

Insolvency registers in the EIR 2015

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Not a sexy subject, but in practice a dire necessity. The recast of the EU Insolvency Regulation (EIR) was based on the European Commission's identification of five main shortcomings in the original regulation, which has been in place since 2002. One of the shortcomings was the ragged registration system.

In day-to-day practice, stakeholders in insolvency proceedings until now could be confronted with the fact that proceedings had already been opened, but not registered – and non-registration or sloppy registrations have created problems. Every EU member state has had its very own insolvency registration system, but the inter-connectedness of these registers has never been given serious thought.

The Commission has, however, taken a firm approach on the subject in the new regulation. In order to improve in the EU the provision of information to relevant creditors and courts, and to prevent the opening of parallel insolvency proceedings, member states will be required to publish relevant information on cross-border insolvency cases in a publicly accessible electronic register. In addition, in order to facilitate access to that information for creditors and courts domiciled or located in other member states, the new regulation provides for the interconnection of such insolvency registers via the [European e-Justice Portal](#).

How has this been worked out in the new regulation (EIR 2015), which will apply from 26 June this year?

Article 24 (on the “Establishment of insolvency registers”), paragraph 1 of the EIR 2015, provides that member states shall establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published. The provision therefore establishes a specific duty for each member state to establish and maintain these registers. In a few years, we will know whether third parties acting on misinformation in these registers can hold a member state liable.

From a legislative point of view, article 24 defines “insolvency registers”, which might well have been taken into the list of definitions in article 2 of the EIR 2015. The provision is not specific to the nature of “one or several” of these registers, but the following articles in the regulation certainly presuppose these being registers available via the internet.

The meaning of “information concerning insolvency proceedings” in paragraph 1 seems to be rather wide. It relates both to main insolvency proceedings as well as to secondary insolvency proceedings. The information shall be published as soon as possible after the opening of such proceedings.

Information required

The information to be published contains ten categories, such as the date of opening; court and case reference number of the insolvency proceedings; the type of proceedings referred to in annex A; the judicial basis of its opening; the type of debtor (for companies the debtor's name, registration number, registered office or, if different, postal address); and the name,

postal address or e-mail address of the insolvency practitioner, if any, appointed in the proceedings. Interestingly, the information to be published also includes the time limit for lodging claims, if any, or a reference to the criteria for calculating that time limit; the court before which those claims should be lodged; and, where applicable, the time limit within which a challenge of the decision opening insolvency proceedings is to be lodged.

It is my reading that the role of a member state itself is passive regarding creditors: just facilitating the provision of information, not more, but not less either. The EIR 2015 does not require member states to calculate those time-limits on a case-by-case basis. The idea is that member states should be able to fulfil their obligations by adding hyperlinks to the European e-Justice Portal, where self-explanatory information on the criteria for calculating those time-limits is to be provided.

This is the basic package of information one may expect to be available when accessing an insolvency register in the EU in the near future (the mandatory information). However, member states are not precluded from including documents or additional information in their national insolvency registers, such as – if available under the law of a member state – a directors' disqualifications related to insolvency (optional information).

Duty to inform known foreign creditors

The registration rules contain specific rules for “known foreign creditors”. Who are these? Throughout the whole regulation, a foreign creditor means a creditor that has its habitual residence, domicile or registered office in a member state other than the state of the opening of proceedings. Since 2002 in the EU, it is a ground rule that foreign creditors include the tax authorities and social security authorities of member states. There is a duty to inform known foreign creditors. In practice this is a duty for the IP, so it should inform foreign creditors of the court before which the case is pending, and, where applicable, the time limit within which a challenge of the decision opening insolvency proceedings must be lodged – or at least provide a reference to the criteria for calculating any time limit. This rule functions as a safety valve for the benefit of a creditor who has not been informed by the IP.

Duties of the Commission

Article 25(1) of the EIR 2015 is a rule of self-punishment. The Commission imposes a duty on itself to establish a decentralised system for the interconnection of insolvency registers. That system shall be composed of the national insolvency registers and the European e-Justice Portal, which shall serve as a central public electronic access point to information in the system. The system shall provide a search service in all the official languages of the institutions of the union, in order to make available the mandatory information and any other documents or information included in the insolvency registers that the member states choose to make available through the European e-Justice Portal.

By means of so-called implementing acts, the Commission shall adopt technical specifications and standards for access and search of described information. A delegated act is the power of the Commission, given to it by the European Parliament and the Council, to adopt non-legislative acts of general application that supplement or amend certain non-essential elements of a legislative act.

Apart from the (near total) absence of any system of inter-relationship between insolvency registers of member states, other obstacles to a fully-functioning system for sharing all the information necessary were issues such as finding access to such a register, lack of standardisation of information, and of course, the language in which such information could be available.

Since Summer 2014, the Commission has already maintained an interconnection search interface, a functionality of the European e-Justice Portal, which allows interested parties to search for insolvent entities, either natural or legal persons, within the EU. It was started by the Commission in cooperation with the participating member states: the Czech Republic, Germany, Estonia, Netherlands, Austria, Romania and Slovenia. The rules in the EIR 2015 regarding registration form the next step.

Costs

The EIR 2015 provides that the EU itself will bear the costs for establishment, maintenance and development of the system of interconnected insolvency registers. The cost of establishing and adjusting national registers to make these compatible and interoperable within the European e-Justice Portal will be borne by the respective member states.

In addition, the EIR 2015 addresses the conditions for access to the information in the insolvency registers via the European e-Justice Portal. There are two categories: information free of charge, and information for which a reasonable fee may be requested. The member states shall ensure that the mandatory information referred to above is available free of charge via the system of interconnection of insolvency registers. They may, however, charge a reasonable fee for access to other data, including optional information.

The regulation allows member states to set conditions to access information in as far as it concerns information relating to individuals not exercising an independent business or professional activity, and where the insolvency proceedings are not related to an independent business or professional activity.

National legislation

Under article 86 of the EIR 2015 member states shall provide and update regularly “a short description of their national legislation and procedures relating to insolvency” and the Commission shall make this information available to the public. In the interests of creditors and courts, one may expect that member states will cooperate in drafting a sound and well-thought through list of topics for such a description, and have it discussed and checked by associations of IPs and courts.

I would also recommend that member states collaborate to have the information presented in a uniform, accessible way and agree on a system for updating the information. If you have a peek at the present e-justice system the conclusion is clear: there is still a long march to go.

Deadlines

The general date of entry into force of the EIR 2015 is 26 June 2017. As there is still quite some work to do, article 86 provides for different entry dates of the various new requirements: the need to provide “information on national and union insolvency law” has actually already

applied since 26 June 2016; article 24(1) on the “establishment of insolvency registers” shall apply from 26 June 2018; and article 25 on “interconnection of insolvency registers”, shall apply from 26 June 2019.

References

Interconnection search interface on the European e-Justice Portal: https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do

This is a slightly adapted version of a regular column Bob Wessels is writing for Global Restructuring Review (GRR) on the topic of cross-border restructuring and insolvency in a European context. GRR is a subscription-only publication, but here is a link to the full piece, which appeared in March 2017, on GRR's website at <http://globalrestructuringreview.com/>