

# Insolvency Registers in the Recast European Insolvency Regulation

Emmanuelle Inacio takes a closer look at insolvency registers and their interconnection, creditors' rights and confidentiality.



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**The establishment of insolvency registers in all Member States and their interconnection is an innovation of the Recast European Insolvency Regulation (EIR), created to “improve the provision of information to relevant creditors and courts and to prevent the opening of parallel insolvency proceedings”<sup>1</sup>.**

Indeed, the previous EIR does not provide for a mandatory publication of the opening of insolvency proceedings in any other Member State. This is only a possibility given to the liquidator appointed in a main or secondary proceedings.

The publication becomes mandatory for the liquidator of the Member State where the main insolvency proceedings are opened only if any Member State within the territory of which the debtor has an establishment requires it<sup>2</sup>.

Regarding the registration in any public register in the other Member States, only the liquidator of the main insolvency proceedings has the possibility to request it. The registration of the judgment opening the main insolvency proceedings is however mandatory if required by any Member State<sup>3</sup>.

Nevertheless, the publication does not seem to have formal legal effects, other than those they have under the national law, as Recital 29 of the previous EIR states that publication is not a condition for recognition of the foreign proceedings. Indeed, the decision opening the proceedings becomes effective in the other Member States, even without

publication in those Member States.

Of course, the previous EIR provides two provisions that mitigate the effects of the absence of mandatory publication.

On the one hand, Article 24 provides that the person who was unaware of the opening of proceedings honouring an obligation for the benefit of the debtor instead of the liquidator shall be deemed to have discharged. The ignorance shall be presumed, in the absence of proof to the contrary, where the obligation has been honoured before the publication. However, where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed to have been aware of the opening of proceedings.

On the other hand, Article 40 establishes a duty to inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States, by means of an individual notice.

However, the good functioning of cross-border insolvency proceedings relies to a significant extent on the publicity of the relevant decisions relating to an insolvency procedure<sup>4</sup>.

The Recast EIR thus obligates the Member States to establish and maintain in their territory one or several publicly accessible insolvency electronic registers in which information concerning cross-border insolvency cases shall be published as soon as possible after the opening of such proceedings<sup>5</sup>.

The mandatory information that should be made publicly

available is related to the identification of the court, debtor, insolvency practitioner, if any, date of the opening and closing, if any, of insolvency proceedings, type of insolvency proceedings and the jurisdiction for opening proceedings.

Also mandatory to be published are: the time limit for lodging claims, if any, or a reference to the criteria for calculating that time limit; the court before which and, where applicable, the time limit within which a challenge of the decision opening insolvency proceedings is to be lodged in accordance with Article 5, or a reference to the criteria for calculating that time limit.

Moreover, Member States have the possibility of including documents or additional information in their national insolvency registers, such as directors' disqualifications related to insolvency.

Member States are not obliged to include in the insolvency registers the mandatory information 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 the relevant information is given to the creditors by individual notice, and that claims of creditors who have not received the information are not affected by the proceedings.

In order to facilitate access to information in insolvency registers, the Recast EIR provides for the interconnection of such



**THE RECAST EIR OBLIGATES THE MEMBER STATES TO ESTABLISH AND MAINTAIN IN THEIR TERRITORY ONE OR SEVERAL PUBLICLY ACCESSIBLE INSOLVENCY ELECTRONIC REGISTERS**



insolvency registers via the European e-Justice Portal<sup>6</sup>.

There are other references to publication in the Recast EIR.

Indeed, Article 28 states that the insolvency practitioner or the debtor in possession shall request that notice of the judgment opening insolvency proceedings be published in any other Member State where an establishment of the debtor is located in accordance with the publication procedures provided for in that Member State. They may request this publication where they deem it necessary.

Moreover, Article 29 requires that the insolvency practitioner or the debtor in possession shall request that publication in any public register, where the law of a Member State in which an establishment of the debtor is located, or the law of a Member State in which immovable property belonging to the debtor is located, requires such registration. They may request such registration in any other Member State, provided that the law of the Member State where the register is kept allows such registration.

Finally, the provision of Articles 24<sup>7</sup> and 40 of the previous EIR<sup>8</sup> are maintained.

