damage caused to the estate. The duration of the disqualification period will also depend on whether there are any other judgments in which the same corporate officer had already been disqualified.¹⁸³

Finally, the majority of Member States make no specification in their insolvency law as to whether national provisions apply in cross-border situations. One exception seems to be the Czech Republic, where the national rules¹⁸⁴ specify how they apply to members of statutory bodies of commercial corporations, irrespective of their origin, other (than statutory) elected bodies of business corporations (e.g., supervisory boards) are not affected (they cannot be applied to their members). This highlights that the examination of corporate officers can apply regardless of country of origin. On the other hand, in the Netherlands, the powers granted under Dutch legislation are only available to Dutch bankruptcy trustees.¹⁸⁵

¹⁸⁰ Νόμος 4738/2020, Πύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις (Law No. 4738/2020, Debt Settlement and Facilitation of a Second Chance and further provisions), 27 October 2020, Government Gazette volume A, no. 207, available at http://www.et.gr/ids-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoCrlL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKI3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SluSSytwnti2tIfiWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz_207 (last accessed 18 November 2021), Article 135.

¹⁸¹ Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2014) Official Gazette of Romania, No. 466, 25.06.2014, available at <http://legislatie.just.ro/Public/DetaliuDocument/159286> (last accessed 8 November 2021), Article 56, para 1.

¹⁸² *Ibid*, Article 169.

¹⁸³ Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Act 1/2020, of May 5) (Spanish Recast Insolvency Act) Spanish Official Journal 2020, No 127, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859> (last accessed 27 October 2021), Article 455.

¹⁸⁴ Zákon č. 90/2012 obchodních společností a družstev (zákon o obchodních korporacích) (Commercial Companies and Cooperatives (Business Corporations Act, 22 March 2012 with later amendments), Official Journal 2012, No. 90, available at <https://www.zakonyprolidi.cz/cs/2012-90> (last accessed 6 December 2021), Section 66.

¹⁸⁵ Wet van 30 september 1893 op het faillissement en de surséance van betaling (Faillissementswet) (Law of 30 September 1893 regarding bankruptcy and suspension of payments (Dutch Bankruptcy Act)), available

Report suspicious transactions to law enforcement authorities

Another typical duty for insolvency practitioners is to report suspicious transactions, such as fraud, money laundering, and financing of terrorism, to the relevant law enforcement authorities. Specific provisions of this nature can be found in several Member States, with some exceptions such as Austria, Bulgaria, Poland, and Luxembourg, where no such specific rules were noted.

Where such duty is identified, Member States appear to either obligate a duty for insolvency practitioners to report suspicious transactions via criminal law, civil law, or both. Member States, where legislative rules for insolvency practitioners to report suspicious transactions constitute civil law provisions, are, for instance, Denmark, Croatia, Greece, Finland, France, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. In turn, However, criminal law provisions were identified, for instance, in Belgium and the Czech Republic.

In particular, as regards civil law provisions, in Finland, national legislation¹⁸⁶ provides that if there is a reason to suspect that the debtor has committed an offence against the creditors, an accounting offence or any other offence in the course of business which may be of importance for the liquidation of the estate and receipt of payment, the estate administrator must file a criminal report to the police. Furthermore, in Latvia, the law sets out a duty of an administrator to provide reports and materials to law enforcement authorities. This is regarding facts established in the insolvency proceedings of a legal person or insolvency proceedings of a natural person which may form grounds for initiation of criminal proceedings.¹⁸⁷ Similarly, Irish legislation provides that if it appears to the court, in the course of winding up, that any past or present member of the company has been guilty of any offence in relation to the company, where direction is given by the court, the liquidator shall provide the Director of Public Prosecutions such information.¹⁸⁸ As such, these Member States outline an obligation to report suspicious transactions in their national insolvency law with criminal consequences to be considered subsequently.

In Spain, for example, it is also worth noting that national legislation in this regard has a specific focus on money laundering and terrorist financing. In the Money Laundering and Terrorist Financing Prevention Act, it is provided that the insolvency practitioner must thoroughly examine any transaction or operation, regardless of its amount, which, by its nature may relate to money laundering or the financing of terrorism.¹⁸⁹ Moreover, they must determine whether any transactions the debtor entered into might be linked to money laundering or the financing of terrorism.¹⁹⁰ Subsequently, the insolvency practitioner must inform the Spanish Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC) about transactions that do not correspond to the nature, the volume of activity, or the operating background of the parties involved. However, before informing SEPBLAC, the insolvency practitioner must first carry out a

at <https://wetten.overheid.nl/BWBR0001860/2021-01-01> (last accessed 8 December 2021), Article 105, in conjunction with Article 106.

¹⁸⁶ Konkurssilaki 20.2.2004/120 (Bankruptcy Act 20.2.2004), available at <https://www.finlex.fi/fi/laki/ajantasa/2004/20040120> (last accessed 30 November 2021), Chapter 14 Section 5.

¹⁸⁷ Maksātnespējas likums (Insolvency Law). 1 November 2010, available at <https://likumi.lv/ta/id/214590-maksatnespejas-likums> (last accessed 6 December 2021), Article 26(3).8.

¹⁸⁸ Companies Act 2014, available at <https://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/html> (last accessed 8 February 2022). s. 723(3).

¹⁸⁹ Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo (Act 10/2010, of April 28, on money laundering and the financing of terrorism), Official State Gazette of Spain 2010, No 103, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2010-6737> (last accessed 7 December 2021), Article 17.

¹⁹⁰ Ibid.

thorough examination, which must find that there are no economic or professional justifications for carrying out such transactions.¹⁹¹

In a similar manner to Spain, the Netherlands provides an obligation for insolvency practitioners to report 'unusual transactions', particularly those related to money laundering or the financing of terrorism. These should be notified to the Financial Intelligence Unit.¹⁹² However, this is provided alongside a general provision according to which the insolvency practitioner is obliged to inform the bankruptcy judge of any irregularities and if he or the supervisory judge deems necessary, report or notify the competent authorities of irregularities.¹⁹³ This is also an interesting case that the insolvency practitioner is obliged to inform the bankruptcy judge of such irregularities with the reporting to the authorities to be decided by either the insolvency practitioner themselves or the bankruptcy judge.

Slovakia and the Netherlands, refer to the relevant authority directly in their legislation, rather than more broadly referring to law enforcement authorities. It is provided under Section 17 of Act no. 297/2008¹⁹⁴ that the liable entity is obliged to report to the financial intelligence unit an unusual business operation or an attempt to perform it without undue delay.

Alternatively, looking at countries having criminal provisions obliging insolvency practitioners to report suspicious activities to the relevant authorities, in Belgium, the trustee needs to report to the General Attorney any activities and/or transactions that are suspicious and/or could be considered as a criminal offence.¹⁹⁵ Furthermore, in the Czech Republic, the insolvency practitioner can press criminal charges in many cases pursuant to the Criminal Code.¹⁹⁶

As much as Austria, Bulgaria, Luxembourg, and Poland do not appear to have specific legislative provisions regarding the reporting of suspicious transactions to the relevant authorities, there are more general provisions allowing, but not imposing a duty on insolvency practitioners to report such transactions. For example, in Austria, the insolvency administrator is entitled to report any suspicious transactions to law enforcement authorities with the right not limited to any type of asset.¹⁹⁷ Furthermore, in Poland, there is no legal obligation on the insolvency practitioners to report a crime, as this obligation only applies to state and local government institutions. However, everyone has a social obligation to notify

¹⁹¹ Ibid, Article 18.

¹⁹² Wet van 1 July 2021 ter voorkoming van witwassen en financieren terrorisme (WWFT) (Act of 1 July 2021 for the prevention of money laundering and terrorism (PMLTA)), available at <https://wetten.overheid.nl/BWBR0024282/2021-07-01> (last accessed 8 December 2021), Article 16.

¹⁹³ Ibid, Article 68.

¹⁹⁴ Zákon č. 297/2008 Z.z. o ochrane pred legalizáciou príjmov z trestnej činnosti a o ochrane pred financovaním terorizmu a o zmene a doplnení niektorých zákonov (Act no. 297/2008 Coll. on Protection against Money Laundering and Terrorist Financing and on Amendments to Certain Acts), available at <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2008/297/20210101> (last accessed 26 December 2021).

¹⁹⁵ Code D'instruction Criminelle - Livre Premier of 17 November 1808 updated on 5 May 2019 (Code of Criminal Procedure), available at http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1808111730%2FF&caller=list&row_id=1&numero=8&rech=9&cn=1808111730&table_name=LOI&nm=1808111701&la=F&dt=CODE+D%27INSTRUCTION+CRIMINELLE&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains++%27CODE%27%26+%27D%27%26+%27INSTRUCTION%27%26+%27CRIMINELLE%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=37&imgcn.y=15#LNK0009 (last accessed 27 December 2021), Article 29.

¹⁹⁶ For instance, under Sections 222-227 of the Criminal Code (damage to creditor, preference of the creditor, breach of obligation in insolvency proceedings, or breach of the obligation to make a true declaration of assets).

¹⁹⁷ Strafprozeßordnung (Austrian Criminal Procedures Code), available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326> (last accessed 8 December 2021).

the public prosecutor or the police upon learning that an offence prosecuted *ex officio* has been committed.¹⁹⁸

Finally, it should be noted that the majority of Member States make no specification in their insolvency law as to whether national provisions apply in cross-border situations. However, in Austria, it was underlined how anyone, including citizens of other Member States, is entitled to report suspicious activities to law enforcement authorities under Section 80 of the Austrian Code of Criminal Procedure. In turn, in Romania, it was observed that after the recognition of the foreign procedure, the foreign representative has the procedural capacity to request the annulment of any transactions conducted by the debtor that resulted in harming the creditors' interests.¹⁹⁹

¹⁹⁸ Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego (Code of Criminal Procedure, 6 June 1997 with later amendments), Official Journal 1997, No 89, Item 555, available at <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970890555/U/D19970555Lj.pdf> (last accessed 19 November 2021), Article 304(1).

¹⁹⁹ Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2014) Official Gazette of Romania, No. 466, 25.06.2014, available at <http://legislatie.just.ro/Public/DetaliuDocument/159286> (last accessed 8 November 2021), Article 295, par.1.

Access asset registers

One of the main means for insolvency practitioners to identify relevant assets of the debtor in the context of insolvency proceedings is to research available official asset registers or databases that may contain useful information with regards to property or liens of the debtor. Though the types of asset registers and information contained therein may differ from one Member State to another, in general, all countries grant powers to insolvency practitioners to access said registers in the context of insolvency proceedings. In the majority of cases, it should be noted that powers to request and obtain certain information are mainly directly connected to the power and/or duty of an insolvency practitioner to assess the debtor's financial situation in view of compiling an inventory of the insolvency estate. Though a more detailed overview on the available registers across the Member States will be further elaborated in Chapter 3, the following paragraphs are aimed at highlighting similarities and differences of approaches taken with regards to the means by and the extent to which such powers to access registers and information appear to be incorporated in the national legislative frameworks.

In fact, in some cases, the powers to access asset registers are not necessarily provided by laws or regulations but are rather a direct consequence of the fact that some registers appear to be publicly available and freely accessible in certain countries. This is the case, for instance, in Austria, where public access is granted to the commercial register (*Firmenbuch*), where information is registered regarding shareholders and corporate officers of companies, and the land register (*Grundbuch*), where the owner of (almost) every plot of land in Austria and mortgages are registered. These registers cover real estate, direct corporate legal interests in legal persons and trusts, and security interests related to such assets. A similar situation appears in Bulgaria, Slovenia, and Spain, where most asset registers are publicly available. In Bulgaria, it is also to be noted that national legislation provides a general power for the insolvency practitioner to 'establish the property of the debtor'²⁰⁰ which may be interpreted as indirectly encompassing the power to access registers of assets. In Spain, the public nature of every public register and the means by which such publicity shall be made effective is also directly established in several pieces of legislation.²⁰¹ Furthermore, besides information on real estate, movable assets and security interests on said assets, it is also possible to access other types of information, such as corporate information, ownership of patents and trademarks, etc.

In some instances, the powers to obtain information and/or access registers are directly incorporated within national insolvency legislation. For instance, in the Czech Republic, the right of the insolvency practitioners to obtain information from many public administration authorities (e.g., cadastral authorities, motor vehicle registration authorities, as well as notaries, bailiffs, securities registers, financial institutions, telecommunications or postal

²⁰⁰ Търговски закон (Commerce Act of 18 June 1991 with later amendments), available at <https://lex.bg/laws/ldoc/-14917630> (last accessed 11 March 2022), Article 658(1)(5).

²⁰¹ Ley de 16 de diciembre de 1954 sobre hipoteca mobiliaria y prenda sin desplazamiento de posesión (Chattel Mortgage and Non-Possessory Pledge Act of 16 December 1954), Official State Gazette of Spain 1954, No 352, available at [https://www.boe.es/eli/es/l/1954/12/16/\(2\)/con](https://www.boe.es/eli/es/l/1954/12/16/(2)/con) (last accessed 7 December 2021), Article 78; Decreto de 8 de febrero de 1946 por el que se aprueba la nueva redacción oficial de la Ley Hipotecaria (Decree dated 8 February 1946, approving the new official drafting of the Mortgage Act), Official State Gazette of Spain 1946, No 58, available at [https://www.boe.es/eli/es/d/1946/02/08/\(1\)/con](https://www.boe.es/eli/es/d/1946/02/08/(1)/con) (last accessed 7 December 2021), Articles 221 *et. seq.*; Real Decreto 1784/1996, de 19 de julio, por el que se aprueba el Reglamento del Registro Mercantil (Royal Decree 1784/1996, of 19 July, approving the Commercial Registry Regulations), Official State Gazette of Spain 1996, No 58, available at <https://www.boe.es/eli/es/rd/1996/07/19/1784> (last accessed 7 December 2021), Article 12; Real Decreto 892/2013, de 15 de noviembre, por el que se regula el Registro Público Concursal (Royal Decree 892/2013, of 15 November, approving Public Insolvency Registry), Official State Gazette of Spain 2013, No 289, available at <https://www.boe.es/eli/es/rd/2013/11/15/892> (last accessed 7 December 2021). Articles 2 and 4; Ley 17/2001, de 7 de diciembre, de Marcas (Act 17/2001, of 7 December, on trademarks), Official State Gazette of Spain 2001, No 294, available at <https://www.boe.es/eli/es/l/2001/12/07/17/con> (last accessed 7 December 2021), Articles 1.3, 18 and 46.6; and Ley 24/2015, de 24 de julio, de Patentes (Act 24/2015, of 24 July, on patents), Official State Gazette of Spain 2015, No 177, available at <https://www.boe.es/eli/es/l/2015/07/24/24> (last accessed 7 December 2021), Articles 2, 37 and 41.

service providers, etc.) is specifically granted by national legislation.²⁰² This seems to be the case also in other countries. For example, in Greece, national legislation provides that the insolvency administrator is solely vested with the authority to seal the assets of the debtor,²⁰³ and carry out the relevant access procedure before asset registers.²⁰⁴ It should be noted that the insolvency administrator draws up the inventory of all assets belonging to the debtor, irrespective of whether such assets are subject to registration.²⁰⁵ Similarly, in Estonia, the right to obtain information and documents from the state and local government agencies, credit institutions, and other persons, necessary for determining the financial status of the debtor is contained in national law.²⁰⁶ In Latvia, it was noted that the power to access registers is also covered under insolvency legislation,²⁰⁷ according to which an administrator has the right to become acquainted with the financial situation and all the documents of a debtor, as well as the right to request and receive all the documents, in consideration of the fact that asset registers are considered as 'documents'. In Malta, it was also indicated that the liquidator enjoys the legal representation of the company in dissolution, which would include the right to access public registers of assets on its behalf.²⁰⁸

Besides access to a specific register, certain relevant information of the debtor may also be obtained by filing specific requests to the relevant bodies. For instance, in Belgium, it was noted that the trustee has access to all registers (e.g., licence plate registers, real estate records, tax documents, etc.), but may also access the list of bank accounts, balance and history of transactions of the debtor by requesting such information to every bank/financial institution. Moreover, through the bailiff, the insolvency practitioner may also access information concerning the confiscation of seizure measures. However, the powers of the insolvency practitioners do not seem to extend to accessing the information on claims or movable assets other than means of transport. Also, in Croatia, to obtain information on assets insolvency practitioners may file specific requests to competent bodies. For instance, for real estate, the request is filed to the State Geodetic Administration, in general, or to a specific court that is geographically competent for the real estate; for direct corporate interests in legal persons and trusts, the request is filed to the so-called Central Depository and Clearing Company Inc., which has insight into direct corporate interests; and for bank accounts, requests are filed to the specific financial institutions, etc.

In Italy, additional access conditions and particular procedures apply to insolvency practitioners seeking to obtain certain information. For instance, the insolvency practitioner must request an authorisation from the President of the Court (of the place of residence of the debtor or of the place where the insolvency proceedings are opened)²⁰⁹ in order to be

²⁰² Zákon č. 182/2006 Sb. Zákon o úpadku a způsobech jeho řešení (insolvenční zákon) (Act on Bankruptcy and Methods of its Resolution (Insolvency Act)), 9 May 2006 with later amendments, Official Journal 2005, No. 182, available at <https://www.zakonyprolidi.cz/cs/2006-182> (last accessed 6 December 2021), Section 43 and 44.

²⁰³ Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις (Law No. 4738/2020, Debt Settlement and Facilitation of a Second Chance and further provisions), 27 October 2020, Government Gazette volume A, no. 207, available at http://www.et.gr/idos-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdW4r4xouZundtvSoCrlL8ga89WekpFQd5MXD0LzQLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKI3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SluSSytwnti2tIfFWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz_207 (last accessed 18 November 2021), Article 87 par. 1.

²⁰⁴ Ibid, Article 85 par. 2 and 3.

²⁰⁵ Ibid, Article 141 par. 2.

²⁰⁶ Pankrotiseadus (Bankruptcy Act), RT I 2003, 17, 95, available at <https://www.riigiteataja.ee/akt/106052020023> and available (in English) at <https://www.riigiteataja.ee/en/eli/519052020005/consolide> (last accessed 22 December 2021), Article 55 (4) and 22 (3).

²⁰⁷ Maksātnespējas likums (Insolvency Law). 1 November 2010, available at <https://likumi.lv/ta/id/214590-maksatnespejas-likums> (last accessed 6 December 2021), Article 27 (1) 4).

²⁰⁸ Companies Act, Cap. 386 of the Laws of Malta, available at <https://legislation.mt/eli/cap/386/eng/pdf> (last accessed 24 December 2021), Article 238(1)(a).

²⁰⁹ See Regio Decreto 28 ottobre 1940, n. 1443 Codice di procedura civile (Code of Civil Procedure), Official Gazette No. 253 of 28 October 1940, available at www.gazzettaufficiale.it/eli/id/1940/10/28/040U1443/sg (last accessed 20 November 2021),

authorised to access the data contained in the databases of the public administrations and, in particular, in the tax register, including the archive of financial relations, and the databases of social security institutions. Moreover, when filing the request, the insolvency practitioner is required to pay a monetary fee (i.e., so-called *contributo unificato*). On the other hand, access to public registers is granted through the Italian Revenue Agency. The rule does not specify what type of assets may be subject to verification. However, once the authorisation has been obtained from the President of the Court, the request to the Revenue Agency must be sent by means of a form which, in the case of the author being an insolvency practitioner, provides a generic request for 'all information to identify assets and liabilities'. This means that the Agency will conduct a broad search of all public records. For example, where available, information will be sought on real estate, registered movable property, shareholdings, and security rights. In addition to this information, there will also be information in the tax register (tax returns, income received, list of deeds in the register) and in the financial relations register (list of credit institutions and other financial intermediaries with which the debtor has relations).

An additional peculiarity was noted in Romania where, though the relevant asset registers appear to be publicly accessible when the information obtained by the insolvency practitioner in the context of the compilation of the debtor's inventory concerns assets for which a register is mandatory,²¹⁰ the insolvency practitioner shall send a copy of the decision that opened the insolvency proceedings to the authorities responsible for said registers, as to make mention of this fact in the registers.

Launch any other civil or administrative proceedings for the purpose of tracing and preserving assets

The following paragraphs will focus on the power/duty of insolvency practitioners to launch civil or administrative proceedings for the purpose of tracing and preserving assets other than search and freezing orders.²¹¹

Attending to the rationale behind the role of the insolvency practitioner and its responsibility to administer the assets and estate of the debtor throughout insolvency proceedings, most Member States grant insolvency practitioners with judicial options to fulfil their function. Some Member States empower insolvency practitioners with the sole right to commence certain judicial proceedings whilst there are ongoing insolvency proceedings. The Portuguese legislation²¹² establishes that during the pendency of the insolvency proceeding, the insolvency practitioner has the exclusive power to propose and follow:

- such liability actions as are legally due, in favour of the debtor himself, against the founders, de jure and de facto directors, members of the debtor's supervisory body

Article 492, and Regio Decreto 18 December 1941, n. 1368 Disposizioni per l'attuazione del Codice di procedura civile e disposizioni transitorie (Implementing provisions of the Code of Civil Procedure), Official Gazette No. 302 of 24 December 1941, available at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1941-08-25:1368> (last accessed 20 December 2021), Article 155 par. 1. For the identification of residence, domicile, abode or head office, the general criteria set out in Articles 18 and 19 of the Code of Civil Procedure apply. According to the case, the filing of the certificate of residence or the Chamber of Commerce certificate will be required.

²¹⁰ Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2014) Official Gazette of Romania, No. 466, 25.06.2014, available at <http://legislatie.just.ro/Public/DetaliiDocument/159286> (last accessed 8 November 2021), Article 101, paragraph 4.

²¹¹ See the above subsections on the powers to request search and freezing orders.

²¹² Decreto-lei n.º 53/2004, de 18 de março, Código da Insolvência e da Recuperação de Empresas (Decree-Law no. 53/2004 of 18 March, Portuguese Insolvency and Corporate Recovery Code), available at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=85&tabela=leis (last accessed 20 December 2021), Article 82(3).

and partners, associates or members irrespective of the agreement of the debtor or its corporate bodies, partners, associates or members;

- actions aimed at compensating the generality of insolvency creditors for losses caused by the decrease in the assets of the insolvent estate, both before and after the declaration of insolvency; actions against those legally liable for the debts of the insolvent party.

As such, Portuguese legislation allows the insolvency practitioner to bring a variety of actions, including liability actions, compensation, actions and actions against those legally liable for the debts of the debtor. This is substantiated by case-law. Accordingly, the Porto Court of Appeal ruled that during insolvency proceedings, only the insolvency practitioner has the standing to propose and pursue actions, including actions of an enforcement nature, seeking compensation for losses caused to the generality of the insolvency creditors by the decrease in the insolvent estate's assets, both before and after the declaration of insolvency.²¹³ In Denmark, the insolvency practitioner has the sole right to launch civil proceedings.²¹⁴ Lastly, in Greece, the power to initiate both civil and administrative proceedings concerning access to assets is vested in the insolvency practitioner.²¹⁵

Furthermore, there are Member States that empower the insolvency practitioner to commence any proceeding deemed fit in order to fulfil their obligations throughout the insolvency proceeding. In Austria, the insolvency practitioner is entitled to launch any civil or administrative proceedings necessary to trace/preserve all assets.²¹⁶ An insolvency practitioner in Malta benefits from similar powers.²¹⁷ In Lithuania, even though there is no special power conferred on the insolvency practitioner to commence judicial actions, as a representative of the debtor, the insolvency practitioner has the right to initiate any action.²¹⁸

There are, however, some Member States that require the authorisation of the court in order to commence a judicial action on behalf of the debtor. In Italy, the insolvency practitioner must be authorised by the delegated judge (judge of the procedure) to take legal action for the recovery of claims in the insolvency proceedings. Moreover, the insolvency practitioner must include a written statement as to the appropriateness of the action and the expectations of recovery of the claim in the application for authorisation to sue.²¹⁹ Even though it is not specified by the Italian legislation which assets are subject to these recovery

²¹³ Oporto Court of Appeal, 26 January 2021, no. 1871/17.7T8VNG, available at [http://www.dgsi.pt/itrp.nsf/56a6e7121657f91e80257cda00381fdf/ea999d6a83e6ef958025867e0035a68c?OpenDocument](http://www.dgsi.pt/itrp.nsf/56a6e7121657f91e80257cda00381fdf/ea999d6a83e6ef958025867e0035a68c?OpenDocument&http://www.dgsi.pt/itrp.nsf/56a6e7121657f91e80257cda00381fdf/ea999d6a83e6ef958025867e0035a68c?OpenDocument) (last accessed 20 January 2022).

²¹⁴ Konkursloven (Bankruptcy Act), Lovbekendtgørelse nr. 775 af 5. marts 2021, Danish Official Gazette n^o775, 03/05/2021, available at <https://www.retsinformation.dk/eli/ta/2021/775> (last accessed 27 December 2021), § 100 and § 137.

²¹⁵ See Annex A, national country reports, EL desk research questionnaire.

²¹⁶ Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO) (Austrian Insolvency Code), available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001736> (last accessed 19 November 2021), Section 83.

²¹⁷ Companies Act, Cap. 386 of the Laws of Malta, available at <https://legislation.mt/eli/cap/386/eng/pdf> (last accessed 24 December 2021), Article 238(1)(a).

²¹⁸ Lietuvos Respublikos juridinių asmenų nemokumo įstatymas of 13 June 2019 No XIII-2221 (The Law on Insolvency of Legal Entities of the Republic of Lithuania), available at <https://www.e-tar.lt/portal/lt/legalAct/68f2cad098b711e9ae2e9d61b1f977b3/asr> (last accessed 4 November 2021), Article 56(2).

²¹⁹ Regio Decreto 16 marzo 1942, n. 267 Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa (Royal Decree No. 267 of March 16, 1942, Rules for Bankruptcy, Agreement with Creditors, Supervised Administration and Mandatory Administrative Liquidation), Official Gazette No. 81 of 6 April 1942, available at https://www.gazzettaufficiale.it/atto/vediMenuHTML;jsessionid=ELVMkiA0qclbJNTbg9T2KA.ntc-as1-guri2b?atto.dataPubblicazioneGazzetta=1942-04-06&atto.codiceRedazionale=042U0267&tipoSerie=serie_generale&tipoVigenza=originario (last accessed 30 November 2021), Article 43.

actions, the interpretation in practice is that actions can be directed towards all categories of assets, provided that there is a real advantage for the procedure.²²⁰

In a considerable number of Member States, the national desk research findings noted the relevance, in this context, of the powers of insolvency practitioners to initiate actions for recovery. These are understood as actions under which the court ensures that assets belonging to the debtor that are held by third parties are transferred to the debtor/insolvency practitioner. Furthermore, these actions might also encompass the revoking of any transactions, concluded by the debtor before the declaration of bankruptcy that damage the interests of creditors. The reach and definition of recovery actions are dependent on national legislation. For instance, under Estonian law, by declaring bankruptcy, 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 bankruptcy estate or the assets therein is transferred to the insolvency practitioner.²²¹ The insolvency practitioner shall reclaim the property of the debtor for the bankruptcy estate which is in the possession of third persons unless otherwise provided by law. In line with this, a claim for recovery shall be filed by the insolvency practitioner.²²² Similarly, in Sweden, the insolvency practitioner is required to prepare a written report on the *status quo* of the estate and the reasons for the insolvency of the debtor.²²³ The report must include information on whether there are circumstances giving rise to the recovery of the bankruptcy estate. The insolvency practitioner may demand recovery of said assets by: i) instituting proceedings in a general court within 1 year from the bankruptcy decision; ii) making an objection to a lodged proof of debt in connection with distribution proceedings, contesting the claim in other procedures concerning payment or priority rights in the bankruptcy; and/or iii) objecting to another application presented in litigation against the bankruptcy estate.²²⁴

In Finland, the insolvency practitioners are also entitled to launch a proceeding for the recovery of the debtor's assets.²²⁵ In Romania, they are empowered to commence different civil proceedings, including recovery actions, which will be exempted from any judiciary taxes.²²⁶ Croatian law does not seem to confer a broad power to initiate other insolvency proceedings to the insolvency practitioner. On the contrary, in Croatia, an insolvency practitioner has the power and obligation to take over ongoing actions relating to (i) the exclusion of an object from the insolvency estate; (ii) separate settlement; or (iii) liability of the insolvency estate. Furthermore, the insolvency practitioner is also authorised to refute the legal actions of the insolvency debtor on behalf of the insolvency debtor on the basis of the court's approval.²²⁷ In Slovenia, an avoidance action may be brought by the insolvency practitioner within 12 months after the decision on the commencement of the bankruptcy

²²⁰ See Annex A, national country reports, IT desk research questionnaire.

²²¹ Pankrotiseadus (Bankruptcy Act), RT I 2003, 17, 95, available at <https://www.riigiteataja.ee/akt/106052020023> and available (in English) at <https://www.riigiteataja.ee/en/eli/519052020005/consolide> (last accessed 22 December 2021), Article 35(1), p 2.

²²² Ibid, Article 118(1).

²²³ Konkurslagen (1987:672) (Bankruptcy Act (BA)), with later amendments, available at www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/konkurslag-1987672_sfs-1987-672 (last accessed 14 December 2021), Chapter 7, Section 15 (1).

²²⁴ Ibid, Chapter 4, Section 19-20.

²²⁵ Laki takaisinsaannista konkurssipesään 26.4.1991/758 (Act on the Recovery of Assets to Bankruptcy 26.4.1991/758), available at <https://www.finlex.fi/fi/laki/ajantasa/1991/19910758> (last accessed 30 November 2021).

²²⁶ Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2014) Official Gazette of Romania, No. 466, 25.06.2014, available at <http://legislatie.just.ro/Public/DetaliuDocument/159286> (last accessed 8 November 2021), Article 115(1).

²²⁷ Stečajni zakon na snazi od 02.11.2017. godine (Insolvency Law of 2 November 2017 with latter amendments), available at <https://www.zakon.hr/z/160/Ste%C4%8Dajni-zakon> (last accessed 3 November 2021), Article 165.

proceedings.²²⁸ Moreover, under Slovenian law, the insolvency practitioner is empowered to bring compensation claims against the management board and other persons potentially carrying civil liability for damages against the debtor.²²⁹

As such, throughout the EU, insolvency practitioners are consistently empowered to act judicially on behalf of the debtor. Even though some Member States limit this power to the refuting of claims in litigation procedures or by requiring a court to authorise the initiation of actions, other Member States legislated on the matter in order to confer the insolvency practitioner with a wide margin of action. These Member States did so by conferring the power to commence other civil or administrative actions solely to the insolvency practitioner or by granting the insolvency practitioner discretion as to what actions may be required.

In the cross-border context, request mutual assistance or turn to a domestic judicial authority to request mutual assistance in another Member State

Attending to the cross-border character of certain insolvency proceedings, insolvency practitioners throughout the EU may face challenges in relation to the tracing, recovery and preservation of assets. This subsection will focus on the analysis of the national rules on the powers of insolvency practitioners to rely on the cooperation with foreign insolvency practitioners and foreign courts to fulfil their functions.

A significant number of desk research findings reported that in relation to cross-border cooperation the applicable rules are those belonging to the *acquis communautaire*. For example, this was the outcome of the desk research conducted in the Czech Republic, Latvia, Spain, and Sweden.

For example, in the Czech Republic, it is noted that whenever an insolvency proceeding has an EU cross-border element, the applicable rules would be Article 42 and 43 of the EIR, together with the national rules of the Member State to which the provisions of EU law refer. The relevant EU rules relating to the cooperation between courts provide that a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with another court before which a request to open insolvency proceedings is pending, or which has opened such proceedings. This cooperation may happen through the coordination in the appointment of the insolvency practitioners.²³⁰ Furthermore, under Article 43 EIR, the insolvency practitioner is given the duty to cooperate and communicate with foreign courts. In Latvia, the lack of a 'one-size-fits-all' approach was noted beside the fact that a foreign insolvency practitioner has the same rights and obligations as a national insolvency practitioner.²³¹ Spain, however, refers to national law in order to allow the insolvency practitioner to request assistance from the national court in

²²⁸ Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju - ZFPPIPP (Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act) (Official Gazette of the Republic of Slovenia, no. 176/21, as amended), available at <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4735> (last accessed 17 December 2021), Article 277. See also Article 269, Article 271(2), according to which transactions or legal actions/omissions can be challenged if they were entered into or performed by the debtor within the 12 months (or 36 months for transactions with minor or no consideration) preceding the petition for Bankruptcy proceedings to be filed and until their commencement, provided that the subjective element and one of the objective elements exists. As for the objective elements, these relate to the consequence of the transaction that resulted in a reduction of the assets available to meet creditors' claims in the bankruptcy; and/or because of the transaction, an individual creditor gained a more favourable position than other creditors. The subjective element refers to the need to show that the party benefiting from the transaction knew or should have known that the debtor was insolvent at the time of the transaction. The subjective element is not required in case of gratuitous transfers to third parties and/or where the third party's obligation was of a minor value.

²²⁹ See Annex A, national country reports, SI desk research questionnaire.

²³⁰ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ 141, 5.6.2016, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022), Article 42(3)(a).

²³¹ Maksātnespējas likums (Insolvency Law). 1 November 2010, available at <https://likumi.lv/ta/id/214590-maksatnespejas-likums> (last accessed 6 December 2021), Article 9.

relation to assets located abroad.²³² The Spanish court can then request assistance from a foreign court under the EIR.

