

DETERMINATION OF INTERNATIONAL JURISDICTION BY COUNCIL REGULATION (EC) NO 1346/2000, ON INSOLVENCY PROCEEDING

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Abstrakt v rodném jazyce

Mezinárodní příslušnost k zahájení a vedení insolvenčních řízení podle nařízení Rady (ES) č. 1346/2000, o úpadkovém řízení se určuje zvláště pro řízení hlavní a zvláště pro řízení teritoriálně omezená a to na základě odlišných kritérií. Tato kritéria jsou: hlavní zájmy dlužníka a provozovna. V obou případech jde o autonomní pojmy, které se vykládají podle nařízení jednotně a nezávisle na právních řádech jednotlivých členských států.

Klíčová slova v rodném jazyce

Centrum hlavních zájmů, provozovna, teritoriálně omezená řízení, vedlejší řízení, nezávislé řízení, hlavní řízení.

Abstract

Contribution focuses on the determination of international jurisdiction by Council Regulation No 1346/2000, on insolvency proceeding. International jurisdiction is determinate by different criterions. These criterions are centre of the debtor's main interests and establishment. These terms are autonomous concept. As such, their meaning is uniform and independent of the national laws of the Member States, the latter may not modify that meaning.

Key words

Centre of main interests, establishment, territorial proceeding, secondary proceeding, independent proceeding, main proceeding.

1. INTRODUCTION

This paper focuses on the determination of international jurisdiction by Council Regulation (EC) No 1346/2000, on insolvency proceeding (below only "Insolvency Regulation"). In according to this regulation it is possible to open two type of insolvency proceedings – *Main proceeding* and *Territorial proceedings*. These territorial proceedings are disposed on secondary and independent proceedings.¹ International jurisdiction is determinate by different criterions. These criterions are *centre of the debtor's main interests* and *establishment*. The Insolvency Regulation only determines the international jurisdiction of the courts of the State. The territorial jurisdiction within that State will be determined by its national law.

These terms are autonomous concept. As such, their meaning is uniform and independent of the national laws of the Member States, the latter may not modify that meaning. The method

¹ Virgos, M., Garcimartin, F. *The European Insolvency Regulation: Law and Practice*. Hague: Kluwer Law International, 2004, p. 157 or Bělohávek, A., J. *Evropské insolvenční právo*. Bulletin advokacie, 2007, No 11, p. 40

to determine the centre of main interests and establishment must be the same for all Member States.²

2. CENTRE OF MAIN INTERESTS

Article 3.1 of Insolvency Regulation enables the court of the Member State where the centre of the debtor's main interests is located to open **main insolvency proceeding**. Such proceeding has universal scope and is intended to encompass all the debtor's assets on a worldwide basis and to affect all creditors, independently of where they are located.³ Central term of Insolvency Regulation is therefore centre of main interests. Fundamental source of interpretation of this term is Virgos-Schmit report, that was many times excerpt by European Court of Justice. Other source of interpretation is definition comprehended in the recital 13 of Preamble. Concept of this definition was adopted from mentioned report. There is said: "*The centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties*". Concept of stated definition has open character. This open character gives it the advantage of flexibility. The concept can applied to any class of debtor and to any type of organizational structure of that debtor. Insolvency Regulation does not make distinctions between natural person, legal person, trader, non-trader, public or private. However, this open texture may be its greatest weakness, because its practical application implies a previous examination and evaluation of the debtor's circumstances.⁴

The definition results from the combination of several fundamental ideas. The important factor that determine centre of debtor's main interests is the place where the interests are administered, not the place where those concrete interests are located. It is therefore the place from where the debtor conducts its activities. Administration is intended to mean the management and control of interests. Interests must be understood as referring to the debtor's economic affairs.⁵ Another relevant aspect is the external organization of the debtor. This is why the definition requires that such place must be ascertainable by third parties. Debtor should has several centres of main interests. The principle used in Insolvency proceeding implies that a debtor can have only one centre.⁶

If a debtor is natural person and is engaged in an independent business or professional activity, the centre of main interests will normally correspond to the state where he has his business or professional centre (professional domicile). For other individuals in general, no

