NEW EIR RULES

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Abstract:
The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively.
To achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Union measure which is binding and directly applicable in the Member States.

Key words*: business, insolvency, sanctions*

JEL Classification: K22

Introduction

The law of insolvency, an important institution of law, is regulated in Romania and internationally. Naturally, the Romanian Parliament has regulated the insolvency procedure in accordance with the country's level of development and the national traits. However, at an international level, various countries became involved in imposing a coordination of the insolvency procedures, which could have cross-border consequences.

As of June 26, 2017, the EU Regulation no. 848/2015 of the European Parliament and Council on the insolvency procedure will enter in force. The new EU document envisages to update the present-day regulations dating back to 2000, to expand the application area of the regulation and to end the insolvency tourism phenomenon.

European Insolvency Regulation no. 1346/2000

Since 1961, the European Communities attempted to launch a project of international insolvency agreement. Failure of such a project led to numerous bilateral agreements between countries. The business internationalization revealed difficulties connected to coordinating an insolvency procedure with repercussions on most European Union member states. While relying on the idea of unifying the international insolvency law at European law, the Regulation no. 1346/2000[1] was passed.

When that Regulation entered in force on May 31, 2002, the persons involved were bound to cooperate, as was the coordination of the approaches to be made in connection to the assets of an insolvent debtor, when an extraneous element existed. Application of the regulation is mandatory for all European Union member states.

By that document, clear rules were set out concerning the applicable jurisdiction and law. Those provisions are highly significant while considering the various approaches of the Romanian Parliament mainly on the insolvency area, but also on that of general law. The national specificity of each member state generates various non-uniform legislations, a reason why it is impossible to apply unitary norms at European level, in the insolvency domain.

The regulation applies only to the natural or legal person debtor subject to the insolvency procedure, whose center of main interest (COMI) is in a European Union

[1] Regulation no. 1346 on the insolvency procedures was published in the Official Journal of the European Union no. L160 of June 30, 2000

member state. It must be stated that certain legal persons are exempted from applying the regulation given criteria connected to the national inspection competences on the insurance companies, credit institutions and investment companies, which also have special regulations.
COMI is presumed to be the office or the domicile of the debtor. COMI must correspond to the place where the debtor usually runs its business and may be checked by third parties. The notion of legal person's office is also defined in article 2 letter h of REI as the place of running the business, where the debtor permanently develops an economic activity while using human resources and assets.
The main insolvency procedure will be initiated on the territory of that European Union member state where the COMI was found. If the main insolvency procedure was initiated, any procedure began subsequently on the territory of another member state, where the debtor has another office, will be called secondary. The applicable law to the secondary procedure is the law of the member state where the main procedure was initiated, with several exceptions concerning the main rights and legal situations, such as real property or employment contracts.
Article 16 of REI sets out as a principle that the member states will acknowledge the insolvency procedures *ipso iure*, meaning without any other formalities or conditions for the enforceable decision of beginning the main procedure.
The declared purpose of that Regulation is to ensure a unitary equal treatment for all creditors, thus that they would not be discriminated. Each creditor can submit receivables statement in all insolvency procedures that have been initiated. As well, the EU document establishes the obligation to inform the creditors; that obligation is assigned to the insolvency practitioner appointed to that case.
Next to the rules referring strictly to the procedure to follow if cross-border insolvency occurs, this regulation binds the insolvency practitioners and the syndic judges to cooperate, as well as to coordination of the insolvency procedures.
The utilization of that regulation represented a significant step towards unifying the insolvency law at European level.

