

# The undertaking of the insolvency practitioner in cross-border insolvencies according to Regulation 2015/848

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*Abstract:* The aim of this report is to analyze the new option of the insolvency practitioner to give an undertaking as an alternative of secondary insolvency proceedings. The requirements, stages and potential problems regarding the undertaking will be analyzed. Also a comparison with Bulgarian law will be made.

*Key-Words:* Regulation 2015/848, undertaking, insolvency practitioner, secondary proceedings

## 1 Introduction

In 2002 Regulation 1346/2000<sup>1</sup>, regarding cross-border insolvency proceedings in the EU, is enacted. It incorporates a model, regulating such proceedings, different from the ones, used in the earlier drafts – “modified universalism”. According to this model main insolvency proceedings can be opened in the member state, in which the center of the debtor’s main interests is situated. All creditors participate in these proceedings and it encompasses all assets of the debtor across the EU. However, main proceedings can be restricted by opening secondary insolvency proceedings in the Member State, in which the debtor has an establishment. Secondary proceedings include only the assets in that Member State and another insolvency practitioner is appointed. These proceedings have two functions. The first one is a protective function – by applying the law of the Member State, in which territory the proceedings have been opened, the local creditor’s interests can be better protected. The second function is auxiliary. The estate of the debtor may be too complex for it to be managed and liquidated effectively by the insolvency practitioner in the main insolvency proceedings. In this case the opening of secondary insolvency proceedings will guarantee the effectiveness of the insolvency proceedings by creating a separate insolvency estate which will be managed by another insolvency practitioner.

The good idea behind secondary proceedings, however, is not applied efficiently enough in practice. This is proven by the Heidelberg-Luxembourg-Vienna Report<sup>2</sup> by the Commission, regarding the application of Regulation 1346/2000. Empirical data shows that most secondary proceedings burden the process, instead of helping it. This is a result of the additional costs for the appointment of another insolvency practitioner, the involvement of another court and the communication between them.

Because of the inefficiency of secondary proceedings, changes in the Regulation were necessary. This led to the enactment of the new Regulation 2015/848<sup>3</sup>, which applies to cross-border insolvency proceedings opened after 26 June, 2017. One of the most notable changes is the opportunity for the insolvency practitioner to give an undertaking according to Article 36, with which to avoid the opening of secondary insolvency proceedings. When creating this new rule the European legislator took note of the experience of English courts. More specifically, in several cases<sup>4,5</sup> the insolvency practitioner with the consent of the court managed to reach an agreement with local creditors that when distributing the assets or proceeds from them they will receive payment according to their national distribution rules. In this way the practitioners avoided the opening of secondary insolvency proceedings and the unnecessary expenses, connected with them.

The saved proceeds were used to increase the satisfaction percent of creditor's claims.

The procedure of giving an undertaking can be divided into 3 stages: offer to give an undertaking, approval and enforcement.

## 2 Offer to give an undertaking

According to Article 36 of the Regulation: "In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main proceedings may give an unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, he will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State."

From this article two conclusions can be made. Firstly, only the insolvency practitioner in the main proceedings can offer to give an undertaking. Secondly, such an undertaking can be given only for the assets, situated in the Member State, where secondary proceedings can be opened. Hence, the debtor must have an establishment in that country. The definition for "establishment" according to the Regulation is different compared to the one in the Bulgarian Commercial Act (according to Bulgarian law an establishment is the combination of rights, obligations and factual relations of a trader). According to Article 2 of the Regulation an establishment is every place of operations, where the debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets. Hence, the mere fact that the debtor has assets in a Member State isn't enough for the opening of secondary insolvency proceedings. It is also necessary human means to be present – people, who are hired by the debtor to act on his behalf. Also, the economic activity of the debtor must be non-transitory – the signing of several contracts by the debtor cannot be acknowledged as forming an

establishment. The most common example of an establishment is the branch of the debtor.

If the debtor has assets in a Member State, which do not form an establishment, then an offer for an undertaking cannot be made. The insolvency practitioner can either sale these assets or move them to the State, in which main proceedings are opened.

The undertaking must be made in writing. It is also subject to the requirements relating to form and approval of the distribution of the Member State of the opening of main insolvency proceedings. If the insolvency practitioner in main insolvency proceedings, opened in Bulgaria, intends to offer an undertaking regarding assets in another Member State, the undertaking has to be approved by the court, following the rules of approval of a distribution account.

The last sentence of paragraph 1 of Article 36 requires that the undertaking must specify the factual assumptions on which it is based. This means that the exact assets, their value and the options for sale must be included. When determining whether assets are situated in the specific Member State, we must comply with the rules of Article 2, point 9 of the Regulation, which determine where different types of assets are situated. The relevant point in time for determining the assets is the moment at which the undertaking is given. The language, in which it must be made, is the official language of the Member State, in which secondary proceedings could have been opened.

