

Cross-border insolvency: Rules on the harmonization of European turn-around and bankruptcy proceedings

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In the context of globalisation, companies are often active not only in the country of incorporation but also in several other legal systems. If a company fails, there is a need for rules that make the insolvency proceedings predictable. In the EU there are two current regulations¹ to take into account, one applicable before and one after 24.06.2015.

Cross-border insolvency in the EU

European companies are, in general, entitled to operate in all member states, but each state has its own laws regulating insolvency. Many give preference to creditors for the settlement of claims; others privilege the debtors and make turn-around proceedings as well as the writing off debts easier.

Forum shopping: As a result of the freedom to establish anywhere, companies can relocate their headquarters to states that favour a debtor-friendly jurisdiction. The EU regulations on insolvency proceedings are aimed at preventing headquarters relocation for this reason. They do not provide uniform insolvency procedures but serve to identify how members states' legal systems apply to the circumstances, and prevent forum shopping.

Centre of Main Interests (COMI)

To determine which legal system applies, the term *COMI* (*Centre Of Main Interests*) has been introduced. *COMI* is the geographical focus of the debtor's main interests: where the activity of the company is mainly exercised, where most assets are found, where most employees are active, etc.

The official headquarters play an important role: it is presumed that COMI is located there. But this can be overturned by creditors or the debtor with appropriate evidence.

Insolvency proceedings are subject to the legislation of the member state in which the debtor's COMI is situated; this is where the main insolvency proceedings are opened. Other member states in which the debtor is active or owns assets will then apply the same rules. The official receiver appointed in the COMI – state has the ability to apply the rules (eg regarding the subsequent turnaround proceedings²; the personal liability of company directors; or even the sale of assets).

¹ Council Regulation (EC) 1346/ 2000 of 29 May 2000 on insolvency proceedings and Regulation (EU) 2015/ 848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)

² In member states there are significantly different time spans in which reorganisation proceedings can be performed. In Romania, such proceeding can reach a maximum of 4 years.

Several insolvency proceedings simultaneously applicable

There are situations that are impossible to solve with a single procedure. If the activity of the debtor is of larger proportions and he operates a branch in another member state, a secondary procedure will be opened. There are two steps: (i) the decision to open the main proceeding in the COMI member state is recognized in the second member state, (ii) secondary insolvency proceedings will be opened according to the rules of the second state.

The secondary proceeding will be a bankruptcy aimed at a complete liquidation of the company's assets in the second member state.

Creditors' situation

Neither creditors' geographical proximity to COMI nor their national citizenship determine preferential rights. Creditors must be treated according to the rules of the COMI legal system (or the local system in the case of a secondary insolvency).

There is, however, a provision that could complicate the collection of debts: the *Pari Passu* Principle. Creditors that have been allocated payments within insolvency proceedings cannot collect them until all creditors in the same category can be paid to the same extent. This way, the widely recognized competitive character of the insolvency proceeding is upheld.

Conclusion

Insolvency is one of the most dynamic circumstances for a company. Claims lose their enforceability, managers lose their control and rights are subject to new conditions. Although the way of managing this varies in EU member states, a generally applicable procedure is not desired, as individual value systems of member states should be upheld.

So the EU rules identifying the applicable legal provisions in insolvency are necessary and serve the predictability and stability of the single market.

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