² Virgos, M., Garcimartin, F. The European Insolvency Regulation: Law and Practice. Hague: Kluwer Law International, 2004, p. 37

³ Virgos-Schmit report No. 73

⁴ Virgos, M., Garcimartin, F. The European Insolvency Regulation: Law and Practice. Hague: Kluwer Law International, 2004, p. 38

⁵ Wessels, B. European Union Regulation on Insolvency Proceedings: An Introductory Analysis. American Bankruptcy Institute, 2003, p. 15

⁶ Virgos, M., Garcimartin, F. The European Insolvency Regulation: Law and Practice. Hague: Kluwer Law International, 2004, p. 40

professionals, the place of their main interests is habitual residence.⁷ This term can be interpreted in accordance with the Brussels I Regulation.⁸

Where companies and legal persons are concerned, the Insolvency Regulation presumes, that the debtor's centre of main interests is a place of his registered office. This place normally corresponds to the debtor's head office. But in the contradictory cases, the place of main interests will correspond to the place that appears as its central administration, the place from which the main activities are controlled and ultimate decisions at the highest level are made.⁹

The Insolvency Regulation offers no rules for groups of affiliated companies. International jurisdiction for related companies must exist for each of them, because according to the Regulation the jurisdiction must be determinate for each of separate legal entity.¹⁰

3. ESTABLISHMENT

Territorial insolvency proceeding should be opened in the Member State where the debtor has his establishment. This rule of jurisdiction is valid for any territorial proceeding, be they secondary or independent. The aim of this possibility is following – foreign debtors who operate in the inland through the local establishment can be subject to the same insolvency rules as domestic debtors. This means that the effects of the insolvency will be determined not by the law of the State where the debtor's centre of main interests is located, but by the law of the State where the establishment and assets are situated.¹¹ This concept protects local creditors. They know local insolvency law, they can communicate with local administrator of assets and they can speak by own language.

According to the Regulation an establishment is “*any place of operations where the debtor carries out a non-transitory economic activity with the human means and goods*”. Criterion for opening of territorial proceeding isn't only pure inherence of assets in the State, but it presumes some activity.¹² The definition provided by the Regulation is a relatively open definition, based on the combination of two elements: a place of business or operations, with a certain degree of organization and permanence in time. Directives of interpretation are following – first directive is an external point of view and the second directive is an internal point of view.

Place of operations means a place from which economic activities are exercised externally and whether the said activities are commercial, industrial or professional. A purely occasional place of operations cannot be classified as an establishment. A certain stability is required. A place of business clearly set up for a short temporary purposes does not qualify as an establishment. On the other hand, the Insolvency Regulation does not require a permanent

⁷ Virgos-Schmit report No. 75 or Šabatka, P. Mezinárodní pravomoc podle nařízení o insolventních řízeních. Právní rozhledy, 2006, No 3, p. 96

⁸ Council Regulation No 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters .

⁹ Šabatka, P. Mezinárodní pravomoc podle nařízení o insolvenčních řízeních. Právní rozhledy, 2006, No 3, p. 97 or Virgos, M., Garcimartin, F. The European Insolvency Regulation: Law and Practice. Hague: Kluwer Law International, 2004, s. 43

¹⁰ Virgis-Schmit report No. 76

¹¹ Virgos, M., Garcimartin, F. The European Insolvency Regulation: Law and Practice. Hague: Kluwer Law International, 2004, s. 156

¹² Šabatka, P. Mezinárodní pravomoc podle nařízení o insolvenčních řízeních. Právní rozhledy, 2006, No 3, p. 99

establishment, i.e. an establishment open on an indefinite time basis. The reference to human means and goods expresses the requirement of some form of organizational presence in the forum, for example a branch, an office, a factory, a workshop. The formulation of these elements is not rigid. The decisive factor is how the activities appears externally, and not the intention of the debtor. All of these elements have to be specified in the light of the general idea: the requirement that the place of operations represents a certain degree of external business activity on the part of the debtor, in or from that State.¹³

The concept of “establishment” is neutral with regard to the nature of the debtor, an individual or a legal person, or the capacity (merchant, professional) in which he may act. The function of this criterion is solely to confer jurisdiction upon the courts of the State in question, and therefore, the principle, any natural or legal person, whether or not a trader, can have an establishment for the purposes of the Insolvency Regulation.¹⁴ This prevails over national rules which may reserve the use of the concept of establishment to specific persons.

