

Applying the Regulation (EU) 2015/848 on insolvency proceedings

Myriam Mailly, Technical Officer of INSOL Europe, writes about what insolvency practitioners need to know before applying the Regulation (EU) 2015/848 on insolvency proceedings (hereafter “EIR 2015 (recast)”) which entered into force on 26 June 2017



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Corrigendum to Regulation (EU) 2015/848 (OJEU of 21 December 2016)

The initial version of Article 84(1) of the EIR 2015 (recast) covered only insolvency proceedings opened after 26 June 2017, while Article 84(2) stated that “*Regulation (EC) No 1346/2000 shall continue to apply to insolvency proceedings which fall within the scope of that Regulation and which have been opened before 26 June 2017*”.

As a result, neither EIR 2000 nor EIR 2015 (recast) would have

been applicable for cross-border insolvency proceedings opened by a court on the day of 26 June 2017.

By the corrigendum published on 21 December 2016, that problem is now fixed: the EIR 2015 (recast) is applicable on 26 June 2017.

Updated Annexes to Regulation (EU) 2015/848 (OJEU of 3 March 2017)

Regulation (EU) 2017/353 of 15 February 2017, replacing Annexes A and B to Regulation

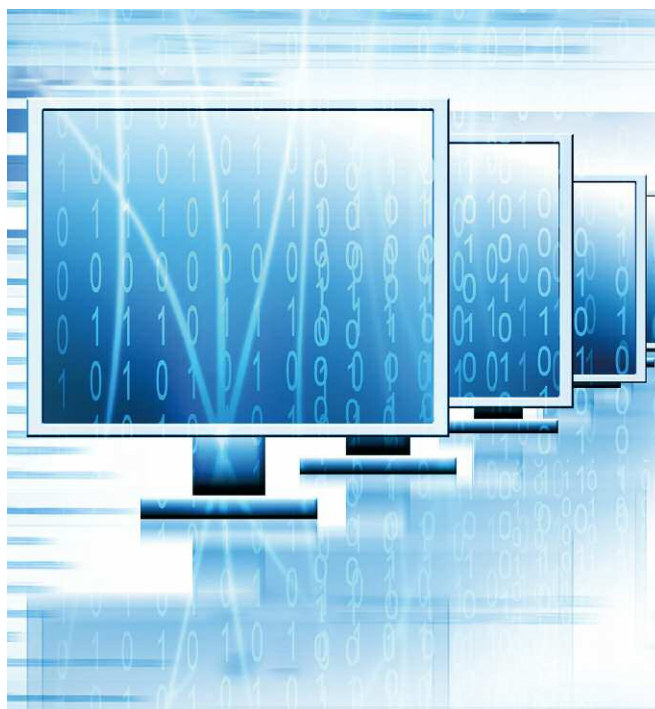
(EU) 2015/848, has been published on 3 March 2017.

This Regulation takes into account the information notified to the Commission by Poland, on the substantial reform of its domestic law on restructuring taking effect as of 1st January 2016. That is why Poland requested to change the lists set out in Annexes A and B to the Regulation (EU) 2015/848 accordingly.

It is however important to bear in mind that since the Annexes are an intrinsic part of the Regulation, they are directly applicable in the Member States. That is why, insolvency practitioners are highly recommended to check the latest version of the Annexes before applying the EIR 2015 (recast).



ARTICLE 24 OF THE EIR 2015 (RECAST) REQUIRES EU MEMBER STATES TO PUBLISH RELEVANT INFORMATION IN A PUBLICLY ACCESSIBLE ONLINE REGISTER



Updated information related to national and EU insolvency laws on the basis of Article 86 of the EIR 2015 (recast)

Article 86 of the EIR 2015 (recast) which entered into force on 26 June 2016 aims mainly at making a short description of national legislations and procedures relating to insolvency available to the public, and in particular related to the matters listed in Article 7(2) (“the law of the State of the opening of proceedings”).

As of 29 June 2017, a short description of national legislations and procedures

relating to the matters listed in Article 7(2) are available for the nineteen following jurisdictions: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Malta, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom.

Standard forms to be used by insolvency practitioners on the basis of Article 88 of the EIR 2015 (recast)

Standard forms in all official languages of the European Union have been published on 22 June 2017 by the European Commission.

First of all, these standard forms will allow Member States to make conditional, via the system of interconnection, the access to information regarding insolvent individuals, upon the verification of the existence of a legitimate interest for accessing such information (Article 27(4)).

Secondly, insolvency practitioners will be required to send a copy of the standard form for lodging of claims together with their notice, so as to inform immediately the known foreign creditors of the opening of insolvency proceedings (Articles 54 and 55). Please note that the EIR 2015 (recast) makes clear that the consequences of the incomplete filing of the standard forms should however remain a matter for the national law.

Thirdly, a standard form will be created for insolvency practitioners appointed to represent any member of a group of companies, allowing them to object within 30 days of receipt of the notice

- against the request for the opening of group coordination proceedings;

- against the inclusion within the group coordination proceedings of the insolvency proceedings in which they have been appointed; or
- against the person proposed as a coordinator (Article 64).

Next steps: establishment and interconnection of national insolvency registers (2018-2019)

To better ensure that creditors and courts receive relevant information and to prevent parallel proceedings being opened, Article 24 of the EIR 2015 (recast) requires EU Member States to publish relevant information in a publicly accessible online register. The deadline for establishing such national registers for national governments is 26 June 2018. Once established at a national level, these registers will be interconnected via the European e-Justice Portal by 26 June 2019.