European Insolvency Regulation Recast no. 848/2015

The practice revealed the need to revise the present-day legal text. Thus, several gaps that require remediation have been identified.
First, various approaches passed by the national Parliaments were seen; the purpose was to support the debtor facing financial difficulties in accessing pre-insolvency proceedings. Given that the main purpose of the regulation is for the debtor facing financial difficulties to reorganize and be saved, it seems natural that those regulations would have a counterpart at cross-border level. By noticing different procedures, approaches, and arrangements that the debtor can use for preventing its insolvency, which the member states apply at national level, eight types of pre-insolvency proceedings[2] were outlined. They will be acknowledged at European level too
Another topic under the criticism of experts in this area is limiting the secondary insolvency procedures to bankruptcy. If the reorganization proposes a recovery opportunity within the main procedure, that matter contradicted the obligation to deal with the debtor in the secondary procedures concerning the bankruptcy. Thus, it was found that limiting the secondary procedures to bankruptcy contradicted the attempt to save the debtor. Furthermore, beginning the secondary procedures of insolvency should not be made only because the legal conditions are met, but that approach must be proven effective, while considering the main insolvency procedure. Thus, upon the

[2]For more information, please refer to http://bobwessels.nl/wp/wp-content/uploads/2015/09/EIR-Recast-Aug-2015-Technical-note.pdf

reasoned request of the insolvency practitioner, the court competent to initiate the secondary procedure will be able to postpone or even refuse that approach if not necessary while considering the protection of the local creditors' interests. For supporting that simplification of the insolvency cross-border procedure, the insolvency practitioner in the main procedure will be able to apply a special legal treatment to the local creditors, according to the applicable local laws, as if the secondary insolvency procedure were initiated. Certainly, beginning several secondary insolvency procedures must be avoided because their coordination is difficult.

The lack of information at European level in connection to a debtor becoming insolvent can also lead to difficulties for the judges and for the creditor. Furthermore, one should be able to check whether the insolvency procedure was initiated in connection to a certain person, in Europe, as well as the court decisions relevant for the judges and the creditors in other European Union member states. The proposal refers to creating a European insolvency registry, which can be electronically accessed at least by judges and insolvency practitioners, for supplying accurate data to all participants in the national insolvency procedure.

The new regulation sets out that each member state would hold an electronic insolvency registry available online, which would be accessed free of charge, indicating at least the name of the debtor, date when the procedure began, and file number, type of procedure initiated, identification data of the insolvency practitioner, deadline for submitting the receivable statements, and the decision to open the insolvency procedure. Those national registries will be connected to the European e-Justice Portal, which will become the access point to the electronic central system concerning the insolvency.

Another aspect claiming the need for approximation is the term of submitting the receivable statements by the creditors, which vary greatly among countries. The German insolvency code provisions a term of declaring receivables between 3 weeks and 3 months of the date of initiating the insolvency procedure; Spain has exactly 1 month of the publication in the Official Bulletin of the notice to begin the insolvency procedure; while the British legislation indicates no set term, it being settled by the insolvency practitioner, according to the procedure complexity; and in France, the national creditors and the foreign ones have different terms[3]. For diminishing the uncertainty and creating an equal treatment of the creditors in various European Union member states, it is necessary to urgently approximate the legal norms on submitting and checking the receivables, the terms, as well as the applicable punishments[4]. Simplification of the procedure of submitting the receivable statements might be made also by issuing a single European standard form, available in various world languages.

As well, the Regulation does not contain specific rules for approving the insolvency procedure of a group of companies. Lack of such a regulation significantly diminishes the chances for reorganizing a group of companies because, from a cross-border standpoint, they must be dealt with as separate companies, without the possibility to consider them as a whole, as a group of interconnected companies.

The most acute problem leading to great difficulties for the syndic judges is setting out the COMI, based on which the competent jurisdiction for initiating the main procedure and the applicable law are determined as well. The broad definition of that notion – place where the debtor usually runs its business interests – has proven difficult to apply in practice. The reason is that on many occasions, the place where a business is ran is

[3] M. Comsa, Rezolvarea situatiilor de insolventa cu elemente de extraneitate în Romania. Raporturile cu celelalte state membre ale Uniunii Europene - Regulamentul CE nr. 1346/2000 (Solving the insolvency situations with extraneous elements in Romania. Relations with the other European Union member states – Regulation EC no. 1346/ 2000), p.19