Term establishment cannot be interpreted according to Brusel I. Regulation¹⁵ and it isn't possible interpret this term according to article 21 till 23 of Czech Commercial Code.¹⁶ Concept of establishment in the article 21 of Czech Commercial Code is very similar as a term establishment in the Insolvency Regulation. However, concept of establishment according to Insolvency Regulation is wide sense.¹⁷

Concept of establishment was adopted by Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL). Article 2 (f) includes following definition: „*Establishment*” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. The purpose of the present Law is to provide effective mechanisms for dealing with cases of crossborder insolvency. Model Law is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several significant ways.¹⁸

4. RELEVANT MOMENT

Relevant moment to establish international jurisdiction is when the application for insolvency proceedings is filled. It is at this moment that the debtor's centre of main interests or debtor's establishment must be located in the forum. Changes occurring afterwards have no influence on jurisdiction and thus a later modification has no effect (the principle of *perpetuatio fori* is

¹³ Virgos, M., Garcimartin, F. The European Insolvency Regulation: Law and Practice. Hague: Kluwer Law International, 2004, p. 160 - 161

¹⁴ Virgos-Schmit report No. 71

¹⁵ This regulation doesn't include definition of establishment.

¹⁶ No 513/1991, Commercial Code

¹⁷ Bělohávek, A., J. Evropské a mezinárodní insolvenční právo. Komentář. 1. vydání. Praha : C.H. Beck, 2007, p. 108.

¹⁸ http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html

applied).¹⁹ However, this conclusion doesn't consequent on Insolvency Regulation. The provision 3.1. does not specify whether the court originally seised retains jurisdiction if the debtor moves the centre of his main interests (or establishment) after submitting the request to open proceedings but before the judgment is delivered.²⁰

Thus, this question was solved by European Court of Justice as a preliminary question in the case of Susanne Staubitz -Schreiber.²¹ This case only deal with centre of main interests, but general rules can be adopted to establishment. The dispute in the main proceeding was following. The applicant in the main proceeding was resident in Germany where she operated a telecommunications equipment and accessories business as a sole trader. She ceased to operate that business in 2001 and requested, on 6 December 2001, the opening of insolvency proceedings regarding her assets before the Amtsgericht-Insolvenzgericht Wuppertal. On 1 April 2002, she moved to Spain in order to live and work there.²² By order of 10 April 2002, the Amtsgericht-Insolvenzgericht Wuppertal refused to open the insolvency proceedings applied for on the ground that there were no assets. The appeal brought by the applicant in the main proceedings against that order was dismissed by the Landgericht Wuppertal on the ground that the German courts did not have jurisdiction to open insolvency proceedings in accordance with Article 3.1. of the Insolvency Regulation, since the centre of the main interests of the applicant in the main proceeding was situated in Spain.²³ The applicant submits that the question of jurisdiction should be examined in the light of the situation at the time when the request to open insolvency proceedings was lodged.²⁴

European Court of Justice note, that a transfer of jurisdiction from the court originally seised to a court of another Member State on that basis would be contrary to the objectives pursued by the Regulation.²⁵ In the fourth recital in the Preamble to the Insolvency Regulation, the Community legislature records its intention to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position.²⁶ Furthermore, retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors.²⁷

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¹⁹ Virgos, M., Garcimartin, F. The European Insolvency Regulation: Law and Practice. Hague: Kluwer Law International, 2004, p. 159

²⁰ Decision of ECJ C-1/04, par. 23

²¹ Decision of ECJ C-1/04, Susanne Staubitz-Schreiber. Accessible on http://curia.europa.eu/en/content/juris/index_form.htm

²² Decision of ECJ C-1/04, par. 15

²³ Decision of ECJ C-1/04, par. 16

²⁴ Decision of ECJ C-1/04, par. 17

²⁵ Decision of ECJ C-1/04, par. 24

²⁶ Decision of ECJ C-1/04, par. 25

²⁷ Decision of ECJ C-1/04, par. 27

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