Opening secondary insolvency proceedings in the EU

Bernard P.A. Santen, Fabian A. van de Ven and Gert-Jan Boon provide a concise survey of what judges should consider before opening secondary proceedings in an EU Member State after Burgo/Illochroma

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1. Introduction

This article aims to offer a concise survey of what judges should consider before opening secondary proceedings in an EU Member State.

This theme was triggered at the training sessions of the EU/III Judicial Cooperation ("JudgeCo") project[1] organised for judges on the European Insolvency Regulation ("EIR") and its then upcoming revision ("EIR Recast")[2] in the last quarter of 2014 in Istanbul[3], Riga[4] and Amsterdam.[5] In all, over sixty mostly 'first-instance' insolvency judges from over 15 EU countries were involved. When the concept of 'synthetic secondary insolvency proceedings' was introduced,[6] a number of judges were opposed to the construction as being impractical and not executable in their daily line of work. They expressed interest in having a survey of the necessary considerations to take into account before opening secondary insolvency proceedings. This article intends to make good on that promise.

Section 2 of this article presents a brief introduction of the concept of the synthetic secondary proceedings. Section 3 discusses two related judgments of the Court of Justice of the European Union ("CJEU"). Section 4 concludes with a list of observations to be made by a Court when having to decide on the opening of secondary proceedings.[7]

2. Secondary proceedings versus synthetic secondary proceedings

Article 3(2) EIR defines secondary proceedings as any proceedings opened subsequently after main insolvency proceedings have been opened under paragraph 1.

According to Articles 3(3) and 27 EIR these secondary proceedings must be winding-up proceedings as listed in Annex B to the EIR. Chapter III (Articles 27-35) of the EIR describes the secondary proceedings and the role of the insolvency office holder (IOH) in both the main and in the secondary proceedings.[7]

The opening of secondary proceedings may be requested by the IOH in the main proceedings or by anyone empowered to request the opening of insolvency proceedings in that Member State (Article 29 EIR), usually a creditor. Mutual assistance between the IOHs managing the main and secondary proceedings is provided for in three ways.[8] Article 31 EIR provides a duty for the IOHs in the main and secondary proceedings to *communicate* any information which may be relevant to the other proceedings. It relates in particular to the progress made in lodging and verifying claims, and all measures aimed at terminating the proceedings. Moreover, all IOHs are duty bound to cooperate with each other (Article 31(2) EIR). Finally, Article 31(3) EIR requires the IOHs in secondary proceedings to give the IOH in the main proceedings an early opportunity to submit proposals on liquidation or use of the assets in the secondary proceedings. For further information on secondary proceedings we refer to literature.[9]

One does not have to be clairvoyant to forecast that opening secondary proceedings will cause additional costs and complexity, that are, depending on the case, e.g. if the assets or the creditors are few in value or in number, better avoided. That is essentially what the concept of synthetic secondary proceedings aims to do. 'Synthetic', 'virtual' or 'as if' secondary proceedings[10] are no separate proceedings at all. Instead, the concept encompasses an engagement by the IOH in the main proceedings to creditors in a country where the debtor has an establishment. The IOH in the main proceedings provides assurances to individual creditors in countries where secondary insolvency proceedings could be opened, that their local priority rules will be respected, as far as possible, within the on-going (main) proceedings, "provided that no secondary proceedings were opened."[11]

Article 36 EIR Recast contains as many as 10 paragraphs to introduce the concept into the new Insolvency Regulation, and it codifies current English practice, as in 2006 this way of handling has been sanctioned in two British cases, i.e. MG Rover[12] and Collins & Aikman.[13] In the latter case, the Court observed that treating creditors in other Member States according to the Joint Administrators' proposals as if secondary proceedings have been opened there, would be the best alternative because doing so

would avoid delay, expense, and undesirable complication and uncertainty. But there is more to this. Legally, secondary proceedings are a winding-up procedure. Many times this is inconvenient, as continuation of trading is often necessary.[14] Moreover, an important economic advantage of synthetic secondary proceedings is that of synergy.[15] As said, the concept of 'synthetic' proceedings will be available as a matter of sound EU law as of June 2017.