[4] Report of the European Parliament – Directorate General for Internal Policies 2010, Approximation of legislation on insolvency at European Union level, p. 19

not the office, especially when a permanent activity unfolds in a place that is not the site for making the main business decisions. That presumption can be overthrown by supplying evidence to the contrary. For example, the court[5] decided that, although a company only had a branch in Romania, it was set out that it represented COMI because the entire activity, assets, and employees were located in Romania. Thus, if from the standpoint of third parties, the declared office and the business site were not located in the same country, the presumption can be overthrown provided sufficient de facto elements allowing a conclusion contrary to that deriving from the legal text exist.
By speculating the possibility to apply the legislation of the place where the company office was declared, the debtor developed a phenomenon called insolvency tourism, all with the aim to benefit of the legislation most favorable to the debtor, while damaging the creditors – forum shopping. That practice of the debtors is not favorable to the insolvency procedures where the short time reaction makes a difference between saving the business and failure due to the litigations generating it. Aiming to avoid such situations in the future, before the procedure is initiated, the competent court is bound to check ex officio whether COMI is really located within its jurisdiction. If the court believes necessary, it will be able to ask to the debtor evidence substantiating the request to begin the procedure or furthermore, to allow the creditors to express their point of view in connection to jurisdiction.
If the management of a company is in the same place as its declared office or that is the site where the business decisions are made, aspects confirmed by third parties, the matter of overthrowing the presumption that the company's office would point out to the competent court should not be taken into account.
Finally, the new regulations further support the cooperation at all levels: between judges, between insolvency practitioners and between judges and insolvency practitioners in a simple and easy manner, which would help coordinate the procedures open in a cross-border insolvency case. Cooperation allows the insolvency practitioners and syndic judges to conclude protocols in view to facilitate the cross-border cooperation of multiple insolvency proceedings in different member states concerning the same debtor, or members of the same group of companies.

Conclusions
Regulation no. 848/2015 will enter in force on June 26, 2017, date when the present Regulation no. 1326/2000 will be rescinded. All cross-border insolvency procedures initiated prior to June 26, 2017 will be governed by the present regulation. Regulation no. 848/2015 will apply only to the insolvency procedures initiated after the reference date. Thus, the impact of modifications on the cross-border insolvency law will be quantified only in mid-2018.
The direct predictable impact of the new regulation on the Romanian legislation will be the obligation to create the insolvency registry. Right now, in Romania, the Bulletin of Insolvency Procedures is available electronically and online. It holds the decisions of the syndic judges and all the procedural documents that must be published, according to the Romanian laws. Debtors may be found based on their name or file number, and by reading the published documents, the designated insolvency procedure, the term of declaring the receivables, the table of receivables, etc. may be found as well. The only major obstacle of the Romanian insolvency file advertising system is conditioning the access to those data by paying some fees. As can be seen, the new European regulations imperatively ask for the provision of free access to information, an aspect which will prove to be particularly beneficial given the well-known fact that the courts of law,

[5] Conclusion of August 24, 2009, Bucharest Court of Law, 5th Commercial Section, published in Procedura insolventei. Culegere de practica judiciara 2006-2009 (Insolvency procedure. 2006-2009 jurisprudence). Vol. III, Ed. C. H. Beck, 2011, p. 521-529

budgetary institutions, and, last but not least, the creditors of Romania do not pay the requested tariffs. Knowing the relevant information of an insolvency file will transform the creditors, most of them now characterized by passivity, into active participants in the insolvency procedure. That is a vital matter for rendering the entire process of the debtor efficient.

With respect to the novelties to be introduced, they can bring clarity, transparency and efficiency to the cross-border insolvency procedures, which are ever more present in the European Union. It is obvious the fact that saving the business holds priority before beginning the bankruptcy procedure.

Regulation no. 848/2015 will coherently, transparently and efficiently assist the debtors acting in the EU member states, which face financial difficulties inherent to any business, thus that they will be encouraged to surpass that situation under the protection of some legal provisions, which apply to the entire European Union.