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INSOLVENCY PROCEEDINGS OF MEMBERS OF A GROUP OF COMPANIES

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Abstract: *Since the enactment of Regulation 1346/2000 one of the most controversial topics has been the cross-border insolvency proceedings of members of a group of companies. With the new Regulation 2015/848 the European legislator has introduced explicit rules regarding such proceedings. The aim of this article is to analyse these new rules. More specificly - how such proceedings can be initiated, what is the role of the courts of the Member States and the insolvency practitioners and what are the tasks of the coordinator. In addition, a general evaluation of the new rules and whether they contribute to the effectiveness of the proceedings, will be given.*

Keywords: *Regulation 2015/848, cross-border insolvency, group of companies, coordinator*

INTRODUCTION

The creation of an act, regulating cross-border insolvency proceedings between European countries, has been discussed more than 40 years. The result of these efforts is Council Regulation (EC) 1346/2000 of 29th May 2000, which is applicable to insolvency proceedings, opened after the 31st May 2002. The Regulation however doesn't include rules regarding cases, in which insolvency proceedings have been opened for two or more members of a group of companies. This led to serious difficulties in practice. For this reason the European legislator with the enactment of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20th May 2015 created the new Chapter V - Insolvency proceedings of members of a group of companies. The aim of this report is to analyse these new rules and how they will contribute to the efficiency of such proceedings.

EXPOSITION

The first topic, which must be clarified, is regarding the scope of Chapter V. More specifically what must be understood by "group of companies". Regulation 2015/848 defines this term in article 2. According to this text "group of companies" means a parent undertaking and all its subsidiary undertakings. There is also a definition of "parent undertaking" - an undertaking, which controls, either directly or indirectly, one or more subsidiary undertakings. Hence group of companies must be understood as a holding structure.

According to recital 51 the main goal of the new Chapter V is to guarantee the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. This shall be accomplished by cooperation between the participants in these proceedings, which cooperation is guaranteed by the Regulation.

Chapter V includes two sections - "Cooperation and communication" and "Coordination". The first section consists of rules regarding the cooperation between the insolvency practitioners, appointed in the insolvency proceedings of the members of the group of companies. The courts of the Member States must also cooperate with each other and with the foreign insolvency practitioners. These rules apply in the cases when group coordination proceedings are not opened before the court of a Member State. Also, the insolvency practitioner in the proceeding for a member of the group can participate in the insolvency proceedings of the other members of the group, if this will contribute to the efficient administration of the proceeding (for example - to be heard in the proceeding of the other member. Although the rules of this section deserve a thorough analysis, this report will focus on the second section of Chapter V.

Section 2 "Coordination"- Article 61 to Article 77, creates a new procedure - group coordination proceedings. The aim of such proceedings is the more efficient administration of the insolvency proceedings of the members of the group of companies. This administration may lead to a higher paid percentage of the creditors claims or even the continuation of the debtors commercial activity after the insolvency proceeding.

According to Article 61 of Regulation 2015/848 group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group. There are 3 types of insolvency proceedings according to the Regulation which may be initiated before a court of a Member State - main, secondary and territorial. Main insolvency proceedings can be opened by the court of the Member State within the territory of which the centre of the debtor's main interests is situated. In its preliminary rulings the European Court of Justice states that "centre of main interests" must be interpreted as the place, where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (mainly, the place where the central administration of the debtor is situated). Secondary proceedings may be opened in the Member State in which the debtor has an establishment. The term "establishment" is defined in Article 2 - any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to oped main insolvency proceedings a non-transitory economic activity with human means and assets. Territorial proceedings may be opened prior to the opening of main insolvency proceedings before the court of the Member State in which the debtor has an establishment. Group coordination proceedings may be initiated before the court of a Member State, if one of the three abovementioned requirements are present for that court.

Every insolvency practitioner, appointed in the proceedings of the members of the group, has legitimation to file a request for the opening of group coordination proceedings.

According to Article 61, paragraph 3 the request by the insolvency practitioner must be accompanied by four applications. The first one is a proposal as to the person to be nominated as the group coordinator. The requirement for a person to be appointed as a coordinator are set out in Article 71 - the person must be eligible under the law of a Member State to act as an insolvency practitioner. Also, the coordinator cannot be one of the insolvency practitioners, appointed in the proceedings of the members of the group of companies and there must not be a conflict of interests in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members. These rules guarantee that the coordinator will fulfill his obligations impartially.

The second application to the request is an outline of the proposed group coordination. The outline must include a justification of: why such procedure is appropriate to facilitate the effective administration of the insolvency proceedings of the group members; that no creditor of a participating group member is likely to be financially disadvantaged by the inclusion of the group member in the coordination proceeding. Also in his request the insolvency practitioner must include that the proposed coordinator fulfills the requirement for that position. The outline is important, because after the request for opening coordination proceedings is filed, the court must determine whether to send a notification to the appointed insolvency practitioners in the group members proceedings. This determination is done based on the outline (Articles 61 and 63).

The third application is a list of: the insolvency practitioners, appointed in the group members proceedings, the courts and competent authorities involved in the insolvency proceedings.

The last application is an outline of the estimated costs of the group coordination and the estimation of the share of those costs to be paid by each member of the group. The main goal of the group coordination is improving efficiency of the insolvency proceedings of the group members. This goal cannot be accomplished if the coordination proceedings greatly increase the costs in the insolvency proceedings and burden unnecessarily the latter.

The Regulation includes a rule regarding the cases when multiple requests for the opening of group coordination proceedings are made before the courts of different Members States.