If you are curious or too impatient, be aware that you can already have access to the pilot project involving the following Member States: Austria, the Czech Republic, Estonia, Germany, Latvia, the Netherlands, Slovenia and Romania. ■

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Applying the Regulation (EU) 2015/848 on insolvency proceedings (Part 2)

Myriam Mailly writes about what insolvency actors need to know before applying the Regulation (EU) 2015/848 of 20 May 2015 (OJ L 141 of 05.06.2015, p. 19-72) on insolvency proceedings (hereafter “EIR 2015 (recast)”) entered into force on 26 June 2017



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THESE SOFT LAW INSTRUMENTS SHOULD ENCOURAGE AN EFFECTIVE COMMUNICATION BETWEEN COURTS IN INSOLVENCY CASES WITH CROSS-BORDER EFFECTS



Cooperation

Pursuant to Recital 48 of the EIR 2015 (recast) a proper cooperation between the actors involved in cross-border insolvency proceedings “*implies the various insolvency practitioners and the courts involved cooperating closely, in particular by exchanging a sufficient amount of information (...). When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in Principles and Guidelines on Communication and Cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant Guidelines prepared by the United Nations Commission on International Trade Law (UNCITRAL).*”

If a majority of (if not all) insolvency practitioners appointed in cross-border insolvency proceedings is already familiar with the guidelines published by UNCITRAL, and in particular the explanatory texts entitled “*UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (2011)*” and “*UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)*”, other texts should however be taken into consideration.

Principles and Guidelines

Indeed, a number of non-binding recommendations exists in the area of cross-border communication and cooperation and is (or can be) used in European jurisdictions (and beyond).

First of all, one should remember that the *European Communication and Cooperation Guidelines For Cross-Border Insolvency* (also well known as ‘CoCo Guidelines’) (2007) were drafted to provide some

substantial and procedural guidance to those involved in main and secondary insolvency proceedings in the context of the EU Insolvency Regulation (2000). These Guidelines were used for example in the *Nortel* case (See CJEU, case C-649/13 and especially the opinion of the Attorney-General).

That is why in 2015, the *EU Cross-Border Insolvency Court-to-Court Cooperation Principles* (also known as the ‘EU JudgeCo Principles and Guidelines’) have been adopted. These guidelines were specifically drafted to be



used in the context of the EU Insolvency Regulation (recast). The text is divided into two parts: a first one which contains 26 Principles including subjects such as cross-border sales or cross-border reorganisation plans, and a second one, containing 18 Guidelines related to the EU Cross-Border Insolvency Court-to-Court Communications Guidelines, intended to facilitate communications in individual cross-border cases.

Along these “European” guidelines, the *American Law Institute/International Insolvency Institute (ALI-III) Global Principles and Guidelines* (2012) may also be useful. These updated guidelines are suitable for being used in a global context (common law or civil law jurisdictions).

In addition, Guidelines designed mostly for common law jurisdictions have also been

published: *The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* (“JIN Guidelines”). These guidelines aim at facilitating protocols which improve court-to-court communication and cooperation on a case-by-case basis.

These soft law instruments should encourage an effective communication between courts in insolvency cases with cross-border effects. As the EU Insolvency Regulation (recast) is now applicable, let it work! ■

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Applying the Regulation (EU) 2015/848 on insolvency proceedings (Part 3)

Myriam Mailly writes about the tools available to insolvency practitioners (hereafter, 'IPs') who will need to conclude cross-border insolvency agreements or protocols under the scope of the EIR 2015 (recast).



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The Recast Insolvency Regulation aims at fostering a proper cooperation between IPs taking into account best practices as set out in the Guidelines adopted by European and International organisations such as UNCITRAL.

In particular, Recital 49 of the EIR 2015 (recast) states that IPs “*should be able to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of*

companies, where this is compatible with the rules applicable to each of the proceedings. (...) Simple generic agreements may emphasise the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements may establish a framework of principles to govern multiple insolvency proceedings (...)”.

It is also important for IPs to consider the need to conclude insolvency protocols in light of the fact that, pursuant to the applicable national law, such protocols “*may be approved by the courts involved, where the*

national law so requires.”

In order to help IPs in that regard, guidelines have been published by a number of organisations dealing with cross-border insolvency matters. Apart from the tools necessary for the application of the EIR 2015 *per se* such as the publication of standard forms in order to inform known foreign creditors and to object with regard to group coordination proceedings or the publication of updated information on national proceedings listed into Annex A of the European Insolvency Regulation (see *Part 1*), other



IPs SHOULD BE AWARE THAT INSOL EUROPE'S INSOLVENCY REGULATION CASE REGISTER COULD ALSO BE HELPFUL FOR THEIR DAY-TO-DAY PRACTICE



texts have to be put on the scene where there is a need to conclude cross-border insolvency protocols.

For example, the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) provides relevant information on practical aspects of cross-border cooperation and communication between IPs. In particular, Part III of the Practice Guide deals with cross-border insolvency agreements and provides relevant information on when and how to use them. This third part was built on practical experience and the Annex I of the Practice Guide contains an interesting list of case summaries to illustrate how different issues had been addressed in practice, such as claims resolution including employees' claims (*Sendo*) or intra-group transactions (*Calpine Corporation*), coordinated asset sales (*AgriBioTech Canada, Inc.* or *Alphastar Television Network, Inc.*), coordinated restructuring

plans (*Smurfit-Stone Container Corporation*) or determination of IPs' fees (*360Networks Inc.*), and so on... Furthermore, IPs should be aware that the University of Leiden has made public a part of the International Insolvency Institute's ('III') protocols database.

At last but not least, IPs should be aware that INSOL Europe's Insolvency Regulation Case Register could also be helpful for their day-to-day practice as the first decisions delivered by national courts under the EIR 2015 (recast) are now available on the Lexis Nexis dedicated platform. ■

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