Some Member States, such as Estonia and Hungary, noted the existence of transparency/publication obligations in order to allow for a flow of information between the Member States, the courts and the insolvency practitioners. In Estonia, for instance, the obligation to publish the bankruptcy notice appears significant. Accordingly, if a debtor, established in Estonia or the Estonian commercial register is declared bankrupt in line with the EIR, the insolvency practitioner or the competent authority is bound to publish the notice.²³³ The notice shall set out whether the bankruptcy proceedings were initiated on the basis of Article 3(1) or (2) of the EIR, and which Member State's law applies to the bankruptcy proceedings. In Hungary, it was noted that if the main insolvency proceedings have been opened against the debtor in another Member State under the EIR, the foreign insolvency practitioner appointed for the main proceedings and/or the debtor in possession of its assets in the insolvency proceedings must request to have the key elements of the judgment opening the main insolvency proceedings and/or the decision appointing the foreign insolvency practitioner published. The foreign insolvency practitioner and/or the debtor in possession of its assets in insolvency proceedings shall be held liable for damage resulting from the late performance of, or non-compliance with, the obligation of publication.²³⁴

Furthermore, in some Member States, such as Lithuania and Spain, reference was made also to international tools of cooperation between insolvency practitioners and national courts in relation to insolvency proceedings. In Lithuania, this subject matter is not regulated under national insolvency law but may, instead, fall under bilateral agreements. For example, the Agreement on Legal Assistance and Legal Relations Among the Republic of Estonia, Republic of Latvia and Republic of Lithuania²³⁵ states that justice institutions of Contracting States provide each other with legal assistance in civil, family and criminal cases in accordance with the provisions of the agreement. Justice institutions also provide legal assistance to other institutions to the competence of which covers the respective civil, family and/or criminal cases. Legal assistance includes the performance of procedural actions provided in the laws of the Contracting State to which the request is submitted.²³⁶ Furthermore, in Spain, it was noted that the International Legal Cooperation Act in Civil Matters would be applicable (i) in those matters not regulated in the aforementioned Regulations, and (ii) in relation to third party states. Lastly, in other countries, such as Sweden, reference was made to the tools available under the EIR.

Additionally, Belgium, Finland, Italy, the Netherlands, Portugal, Romania, and Slovenia are amongst the Member States where the desk research findings indicated national rules on the matter. Rules in Belgium and Romania reflect those at EU level. Hence, in Belgium, as soon as a Belgian court is requested to open an insolvency proceeding or has opened insolvency proceedings under the EIR, any request for cooperation with a court of another Member State, before which an application for the opening of insolvency proceedings is pending or which has opened such proceedings, falls within the competence of the judge

²³² Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Act 1/2020, of May 5) (Spanish Recast Insolvency Act) Spanish Official Journal 2020, No 127, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859> (last accessed 27 October 2021), Article 175.

²³³ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ 141, 5.6.2016, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022), Article 33(5).

²³⁴ See Annex A, national country reports, HU desk research questionnaire.

²³⁵ Lietuvos Respublikos, Estijos Respublikos ir Latvijos Respublikos sutartis dėl teisinės pagalbos ir teisinių santykių (Agreement on Legal Assistance and Legal Relations Among Republic of Estonia, Republic of Latvia, and Republic of Lithuania), available (in Lithuanian) at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.11191> (last accessed 15 December 2021).

²³⁶ See Annex A – desk research questionnaire – Lithuania.

appointed by the court or the delegated judge.²³⁷ In Romania, the national courts have to ensure cooperation with foreign representatives to the extent possible. In Finland, the national insolvency practitioners have not mentioned having the power to directly cooperate or request assistance from foreign courts or foreign insolvency practitioners. Nevertheless, insolvency practitioners in Finland may request assistance from the Bankruptcy Ombudsman who, in turn, can request mutual assistance from the local authorities in another Member State. In Italy, it is possible for insolvency practitioners to request assistance in cross-border cases. However, any request for assistance that involves a cost for the procedure (both administrative fees and professional fees) must be authorised by the judge of the procedure.²³⁸ Moreover, any request must be justified on the grounds of expediency. Lastly, in the Netherlands, in the case of fraud, a bankruptcy trustee can reach out to the Public Prosecutor who can then consider whether possibilities exist, based on supranational legislation, and whether it is desirable to file a mutual legal assistance request with an authority in another country.²³⁹

Delving deeper into existing national rules, Portuguese legislation²⁴⁰ states that the recognition of foreign main insolvency proceedings shall not prevent the commencement of private proceedings ('secondary proceedings') in Portugal. If the main proceedings are opened, any effects already produced from other proceedings previously opened in Portugal, which are to be closed as a result of such opening and are not limited to the duration of the proceedings, shall be safeguarded. Under Portuguese legislation, the foreign insolvency administrator has legal standing to request the opening of secondary proceedings. In these proceedings, proof of insolvency is not required. As for the communication between insolvency practitioners, the national insolvency practitioner shall promptly communicate to the foreign administrator all circumstances relevant to the development of the foreign proceedings. Furthermore, the foreign administrator has the legitimacy to participate in the creditors' meeting and to present an insolvency plan.

In Slovenia, domestic courts and insolvency administrators are statutorily required to cooperate with foreign courts and insolvency administrators. The domestic court shall, in certain matters,²⁴¹ cooperate to the fullest extent possible with the foreign courts and insolvency administrators, directly or through the domestic insolvency administrator.²⁴² To this extent, the domestic court shall be entitled to: (i) exchange information directly with the foreign court or foreign insolvency administrator; (ii) request information or legal assistance directly from the foreign court or insolvency administrator; and (iii) provide information or carry out acts of legal assistance based on a direct request from the foreign court or

²³⁷ Livre XX du Code de droit économique, inséré par la loi du 11.08.2017, publié au Moniteur belge le 11.09.2017, entrée en vigueur le 1.05.2018 (Economic Law Code), available at http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=2013022819&table_name=loi&&caller=list&fromtab=loi&tri=dd+AS+RANK#LNK0725 (last accessed 27 December 2021), Article XX.207, XX.208 and 209.

²³⁸ See Regio Decreto 16 marzo 1942, n. 267 Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa (Royal Decree No. 267 of March 16, 1942, Rules for Bankruptcy, Agreement with Creditors, Supervised Administration and Mandatory Administrative Liquidation), Official Gazette No. 81 of 6 April 1942, available at https://www.gazzettaufficiale.it/atto/vediMenuHTML.jsessionid=ELVMkIA0qclbJNTbg9T2KA...ntc-as1-guri2b?atto.dataPubblicazioneGazzetta=1942-04-06&atto.codiceRedazionale=042U0267&tipoSerie=serie_generale&tipoVigenza=originario (last accessed 30 November 2021), Article 31 and 32.

²³⁹ See Annex A, national country reports, IT desk research questionnaire.

²⁴⁰ Lei n.º 53/2004, de 18 de março, Código da Insolvência e da Recuperação de Empresas (Decree-Law no. 53/2004 of 18 March, Portuguese Insolvency and Corporate Recovery Code), available at http://www.pgdisboa.pt/leis/lei_mostra_articulado.php?nid=85&tabela=leis (last accessed 20 December 2021), Article 296.

²⁴¹ Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju - ZFPPIPP (Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act) (Official Gazette of the Republic of Slovenia, no. 176/21, as amended), available at <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4735> (last accessed 17 December 2021), Article 271(2) and 449(1)31.

²⁴² Ibid, Article 471.

insolvency administrator. Similarly, the domestic insolvency practitioners shall cooperate to the fullest extent possible with the foreign courts and insolvency administrators.²⁴³ In the extent of this cooperation, the insolvency administrator shall be entitled, under the supervision of the domestic court, to exchange information directly with the foreign court or insolvency practitioner.²⁴⁴ This cooperation may be executed in any form, which provides the realisation of the purpose and includes: (i) the appointment of a person or body to act in accordance with the rules of the court and cooperate with the foreign court or foreign insolvency administrator; (ii) the provision of information using any means which the court assesses appropriate, (iii) the coordination of the management and supervision of the assets and operations of an insolvent debtor; (iv) the conclusion and carrying out of agreements which refer to the coordination of insolvency proceedings with foreign courts; and (v) the coordination of parallel procedures against the same insolvent debtor.²⁴⁵

In summary, the data collected across the Member States showed the existence of diverse rules and mechanisms that confer powers on the insolvency practitioners to request cooperation with foreign and national courts or insolvency practitioners in cross-border scenarios. Some Member States rely on EU level rules and provisions on transparency and openness of proceedings. Other experts referred to international provisions that attribute such powers and establish cooperation between Member States. Lastly, national rules mostly reflect the rules under the EIR and, even though Member States rely on the possibility of cross-border cooperation, internal rules diverge in relation to certain matters.

2.2.2. Field research findings

The following paragraphs are aimed at providing a brief overview of the views of national stakeholders interviewed in the context of the data collection activities conducted for the present Study, with particular focus on their practical experiences and feedback in relation to the powers and duties of insolvency practitioners, including views on the effectiveness of the mechanisms of Article 21 EIR.

Firstly, interviews with national stakeholders showed that the scope and effectiveness of insolvency practitioners' powers are perceived differently across Member States. Some stakeholders from the Czech Republic, Lithuania, Latvia, Sweden and Slovenia stated that their national legislation grants insolvency practitioners efficient and well-structured powers.²⁴⁶ On the contrary, a stakeholder from Spain indicated that insolvency practitioners lack the necessary powers to make their action effective and suggested that they be granted the same powers of public (tax) authorities.²⁴⁷ Another stakeholder from the Czech Republic described insolvency practitioners' powers as quite balanced, in comparison to the more intrusive powers of bailiffs.²⁴⁸ Many stakeholders concurred that the efficiency of the insolvency practitioners' powers depends on the debtor disclosing or registering their assets or bank accounts with the competent authorities (e.g., tax authorities) or official registers.²⁴⁹ Other stakeholders also pointed out that data protection requirements are sometimes used as a shield to conceal information on the debtors' assets²⁵⁰ and that the length of insolvency

²⁴³ In the matters referred to in Article 449(1)33 of the Insolvency Act and pursuant to their competencies and under the supervision of the domestic court. Ibid, Article 449(1)31.

²⁴⁴ Ibid, Article 472(2).

²⁴⁵ Ibid, Article 473.

²⁴⁶ See Annex A, national country reports, CZ, LT, LV, RO, SE and SI interview reports.

²⁴⁷ See Annex A, national country reports, ES interview report.

²⁴⁸ See Annex A, national country reports, CZ interview report.

²⁴⁹ See Annex A, national country reports, EL, RO interview reports.

²⁵⁰ See Annex A, national country reports, LT interview report.

procedures allows for asset disposals or concealments.²⁵¹ Finally, stakeholders from Hungary noted that inefficiency in their national registers (such as fragmentation, poor interconnection, time-consuming and costly consultation) results in possibilities for debtors to hide their assets from insolvency practitioners.²⁵²

With specific regard to these powers in cross-border situations, stakeholders generally indicated that insolvency practitioners' powers are the same, but they face more difficulties due to the different rules governing insolvency procedures in each Member State, which require them to contact local stakeholders or practitioners.²⁵³ In this respect, one stakeholder assessed the EIR as being a positive way forward,²⁵⁴ while another stakeholder suggested that introducing authorities with the specific task to supervise the management of bankruptcy estates – as is the case with the Bankruptcy Ombudsman in Finland – in all Member States would help and support insolvency practitioners in cross-border situations.²⁵⁵ One stakeholder from the Netherlands²⁵⁶ also indicated that asset tracing outside the EU generally proves harder than within the EU. One stakeholder from Luxembourg indicated that, in cross-border situations, insolvency receivers will contact registers or persons only if there are indications that assets exist in a specific country.²⁵⁷ Similarly, a stakeholder from Greece noted that it would be financially sensible for the creditors to pursue contact with a local stakeholder in order to open enforcement actions only if a specific asset is of significant value and registered with a competent register abroad (i.e., immovable asset)²⁵⁸. As a general remark, some stakeholders indicated that, to their knowledge, cross-border situations are quite rare in their Member State,²⁵⁹ while one stakeholder from Latvia commented that insolvency procedures involving neighbouring countries, such as Lithuania and Estonia, are frequent in their experience.²⁶⁰

When asked whether clear differences appear in the practices and rules on the tracing, preserving and recovery of debtor's assets by insolvency practitioners depending on the type of asset involved, a consistent group of stakeholders stressed that asset tracing is easier for assets that are subject to compulsory registration in official or public registers, such as land registers, vehicle or vessel registers, weapon registers, etc., whereas the tracing of moveable assets – including immaterial ones, such as licenses – is more difficult.²⁶¹ On the contrary, some stakeholders stated that no significant differences exist depending on the type of assets involved.²⁶² Bank accounts were considered differently by stakeholders, as according to some they are easily traceable,²⁶³ while others²⁶⁴ deemed them more difficult to trace. Shares, participations or equity interests were generally considered quite difficult to track down, especially when held through complex structures,²⁶⁵

²⁵¹ See Annex A, national country reports, LV interview report.

²⁵² See Annex A, national country reports, HU interview reports.

²⁵³ See Annex A, national country reports, EL, NL interview report.

²⁵⁴ See Annex A, national country reports, CZ interview report.

²⁵⁵ See Annex A, national country reports, FI interview report.

²⁵⁶ See Annex A, national country reports, NL interview report.

²⁵⁷ See Annex A, national country reports, LU interview report.

²⁵⁸ See Annex A, national country reports, EL interview report.

²⁵⁹ See Annex A, national country reports, CZ, RO, SE interview reports.

²⁶⁰ See Annex A, national country reports, LV interview report.

²⁶¹ See Annex A, national country reports, CZ, DE, EL, ES, LV, NL, RO interview reports.

²⁶² See Annex A, national country reports, CZ, LT, SE, SI interview reports.

²⁶³ See Annex A, national country reports, CZ interview report.

²⁶⁴ See Annex A, national country reports, DE, ES interview reports.

²⁶⁵ See Annex A, national country reports DE, NL interview reports.

while one stakeholder from Romania indicated that tracing shares does not pose many obstacles.²⁶⁶ Stakeholders from Luxembourg²⁶⁷ and Romania²⁶⁸ pointed out differences regarding third parties' rights or claims and other types of assets.

As regards the effectiveness of particular practices or powers, some stakeholders identified tracing of registered assets as the most effective practice,²⁶⁹ and some others suggested that access by practitioners to higher amounts of information relating to the assets – e.g., information on corporate structures or information obtained by tax authorities – would enhance their powers, especially if the information is accessed before the opening of insolvency procedures.²⁷⁰ Stakeholders from Romania assessed their national mechanism allowing for the annulment of fraudulent transactions to the detriment of creditors as particularly effective.²⁷¹ Some stakeholders from Greece²⁷² and Lithuania pointed at the close cooperation between insolvency practitioners and judges competent for insolvency cases, as well as between national and cross-border institutions, as an effective practice. In this respect, one stakeholder mentioned that, according to her experience with cross-border situations with non-EU countries, bilateral agreements have helped stakeholders located in different countries to interact over national borders and even trace and recover assets.²⁷³ One stakeholder from Luxembourg assessed positively the national legislation allowing for the rights conferred on pledgees not to be suspended by the opening of insolvency procedures, and the provisions of the EIR allowing for the recognition of the judgment opening the insolvency proceedings and the appointment of insolvency practitioners.²⁷⁴ Another stakeholder from Luxembourg indicated that an effective practice would be transferring the contact obligation onto the registries (e.g., the obligation to provide information).²⁷⁵

When asked about the existence of any issues and/or limitations with regards to the powers and duties attributed to insolvency practitioners, and possible means to address these, some stakeholders indicated that divergences in Member States' laws – in relation to both their approach to insolvency and the powers assigned to practitioners – can cause inefficiencies in practice.²⁷⁶ In this respect, one stakeholder suggested that the creation of a cross-border mechanism at EU level for local authorities to support insolvency practitioners in tracing, preserving and recovering assets, would make the processes more clear and predictable, and also encourage insolvency practitioners to take action in cross-border situations.²⁷⁷ Stakeholders from Latvia also noted that the circulation of information between officials and practitioners is often slow and difficult, also due to strict requirements for personal data protection.²⁷⁸ One stakeholder from Luxembourg commented that the automatic recognition of bankruptcy judgments within the EU has greatly facilitated operations, in comparison to EEA countries (Switzerland, in particular) where it is necessary

²⁶⁶ See Annex A, national country reports RO interview report.

²⁶⁷ See Annex A, national country reports LU interview report.

²⁶⁸ See Annex A, national country reports RO interview report.

²⁶⁹ See Annex A, national country reports CZ, ES, LV interview reports.

²⁷⁰ See Annex A, national country reports LV, NL interview reports.

²⁷¹ See Annex A, national country reports RO interview report.

²⁷² See Annex A, national country reports EL, LT interview reports.

²⁷³ See Annex A, national country reports FI interview report.

²⁷⁴ See Annex A, national country reports LU interview report.

²⁷⁵ See Annex A, national country reports LU interview report.

²⁷⁶ See Annex A, national country reports CZ, LT, RO interview reports.

²⁷⁷ See Annex A, national country reports, FI interview report.

²⁷⁸ See Annex A, national country reports LV interview report.

to have the *exequatur* for the recognition of the bankruptcy judgment; however, some grey areas remain, such as simplified recovery procedures which are not recognised in all Member States, despite being very useful and inexpensive.²⁷⁹ Furthermore, another stakeholder from Luxembourg noted that recognition of insolvency practitioners from other Member States is not easy in Luxembourg, where proceedings are currently pending in relation to whether foreign practitioners need to be registered with the Luxembourg Trade and Companies Register to initiate a judicial action.²⁸⁰ Some stakeholders indicated that simplifying and digitalising access to asset registries and practitioners' registries and making them interconnected would be helpful, especially when dealing with so-called 'tax haven' countries.²⁸¹ Stakeholders also pointed out the need to simplify register consultation. For example, one stakeholder noted that, in Poland, it is currently not possible to search the Land and Mortgage Registers by entering the property address only.²⁸² One stakeholder from Romania further indicated that insolvency procedures are more often than not inefficient from the creditors' perspective since concrete sums are rarely recovered due to the inexistence of traceable assets in the possession of those responsible and, in many cases, assets are handed over in a used or damaged state.²⁸³

Finally, stakeholder views were collected on whether the current provision of Article 21 of the EIR may have any shortcomings and, if so, how these could be addressed. In this context, several stakeholders indicated harmonisation of national laws as their preferred way to address the (possible) shortcomings of Article 21 EIR.²⁸⁴ Other stakeholders stated that removing the limits of jurisdiction for appointed insolvency practitioners in cross-border cases would be the best approach.²⁸⁵ Among them, one stakeholder from the Netherlands noted that the creation of coercive measures at the EU level may come in conflict with the different underlying rationales of insolvency procedures in Member States, whereas harmonising coercive measures may lead to substantive deviations from other coercive measures available under national law in the Member States.²⁸⁶ Some stakeholders raised doubts on this option, as insolvency practitioners still have varying powers across Member States²⁸⁷ and the removal of jurisdictional boundaries may be perceived by many countries as an unacceptable erosion of the principle of territoriality of the courts' or insolvency practitioners' jurisdiction.²⁸⁸

Additionally, stakeholders in Greece and Lithuania favoured the creation of EU level substantive powers and tools, each driven by different principles;²⁸⁹ one of them further specified that these powers could entail the incorporation of single EU registries accessible to insolvency administrators.²⁹⁰ Two stakeholders in the Czech Republic also commented on this option expressing their view that EU level substantive powers and tools would need

²⁷⁹ See Annex A, national country reports LU interview report.

²⁸⁰ See Annex A, national country reports LU interview report.

²⁸¹ See Annex A, national country reports CZ, DE, EL, ES, NL, SI interview reports.

²⁸² See Annex A, national country reports, PL interview report.

²⁸³ See Annex A, national country reports RO interview report.

²⁸⁴ See Annex A, national country reports CZ, LU, LT, LV, RO, SI interview reports.

²⁸⁵ See Annex A, national country reports EL, ES, NL interview reports.

²⁸⁶ See Annex A, national country reports NL interview report.

²⁸⁷ See Annex A, national country reports CZ interview report.

²⁸⁸ See Annex A, national country reports CZ interview report.

²⁸⁹ See Annex A, national country reports EL, LT interview reports.

²⁹⁰ See Annex A, national country reports EL interview report.

to be driven by the same principles across Member States.²⁹¹ Finally, one stakeholder from Sweden expressed the opinion that the current rules are sufficient.²⁹²

2.3. Analysis and policy recommendations

In the following sections, an analysis of the findings concerning the cross-border situation with regard to the powers of insolvency practitioners to trace and preserve assets is outlined in Section 2.3.1, whilst Section 2.3.2 outlines some policy recommendations exploring how to utilise such powers to improve the ability to trace and preserve assets in cross-border situations.

2.3.1. Analysis

The following paragraphs offer an initial assessment of the findings concerning the powers of insolvency practitioners to trace and preserve assets of the debtor across the EU. This analysis was developed following the discussions of the Advisory Board Meeting to include information on the impact of national rules and practices (if any) on the practical application of the EIR, or the coordination of insolvency proceedings falling under the scope of the EIR.

Preliminary considerations

First of all, it is worth recalling that one might distinguish between bankruptcy law which applies to individuals, and corporate insolvency law which applies to legal persons. Bankruptcy law involves a process of collection and distribution of assets belonging to persons who cannot pay their debts and the subsequent distribution of these assets to creditors in full or partial satisfaction of debts owing to them. The process of individual execution by creditors against the debtor's assets is replaced by a process of collective execution. During the process of collection and distribution, the debtor is generally subject to certain restrictions and disqualifications. These may continue for a time while the debtor's affairs are investigated, and attempts may be made to locate any 'secreted' (hidden away) assets. After a period has elapsed, the debtor is given a debt discharge and a so-called 'second chance' to be free in general from existing debt burdens. Corporate insolvency law is divided between liquidation law and corporate rescue or restructuring law. Liquidation involves a process of collective execution, realisation and distribution against the assets of a legal person. Enforcement efforts by individual creditors are precluded with a stay/moratorium in place. Instead, the process is collectivised through a professional called a liquidator or insolvency practitioner who acts on behalf of all the creditors. Normally at the end of the process, the existence of the corporate debtor as a legal person is brought to an end.

Corporate rescue law involves consideration of the legal mechanisms in place to try to ensure the recovery and rehabilitation of viable but financially distressed businesses. Again, there is normally a moratorium on the enforcement of claims and debts against the debtor business; an insolvency practitioner may be appointed to stabilise the affairs of the ailing debtor; then either the insolvency practitioner and/or the debtor's management team may try to work out a restructuring plan with the debtor's creditors.²⁹³

²⁹¹ See Annex A, national country reports CZ interview report.

²⁹² See Annex A, national country reports SE interview report.

²⁹³ This may involve the injection of new funds into the debtor on a priority basis and/or existing creditors agreeing to forego part of their existing debts or agreeing to swap these debts for equity in the debtor's business. See generally S Paterson, 'Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards' (2014) 14 *Journal of Corporate*

As explained in Chapter 1, the main European instrument in the field is the EIR, which is essentially a private international law measure rather than a measure of substantive harmonisation.²⁹⁴ The EIR deals with issues of jurisdiction to open insolvency proceedings, the applicable law in respect of such proceedings, and the recognition and enforcement of insolvency proceedings that have been opened in other EU Member States. The EIR allocates jurisdiction to open insolvency proceedings and determines the applicable law in respect of such proceedings. It also establishes, however, basic minimum European standards in respect of the treatment of foreign creditors and notification of proceedings and also, to a certain extent, on the powers and duties of insolvency practitioners.

As explained in Chapter 1, the EIR should also be seen in the context of the UNCITRAL Model Law on Cross Border Insolvency.²⁹⁵ The UNCITRAL Legislative Guide on Insolvency²⁹⁶ points out that the insolvency practitioner has a central role in the effective and efficient implementation of insolvency law, with 'certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially.'²⁹⁷

Article 21(1) of the EIR provides that the insolvency practitioner²⁹⁸ appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings, in another Member State. The insolvency practitioner may 'in particular' remove the debtor's assets from the territory of the Member State in which they are situated, though this power is subject to Article 8 and 10 of the EIR.²⁹⁹ Article 21(2) also deals with the powers of the insolvency practitioner that has been appointed in relation to secondary proceedings. However, Article 21(3) requires that in exercising their powers, the insolvency practitioner must comply with the law of the State in which they intend to take action, in particular with regard to procedures for the realisation of assets.³⁰⁰ The requirement would seem to mean that while the content and extent of the insolvency practitioner's powers will depend on the law of the State of the opening of proceedings, the manner in which these powers are to be exercised will be governed by the law of the Member State in which the insolvency practitioner intends to act (and the latter, in particular, includes observance of procedures in that Member State for the realisation of assets).³⁰¹ More specifically, the insolvency practitioner's powers do not

Law Studies 333; 'Rethinking the Role of the Law of Corporate Distress in the Twenty-First Century' Law Society and Economy Working Paper Series, WPS 27-2014 December 2014.

²⁹⁴ The EIR is based on judicial cooperation in civil matters and its Treaty foundation is, therefore, Article 81 of the Treaty on the Functioning of the European Union (TFEU). See Consolidated Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> (last accessed 11 March 2022).

²⁹⁵ UNCITRAL Model Law on Cross-Border Insolvency, 1997, available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last accessed 11 March 2022), and for a list of countries that have adopted the model law, see Status: UNCITRAL Model Law on Cross-Border Insolvency, 1997, available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last accessed 11 March 2022).

²⁹⁶ UNCITRAL Legislative Guide on Insolvency Law, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf (last accessed 11 March 2022), p 174.

²⁹⁷ The EBRD suggests that an insolvency process cannot be imagined without the involvement of an insolvency practitioner who in many respects is the lynch pin of the process – the link between the court, creditors and the debtor – see EBRD, Assessment of Insolvency Office Holders: Review of the Profession in the EBRD Region (2014), available at http://www.inppi.ro/arhiva/anunturi/download/196_1f89a9d9c30bb669c1a3020f0960c8da (last accessed 11 March 2022). On the need for training and capacity building in the insolvency profession, see OECD, Asian Insolvency Systems: Closing the Implementation Gap, Paris, 2007.

²⁹⁸ Defined in Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2016, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022), Article 2(5).

²⁹⁹ Article 8 is concerned with third party rights in rem and Article 10 with reservation of title. See *Ibid.*

³⁰⁰ See Virgos-Schmit, paras 158–166; Virgos and Garcimartin, *European Insolvency Regulation: Law and Practice* (2004), pp 195–199; Bayfield and Peters, in Moss et al. (eds), pp 142–145; Moss and Smith, *Ibid.*, pp 371–375.

³⁰¹ See Virgos-Schmit, para 164(c).

include 'coercive measures' or the 'right to rule on legal proceedings or disputes'. Consequently, it would appear that if an insolvency practitioner needs to take coercive measures in another Member State, 'with regard to assets or persons'³⁰² located there, the insolvency practitioner must apply to the authorities of the State where the assets or persons are located to have them adopted or implemented.³⁰³ It is, apparently, the case that in some Member States an insolvency practitioner may also act as a judge, and rule on disputes.³⁰⁴ Such power may not be exercised by an insolvency practitioner under the EIR.

The definition of insolvency practitioner

Besides collecting information on the different powers granted to insolvency practitioners across the Member States, the national data collection activities also showed that the so-called 'insolvency practitioner' is known by different names in different countries. Expressions such as 'administrators', 'trustees', 'liquidators', 'supervisors', 'receivers', 'mediators', 'curators', 'officials', 'office holders', 'judicial managers' or 'commissioners' are used across the EU. In this context, it is worth recalling that the original version of the EIR used the expression 'liquidator' and defined this to mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested, or to supervise the administration of the debtor's affairs.³⁰⁵ The person who took control of a debtor's affairs after insolvency proceedings had been opened was referred to throughout the original EIR as a liquidator even though that person might be charged with the task of preparing a restructuring plan. This regulation envisaged the liquidation of assets as the paradigmatic insolvency proceeding, hence the use of the expression 'liquidator'. The recast EIR envisages, however, insolvency as encompassing a broader range of procedures that includes debt restructuring and restoring the financial health of ailing business enterprises, as well as simply the liquidation of their assets. Therefore, it opts for more neutral terminology and uses the expression 'insolvency practitioner' rather than liquidator. 'Insolvency Practitioner' is defined as meaning 'any person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or in part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii); or (v) supervise the administration of the debtor's affairs'.³⁰⁶

The more recent Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt ('Directive on restructuring and insolvency') is concerned with restructuring and debt discharge, as well as insolvency, hence the need for broader and more inclusive terminology. It proved impossible, however, to settle on a single expression as such. Article 2(12) of the Directive on restructuring and insolvency refers to a 'practitioner in the field of restructuring' as meaning any person or body appointed by a 'judicial or administrative authority to carry out, in particular, one or more of the following tasks: (a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan; (b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority; (c) taking partial control over the assets or affairs of the debtor during negotiations.' Article 26 then uses the

³⁰² Ibid, para 164(a).

³⁰³ Ibid.

³⁰⁴ Moss and Smith, in Moss *et al.* (eds), p 374.

³⁰⁵ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 3.6.2000, p. 1-18, available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32000R1346> (last accessed 11 March 2022), Article 2(b).

³⁰⁶ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022), Article 2(5).

somewhat empty, umbrella term 'practitioner' to refer to practitioners appointed by a judicial or administrative authority in procedures concerning restructuring, insolvency and discharge of debt.

In conclusion, both at national and EU level, it should be kept in mind how differences in the specific powers of insolvency practitioners may stem from the specific type of role that each country attributes to such professionals (independently of their 'name') across the different insolvency proceedings.

Powers and limits of insolvency practitioners

Insolvency proceedings typically require the replacement, in whole or in part, of the debtor's management authority. The main role of the insolvency practitioner is to maximise the interests of creditors and other parties harmed by the insolvency; hence the fact that the quintessential powers of an insolvency practitioner involve collecting the assets of the debtor with a view to administering and distributing them. This task cannot be performed if the assets are secreted or kept hidden by the debtor company's directors or management. In most legal systems, it was noted how the latter often become subject to a duty to make the assets available to the insolvency practitioner and to cooperate with the insolvency practitioner in the process of tracing and tracking down the assets. Persons who might be able to give useful information on the location of assets and to facilitate identification and recovery of the same may also become subject to a duty to provide such information and to facilitate the carrying out of the insolvency practitioner's task in the identification and recovery of assets. It should be kept in mind that the powers of the insolvency practitioner in terminal insolvency proceedings, which wind up a business, may differ from those in rescue proceedings, which reorganise a business.

The data collected at national level and outlined in Section 2.2 noted the existence of similarities and differences across Member States in terms of national rules concerning the powers provided to insolvency practitioners to trace and preserve assets. In general, it appears that insolvency practitioners across the EU generally have the benefit of broad powers to access information and to demand testimony from individuals such as directors or managers. The availability of a statutory mandate to investigate, often under the protection of secrecy, can be a powerful weapon in large asset recovery cases. Among other things, an insolvency practitioner is generally entitled to bring claims against a company's former directors for any wrongdoing in involving the company and leading to its insolvency. Claims for restitution or damages can also be made against third parties dishonestly assisting with or participating in that wrongdoing.

However, if defendants or assets are located in a foreign jurisdiction, the question arises about how far an insolvency practitioner's information gathering powers may be exercised outside the jurisdiction of the Member State that opens insolvency proceedings and whether any particular limitations are encountered. In this regard, rather than particular issues or limitations directly stemming from divergent substantive national laws *per se*, difficulties encountered to trace and preserve assets in cross-border situations were mentioned to mainly stem from the occurrence of more practical matters. First and foremost, the costs associated with the tracing and recovery procedures constitute barriers, leading to asset tracing procedures that could be carried out to be only pursued in practice when there may be already some knowledge of the existence of a high-value asset in another country. In this sense, one may, even more, understand how rather than solely rely on the powers to trace and obtain information, insolvency practitioners heavily rely on the debtor's collaboration and obligations to provide all information. Language barriers may also play a role, as well as potential inefficiencies stemming from the length of administrative routes to request and obtain information from certain authorities, or the non-speedy circulation of information between authorities or competent bodies holding information within the same Member States.

As regards the practical existing tools in cross-border situations, however, reference to the functioning of the mechanisms of Article 21 of the EIR were often mentioned by national reporters. In this context, it is worth noting how Recital 4 of the preamble to the EIR refers to the fact that the activities of undertakings have more and more cross-border effects and are, therefore, increasingly being regulated by EU law. The insolvency of such undertakings also affects the proper functioning of the internal market, and there is a need for an EU act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.' Nevertheless, it refers to the coordination of national measures, which implies that the principle of territorial limitation on the measures adopted by a particular Member State remains a general proposition.

Looking at the practical application of the mechanisms of the EIR, in the UK (pre-Brexit), for instance, the exercise of an insolvency practitioner's powers in other Member States was an issue in *Wallace v Wallace*.³⁰⁷ In that case, it was held that the liquidator of an insolvent company was entitled to an order under the UK Insolvency Act 1986, Section 236(3), requiring the company's former bookkeeper who was resident in Ireland, to deliver up the books and records of the company in his possession or control. Reference was made to the EIR and the authority of a liquidator to exercise the powers conferred on him by UK domestic law in other Member States. Moreover, the former bookkeeper was sufficiently connected with the UK jurisdiction for it to be just and proper to make an order despite the foreign element. He had been an important part of the company's operations and if he had possession of the company's books and records, he could not complain that an order requiring him to make those books and records available on a winding-up involved any excess of jurisdiction by the English court. That court had an entirely legitimate interest in requiring the bookkeeper, even if abroad, to make such documents and information available to the liquidator.

The same result was reached on the basis of somewhat different reasoning in *Re Akkurate Ltd (In Liquidation)*.³⁰⁸ The court held that the EIR extended the territoriality of purely domestic insolvency provisions. Proceedings under Section 236(3) of the UK Insolvency Act derived directly from and were closely connected to insolvency proceedings, and the aim of the EIR was to confer jurisdiction on the courts of the Member State in which the insolvent entity had its COMI. Therefore, the EIR conferred extraterritorial jurisdiction on the English court to make orders against EU-resident parties under Section 236.

