INSOLVENCY PROCEEDINGS: THE NEW EU REGULATION 2015/848

Introduction


The Regulation 2015/848 will enter into force from 25 June 2015 but it will be applicable to relevant insolvency proceedings from 26 June 2017, recasting the previous discipline. The exceptions are:
- art. 86 of the Recast Regulation (the description of national insolvency law and procedures to be provided by each member state (particularly the matters governed by the law of the main proceedings) which shall apply from 26 June 2016;
- art. 24, paragraph 1 of the Recast Regulation concerning the establishment of national insolvency registers, which shall apply from 26 June 2018;
- art. 25 of the Recast Regulation concerning the interconnection of national registers, which shall apply from 26 June 2019.

The new discipline adopts a new ‘rescue and recovery’ perspective on insolvency, regarding insolvency not only as liquidation but also facilitating the survival of businesses and presenting a second chance for entrepreneurs.

Among other objectives, the new rules are aimed at making cross-border insolvency proceedings more “efficient and effective”, to improve the proper functioning of the internal market, and discouraging abusive “forum shopping”.

In light of the above mentioned objectives, the Regulation 848/2015 heralds a number of changes in the discipline of cross-border insolvency proceedings. We hereby list the most significant.

1. SCOPE

The scope of the Recast Regulation has been extended to go further than the liquidation proceedings already covered by the previous EC Regulation 1346/2000. The new rules also cover proceedings which provide for the restructuring of a debtor at a stage where there is only a likelihood of insolvency, the so called “hybrid proceedings” (which leave the debtor fully or partially in control of his assets and affair), as well as proceedings providing for a debt discharge or a debt adjustment of consumers and self-employed persons.

The provision of art. 1 states now that the Regulation applies to “public collective proceedings, including interim proceedings”, with the purpose of rescue, adjustment of debt, reorganization or liquidation.

The fact that the new discipline now covers also proceedings non exclusively based on liquidation and the debtor in possession proceedings, not necessarily requiring the appointment of an officeholder, represents a big innovation.
Hence, Annex A listing the proceedings covered by the Regulation has been amended, including now, as to Italy, restructuring agreements under 182 bis of the Italian Insolvency Law, and proceedings for a debt discharge or adjustment for consumers and self-employed people.

The amending Regulation extends therefore the insolvency regulation’s scope to include certain pre-insolvency and hybrid-proceedings, aiming clearly to rescue the company and give viable businesses a second chance, by anticipating the intervention on the crisis.

On the contrary, the Regulation does not apply to the general remedies provided by corporate law, non-exclusively related to insolvency situations, and the proceedings referred to insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC, collective investment undertakings, which are governed by an ad hoc discipline.

2. **THE DISCIPLINE**

The reform does not modify the fundamental framework of cross-border insolvency adopted by the Regulation 1346/2000. Art. 3 of the Recast Regulation enables main insolvency proceedings to be opened before the Court where the debtor has the centre of its main interests (so called “COMI”), at the same time permitting that secondary insolvency proceedings is commenced in another Member State where the debtor has an establishment. The effect of the secondary insolvency proceedings are limited to the assets located in that State.

Although the general lines remain unmodified, the new discipline has introduced a number of significant changes. Among these, the concept of COMI has been more precisely defined as the “place where the debtor conducts the administration of its interests on a regular basis and which is ascertained by third parties”. Therefore, the Recast Regulation confirms the principle elaborated over time by the Court of Justice (case C-241/04 Eurofood; case C-396/09 Interedil; case C-191/10 Rastelli) establishing a rebuttable presumption that COMI is at the company’s registered office.

However, the judge may not rely upon the COMI presumption if an overall 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” is located in another Member State.

The Recast Regulation has also introduced that, in case of individuals carrying on an independent business or professional activity, the COMI is presumed in the place of that individual’s principal place of business. For individual not exercising a business or professional activity, the COMI is at the individual’s habitual residence.

A further important innovation is provided under art. 4 of the Recast Regulation, where it is required the court seized of a request to open an insolvency proceedings of a State Member to examine of its own motion whether it has jurisdiction and to specify the grounds.

