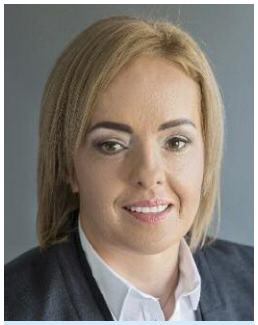
The Undertaking: Mystery or reality?

Andrea Csőke, Nicoleta Mirela Nastasie and Róbert Muzsalyi ask how does the undertaking, provided by the 2015/848/EU Regulation, work in Romania and in Hungary?

ANDREA CSŐKE
Judge at the Supreme Court of Hungary



NICOLETA MIRELA NASTASIE
Judge at the Bucharest Tribunal, Romania

RÓBERT MUZSALYI
Judicial Clerk at the Supreme Court of Hungary

The differences between Member States in relation to substantive and procedural rules are commonly a source of difficulties in cross-border proceedings.

Among others the Regulation 2015/848 of the European Parliament and the Council on insolvency proceedings (hereinafter: EIR-R) provides some new legal instruments to limit the possibility of secondary insolvency proceedings. The undertaking (Art. 36) is one of the new features which has not been known before in Continental legal systems.

We consider that the application of the undertaking in different insolvency regimes involves some difficulties. To demonstrate this assumption, we will compare the Romanian and the Hungarian legislation in this field and show the differences and the similarities.

Preparing the undertaking when the main insolvency proceedings are opened in Romania

Romanian law does not regulate the situation of an undertaking following the meaning and the effects provided by EIR-R.

In the reorganisation proceedings, the judicial administrator may propose an undertaking as part of the reorganisation plan, a tool for an efficient administration of the main insolvency proceedings, in direct relation to the complexity of the restructuring process. During the implementation of the

reorganisation plan the undertaking is possible if one takes into consideration its purpose and effects on the debtor's estate. The approval of the reorganisation plan is the creditors' right, but the plan has to obtain judicial confirmation.

In the winding-up procedure the insolvency practitioner is entitled to propose an undertaking. The courts have limited power in relation to the management and the estate of the debtor. The general assembly of the creditors has the right to approve the insolvency practitioner's proposal for the undertaking.

When the main proceedings are opened in another Member State

Romanian creditors should be informed about the opening of main insolvency proceedings in another Member State, about the practitioner's intention to provide an undertaking, the contents of the undertaking and the arguments supporting it, including the effects on creditors' rights and the local debtor's estate.

Creditors vote on a reorganisation plan in five categories. The reorganisation plan must be approved by the absolute majority in each category in relation to the value of claims, not the number of creditors.

Even though there is no provision in the national law, the Romanian syndic judge may consider an application on the legal basis of Article 36 (5) EIR-R admissible, take note and verify the legal requirements of the undertaking for its approval, but this is just a presumption, in the absence of relevant jurisprudence. The Romanian insolvency law has kept the traditional view that in applying the procedure, the main

role lies with the courts, thus certifying the essentially judicial nature of collective proceedings.

A formal confirmation of the Romanian court decision to approve the undertaking does not seem necessary, but there exists the possibility for a Romanian judge to consider it his duty to examine *ex officio* some formal requirements, such as the approval by a qualified majority of local creditors, the publication and notification of the undertaking and the real possibility for the unknown creditors to find out about the undertaking.

Preparing the undertaking when the main proceedings are opened in Hungary

The Hungarian Insolvency Act (*Act XLIX of 1991 on Insolvency Proceedings*, hereinafter: "HIA") was amended in connection with the entry into force of the EIR-R. Special provisions were added in relation to the applicability of the undertaking in the winding up proceedings (in Hungary there is no possibility to propose an undertaking in the reorganisation proceedings).

Statements of undertaking issued to creditors established in other Member States shall be considered valid only if approved in advance by the Hungarian court. In a request submitted to the court, the practitioner shall demonstrate what assets are situated in the Member State of the undertaking, supported by financial statements and documents, their value, plans for the sale of such assets, and the objectives of the undertaking for creditors, as well as the disadvantages that the lack of undertaking is likely to cause. A list of claims of known foreign creditors in the other Member State, indicating the rules set out in the HIA for the payment of such claims and how they should be classified in the priority order provided by HIA, should also be provided.

If the creditors in the other Member State affected do not approve the undertaking which was approved by the court in advance, the insolvency practitioner shall inform them urgently about the possibility of joining the main insolvency proceedings in Hungary, with the payment of a registration fee, with the provision that the time limit for the submission of notices for claims shall commence on the day of the voting on the statement of undertaking.

The court shall inform the creditors and address them a written statement about the undertaking, but it is not binding for the court. In such a situation – when the main proceedings are opened in Hungary – any insolvency court is entitled to approve a proposal for undertaking, there is no court with exclusive jurisdiction.

In the event of any unlawful action or negligence – including failure to fulfill the undertakings – the foreign creditors may file an objection within 15 days. This is a legal remedy by which creditors can ask the court to compel the insolvency practitioner to fulfill the undertaking.

When the main proceedings are opened in another Member State

The Fővárosi Törvényszék (Budapest-Capital Regional Court) shall have exclusive competence for opening, determining territorial insolvency proceedings and controlling the undertaking proceedings.

The communication of an undertaking by a foreign insolvency practitioner to Hungarian local creditors shall contain a statement declaring that the undertaking is following the validity requirements according to the national law of the Member State of the main proceedings. The foreign insolvency practitioner shall provide, for the Hungarian's creditors complete information, elements about the local assets affected by the undertaking, including their value and plans for their sale, in Hungarian. The foreign insolvency practitioner shall inform Hungarian local creditors about the voting process for the approval of the undertaking. The voting shall be conducted in the presence of a public notary.

Creditors are grouped in two categories: secured and unsecured. Creditors can vote according to their accepted claims. If the plan is approved by a majority of votes in both categories, the undertaking is approved.

Conclusions

It is obvious from the above that although we are close neighbours and there are companies with a seat in one country and an establishment in the other, our insolvency rules are totally different.

The Hungarian legislator tried to keep up with the new European rules of the EIR-R, the Romanian one did not wake up yet, while courts must deal with challenges generated by the undertaking. In Hungary, the HIA gives a big task and responsibility to the judge, while the Romanian rules are based on the creditors' activity, giving them the possibility to deal in accordance with their interests. From the creditors' point of view, inconsequent or insufficient rules are much better than no procedural rules. But the lack of rules leads to legal uncertainty in cross-border situations.

The goal of our work is to show how serious the problems related to an undertaking as alternative to secondary proceedings may become. This reality requires flexibility and a positive attitude from all parties involved - debtors, creditors and national authorities with competence in the field - in order to produce positive effects and develop the undertaking as an efficient mechanism for international cooperation. ■

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