## 3 Approval of the undertaking

The second stage is the approval of the undertaking. According to paragraph 5 it must be approved by the known local creditors. The term "local creditors" is defined in Article 2, point 11 - these are the creditors, whose claims against the debtor arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the center of the debtor's main interests is located. The insolvency practitioner must inform the known local creditors about the undertaking and the rules and procedures for its approval. Two serious questions arise here. The

first one is what is the exact meaning of “known local creditors”, who can approve the undertaking. The second – in what way must the insolvency practitioner inform the known local creditors about the offered undertaking.

Regarding the first question there isn't a unified answer in legal literature. One of the possible answers can be found in the Bulgarian insolvency cases regarding Article 40 of Regulation 1346/2000 (now Article 54 of Regulation 2015/848). According to this Article as soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States. Here the Bulgarian practice accepts that “known creditors” are these, who can be identified by the insolvency practitioner from the debtors books and other documents<sup>6</sup>.

Some authors rely on a ruling of the Czech Supreme Court on the case *Sahin v. QSN24h*. In it “local” are these creditors, who in the course of the insolvency proceedings can be determined by the court or insolvency practitioner. Hence, the creditors can become “known” to the practitioner either by the debtor's accounts, if they are properly maintained, or when they lodge their claims in the main proceedings.

The second opinion should be supported because in that way the interests of local creditors will be more protected and they will have a better chance to participate in the approval of the undertaking.

When analyzing the second question - in what way must the insolvency practitioner inform the known creditors about the offered undertaking, the starting point must be what type of norm is Article 36, paragraph 5. It is a collision norm, which means that the national law of the Member State, in which the assets, included in the undertaking, are situated, will be applied to the procedure of informing local creditors. Since the rules of approval of a restructuring plan apply to the approval of the undertaking, then the same rules must be applied when informing the known local creditors. Hence, if an insolvency practitioner, appointed in main

insolvency proceedings, intends to give an undertaking in Bulgaria, he must inform the creditors by a publication in the Bulgarian Commercial Register.

As for the procedure of approval of the undertaking, it was already mentioned that the rules on qualified majority and voting that apply to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened shall apply. If the insolvency practitioner in the main proceedings is willing to give an undertaking, regarding assets in Bulgaria, then for its approval Chapter 44 of the Bulgarian Commercial Act must be applied. According to it only creditors, whose claim have been approved or who have been given the right, can vote on the restructuring plan. This rule would lead to the necessity for local creditors first to lodge their claims in the main proceedings, which will slow the procedure of giving an undertaking. In order to avoid this, recital 44 of the Regulation states: where under national law the voting rules for adopting a restructuring plan require the prior approval of creditors' claims, those claims should be deemed to be approved for the purposes of voting on the undertaking.

The insolvency practitioner is also obliged to inform creditors about the result of the vote – whether the undertaking is approved or rejected. Again, there are no rules on how the notification must be done but it should be done by publication in the Commercial Register. The approved undertaking is binding on the estate.

#### **4 Enforcement of the approved undertaking**

After the approval of the undertaking the insolvency practitioner must enforce it – he must realise the assets, included in it, and distribute the received proceeds between the creditors. The distribution must be done according to the rules of the Member State, where secondary insolvency proceedings may be opened.

In Article 36 of the Regulation there are several ways for protection of local creditors' interests when an undertaking is approved. Firstly, the

insolvency practitioner is obliged to inform them about an intended distribution prior to distributing the assets or proceeds. If it does not comply with the terms of the undertaking or the applicable law, every local creditor can challenge the distribution before the court of the Member State in which main insolvency proceedings have been opened. In such cases, no distribution shall take place until the court has taken a decision on the challenge.

Another guarantee for local creditors is that the insolvency practitioner is liable for any damages, caused to them as a result of his non-compliance with the obligations and requirements, set out in Article 36.

In order to insure that the conditions, set out in the undertaking, will be fulfilled local creditors can seize:

a) the court of the Member State, in which main insolvency proceedings are opened, and require that the insolvency practitioner takes any suitable measure necessary to ensure compliance with the terms of the undertaking, available under the law of the State of opening of main proceedings;

b) the court of the Member State, in which secondary insolvency proceedings could have been opened, and require that the court takes provisional or protective measures to ensure compliance by the practitioner with the terms of the undertakings.

The fact that an undertaking is approved does not exclude the option to request the opening of secondary insolvency proceedings but the request must be lodged within 30 days of receiving the notice of the approval –Article 37,

paragraph 2. If a request is lodged, the court must inform the insolvency practitioner in the main proceedings, who can ask the court to reject the request, if the general interests of local creditors are adequately protected by the undertaking.

## 5 Conclusion

In general, the new option for the insolvency practitioner to give an undertaking is a good alternative to the opening of secondary insolvency proceedings. The institute's regulation, however, leaves some unresolved issues, concerning the determination of known local creditors. This could lead to difficulties when approving the undertaking. In the next few years we will see how this new rule will be applied by practitioners and whether it will give the desired results.

### *References:*

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