This provision has been introduced in response to the practical problems arisen from the application of the previous discipline whereby, lacking a dispute of the parties on the point, the courts did not always specify whether the proceedings commenced before it was a main insolvency proceeding or secondary insolvency proceedings. Pursuant to the new discipline the Court, in the decision to open the proceedings, should specify whether the latter is the main insolvency proceeding or a secondary one.

If, under the national law of the Member State, the opening of the insolvency proceedings does not involve any judicial decision, the Member State may entrust the officeholder to examine whether the Member State has jurisdiction over the proceedings pursuant to art. 3 of the Recast Regulation or specify whether the insolvency proceeding is a main proceedings or a secondary one.

As to the secondary insolvency proceedings, the European lawmaker has taken into account that they may hamper the efficient administration of the insolvency estate. For this reason, the Recast Regulation provides for two different means to refuse or postpone the request to open secondary proceedings (whose effects are limited to the assets located in the territory of the State where the proceedings is opened) altogether:
The first one is governed by art. 37 of the Regulation, providing that the main proceedings officeholder may give an undertaking to local creditors that, in respect of the assets located in a Member State where secondary proceedings could be opened, local distribution and priority rules will be respected. Where such an undertaking meets the majority a qualified majority of creditors, the court seized of a request to open a secondary insolvency proceedings should be able to refuse that request.

The second case is represented by the possibility, for the court seized of a request to open secondary insolvency proceedings to stay temporarily the opening of the secondary proceedings, where a temporary stay of individual proceedings has been granted in the main insolvency proceedings, in order to preserve the efficiency of the stay granted in the main insolvency proceedings, provided that suitable measures are in place to protect the interests of local creditors.

A relevant innovation is that one allowing the secondary insolvency proceedings to be rescue as well as liquidation proceedings.

3. **GROUP OF COMPANIES**

Section V of the Regulation establishes new rules for insolvency proceedings opened in relation to a member of a group of companies.

Putting aside the goal to setting for the jurisdiction of a single Member State (as a matter of fact, a consensus of all Member States couldn't be reached in favor of such solution), the European lawmaker has opted for a coordination procedure between the insolvency proceedings involving different companies of the same group. For the purposes of the Regulation, the definition of “group of companies” is provided by art. 2, paragraph 13 of the Regulation, according to which a group is “a parent company and all its subsidiary companies”. It is provided also that a parent company is “the company controlling, directly or indirectly, one or more subsidiary companies. A company issuing a consolidated financial statement, pursuant to the EU Directive 2013/34/EU of the European Parliament and of the Council, is considered as a parent company”. In case of parallel insolvency proceedings are opened in relation to several companies of the same group, a proper cooperation between the subjects involved shall be reached. The courts and the officeholder involved shall, therefore, cooperate and communicate between each other, according to the same rules provided for the main insolvency proceedings and for the secondary insolvency proceedings relating to the same debtor.

Moreover, it is established that the officeholder appointed in an insolvency proceedings opened in relation to a member of a group of companies, could request the opening of a coordination procedure for the whole group.

4. **THE REGISTER**

In order to enhance the establishment of a European judicial space the Recast Regulation establishes that, by June 2019 *a system of electronic interconnection of the so called “national insolvency registers”* should be created. The national insolvency register shall be created by each member state and be publicly accessible via the European e-justice portal. The clear aim of this provision is that one of facilitating the coordination of the cross-border insolvency proceedings opened in the Member States and enhance the information to the relevant creditors and courts, as well as to prevent the opening of parallel insolvency proceedings.
The Dispute Resolution department of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest for you.

For further information:

**PAOLO POTOTSCHNIG**  
Tel. +39 02 89 63 071  
ppototschnig@legance.it

**STEFANO PARLATORE**  
Tel. +39 06 93 18 271  
sparlatore@legance.it

**DANIELE GERONZI**  
Tel. +39 06 93 18 271  
dgeronzi@legance.it

or Your direct contact at Legance.

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