AMENDING REGULATION (EC) NO.1346/2000 ON INSOLVENCY PROCEEDINGS - SOLVING DEFICIENCIES OR ATTEMPT TO RESCUE COMPANIES IN DIFFICULTY?

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Abstract
EC Insolvency Regulation claims, after more than 10 years, several changes imposed by some of the issues raised by the practice of its application but also by the need to promote economic recovery for enterprises in difficulty in the current economic crisis.
This paper analyzes the major segments of change and aims to determine whether these segments provide a coherent answer for the practical difficulties faced by the EC Regulation and whether extending its scope by revising the definition of insolvency proceedings may offer better chances of recovery for the enterprises in difficulty.

Keywords: *scope, insolvency proceedings, COMI, procedures publication, groups of companies.*

Introduction

Regulation no.1346/2000 on insolvency proceedings is no longer a subject of curiosity or debate. It has passed this phase long ago during the years of application. The problems raised by the practice during those years are not some abstract scientific notes but real questions having roots in the economic reality.

The actual need to rescue enterprises during the current economic crisis claimed a new approach of the Regulation and for this purpose, all existing debates generated mature ideas for changing the face of the Regulation. As professor Bob Wessels observed in his article "Revision of the EU Insolvency Regulation: What type of facelift?"[1], "The regulation has laid a basis for cross-border insolvency solutions. Some parts in the basis should be renewed, other parts should be added to create a European house in which one can live with some comfort".

This paper analyses the major segments of change by comparison with initial recitals and aims to determine whether these segments provide a coherent answer for the practical difficulties faced by the EC Regulation and whether extending its scope by revising the definition of insolvency proceedings may offer better chances of recovery for the enterprises in difficulty.

The offer of the Regulation no 1346/2000 on insolvency proceedings

The Insolvency Regulation is the product of a hard and long negotiation process having in mind that a body of substantive insolvency Law at EU level is not possible to achieve because of so many disparities between national insolvency laws. This reality was acknowledged also in the eleven Recital of the Regulation, being also the reason for not forcing the obvious truth by trying to introduce insolvency proceedings with universal scope in the entire Community.

Objectives that justified an action at EU level establishing a procedure applicable directly in Member States were also described in the Recitals of the Regulation and can be resumed in three ideas:

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[1] Wessels Bob, "Revision of the EU Insolvency Regulation : What type of facelift?", article presented at the Conference "The future of the European Insolvency Regulation", 28 April 2011, Amsterdam, available at www.eir-reform.eu.

- proper functioning of the internal market requires efficient and effective proceedings
- the measures taken over insolvent debtor's assets must be coordinated
- forum shopping is to be avoided

We will summarize the content of the Regulation according to this ideas so that the next section of the paper regarding the changes to be made in the Regulation will be easier to follow.

The Regulation scope is to apply to collective insolvency proceedings involving the divestment of the debtor and the appointment of a liquidator(all the collective proceedings referred to are listed in Annex A of the Regulation). The international jurisdiction, as article 3 provides, can be divided in primary and secondary jurisdiction[2].According to article 3(1), "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary" and article 3(2) "Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State".

Clarifying the scope of the proceedings, article 3(3) and article 3(4) qualified as secondary proceedings the proceedings opened subsequently under paragraph 2 of article 3, when insolvency proceedings have been opened under paragraph 1 of article 3(as winding-up proceedings) and as territorial insolvency proceedings the proceedings referred to in paragraph 2 of the article 3 that are opened prior to the opening of main insolvency proceedings only "where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated"(article 4a) or "where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment"(article 4b)

The Regulation stated the need to coordinate parallel proceedings so the realization of assets and a fair distribution to creditors can be offered. Recital 12, 16, 17, 19 provide proofs of the intention to protect diversity of interests - the courts are enable to order protective measures form the time of the request to open proceedings, preservation measures taken prior and after the commencement of the insolvency proceedings, protection of local interest, opening of secondary proceedings when the efficient administration of the estate requires in cases when the debtor's estate is complex.

Duty to cooperate and communicate information is a special but poor section in the Regulation(article 31) representing a transcription of common ideas about what cooperation is meant to do(liquidators in the main and secondary proceedings need to cooperate with each other, communicating information relevant to the other proceedings).

In the matter of forum shopping, the problems are strongly related with the concept of "center of main interests"(COMI), referred at in Recital 13 and in article 3 "In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary". This concept must be interpreted according to Recital 13 as "the place where de debtor conducts the administration of his interests on regular basis", being "therefore ascertainable by the third parties". As explained in Report on the Convention on Insolvency Proceedings by Miguel Virgos and Etienne Schmit in 1996, by using the term "interests" the intention was to cover all general economic activities not only commercial, industrial

[2] Omar, Paul J., The European insolvency regulation 2000 - A Paradigm of International Insolvency Cooperation,Bond Law Review, Vol15, Iss.1, Article 10, available at http://epublications.bond.edu.au/blr/vol15/iss1/100.

and professional activities so that the provisions could be applied also to the activities of private individuals and as a criterion for the cases where the interests include different types of activities run from different centers was used the term "main''.