Reference was made to *Schmid v Hertel*³⁰⁹ where the Court of Justice of the European Union ('CJEU') mentioned³¹⁰ how Article 3(1) states unequivocally that '[t]he courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings'; thus, the location of the debtor's assets is irrelevant, except in so far as it may be a factor to be taken into account in determining where the centre of the debtor's main interests is and/or whether secondary proceedings need to be opened under Article 3(2). The place of residence of any potential defendant to an action which may (if necessary) be subsequently brought within those proceedings by the liquidator to set a transaction aside and recover additional assets for the benefit of the creditors is likewise irrelevant to the question of which is the competent court to open proceedings. Such action comes within the jurisdiction of the court that has

³⁰⁷ *Wallace v Wallace* [2019] EWHC 2503 (Ch), [2019] BCC 1224, available at <https://www.bailii.org/ew/cases/EWHC/Ch/2019/2503.html> (last accessed 11 March 2022). Please note that the case-law described in relation to the UK relates to a time when this country was still a Member State of the European Union, and hence the EIR rules were applicable also in respect of the UK.

³⁰⁸ *Akkurate Ltd, Re* [2020] EWHC 1433 (Ch), available at <https://www.bailii.org/ew/cases/EWHC/Ch/2020/1433.html> (last accessed 11 March 2022).

³⁰⁹ Judgment of the Court of Justice of the European Union, *Ralph Schmid v Lilly Hertel*, C-328/12, EU:C:2014:6, available at <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-328/12> (last accessed 11 March 2022).

³¹⁰ *Ibid*, para 30.

(already) opened such proceedings because it is an action that derives directly from such proceedings and is closely connected to them.

2.3.2. Policy recommendations

Based on the information collected in the legal desk research and field research at the national level, as well as the information discussed with the relevant experts in the Advisory Board Meeting, the following subsection contains some policy recommendations exploring how to utilise such powers to improve the ability to trace and preserve assets in cross-border situations. In particular, it is submitted that Article 21 of the EIR could be supplemented by an EU measure that requires each Member State to introduce a judicial mechanism that allows the 'freezing' or preservation of bank accounts in its jurisdiction in appropriate circumstances. The appropriate circumstances would include the support of substantive insolvency proceedings that have been opened either in that State or in another Member State.

This measure could take the form of a non-binding recommendation or a Directive. It could also take the form of an express extension of the European Account Preservation Order ('EAPO')³¹¹ procedure to insolvency practitioners who are not currently and expressly designated as being potential beneficiaries of the procedure. There are other aspects of this procedure and its application to insolvency proceedings that might usefully be clarified. The EAPO procedure enables a court in one Member State to freeze funds that are held in the bank account of a debtor in another Member State (with the exception of Denmark).³¹² The mechanics for obtaining an EAPO are set out in Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters ('Regulation (EU) 2016/1823')³¹³ and the procedure is intended to serve as an additional and alternative procedure to existing legal procedures in each Member State. The Regulation is relatively new having been in force only from 18 January 2017. The content of all the EAPO-related forms is laid down in Commission Implementing Regulation (EU) 2016/1823.³¹⁴

The following subsections will provide some greater detail on the EAPO procedure under Regulation (EU) 2016/1823, focusing on its relationship with insolvency proceedings.

Overview of the EAPO procedure

The EAPO procedure takes place without the debtor having been informed, to prevent the debtor from moving, hiding or spending the funds in the account. The objective of such procedure is to make EU debt recovery easier, and can only be used in cross-border cases. However, according to Article 2(c) of Regulation (EU) No 655/2014, the Regulation (and, therefore, the EAPO) cannot apply to claims of 'a debtor in relation to whom bankruptcy

³¹¹ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59 – 92, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0655> (last accessed 11 March 2022).

³¹² Denmark is the subject of an opt out from the Regulation. This means that creditors based in Denmark may not apply for an EAPO and one may not obtain an EAPO in relation to a Danish bank account.

³¹³ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59 – 92, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0655> (last accessed 11 March 2022).

³¹⁴ Commission Implementing Regulation (EU) 2016/1823 of 10 October 2016 establishing the forms referred to in Regulation (EU) No 655/2014 of the European Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, C/2016/6339, OJ L 283, 19.10.2016, p. 1-48, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1823> (last accessed 11 March 2022).

proceedings, proceedings for the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions, or analogous proceedings have been opened’.

Even if the so-called ‘insolvency exclusion’ is not intended to prevent companies in insolvency proceedings from applying for EAPOs, insolvency practitioners should be empowered to obtain such EAPOs. EAPOs may be a very valuable tool to support asset tracing and recovery including the avoidance of suspect transactions that have occurred in the vulnerable period prior to the commencement of formal insolvency proceedings. EAPOs may also be a very valuable tool to enhance the prospects of recovery in wrongful trading style actions brought against company directors by insolvency practitioners. Nevertheless, the potential application of the EAPO procedure to transactional avoidance and wrongful trading actions as well as other insolvency-related actions is somewhat problematic.

The requirements for obtaining an EAPO are set out in Article 7, which is supplemented by Recital 14 of the Regulation (EU) No 655/2014. Article 7 provides that the court shall issue an EAPO when the creditor has submitted sufficient evidence of an urgent need for protective measures (in the form of an EAPO), because there is a real risk that, without such measures, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult. Where the creditor has not yet obtained an enforceable Member State judgment the creditor is also required to submit sufficient evidence to satisfy the court that it is likely to succeed on the substance of his claim against the debtor.

Effects of an EAPO

According to the provisions of Regulation (EU) No 655/2014, the effect of an EAPO is governed by the law of the location of the bank account in question³¹⁵ and has the same rank as an equivalent order under national law. Therefore, if the equivalent national order in one Member State gives the claimant priority over other creditors in respect of the frozen bank account, an EAPO will do the same. On the other hand, if there is no priority in national law, the effect of an EAPO will be the same. EAPOs will not, therefore, be uniform in their effect across the EU.

Making an application for an EAPO

The effect of an EAPO might differ from Member State to Member State, but the means of application will be the same. An application is made, without notice to the defendant, in writing on the EU's standard form. In accordance with Regulation (EU) No 655/2014, the claimant must declare that it is aware that ‘any deliberately false or incomplete statements may lead to legal consequences under the law of the Member State in which the application is lodged’.³¹⁶ This is a matter of national law.

The court must give its decision within 10 working days of the application if the applicant has not already obtained judgment and within 5 working days if the applicant has already obtained judgment. As per Regulation (EU) No 655/2014, the relevant periods may be extended, however, if the court decides to hear oral evidence or if it court decides that the applicant must provide security.³¹⁷

If the claimant has not issued substantive proceedings when it applies for an EAPO, it has 30 days from its application or 14 days from the court's making the order, whichever is the

³¹⁵ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59 – 92, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0655> (last accessed 11 March 2022), Article 32.

³¹⁶ Ibid, Article 8(2).

³¹⁷ Ibid, Article 18.

latter, to institute the action, though this period can be extended, as per Article 10 of Regulation (EU) No 655/2014. If the claimant fails to start substantive proceedings, the EAPO shall terminate.

Article 12(1) of Regulation (EU) No 655/2014 provides if the claimant does not yet have judgment, the court is obliged to order the applicant to provide security 'for an amount sufficient to prevent abuse of the procedure... and to ensure compensation for any damage suffered by the debtor' as a precondition to making the order. Alternatively, Article 12(2) provides if the claimant already has judgment, the court has greater discretion regarding security. The court may require the provision of security if it considers security 'necessary and appropriate in the circumstances of the case.'

Accounts caught by an EAPO

A bank for the purposes of Regulation (EU) No 655/2014 is an 'undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account'. An EAPO can be granted in respect of a joint account as well as an account in the sole name of the defendant. Monies in a joint account will only be frozen to the extent that they may be subject to preservation under the law of the location of the bank account in question.³¹⁸ It is worth noting that the relevant definition was limited from the original proposal where the definition of 'bank accounts' extended far beyond what would ordinarily fall within that term and included, for example, shares, bonds and derivatives of all kinds held with, issued by or entered into with a bank.

Identifying bank accounts

According to Regulation (EU) No 655/2014, if a claimant wants to obtain an EAPO, it must provide the name and address of the bank at which the defendant holds accounts or other means to identify the bank (i.e., IBAN or BIC) and, if available, the account numbers.³¹⁹ If the claimant does not yet have judgment against the defendant, the claimant has no ability under the Regulation to demand information about the defendant's bank accounts. However, if the claimant has judgment against the defendant, if the claimant has reason to believe that the defendant holds an account with a bank in a specific Member State and if the judgment is enforceable, the claimant can ask the court to which it has applied for an EAPO to obtain information from the authorities in the Member State where the account is thought to be located about accounts held there by the defendant.³²⁰

The court to which the application for an EAPO has been made transmits the request to the 'information authority' in the country in which the defendant's bank accounts are supposedly situated, as stipulated by Article 14(3) of Regulation (EU) No 655/2014. Article 14(4) and (5) provide that the information authority must have available to it under its national law at least one of four methods to identify bank accounts held by the defendant. These methods are: an obligation on banks in its territory to disclose whether a defendant holds accounts with them; access to public registers or other information held by public authorities about bank accounts; the possibility of its courts obliging the defendant to identify its accounts, coupled with an in personam order preventing the defendant from withdrawing funds from its accounts up to the amount of the EAPO; and other efficient and effective methods, provided that they are not disproportionately costly or time-consuming.

Article 23(1) of Regulation (EU) No 655/2014 provides that an EAPO shall be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders.

³¹⁸ Ibid, Article 30.

³¹⁹ Ibid, Articles 8(2)(d) and (e).

³²⁰ Ibid, Article 14(1).

Assuming that a claimant knows the location of the defendant's bank accounts or can find out such information, an EAPO (in standard form) can be made and, if so, it must be recognised and is enforceable in all other Member States without any special procedure.³²¹ Article 23(3) then stipulates that the EAPO must be transmitted to the competent authority in the location of the bank accounts. The competent authority must then take the necessary steps to have the order enforced.³²² This means serving the EAPO on the bank(s) identified in it.³²³

According to Regulation (EU) No 655/2014, when a bank receives an EAPO, the bank must implement the EAPO 'without delay'.³²⁴ The bank can notify the defendant whose accounts it has blocked that the bank has received an EAPO.³²⁵ By the end of the third working day following implementation of an EAPO, the bank must issue a declaration to the authorities in its State, for onward transmission to the court that granted the EAPO, setting out whether, and if so what, funds have been frozen by the EAPO and the date on which the EAPO was implemented.³²⁶ Banks are entitled to charge fees for implementing an EAPO but only if, and to the extent, that banks are able to charge for implementing equivalent orders made under national law.³²⁷

Conclusions

To conclude, it is not certain whether the EAPO procedures will be widely used but there is a strong case for clarifying that the procedure may be availed of by insolvency practitioners who are pursuing the goals of asset tracing and recovery in respect of the assets of an insolvency debtor. The strict requirements for the issuing of an EAPO and the need for the claimant to provide security could deter the use of EAPOs. Such requirements, however, are justified by the need to balance the rights of both claimants and defendants.

Alternatively, in simple cases, the EAPO procedure should operate relatively smoothly and straightforwardly. In more complex cases, however, an EAPO application may be neither easy nor cheap. There are likely to be challenges before the court that granted the EAPO as the defendant questions its grant, as well as in the courts of the frozen accounts as the defendant applies to release funds so as to provide ordinary living expenses and legal advice.

The provisions allowing claimants to search for bank account details are limited to post-judgment cases, and may work well for countries that maintain central registers of bank accounts, but can come across as cumbersome and impracticable in the case of countries that do not.

Moreover, the effect of EAPOs will not be uniform across the EU. The ranking of EAPOs compared with other claims for payment, including banks' rights of set-off, will depend upon national law. The same is true in respect of the liabilities of banks for failure to comply with the terms of an EAPO.

In Section 4.3.2, please note that there is a similar policy recommendation concerning freezing injunctions in common law jurisdictions. This recommendation is considered in the context of creditor tools, and overlaps with the objectives of the EAPO procedure.

³²¹ Ibid, Article 22.

³²² Ibid, Article 23(5).

³²³ Ibid, Recital (25).

³²⁴ Ibid, Article 24(1).

³²⁵ Ibid, Article 25(4).

³²⁶ Ibid, Article 25(1).

³²⁷ Ibid, Articles 43(1) and (2).

2.4. Case study

Handelsveem BV v Hill

Court

Hoge Raad (Netherlands)

Judgment Date

18 March 2011

Summary

An order made in England under the Insolvency Act 1986 s.366, requiring a third party in the Netherlands to provide a list of goods held on behalf of the bankrupt, derived directly from the insolvency proceedings and was closely linked with them as required by the EIR. This is because the English court derived from that provision its competence to order any person appearing before it to give information concerning the bankrupt or his dealings, affairs and property.

Detailed facts and judgment

The appellant (H) appealed against an order of a Netherlands court granting leave for the enforcement of an order made under the Insolvency Act 1986 s.366 that provides a detailed list of goods stored on behalf of the bankrupt (B).

In November 2008, a bankruptcy order had been made against B in England. In July 2009, the trustees in bankruptcy, relying on the EIR obtained the order subject to enforcement, which required H to provide a detailed list of all goods stored at its premises for B during 2008, together with related documents. That order was upheld by the Netherlands courts and the appeal was dismissed.

The order of July 2009 was made on the basis of the UK Insolvency Act, from which the English court derived its competence to order any person appearing before it to give information concerning the bankrupt or his dealings, affairs and property. Accordingly, that order derived directly from the insolvency proceedings and was closely linked with them as required by the Insolvency Regulation. Such a link had to be assessed on the basis of the law of the Member State in which the insolvency proceedings were opened.

According to the EIR, a trustee appointed in another Member State was able to exercise all the powers conferred on him by the law of the Member State in which the insolvency procedure was opened. The EIR limited the exercise of those powers to those which did not comprise the use of coercive measures. However, the prohibition on the use of coercive measures did not apply in a case such as this, where the trustees were acting in another Member State on the basis of a judgment that was recognised and enforceable in other Member States under the Insolvency Regulation.

3. Access to asset registers and information

3.1. Introduction

This section sets out the findings of the Study in relation to the asset registers available across the Member States including the conditions for insolvency practitioners to access such registers.

Section 3.2 describes the main findings of the data collected by means of desk research questionnaires and interviews completed with national stakeholders across the Member States, to shed light on the practical experiences on the use of asset registers and any issues or limitations that insolvency practitioners may face to access the information therein. Section 2.3 sets out the Study Team's analysis in respect of the topic at hand, with a particular focus on particular issues stemming from the research findings, as well as some policy recommendations exploring how best to improve the operation of registers in cross-border situations. Finally, Section 2.4 provides a case study in respect of Spain which provides an example of asset tracing in relation to third parties that might be held liable to creditors as part of the insolvency proceedings.

3.2. Summary of the main findings of the data collected

With regards to asset registers, the data collected via desk research at national level was aimed, first of all, at outlining if and to what extent insolvency practitioners have the powers to access asset registers in the context of insolvency proceedings. The overview of the data collected in this regard is provided in Chapter 2.

In addition, a mapping of the most relevant asset registers available across all Member States was also conducted. This mapping was aimed at identifying the types of asset registers available in each country, including a brief description of the information contained in such registers, the responsible authorities, the geographical scope of the register, as well as the conditions to access such registers respectively for national insolvency practitioners and insolvency practitioners from another Member State.³²⁸ Finally, the desk research looked into whether, besides asset registers, national laws provide for any other ways for insolvency practitioners to obtain information on assets, and whether there are any general requirements (e.g., in civil, public administrative or international law) that might restrict the access by insolvency practitioners to information on assets (e.g., due process, protection of property, data protection, national sovereignty, treaty obligations).

The paragraphs in Section 3.2.1 below offer a brief overview and examples of the data collected in this regard. Additionally, interviews with stakeholders at national level also allowed the collection of information on the efficacy of asset registers available across the Member States, including in cross-border situations, and any particular elements that may hinder access to information. Examples of stakeholders' views on the matter at hand are also outlined in Section 3.2.2 below.

³²⁸ The list of these registers for each Member State, including a brief description of such register, authority responsible for its functioning, its geographical and internet address and other relevant information are included Annex A, national country reports, desk research questionnaires, question 4.

3.2.1. Desk research findings

i. Overview of asset registers across the Member States

The data collected via desk research at national level allowed the pinpointing of the available asset registers available across the Member States, which may serve the tracing of assets in the context of insolvency proceedings. The comparison of the data collected not only allowed the identification of differences with regards to the existence and/or the content of such registers but also similarities of approaches taken across the countries with regards to the systems in place to register certain types of assets. In particular, the analysis of the data collected allowed the Study Team to determine the existence of the following main broad categories of registers:

- Cadastre or land registers;
- Security registers;
- Commercial, trade or company registers;
- Beneficial ownership and trust registers;
- Banking and tax authority/accounting registers;
- Patent and trademark registers;
- Registers of vehicles, ships and aircraft;
- Other types of registers.

Traditionally, systems of land and immovable property registration allow to record matters concerning ownership, possession, or other rights *in rem*, and serve as a tool to provide evidence of title, or aid transactions and provide reliable information about ownership of and interests affecting land and property. Hence, it should not come as a surprise that all Member States were found to keep **cadastre, land or property registers**, such as the *Registre du cadastre* in Belgium,³²⁹ the *Registro de la propiedad* in Spain,³³⁰ or the *Kadaster* in the Netherlands.³³¹ In some countries, more than one registration system exists to record information on real estate. In Croatia, for instance, the system of registration of real estate and rights is based on two registers, namely: i) the cadastre,³³² and ii) the land register (*Zemljišne knjige*). The cadastre is a record that contains data on the particles³³³ and buildings that lie permanently on the earth's surface or below it. The cadastral records are kept by the regional offices for the cadastre of the State Geodetic Administration and the City Office for Cadastre and Geodetic Affairs of the City of Zagreb. On the other hand, land registers are public registers in which data on the legal status of real estate relevant to legal transactions are entered. The land register consists of a general ledger and a collection of documents. Land registers are kept in the land register departments of the municipal courts. It should be noted that where such double registration systems exist, higher possibilities of finding inconsistent information may arise. For instance, in Croatia, it was noted that occasionally the land register and the cadastre systems present different data (e.g., on ownership of the land) as the land registers were not regularly updated in the past.

³²⁹ Resigtre du cadastre, available at https://e-justice.europa.eu/109/EN/land_registers_in_eu_countries?BELGIUM&init=true&member=1 (last accessed 11 January 2022).

³³⁰ Registro de la Propiedad (Land Register), available at <https://www.registradores.org/el-colegio/registro-de-la-propiedad> (last accessed 11 January 2022).

³³¹ Kadaster, available at www.kadaster.nl (last accessed 6 April 2022).

³³² Državna geodetska uprava (State Geodetic Administration), available at <https://oss.uredjenazemlja.hr/public/cadServices.jsp?action=dkpViewerPublic> (last accessed 11 January 2022).

³³³ In the Croatian language, 'cadastral particle' refers to a part of the land.

Therefore, even though the land register has primacy over the cadastre, the latter is nonetheless an important indicator of a potentially different situation (for instance, of ownership) in reality. In Ireland, this is also the case, with the Land Register and Register of Deeds.³³⁴ The distinction is linked to the title of the property rather than the type of property. The Land Register is a more modern system, and all property needs to be registered with it upon transfer. The land register guarantees title, whereas the register of deeds does not. For property not registered in the land register, the only way to ensure good title is to examine the deeds themselves. In Latvia, two registers were also identified where information on real estate is recorded; the so-called 'National computerised landbook'³³⁵ coexists with the 'State Land Register',³³⁶ with the latter possibly containing information on real estate which may not yet be registered in the former (e.g., land plots which are still in the process of receiving title).

Despite all Member States having a real estate register, however, differences appear with regards to the information that may be contained therein. In most countries, the land registers also contain further information on the security rights attached to the immovable property. An example of such joint registration system can be found in the Property Information Register in Finland,³³⁷ or in the National Land Register³³⁸ of Romania. Furthermore, in Cyprus, the Land Register³³⁹ contains information on the identity of every registered plot of land or unit of immovable property (location, description, surface area, fiscal value, etc.). It also contains information on the holders of the legal title of real property, as well as records of all registrable interests on real property, including mortgages, charges *in rem*, encumbrances, deeds of sale, easements, tenancies, restrictive covenants and other related information. In Italy, in addition to the 'National Land Register Search', the Registrar's office (*Conservatoria*)³⁴⁰ also allows for a Mortgage Inspection. A similar situation appears in Spain, where the purpose of the land register³⁴¹ is to also record acts and contracts relating to ownership and other rights *in rem* over real estate, including security interests, liens and encumbrances over the assets registered. A further example is Bulgaria, where according to the Cadastre and Property Register Act,³⁴² the Property Register consists of lots of immovable properties.³⁴³ The following acts are recorded in the Property Register:³⁴⁴ acts recognising or conveying right of ownership or establishing, conveying, modifying and terminating other rights *in rem* over immovable properties, foreclosures, as well as other legal actions, circumstances and legal facts for which registration is envisaged by law.³⁴⁵ Additionally, certain court claims related to real estate

³³⁴ These are available at <https://www.prai.ie/> (last accessed 13 January 2022).

³³⁵ Valsts vienotā datorizētā zemesgrāmata (National computerised landbook), available at <https://www.zemesgramata.lv/> (last accessed 11 January 2022).

³³⁶ Valsts zemes dienests (State Land Register), available at <https://www.vzd.gov.lv/lv> (last accessed 11 January 2022).

³³⁷ Finnish Property Information Register, available at <https://www.maanmittauslaitos.fi/asioi-verkossa/asiointipalvelu-henkiloasiakkaille> (last accessed 11 January 2022).

³³⁸ Available at <https://www.ancpi.ro> (last accessed 11 January 2022).

³³⁹ Land Register, Legal Database, available at <https://portal.dls.moi.gov.cy/en-us/land-information-system/Pages/default.aspx> (last accessed 11 January 2022).

³⁴⁰ Conservatoria, available at <https://www.conservatoria.it/> (last accessed 11 January 2022).

³⁴¹ Registro de la Propiedad (Land Register), available at <https://www.registradores.org/el-colegio/registro-de-la-propiedad> (last accessed 11 January 2022).

³⁴² Закон за кадастъра и имотния регистър (Cadastre and Property Register Act from 01.01.2001 with later amendments), available at <https://www.lex.bg/laws/ldoc/2134918656> (last accessed 11 March 2022).

³⁴³ Закон за кадастъра и имотния регистър (Cadastre and Property Register Act from 01.01.2001 with later amendments), available at <https://www.lex.bg/laws/ldoc/2134918656> (last accessed 11 March 2022), Article 3(1).

³⁴⁴ Property Register, available at <https://portal.registryagency.bg/en/> (last accessed 11 January 2022).

³⁴⁵ Закон за кадастъра и имотния регистър (Cadastre and Property Register Act from 01.01.2001 with later amendments), available at <https://www.lex.bg/laws/ldoc/2134918656> (last accessed 11 March 2022), Article 3(2).

(e.g., court claim for termination of an agreement that transfers property rights) are subject to registration with the Property Register. The court claims which have to be registered are prescribed in the Property Act³⁴⁶ and the Regulation on Entries.³⁴⁷ In the Netherlands, the *Kadaster*³⁴⁸ does not only contain information on real estate but for all registered goods (*registergoederen*), i.e., all goods for which registration in a public register is necessary for a transfer of a good or creation of a right in relation to a good (e.g., right of mortgage). This inter alia concerns real estate, large ships and aircraft. Similarly, in Denmark, the 'Property and personal book' (*Ting- og personbog*)³⁴⁹ is the real estate, security rights and transport register.

Interestingly, it is worth highlighting that, in Ireland, unlike the other Member States, there is an online **probate register**.³⁵⁰ This contains details of Grants of Representation (i.e. Grants of Probate Letters and Administration) which have been issued in the Republic of Ireland since 1992. The authority responsible for the register is the Office of the Examiner of the High Court.

On the contrary, there are other countries where securities attached to assets noted in the land (or other) registers are recorded in separate **security registers**. An example of this situation was, until very recently, encountered in Lithuania, where besides the Real Estate and Cadastre Register,³⁵¹ a specific Mortgage Register was also kept by the State Enterprise Centre of Registers (*Valstybės įmonė Registrų centras*), precisely to register and manage contractual and legal mortgage and mortgage transactions. It should, however, be noted that this Mortgage Register has recently ceased to exist: as of 1 January 2022, pledges on movable assets will be registered in the Register of Contracts and real estate mortgages will be registered in the Real Estate Register. Likewise, in the Czech Republic, on the one hand, the real estate cadastre³⁵² contains a set of data on real estate as defined by Act No. 99/2013 on Real estate Cadastre, including their inventory, description, their geometric and positional determination, and the registration of rights to these real estates. On the other hand, a right of pledge over immovable property not entered in the public register, a factory and movable property in bulk shall be created by an entry in the Register of Pledges held by the notarial chamber.³⁵³ The entry in the register of pledges shall be made by the notary who drew up the pledge agreement without undue delay after the conclusion of the pledge agreement.³⁵⁴

In this context, it is worth noting how other types of security registers are found in certain countries. For instance, in Bulgaria, the Central Register of Special Pledges³⁵⁵ exists to

³⁴⁶ Закон за собствеността (Property Act of 1999 with later amendments), available at <https://www.lex.bg/laws/ldoc/2122102787> (last accessed 11 March 2022), Article 112.

³⁴⁷ Правилник по вписванията (Entries Regulation of 1951 with later amendments), available at <https://www.lex.bg/laws/ldoc/25375744> (last accessed 11 March 2022), Articles 11-14.

³⁴⁸ Kadaster, available at www.kadaster.nl (last accessed 11 January 2022).

³⁴⁹ Ting- og personbog, available at <https://www.tinglysning.dk/tmv/forespoergul> (last accessed 11 January 2022).

³⁵⁰ Probate Register Online, available at <https://www.courts.ie/probate-register-online> (last accessed 3 March 2022).

³⁵¹ Nekilnojamojo turto kadastras ir registras, available at <https://www.registrucentras.lt/turtas/> (last accessed 11 January 2022).

³⁵² Real estate cadastre, available at <https://nahlizenidokn.cuzk.cz/> (last accessed 11 January 2022).

³⁵³ If the pledge agreement stipulates so, the pledge right to the movable property shall be created by entry in the register of pledges. This register is not public and as only notaries have access. However, notaries shall provide the insolvency practitioner with assistance without undue delay upon his written request. See also Občanský zákoník (Civil Code, 22 March 2012, with its later amendments), Official Journal 2012, No. 89, available at <https://www.zakonyprolidi.cz/cs/2012-89>, Section 1319 and Notářský řád (Notary Order, 7 July 1992 with its later amendments), Official Journal 1992, No. 358, available at <https://www.zakonyprolidi.cz/cs/1992-358>, Section 35f (both last accessed 6 December 2021).

³⁵⁴ All paragraphs result from the Section 1319 of the Czech Civil Code.

³⁵⁵ The Central Register of Special Pledges does not have a website. However, general information is available at https://iisda.government.bg/adm_services/services/service_provision/61887 (last accessed 5 April 2022).

record the circumstances and acts as required by the Law on Special Pledges.³⁵⁶ More specifically, it contains information about existing special pledges (i.e., the property subject to the special pledge, identification of the creditor, the debtor, the type and amount of the obligation of the debtor, etc.). Apart from special pledges, this record may also include information about lease agreements, sale-purchase agreements with retention of title (ROT) clause, etc. A similar register, i.e., the Central Information on Registered Pledges³⁵⁷ is accessible in Poland. In Croatia, encumbrances, rights or prohibitions on movable property, shares, stakes and business stakes are also recorded in a unique database, i.e., the Financial Agency ('FINA') Register of Liens.³⁵⁸ The Spanish chattel register (*Registro de Bienes Muebles*) contains information on the ownership, liens and encumbrances on movable property. Here, among others, information may also be found regarding vessels and aircraft, cars and other motor vehicles, industrial machinery or general contracting conditions. In Slovenia, the Register of non-possessory security interests and goods in distraint³⁵⁹ provides information on non-possessory security interests over certain immovable property (e.g., motor vehicles, inventory or equipment in a certain location, and inventory and equipment with a non-specified location).

Additionally, in certain countries, so-called '**book-entry**' registers or '**securities depository**' registers exist. In Finland, the book-entry register³⁶⁰ is a register licensed by the Ministry of Finance, which consists of investors' book-entry accounts, book-entry securities registered in book-entry accounts, and the rights and obligations concerning book-entry accounts and book-entry securities. Such a right may be, for example, a right to subscribe for shares, an option right, or the right to receive a return on book-entry securities registered in the book-entry account, such as a dividend payable on shares. A similar register is the Central Securities Depository ('CSD') of Prague in the Czech Republic.³⁶¹ The primary activities of the CSD Prague consist of keeping the central register of dematerialised securities and the settlement of trades in investment instruments. The central register is a two-stage register composed of a register kept by the CSD Prague and the follow-up records maintained by authorised entities, especially banks, investment firms, companies, etc. An analogous function seems to be attributed to the register of the Central Depository and Clearing Company in Slovenia,³⁶² which manages the central depository of dematerialised securities.³⁶³

Along with land and property registers, another common feature in all Member States is the existence of **commercial, company or trade registers**. These registers are the main legal instrument for providing security to commercial traffic and for the formalisation of business, having the main purpose of registering enterprises, legalising the books that entrepreneurs are obliged to keep according to the legal provisions in force in each country, registering the financial statements of enterprises, etc. Examples of such registers are, for instance,

³⁵⁶ Закон за особените залози (Law on Special Pledges of 1997 with later amendments), available at <https://www.lex.bg/laws/ldoc/2133897734> (last accessed 11 January 2022), Article 22(1).

³⁵⁷ Available at <https://www.gov.pl/web/sprawiedliwosc/rejestr-zastawow> (last accessed 11 January 2022).

³⁵⁸ Financijska agencija – Upisnik založnih prava (Financial agency (FINA) – Register of Liens), available at <https://www.fina.hr/en/register-of-liens> (last accessed 11 January 2022).

³⁵⁹ Register of non-possessory security interests and goods in distraint, available at <https://www.ajpes.si/RZPP/Iskalnik/JavniPodatki> (last accessed 5 April 2022).

³⁶⁰ Book-entry register, available at https://www.euroclear.com/finland/fi/Public_register.html (last accessed 11 January 2022).

³⁶¹ Central securities depository Prague, available at <https://www.cdcp.cz/?lang=en> (last accessed 11 January 2022).

³⁶² Središnje klirinško depozitarno društvo (Central Depository and Clearing Company), available at <https://www.skdd.hr/portal/f?p=100:1:2512059476220> (last accessed 11 January 2022).

³⁶³ Središnje klirinško depozitarno društvo d.d. (Central Depository and Clearing Company), available at <https://www.skdd.hr/portal/f?p=100:400:5282415200247> (last accessed 5 April 2022).

the Austrian Commercial Register (*Firmenbuch*),³⁶⁴ the Commercial Register and Register of Non-Profit Legal Persons in Bulgaria,³⁶⁵ the Finnish Trade Register,³⁶⁶ the Irish Companies Registration Office (CRO),³⁶⁷ the Italian Company Register (*Registro Imprese*),³⁶⁸ the Luxembourg Business Register,³⁶⁹ the Lithuanian Register of Legal Entities (*Juridinių asmenų registras*), the Spanish Commercial Register (*Registro Mercantil*),³⁷⁰ etc.

Despite the commonality of having company/commercial registers established in each country, once again the information that may be found in each of said registers seems to vary from country to country. In particular, this is true when considering that in some countries, company registers also record direct corporate interest and/or beneficial ownership information, whilst in other countries, this information is contained in separate specific registers.

Examples of the first group of countries are Bulgaria, Spain, Denmark,³⁷¹ Latvia,³⁷² and Sweden. In Sweden, the Company Register³⁷³ not only records general information on the company (e.g., place of registered office, shares, board members), but also reports information on direct corporate interests and beneficial ownership interests. In the Netherlands, the *Handelsregister*,³⁷⁴ is the register for the registration of businesses. This concerns Dutch businesses, as well as foreign businesses with a branch in the Netherlands. The *Handelsregister* contains a variety of information on businesses, in particular the contact information, the directors/supervisory board members, articles of association, and annual accounts. The *Handelsregister* also shows the shareholder of a legal entity, but only if the shareholder holds 100% of the shares. Moreover, as of 27 September 2021, new legal entities that are registered in the *Handelsregister* need to register their Ultimate Beneficial Owner ('UBO'). Existing legal entities had until 27 March 2022 to register their UBO(s). In Poland, for instance, the National Court Register ('NCR')³⁷⁵ records commercial companies and their partners, with the exception of limited liability companies, where only the partners holding at least 10% of the share capital are registered. There is an obligation to submit reports to the repository of the financial statements. The repository of financial documents also stores the financial statements of companies, reports, which sometimes must be submitted within 15 days from their approval, and where the company's assets are listed and described.

³⁶⁴ Austrian Commercial register (Firmenbuch), Accessing the register online is done via different commercial providers, such as ADVOKAT Unternehmensberatung Greiter & Greiter GmbH, Wiener Zeitung Digitale Publikationen GmbH, 360 kompany AG, lexunited - online information system GmbH, MANZ'sche Verlags- u Universitätsbuchhandlung GmbH.

³⁶⁵ Commercial Register and Register of Non-Profit Legal Persons, available at <https://portal.registryagency.bg/en/>.

³⁶⁶ Finnish Trade Register, available at <https://www.prh.fi/en/kaupparekisteri.html> (last accessed 12 January 2022).

³⁶⁷ Irish Companies Registration Office (CRO), available at <https://www.cro.ie/en-ie/> (last accessed 12 January 2022).

³⁶⁸ Registro Imprese (Company Register), available at <https://www.registroimprese.it/> (last accessed 12 January 2022).

³⁶⁹ Luxembourg Business Registers, available at <https://www.lbr.lu/mjrcs-lbr/isp/IndexActionNotSecured.action?time=1638537554199&loop=3> (last accessed 12 January 2022).

³⁷⁰ Registro Mercantil (Commercial Register), available at <https://www.registradores.org/el-colegio/registro-mercantil> (last accessed 12 January 2022).

³⁷¹ Centrale Virksomhedsregister (Company Register), available at <https://datacvr.virk.dk/data/> (last accessed 12 January 2022).

