

SaveComp: Effectiveness of the European Insolvency Regulations

International Jurisdiction and the Insolvency Regulation Recast

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The Recast Regulation – Art 1 – Scope

1. This Regulation shall apply to **public collective proceedings**, including interim proceedings, which are based on laws relating to insolvency and in which, **for the purpose of rescue, adjustment of debt, reorganisation or liquidation**:

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

The Recast Regulation – Art 1 – Scope ctd.

- Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.
- The proceedings referred to in this paragraph are listed in Annex A.
- 2. This Regulation shall not apply to proceedings referred to in paragraph 1 that concern:

The Recast Regulation – recital (10)

- The scope of this Regulation should extend to proceedings which promote the **rescue** of economically viable but distressed businesses and which give a **second chance** to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. ...

‘Public collective proceedings’

- (12) This Regulation should apply to proceedings the opening of which is **subject to publicity** in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings.
- Art 2(1): ‘collective proceedings’ means proceedings which include **all or a significant part of a debtor's creditors**, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them; ... (and see recital (14))

The Recast Regulation – International Jurisdiction

- Art 3; supported by recitals (22) – (38)
- Master condition in recital (25): This Regulation applies only to proceedings in respect of a debtor whose **centre of main interests** is located in the Union.
- Art 3.1: The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings (**'main insolvency proceedings'**). **The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties [and see recital (28)].**

Addressing concerns re. mobile COMI

- **Examination as to jurisdiction**
 - Art 4.1: A court seised of a request to open insolvency proceedings shall **of its own motion examine** whether it has jurisdiction pursuant to Article 3. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) or (2).
- **Judicial review of the decision to open main insolvency proceedings**
 - Art 5.1: The debtor or any creditor may challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction.

Addressing concerns ctd. – Art 3.1 - Presumptions

- In the case of a **company or legal person**, the **place of the registered office** shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the **3-month period** prior to the request for the opening of insolvency proceedings.
- In the case of an **individual exercising an independent business or professional activity**, the centre of main interests shall be presumed to be that **individual's principal place of business** in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the **3-month period** prior to the request for the opening of insolvency proceedings.

Addressing concerns – Art 3.1 – Presumptions ctd.

- In the case of **any other individual**, the centre of main interests shall be presumed to be the place of the **individual's habitual residence** in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the **6-month** period prior to the request for the opening of insolvency proceedings.

Rebutting the Art 3.1 presumptions

Recital (30): Accordingly, **the presumptions** that the registered office, the principal place of business and the habitual residence are the centre of main interests **should be rebuttable**, and the **relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State**. **In the case of a company, it should be possible to rebut this presumption where** the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive 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 and of the management of its interests is located in that other Member State. **In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption**, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation.

Territorial, incl. secondary proceedings

- **Art 3.2:** Where the centre of the debtor's main interests is situated within the territory of a Member State, the **courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.** The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
- **Art 2.10:** 'establishment' means any place of operations where a 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;

The rescue culture

- Abolition of need for secondary proceedings to be winding-up proceedings.
- Virtual/synthetic secondaries
 - [Art 36](#): Right to give an [undertaking](#) in order to avoid secondary insolvency proceedings [see also recitals (41) – (44)]
 - [Art 38](#): [Decision to open secondary insolvency proceedings](#) - 1. A court seised of a request to open secondary insolvency proceedings shall immediately give [notice](#) to the insolvency practitioner or the debtor in possession in the main insolvency proceedings and give it an opportunity to be heard on the request.

Art 6 – interface with Brussels I Recast

- Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them
 - 1. The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.
 - 2. Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012.