Time and reason for changes

In 2009, an estimated 1.7 million jobs were lost because of business failures, according to Creditreform Economic Research Unit. In 2010, some 600 companies in Europe went into liquidation every day, pointed EU Justice Commissioner in Dublin, September 2012. According to the data published by the Insolvency Proceedings Bulletin, in Romania, in the first 8 months of the year 2012, the insolvency procedure began for a number of 16.481 companies, 7,59% more than in the same period in 2011, concluded Coface Romania. This are only numbers but all are reflecting the same idea - difficult economic times. The reform of the Regulation must be accommodated not only to concepts but also to practical needs. Article 46 stipulates that no later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation.

On the 23.03.2011, the Legal Affairs Committee held a workshop on "Harmonisation of insolvency proceedings at EU level" trying to identify the areas eligible for harmonization in national insolvency laws. The debated issues were structured in 4 categories to be considered in future legislative initiatives:

- harmonization where possible in the maters of opening insolvency proceedings, filling of claims, avoidance actions, liquidators, restructuring plan
- revision of the Insolvency Regulation regarding COMI, definition of the establishment, duty of cooperation for liquidators and for courts
- insolvency of groups of companies
- creation of an EU Registry in order to find information about the opening of insolvency proceedings and the deadlines and the form requested to fill in the claims.

In one of the papers[3] issued by the Directorate General for Internal Policies after the workshop, we can find also the practitioners point of view(INSOL Europe working Group) about the improvements needed to be made. In brief, the document added to the 4 presented categories some practical problems as follows: extension of the scope of the Regulation (including reorganization proceedings); recognition of the proceedings opened in the case when COMI is situated in a non EU country; the different treatment for pledged assets, having in mind article 5(1) regulating third parties right in rem; difficulty to challenge detrimental acts (article 13) by selecting the law applicable to the contract; effects of insolvency proceedings on lawsuits pending(coordination of article 4(2)f and article 15);the treatment of secured and non-secured claims in different insolvency proceedings regarding the same debtor; different contract approach when a territorial proceeding is opened, by contrast with the law of the Member State where the main proceedings are opened.

At this point is interesting to mention some of the suggestion made by the Committee on Employment and social Affairs to be incorporated by the Legal Affairs Committee in the motion for resolution - greater harmonization of insolvency proceedings will promote equality and may have a positive impact on Member State's competitiveness and also on potential employment opportunities; in the context of economic crisis, the issue of insolvency must be considered also from an employment-law perspective; considers necessary to be increased the priority of employees' claims relative to other creditors' claims; underlines the need for the timeframes for main and secondary proceedings to be harmonized and shortened in order to offer legal certainty to paid employees.

The European Parliament Resolution of 15 November 2011, having regard to the Report of the Committee on Legal Affairs and the opinions of the Committee on Economic and Monetary

[3] "The revision of the EU insolvency regulation", Directorate General for Internal Policies, Policy Department C:Citizens"Rights and Constitutional Affairs, 2011, available at http://www.europarl.europa.eu/studies.

Affairs and the Committee on Employment and Social Affairs, requested the Commission on insolvency proceedings in the context of EU company law to submit one or more proposals relating to an EU corporate insolvency framework. The detailed recommendations as to the content of the proposals requested was structured in 4 parts[4], as follows (we will insist only on some content of the recommendation).

1. *Harmonization of specific aspects of insolvency law and company law*

Opening of insolvency proceedings - insolvency proceedings can be brought against natural persons, legal entities or associations or can concern assets of entities without legal personality(European Economic Interest Grouping);proceedings are opened if the debtor is insolvent or if the request is made by the debtor if debtor's insolvency is imminent; the Member States must regulate the situations when the debtor is liable in the event of non-filing or improper filing.

Recommendation on the harmonization of certain aspects of the fillings of claims - creditors file in written form within a certain period of time and Member States are required to regulate this period of time within one to three months from the date of publication of the bankruptcy decision; the creditor must disclosure the documentation in support of the claim; after this period filings imply if verified but additional costs for the creditor .

Harmonization of avoidance actions

Harmonization in the field of qualification of liquidator

Harmonization of restructuring plans – "unimpaired creditors, or parties that are not affected by the plan, should not be entitled to vote on the plan or, at least, should not be able to impede it"; the plan must be approved before the relevant court.