³⁷² Latvijas Republikas Uzņēmumu reģistrs (The Register of Enterprises of the Republic of Latvia), available at <https://www.ur.gov.lv/lv/> (last accessed 12 January 2022).

³⁷³ Company Register, available at www.bolagsverket.se (last accessed 12 January 2022).

³⁷⁴ Handelsregister, available at www.kvk.nl (last accessed 12 January 2022).

³⁷⁵ Central Information of the National Court Register and repository of financial documents, available at <https://ekrs.ms.gov.pl/> (last accessed 12 January 2022). A company may be searched in the NCR by its NCR number (Polish number KRS), tax identification number (Polish number NIP), statistical number (Polish number REGON), or by its name.

In turn, in other instances, the identity of the ultimate **beneficial owner** ('UBO') of a company is not recorded in the company register. This was noted for instance in Cyprus, where this information is not publicly available in the Business Register.³⁷⁶ However, a specific separate register, i.e., the Central Register of True Beneficial Owners of Companies and Other Legal Entities³⁷⁷ was recently created to record information on the true beneficial ownership of a certain company or legal entity, association, foundation, or federation. This register was established by virtue of Articles 21-22 of Law. 4809(I)/2021,³⁷⁸ amending Law 188(I)/2007,³⁷⁹ and is still in the pilot stage and has not been launched yet by the Cypriot authorities. Beneficial ownership registers are found also in other countries, such as Belgium and Ireland. In Belgium, for instance, there is the UBO register³⁸⁰ which holds records of persons who are shareholders of an enterprise/company as well as its directors. Furthermore, in Ireland, there is the Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies ('RBO')³⁸¹ which requires all corporate and legal entities to hold adequate, accurate and current information on their beneficial owners.

In Greece, the real (ultimate beneficiary ownership) register³⁸² was introduced by Law 4557/2018³⁸³ which, in Article 3 par. 17, defines as UBOs – and obliged persons to notify themselves in the correspondent register – the natural person(s) who ultimately own the company or control the company by holding or controlling directly or indirectly a sufficient percentage of its shares or voting rights or other ownership rights, including inter alia through bearer shares or other means. Holding a percentage of voting rights or ownership rights above 25% by a natural person is an indication of direct control. Holding a percentage of voting rights or ownership rights above 25% of a company by another company, whose control is exercised by natural person(s) or by multiple companies controlled by the same natural person(s), is an indication of indirect control. In case of trusts (and other types of legal entities or legal arrangements similar to trusts), the following persons are considered as the 'beneficial owners': a) the settlor; b) the trustee(s); c) the protector, if any; d) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates. The Greek law³⁸⁴ also provides for three types of Beneficial Ownership Registers where UBOs should be registered:

- Beneficial Ownership Special Register, held privately, by legal entities with a registered seat in Greece and should be sufficient, accurate and updated under the

³⁷⁶ Available at <https://www.companies.gov.cy/en/21-eservices/esearch-in-business-entity-s-registry>.

³⁷⁷ At the time of this report the register is still at the pilot stage, hence no link is available. However, further information is available at <https://www.companies.gov.cy/en/knowledgebase/news/beneficial-owners-register-of-corporate-and-other-legal-entities> (last accessed 12 January 2022).

³⁷⁸ Ο περί της Παρεμπόδισης και Καταπολέμησης της Νομιμοποίησης Εσόδων από Παράνομες Δραστηριότητες (Τροποποιητικός) Νόμος του 2021, Ν. 4809(I)/2021, όπως έχει τροποποιηθεί ((Amending) Law on Preventing and Combating Money Laundering of 2021, L. 4809(I)/2021, as amended).

³⁷⁹) Ο περί της Παρεμπόδισης και Καταπολέμησης της Νομιμοποίησης Εσόδων από Παράνομες Δραστηριότητες Νόμος του 2007, Ν. 188(I)/2007, όπως έχει τροποποιηθεί (The Law on Preventing and Combating Money Laundering of 2007, L. 188(I)/2007, as amended).

³⁸⁰ Ultimate Beneficial Owner ('UBO') register, available at <https://finance.belgium.be/en/E-services/register-beneficial-owners> (last accessed 12 January 2022).

³⁸¹ Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies ('RBO'), available at <https://rbo.gov.ie/> (last accessed 3 March 2022).

³⁸² Μητρώο Πραγματικών Δικαιούχων (Real beneficiaries' register), available at <https://www.gsis.gr/polites-epiheiriseis/epiheiriseis/mitroo-pragmatikon-dikaioyhon> (last accessed 17 November 2021).

³⁸³ Νόμος 4557/2018 Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας (ενσωμάτωση της Οδηγίας 2015/849/ΕΕ) και άλλες διατάξεις (Law 4557/2018 published on 30 July 2018 on Government Gazette volume A' no. 139 (On the prevention of the use of the financial system for the purposes of money laundering or terrorist financing)), available at <https://www.taxheaven.gr/law/4557/2018> (last accessed 17 November 2021).

³⁸⁴ Ibid, Articles 20 and 21.

responsibility of the legal representative or a specially authorised person. The information should include the name and surname, date of birth, nationality and country of residence of the beneficial owners, as well as the type and extent of the rights they hold.³⁸⁵

- Beneficial Ownership Central Register created and held by the General Secretariat of Information Systems (public law authority) and linked electronically with the Tax Registration Number (TRN) of each legal entity. The Central Register obtains information from all Greek legal entities or entities with a registered seat in Greece, as well as public and other authorities.³⁸⁶
- Special Register of Beneficial Ownership of Trusts must be created and privately maintained by the trustees of any express trusts, exercised in Greece or residing in Greece.

The information should contain the name, date of birth, nationality and country of residence of the beneficial owners, as well as the type and extent of the rights they hold.³⁸⁷ In sum, the aforementioned information of the private registers, as well as any updates thereof, should be recorded in a special section of the aforementioned Central Register.³⁸⁸

In Croatia, the Financial agency ('FINA') - Register of Beneficial Owners³⁸⁹ is the central electronic database containing data on beneficial owners of legal entities and trusts. A similar register appears also in Slovenia,³⁹⁰ as well as in Luxembourg, where information on the economic beneficiaries of the companies (the name and the percentage of ownership) is found in the *Registre des Bénéficiaires Effectifs*.³⁹¹ In Romania, instead, it was noted that the National Trade Register³⁹² Office also organises a national register for beneficial owners. However, at present, even though there is an obligation for legal entities to declare beneficial ownership, a national register dedicated to beneficial ownership is still under work, and while individual information requests can be filed, the record does not yet function as a publicly accessible register.

In the Czech Republic, on one hand, the information on the structure of relationships between controlling and controlled legal persons is to be deduced from the Report on Relations,³⁹³ which is to be found for each specific entity in the commercial register. On the other hand, a separate Public Register of Real Owners³⁹⁴ has also been introduced, alongside the Public Register of Trusts.³⁹⁵ In particular, the latter contains information on trust funds and foreign trust funds, whereby a foreign trust fund operates in the Czech

³⁸⁵ Ibid, Article 20 paras. 1 and 4.

³⁸⁶ Ibid, Article 20 paras. 1 and 5.

³⁸⁷ Ibid, Article 21 paras.1 and 2.

³⁸⁸ Ibid, Article 20 par. 8.

³⁸⁹ Financijska agencija – Registar stvarnih vlasnika (Financial agency (FINA) - Register of beneficial owners), available at <https://www.fina.hr/registar-stvarnih-vlasnika>.

³⁹⁰ Ultimate Beneficial Owner Register, available at <https://www.ajpes.si/eRDL/Iskalnik/Javni#> (last accessed 12 January 2022).

³⁹¹ Registre des Bénéficiaires Effectifs, available at <https://www.lbr.lu/mjrcs-rbe/jsp/IndexActionNotSecured.action?time=1638537582158&loop=1> (last accessed 12 January 2022).

³⁹² Romanian Trade Register, available at <https://portal.onrc.ro/ONRCPortalWeb/ONRCPortal.portal> (last accessed 12 January 2022).

³⁹³ The Report on relations, available at <https://or.justice.cz/ias/ui/rejstrik> (last accessed 12 January 2022)

³⁹⁴ Public register of real owners, available at <https://esm.justice.cz/ias/issm/rejstrik> (last accessed 12 January 2022). See also Zákon č. 90/2012 obchodních společnostech a družstvech (zákon o obchodních korporacích) (Commercial Companies and Cooperatives (Business Corporations Act, 22 March 2012 with later amendments), Official Journal 2012, No. 90, available at <https://www.zakonyprolidi.cz/cs/2012-90> (last accessed 6 December 2021), Section 82.

³⁹⁵ Public register of trusts, available at <https://esf.justice.cz/ias/isesf/rejstrik> (last accessed 12 January 2022).

Republic, in particular if: a) it is administered from the territory of the Czech Republic; b) it consists of assets which are predominantly located in the territory of the Czech Republic; c) it administers immovable property situated in the territory of the Czech Republic; d) its trustee or a person in a similar capacity is domiciled or has their registered office in the Czech Republic; e) its trustee or a person in a similar position in relation to the property administered has established a business relationship in the Czech Republic; or f) the purpose pursued by its creation is to be achieved in the territory of the Czech Republic.³⁹⁶ Also in Cyprus, Article 23 of the aforementioned Law 4809/(I)2021, amending Law 188(I)/2007, recently established the creation of the Register of Trusts and Similar Legal Arrangements in the Republic which, however, has not yet been launched by the competent authorities.

In certain countries, information concerning **bank accounts** also appears to be accessible via specific registers or databases. For instance, though it may be considered to be the case in the majority of countries, in Bulgaria, it was specifically noted that the Bulgarian National Bank maintains an electronic information system containing data on: (i) the bank accounts and payment accounts with an international bank account number (IBAN), maintained by banks, payment institutions and electronic money companies; (ii) the holders of the respective accounts and the persons authorised to dispose of the accounts; (iii) the beneficial owners of the account holders; and (iv) any security interest.³⁹⁷ The Register is not public, and access is limited mainly to state authorities. It is not expressly stated in the law that insolvency practitioners may have access to that register. However, natural and legal persons may, upon request, receive information from the Bulgarian National Bank on the information contained therein, under the terms and conditions of Ordinance No. 12 of the Bulgarian National Bank of 29 September 2016.³⁹⁸

Since, after the opening of the insolvency proceedings, the debtor is represented by the insolvency practitioner,³⁹⁹ the latter could request information on behalf of the debtor. The existence of the Central Register of Bank Accounts, Payment Accounts, and Bank Deposits was indicated as being recently established in Cyprus, once again by virtue of Article 23 of Law 4809/(I)2021, amending Law 188(I)/2007. Similarly to Bulgaria, at present, the law in Cyprus does not provide the general public with access to this register, which is strictly limited to police, tax and customs authorities. In Poland, the so-called 'OGNIVO' system⁴⁰⁰ includes data (as of 30 November 2021)⁴⁰¹ on bank accounts in 38 commercial banks, 517 cooperative banks, and 30 cooperative savings and credit unions. Also, in Poland, it was indicated that it may be possible to check which bank accounts an entrepreneur has declared as being related to the business in the 'List of entities registered for VAT, non-registered and deleted and reinstated in the VAT register'.⁴⁰² Finally, in Slovenia information

³⁹⁶ Zákona o veřejných rejstřících právnických a fyzických osob (Act on Public Registers of Legal and Natural Persons, 30 September 2013, with later amendments), Official Journal 2013, No. 304, available at <https://www.zakonyprolidi.cz/cs/2013-304?text=304%2F2013> (last accessed 5 April 2022), Section 65.

³⁹⁷ Закона за кредитните институции (Law on Credit Institutions of 01.01.2007 with later amendments), available at <https://www.lex.bg/laws/ldoc/2135532723> (last accessed 5 April 2022), Article 56a(1).

³⁹⁸ Наредба № 12 на БНБ от 29 септември 2016 г. (Ordinance No. 12 of the Bulgarian National Bank of 29 September 2016 with later amendments), available at https://www.bnb.bg/bnbweb/groups/public/documents/bnb_law/regulations_accounts_reg_bg.pdf (last accessed 5 April 2022).

³⁹⁹ Търговски закон (Commerce Act of 18 June 1991 with later amendments), available at <https://lex.bg/laws/ldoc/-14917630> (last accessed 13 January 2022), Article 658(1)(1).

⁴⁰⁰ The OGNIVO system, available at <https://www.centralnainformacja.pl/o-uslugze/czym-jest-ognivo/> (last accessed 5 April 2022).

⁴⁰¹ Available at <https://www.centralnainformacja.pl/o-uslugze/lista-uczestnikow-centralnej-informacji/> (last access 30 November 2021).

⁴⁰² Available at <https://www.podatki.gov.pl/wykaz-podatnikow-vat-wyszukiwarka> (last accessed 12 January 2022).

on transactional accounts of entities registered under the laws of Slovenia may also be found in the AJPS - Bank Accounts Register.⁴⁰³

As will further be described in the paragraphs below,⁴⁰⁴ although bank account information may not be recorded (or may not be accessible directly by insolvency practitioners) for specific registers in the majority of the countries, in, many instances, it was noted how the insolvency practitioner/administrator may and will, in fact, contact banks or financial institutions and secured creditors in order to request and obtain the bank account and credit information it may need in view of the recollection of the bankrupt estate.

The relevance for insolvency practitioners of **tax authority and accounting registers** in the context of asset tracing and recovery was also noted. As explained above for bank accounts and credit information, in many instances, also tax and accounting information may not be directly accessible to the insolvency practitioner in specific registers, but the latter has nonetheless the powers to request this information to the relevant authorities. In Denmark, for instance, the relevance of the records of, inter alia, bank accounts, audits, and real estate that the tax authority keeps on every company and citizen was noted. In Latvia, it was indicated how accounting documents (e.g., annual statements) appear to be one of the most relevant forensic tools available to insolvency practitioners for asset tracing and recovery and, in this context, information from the State Revenue Service (Valsts ieņēmumu dienests) appears to be quite important.⁴⁰⁵ In Poland, the Treasury Pledge Register held by the Head of the Third Tax Office in Szczecin⁴⁰⁶ also was noted as containing information on fiscal/tax pledges which may be established as movable assets and transferable property rights owned by the taxpayer (or jointly owned by the taxpayer and their spouse).⁴⁰⁷

As for bank account records, **trademark and patent registers** are also common across all Member States. Examples of such registers were noted, amongst others, for the Czech Republic,⁴⁰⁸ Cyprus,⁴⁰⁹ Greece,⁴¹⁰ Spain,⁴¹¹ Poland,⁴¹² and Slovenia.⁴¹³

⁴⁰³ Bank Accounts Register, available at <https://www.ajpes.si/eRTR/JavniDel/Iskanje.aspx> (last accessed 12 January 2022).

⁴⁰⁴ See this section, letter (c) 'other means for insolvency practitioners to obtain information on assets'.

⁴⁰⁵ Valsts ieņēmumu dienests (State Revenue Service), available at <https://www.vid.gov.lv/lv> (last accessed 5 April 2022). In accordance with the Latvian legislation, the State Revenue Service is a direct administrative authority under the supervision of the Latvian Minister of Finance, which ensures the accounting of tax payments and taxpayers; the collection of taxes, duties and other mandatory payments specified by the State in the territory of the Republic of Latvia; and collects taxes, duties and other mandatory payments into the budget of the European Union.

⁴⁰⁶ Available at <https://www.zachodniopomorskie.kas.gov.pl/izba-administracji-skarbowej-w-szczecinie/informacje-podatkowe-i-celne/centra-kompetencyjne/rejestr-zastawow-skarbowych> (last accessed 13 January 2022).

⁴⁰⁷ According to Article 41 (1) of Ustawa z dnia 29 sierpnia 1997 r. Ordynacja podatkowa (Tax Ordinance, 29 August 1997 with later amendments), Official Journal 1997, No 137, Item 926, available at <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19971370926/U/D19970926Lj.pdf>, (last accessed 19 November 2021), the fiscal pledge may be established on all movables and transferable property rights owned by the taxpayer or jointly owned by the taxpayer and his spouse if the value of the respective movables or rights amounts to at least PLN 13,500 (the amount is valorised) on the day the pledge is established. The fiscal pledge may be established in favour of the State Treasury and local government authorities in connection with tax liabilities, as well as in connection with tax arrears and default interest on such arrears.

⁴⁰⁸ Industrial property office of the Czech Republic, available at <https://isdv.upv.cz/webapp/resddb.home> (last accessed 5 April 2022).

⁴⁰⁹ Available at <https://www.intellectualproperty.gov.cy/en/intellectual-property-lifecycle/get-ip-information>.

⁴¹⁰ Διοικητική Υπηρεσία Εμπορικών Σημάτων – Εθνικό Μητρώο Εμπορικών Σημάτων (Administrative Trademark Committee – National Trademark Register), available at <http://des.gge.gov.gr/home/index> (last accessed 17 November 2021).

⁴¹¹ Oficina Española de Patentes y Marcas (Spanish Office of Trademarks and Patents), available at <https://www.oepm.es/es/index.html> (last accessed 13 January 2022).

⁴¹² The Registers of the Polish Patent Office, available at <https://ewyszukiwarka.pue.upr.gov.pl/search/simple-search?lng=pl> (last accessed 13 January 2022).

⁴¹³ Intellectual Property Rights Register, available at <http://www.uil-sipo.si/sipo/activities/databases/> (last accessed 13 January 2022).

The same may be said for national registers having the purpose of recording information on **vehicles, ships, and/or aircraft** given that, similarly to land registration, traditionally registration of this type of property with a national authority is compulsory across the countries according to national legislation. Examples of such registers are found, amongst others, in Belgium,⁴¹⁴ Croatia,⁴¹⁵ Cyprus,⁴¹⁶ Finland,⁴¹⁷ Greece,⁴¹⁸ Luxembourg,⁴¹⁹ Lithuania,⁴²⁰ Latvia,⁴²¹ Slovenia,⁴²² Spain,⁴²³ Sweden,⁴²⁴ etc.

Amongst other types of registers and relevant records which have been pinpointed in certain countries as possible means to access relevant information on the debtors and their assets, in Spain, the Register of General Terms and Conditions⁴²⁵ provides access to information on the general terms and conditions that must be registered by law (such as those the courts consider null, as well as those that are registered voluntarily). In Poland, a register makes it possible to check which entity has the right to use a remote internet domain.⁴²⁶ In Slovenia, another register⁴²⁷ provides information on protestations made regarding the promissory notes issued by legal entities. In Lithuania, information about property seizure acts provided by courts, judges, bailiffs, prosecutors, officers of the State Tax Inspectorate, the State Social Insurance Fund Board, and other state institutions and officers empowered to seize property on the grounds according to the procedure established by the laws of the Republic

⁴¹⁴ Service public fédéral Mobilité et Transports, available at <http://www.mobilit.belgium.be> (last accessed 13 January 2022).

⁴¹⁵ Javni pretraživač plovila (Public vessel search engine), available at <https://mmpi.gov.hr/en> (last accessed 13 January 2022); Hrvatska agencija za civilno zrakoplovstvo (Croatian Civil Aviation Agency), available at <https://www.ccaa.hr/popis-registriranih-zrakoplova-64123> (last accessed 13 January 2022).

⁴¹⁶ Register of Cyprus Ships & Special Book of Parallel Registration, available at https://www.dms.gov.cy/dms/shipping.nsf/shipreg_en/shipreg_en?OpenDocument (last accessed 13 January 2022); Aircraft register, available at http://www.mcw.gov.cy/mcw/dca/dca.nsf/DMLregister_en/DMLregister_en?OpenDocument (last accessed 13 January 2022); Register of Licensed Vehicles, available at http://www.mcw.gov.cy/mcw/RTD/rtd.nsf/rtd10_en/rtd10_en?OpenDocument (last accessed 13 January 2022).

⁴¹⁷ Vehicle, watercraft and aircraft information registers, available at <https://www.traficom.fi/en/services> (last accessed 13 January 2022).

⁴¹⁸ Υπουργείο Ναυτιλίας και Νησιωτικής Πολιτικής – Ελληνικό Νηολόγιο (Ministry of Maritime Affairs and Insular Policy), available at <https://www.ynnp.gr/el/navtilia/ellhniko-nhologio/>; Υπηρεσία Πολιτικής Αεροπορίας – Μητρώο Αεροσκαφών (Hellenic Civil Aviation Authority – Aircraft register), available at <http://www.ypa.gr/flight-safety/aircraft-register/> (last accessed 17 November 2021).

⁴¹⁹ Société nationale de circulation automobile, available at <https://snca.public.lu/fr.html> (last accessed 13 January 2022).

⁴²⁰ Transporto priemonių registravimas (Register of Vehicles), available at <https://www.regitra.lt/lt/paslaugos/transporto-priemones> (last accessed 13 January 2022); Civilinių orlaivių registras (Register of Civil Aircraft), available at <https://tka.lt/oro-transportas/> (last accessed 13 January 2022).

⁴²¹ Ceļu Satiksmes Drošības Direkcija (Road Traffic Safety Directorate), available at <https://www.csdd.lv/> (last accessed 13 January 2022); Latvijas Kuģu reģistrs (Latvian Ship Register), available at <https://www.lja.lv> (last accessed 13 January 2022); Valsts tehniskās uzraudzības aģentūra (State Technical Control Agency of Latvia), available at <https://www.vtua.gov.lv/valsts-tehniska-uzraudziba/#jump> (last accessed 13 January 2022).

⁴²² Boats register, available at <https://e-uprava.gov.si/javne-evidence/plovila.html> (last accessed 13 January 2022); Aircraft register, available at <https://register.caa.si/> (last accessed 13 January 2022).

⁴²³ Dirección General de Tráfico (General Directorate of Traffic), available at <https://sede.dgt.gob.es/es/> (last accessed 13 January 2022); Dirección General de la Marina Mercante (General Directorate of the Merchant Navy), available at <http://apps.fomento.gob.es/CVP/listapublicaciones.aspx?c=Marina%20Mercante> (last accessed 13 January 2022).

⁴²⁴ Transport register, available at www.transportstyrelsen.se (last accessed 13 January 2022).

⁴²⁵ Register of General Terms and Conditions, available at <https://www.registradores.org/registro-de-condiciones-generales> (last accessed 13 January 2022).

⁴²⁶ Krajowy Rejestr Domen prowadzony przez Naukową i Akademicką Sieć Komputerową – Państwowy Instytut Badawczy (National Domain Register maintained by the Research and Academic Computer Network - National Research Institute), available at <https://dns.pl/> (last accessed 13 January 2022).

⁴²⁷ Protested promissory notes register, available at <https://www.ajpes.si/eRPM/Iskanje.aspx> (last accessed 13 January 2022).

of Lithuania, is also recorded in a respective register.⁴²⁸ In Finland, the Business and Consumer Information Register⁴²⁹ combines several different data sources (i.e., trade register, business information system, companies, statistics, legal register centre, tax authorities) to provide information about businesses' and private consumers' contact data, decision-makers, persons in charge, finances, company news, payments, payment defaults, and ratings. Moreover, the Finnish Register of Donations (*Lahjoitus-asioiden rekisteri*)⁴³⁰ contains information on notifications concerning the donation of movable assets. In the Czech Republic, a public record containing a list of submitted claims of creditors in relevant insolvency proceedings is also available.⁴³¹

In other countries, so-called insolvency registers or bulletins were also identified. This was the case, for instance, in Spain, where the Public Insolvency Register⁴³² is conceived as a tool available to the creditors of any debtor and to the Administration of Justice as it contains information about the state of any insolvency proceeding or the usage of pre-insolvency tools, and it facilitates the communication to the public registers of the decisions adopted by the commercial courts. Similarly, in Romania, the Insolvency Procedure Bulletin⁴³³ was noted. Though not constituting a genuine asset register system, the bulletin is designed as a special citation system for insolvency procedures and offers monthly updates for all such proceedings. The Insolvency Procedure Bulletin is held by the National Trade Register Office and is organised in divisions for each county. In Poland, on the 1st of December 2021, the National Register of Debtors⁴³⁴ was launched. The register constitutes a bankruptcy register within the meaning of Article 24(1) EIR. Five main types of assets can be searched in the system, i.e., movable assets, real estate, cash, property rights, and receivables. Within each type of asset, it is possible to select individual components, such as cars, jewellery, machines, shares in companies, flats, etc. The system is new and there is no information contained on any assets yet, so it is not possible to assess its performance. Nevertheless, the first impression is positive with regards to both the level of detail that can be entered into the system and the appearance of the application itself. In particular, it is for the trustees to enter into this register the assets they have identified. If the bankrupt's assets are hidden or there is no information about them, such assets will not be included in the register.

ii. Conditions to access asset registers

Besides the existence and availability of registers of certain types of assets across the Member States, the data collection at national level mapped the requirements that need to be met by insolvency practitioners to access the information contained in the identified records of assets. Moreover, not only was it ascertained whether access conditions vary from one country to another, and/or from one type of register to another, but also whether any different requirements seemed to be applicable depending on whether it is a national insolvency practitioner, or a practitioner from another Member State requesting access to

⁴²⁸ Turto arešto aktų registras (Register of Property Seizure Acts), available at https://www.registrucentras.lt/turto_arestai/ (last accessed 13 January 2022).

⁴²⁹ Business and consumer information register, available at <https://www.asiakastieto.fi/web/en/> (last accessed 13 January 2022).

⁴³⁰ Lahjoitus-asioiden rekisteri (Register of Donations), available at <https://dvv.fi/en/extracts-from-registers> (last accessed 13 January 2022).

⁴³¹ The submitted claims in a relevant insolvency proceeding can be found at the following website, available at www.isir.justice.cz, section P – submitted claims (last accessed 13 January 2022).

⁴³² Registro Público Concursal (Public Insolvency Register), available at <https://www.publicidadconcursal.es/concursal-web/> (last accessed 13 January 2022).

⁴³³ Insolvency Procedure Bulletin, available at <https://portal.onrc.ro/ONRCPortalWeb/ONRCPortal.portal> (last accessed 13 January 2022).

⁴³⁴ National Debtors Register, available at <https://prs.ms.gov.pl/krz> (last accessed 13 January 2022).

the register in a certain country. The paragraphs below will provide some examples of access conditions identified both for national and foreign insolvency practitioners for registers identified in a sample of countries.

In Austria, for instance, both the land register (*Firmenbuch*) and the commercial register (*Grundbuch*) are publicly available and accessible without having to provide any reasons for access. This applies both to national and foreign insolvency practitioners. In Belgium, instead, whilst for the cadastre register and the Ultimate Beneficial Owner register no specific access conditions are required for national insolvency practitioners, the vehicle register of the *Service public fédéral Mobilité et Transports* is not directly and freely accessible, but the information is nonetheless provided to the insolvency practitioner if requested. In turn, it appears that foreign practitioners are not granted the same access conditions, as information is only provided through a duly appointed authorised person (e.g., a domestic insolvency practitioner).

In Bulgaria, though the property register⁴³⁵ and the Central Register of Special Pledges⁴³⁶ are public, however, payment of a state fee is required for access to the information. On the other hand, the commercial register is public and the references within are accessible free of charge.⁴³⁷ The same requirements apply to both national and foreign insolvency practitioners. In turn, in principle, only state authorities seem to have direct access to the register of bank accounts kept by the Bulgarian National Bank. However, the insolvency practitioner⁴³⁸ could request information on behalf of the debtor by (i) filing an application to the Bulgarian National Bank, and (ii) payment of a statutory fee.⁴³⁹ As regards foreign practitioners, the following considerations are relevant. According to national legislation,⁴⁴⁰ any person may receive information about themselves contained in the Register of bank accounts and deposit boxes. In terms of legal entities, the application for access to information may be filed either by the legal representative of the company or by an authorised person (by virtue of a notarised Power of Attorney).⁴⁴¹ A copy of the Power of Attorney is attached to the application for access to information. Consequently, in order for an EU insolvency practitioner to obtain information from the Register of bank accounts and deposit boxes, a notarised Power of Attorney from the insolvent debtor would be necessary.

In Cyprus, both national and foreign practitioners have free access to the basic information of a company in the business register (e.g., company's name, type of legal entity, etc.). For a fee of EUR 10, any interested party can access further information on the register, such as share capital, charges and mortgages, and review all filed documents. There is also free access to information on holders and coverage of filed intellectual property rights. In turn, there is no public access to the land register. Only interested parties, upon payment of a nominal fee, can request information on property in which they have a legitimate interest.

⁴³⁵ Закон за кадастъра и имотния регистър (Cadastre and Property Register Act from 01.01.2001 with later amendments), available at <https://www.lex.bg/laws/ldoc/2134918656> (last accessed 11 March 2022), Article 8(1).

⁴³⁶ Закон за особените залози (Law on Special Pledges of 1997 with later amendments), available at <https://www.lex.bg/laws/ldoc/2133897734> (last accessed 11 January 2022), Article 24(1).

⁴³⁷ Закон за търговския регистър и регистъра на юридическите лица с нестопанска цел (Commercial Register and Register of Non-Profit Legal Persons Act of 2008 with later amendments), available at <https://www.lex.bg/laws/ldoc/2135522741> (last accessed 5 April 2022), Article 11(1).

⁴³⁸ Наредба № 12 на БНБ от 29 септември 2016 г. (Ordinance No. 12 of the Bulgarian National Bank of 29 September 2016 with later amendments), available at https://www.bnb.bg/bnbweb/groups/public/documents/bnb_law/regulations_accounts_reg_bg.pdf (last accessed 5 April 2022). See also Закона за кредитните институции (Law on Credit Institutions of 01.01.2007 with later amendments), available at <https://www.lex.bg/laws/ldoc/2135532723> (last accessed 5 April 2022), Article 56a(1) and Търговски закон (Commerce Act of 18 June 1991 with later amendments), available at <https://lex.bg/laws/ldoc/-14917630> (last accessed 13 January 2022), Article 658(1)(1).

⁴³⁹ See Ibid, Ordinance No. 12 of the Bulgarian National Bank, Article 22

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid, Article 12.

Information is provided in the form of a 'search certificate.' Insolvency practitioners from Cyprus or another Member State can request access to the information contained in the register as agents of an 'interested party'.⁴⁴² Free access is granted instead to registers on vehicles (e.g. ships, aircraft, and other licensed vehicles). The same insolvency practitioners will be able to access the Central Register of True Beneficial Owners of Companies and Other Legal Entities as any other member of the public. Specifically, members of the public will be able to access information on the name, date of birth, citizenship, habitual residence, and the kind and extent of the true beneficial owner's interests in the legal entity. Prior electronic registration of the requesting party and payment of EUR 3.50 per request will be required.⁴⁴³ In turn, access to the Trust Register will be granted only to people establishing that they have a legitimate interest⁴⁴⁴, whilst at present, the Cyprus legal framework does not provide insolvency practitioners with access to the bank account registers of the Central Bank of Cyprus, which is strictly limited to police, tax, and customs authorities.⁴⁴⁵

In Greece, for all registers identified, it was noted that the insolvency administrator, who is, in principle, solely vested with the authority to manage the assets of the debtor, may access the files holding the relevant asset information without any restriction.⁴⁴⁶ For the cadastral register, for instance, it was noted that for subsequent registrations made against the immovable assets of the debtor, the insolvency administrator shall need to provide the cadastral office with a copy and summary of the court decision approving their appointment as administrator of the debtor's estate.⁴⁴⁷ In practice, it was indicated that access to the files of such registers is unrestricted to Greek qualified lawyers. As no interconnection platform is available yet, insolvency practitioners may access such register by appointing a local Greek qualified attorney-at-law to carry out a land asset search against a particular debtor⁴⁴⁸. Furthermore, in Greece, as a general note for all powers/duties of insolvency practitioners including that to access registers, foreign insolvency administrators are entitled to carry out all powers/duties conferred to Greek insolvency administrators by Law 4738/2020, following a petition filed before the Greek court handling the local insolvency

⁴⁴² Under Section 51A in Chapter 224 of Ο περί Ακίνητης Ιδιοκτησίας (Διακατοχή, Εγγραφή και Εκτίμηση) Νόμος (Immovable Property (Tenure, Registration and Valuation) Law), available at <http://www.cylaw.org/nomoi/indexes/224.html> (last accessed 5 April 2022), an 'interested party' means the owner, his universal or specific successors in title, the owner of any trees, buildings or other objects on land which belongs to another and vice versa, a person with any right or interest in the immovable property, a person who satisfies the Director that he is a prospective purchaser or mortgagor, the plaintiff in any action against the owner of the property, a professional valuer who requires certain information for the purpose of valuing certain immovable property in connection with a compulsory purchase, and any person not already specified to whom the Director orders that information be furnished.

⁴⁴³ Ο περί της Παρεμπόδισης και Καταπολέμησης της Νομιμοποίησης Εσόδων από Παράνομες Δραστηριότητες Νόμος του 2007 (Ν. 188(Ι)/2007), όπως έχει τροποποιηθεί (The Law on Preventing and Combating Money Laundering of 2007 (L. 188(I)/2007, as amended)), available at http://www.cylaw.org/nomoi/indexes/2007_1_188.html (last accessed 5 April 2022), Articles 61A(6) and 61B(6), as well as Article 61A(11)(c) and 12(c).

⁴⁴⁴ Ibid, Article 61C(12).

⁴⁴⁵ Ibid, Article 61D(3).

⁴⁴⁶ Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις (Law No. 4738/2020, Debt Settlement and Facilitation of a Second Chance and further provisions), 27 October 2020, Government Gazette volume A, no. 207, available at http://www.et.gr/docs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8qa89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLcmTXKaO6fpVZ6Lx3UnKl3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LidQ163nV9K--td6SluSSYtwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz_207 (last accessed 18 November 2021), Article 93 par. 1.

⁴⁴⁷ Ibid, Article 139 par. 2.

