EIR Recast: Some tiny interesting details...

Andrea Csőke draws your attention to some of the small but significant changes to European Insolvency Regulation 2015/848 (EIR Recast)

There are some interesting details in the old-new (recast) cross-border insolvency Regulation 2015/848. I do not want to deal with the big questions, like hybrid, pre-insolvency proceedings, or the insolvency proceedings of members of a group of companies, I only want to draw your attention to some "tiny" differences between the old and the recast Regulation.

Gaps in the Annexes

First of all, I see gaps in the new system of the Annexes. According to Art. 2 (4) all of the insolvency proceedings would be mixed into one Annex: "A". Without any other help nobody will know which one is for reorganisation and which one is for winding up. What is more important to know is in which proceedings the insolvency status of the debtor has to be examined by the court, and which concern a solvent company.

I know that Member States have to summarise the main information about their proceedings till 26 June 2016, they shall update them, and these will be published by the Commission (Art.86.), but I have to confess that in my practice not everybody will be able to perform these obligations in time.

This "little" question could be very important in a case, because the court of the secondary proceedings should know whether the proceedings opened in another Member State are based on insolvency or not. Art.34 contains the rule about the opening of the secondary proceedings:

> "*Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened.*"

Probably INSOL Europe, or its Judicial Wing, can help to sort out the proceedings under the Regulation into two – or three – groups: proceedings that concern only solvent companies, proceedings opened against insolvent ones and proceedings that concern both types.

Forum shopping

The second interesting detail – I am sure that it was a surprise to me only – is that the recast Regulation does not condemn all types of forum shopping (using the meaning in the old Regulation), only the bad ones. "Forum shopping" – with its pejorative content – means only bad forum shopping, the earlier "good" one, is NOT forum shopping. In fact, the recitals (5) and (29) contain the following rules:

> *(5) It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping).*
>
> *(29) This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.*

Local creditor

The third detail is the modification of the concept of "local creditor".

According to Art. 2. (11)

> " *'local creditor' means a creditor whose claims against a debtor arose from, or in connection with, the operation of an establishment situated in a Member State other than the Member State in which the debtor's centre of main interests is located*".

The definition does not include the idea that the COMI of this creditor should be situated in that Member State where the establishment is. Comparing to the "old" EIR, this text only gives the meaning of a local creditor, "*whose claim arises from the operation of that establishment*", but there is something missing from the text: that this kind of creditor is the one whose "*domicile, habitual residence or registered office is in the Member State within the territory of which the establishment is situated.*" [1346/2000/EC Art.3.(4) b)]

The real meaning can be understood only together with Art.2.(12) , because it explains the meaning of "foreign creditor":

> "*a creditor which has its habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States.*"

JUDGE ANDREA CSÖKE
Hungary

> **THE RECAST REGULATION DOES NOT CONDEMN ALL TYPES OF FORUM SHOPPING, ONLY THE BAD ONES**

HOW CAN WE RECONCILE THESE DIFFERENT OPINIONS WITH THE RECAST REGULATION?

Share your views!

Of course, the two definitions together give us the meaning of the local creditor in the "old" EIR (because, logically, if someone is not a foreign creditor, he is a local one), but in the new EIR, Art.3. (4) b/i. allows for opening territorial insolvency proceedings only by a "*creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested.*"

All we can say is that those creditors whose domicile or registered offices are in the Member State where the establishment of the debtor is, but whose claim did not arise from the activity of this establishment, cannot file for opening secondary proceedings.

Different opinions

Probably I should not say that the next remark is also a "detail", because I think it is a very important question.

Recital (7) contains the following:

(7) Bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council. Those proceedings should be covered by this Regulation. The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. ***However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.***

The EUCJ said in the case of German Graphics - C-292/08 - the following:

17. "*…Furthermore, it is conceivable that, among those judgements, there are some judgements which will come within the scope of application neither of Regulation No 1346/2000 nor of Regulation No 44/2001.*"

But in the Nortel Network case - C-649/13 – it seems that the Court had a contrary opinion:

23. "*In that regard, the Court has already held that Regulations No 44/2001 and No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the scope of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in Nickel & Goeldner Spedition, C 157/13, EU:C:2014:2145, paragraph 21 and the case-law cited).*

How can we reconcile these different opinions with the recast Regulation?

Can we say that Recital (7) and the judgment of the German

Graphics case refer to insolvency proceedings – because there are national insolvency proceedings which are not under the scope of the European Insolvency Regulation – and that the Nortel Network judgment refers only to the actions which are in close connection with insolvency procedures, but are not part of the insolvency proceedings, and to other actions which are related to civil and commercial matters?

In my opinion, with this interpretation we could handle the apparent contradiction.

Groups of companies

The last "detail" is probably only a misunderstanding. I have heard from my colleagues that the earlier practice of gathering the members of a group of companies under one jurisdiction is prohibited by Art.3 (1) of the recast EIR.

Interpreting the text, my opinion is that this rule deals only with the registered offices. Art.3. (1) subparagraph 2.says that in the case of a company the COMI shall be presumed in the country where the registered office is. "*That presumption shall only apply if the registered office has not been moved to another Member State within the three-month period prior to the request for the opening of insolvency proceedings*." It means that when the registered office was moved from one country to another (Interedil case) the debtor shall wait for three months before the presumption quoted in connection to registered offices applies. But it is not prohibited rebutting the presumption by giving evidences about real COMI changing, regardless of the registered office.

Thus, in fact, according to Preamb. (53) of the new EIR the earlier practice in connection with groups of companies is not prohibited.

"*The introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them.*" ■

IS GATHERING THE MEMBERS OF A GROUP OF COMPANIES UNDER ONE JURISDICTION PROHIBITED BY ART.3 (1) OF THE RECAST EIR?