3. The court's role in opening secondary proceedings

In the CJEU case of Bank Handlowy/Christianapol,[16] the main proceedings opened in France were a '*procédure de sauvegarde*'. The question was raised whether such a procedure with a 'protective purpose' could be aligned with secondary proceedings, to be opened in Poland, which by law have a winding-up purpose.

The CJEU considered that "*secondary proceedings, although intended to protect local interests, may also serve other purposes, which is why they may be opened at the request of the liquidator in the main proceedings, when the efficient administration of the estate so requires.*"[17]

Interestingly, the CJEU uses "*may be opened*" and "*when the efficient administration so requires*". By some this consideration was interpreted as a first sign of letting the court decide when dealing with a request to open secondary proceedings.[18]

A second and recent case was that of Burgo/Illochroma.[19] Illochroma, a Belgian company with its COMI in France, was placed in liquidation by a French court. According to the French liquidator, Burgo (an Italian creditor of Illochroma) presented its statement of liability to Illochroma too late. Since Illochroma had an establishment in Belgium, Burgo subsequently requested the opening of secondary proceedings in Belgium. The referring court observed that Article 29 EIR does not state whether "*the opening of secondary proceedings is a right that must be recognised by the court having jurisdiction in that regard or whether that court enjoys a discretion(..)* ."

The CJEU points out that "*(..) it should be borne in mind in that context, first, that the Member States must, when establishing the conditions to be met for secondary proceedings to be opened, comply with EU law and, in particular, its general principles as well as the provisions of the EIR.*"[20]. The CJEU continues: "*Second, the court before which the action seeking the opening of secondary proceedings has been brought must have regard, in applying its national law, to the objectives underlying the possibility of opening such proceedings (..).*" In short, these objectives are 'to protect the diversity of interests'

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THE CJEU LEAVES OPEN WHAT THE IMPLICATIONS OF "EU LAW AND, IN PARTICULAR, ITS GENERAL PRINCIPLES" MIGHT BRING

i.e. 'the protection of local interests', and more generally to serve 'different purposes' as mentioned in Recital 19. Thirdly, the court which has opened the secondary proceedings must have a regard to the objectives of the main proceedings and take into account the overall EIR scheme.[21]

Surprisingly, the CJEU leaves it open what the implications of "*EU law and, in particular, its general principles as well as the provisions of the EIR*", "*to protect the diversity of interests*" and "*objectives of the main proceedings*" might bring. One line of thought could flow from the EIR's aim as laid down in Recital 2 EIR: "*cross-border insolvency proceedings should operate efficiently and effectively*".[22] Another flows from the principle of "*sincere cooperation*" between Member States, implying their public institutions such as courts, as formulated in Article 4(3) TEU and applicable through Article 81 TFEU.[23] These would be of useful guidance in considering opening secondary proceedings.

4. Observations to be made by the Court

The previous analyses on the CJEU case law means that a court called to open secondary proceedings should observe:

(1) Whether it has jurisdiction pursuant to Article 3(2) EIR ('without the debtor's insolvency being examined in that other State', Article 27 EIR); if so, the national law is applicable (Article 28 EIR);

(2) Whether the national law provides for court discretion to open secondary proceedings or not, any such decision having (a) to comply with EU law, (b) in particular with its general principles, as well as (c) the provisions of the EIR.[24] The general principles refer, e.g., to 'sincere cooperation' (Article 4(3) TEU) and to the protection of the fundamental human rights (Article 6 TEU), such as that of non-discrimination as mentioned in the Burgo/Illochroma case, and various others, as mentioned in CJEU case law;

(3) If the national law is applied, the court must see if the objectives of the opened proceedings, such as the protection of local interests, are respected (Recital 12), because such openings might serve a different purpose as well (Recital 19), for instance, when the estate of the debtor is too complex to administer as a unit or when differences in the legal systems concerned are so great that difficulties may arise.[25]

Moreover, either as part of the deliberations sub (2) or sub (3) we feel that the court should also observe the general objective of the EIR, which is according to Recital 2 "*that cross-border insolvency proceedings should operate efficiently and effectively.*"

In 2017 the EIR Recast will enter into force. This will provide for interesting new issues on the opening of secondary proceedings. The effect of the EIR Recast will be discussed in the next issue of *eurofenix*. ■