2. *Revision of Council Regulation (EC) No 1346/2000* - scope of the Insolvency Regulation should be extended to insolvency proceedings in which the debtor remains in possession ; a clear definition of COMI must be included as to prevent forum-shopping; the Insolvency Regulation should include also a definition of 'establishment' as "any place of operations where the debtor carries on a non-transitory economic activity"; the Insolvency Regulation should provide for an unequivocal duty of communication and cooperation between liquidators and between courts; timeframes should be shortened ;"the review of the avoidance action rules should take into account that due to avoidance actions some healthy subsidiaries of a company are driven into insolvency".

3. *Insolvency of groups of companies* –The Member State where the operational headquarters of the group is situated must open the insolvency proceedings and an unique insolvency practitioner must be appointed; when ancillary proceedings are opened a committee should be formed to defend the interests of local creditors and employees; establishing rules to facilitate the use of the forms of cooperation between courts and insolvency practitioners to coordinate the insolvency proceedings.

4.*The creation of an EU insolvency register* - In the context of the European e-Justice Portal was proposed an EU Insolvency Register containing the relevant court orders and judgments, the appointment of the liquidator, the contact details and the deadlines for filling claims.

At the 1st European Insolvency & Restructuring Congress held in 9 February 2012 in Brussels, Vice-President of the European Commission, EU Justice Commissioner, Viviane Reding affirmed, mentioning that the Regulation does not accommodate the concepts of rehabilitation and reorganization, the need for a fresh start that must allow the surviving of honest enterprises during the difficult economic conditions "We must now focus on the fresh start that allows good honest businesses the chance to survive these difficult economic times. The Insolvency Regulation has proved to be very useful over the years, but it now needs a face-lift. First, we have to assess the efficiency of the current Regulation. To what extent has the initial objective been achieved, "to avoid forum shopping"? Second, we must ensure that the Regulation is consistent with other EU policies and legislation – I would mention developments in banking law, company law, and the rights of

[4] "Motion for a European Parliament Resolution" and "Annex to the Motion for a Resolution :Detailed Recommendations as to the content of the proposal requested",2011, http://www.europarl.europa.eu.

employees as well as entrepreneurs. Furthermore, we want to bring EU insolvency legislation in line with national best practices and the UNCITRAL Model Law on cross-border insolvencies. Third, the Regulation should enter into the internet era. With e-Justice, any court in the EU will have access to insolvency registers in other Member States. The Commission is supporting a pilot project with 9 Member States for the interconnection of these registers. Beyond that, the e-filing of claims would present advantages to liquidators and foreign creditors"[5].

The proposal amending Council Regulation (EC) No.1346/2000 on insolvency proceedings - is the future brighter?

At 12 December 2012 in Strasbourg, the European Parliament and the Council of the European Union adopted the proposal for a Regulation amending Council Regulation (EC) No.1346/2000 on insolvency proceedings. As seen from the brief presentation of the Regulation and from the detailed recommendations, there were identified some main shortcomings - the scope of Regulation does not cover pre-insolvency proceedings or the hybrid proceedings which leave the existing management in place ; determining the competent Member State to open the proceedings is difficult because of the problems raised in applying COMI concept in practice; opening of the secondary proceedings that moreover is a winding-up procedure is an obstacle in restructuring of the debtor's activities; the rules on publicity of insolvency proceedings and on cooperation between courts or insolvency practicioners are not mandatory ;lack of provisions for group insolvency.

In the next steps, we will try to follow the amendments in the new Regulation having in mind the presented shortcomings.

The *scope* of the Regulation was extended. Article 1 states now that the Regulation applies to collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency or adjustment of debt and in which, for the purpose of rescue, adjustment of debt, reorganization or liquidation, the debtor is totally/partially divested of his assets and a liquidator is appointed or the assets of the debtor are subject to court control(the initial content provided that the Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator).

COMI concept was also clarified and through this the jurisdiction of the competent court. The Recital 13 from the Regulation was deleted and new Recitals, 13a and 13b are inserted. The Recital 13 a states that " The 'centre of main interests' of a company or other legal person should be presumed to be at the place of its registered office. It should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties."[6].The new introduced Recital 12 a gives the court the possibility to examine ex officio whether the debtor's centre of main interests or establishment is located within its jurisdiction and also the possibility to require additional evidence or give the debtor's creditors the opportunity to present their views(proofs) on the question of jurisdiction.

In the matter of *secondary proceedings*, that may damage sometimes the efficient administration of the estate, new Recital 19a introduces provision according to which the court

[5] Taking Insolvency Law into the 21 st Century to Ensure Justice for Growth, speech of Vice-President of the European Commission, EU Justice Commissioner Viviane Reding at the 1st European Insolvency & Restructuring Congress held in 9 February 2012 in Brussels, http://europa.eu/rapid/press-release.