⁴⁴⁸ The unrestricted access of Greek qualified lawyers to public authorities and registers is stipulated in Κώδικας περί δικηγόρων Ν. 4194/2013 ('The Lawyer's Code') Law no. 4194/2013, published on 27 September 2013 on Government Gazette volume A' no. 208, available at <https://www.kodiko.gr/nomothesia/document/76222/nomos-4194-2013> (last accessed 17 November 2021), Article 34 par. 2

proceedings.⁴⁴⁹ For cases involving Member States, the legal base for such petition shall also refer to Article 21 of the EIR.

In Spain, with regards to the land register, the commercial register, the chattel register and the register of general terms and conditions, it was noted that for the request of both the national or foreign insolvency practitioner to be processed, the interest behind the consultation must be stated, so that (i) the statement can be qualified and considered legitimate by the registrar who will issue the information, and (ii) it remains at the disposal of the property owner, who may at any time consult the information issued regarding their property and the alleged causes of interest. Specifically, the designation of the insolvency practitioner after the opening of the insolvency proceedings will be considered a legitimate interest to consult the assets of the debtor. In turn, no particular access conditions appear with regards to the public insolvency register, the patent and trademark register, and the register of the General Directorate of the Merchant Navy containing information on Spanish ships. As for the General Directorate of Traffic Vehicle Register, if insolvency practitioners do not have data regarding the vehicles, such as the matriculation number, they may access this information by asking the court to do so through the Neutral Judicial Point. No differentiation in access conditions was noted for foreign insolvency practitioners.

In Finland, for national insolvency practitioners, in order to access the register of property information (*Kiinteistötieto-rekisteri*) and the vehicle, watercraft and aircraft information registers (*Ajoneuvo-, vene- ja ilma-alusrekisterit*), the user's electronic identification is required. Finnish citizens can identify themselves by using Finnish identification tokens, such as online banking codes or mobile certificates.⁴⁵⁰ As for foreign practitioners, access to the register is possible only for EU citizens who can use common European means of identification (eIDAS)⁴⁵¹ provided by their Member State – this is currently possible to access from Estonia, Italy, Denmark, Spain, Croatia, Portugal, and the Czech Republic. Besides this, general access to the register of property information is free, but some information (e.g., ownership details and information on securities) and official certificates are subject to a fee. For the vehicle registers, technical details about vehicles can be accessed for free, but information about ownership is available upon payment only. Information on the watercraft register is also chargeable, whilst all information on the aircraft register is free of charge. As for the trade register (*Kauppa-rekisteri*), basic information (name, company ID, registered office) of companies and businesses can be searched freely without fees, but more detailed information and documents, such as financial statements and details about a person's liabilities, are available for purchase only. No specific access conditions are identified for non-Finnish citizens. In particular, it was also noted that it is possible to carry out searches in English, but some information, such as financial statements, are either in Finnish or Swedish. English translations may also contain restricted information. In turn, as regards the book-entry register (*Arvo-osuusrekisteri*) data can be requested by any user via email or phone, or accessed by means of a registered user account. The data is available upon payment only. An explanation of the intended use for the data must be provided when requesting the data, which is available both in Finnish and English. In the business and consumer information register (*Yritys- ja asiakastieto-rekisteri*), any user can search basic information on businesses free of charge and without registration or e-identification.

⁴⁴⁹ Νόμος 3858/2010 Προσαρμογή του Ελληνικού Δικαίου στο πρότυπο νόμου του έτους 1997 για τη «Διασυνοριακή πτώχευση» της Επιτροπής των Ηνωμένων Εθνών για το Διεθνές Εμπορικό Δίκαιο και άλλες διατάξεις. (Law 3858/2010 'Adaptation of Greek Law to the model law of the year 1997 on the 'Cross-border bankruptcy' of the United Nations Commission on International Commercial Law and other provisions.'), Law 3858/2010 dated 1 July 2010, published on Government Gazette volume A' no. 102, available at <https://www.taxheaven.gr/law/3858/2010> (last accessed 18 November 2021), Articles 11-13.

⁴⁵⁰ Information about strong identification for e-services provided by Finnish public authorities available on Suomi.fi services webpage, available at <https://www.suomi.fi/instructions-and-support/information-on-eidentification/strong-identification-for-eservices> (last accessed 10 January 2022).

⁴⁵¹ Information about eIDAS Regulation is available on the European Commission's webpage, available at <https://digital-strategy.ec.europa.eu/en/policies/eidas-regulation> (last accessed 10 January 2022).

Reports, such as financial statements, are available upon purchase only. Businesses and private persons can also receive their own personal data from the register, but only upon e-identification using Finnish identification tokens (online banking codes or mobile certificates). It is possible for companies registered in Finland to become contract customers for specified information services and receive information also about private individuals. An explanation of the legal use of personal data must be provided when requesting the data. Finally, concerning the register of donations (*Lahjoitus-asioiden rekisteri*), both national and foreign insolvency practitioners may request data by email or by phone from the Digital and Population Data Services Agency. In Croatia, no particular conditions were identified either for national or foreign insolvency practitioners to access the identified registers in this country.⁴⁵² In Italy, instead, access to the cadastral service and registrar's office (*conservatoria*) is subject to the authorisation of the delegated judge pursuant to Article 492 bis of the Italian Code of Civil Procedure and Article 155- *quinquies* par. 1 of the implementing provisions of the Italian Code of Civil Procedure. The service is subject to the payment of secretarial fees, whilst the company register (*Registro Imprese*) is publicly accessible via the register portal, with each request for information being subject to a specific fee, independently of whether any search results are obtained. In Luxembourg, no particular access conditions for national or foreign insolvency practitioners were identified for the asset registers identified, with the exception of the cadastre portal (*Portail du cadastre et de la topographie*),⁴⁵³ for which the online search for information requires to provide the registration number (*Matricule*) and to attach a document justifying the request (e.g., in the case of insolvency proceedings, this may be the decision of opening the bankruptcy proceeding)⁴⁵⁴. It is also worth noting that the real estate registers of the different territorial district offices of the *Administration de l'Enregistrement Service des Hypothèques* must be contacted by post (whilst other registers are either accessible online or may be contacted by e-mail).

In Lithuania, the access conditions to the relevant registers also do not seem to differ depending on whether the party interested in obtaining information is a national or foreign practitioner. For instance, the register of legal entities (*Juridinių asmenų registras*)⁴⁵⁵ and the real estate and cadastre register (*Nekilnojamojo turto kadastras ir registras*)⁴⁵⁶ are all publicly accessible online (in case an agreement with the registrar is concluded), or by submitting a request for information at the office of the registrar. The same applies to the register of property seizure acts (*Turto arešto aktų registras*),⁴⁵⁷ taking into account that data contained in such register (including personal data) can be submitted to persons who specify the goal for the use of data and a condition for legitimate management of personal data.

⁴⁵² According to the Croatian Insolvency law, practitioners should be provided with all relevant information regarding the debtor's direct corporate interests in legal person and trusts. However, even if foreign practitioners may not be familiar with this, they have the legal basis to ask the Central Depository and Clearing Company Inc (Središnje klirinško deponitarno društvo) to provide them with all relevant information.

⁴⁵³ Portail du cadastre et de la topographie, available at <https://extraits.geoportail.lu> (last accessed 13 January 2022).

⁴⁵⁴ See <https://extraits.geoportail.lu/> (last accessed 20 January 2022).

⁴⁵⁵ Lietuvos Respublikos Vyriausybės nutarimas Dėl Juridinių asmenų registro nuostatų patvirtinimo (Decision of the Government of the Republic of Lithuania on Approval of Regulations of the Register of Legal Entities) of 12 November 2003 No VIII-1407, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.221119/asr> (last accessed 15 December 2021), Item 229.

⁴⁵⁶ Lietuvos Respublikos nekilnojamojo turto registro įstatymas) of 24 September 1996 No I-1539 (Law of the Republic of Lithuania on the Register of Real Estate) (the Law on the Register of Real Estate), available at <https://www.e-tar.lt/portal/lt/legalAct/TAR.38E82AA2664C/asr> (last accessed 15 December 2021), Article 42

⁴⁵⁷ Lietuvos Respublikos Vyriausybės nutarimas Dėl Turto arešto aktų registro nuostatų patvirtinimo (Decision of the Government of the Republic of Lithuania on Approval of Regulations of the Register of Property Seizure Acts) of 5 March 2002 No 314, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.161584/asr> (last accessed 15 December 2021), Item 58.

Like other countries, in the Netherlands, access to the real estate register (*Kadaster*) and the commercial register (*Handelsregister*) does not appear to be subject to any particular condition for either national or foreign insolvency practitioners, with the exception of the information on ultimate beneficial ownership for which only limited information for legal entities is publicly available. As for the main vehicle register (the so-called 'RDW' register),⁴⁵⁸ the national bankruptcy trustees can request an overview of motor vehicles and fast boats owned by the debtor at the time of the request and in the preceding nine years, and such overview is subject to the payment of a fee. Access conditions to insolvency practitioners from other Member States are not specifically regulated. In particular, the RDW offers online access to its register for people from certain Member States through identification with eIDAS, but a Dutch social security number and bank account still seem to be required.

In Poland, the information contained in most registers is either publicly accessible free of charge, (e.g., the register for industrial property rights, or the national debtors register, etc), or may be directly requested from the competent authority by the insolvency trustee, including insolvency practitioners from other Member States, (e.g., the land and building registers, the fishing vessels register, etc).

In Sweden, all identified asset registers are publicly accessible by national or foreign insolvency practitioners. The same is true in Slovenia, where solely a simple registration to the online platform is required (e.g., for the land register, or the ultimate beneficial ownership register), as well as in Romania, where different administrative fees are, however, necessary for each request.

Finally, as a general requirement, in some countries (e.g., Cyprus, Lithuania, Spain), it was noted that, in certain instances, such as when specific requests have to be filed by insolvency practitioners to obtain information (e.g., when the information is not accessible directly via an online portal), a legitimate interest must be indicated with the request. It also, however, appears that the opening of insolvency proceedings *per se* and the appointment of an insolvency trustee or administrator do, in practice, act as legitimate interests for this matter.

In conclusion, in the majority of Member States, the data collected does not show any particular restriction for insolvency practitioners to access registers, nor do any particular differentiations seem to be in place specifically for foreign insolvency practitioners in most cases. However, despite the access to registers being formally granted to all, it may be relevant to mention how language limitations may, in practice, constitute a barrier to access information in certain countries.

iii. Other means for insolvency practitioners to obtain information on assets

Besides the access to specific registers and data records, the legal mapping conducted across the Member States also aimed at identifying whether national laws provide any other ways for insolvency practitioners to obtain information on assets. In some countries, no particularly relevant additional means to access information was noted as being significantly relevant. For instance, in Austria, no specific means were indicated aside from a 'mail block' (i.e., all physical mail addressed to the debtor company is automatically forwarded to the offices of the insolvency practitioner).⁴⁵⁹ Similarly, in Cyprus, there seems to be no other official source from which insolvency practitioners could obtain information on assets. In like manner, there are no special rules or procedures on obtaining information and evidence from law enforcement and regulatory agencies that tackle money laundering and fraudulent

⁴⁵⁸ RDW register, available at www.rdw.nl (last accessed 13 January 2022).

⁴⁵⁹ Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung - IO) (Austrian Insolvency Code), available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001736> (last accessed 19 November 2021), Section 78.

acts. Granted, if any information reaches the public sphere, it could prompt insolvency practitioners and any interested party to use the normal routes of obtaining evidence in civil proceedings. However, in many countries mention was made to the importance of i) the possibility of insolvency practitioners to directly request certain information from relevant bodies or authorities, and ii) the relevance of the obligations that are usually set on the debtors to cooperate with and provide information to the insolvency practitioner or the judge hearing the case. In this context, in Belgium, it was noted that the insolvency practitioner (namely the trustee) may ask the bank for any information regarding a specific (bankrupt) legal person, and may also ask a bailiff for any information regarding confiscation/seizure of assets of the (legal) person.⁴⁶⁰

In Greece, it was noted that the debtor must provide the insolvency administrator with any information pertaining to the insolvency proceedings and act in good faith as regards the accuracy of such data.⁴⁶¹ Under this legal basis and as derived from the interviews with national stakeholders, insolvency administrators in practice may only rely either on information derived from registers or ask the debtor to provide them with their complete tax declaration forms. In these forms, given that they are accurately provided by a debtor who acts in good faith, insolvency administrators aim to trace assets that are not subject to compulsory registration using a register. In Latvia, an administrator has the following rights:⁴⁶² 1) to request and receive from the debtor and representatives thereof the information necessary in insolvency proceedings of a legal person or insolvency proceedings of a natural person; 2) to request and receive from state and local government authorities, free of charge, information at their disposal regarding the debtor and representatives that is necessary in insolvency proceedings of a legal person or insolvency proceedings of a natural person; 3) to request and receive from other competent persons and authorities the information at the disposal thereof which is related to the course of insolvency proceedings of a legal person or insolvency proceedings of a natural person. In Luxembourg, it was noted how it is practice for the insolvency practitioner to send a circular letter to various credit institutions and insurance companies operating in Luxembourg in order to obtain information on assets. Additionally, Article 478 of the Commercial Code provides that, as a logical corollary of the principle of divestment of the bankrupt, the latter will no longer receive correspondence addressed to him. It will, therefore, be up to the curator to examine it. This examination could also enable tracking the existence of certain creditors who are still unaware of the bankruptcy of their correspondent. In the Netherlands, a bankruptcy trustee can request the Ministry of Justice provides information free of charge, with an overview of all direct and indirect corporate interests of a debtor. This includes interests that are less than 100% and are, thus, not visible in the *Handelsregister*. Moreover, if there is a 'fiscal interest' (i.e., the Tax Authority is a creditor of the debtor) and the bankruptcy trustee is considering a directors' liability claim, or if the debtor has possibly committed criminal acts, the Tax Authority can decide to provide information that it possesses on a debtor to a bankruptcy trustee.⁴⁶³ This includes in particular information on

⁴⁶⁰ Loi portant création d'un fichier central des avis de saisie, de délégation, de cession et de règlement collectif de dettes et modifiant certaines dispositions du Code judiciaire (Law of 29 May 2000 regarding the creation of a central file of notices of seizure, delegation, assignment and collective settlement of debts and amending certain provisions of the Judicial Code), available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2000052936&table_name=loi (last accessed 27 December 2021).

⁴⁶¹ Νόμος 4738/2020, Πύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις (Law No. 4738/2020, Debt Settlement and Facilitation of a Second Chance and further provisions), 27 October 2020, Government Gazette volume A, no. 207, available at http://www.et.gr/idsoc-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoClrL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKI3nP8NxdnJ5r9cmWyJWeiDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SluSSytwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz_207 (last accessed 18 November 2021), Article 95.

⁴⁶² Maksātnespejas likums (Insolvency Law). 1 November 2010, available at <https://likumi.lv/ta/id/214590-maksatnespejas-likums> (last accessed 6 December 2021), Article 27.

⁴⁶³ See in particular: Leidraad Invordering 2008 (Collection Guidelines 2008), available at <https://wetten.overheid.nl/BWBR0024096/2021-10-06> (last accessed 8 December 2021), Article 36.2.

bank accounts and bank balances. In Poland, the insolvency practitioners shall request a search of the bankrupt's assets by the bailiff⁴⁶⁴, limited to a search in databases to which the bailiff has access (i.e. according to the so-called 'bailiff's asset tracing procedure'). If the bailiff's research does not produce results, then the insolvency practitioners have no other legal tools to search for such assets.

In Romania, it was indicated that insolvency practitioners will consult the local tax offices, which are present in every local administration to determine the situation of movable assets such as vehicles that need to be registered for taxation purposes – though this may also be considered as an indirect consultation of asset records. Furthermore, the primary source of information for the insolvency practitioner is the internal financial statements and documents of each debtor company. Moreover, the debtor is obliged to offer access to any documentation (such as financial statements or other such documents) deemed necessary by the insolvency practitioner.⁴⁶⁵

In Sweden, the administrator usually communicates in writing to all banks, credit institutions, or similar bodies indicated by the debtor, the fact that the debtor is declared bankrupt, which can give the administrator more information about assets held by these institutions. In Slovenia, it was noted how with the commencement of the bankruptcy proceedings of a legal entity, the insolvency practitioners become the debtor's sole legal representatives. Therefore, the employees and other stakeholders in the company structure should cooperate with the insolvency practitioner as they normally would with the legal representatives (according to general corporate rules). Moreover, after the court issues the decision to commence the bankruptcy proceedings, the former legal representatives are required to immediately: (i) provide the administrator with access to the debtor's premises; (ii) deliver keys and other equipment necessary for the access and security of such premises; (iii) deliver any other assets in their possession and/or the equipment and documents necessary to takeover such assets; and (iv) in the period of three business days, hand-over the debtor's operations and deliver all debtor's business and other documentation. Similarly, the corporate governance body members, shareholders and debtor's employees are required to provide the administrator with all information on the debtor's transactions, business and operations necessary to maintain and manage the bankruptcy proceedings and financial statements.⁴⁶⁶ If the circumstances of the case require so, the administrator may ask for the presence and assistance of the police.⁴⁶⁷ With the commencement of the bankruptcy proceedings, the administrator becomes entitled to request assets and other information from various assets databases (banks, investment firms, central securities clearing corporations, courts, tax administration, etc.)⁴⁶⁸ to provide all data that is required to assess the legal status and financial position of the debtor and transactions that could have the characteristics of rebuttable legal actions (avoidance

⁴⁶⁴ Ustawa z dnia 28 lutego 2003 Prawo upadłościowe (Bankruptcy Law, 28 February 2003 with later amendments), Official Journal 2003 No 60 Item 535, available at <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20030600535/U/D20030535Lj.pdf>, (last accessed 19 November 2021), Article 178 (2).

⁴⁶⁵ Legea Nr. 85/2014 privind procedurile de prevenire a insolvenței și de insolvență, 25 Iunie 2014 (Law No. 85/2014 on pre-insolvency proceedings and insolvency proceedings, adopted on 25 June 2014) Official Gazette of Romania, No. 466, 25.06.2014, available at <http://legislatie.just.ro/Public/DetaliiDocument/159286> (last accessed 8 November 2021), Article 82, paragraph 1.

⁴⁶⁶ Konkurslagen (1987:672) (Bankruptcy Act (BA)), with later amendments, available at www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/konkurslag-1987672_sfs-1987-672 (last accessed 14 December 2021), Article 292.

⁴⁶⁷ Ibid, Article 293.

⁴⁶⁸ This data is especially data about (i) bank accounts and their balances, (ii) securities and other financial instruments accounts and their balances, (iii) balance of monetary and other deposits at the banks, investment firms or other person, (iv) information on life and non-life insurance, (v) ownership and other property interests over real estate, (vi) information available in the driver licenses register, (vii) information available in the boats and aircraft register, and (viii) pension and health insurance information.

actions).⁴⁶⁹ When a debtor is a natural person, the administrator may also request information on the assets owned by the debtor's spouse or a person with whom he lives in a same-sex partnership under the law governing the registration of a same-sex partnership.⁴⁷⁰ Moreover, domestic courts and insolvency administrators are statutorily required to cooperate with foreign courts and insolvency administrators.⁴⁷¹ Similarly, the domestic insolvency administrators shall cooperate to the fullest extent possible with the foreign courts and insolvency administrators.⁴⁷² In the extent of this cooperation, the insolvency administrator shall be entitled, under the supervision of the domestic court, to exchange information directly with the foreign court or insolvency administrator.⁴⁷³ Such cooperation may be executed in any form, which provides for the realisation of the purpose and includes: (i) the appointment of a person or body to act in accordance with the rules of the court in order to cooperate with the foreign court or foreign insolvency administrator; (ii) the provision of information by using any means which the court assesses appropriate; (iii) the coordination of management and supervision of assets and operations of an insolvent debtor; (iv) the conclusion and carrying out of agreements which refer to the coordination of insolvency proceedings with foreign courts; and (v) the coordination of parallel procedures against the same insolvent debtor.⁴⁷⁴ In Germany, it was also noted how the insolvency administrator has detailed information rights vis-à-vis the debtor.

In the Czech Republic, there are many public subjects obliged to cooperate with the insolvency practitioner in searching for assets.⁴⁷⁵ Namely, but not limited to, public administration authorities, in particular cadastral authorities, motor vehicle registration authorities and other administrative authorities, as well as notaries, bailiffs, securities registers, financial institutions, telecommunications service providers, postal service providers, and other persons involved in the transport of parcels, press publishers, and carriers. In general, the cooperation consists in providing the insolvency practitioner with information on the debtor's assets to the same extent as they would have provided it directly to the debtor. Such cooperation shall also consist in the fact that the authorities and persons mentioned, who are in possession of documents or other things which may serve to establish the debtor's assets, shall, without undue delay after receipt of the request, deliver or lend them to the insolvency practitioner. In the case of data held in electronic form, the authorities and persons shall comply with the obligation to cooperate by giving the insolvency practitioner remote access to the data. The assistance shall be provided free of charge; where the assistance is not provided by public authorities, the person who provided the assistance shall be entitled to reimbursement of the associated costs.⁴⁷⁶ Generally, insolvency practitioners from another Member State might also attain information on assets, shall they become a hosting insolvency practitioner and fall under the scope of Czech

⁴⁶⁹ Konkurslagen (1987:672) (Bankruptcy Act (BA)), with later amendments, available at www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/konkurslag-1987672_sfs-1987-672 (last accessed 14 December 2021), Articles 291(4), 472, and 473.

⁴⁷⁰ Ibid, Article 384(8).

⁴⁷¹ According to Article 471 of the Swedish Insolvency Act, see Ibid, the domestic court shall in the matters referred to in Article 449(1) of cooperate to the fullest extent possible with the foreign courts and insolvency administrators, directly or through the domestic insolvency administrator. In this extent, the domestic court shall be entitled to (i) exchange information directly with the foreign court or foreign insolvency administrator, (ii) request information or legal assistance directly from the foreign court or insolvency administrator, and (iii) provide information or carry out acts of legal assistance based on a direct request from the foreign court or insolvency administrator.

⁴⁷² Pursuant to Article 472 of the Swedish Insolvency Act, see Ibid, in the matters referred to in Article 449(1) and pursuant to their competencies and under the supervision of the domestic court.

⁴⁷³ Ibid, Article 472(2).

⁴⁷⁴ Ibid, Article 473.

⁴⁷⁵ Zákon č. 182/2006 Sb. Zákon o úpadku a způsobech jeho řešení (insolvenční zákon) (Act on Bankruptcy and Methods of its Resolution (Insolvency Act)), 9 May 2006 with later amendments, Official Journal 2005, No. 182, available at <https://www.zakonyprolidi.cz/cs/2006-182> (last accessed 6 December 2021), Sections 43 and 44..

⁴⁷⁶ Ibid, Section 43 par. 2.t

insolvency legislation. The information and documents provided within the scope of the statutory cooperation are relevant both for the examination of the registered or otherwise asserted claims and for the preparation of a proper inventory of the estate. If the insolvency administrator is not provided with the cooperation, he may apply to the insolvency court to call for remedy. If no remedy is arranged after that, a fine of up to CZK 50,000 may be imposed on the obliged person.⁴⁷⁷

In Spain, it was noted that the court will ask for any information available from the tax, social security, and traffic authorities that may reveal leads for asset tracing through the Judicial Neutral Point.⁴⁷⁸

In Lithuania, an insolvency administrator has a right to receive from the state and municipal institutions and companies, as well as from other natural and legal persons, information necessary for the performance of the functions of an insolvency administrator, including personal data, in compliance with data protection requirements and requirements for the protection of commercial (production) secrets.⁴⁷⁹

In Finland, the estate administrators in bankruptcies and administrators in the restructuring of enterprises get access to the bankruptcy and restructuring proceedings case management system *Konkurssi- ja yrityssaneerausasioiden asiantuntijajärjestelmä* ("KOSTI").⁴⁸⁰ The system is regulated by law⁴⁸¹ and upheld by the Bankruptcy Ombudsman's Office. KOSTI provides a digital platform for the estate administrators, debtors and creditors, the bankruptcy ombudsman, as well as some other public authorities in order to communicate and share information during the insolvency proceedings.⁴⁸² The Finnish Tax Administration's Grey Economy Information Unit produces a company's obligation compliance report, which is automatically published in the KOSTI system after the beginning of the proceedings. The report is visible only to certain specified authorities and the estate administrator. The report combines information from different national public registers (including the trade register) containing details about the debtor's operations, finances and the compliance of obligations related to taxes and other public duties. The report works as an important source of information for estate administrators about the debtor's overall financial situation.⁴⁸³ Moreover, all virtual currency providers must be registered in the register of virtual currency providers maintained by the Financial Supervisory Authority.⁴⁸⁴ Virtual currency providers must identify their clients and keep

⁴⁷⁷ Petr Sprinz, 'Insolvenční zákon: komentář' (2019), Prague, C. H. Beck. Velké komentáře. ISBN isbn978-80-7400-753-8, p. 130 et se.

⁴⁷⁸ Punto Neutro Judicial (Judicial Neutral Point), available at <https://www.poderjudicial.es/cgpi/es/Temas/e-Justicia/Servicios-informaticos/Punto-Neutro-Judicial/#:~:text=El%20Punto%20Neutro%20Judicial%20es,con%20objeto%20de%20facilitar%20y> (last accessed 13 January 2022).

⁴⁷⁹ Lietuvos Respublikos juridinių asmenų nemokumo įstatymas of 13 June 2019 No XIII-2221 (The Law on Insolvency of Legal Entities of the Republic of Lithuania), available at <https://www.e-tar.lt/portal/lt/legalAct/68f2cad098b711e9ae2e9d61b1f977b3/asr> (last accessed 4 November 2021), Article 66(2)(2).

⁴⁸⁰ Available at <https://kosti.oikeus.fi/> (last accessed 13 January 2022).

⁴⁸¹ Laki konkurssi- ja yrityssaneerausasioiden asiantuntijajärjestelmästä 17.5.2019/667 (Act on the Bankruptcy and Restructuring Proceeding Case Management System 17.5.2019/667), available (in Finnish) at <https://www.finlex.fi/fi/laki/alkup/2019/20190667> (last accessed 30 November 2021).

⁴⁸² Description of the KOSTI case management system, available (in Finnish) at <https://www.konkurssiassiamies.fi/fi/index/kosti/kostinkayttoonotto.html> (last accessed 30 November 2021).

⁴⁸³ A short description of the Company's obligation compliance report, available at <https://www.suomi.fi/services/companys-obligation-compliance-report-finnish-tax-administration/3b358c48-a7b7-436c-9529-b7e355b6a144> (last accessed 30 November 2021).

⁴⁸⁴ Laki virtuaalivaluutan tarjoajista 26.4.2019/572 (Act on Virtual Currency Providers 26.4.2019/572), available (in Finnish) at <https://finlex.fi/fi/laki/alkup/2019/20190572> (last accessed 30 November 2021)..

books about services provided to them.⁴⁸⁵ Estate administrators can request information about the debtor's registered virtual currencies from the Financial Supervisory Authority.⁴⁸⁶

iv. Requirements that might restrict the access by insolvency practitioners to information on assets

Finally, the mapping at national level looked into any general requirements (e.g., in civil, public administrative or international law) that might restrict the access by insolvency practitioners to information on assets. In some countries, data protection was noted as a potential access barrier. For instance, in Spain, it was underlined how the right to protection of personal data of the creditors who are natural persons must be respected during the insolvency proceedings, as stated in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('GDPR').⁴⁸⁷ Specifically, when complying with the communication of the list of creditors before presenting it,⁴⁸⁸ the insolvency practitioner must respect the creditors' right to the protection of their personal data. However, in exceptional cases, the court may determine that the list of creditors should be kept confidential, and the creditors may only access the information regarding their own claims. The legal framework for the protection of personal data and other information was also mentioned in Cyprus, as well as Sweden where the Public Access to Privacy Act⁴⁸⁹ contains rules that can prohibit authorities from releasing documents. However, there are certain exceptions for data to be provided to an administrator in the bankruptcy of an individual. For example, the Enforcement Authority (*Kronofogden*) is a government agency that registers, monitors and collects debts. Chapter 34, Section 1 of the Public Access to Privacy Act states that confidentiality applies to the agency's activities. Information collected about an individuals' personal or financial relationships is confidential. This does not prevent information about an individual from being disclosed to a trustee in the individual's bankruptcy.

In Greece, the necessity to prove a legitimate interest to access certain information was pointed out as a potential restriction. Tax and bank secrecy were also mentioned in Germany and Cyprus. In Finland, it was underlined how from a practical point of view, many of the registers containing information about debtor's assets require strong electronic identification⁴⁹⁰ in order to access the data, which could become an obstacle in cross-border situations when electronic identification means are not available. Additionally, the costs to access certain information may also play a role. Also, in Finland, in fact, it was noted that service providers having to provide debtor information have a right to receive a payment for the disclosure of the information. However, if there are not sufficient funds in the debtor's estate to pay for said services, the estate administrator can request assistance from the

⁴⁸⁵ Ibid, Sections 10, 11 and 13.

⁴⁸⁶ Description of the virtual currency providers' register, available at <https://www.finanssivalvonta.fi/en/fintech--financial-sector-innovations/virtuaalivaluutan-tarjoajat/> (last accessed 30 November 2021).

⁴⁸⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1-88, available at <http://data.europa.eu/eli/reg/2016/679/oj> (last accessed 7 December 2021).

⁴⁸⁸ Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal (Act 1/2020, of May 5, which approves the Recast Insolvency Act), Official State Gazette of Spain 2020, No 127, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859> (last accessed 7 December 2021), Article 289.

⁴⁸⁹ Offentlighet- och Sekretesslag (2009:400), The Public Access to Privacy Act (2009:400) with later amendments, available at www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/offentlighets-och-sekretesslag-2009400_sfs-2009-400 (last accessed 6 April 2022).

⁴⁹⁰ About electronic identification, see description on National Cyber Security Centre's webpage, available at <https://www.kyberturvallisuuskeskus.fi/en/our-activities/regulation-and-supervision/electronic-identification> (last accessed 30 November 2021).

bankruptcy ombudsman, who is entitled to receive the information free of charge.⁴⁹¹ Similar remarks were noted in Romania, where the general requirements that could potentially act as barriers include the necessity of a user registration authorised by the relevant asset register platforms (thus, ensuring data protection and intellectual property rights), as well as certain fees when a formal request for information is made.⁴⁹²

Nonetheless, certain observations made with regards to certain Member States also appear to be relevant to understanding the extent to which such general rules may, in practice, constitute an actual obstacle to obtaining asset information. In Belgium, in fact, it was noted that generally speaking, the trustee (in case of a bankruptcy) has access to any information the (bankrupt) person had on itself before the bankruptcy, without limitation. The general rule is that access should be necessary for the mission of the trustee. In Denmark, in general, the court-appointed trustee has access to information equivalent to the debtor, meaning all information available to the debtor should be made available to the trustee; this is in spite of the existence of general requirements that might restrict the access of insolvency practitioners to information on assets. Moreover, a general request information orders can be granted by the court as in any other civil dispute. A remark that applies to all Member States is the fact that the debtor's duty to provide information may be nonetheless limited by the Article 6 of the European Convention on Human Rights⁴⁹³ in regard to self-incrimination. Finally, a similar remark was indicated in Finland, as a general rule, insolvency practitioners (estate administrators and administrators) have the same access to information about debtors' finances as the debtors themselves.⁴⁹⁴ Third parties, such as accounting firms, register providers or banks are obliged to provide information on the debtor's assets which is of use to the insolvency practitioners, notwithstanding any privacy restrictions. However, these service providers have a right to receive a payment for the disclosure of the information. If there are no sufficient funds in the debtor's estate to pay the said services, the estate administrator can request assistance from the bankruptcy ombudsman, who is entitled to receive the information free of charge.⁴⁹⁵

3.2.2. Field research finding

As regards the extent to which asset registers constitute a useful tool in the context of insolvency proceedings, many stakeholders concurred that they are the most important source insolvency practitioners rely on.⁴⁹⁶ However, practitioners need to rely also on the documents kept by the debtor, which the latter surrenders to the insolvency administrator.⁴⁹⁷ One stakeholder from the Czech Republic specified that asset registers are reliable as far as corporate debtors are concerned, whereas insolvency practitioners have to find

⁴⁹¹ Laki konkurssipesien hallinnon valvonnasta 31.1.1995/109 (Act on the Supervision of Bankruptcy Estates 31.1.1995/109), Section 8, available (in Finnish) at <https://www.finlex.fi/fi/laki/ajantasa/1995/19950109> (last accessed 30 November 2021).

⁴⁹² General requirements can be consulted, available at <https://portal.onrc.ro/ONRCPortalWeb/ONRCPortal.portal> (last accessed 6 December 2021).

⁴⁹³ European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, available at https://www.echr.coe.int/documents/convention_eng.pdf (last accessed 6 April 2022).

⁴⁹⁴ Konkurssilaki 20.2.2004/120 (Bankruptcy Act 20.2.2004), available at <https://www.finlex.fi/fi/laki/ajantasa/2004/20040120> (last accessed 30 November 2021), Chapter 8 Section 9; Laki yrityksen saneerausesta 25.1.1993/47 (Restructuring of Enterprises Act 25.1.1993/47), available at <https://finlex.fi/fi/laki/ajantasa/1993/19930047> (last accessed 30 November 2021), Chapter 3 Section 9; and Laki yksityishenkilön velkajärjestelystä 25.1.1993/57 (Act on the Adjustment of the Debts of a Private Individual 25.1.1993/57), available at <https://www.finlex.fi/fi/laki/ajantasa/1993/19930057#L3P9> (last accessed 30 November 2021), Chapter 9 Section 67.

⁴⁹⁵ Laki konkurssipesien hallinnon valvonnasta 31.1.1995/109 (Act on the Supervision of Bankruptcy Estates 31.1.1995/109), available at <https://www.finlex.fi/fi/laki/ajantasa/1995/19950109> (last accessed 30 November 2021), Section 8.

⁴⁹⁶ See Annex A, national country reports, CZ, EL, ES, LT, LU, LV, NL, RO, SE interview reports.