This article is a shortened version of a larger study, available at www.TRI-Leiden.eu

Footnotes:

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1 On the JudgeCo-project, see: www.eujudgeco.eu and www.TRI-Leiden.eu.
2 Regulation (EU) 2015/848, as published on 5 June 2015 in O.J. L 141/19. The EIR Recast comes into force on 26 June 2017 (Article 92, as published).
3 At the occasion of the INSOL Europe 2014 annual conference (10 October). Admittance for INSOL Europe Judicial Wing members only. There were 14 judges present.
4 On 3 November 2014, 13 judges present, 5 EU nationalities.
5 On 1 and 2 December 2014, 39 judges present, 16 nationalities.
6 The concept will be explained in section 2 of this article.
7 The abbreviation 'IOH', coined by the EBRD in their 2007 report: *Office Holder Principles* (2007), is used throughout this article to indicate the 'liquidators' mentioned in Annex C of the EIR and the 'insolvency practitioners' of Annex B of the EIR Recast.
8 Paul J. Omar, The European Insolvency Regulation: Current Structure and Issues (2014) (course material for the EU JudgeCo training sessions, p. 170).
9 See Signe Viimsalu, The Meaning and Functioning of Secondary Insolvency Proceedings, Doctoral Thesis, University of Tartu, 2011, available via: http://dspace.utlib.ee/dspace/bitstream/handle/10062/18512/viimsalu_signe.pdf?sequence=1 Bob Wessels, 2012, *International Insolvency Law*, Deventer: Kluwer, 3rd ed.; Christoph Paulus, 2013, Europäische Insolvenz-verordnung, Frankfurt Am Main, 4th ed.
10 See e.g. Bob Wessels, Contracting out of Secondary Insolvency proceedings: the main Liquidator's Undertaking in the meaning of Article 18 in the proposal to Amend the EU Insolvency Regulation, *Brooklyn Journal of Corporate, Financial & Commercial Law*, Brooklyn Law School, Fall 2014, Vol. 9, Number 1, , p. 75 and for 'synthetic' and 'virtual' p. 81.
11 Omar, *op.cit.* p. 27. See also Antonio Leandro, Amending the European Insolvency Regulation to Strengthen Main Proceedings, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 317-340; Bob Wessels, Contracting out of Secondary Insolvency proceedings: the main Liquidator's Undertaking in the meaning of Article 18 in the proposal to Amend the EU Insolvency Regulation, *Brooklyn Journal of Corporate, Financial & Commercial Law*, Brooklyn Law School, Fall 2014, Vol. 9, Number 1, pp. 63-110.
12 *In re* MG Rover Benelux SA/NV (In Administration), [2006] (High Court of Justice Chancery). EWHC (Ch) 1296. See also Bob Wessels, *International Insolvency Law*, Deventer: Kluwer, 2012, para. 10616a; Wessels, 2014, p. 77.
13 *In re* Collins & Aikman Europe SA, [2006] EWHC (Ch) 1343.
14 See Wessels, 2014, p. 70 sub iv on Nortel.
15 See the MG Rover case at 8 and 9, and also Omar *op.cit.* p. 28.
16 Bank Handlowy/Christianapol, CJEU 22 November 2012, C-116/11, ECLI:EU:C:2012:739.
17 At 58.
18 Leandro, *op. cit.* presents a detailed analysis of the case.
19 Burgo Group SpA/Illochroma SA in liquidation, CJEU 4 September 2014, C-327/13, ECLI:EU:C:2014:2158, at 18.
20 At 64.
21 Burgo Group SpA/Illochroma SA in liquidation, CJEU 4 September 2014, C-327/13, ECLI:EU:C:2014:2158, at 66.
22 In the EIR Recast this can be found in Recital 3. Note, that in the Bank Handlowy/Christianapol case, the CJEU refers to 'efficient administration'.
23 The EIR Recast refers in Recital 3 to Article 81 TFEU.
24 Burgo Group SpA/Illochroma SA in liquidation, CJEU 4 September 2014, C-327/13, ECLI:EU:C:2014:2158, at 64.
25 At 65 and reiterated at 67.

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