[6] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation(EC)No.1346/2000 on insolvency proceedings, http://ec.europa.eu.

opening secondary proceedings is able, to postpone or to refuse the opening if it is not necessary for protection of the interests of local creditors(but only on liquidator's request).Another different approach can be found in the new recital 20 that brings on strongly the idea of coordinated concurrent proceedings pending that can conduct to a effective realization of the assets and also gives the liquidator in the main proceedings a dominant role through several possibilities for intervening in the secondary insolvency proceedings proposing a restructuring plan or a suspension of the relaxation of the assets.

Cooperation and coordination seemed improved in the new Regulation by the provisions of new article 31 – "Cooperation and communication between liquidators" extended with the help of two new articles - 31a, "Cooperation and communication between courts" and 31b – "Cooperation and communication between liquidators and courts". For business consideration, the main content of the decision opening the proceedings should be published at the request of the liquidator and if there is an establishment in the Member State concerned, the publication should be mandatory until is established a system of interconnection of insolvency registers, composed of the insolvency registers and the European e-Justice Portal which shall serve as central public electronic access point to information from the system.

A new chapter - IVA – "Insolvency of Members of a Group of Companies" was introduced as a response to the need of coordination of the insolvency proceedings concerning different members of the same group of companies. The new Regulation defines in Article 2 the concept *group of companies* as a "number of companies consisting of parent and subsidiary companies" and parent company as a company which has a majority of the shareholders' or members' voting rights in another company (a "subsidiary company") or is a shareholder or member of the subsidiary company and has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary or exercise a dominant influence over the subsidiary company. Referring at the opening of the procedure for several companies belonging to a group Principle 20b stipulates though that the "introduction of rules on the insolvency of groups of companies should not limit the possibility of 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 these companies is located in a single Member State. In such situations, the court should also be able to appoint, if appropriate, the same liquidator in all proceedings concerned".

Conclusions

Premises are good and as we can see, the aim of the proposal is not only to solve the problems but also to modernise the provisions of the insolvency Regulation no.1346/2000 but the truth is that only the economic crisis opened the eyes. Many solved problems are old facts spoken about since Virgo-Schmit report in 1996. The idea to help continuation of business through pre-insolvency and hybrid proceedings although for a long time "many policies have focused on the necessity to "produce" more entrepreneurs and not so much on the necessity to preserve the stock of entrepreneurs"[7], is not a new born, it represents a change made in French law since last century. Cases as Rechtsbank's Gravenhage, when the court decision determined Dutch entrepreneur to apply for insolvency and have his business liquidated because the debt reorganisation procedure was not covered by the EIR[8] or the apparition of the risk in the matter of mutual trust between courts, as we can follow in the ruling of CJEU in the Eurofood case(Case C-341/04, Eurofood IFSC Ltd) are not abstract elements but realities. Also, postponing the creation of a set of rules for groups of

[7] Report of the expert Group, "A second chance for entrepreneurs- Prevention of bankruptcy, simplification of bankruptcy procedures and support for a fresh start", 2011, European Commission, Enterprise and Industry Directorate - General, http://www. ec.europa.eu.

[8] Rechtsbank's Gravenhage, First instance court, Netherlands, judgment of 10 June 2010, www.insolvencycases.eu.

companies, for different political or practical reasons, was not a very good answer to the business evolution as professor Bob Wessels showed[9] "The lack of provisions concerning multinational groups of companies has been classified as an omission. However, not all critics take into account the fact that cross-border insolvency within Europe was discussed for over forty years before the Regulation finally enacted. The discussions concerned complex problems. At the time, the decision to postpone "group insolvencies" to a later date may have been considered both politically and practically prudent. Furthermore, the Regulation reflects thinking of the 1980s and 1990s, when the phenomenon of groups of companies was not as current as in the first decade of the 21st century and, moreover, in European domestic insolvency laws reorganisation or rescue of companies was not the prevailing option.". The notice that "technological issues, procedural issues and substantive issues of the Regulation are mutually dependent"[10] has a correspondent in the operational objectives of the amendments as are presented in the Commission Staff working Document, Impact assessment, accompanying the document Revision of Regulation(EC) No 1346/2000 on insolvency proceedings, Strasbourg, 12.12.2012[11]: regulate pre-insolvency and hybrid proceedings and clarify the rules relating to jurisdiction for opening insolvency proceedings without prejudice of the freedom of establishment in the European Union; reduce the number of cases in which determining the jurisdiction raised problems and also ensuring the possibility for judicial review in this cases; reduce the number of secondary proceedings; improved coordination between courts and practitioners; introducing mandatory publication of relevant decisions in each Member State so that transparency is increased; improved access to justice for SMEs through measures that facilitate the lodging of claims; introducing a legal framework for group insolvency.

Until the Regulation shall apply we can only trust the desire of improvement and continue to analyse in details in further materials each proposed action generally introduced in this paper.

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