⁴⁹⁷ See Annex A, national country reports, DE interview report.

information from other sources when consumer debtors are involved.⁴⁹⁸ Some stakeholders also made a distinction based on the types of assets involved, registers for real estate, ships, cars or aeroplanes are deemed as being the most reliable for practitioners.⁴⁹⁹ According to a stakeholder in Sweden, in fact, the former registers provide a very good control mechanism in order to track ownership, whilst for instance pledged assets are not easy to trace if the pledged goods consist of other goods/assets than real estate.⁵⁰⁰ Finally, one stakeholder from Slovenia indicated that insolvency practitioners receive most of the information directly from the debtor and only resort to asset registers to check that the information disclosed was complete and find other information on the assets.⁵⁰¹

Other registers mentioned by stakeholders as useful were the registers for weapons,⁵⁰² mortgages,⁵⁰³ trade names,⁵⁰⁴ and shares and owned social parts of companies.⁵⁰⁵ One stakeholder from Slovenia noted that asset registers usually do not provide the option to search assets through the debtor's identity but rather require searches to be run with other distinctive elements that can be received through written inquiries addressed to the register operators or by the debtor itself.⁵⁰⁶ Moreover, one stakeholder from Slovakia mentioned that not all the available registers contain historical data related to the period prior to the insolvency proceedings (e.g., dating 3 years back), thus, posing potential obstacles to clawback actions.⁵⁰⁷

Some stakeholders indicated that asset registers are a useful tool also in cross-border situations.⁵⁰⁸ One stakeholder from Germany, for instance, noted that, although some registers provide links to other national registers, the creation of an EU-wide register would be helpful.⁵⁰⁹ One stakeholder from Spain indicated that the use of registers in cross-border cases is hindered by the lack of recognition of insolvency practitioners' powers by other Member States and the related costs.⁵¹⁰ One stakeholder from Romania stated that asset registers are the only option for identifying assets in cross-border situations;⁵¹¹ to the contrary, one stakeholder from Luxembourg indicated that registers are less useful in cross-border situations as foreign registers would only be consulted if there is an indication that an asset exists in a specific country.⁵¹² Some stakeholders pointed at language barriers and differences between legal systems as possible obstacles to the use of registers in cross-border cases,⁵¹³ and suggested that insolvency administrators be taught how to work with EU asset registers.⁵¹⁴

⁴⁹⁸ See Annex A, national country reports, CZ interview report.

⁴⁹⁹ See Annex A, national country reports, CZ, EL, ES, LT, LU, NL, RO, SE interview reports.

⁵⁰⁰ See Annex A, national country reports, SE interview report.

⁵⁰¹ See Annex A, national country reports, SI interview report.

⁵⁰² See Annex A, national country reports, CZ interview report.

⁵⁰³ See Annex A, national country reports, LU interview report.

⁵⁰⁴ See Annex A, national country reports, NL interview report.

⁵⁰⁵ See Annex A, national country reports, RO interview report.

⁵⁰⁶ See Annex A, national country reports, SI interview report.

⁵⁰⁷ See Annex A, national country reports, SK interview report.

⁵⁰⁸ See Annex A, national country reports, DE, EL, LT, NL, RO, SI interview reports.

⁵⁰⁹ See Annex A, national country reports, DE interview report.

⁵¹⁰ See Annex A, national country reports, ES interview report.

⁵¹¹ See Annex A, national country reports, RO interview report.

⁵¹² See Annex A, national country reports, LU interview report.

⁵¹³ See Annex A, national country reports, LV interview report.

⁵¹⁴ See Annex A, national country reports, LT interview report.

As far as the requirements to access asset registers are concerned, some stakeholders stated they are satisfied with access conditions, especially when acting in their capacity as appointed practitioners.⁵¹⁵ Other stakeholders indicated that access conditions could be simplified,⁵¹⁶ and pointed at an excessive bureaucratic burden, which makes it difficult to obtain cooperation from financial institutions,⁵¹⁷ as well as the difficulties to prove legitimate interest⁵¹⁸ and the lengthy responses from the competent authorities.⁵¹⁹ Furthermore, one stakeholder indicated that, in the Polish legal system, insolvency practitioners (trustees) do not have free access to all registers, as alongside public registers there are registers that trustees can only access through the bailiff, and registers covered by secrecy, for which the court's permission is needed.⁵²⁰ One stakeholder from Latvia assessed positively national rules allowing all administrators to enter into a contract with public registers maintained by the State, thus, having unlimited and rapid access to them on the basis of the authorisation given by the court adjudication regarding the insolvency and their appointment as administrators.⁵²¹ One stakeholder in Romania also indicated that certain access conditions hinder the efficiency of asset registers up to a certain point. For instance, in the case of immovable assets, in order to identify a particular asset, one would have to indicate the cadastral registration number, which is not always available.⁵²² Furthermore, in some instances, the aid of a cadastral expert is needed. The same stakeholder additionally indicated that it would be more efficient if the information were centralised, i.e., based on a search by the company, allowing for the tracking of all its assets. Another stakeholder also indicated that in Romania each local land register office can only grant information with regards to its own jurisdiction. Hence, if the debtor were to have assets in different counties, information requests shall be filed in each county individually, a procedure that is not time and cost-efficient. Efficiency could, therefore, be enhanced by implementing a nationally centralised registration system, or by improving communication between the local counties.⁵²³

With regards to other information sources besides assets registers, tax declarations, financial statements and annual accounts were generally indicated as constituting relevant and reliable sources of information.⁵²⁴ Stakeholders also mentioned capital market information (where applicable)⁵²⁵ and private information providers and investigators,⁵²⁶ as well as questionnaires and personal research,⁵²⁷ including from media reports.⁵²⁸ One stakeholder from Slovakia indicated information from bank account movements as a useful source of information,⁵²⁹ while a stakeholder from Finland mentioned that special audits –

⁵¹⁵ See Annex A, national country reports, CZ, EL, LT, LU, LV, NL, SI interview reports.

⁵¹⁶ See Annex A, national country reports, LT, ES interview reports.

⁵¹⁷ See Annex A, national country reports, CZ interview report.

⁵¹⁸ See Annex A, national country reports, DE interview report.

⁵¹⁹ See Annex A, national country reports, RO interview report.

⁵²⁰ See Annex A, national country reports, PL interview report.

⁵²¹ See Annex A, national country reports, LV interview report.

⁵²² See Annex A, national country reports, RO interview report.

⁵²³ See Annex A, national country reports, RO interview report.

⁵²⁴ See Annex A, national country reports, DE, EL, LU, LV, R, SE, SI interview reports.

⁵²⁵ See Annex A, national country reports, DE interview report.

⁵²⁶ See Annex A, national country reports, LV, SE interview reports.

⁵²⁷ See Annex A, national country reports, NL interview report.

⁵²⁸ See Annex A, national country reports, DE interview report.

⁵²⁹ See Annex A, national country reports, SK interview report.

which can be funded by the Finnish Bankruptcy Ombudsman, in case the estate has no sufficient funds – can be helpful to find assets to be recovered.⁵³⁰

Stakeholders also provided opinions on whether insolvency practitioners shall have the same access to information as debtors. Many stakeholders concurred that it would be useful that insolvency practitioners have the same access to information as the debtor had prior to proceedings.⁵³¹ However, some stakeholders indicated that, while third parties such as accounting firms generally cooperate with appointed insolvency practitioners, they are also bound by non-disclosure agreements with their clients⁵³² or may be reluctant to give too much information as they could face liability for having failed to spot problematic issues.⁵³³ One stakeholder from Luxembourg specifically indicated that access to documents held by third parties (such as accountants or domiciliation agents) whose invoices have not been paid is problematic, as the principle of equality between creditors would block insolvency receivers from proceeding with the payment of pre-bankruptcy debts.⁵³⁴ Finally, two stakeholders indicated that their national legislation currently provides sufficient access to information to insolvency practitioners⁵³⁵ and one stakeholder from Finland further specified that accounting firms are obliged by law to provide the necessary information to insolvency practitioners.⁵³⁶

A significant group of stakeholders also indicated that it would be useful for insolvency practitioners to have access to beneficial ownership or transparency registers.⁵³⁷ Some stakeholders, however, noted that such registers are already publicly accessible.⁵³⁸ Two stakeholders from Romania noted that beneficial ownership registers have not been entirely set up yet in their Member State, but also specified that insolvency practitioners can file requests for information on specific companies with the national trade register.⁵³⁹ Two stakeholders from Greece noted that their national law already grants insolvency practitioners access rights comparable to those of authority officials and, therefore, concluded that insolvency practitioners do not lack information sources.⁵⁴⁰ Finally, some stakeholders indicated that having access to beneficial ownership registers would not be beneficial for insolvency practitioners.⁵⁴¹ In particular, one stakeholder from the Czech Republic noted that beneficial ownership registers would not provide information on the debtors' assets,⁵⁴² while one stakeholder from Slovenia assessed the information contained in such registers as unreliable, as each subject registers the information independently, without having to provide any proof.⁵⁴³

⁵³⁰ See Annex A, national country reports, FI interview report.

⁵³¹ See Annex A, national country reports, CZ, DE, LT, LU, LV, RO, SE, SI interview reports.

⁵³² See Annex A, national country reports, EL interview report.

⁵³³ See Annex A, national country reports, ES interview report.

⁵³⁴ See Annex A, national country reports, LU interview report.

⁵³⁵ See t Annex A, national country reports, NL, RO interview reports.

⁵³⁶ See Annex A, national country reports, FI interview report.

⁵³⁷ See Annex A, national country reports, ES, LT, LY, LV, NL, RO, SE interview reports.

⁵³⁸ See Annex A, national country reports, LU, LV interview reports.

⁵³⁹ See Annex A, national country reports, RO interview report.

⁵⁴⁰ See Annex A, national country reports, EL interview report.

⁵⁴¹ See Annex A, national country reports, CZ interview report.

⁵⁴² See Annex A, national country reports, CZ interview report.

⁵⁴³ See Annex A, national country reports, SI interview report.

3.3. Analysis and policy recommendations

In the following sections, an analysis of the findings concerning the cross-border situation with regard to the asset registers across the Member States and the ability to trace and preserve assets in such situations is outlined in Section 3.3.1, whilst Section 3.3.2 outlines some policy recommendations exploring how best to improve the operation of such registers in cross-border situations.

3.3.1. Analysis

The data collected reveals a considerable variety of registers available for consultation by insolvency practitioners. Although the findings show that the existence of the registers is overall useful in practice, there are still a few issues emerging, in particular from a cross-border perspective. These issues will be discussed in Section 3.3.1 and mainly relate to: (i) the diversity of registers; (ii) the diversity of the information contained in similar registers; (iii) requirements to access the registers; and the (iv) availability and quality of the information in the registers.

i. Diversity of registers

First of all, the majority of the Member States have at least a register of land/cadastre and a register of businesses. However, there is a considerable lack of uniformity concerning other types of registers, such as registers of bank accounts, registers of security rights, and registers of beneficial property. Additionally, not all Member States adopt the same systems to register similar types of assets. The variety of registers identified across the EU via the mapping at national level generally brought to light the level of complexity and challenges in respect of obtaining a clear and overall picture of all registers available in the Member States. Such convolution might undermine the cross-border tracing efforts of the insolvency practitioners as they might not be aware of where to look for information and, therefore, might increase the time and costs necessary to effectively trace and recover assets.

ii. Information contained in the registers

Secondly, there seems to be a lack of consistency concerning the information available within similar registers. For example, in certain countries, a security right attached to an immovable property may be transcribed within the land register (e.g., Italy), whilst in other countries, the right might be transcribed in a separate register (e.g., the former Mortgage Register in Lithuania).⁵⁴⁴ Moreover, some registers may perform different functions within the same legal system. For example, in Italy, there are two systems of registration of immovable property: the cadastre system and the tabular cadastre system. The second system is peculiar only to the northeast Italian territories that used to be part of the Austrian-Hungarian Empire. The tabular cadastre system has the peculiarity that the transcription of a transaction on the register constitutes the ownership title, while in the normal cadastre, the register has exclusively evidentiary value.⁵⁴⁵

As for the first issue, the lack of clarity concerning where to find the relevant information and the value of the information contained in a particular register affects the time and cost-efficiency of the tracing process and consequently of the insolvency proceedings. As for the second matter, as has been noted for Croatia in Section 3.2, higher possibilities of finding

⁵⁴⁴ Though it should be recalled that such separate register has ceased to exist as of 1 January 2022.

⁵⁴⁵ Arturo Picciotto, 'Lineamenti generali del sistema tabolare, principali differenze con il sistema della trascrizione, e procedimento in affari tavolari', available at <http://www.tribunale.trieste.it/documenti/relazioni/persito2.htm> (last accessed 18 January 2022).

inconsistent information may arise if double registrations systems are in place and not regularly updated.

iii. Access to Information

The third matter concerns the diversity across the countries in respect of the conditions to access the information contained in the registers. Some countries provide access free of cost and without the need for a legitimate cause.⁵⁴⁶ Others require both the payment of a fee and the authorisation of the judge to access the information.⁵⁴⁷ Finally, the third group of countries presents some registers which access is free and others that access is conditioned upon the payment of a fee.⁵⁴⁸ The lack of uniformity concerning the conditions to access the registers undermines the predictability of the outcome of the cross-border tracing and recovery process and the overall efficiency of the European Insolvency framework.

Overall, the current system of registers within the Member States provides a complex picture characterised by levels of diversity of registers and registration approaches among Member States. Once more, such inconsistencies may undermine the predictability of the costs and time necessary to trace the assets in other Member States. For instance, a Spanish interviewee indeed pointed out that asset tracing in Spain is time-consuming and costly.⁵⁴⁹ It can also be argued that such inconsistencies may leave space for abuse by debtors seeking to conceive their assets.

iv. Availability and quality of the necessary information

A fourth issue concerning the tracing process is the availability and quality of the information contained in the registers or the books. Some of the stakeholders interviewed reported that, in certain instances, debtors may fail to provide accurate financial accounting documents requested by law,⁵⁵⁰ others remarked that when the information should be self-submitted by the debtor, it is not always available.⁵⁵¹ The lack of compliance by the debtor – whether fraudulent or not – creates considerable issues in the asset tracing process. Though the matter does not fall within the realm of the current research, however, the potential divergencies in the measures to foster debtor compliance across the Member States is still a factor that be taken into consideration as to the overall of potential issues arising in respect of asset tracing and recovery across the EU.

3.3.2. Policy recommendations

Based on the information collected in the legal desk research and field research at the national level, as well as the information discussed with the relevant experts in the Advisory Board Meeting, the following subsection contains some policy recommendations exploring how best to improve the operation of such registers in cross-border situations.

At EU level, there is already a website collecting information concerning Member States' asset registers, providing the relevant links to some registers for the purposes of asset tracing.⁵⁵² A first recommendation would be, for instance, to update and standardise this

⁵⁴⁶ See Annex A, national country reports, AT legal desk research questionnaire.

⁵⁴⁷ See Annex A, national country reports, IT legal desk research questionnaire.

⁵⁴⁸ See Annex A, national country reports, BG legal desk research questionnaire.

⁵⁴⁹ See Annex A, national country reports, ES interview report.

⁵⁵⁰ See Annex A, national country reports, LT interview report.

⁵⁵¹ See Annex A, national country reports, RO interview report.

⁵⁵² For example, e-Justice, Registers – business, insolvency & land, available at https://e-justice.europa.eu/514/EN/registers_business_insolvency_amp_land (last accessed 8 March 2022).

website; this is recommended with particular regard to updating the pre-existing EU level registers, i.e. insolvency registers, land registers, and business registers, as well as including overview and links to more types of register, i.e. registers of security interests and beneficial ownership registers.

The existing EU platform contains links to national records concerning insolvency registers, business registers and land registers. The platform for business registers is easy to access, and includes a search bar that allows for a quick search. However, it only allows searching for companies. Considering that many enterprises in the EU are partnerships or sole traders, it would be beneficial to include these within the European e-Justice website and add search tools. This inclusion would facilitate asset tracing for those business entities that generally have less money available to be spent as insolvency expenses. Therefore, any tool that reduces the cost of asset tracing would be beneficial for these entities.

Alternatively, there are two considerations to be made concerning the land registers. First, the EU platform currently presents information and links to the national registers. Although the questions on the pages are standardised, the answers display considerable variations in terms of the level of detail and content presented from different countries. It would be beneficial to revise the web pages with a uniform approach to ensure that the information displayed is consistent among Member States.

Second, the European Land Registry Association ('ELRA') connects different land registers among Member States and other European countries.⁵⁵³ ELRA also provides templates for displaying information in land registers uniformly across the Member States. However, only 22 Member States are currently members of ELRA.⁵⁵⁴ It would be beneficial for the EU to liaise with ELRA and develop a recommendation concerning the adoption of the European Land Registry Document template or similar, which could then apply in all 27 Member States.⁵⁵⁵ A liaison with ELRA would be beneficial because of their specific expertise and most likely cost-effective as the templates are already developed.

Additionally, the EU webpage could include an overview and links to the following registers: (i) registers of security interest, and (ii) beneficial ownership registers. These types of registers are not currently present in all Member States. For the Member States lacking the aforementioned registers, the descriptive page should refer to the other national registers where the information could be found. For example, if a country does not have a register of security interests, but the securities are registered in the land register, the national page in the EU website could explain this and provide the direct link for the relevant land registers. Moreover, a recommendation could present the best practices developed by the Member States so far and stress the importance of tracing effective ownership.

Moreover, some national registers' websites provide an instant translation into English. However, not all professionals in the EU speak or read English. It would be recommendable to have the registers' websites available at least in all the working languages of the EU. This would increase accessibility and fairness.

It is necessary to consider different elements concerning centralised bank account registers. Following the 5th Directive on Money Laundering,⁵⁵⁶ some Member States have developed

⁵⁵³ European Land Registry Association, available at <https://www.elra.eu/> (last accessed 8 March 2022).

⁵⁵⁴ These are Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, and Sweden.

⁵⁵⁵ European Land Registry Association, Interoperability Model for Land Registers (IMOLA), available at <https://www.elra.eu/imola/> (last accessed 8 March 2022).

⁵⁵⁶ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC OJ L 141, 5.6.2015, p. 73–117, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849> (last accessed 11 March 2022).

their centralised bank account registers. However, the access to these registers is sometimes limited to public prosecutors or courts only in the context of criminal cases.⁵⁵⁷ At times, the access is even more restricted to exclusively money laundering cases.⁵⁵⁸ In this respect, further studies could be recommended to develop a clearer understanding of the approach taken in this regard across all Member States, and the policy reasons behind the restriction of access to these types of registers.

Finally, a proposal to harmonise the conditions of access to the national registers could also be somehow considered, as the harmonisation would increase fairness in cross-border asset tracing. However, the price and cost of the national registers depend on various factors, including the country's wealth, the policy consideration given to a particular register from the national government, regional and structural subsidies, etc. Consequently, it may not be deemed feasible that a centralised measure could level the cost of access in a way that considers and respects all national instances.

3.4. Case study

N/A v. IN DESTINATION INCOMING, S.L.U.⁵⁵⁹

Summary of the Case

In this case, the court granted *ex officio* the precautionary seizure of a certain amount of assets and rights of the debtor (IN DESTINATION INCOMING, S.L.U.). The Court found that the debtor fulfilled the four requirements necessary to grant an interim measure of precautionary seizure and these requirements were complemented with the general regime provided in Articles 721 to 729 of the Act 1/2000, of January 7, on Civil Procedure (the 'Civil Procedure Act')⁵⁶⁰ and, therefore, the search for assets and rights would be carried out from a judicially neutral perspective to grant effectiveness to the interim measure of seizing. Furthermore, the Court highlighted that where sufficient assets and rights are not found in Spain to carry out the preventive seizure in the agreed terms, the Court will request the Member States whose nationality corresponds to the affected parties to recognise the resolution of opening the insolvency proceedings for the adoption of interim measures, as provided for in Article 19 of the EIR, and it will be enforced according to Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Ia Regulation').⁵⁶¹

Parties' main arguments of the Case

IN DESTINATION INCOMING, S.L.U. was declared to be in voluntary insolvency proceedings by order of Commercial Court 6 of Palma de Mallorca. In this case, the court granted *ex officio* the interim measure of seizing, on a precautionary basis, a certain amount of the assets and rights of the debtor's members of the board of directors that is reasonably considered to be sufficient to cover the insolvency deficit jointly and severally.

⁵⁵⁷ See Austria: Bundesgesetz über die Einrichtung eines Kontenregisters und die Konteneinschau (Kontenregister- und Konteneinschaugesetz – KontRegG) BGBl. I Nr. 116/2015, Section 4.

⁵⁵⁸ See Spain: Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo (Act 10/2010, of April 28, on money laundering and the financing of terrorism), Official State Gazette of Spain 2010, No 103, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2010-6737> (last accessed 7 December 2021).

⁵⁵⁹ Juzgado de lo Mercantil nº 6 de Palma de Mallorca (Commercial Court 6 of Palma de Mallorca), ruling JUR\2020\26676 of 3 October 2021, available at <https://www.poderjudicial.es/search/indexAN.jsp> (last accessed 18 January 2022).

⁵⁶⁰ Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Act 1/2000, of January 5, on Civil Procedure), Official State Gazette of Spain 2000, No 7, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2000-323> (last accessed 7 December 2021).

⁵⁶¹ Regulation (EU) 1215/2012 of the European Parliament and of the Council of December 22, 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF> (last accessed 7 December 2021).

Reasoning of the Court

The court established that there are four requirements that must be met to grant an interim measure of precautionary seizure:

- An order declaring insolvency must be issued, which constitutes the first moment at which the measure may be adopted.
- A well-founded possibility that the insolvency proceedings may be classified as fraudulent must exist, meaning the judge granting the measure *ex officio* must adequately prove that possibility.
- A reasonable possibility that the insolvency estate is not sufficient to pay the debts must exist. Therefore, the reasons must be extended to the qualification of fraudulent of the insolvency proceedings and the insufficiency of the assets.
- The persons against whom the measure is ordered must be practitioners or liquidators, *de facto* or *de jure*, of the insolvency estate, or have been so within two years before the declaration of insolvency.

However, the court stated that these are not the only requirements that must be met to grant the interim measure. They must also be complemented with the general regime established in Articles 721 to 729 of the Civil Procedure Act, with the existence of *fumus boni iuris* (foreseeable fraudulent qualification) and the *periculum in mora*.

Fumus boni iuris: the applicant of the interim measures must present the information, arguments and documentation that enable the court, without prejudging the merits of the case, to make a provisional and indicative judgment favourable to the merits of its claim. Regarding insolvency proceedings, the existence of *fumus boni iuris* refers to the possible classification of the insolvency proceedings as fraudulent.

Periculum in mora: the applicant of the interim measures must justify, in each case, the necessity and urgency of adopting them. Regarding insolvency proceedings, the purpose of these measures would be to avoid the disposal of the assets affected by the qualification of the proceedings.

In short, the court argues that to adopt an interim measure, the insolvency practitioner cannot merely request it, but the request must be justified by the existence of *fumus boni iuris* and *periculum in mora*.

In this case, the above requirements are met due to: (i) the prolonged unbalanced financial situation of the companies that make up the group controlled by the parent company, which, together with most of its British subsidiaries, have been declared insolvent; (ii) the big difference between the valuation of the assets and rights in the inventory and the total amount of the creditors' claims; and (iii) the total amount of the creditors' claims, which, due to the scarcity of assets, makes it very likely that a significant insolvency deficit will arise once the estate has been liquidated.

Due to the size of the liabilities that the insolvency proceedings will reach relating to the assets and rights that make up the insolvency estate, there are indications that the insolvency proceedings could be classified as 'guilty' due to the company's current or former general attorneys-in-fact's gross negligence in generating or aggravating the *de facto* or *de jure* administrator's state of insolvency.

Conclusion by the Court

The Court decided that the search for assets and rights would be carried out from a judicially neutral perspective to grant effectiveness to the interim measure of seizing, on a precautionary basis, the assets and rights of the debtor's board of directors' members, in an amount sufficient to cover the amount prudently foreseen jointly and severally to be equal to the insolvency deficit.

If sufficient assets and rights are not found in Spain, the affected persons will be required to provide sufficient assets and rights to be seized, stating, if applicable, of any charges and encumbrances. If a sufficient amount of assets is located, real estate will be seized first.

If sufficient assets and rights are not found in Spain to carry out the preventive seizure in the agreed terms, the court will request the Member States whose nationality corresponds to the affected parties to recognise the resolution of opening the insolvency proceedings for the adoption of interim measures, as provided for in Article 19 of the EIR, and it will be enforced according to Articles 39 to 44 and 47 to 57 of the Brussels Ia Regulation.⁵⁶²

Significance of Decision

The Decision provides an example of asset tracing in relation to third parties that might be held liable to creditors as part of the insolvency proceedings

⁵⁶² Ibid.

4. Tools at the disposal of creditors for asset tracing and recovery

4.1. Introduction

Having outlined the main powers of insolvency practitioners to trace and preserve assets in Chapter 2, and zoomed into the types of asset registers and access conditions in Chapter 3, in this Chapter, the focus is shifted towards the tools that creditors have at their disposal in respect of tracing and preserving assets. In addition, this Chapter will look at the time before the opening of insolvency proceedings, as well as after the latter have been opened. Section 4.2 provides an overview of the findings of the data collected via desk research and field research on the matter at hand. Furthermore, Section 4.3.1 offers an analysis of the aforementioned, whilst Section 4.3.2 outlines some policy recommendations exploring how best to improve the operation of the creditor's power to use *actio pauliana* during insolvency proceedings. Finally, a case study in respect of Poland is included in Section 4.4 providing an understanding of the functioning of the so-called *actio pauliana* in this country.

4.2. Summary of the main findings of the data collected

In the following sections, an overview of the findings of the desk research conducted with regards to the tools available to creditors across the Member States to trace and preserve assets is outlined in Section 4.2.1, whilst Section 4.2.2 provides stakeholder views collected on the matter at hand.

4.2.1. Desk research findings

The tools at the disposal of creditors can be divided into three main subcategories – those relating to the obtaining of information on (the whereabouts) of assets; the preservation of assets; or the repatriation of assets. As such, for the purposes of this section, tools relating to the three aforementioned subcategories shall be summarised. This will involve distinguishing similarities and differences between the tools adopted in the 27 Member States, as well as considering their stage of application (i.e., before, before and during, during the proceedings); any specification with regard to the type of assets covered; any differentiation or specification in cross-border situations; and whether the tools differ from other tools used in civil law.

Preliminary remarks

Before delving into the tools at the disposal of creditors in the Member States, it is worth highlighting that in Belgium, for instance, no tools specific to insolvency law were noted. Here, one civil law tool, not linked directly to insolvency, was noted that could be utilised by creditors; this tool permits any creditor to ask a bailiff whether they could execute a judgment. In order to execute such judgement, the bailiff has access to the real estate registry and, as such, the tool is limited to real estate assets.

Obtaining information on (the whereabouts of) assets

The majority of Member States have tools in their national insolvency law that permit the obtention of information on assets.

It is worth highlighting that relevant asset registers can be considered a tool allowing the obtention of information on assets – however, these registers were discussed in-depth in

Chapter 3 and, therefore, any information in this regard can be found therein. As such, for some Member States, such as Austria, Bulgaria, Estonia, Finland, Italy, Lithuania, Luxembourg, Malta, and Romania, it was noted that registers can operate as a tool to obtain information on assets.

In Slovakia, similar to an asset register, but also distinct from this, information can be obtained on assets via monitoring databases provided in Member States' insolvency law. Here, the creditors and generally the public can monitor the progress and status of bankruptcy proceedings, as well as assets sold in bankruptcy proceedings on a website administrated by the Ministry of Justice of the Slovak Republic.⁵⁶³ This tool can be used by all persons, with foreign creditors provided the same opportunity to enter the website as domestic creditors. The website allows the creditors to search for the debtor and find out if they are in bankruptcy, and during the bankruptcy, the creditors can find out the current actions performed by the trustee, and find the course of monetisation of the property belonging to the debtor. This tool can be applied either before or during insolvency proceedings and contains information on the following assets: real estate; moveable asset registers other than means of transport registers; direct corporate interests in legal persons and trusts; beneficial ownership interest; and vehicles, machinery, device, and facilities.

Some Member States (also) have more general provisions on the obtention of information on (the whereabouts of) assets. Some examples of such provisions in the Member States are provided below – these select examples were chosen to depict the different tools that the Member States have in regard to obtaining information on the whereabouts of assets.

In Cyprus, a disclosure order aims to reveal the assets of the debtor in the form of an affidavit. This can be requested at any point in time, but certainly after the filing of proceedings on the merit of dispute. It covers all assets⁵⁶⁴ and the information that must be provided includes the type, value, and location of the assets, as well as any other pertinent details. The order, drafted in wide terms, covers both assets held in the name of the defendant and assets held on the defendant's behalf. It frequently accompanies a freezing injunction. The applicant must demonstrate that the following requirements are met: (i) there is a serious question to be tried at the hearing of the main proceedings; (ii) there is a probability that the applicant is entitled to relief; (iii) there is a great risk that it will be difficult or impossible to do complete justice at a later stage if the injunction is not issued; and (iv) the issuance of the injunction must be just and equitable in the circumstances of the case.⁵⁶⁵ Disclosure orders exist under civil law, with no differentiation in insolvency proceedings. Furthermore, such orders can apply in both domestic and international situations and can be used to locate assets abroad.

Alternatively, in the Czech Republic, during insolvency proceedings, the creditors may obtain information about the assets in case there are more than 50 registered creditors in the insolvency proceedings. They can receive information with regards to the following assets: real estate; moveable asset registers other than means of transport registers; direct corporate interests in legal person and trusts; beneficial ownership interest; bank accounts; claims; and security interests relating to the aforementioned assets. After that, the meeting of creditors is obliged to appoint a creditors' committee. The creditors' committee protects the common interest of creditors and, in cooperation with the insolvency practitioner, contributes to the fulfilment of the purpose of the insolvency proceedings.⁵⁶⁶ After the

⁵⁶³ The website is available at <https://ru.justice.sk/ru-verejnost-web/pages/home.xhtml> (last accessed 17 January 2022).

⁵⁶⁴ Real estate, moveable asset registers other than means of transport registers, direct corporate interests in legal person and trusts; beneficial ownership interest, bank accounts, claims, and security interests relating to the aforementioned assets.

⁵⁶⁵ See *Odyseos v. A. Pieris Estates Ltd* (1982) 1 CLR 557 (Cy.).

⁵⁶⁶ Zákon č. 182/2006 Sb. Zákon o úpadku a způsobech jeho řešení (insolvenční zákon) (Act on Bankruptcy and Methods of its Resolution (Insolvency Act)), 9 May 2006 with later amendments, Official Journal 2005, No. 182, available at <https://www.zakonyprolidi.cz/cs/2006-182> (last accessed 6 December 2021), Section 56 par. 1 and Section 58 par. 1.

creditors' committee is appointed, it can pursue multiple activities;⁵⁶⁷ this includes approving, on an ongoing basis, the amount and accuracy of the insolvency practitioner's out-of-pocket expenses and the costs associated with the maintenance and administration of the estate, and deciding to have the annual accounts or extraordinary accounts audited.

Finally, in Slovenia, before the opening of insolvency proceedings, creditors can request the provision of information on the assets of the debtor on the basis of the Enforcement and Security Act.⁵⁶⁸ Irrespective to the creditor's citizenship, the data controller (i.e., the public agent) is required to provide the following information to any creditor that proves legal interest: (i) personal name, (ii) permanent and temporary address, (iii) date of birth, (iv) personal identification number, (v) tax number, (vi) information on salary and other income, (vii) bank accounts, (viii) securities and other financial instruments accounts, (ix) existence and balance of other deposits at banks, investment firms or other entities, (x) shares and interests in legal entities, (xi) legal interests in real estate, (xii) registered motor vehicles, (xiii) information from the aircraft and boats register, (xiv) information from other immovable property registers, (xv) information on pension and health insurance, and (xvi) information on life and non-life insurance. There is no specification as to whether or not this provision applies in cross-border situations.

The preservation of assets

The majority of Member States have tools in their national insolvency law which concern the preservation of assets.

The preservation of assets can be ensured via the existence of *actio pauliana* in Member States' insolvency law. As provided by Advocate General Ruiz-Jarabo Colomer in *Deko Marty Belgium NV*, *actio pauliana* is 'a legal remedy governed by civil law which protects creditors against disposals of assets made by their debtors with the intention to defraud'.⁵⁶⁹ These kinds of tools were found in Member States such as France, Greece, Poland, Romania, Slovenia and Spain.

In Poland, when as a result of a legal transaction performed by a debtor to the detriment of creditors, a third party obtains a material benefit, during the insolvency proceeding, each creditor may request that the transaction be declared ineffective concerning him if the debtor acted with intent to harm creditors, and the third party knew about it or could have learned about it by exercising due diligence.⁵⁷⁰ *Actio pauliana* is applicable when the debtor, by its disloyal behaviour towards the creditor, has prevented the realisation of the claim by causing or aggravating its insolvency and a third party has benefited from its action. The purpose of the *actio pauliana* is to realise the claim despite the debtor's disloyal behaviour, i.e. to realise the claim from the assets of the third party who benefited from the advantage. The means of achieving this goal is the construction of relative ineffectiveness of the action of the debtor with a third party, arising by way of a court ruling.⁵⁷¹ *Actio pauliana* applies to

⁵⁶⁷ For a full list, see *Ibid.*

⁵⁶⁸ Zakon o izvršbi in zavarovanju - ZIZ (Enforcement and Security Act) (Official Gazette of the Republic of Slovenia, no. 3/07, as amended), available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1008> (last accessed 17 December 2021), Article 4(6).

⁵⁶⁹ Judgment of 16 October 2008, *Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium NV*, C-339/07, EU:C:2008:575, available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=66608&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=313606> (last accessed 17 January 2022), para 5.