According to Article 62 in these cases a priority rule applies - any court other than the court first seised shall decline jurisdiction in favour of that court.

The next phase of the procedure is that the seised court gives notice of the request to open coordination proceedings to the insolvency practitioners of the group members, included in the application to the request. This gives them the opportunity to see the content of the request and eventually - make an objection. The objection by the insolvency practitioner must be done within 30 days of receipt of notice. According to Article 64 these objections can be against two things. The first one - against the inclusion of the insolvency proceedings in respect of which the insolvency practitioner has been appointed to the group coordination proceedings. As a consequence of this objection the powers of the coordination court and the coordinator shall have no effect for that member of the group. Secondly, the insolvency practitioner can object to the person proposed as a coordinator. If the court determines that the objection is valid, then it will invite the objecting insolvency practitioner to submit a new request for the opening of group coordination proceedings in which to list another person for coordinator.

Article 66 of the Regulation allows the insolvency practitioners to select a court, different from the first seised, which will have exclusive jurisdiction for opening group coordination proceedings. This can be done up to the moment of opening of the coordination procedure (according to Article 68 the proceedings must be opened after the 30 day period for objections has expired). In order for the choice of court to be valid at least 2/3 of all insolvency practitioners have to agree. The agreement between them must be made in writing or evidence in writing. The court, which is first seised declines jurisdiction in favour of the chosen court, but doesn't have an obligation to send the request to the chosen court. That is why paragraph 4 of Article 66 provides that a new request must be submitted to the chosen court.

After the expiration of the 30 day period for objections the seised court must determine whether to open group coordination proceedings. Such proceedings will be opened, if all the requirements of Article 63 are met. The decision for opening the proceedings includes: appointment of the coordinator, the outline of the coordination and the estimation of costs and the share to be paid by the group members. The decision must be brought to the notice of the participating insolvency practitioners and the coordinator.

Article 69 includes a subsequent inclusion of insolvency proceedings to opened group coordination proceedings. The insolvency practitioner may make such a request to the coordinator in two cases. The first one is when the insolvency practitioner has made an objection to the inclusion to the coordination proceedings but afterwards determines that the inclusion will have a beneficial effect to the insolvency proceedings. The other case is when the insolvency proceedings in which the practitioner is appointed is opened after the opening of group coordination proceedings.

The coordinator, before making his decision regarding the inclusion of insolvency proceedings to the coordination procedure, must consult with the insolvency practitioners, participating in the coordination. He can include the insolvency proceedings, if one of two alternative requirements is met. The first one is when the coordination procedure is at a stage in which the inclusion will contribute to the efficient administration of the insolvency proceedings of the group members and the creditors will not be financially disadvantaged (Article 69, paragraph 2 in connection to Article 63). The other alternative requirement is all of the participating in the coordination procedure insolvency practitioners to have agreed to the inclusion. The coordinator must inform the court and the insolvency practitioners of his decision. The decision can be challenged by the participating insolvency practitioners or the one, whose request for inclusion has been denied before the court which has opened the group coordination proceedings.

The main tasks of the coordinator are listed in Article 72 and they are basically two. The first - to identify and outline recommendations for the coordinated conduct of the insolvency proceedings. The second - to propose a group coordination plan. It has to include measures, guaranteeing the more efficient conduct of the insolvency proceedings of the group members. In paragraph 1 of Article 72 there is a non-exhaustive list of such measures: for re-establishment of

of the economic performance and the financial soundness of the group or any part of it; for the settlement of inter-group disputes as regards intra-group transactions and avoidance actions; agreements between the insolvency practitioners of the insolvent group members. In paragraph 3 there is a prohibition for the coordination plan to include recommendations for consolidation of proceedings or insolvency estates. This rule guarantees the relative independence of the insolvency proceedings of the group members.

The coordinator must perform his obligations impartially and with due care. The insolvency practitioners and the coordinator have to cooperate with each other. A form of such cooperation is communicating any relevant information which will help the efficient conduct of the proceedings.

It is very important to mention that the recommendations of the coordinator and the coordination plan are not mandatory - the insolvency practitioners are not obliged to follow them (Article 70). The insolvency practitioner must however justify his decision not to follow the recommendations or plan - he must give reason for it to the coordinator and the persons or bodies that he must report to under his national law. The rule of Article 70 proves the voluntary character of the group coordination proceedings.

It is possible in the course of the coordination procedure that the appointment of the coordinator be revoked. The reasons for this are listed in Article 75 and they are: when the coordinator acts to the detriment of the creditors of a participating group member or the coordinator fails to comply with his obligations under Chapter V. The court can revoke the appointment on its own motion or at the request of a participating insolvency practitioner.

After completing his task and before ending the group coordination proceedings the coordinator has to establish the final statement of costs and the share to be paid by each member. This final statement must be submitted to the participating insolvency practitioners and the coordination court. Every insolvency practitioner can make an objection in a 30 day period of receipt of the statement. If there are no objections, then the costs and share to be paid by every member shall be deemed to be agreed and the court must confirm the statement. If objections are made, then the court by ruling determines the costs and the share to be paid by every member. This ruling can be challenged by a participating insolvency practitioner according to the procedure set out under the law of the Member State where group coordination proceedings have been opened.

CONCLUSION

The group coordination proceedings can be evaluated as a step in the right direction in creating a detailed regulation of cross-border insolvency proceedings within the European Union. The role of the coordinator will surely contribute to the more efficient administration of the insolvency proceedings in the cases of group of companies. However, to what extend these new rules will be effectively applied in practice, depends to be seen in the next few years.

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