The publication of information in the insolvency registers under the Recast EIR only provides specifically one legal effect: the opening of the minimum legal period that Member States shall observe in order to allow a foreign creditor to lodge his/her claims which shall not be less than 30 days following the publication of the opening of insolvency proceedings in the insolvency register of the State of the opening of proceedings<sup>9</sup>. The publication of information in the insolvency registers under Recast EIR shall not have any other legal effects other than those set out in national law<sup>10</sup>. Indeed, publication is not a prior condition for recognition of the foreign proceedings<sup>11</sup>.

But the establishment of insolvency registers in all Member States and their interconnection

could have another aim: allowing the inclusion of confidential procedures in the scope of the Recast EIR.

If the scope of the regulation has been broadened to include preventive proceedings, only the public proceedings fall within the scope of the new regulation “*in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings*”<sup>12</sup>.

Thus, confidential proceedings are excluded from the scope of this Regulation for reasons of legal certainty. Indeed, “*while such proceedings may play an important role in some Member States, their confidential nature makes it impossible for a creditor or a court located in another Member State to know that such proceedings have been opened, thereby making it difficult to provide for the recognition of their effects throughout the Union*”<sup>13</sup>.

However, the European Commission’s Proposal for a Directive on preventive restructuring frameworks aims to put in place a restructuring framework to enable the debtors to address their financial difficulties at an early stage, when it appears likely that their insolvency may be prevented and the continuation of their business assured<sup>14</sup>. The Proposal then also implies that confidential proceedings will be generalised in the European Union.

Therefore, the opportuneness to include confidential proceedings in the scope of the Recast EIR arises to the greatest extent so far. Indeed, if a confidential procedure is opened in one Member State against a debtor who possesses establishments within the territory of other Member States, the non-recognition of this procedure by the Recast EIR will not prohibit at a later stage the opening of a main insolvency procedure by a court of another

Member State which has jurisdiction to open the main insolvency procedure.

This situation is all the more unfortunate as this seriously threatens the chances of success of the preventive procedure and does not incentivise the debtors to pursue early restructuring.

The main reason invoked against the application of the Recast EIR to confidential proceedings is the respect of the creditors’ rights. Indeed, it is impossible for a creditor or a court located in another Member State to know that confidential proceedings have been opened.

But it would be possible to square the respect of the principle of confidentiality with creditors’ rights.

Indeed, as the Recast EIR provides for the establishment of insolvency registers in all Member States from 26 June 2018 and their interconnection from 26 June 2019<sup>15</sup>, the opening of confidential procedures could be published in the insolvency register of a Member State but the access to this confidential information would be granted only to the insolvency judges and administrative authorities dealing with restructuring, insolvency and second chance matters.

Therefore, in the event of the opening of a confidential procedure in one Member State against a debtor and, at a later stage, the request by a creditor for the opening of a main procedure within the territory of another Member States, the solution would be to take one decision refusing the application *in camera*. This decision would not be publicly available and would be notified only to the parties in order to respect the principle of confidentiality. Then, after the information of the parties, it could be proposed to the creditor to become party of the agreement. Obviously, the creditor could refuse this proposal and exercise his/her right to challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction. ■



**IT IS IMPOSSIBLE FOR A CREDITOR OR A COURT LOCATED IN ANOTHER MEMBER STATE TO KNOW THAT CONFIDENTIAL PROCEEDINGS HAVE BEEN OPENED**



#### Footnotes:

- 1 Recast EIR, Recital 76.
- 2 EIR, Article 21.
- 3 EIR, Article 22.
- 4 Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) no 1346/2000 on insolvency proceedings, COM(2012) 744 final.
- 5 Recast EIR, Article 24.
- 6 Recast EIR, Article 25.
- 7 Recast EIR, Article 31.
- 8 Recast EIR, Article 54.
- 9 Recast EIR, Article 55(6).
- 10 Recast EIR, Article 24(5).
- 11 Recast EIR, Recital 75.
- 12 Recast EIR, Recital 12.
- 13 Recast EIR, Recital 13.
- 14 COM(2016) 723 final, Recital 17.
- 15 Recast EIR, Article 92.