⁵⁷⁰ Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Act of April 23, 1964 Civil Code), Journal of Laws of 1964, No. 16, item 93, available at <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf> (last accessed 6 April 2022), Article 527.,

⁵⁷¹ Prof. dr hab. Edward Gniewek, prof. dr hab. Piotr Machnikowski 'Civil Code. Commentary, edition. 10' (Kodeks cywilny. Komentarz red. prof. dr hab. Edward Gniewek, prof. dr hab. Piotr Machnikowski), publisher: C.H.Beck., Year : 2021, Chapter concernin Article 527.

the following assets: real estate; moveable asset registers other than means of transport registers' direct corporate interests in legal persons and trusts; and bank accounts.

Similarly, in Romania, before the opening of the proceedings, creditors can use the *actio pauliana* that the Romanian Civil Code regulates.⁵⁷² Such legislation reveals that if the creditor can prove harm, they can file for some detrimental transaction of the debtor to be declared unenforceable. In this respect, it is considered that the actions of the debtor are detrimental to the interest of the creditor when they aim to create or augment a state of insolvency. In order to introduce the *actio pauliana*, the creditor's claim has to be certain at the moment of the request. Furthermore, for a transaction to be declared unenforceable, the third party must be aware that the concluded transaction aims to create or augment a state of insolvency.⁵⁷³ The statute of limitation for filing such action is one year from the moment the creditor is aware/should be aware of the harm caused by the debtor's transaction.⁵⁷⁴ *Actio pauliana* applies to the following assets: real estate; moveable asset registers other than means of transport registers; claims; and security interests relating to one or more of the aforementioned assets. Furthermore, this mechanism can also be applied in cross-border situations, if the requirements for introducing such claims are met.

Another manner in which the Member States allow for the preservation of assets in their national laws is via attachment orders – such orders were identified, for instance, in Denmark, Estonia, Italy, Luxembourg, Netherlands, and Portugal.

In some Member States assets can be seized via garnishment – i.e., by which a creditor (the garnishment creditor) freezes money that belongs to the debtor (the garnishment debtor), and which is held by a third party (the garnishee). The creditor then takes delivery of these sums up to the amount the debtor owes. For instance, in Luxembourg, the Code of Civil Procedure allows for the preservation of assets via an attachment order before the opening of insolvency proceedings. Article 693 provides that 'any creditor may, by virtue of authenticated or private titles, seize in the hands of a third party the sums and effects belonging to his debtor, or oppose their delivery',⁵⁷⁵ while Article 694 provides that 'if there is no title, the judge of the debtor's domicile and even of the domicile of the garnishee may, upon request, allow garnishment and opposition'.⁵⁷⁶ Once this freezing order is served, the debtor may then challenge it via summary proceedings in order to have it set aside. At the same time, the enforceability of the validation of the freezing order must be sought. This freezing order applies to the following assets: real estate; direct corporate interests in legal person and trusts; beneficial ownership interest; bank accounts; and claims.

Meanwhile, in the Netherlands, before the opening of insolvency proceedings, it is possible to levy a conservatory attachment in anticipation of a title to enforcement for a claim.⁵⁷⁷ It can be invoked by foreign creditors; however, in principle, an attachment can only be levied on assets located in the Netherlands, but the extraterritorial effect can be achieved via the

⁵⁷² Law No. 287/2009 adopted July 17 2009 with later amendments (Romanian Civil Code) (Legea nr. 287 din 17 iulie 2009 privind Codul civil (Codul civil), Official Gazette of Romania, No. 505, 15.05.2011, available at <https://sintact.ro/#/act/16901347/17?directHit=true&directHitQuery=noul%20cod%20civil> (last accessed 9 November 2021)

⁵⁷³ Ibid, Article 1562, par. 2, and 1563.

⁵⁷⁴ Ibid, Article 1564..

⁵⁷⁵ Nouveau Code de Procédure Civile, published on 17 August 1998 (New Code of Civil Procedure), available at https://legilux.public.lu/eli/etat/leg/code/procedure_civile/20210916 (last accessed 10 December 2021), Article 693.

⁵⁷⁶ Ibid, Article 694.

⁵⁷⁷ Wet van 28 maart 1828 met betrekking tot de burgerlijke rechtsvordering (Wetboek van Burgerlijke Rechtsvordering (Rv) (Act of 28 March 1828 on civil procedure (Dutch Code of Civil Procedure), available at <https://wetten.overheid.nl/BWBR0039872/2021-07-01> (last accessed 8 December 2021), Article 700. This tool may also be used by a bankruptcy trustee during insolvency proceedings in relation to claims of the estate.

Brussel Ia Regulation.⁵⁷⁸ A conservatory attachment involves the freezing of a debtor's assets until an enforceable title is obtained. The effect of such attachment is that assets of the relevant debtor are 'frozen' until the creditor has obtained an enforceable title. An attachment does not create a right of priority. The process of levying a conservatory attachment is as follows:

- The creditor files a petition with the court seeking leave for attachment. In this petition, the creditor needs to substantiate its claim, the assets it wishes to attach and, for certain kinds of assets, needs to substantiate that there is a fear of dissipation of assets by the debtor.⁵⁷⁹
- The court, after a summary assessment of the claim, will decide on the petition. This decision is made in *ex parte* proceedings. However, the court may ask for additional information from the creditor before deciding on the request. The court may also merely grant provisional leave or, although this is exceptional, require that security is provided by the creditor.⁵⁸⁰
- If leave is granted by the court, the bailiff, upon instruction from the creditor, levies the relevant attachment.⁵⁸¹

The freezing order applies to the following assets: real estate; moveable asset registers other than means of transport registers; direct corporate interests in legal person and trusts; beneficial ownership interest; bank accounts; claims; security interests relating to one or more of the aforementioned assets, moveable assets, ships, and aircraft. In regard to certain assets (in particular, bank accounts and receivables), it is not necessary for the petitioning party or the court to specify the relevant asset. It is sufficient that the third party under which the attachment is levied is indicated. In its decision granting leave, the court will specify a time limit for instituting main proceedings under which an enforceable title can be obtained. Usually, this time limit will be 8-14 days after the attachment is levied by the bailiff.⁵⁸² It is noted that the main proceedings may also be foreign proceedings.⁵⁸³ Once a creditor has obtained an enforceable title, it may levy an executory attachment on the assets of a debtor.⁵⁸⁴ Upon the opening of insolvency proceedings, all attachments will lapse.⁵⁸⁵ For suspension of payments, this is only the case if the final suspension of payments is granted.⁵⁸⁶

Finally, some Member States allow for the preservation of assets in their national laws through more general provisions than the previously mentioned *actio pauliana* and

⁵⁷⁸ Regulation (EU) 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, OJ L 351, 20.12.2012, p. 1-32, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215> (last accessed 8 December 2021).

⁵⁷⁹ Wet van 28 maart 1828 met betrekking tot de burgerlijke rechtsvordering (Wetboek van Burgerlijke Rechtsvordering (Rv) (Act of 28 March 1828 on civil procedure (Dutch Code of Civil Procedure), available at <https://wetten.overheid.nl/BWBR0039872/2021-07-01> (last accessed 8 December 2021),, Article 700.

⁵⁸⁰ Ibid, Article 700 and 701.

⁵⁸¹ Ibid, Article 702.

⁵⁸² Ibid, Article 700.

⁵⁸³ HR 25 June 2018, ECLI:NL:HR:2018:773 (Avonwick/VI Holdings), available at <https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2018:773> (last accessed 8 December 2021).

⁵⁸⁴ Wet van 28 maart 1828 met betrekking tot de burgerlijke rechtsvordering (Wetboek van Burgerlijke Rechtsvordering (Rv) (Act of 28 March 1828 on civil procedure (Dutch Code of Civil Procedure), available at <https://wetten.overheid.nl/BWBR0039872/2021-07-01> (last accessed 8 December 2021),, Article 435.

⁵⁸⁵ Wet van 30 september 1893 op het faillissement en de surséance van betaling (Faillissementswet) (Law of 30 September 1893 regarding bankruptcy and suspension of payments (Dutch Bankruptcy Act)), available at <https://wetten.overheid.nl/BWBR0001860/2021-01-01> (last accessed 8 December 2021), Article 33 (Bankruptcy) and Article 301 (Debt Restructuring Natural Persons).

⁵⁸⁶ Ibid, Article 230.

attachment orders – such provisions could be seen, for instance, in Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Italy, Netherlands, Poland, Portugal, Romania, Slovenia, and Spain.

In Bulgaria, prior to the opening of insolvency proceedings, at the request of a creditor and if necessary for the preservation of the debtor's assets, the insolvency court may allow a security measure, i.e. freezing order/foreclosure and/or seal the premises of the debtor in case of the danger of scattering, destruction, or concealment of debtor's proceedings.⁵⁸⁷ An insolvency court will impose those measures if the creditor's application is supported by convincing written evidence or if the creditor provides security in an amount determined by the court, for compensation of the damages caused to the debtor, in case it is established that the debtor is not insolvent.⁵⁸⁸ This mechanism applies to the following types of assets: real estate; moveable asset registers other than means of transport registers; bank accounts; and claims.

Meanwhile, in Greece, during insolvency proceedings, the estate of the debtor is deemed to freeze, and the debtor has no powers over the same assets as the date of issuance of the court decision ruling on the insolvency.⁵⁸⁹ More specifically, following the declaration of the debtor as insolvent, the insolvency administrator has the sole authority to act with regard to the administration of the debtor's assets, including handling claims on the status thereof. Hence, the same insolvency administrator shall be entitled to request such assistance on behalf of the creditors.⁵⁹⁰ The insolvency administrator may also have access to the communications addressed to the insolvent debtor.⁵⁹¹ Moreover, it should be noted that after the initiation of the insolvency proceedings, direct enforcement actions of individual creditors against an insolvent debtor are postponed.⁵⁹² After the commencement of insolvency proceedings, the Law shall apply as *lex specialis* to normally applicable civil law provisions. This tool applies to the following assets: moveable asset registers other than means of transport registers; direct corporate interests in legal person and trusts; beneficial ownership interest; bank accounts; claims; and security interests relating to one or more of the aforementioned assets.

Finally, in Portugal, before and during insolvency proceedings, there is the option to use preventative seizure in order to freeze assets. This is analogous to the preliminary measure of attachment provided under civil law. The judge can only order such provisional measures at the request of the public prosecutor or the injured party. Preventive seizures ordered in criminal proceedings are immediately revoked if the defendant posts economic security. It applies to the following assets: real estate; moveable asset registers other than means of transport registers; direct corporate interests in legal person and trusts; beneficial ownership interest; bank accounts; and claims. In addition, pursuant to the Criminal Procedure Code, all instruments, products or advantages related to the practice of a criminal act are apprehended by the Portuguese Asset Recovery Office ('PARO'), a specialised asset recovery agency that is part of the national judicial police that operates under orders from

⁵⁸⁷ Данъчно-осигурителен процесуален кодекс (Tax and Social Social Insurance Procedure Code of 01.01.2006 with later amendments), available at <https://www.lex.bg/laws/ldoc/2135514513>.

⁵⁸⁸ Търговски закон (Commerce Act of 18 June 1991 with later amendments), available at <https://lex.bg/laws/ldoc/-14917630> (last accessed 17 January 2022), Article 629a(2).

⁵⁸⁹ Νόμος 4738/2020, Ρύθμιση οφειλών και παροχή δεύτερης ευκαιρίας και άλλες διατάξεις (Law No. 4738/2020, Debt Settlement and Facilitation of a Second Chance and further provisions), 27 October 2020, Government Gazette volume A, no. 207, available at http://www.et.gr/ldocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wHUdWr4xouZundtvSoCirL8ga89WekpFQd5MXD0LzQTLWPU9yLzB8V68knBzLCmTXKaO6fpVZ6Lx3UnKI3nP8NxdnJ5r9cmWyJWelDvWS_18kAEhATUkJb0x1LIdQ163nV9K--td6SluSSytwnti2tIFfWRXJ0WsyXRuO1kP3qWGzcmPr-Y1yGz_207 (last accessed 18 November 2021), Article 93 par. 1.

⁵⁹⁰ Ibid, Article 93 par. 1.

⁵⁹¹ Ibid, Article 143.

⁵⁹² Ibid, Article 100.

the Public Prosecutor's Office. The PARO's mandate is to identify, trace and seize property or proceeds related to criminal activities (both domestically and internationally) and to cooperate with asset recovery offices of other countries. The PARO also operates as the country's asset recovery office for purposes of EU Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to crime.⁵⁹³ Within the EU, applications for the seizure of assets and any subsequent enforcement will be decided by the public prosecutor that has territorial jurisdiction.

The repatriation of assets

The majority of Member States have tools in their national insolvency law that permit the repatriation of assets.

In order to repatriate assets, avoidance actions were mentioned across several countries as useful tools also for creditors. Generally, all Member States have national rules in place on avoidance actions, though with differences concerning, for instance, the person entitled to bring such actions, the so-called 'suspect periods' and time limits concerning the acts that may be avoidable, etc. As such, two examples are provided below in respect of Austria and Slovenia.

For instance, in Austria, before the opening of insolvency proceedings, creditors with enforceable claims are entitled to bring actions for avoidance prior to the opening of insolvency proceedings.⁵⁹⁴ The actions for avoidance are essentially limited to: (i) asset squandering; (ii) transactions aimed at disadvantaging creditors; and (iii) gratuitous asset transfers. This applies with regard to the following assets: real estate; direct corporate interests in legal person and trusts; beneficial ownership interest; bank accounts; claims; and security interests relating to one or more of the aforementioned assets.

In Slovenia, before the commencement of insolvency proceedings, the creditors have avoidance actions available on the basis of the provisions of the Obligations Code (i.e. *actio pauliana*).⁵⁹⁵ Based on the Obligations Code, an avoidance action can be brought if the debtor was aware or should have been aware that his actions are harmful to their creditors and the third person, who benefited from the legal action, was aware or should have been aware (suspect period is 1 year from the action/omission). It is deemed that family members were aware that the action harmed the creditors. Regarding the gratuitous transfers or similar transactions, it is deemed that the third person knew that the action is harming creditors (suspect period is 3 years from the action/omission). This applies with regard to the following assets: real estate; moveable asset registers other than means of transport registers; direct corporate interests in legal person and trusts; bank accounts; and claims.

In addition, during insolvency proceedings, in Slovenia, the creditors have avoidance actions available on the basis of the provisions of the Insolvency Act. Here, the avoidance actions on the basis of general civil rules, as mentioned above, become non-applicable. Based on the Insolvency Act, an avoidance action can be brought within 12 months after

⁵⁹³ Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, OJ L 332, 18.12.2007, p. 103-105, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007D0845> (last accessed 17 January 2022).

⁵⁹⁴ Bundesgesetz über das Exekutionsverfahren (Exekutionsordnung – EO) (Austrian Enforcement Act), available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700> (last accessed 22 November 2021), Section 348.

⁵⁹⁵ Based on Obligacijski zakonik - OZ (Obligations Code) (Official Gazette of the Republic of Slovenia no. 97/07, as amended), available at <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1263> (last accessed 17 December 2021).

the finality of the decision on the commencement of the bankruptcy proceedings,⁵⁹⁶ either by the administrator on behalf of the debtor or by any creditor on its behalf but for the account of the debtor.⁵⁹⁷ Transactions or legal actions/omissions can be challenged if they were entered into or performed by the debtor within the 12 months (36 months for transactions without any or minor consideration)⁵⁹⁸ preceding the petition for bankruptcy proceedings being filed and until the commencement of bankruptcy proceedings, provided that the subjective element and one of the objective elements exist.⁵⁹⁹ The subjective element is that it must be shown that the party benefiting from the transaction knew or should have known that the debtor was insolvent at the time of the transaction (subjective element).⁶⁰⁰ This is not required in case of gratuitous transfers to third parties and/or where the third party's obligation was of a minor value.⁶⁰¹ While, the objective elements are the consequence of the transaction resulted in a reduction of the assets available to meet creditors' claims in the bankruptcy; and/or, as a result of the transaction, an individual creditor gained a more favourable position than other creditors.⁶⁰² This applies with regard to the following assets: real estate; moveable asset registers other than means of transport registers; direct corporate interests in legal person and trusts; bank accounts; claims; and other property rights.

4.2.2. Field research findings

As regards the tools that creditors mainly rely upon to trace and preserve assets before the opening or in the context of insolvency proceedings, some stakeholders indicated that creditors are generally entitled to file actions aimed at annulling fraudulent transactions made by debtors or preventing the transfer of assets.⁶⁰³ One stakeholder also underlined that, should the actions of the debtors appear criminal in nature, creditors can also rely on insolvency criminal law or fraud investigations.⁶⁰⁴ One stakeholder from Luxembourg noted that creditors often resort to pledges, as under Luxembourgish law, the exercise of the rights conferred on the pledgee is not suspended by the opening of (national or foreign) insolvency proceedings.⁶⁰⁵ Stakeholders also mentioned other general tools for creditors, such as accessing the creditor's information system,⁶⁰⁶ public registers,⁶⁰⁷ or private databases

⁵⁹⁶ Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju - ZFPPIPP (Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act) (Official Gazette of the Republic of Slovenia, no. 176/21, as amended), available at <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4735> (last accessed 17 December 2021), Article 277.

⁵⁹⁷ Ibid, Article 276.

⁵⁹⁸ In case of Personal Bankruptcy Proceedings and Bankruptcy Proceedings over deceased person's estate, a special deadline of 60 months applies for transactions or legal actions/omissions that are performed for the benefit of specific persons (affiliated persons, legal persons where the natural person acted as representative, etc.) or that are performed as gratuitous transfers to third parties. Moreover, for the transactions and legal actions/omissions that are performed for the benefit of specific persons it is not required to fulfil the subjective element.

⁵⁹⁹ Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju - ZFPPIPP (Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act) (Official Gazette of the Republic of Slovenia, no. 176/21, as amended), available at <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4735> (last accessed 17 December 2021), Article 269.

⁶⁰⁰ Ibid, Article 271(1). Subjective element is deemed to exist if (i) a legal act was conducted within the preceding 3 months before the filing of the petition for Bankruptcy Proceedings; or (ii) a creditor received the payment for its obligation before it was due or if it received the obligation in a form or a manner that was not common according to the ordinary course of trade or practice between the creditor and the debtor (Article 272(3)).

⁶⁰¹ Ibid, Article 271(2).

⁶⁰² Ibid, Article 271(1).

⁶⁰³ See Annex A, national country reports, CZ, RO interview reports.

⁶⁰⁴ See Annex A, national country reports, SK interview report.

⁶⁰⁵ See Annex A, national country reports, LU interview report.

⁶⁰⁶ See Annex A, national country reports, DE interview report.

⁶⁰⁷ See Annex A, national country reports, LT interview report.

providing information on the financial situation of entities,⁶⁰⁸ or filing a bankruptcy application after attempting to collect the debt through a bailiff's order to pay.⁶⁰⁹ Stakeholders from Greece also indicated that creditors resort to the appointment of lawyers to carry out asset searches before the competent registries.⁶¹⁰ Finally, one stakeholder from Spain indicated that creditors have the possibility to file 'involuntary cases' but questioned how these are currently regulated under Spanish law (in particular, with respect to conditions and incentives for filing, the burden of proof, the possibility to request an interim appointment of insolvency practitioners, and seek directors' liability).⁶¹¹

Furthermore, though not being a tool specifically directed to trace or preserve assets, the importance of the rules concerning the possibility of creditors to provide the insolvency practitioner with recommendations, and/or to obtain the dismissal of the insolvency administrator and the appointment of a new one in cases where this may remain inactive during insolvency proceedings was also remarked in certain countries, such as the Czech Republic⁶¹² and Romania.⁶¹³

Some stakeholders indicated that the types of assets involved do not make a significant difference in the success of creditors' actions.⁶¹⁴ However, one stakeholder from Germany indicated that the commercial register is easily accessible online and can provide information on assets with regard to company shareholdings to creditors,⁶¹⁵ while stakeholders from Greece and Romania stated that the chances of success for creditors increase when immovable assets are concerned.⁶¹⁶ Similarly, one stakeholder from Slovenia indicated that creditors are generally successful with regard to public registers (e.g., real estate or interest in companies registers), while they face more difficulties in addressing actions against the beneficiaries of bank transfers, as their details are often anonymised by banks.⁶¹⁷ One stakeholder from Hungary also mentioned the Electronic Public Road Trade Control System (EKAER), which makes it possible to compare property-listing in financial reports and freight documents.⁶¹⁸ Some stakeholders noted that creditors are rarely successful in relying on the tools available to them⁶¹⁹ and that private knowledge and feedback, as well as information from partners, are more reliable information sources for creditors.⁶²⁰ However, one stakeholder from the Czech Republic indicated that the so-called 'creditors' committee' is a tool that allows creditors to have the debtors' documents inspected and to make suggestions to insolvency administrators,⁶²¹ one stakeholder from the Netherlands noted that tools available to creditors are useful to increase pressure on

⁶⁰⁸ See Annex A, national country reports, LV interview report.

⁶⁰⁹ See Annex A, national country reports, LU interview report.

⁶¹⁰ See Annex A, national country reports, EL interview report.

⁶¹¹ See Annex A, national country reports, ES interview report.

⁶¹² See Annex A, national country reports, CZ interview report, where the importance of the decisions taken in the so-called 'creditors committee' were noted.

⁶¹³ See Annex A, national country reports, RO interview report. The Romanian stakeholder described a mechanism available under national law, by which creditors may request that those responsible for the debtor's insolvency be forced to pay damages equal to the injury caused, should the practitioner remain inactive during the insolvency proceedings.

⁶¹⁴ See Annex A, national country reports, CZ, SE interview reports.

⁶¹⁵ See Annex A, national country reports, DE interview report.

⁶¹⁶ See Annex A, national country reports, EL, SI interview reports.

⁶¹⁷ See Annex A, national country reports, SI interview report.

⁶¹⁸ See Annex A, national country reports, HU interview report.

⁶¹⁹ See Annex A, national country reports, DE, LT interview reports.

⁶²⁰ See Annex A, national country reports, LV interview report.

⁶²¹ See Annex A, national country reports, CZ interview report.

debtors, especially if assets to seek recourse against are still there,⁶²² and one stakeholder from Romania assessed the possibility to annul fraudulent transactions as quite effective.⁶²³ With respect to cross-border situations, one stakeholder from Greece noted that no significant differences could be identified, as a local appointed attorney would be acting on behalf of the local insolvency practitioner,⁶²⁴ while other stakeholders noted that cross-border situations pose additional problems,⁶²⁵ and specified that information collection would entail more costs if compared to purely national situations.⁶²⁶

As for the existence of particular gaps with regards to tools available to creditors and the possible remedies to such situations, some stakeholders indicated they would welcome fewer restrictions to access information for creditors, including through a unified access system across Member States.⁶²⁷ One stakeholder from Luxembourg expressed favour for further harmonisation of national laws through EU instruments, such as Regulation (EU) No 655/2014, providing for an EAPO.⁶²⁸ Some stakeholders, however, pointed at possible risks or abuses that might arise from reinforced creditors' tools. For example, one stakeholder from Luxembourg indicated that if creditors were granted more powers (or the same powers as an insolvency receiver), assets would be assigned to the first or most diligent creditor, with a violation of the principle of equality among creditors.⁶²⁹ Similarly, a stakeholder from the Czech Republic noted the risk of abuse and the need for further guarantees should more powers be granted to certain creditor bodies (such as the so-called 'creditors' committee').⁶³⁰ Again, a stakeholder from Poland stressed that creditors should not be able to access asset registers themselves, as they would have no further tools to make use of such knowledge.⁶³¹ Other stakeholders were of a different opinion, and indicated that either no issues or gaps could be identified⁶³² or they were not related to the law, but rather to attitudes (where the possibility of a continued follow-up with the debtor was identified as preferable),⁶³³ lack of transparency in the filing of financial statements,⁶³⁴ practical impossibility to recover sums for creditors notwithstanding favourable court judgments,⁶³⁵ or to the wrong interpretations given to the applicable provisions of law by the data controllers (e.g., banks).⁶³⁶ Finally, two stakeholders from Greece suggested that creditors should entrust local lawyers with the task of asset tracing, way before insolvency proceedings are to be initiated so that they have a concrete picture of the debtor's estate.⁶³⁷

With regards to crypto-currencies and taking into account the fact that public keys attached to virtual assets are practically not amenable to insolvency practitioners, many stakeholders concurred that crypto-currencies are a complex issue that would deserve dedicated

⁶²² See Annex A, national country reports, NL interview report.

⁶²³ See Annex A, national country reports, RO interview report.

⁶²⁴ See Annex A, national country reports, EL interview report.

⁶²⁵ See Annex A, national country reports, LT, NL, interview reports.

⁶²⁶ See Annex A, national country reports, LT interview report.

⁶²⁷ See Annex A, national country reports, DE, LT interview reports.

⁶²⁸ See Annex A, national country reports, LU interview report.

⁶²⁹ See Annex A, national country reports, LU interview report.

⁶³⁰ See Annex A, national country reports, CZ interview report.

⁶³¹ See Annex A, national country reports, PL interview report.

⁶³² See Annex A, national country reports, LV, RO, SE interview reports.

⁶³³ See Annex A, national country reports, LV interview report.

⁶³⁴ See Annex A, national country reports, RO interview report.

⁶³⁵ See Annex A, national country reports, RO interview report.

⁶³⁶ See Annex A, national country reports, SI interview report.

⁶³⁷ See Annex A, national country reports, EL interview report.

legislation, and indicated that checking the bank accounts of debtors to find any trace of crypto-currency purchases could be a solution.⁶³⁸ However, some stakeholders also pointed at the problems or drawbacks of such an approach. One stakeholder from the Netherlands noted that checking the debtors' bank accounts is very intrusive and suggested that such assessment be made by a court-appointed third party to ensure that debtors' rights are safeguarded.⁶³⁹ Some stakeholders noted that there could be crypto-currency purchases that would not be identifiable through bank accounts checks (e.g., cash purchases or purchases made through platforms that are not accessible without the debtor's consent).⁶⁴⁰ One stakeholder from Hungary suggested that, as far as first-generation crypto-currencies, like Bitcoin, are concerned, an efficient tool for their tracing could be looking for extreme high power-consumption and extremely high energy bills, as such type of crypto-currencies is highly dependent on electricity.⁶⁴¹ Some stakeholders were pessimistic with respect to the possibility to trace crypto-currency assets in their Member State at the moment.⁶⁴² Finally, one stakeholder from the Czech Republic indicated that there are already available means to trace crypto-currencies transactions, while at the same time questioning whether courts shall use the same or similar means of seizure for crypto-currencies as in other, more traditional, proceedings⁶⁴³. Similarly, one stakeholder from Finland noted that all virtual asset providers have to register with the Finnish Financial Supervisory Authority (FSA) and insolvency practitioners can request information about possible crypto-currencies from the Finnish FSA virtual assets register.⁶⁴⁴

4.3. Analysis and policy recommendations

In the following sections, an analysis of the findings concerning the asset tracing and recovery tools available to creditors across the Member States is outlined in Section 4.3.1, whilst Section 4.3.2 outlines a principal policy recommendation concerning the *actio pauliana*, exploring the application of such tool could be improved in cross-border situations.

4.3.1. Analysis

The asset tracing and recovery tools available to creditors vary considerably and, amongst others, may be divided between those powers available before the opening of the proceedings and powers available after the opening of the proceedings. Indeed, the opening of the proceedings shifts the dynamics from a one-to-one relation between the debtor and the creditor into a collective procedure. It appears that among all Member States, the opening of the proceedings establishes a *moratorium* of individual actions and the principles of *par condition creditorum*. The analysis provided in this subsection is organised in three subsections: the first subsections address the tools available to creditors before the opening of the insolvency; the second subsection addresses the tools available to creditors during the insolvency proceedings; and the third and final subsection focuses on the so-called *actio pauliana* and other forms of transaction avoidance that can be used by the creditors before and during the insolvency proceedings.

⁶³⁸ See Annex A, national country reports, CZ, ES, LT, LV, LU, RO, SE, SI interview reports.

⁶³⁹ See Annex A, national country reports, NL interview report.

⁶⁴⁰ See Annex A, national country reports, EL, LU, SI interview reports.

⁶⁴¹ See Annex A, national country reports, Annex A, national country reports, HU interview report.

⁶⁴² See Annex A, national country reports, EL, LT interview reports.

⁶⁴³ See Annex A, national country reports, CZ interview report.

⁶⁴⁴ See Annex A, national country reports, FI interview report.

i. Tools available before the opening of the proceedings

Before the opening of the insolvency proceedings, creditors can access the national registers to seek information concerning the debtor's assets. However, the conditions for access display significant discrepancies among the Member States. In some countries, access can be obtained independently by the individual, as in the Netherlands and Sweden (where there is the principle of public access).⁶⁴⁵ In others, such as Greece, the support of a local lawyer may be necessary to access some registers.

Additionally, before the opening of the proceedings, creditors can attempt to recover assets with enforcement proceedings, foreclosures, seizures of the assets, and attachment orders. Similarly, they can prevent the dissipation of assets by requesting interim measures or petitioning for the opening of the insolvency proceedings. In sum, the preliminary conclusions that may be drawn from the mapping at national level and presented in Section 4.2 is that (i) Member States provide a variety of preventive and interim measures, and (ii) the condition and effects of such types of measure vary from Member State to Member State.

ii. Powers available after the opening of the proceedings

During the insolvency proceedings, the powers of the individual creditors appear to be more limited. They can request information from the insolvency practitioner, who generally has a duty of transparency towards the creditors or creditors committee where present. Even where a creditors committee is appointed, it only has a supportive role to the insolvency practitioner without autonomous asset tracing powers.⁶⁴⁶ The limitation to the creditor's powers can be easily justified under the collective principle, and it is generally counterbalanced by the extensive powers that the insolvency practitioner exercises for the benefit of the insolvency estate. During the insolvency proceedings, creditors may be allowed to bring forward avoidance claims that will be discussed in the following paragraphs. In relation to the creditor's avoidance powers, it is necessary to distinguish between powers that can be exercised before the opening of the insolvency and powers available under the collective proceedings.

iii. Creditors' avoidance powers before the opening of the proceedings

In a significant number of Member States, it was noted how before the opening of the insolvency proceedings, individual creditors may seek to trace and recover the debtor's assets through the so-called *actio pauliana* (also referred to as 'the action').⁶⁴⁷ The action seeks to put aside transactions that prejudice the ability of the individual creditor to recover their credit.

Although quite common among the Member States, the *actio pauliana* is not regulated at the EU level, and for a long time, even the EU private international law rules concerning the action were not clear.⁶⁴⁸ In particular, the nature of the action is often debated in the Member States, and it was not clear whether it should have been deemed an action related to contract or tort law. However, following the developments of the CJEU in the cases *Feniks*⁶⁴⁹

⁶⁴⁵ See Annex A, national country reports, interview reports.

⁶⁴⁶ See Annex A, national country reports, CZ, HR legal desk research questionnaires.

⁶⁴⁷ See, for instance, Annex A, national country reports, AT, EL, ES, IT, NL, PL, RO legal desk research questionnaires.

⁶⁴⁸ Laura Carballo Piñeiro, 'Acción pauliana e integración europea: Una propuesta de ley aplicable', 2012, LXIV 1 Revista Española de Derecho Internacional 43, available at <http://www.revista-redi.es/es/articulos/accion-pauliana-e-integracion-europea-una-propuesta-de-ley-aplicable/> (last accessed 6 April 2022), p. 47.

⁶⁴⁹ Judgment of 4 October 2018, *Feniks sp. z o.o. v Azteca Products & Services SL*, C-337/17, EU:C:2018:805, available at <https://curia.europa.eu/juris/liste.jsf?num=C-337/17> (last accessed 6 April 2022).

and *Reitbauer*,⁶⁵⁰ the action is now qualified as a contractual matter related to the creditor's obligations.

The characterisation of the transaction avoidance claims of private law as a matter related to contracts and, in particular, to the contract concluded between the creditor (i.e., the claimant), and the debtor is problematic.⁶⁵¹ First, the connection between the vulnerable transaction and the law governing the contract between the debtor and the creditor is 'too tenuous and too remote'.⁶⁵² Indeed, there is no substantive relationship between the creditor and the third party (i.e., the defendant) before the claim.

Second, the characterisation of the action as a matter related to the creditor's contract deprives the defendant of any predictability of the outcome of the dispute. Indeed, the defendant of the claim is extraneous to the contract concluded between the debtor and the creditor. Therefore, they cannot easily foresee the law applicable to the contract.

Third, the results of *Feniks* and *Reitbauer* may be deemed to be inconsistent with the EIR approach. Concerning the conflicts of laws, the EIR connects the insolvency transaction avoidance claims with either the law of the insolvency forum or the law governing the vulnerable transaction.⁶⁵³ Instead, following the characterisation in the *Feniks* case, the transaction avoidance claim available in civil and commercial matters is connected to the law of the contract between the creditor and the debtor, which should not even come into consideration in the insolvency context.

Although imperfect, the current scenario is an improvement in comparison with the previous legislative and jurisprudential gap. The characterisation of the action is difficult due to historical and structural reasons. For instance, the action is an instrument created before the creation of formal insolvency, and it relates to credit recovery more than contractual enforcement. Moreover, the action has a triangular structure that involves a creditor, a debtor and a third party. It is clearly complicated to identify connecting factors that are of similar predictability for all the parties involved.

A proposal of partial harmonisation of transaction avoidance has been put forward by Dr Oriana Casasola,⁶⁵⁴ and such a proposal also concerns the use of the *actio pauliana*. Outside the procedural framework of insolvency, a harmonised *actio pauliana* could apply when a transaction that prejudices the rights of the creditor has a cross-border character. This can be deemed to occur: (i) when the parties to the transaction are domiciled in two different member states, or (ii) when the law applicable to the transaction is not the law of the jurisdiction where the claim is brought.

In these circumstances, the creditor who needs to bring a claim may not know the law governing the vulnerable transaction. Within the insolvency proceedings, the insolvency practitioner is facilitated in gaining access to the details of the transaction undertaken by the debtor. In contrast, in civil proceedings, the claimant has limited rightful investigation powers on the debtor's business. However, a claimant should be able to learn the domicile

⁶⁵⁰ Judgment of 10 July 2019, *Norbert Reitbauer and others v Enrico Casamassima*, C-722/17, EU:C:2019:577, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62017CJ0722> (last accessed 6 April 2022).

⁶⁵¹ Laura Carballo Piñeiro, 'Acción pauliana e integración europea: Una propuesta de ley aplicable', 2012, LXIV 1 Revista Española de Derecho Internacional 43, available at <http://www.revista-redi.es/es/articulos/accion-pauliana-e-integracion-europea-una-propuesta-de-ley-aplicable/> (last accessed 6 April 2022), p. 57.

⁶⁵² Judgment of 4 October 2018, Opinion of AG Bobek, *Feniks sp. z o.o. v Azteca Products & Services SL*, C-337/17, EU:C:2018:805, available at <https://curia.europa.eu/juris/liste.jsf?num=C-337/17> (last accessed 6 April 2022), para 65.

⁶⁵³ See Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L41, 5.6.2016, p. 19-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848> (last accessed 11 March 2022), Articles 7 and 16.

⁶⁵⁴ Oriana Casasola, 'The Harmonization of Transaction Avoidance: A Compromise Solution', 2020, 29(5) Norton Journal of Bankruptcy Law and Practice 3, available at <https://pure.hud.ac.uk/en/publications/the-harmonization-of-transaction-avoidance-a-compromise-solution> (last accessed 6 April 2022).

of the potential defendant as a precondition of bringing the claim to the defendant's forum under the Brussels Ia Regulation.⁶⁵⁵

At the same time, the counterparty of the vulnerable transaction can rely more on the contractual finality of the transaction concluded with the debtor. Indeed, they should need to check their transaction only against their national law for domestic claimants and against the harmonised rule against cross-border creditors.

⁶⁵⁵ Regulation (EU) 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 (recast), OJ L351, 20.12.2012, p. 1-32, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215> (last accessed 11 March 2022), Article 3.

iv. Avoidance powers during the proceedings

On the other side, in several countries, it was highlighted that creditors can also bring avoidance claims during insolvency proceedings. As mentioned above, the opening of the insolvency proceedings stays the individual creditor's actions. However, some Member States seem to allow individual creditors to bring forward actions even during the insolvency proceedings. For instance, in Spain, individual creditors can bring forward avoidance actions independently if they have requested the insolvency practitioner to bring forward the claim and he has not complied with the request within two months.⁶⁵⁶ Additionally, the individual creditors can also be allowed to use the *actio pauliana* within the insolvency proceedings. In contrast, in Italy, a creditor may continue the individual *actio pauliana* even once the insolvency proceedings are opened if the insolvency practitioners do not take over the individual claim for the benefit of the estate.⁶⁵⁷

In sum, the avoidance powers of the creditors in insolvency are limited due to the collective principle. This limits the ability to trace assets of individual creditors, but the powers are available generally as a residual possibility if the insolvency practitioner decides not to pursue the exercise of avoidance actions. As such, the insolvency avoidance powers display significant drawbacks in cross-border scenarios.

4.3.2. Policy recommendations

Based on the information collected in the legal desk research and field research at the national level, as well as the information discussed with the relevant experts in the Advisory Board Meeting, the following subsection contains some policy recommendations exploring how best to improve the operation of the *actio pauliana* as a tool for creditor's in cross-border insolvency proceedings. In particular, it could be recommended to develop a provision in the EIR concerning the creditor's power to use the *actio pauliana* during insolvency proceedings, as well as provide a tool for creditors to preserve assets which are in line with the freezing injunctions stipulated in common law jurisdictions.

Firstly, it is clear from the data collected that the *actio pauliana* is the most used tool for insolvency proceedings. Such rule is important for the safeguarding of the collectivity principle and the equal treatment of creditors (*par condicio creditorum*).

Before reaching this final policy recommendation, three ways to improve the *actio pauliana* were considered. The first consideration was complete harmonisation at the EU level, which was decided to be virtually impossible due to the interconnection with the national legal systems. The second consideration was to harmonise the *actio pauliana* at the EU level only in cross-border scenarios but, again, this was considered to be difficult in practice due to a lack of clarity as to how this would be received by the Member States. The third consideration was to abolish the *actio pauliana*, but in practice this was considered to be unachievable considering its widespread existence in numerous Member States.

Therefore, the final policy recommendation regarding the *actio pauliana*, and considered to be the most achievable in practice, provides that creditors should be allowed to bring the action forward only if the insolvency practitioner waives their right of action and is subject to the authorisation of the court opening the proceedings. Moreover, an EU provision should specify that the use of the *actio pauliana* within insolvency proceedings displays its effects towards all creditors and the proceedings of the action should be used for distribution among the creditors. Additionally, a preference over a percentage of the proceeds could be set aside for the creditors funding the action when resources are not available within the insolvency estates.

⁶⁵⁶ See Annex A, national country reports, ES legal desk research questionnaire.

⁶⁵⁷ See Cassazione Civile, sez I 05 December 2018 n 29112.

Secondly, another tool that could prove useful to creditors for preserving assets before/during insolvency proceedings could be the possibility of using freezing injunctions such as those provided in common law jurisdictions.

In the UK, for instance, the Privy Council recently provided a juridical foundation for the entire law of freezing orders (freezing injunctions) in *Convoy Collateral Ltd v Broad Idea International Ltd and Cho Kwai Chee*.⁶⁵⁸ In this case, Convoy Collateral applied to the courts in the British Virgin Islands (BVI)⁶⁵⁹ for freezing injunctions in support of proceedings in Hong Kong, against the defendant in those proceedings, Dr Cho, a Hong Kong resident, and against a third-party BVI company, Broad Idea, controlled by Dr Cho.

The court held that the first and primary principle is that the purpose of a freezing order is to stop the enjoined defendant from dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case they brought. Subsequently, it went on to summarise the following:

1. A court has power - where it is just and convenient to do so and it accords with principle and good practice - to grant a freezing injunction against a party (the respondent) over whom the court has personal jurisdiction provided that:
 - i. the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
 - ii. the respondent holds assets (or is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and
 - iii. there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.
2. There are no other relevant restrictions on the availability in principle of the remedy. In particular:
 - i. There is no requirement that the judgment should be a judgment of the domestic court - the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court's enforcement powers.
 - ii. Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.
 - iii. There is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen: it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought (whether in the domestic court or before another court or tribunal).

Were elements of this common law freezing injunction introduced into the national laws of the Member States, it would ensure the possibility for the court to freeze assets where it feels it is convenient and done with principle and good practice. In particular, it would

⁶⁵⁸ *Convoy Collateral Ltd v Broad Idea International Ltd and Cho Kwai Chee* [2021] UKPC 24, available at <https://www.bailii.org/uk/cases/UKPC/2021/24.html> (last accessed 9 March 2022).

⁶⁵⁹ The British Virgin Islands is an offshore Caribbean jurisdiction where judicial appeals may ultimately be brought to the Privy Council in London.

produce a better outcome in any otherwise complex area of law, by combining both the advantages and disadvantages of both orders.⁶⁶⁰

Finally, please note that the development of common law freezing injunctions relates to the proposed extension of the EAPO (see Section 2.3.2 for more information), which draws parallels to such common law approach, even if it does not concern insolvency law.

4.4. Case study

ANONYMOUS V. ANONYMOUS⁶⁶¹

Summary of case

The plaintiff and defendant entered into a settled agreement in Germany – in this agreement, the defendant agreed to transfer to the plaintiff the ownership of real estate located in Poland, before agreeing with the second defendant for the donation of the property which was the subject of the prior agreement with the first defendant. The plaintiff in the suit demanded that the donation agreement be declared ineffective against him. The court pointed out the steps in bringing an *actio pauliana* and that the law applicable was the law governing the particular obligatory relationship between the creditor and the debtor, which is usually the law applicable to the particular obligatory contract between the debtor and the creditor. The plaintiff in the proceedings failed to prove a concrete, real existing pecuniary claim of a specified amount that could be the subject of *actio pauliana* and as a consequence, the Court held that the allegation of infringement of Article 527 § 1 of the Civil Code by its non-application, even though all prerequisites for such application were fulfilled, was unfounded.

Parties' main arguments in the case

The plaintiff and the defendant, who were previously in a civil partnership, entered into a settlement agreement (in Germany), stipulating that it would become effective if not revoked, by the defendant by December 16, 2008, and by the plaintiff by December 2, 2008. In the settlement agreement, the defendant agreed to transfer to the plaintiff the ownership of the real estate located in Poland, in return for a payment of 40,000 EUR. The settlement stipulates the manner and timing of payment by the claimant of the monetary consideration and provides an obligation for the parties to cooperate in the transfer of the ownership title to the real estate in Poland. The settlement agreement was not revoked by the parties within the stipulated deadlines. On 7 January 2009, the defendant entered into an agreement with his father, the defendant H. D. (i.e., the second defendant), an agreement for the donation of the property which was the subject of the settlement.

The plaintiff in the suit demanded that the donation agreement be declared ineffective against him.

Reasoning of the Court

The Supreme Court noted that in Poland - unlike in Germany - there is no provision explicitly indicating the law applicable to the assessment of *actio pauliana*.

The Supreme Court also indicated that pursuant to Article 460 of the Bankruptcy Law, in bankruptcy proceedings, opened in Poland, the law applies unless specific provisions provide otherwise. Pursuant to Article 462, paragraph 3 of the Bankruptcy Law, Polish law

⁶⁶⁰ See Nicolas Kyriakides, 'A European-wide Preservation Order: How the Common Law Practice Can Contribute', available at https://www.harriskyriakides.law/images/blog-images/publi/A_European-wide_Preservation_Order_How_the_Common_Law_Practice_Can_Contribute.pdf (last accessed 10 March 2022).

⁶⁶¹ Sąd Najwyższy (The Supreme Court), ruling II CSK 96/12 of 29 November 2012, available at <http://www.sn.pl/sites/orzecznictwo/orzeczenia2/ii%20csk%2096-12-1.pdf> (last accessed 18 January 2022).

governs, in particular, the possibility to demand that a legal transaction made to the detriment of creditors be declared ineffective. However, such is subject to the reservation provided for in Article 469 of the Bankruptcy Law, that the provisions of Polish law on the ineffectiveness of a legal transaction made to the detriment of creditors do not apply, where the law applicable to such transaction does not provide for the ineffectiveness of transactions made to the detriment of creditors.

The court pointed out that the first step in bringing an *actio pauliana* is to determine whether the contested act has resulted in a reduction of the debtor's assets for the benefit of a third party, and the claimant's request seeks to limit this effect, suggests that the *actio pauliana* should be governed by the law of the country which governs the proximate effect of the contested act. In other words, the conflict-of-laws rule determining the law applicable to an act in rem should be deemed to be the rule determining the law applicable to the progeny of the contested act of the debtor. This solution reflects the interests of both parties to the dispute, i.e. the interests of the creditor and the interests of the third party for whose benefit the debtor affected the transfer.

The law applicable to this matter is the law governing the particular obligatory relationship between the creditor and the debtor, which is usually the law applicable to the particular obligatory contract between the debtor and the creditor.

The plaintiff in the proceedings failed to prove a concrete, real existing pecuniary claim of a specified amount that could be the subject of *actio pauliana*. Undoubtedly, the plaintiff proved that the defendant undertook to transfer the ownership of the real estate indicated in the statement of claim to him. It is also undisputed that the defendant did not transfer the ownership of the real estate to him, but to the defendant.

As a consequence, the allegation of infringement of Article 527 § 1 of the Civil Code by its non-application, even though all prerequisites for such application were fulfilled, turned out to be unfounded.

The Supreme Court dismissed the cassation appeal.

Significance of Decision

The case does not reference either Council Regulation (EC) No 1346/2000 on insolvency proceedings or the EIR but it was assumed in this case that the law applicable to the challenge of a disposition made by a debtor to the detriment of creditors is the law of the country to which the dispositive effect of the debtor's action is subject. Therefore, the case provides guidance as to how the tool of *actio pauliana* functions in Poland.

5. Conclusions

The Study's findings shed light on the legal frameworks for tracing and asset recovery in the 27 Member States. This includes elucidating the powers and duties of insolvency practitioners to trace and preserve assets at the national level and in the cross-border context. The Study identifies the specific rules in the asset tracing framework of the 27 Member States that address cross-border aspects of asset tracing and recovery. This includes the access conditions for national insolvency practitioners to asset registers in both their own Member State and other Member States. In addition to this, the Study elaborates on the civil law measures and tools at the disposal of creditors in order to trace or recover such assets, particularly focusing on those tools used to obtain information on assets, to preserve assets, and to return or repatriate assets.

In the context of this study, the analysis was divided into three streams.

In Stream 1, the Study explored the powers entrusted to insolvency practitioners to trace and preserve assets across the Member States, noting the similarities and differences between these approaches. It found that insolvency practitioners across the EU generally have the benefit of broad powers to access information and to demand testimony from individuals, such as directors or managers. It also found that the definition of insolvency practitioners should be kept in mind as the differences in the specific powers of insolvency practitioners may stem from the specific type of role that each country attributes to such professionals (independently of their 'name') across the different insolvency proceedings. Furthermore, the Study found that, in general, insolvency practitioners across the EU generally have the benefit of broad powers to access information and to demand testimony from individuals. For instance, they have, *inter alia*, the availability of a statutory mandate to investigate, are generally entitled to bring claims against a company's former directors for any wrongdoing involving the company, and claims for restitution or damages can also be made against third parties dishonestly assisting with or participating in that wrongdoing. Nevertheless, questions arose as to how far an insolvency practitioner's information gathering powers may be exercised in cross-border situations with little national provisions elaborating on this.

In Stream 2, the Study elucidated the ability to use official asset registers or databases to locate useful information concerning the property or liens of the debtor. It outlined the prior addressing of this in Article 24 of the EIR, where it is required that Member States establish insolvency registers, interconnected via the European e-Justice portal, and publish relevant court decisions. It was found that despite this requirement, there is a considerable amount of uncertainty as to the quality of information contained in such registers. This is with particular regard to the diversity of registers, the inconsistent information available in such registers, the divergent conditions to access the information contained in such registers, and the differing levels of availability and quality of information contained therein.

Finally, in Stream 3, the Study explored tools available to creditors in the context of asset tracing and preservation, touching base also on the transactions that a debtor – in particular, those tools which allow creditors to obtain information on (the whereabouts) of assets, the preservation of assets, and the returning or repatriation of assets. The Study mapped the similarities and differences in the approaches by the Member States. This mapping found that the asset tracing and recovery tools available to creditors vary considerably and, amongst others, may be divided between those measures available before the opening of insolvency proceedings and after the opening of such proceedings. The similarities found via such exercise were, first of all, the limited tools available after the opening of proceedings across the Member States. Additionally, a vast number of Member States were found to provide creditors with the possibility to trace and recover the debtor's assets through the so-called *actio pauliana*, and to bring avoidance claims during insolvency proceedings. Meanwhile, the principal difficulty noted was the discrepancies in conditions for creditors accessing tools among the Member States.

When considering the above findings and which means could be considered to improve asset tracing and recovery in cross-border situations, the Study provides the following recommendations in respect of the following areas of national insolvency laws:

- 1. The powers of insolvency practitioners to trace and preserve assets in insolvency proceedings:** It could be recommended to implement an EAPO-style framework that could apply in insolvency proceedings. In particular, Article 21 of the EIR could be supplemented by an EU measure that requires each Member State to introduce a judicial mechanism that allows for the 'freezing' or preservation of bank accounts in its jurisdiction. This would assist with clarifying the procedure for preserving assets. Although, it has been noted that there is uncertainty as to whether such EAPO procedures would be widely used, especially in more complex situations, as an application may be neither easy nor cheap in such situations. Furthermore, the strict requirements for the issuing of an EAPO and the need for the claimant to provide security could deter the use of EAPOs.
- 2. Asset registers:** It could be recommended to improve the accessibility of asset registers in other Member States by improving the functioning of the pre-existing European e-Justice portal by standardising and updating the website. It could be useful for the website to provide overviews and links to more types of registers, as well as providing an option to translate the information contained in the registers into all the languages of the EU, to allow for more registers to be easily accessible to insolvency practitioners and creditors attempting to trace assets in other Member States.
- 3. Creditors' tools to trace and preserve assets:** It could be recommended to include a form of *actio pauliana* in the EIR. As the most popular tool provided to the creditors in Member State law, it could be recommended to develop a provision in the EIR concerning the creditor's power to use *actio pauliana* during insolvency proceedings. This would involve the creditors being allowed to bring the action forward only if the insolvency practitioners waive their right of action and are subject to the authorisation of the court opening the proceedings. Moreover, the EU could specify in a provision that the use of the *actio pauliana* within insolvency proceedings should display its effects towards all creditors and the proceedings for the action should be used for distribution among the creditors. This was considered to be the most achievable solution for how to ensure that the Member States with *actio pauliana* provisions safeguard the collectivity principle and the equal treatment of creditors (*par condicio creditorum*).

ANNEXES

Annex A – National country reports

Annex B – Survey results

Annex C – Literature review

| EU Legislation in Relation to Tracing | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|
| Full Reference and Link (where available) | Short Description | EU/ National Level |
| Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141, Recital 76 | Regulation (EU) 2015/848 is the primary legislative instrument in EU insolvency law. It does not harmonise tracing and recovery rules but impacts these regimes indirectly, for instance, through providing access to EU-wide insolvency registers. | EU |
| Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA [2015] OJ L 186 | This Directive is relevant for asset tracing as it grants law enforcement authorities and Asset Recovery Offices with direct access to bank account information for the purposes of fighting serious crime. It aims to improve the cooperation between law enforcement authorities and Financial Intelligence Units and facilitate the exchange of information between Financial Intelligence Units. | EU |
| Regulation (EU) 1215/2012 of the European Parliament and of the Council of December 22, 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF | This is the EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. | EU |
| Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC OJ L 141, 5.6.2015, p. 73–117, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015L0849-20210630 | This is the Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. It is relevant to the policy suggestions regarding registers. | EU |

STUDY ON TRACING AND RECOVERY OF DEBTOR'S ASSETS BY INSOLVENCY PRACTITIONERS

| EU Reports/Recommendations in Relation to Tracing | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------|
| Full Reference and Link (where available) | Short Description | EU/ National Level |
| European Commission 'Green Paper: Building a Capital Markets Union' SWD (2015) 13 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0063&from=EN | This Commission paper sets out its vision for a Capital Market Union in the EU, which is part of an effective and consistent insolvency regime. | EU |
| European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Capital Markets Union for people and businesses-new action plan' COM (2020) 590 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar:61042990-fe46-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF | This Commission Communication emphasises the need for a Capital Market Union in the EU, particularly in the wake of the COVID-19 pandemic. Once again, this document acknowledges the role that insolvency law will play in a successful Capital Market Union. | EU |
| European Commission, 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment', available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws_en | This document provides a summary of the Commission's intention to issue new recommendations on the issue of an EU-wide insolvency regulation. | EU |
| European Commission Press Corner, 'Remarks by Commissioner Gentiloni at the Eurogroup press conference' SPEECH/21/624 (15 February 2021), available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_3061 | This speech by Commissioner Gentiloni reiterated the need for efficient and consistent insolvency laws in the midst of an economic downturn as a result of the COVID-19 pandemic. | EU |
| European Commission Directorate-General Economic and Financial Affairs, 'Corporate solvency of European enterprises: state of play' (1 February 2021), available at https://www.consilium.europa.eu/media/48396/20210402-ewg-commission-note-on-corporate-solvency.pdf | This Commission notice explains the further the link between the COVID-19 pandemic and the potential for insolvency. | EU |
| European Parliament, New EU insolvency rules give troubled businesses a chance to start anew, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623548/EP_RS_BRI(2018)623548_EN.pdf | This briefing note, prepared for the Parliament's Legal Affairs Committee, provides an update on the current legislative landscape in relation to the European insolvency regulation. | EU |

| General Sources in Relation to Tracing | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|
| Full Reference and Link (where available) | Short Description | EU/ National Level |
| Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26 International Insolvency Review 246, available at https://www.researchgate.net/publication/319657699_The_European_Insolvency_Regulation_and_the UNCITRAL_Model_Law_on_Cross-Border_Insolvency_EU_and UNCITRAL_Cross-Border_Insolvency | This article compares the 2015 Recast European Insolvency Regulation with the 1997 UNCITRAL Model Law on Cross-Border Insolvency, focusing on their scope of application, international jurisdiction and the coordination of main and secondary proceedings. | EU |
| The International Who's Who of Commercial Litigators, B. Knoetzi, P. Marsch, Challenges of asset tracing/recovery, p. 3, available at https://knoetzi.com/wp-content/uploads/Who_s-Who-Challenges-of-Asset-Tracing_-_Recovery.pdf | This online article explains the three steps involved in asset recovery in the event of insolvency and how interlinked they each are. Thus, when numerous jurisdictions are involved, the situation becomes complex. As such, a harmonised regime benefits consumers, practitioners and investors. | EU/Int'l |
| World Bank, 2011, Barriers to Asset Recovery, available at https://openknowledge.worldbank.org/bitstream/handle/10986/2320/632580PUB0Barr0ID0186600BOX361512B0.pdf?sequence=1&isAllowed= | This study, undertaken by the World Bank, charts the impact that assets 'stolen' in insolvency processes have on developing countries and how lax tracing laws exacerbates this issue. | EU/Int'l |
| UNCITRAL Colloquium on Civil Asset Tracing and Recovery (Vienna 6 December 2019), Concept Note, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/concept_note_20191127.pdf | This note from an UNCITRAL colloquium explains some contemporary issues in relation to asset recovery. For instance, the development of blockchain technology and digitalisation of assets encompasses anonymity and makes it more difficult to trace the assets online. | Int'l |
| Ilaria Pretelli, 'Cross-border Credit protection against fraudulent transfers of assets: Actio Pauliana in the Conflict of Laws', Yearbook of Private International Law, vol. 13, 2011, pp. 589-640. | This yearbook chapter suggests two different solutions to ascertain the law applicable to transactions defrauding creditors in legal actions filed outside insolvency proceedings: a national conflict of laws rule may well prescribe the application of the <i>lex fori</i> as occurs in the Swiss legal order and a supranational rule – for example, a European Union rule – that can authoritatively draw the frontiers of each national law's empire. In the author's opinion, such a rule could and should be more flexible and take into account the need for judicial evaluation of good faith on a case-by-case basis. | Int'l/EU |
| Judith Dahlgreen, Sarah Brown, Andrew Keay, Gerard McCormack, Directorate-General for Justice and Consumers (European Commission), University of Leeds, Study on a new approach to business failure and insolvency, 2016, available at | This report, commissioned by the Commission, is a comparative study on substantive insolvency law throughout the EU. It also includes an analysis of the Recommendation on a new approach to business failure and insolvency and its implementation in Member States. In relation to tracing, it explains how the <i>actio pauliana</i> can be relied on in many civil law jurisdictions in the EU and its existence alongside specific avoidance rules | EU |

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| <p>https://op.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1/language-en</p> | <p>contained in insolvency legislation. In jurisdictions where the <i>actio pauliana</i> is not operative, other similar avoidance rules often apply.</p> | |
| <p>Patricia Corral, 'Actio Pauliana in EU Private International Law: A matter relating to a contract?' (2021), available at : https://scripties.uba.uva.nl/download?fid=c3948303</p> | <p>This Master Thesis sets out how the Court of Justice of the European Union has included, for the first time, the <i>actio pauliana</i> under the umbrella of the special forum of Article 7(1)(a) of Brussels I bis Regulation of contractual matters in the <i>Feniks</i> case. This ruling has had certain impact. This is because not only are the arguments which the Court used to motivate their decision different from previous judgements, undermining some basic core principles of in the Private International Law Regulations, namely legal certainty and predictability, but it has also instigated the debate around which should be the competent jurisdiction and the applicable law to such action.</p> | <p>EU</p> |
| <p>Simon Bushnell, <i>International Fraud and Asset Tracing - Jurisdictional Comparisons</i> (2014 Sweet & Maxwell)</p> | <p>This book brings together 20 major jurisdictions worldwide and offers an overview of laws and procedures relating to fraud in each one.</p> <p>The topics covered include: managing the internal investigation; disclosure from third parties; steps to preserve assets/documents; and civil proceedings.</p> | <p>Int'l</p> |
| <p>Mara V J Senn and Giselle K Fuentes, 'International Asset Tracing: The Struggle for Transparency Abroad' (2013) 28 <i>Criminal Justice</i> 18</p> | <p>This journal article provides an account of the tension between comprehensive asset tracing laws and offshore jurisdictions.</p> | <p>Int'l</p> |
| <p>Héctor Sbert, 'Asset tracing and recovery in insolvency contexts: an UNCITRAL approach?' (2020) <i>eurofenix</i> 20</p> | <p>This article reports on the recent colloquium in Vienna aiming to kick off a process of debate and analysis among practitioners and academics of different jurisdictions.</p> | <p>Int'l</p> |
| <p>Williams Itheme, 'Theft of Public Assets in Developing Countries and the Ineffective Legal Frameworks on Cross-border Asset Tracing and Confiscation' (2021) 10 <i>Journal of Governance & Regulation</i> 30, available at : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863302</p> | <p>This journal article uses Nigeria as an example of a developing country and critically examines the underlying defects in the cross-border legal framework on asset recovery and confiscation and proffers suggestions on how these defects could be remedied.</p> | <p>Int'l</p> |
| <p>Charlie Monteith and Andrew Dornbierer, 'Tracking and Tracing Stolen Assets in Foreign Jurisdictions' (2013) 2 <i>eurcrim</i> 51, available at : https://eucrim.eu/media/issue/pdf/eucrim_issue_2013-02.pdf#page=21</p> | <p>This article discusses some of the common techniques and tools used by investigators to track and trace stolen assets. It focuses predominantly on a context whereby funds have been stolen through public corruption.</p> | <p>EU</p> |
| <p>Keith Oliver (ed), <i>Fraud, Asset Tracing & Recovery</i> (2021 CDR-News), available at : https://iclg.com/cdr-essential-intelligence</p> | <p>This online edition features articles on the latest developments in the area of asset tracing and recovery. Of particular relevance is the chapter on 'Insolvency used as a tool in asset recovery'.</p> | <p>Int'l</p> |
| <p>Jean-Pierre Brun and Others, 'Using Insolvency, Receivership, or Similar Proceedings to Trace or Recover Assets' in <i>Public Wrongs, Private</i></p> | <p>This book chapter provides an account of when insolvency laws can be used to recover assets through civil proceedings, even in the event where those assets were stolen illegally.</p> | <p>Int'l</p> |

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| Actions: Civil Lawsuits to Recover Stolen Assets (2014 World Bank) | | |
| Antonio Leandro, 'Asset Tracing and Recovery in European Crossborder Insolvency Proceedings' (2021), available at : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3991563 | This article addresses issues in relation to tracing and recovering of assets in cross-border cases. | EU |
| John Greenfield, David Jones, Robin Gist, 'No Stone Unturned: Tools of the trade available to the asset recovery lawyer in Guernsey' (Lexology, 2022), available at https://www.lexology.com/r.ashx?l=9PD2G8U | In this article, the authors set out the weapons at the disposal of the asset recovery lawyer and analyse the methods available to extract the information that any claimant needs from other parties (reluctant or otherwise); obtaining of pre-emptive Court Orders to preserve assets that have been uncovered; assisting actions in other jurisdictions; and finally bringing into play the full might of an insolvency practitioner with all the powers at their disposal. | UK |
| UNCITRAL, 'UNCITRAL Legislative Guide on Insolvency Law' (2019), available at : https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law | The Legislative Guide provides a comprehensive statement of the key objectives and principles that should be reflected in a State's insolvency laws. | Int'l |
| EBRD, 'Assessment of Insolvency Office Holders: Review of the Profession in the EBRD Region' (2014), available at : http://www.inppi.ro/arhiva/anunturi/download/196_1f89a9d9c30bb669c1a3020f0960c8da | This report presents the results of an in-depth study on insolvency office holders conducted by the EBRD across 27 jurisdictions. | Int'l |
| OECD, 'Asian Insolvency Systems: Closing the Implementation Gap' (OECD, Paris, 2007). | This relates to tracing by, among other things, focusing on the need for training and capacity building in the insolvency profession. | Int'l |
| Sarah Paterson, 'Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards' (2014) 14 Journal of Corporate Law Studies 333, available at : https://www.tandfonline.com/doi/abs/10.5235/14735970.14.2.333 | This article is about what happened as parties moved away from negotiating by reference to market norms and moved towards negotiating by reference to their strict legal rights. | Int'l |
| Sarah Paterson, 'Rethinking the Role of the Law of Corporate Distress in the Twenty-First Century' (2014) Law Society and Economy Working Paper Series, WPS 27-2014 December 2014, available at : http://eprints.lse.ac.uk/id/eprint/60583 | This paper proposes a new taxonomy: the law of corporate distress comprised of insolvency law and restructuring law. | Int'l |
| Miguel Virgos, Etienne Schmit, 'Report on the Convention on Insolvency Proceedings' (EU | This is a 1996 Report on the Convention of Insolvency Proceedings. This is a document from the Council of the EU. | EU |

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| Council, 1996), available at : http://aei.pitt.edu/id/eprint/952 | | |
| Miguel Virgos, Francisco Garcimartin, 'The European Insolvency Regulation: Law and Practice' (2004) | This in-depth commentary offers practitioners in international business transactions and litigation a definitive guide to the workings of the Insolvency Regulation. | EU |
| Oriana Casasola, 'The Harmonization of Transaction Avoidance: A Compromise Solution' (2020) 29(5) Norton Journal of Bankruptcy Law and Practice 3, available at : https://pure.hud.ac.uk/en/publications/the-harmonization-of-transaction-avoidance-a-compromise-solution | The present contribution seeks to assess the possible solutions to the unsatisfactory results of the current EU regulation with the knowledge acquired from a comparative study concerning transaction avoidance in UK, Germany and Italy. | EU |

| Case law in Relation to Tracing | | |
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| Full Reference and Link (where available) | Short Description | EU/ National Level |
| Case C-133/78 Gourdain v Nadler ECLI:EU:C:1979:49, available at : https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0133 | According to this reference for a preliminary ruling concerning the bankruptcy and proceedings relating to the winding-up of insolvent companies or other legal persons, all matters directly derived from and closely connected with insolvency proceedings fall within the Judgments Regulation's exclusion of insolvency related actions. | EU |
| C-337/17 Feniks sp. z o.o. v Azteca Products & Services SL [2018] ECLI:EU:C:2018:805, available at : https://curia.europa.eu/juris/liste.jsf?num=C-337/17 | This is a CJEU preliminary ruling concerning the jurisdiction and the recognition and enforcement of judgements in civil and commercial matters and <i>actio pauliana</i> . | EU |
| C-722/17 Norbert Reitbauer and others v Enrico Casamassima [2019] ECLI:EU:C:2019:577 | This is CJEU preliminary ruling concerns in proceedings which have as their object rights in rem in immovable property and proceedings related to the enforcement of judgments. | EU |
| Case C-339/07 Seagon v Deko Marty Belgium NV ECLI:EU:C:2009:83, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62007CJ0339 | As provided by Advocate General Ruiz-Jarabo Colomer in Deko Marty Belgium NV, <i>actio pauliana</i> is 'a legal remedy governed by civil law which protects creditors against disposals of assets made by their debtors with the intention to defraud'. | EU |
| Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509 | This Court of Appeal decision from the jurisdiction of England and Wales established the so-called 'Mareva Injunction' which has since been endorsed in many common law countries. An order granting a Mareva Injunction allows the plaintiff to freeze contested assets. | UK |
| Case C-328/12 Ralph Schmid v Lilly Hertel ECLI:EU:C:2014:6, available at : https://curia.europa.eu/juris/document/document.jsf?text=&docid=14 | In this ruling, the CJEU mentioned how Article 3(1) states unequivocally that '[t]he courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open | EU |

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| <p>6438&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5006518</p> | <p>insolvency proceedings.’ Thus, the location of the debtor's assets is irrelevant, except in so far as it may be a factor to be taken into account in determining where the centre of the debtor's main interests is and/or whether secondary proceedings need to be opened under Article 3(2).</p> | |
| <p>Wallace v Wallace [2019] EWHC 2503 (Ch), available at : https://www.bailii.org/ew/cases/EW/HC/Ch/2019/2503.html</p> | <p>In this case, it was held that the liquidator of an insolvent company was entitled to an order under the UK Insolvency Act 1986, Section 263(3) requiring the company's former bookkeeper who was resident in the Republic of Ireland, to deliver up the books and records of the company in his possession or control. Reference was made to the EIR and the authority of a liquidator to exercise the powers conferred on him by UK domestic law in other Member States.</p> | UK |
| <p>Akkurate Ltd, Re [2020] EWHC 1433 (Ch), available at : https://www.bailii.org/ew/cases/EW/HC/Ch/2020/1433.html</p> | <p>The court held that the EIR extended the territoriality of purely domestic insolvency provisions. Proceedings under Section 236(3) of the UK Insolvency Act derived directly from and were closely connected to insolvency proceedings, and the aim of the EIR was to confer jurisdiction on the courts of the Member State in which the insolvent entity had its COMI.</p> | UK |
| <p>Juzgado de lo Mercantil nº 6 de Palma de Mallorca (Commercial Court 6 of Palma de Mallorca), ruling JUR\2020\26676 of 3 October 2021, available at : https://www.poderjudicial.es/search/indexAN.jsp</p> | <p>In this case, the court granted ex officio the precautionary seizure of a certain amount of assets and rights of the debtor (IN DESTINATION INCOMING, S.L.U.).</p> | ES |
| <p>Sąd Najwyższy (The Supreme Court), ruling II CSK 96/12 of 29 November 2012, available at : http://www.sn.pl/sites/orzecznictwo/orzeczenia2/ii%20csk%2096-12-1.pdf</p> | <p>The court pointed out the steps in bringing an <i>actio pauliana</i> and that the law applicable was the law governing the particular obligatory relationship between the creditor and the debtor, which is usually the law applicable to the particular obligatory contract between the debtor and the creditor.</p> | PL |

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