

Case no. 8767/3/2019

Case no. 8767/3/2019 (36638/3/2018) (Unpublished)

The nature of the proceedings in Romania are such that the identities of the parties are kept confidential in an application such as the one heard here.

Romania and Italy

Bucharest Tribunal, Civil Section VII

Key Words

Centre of main interests; COMI; secondary proceedings; territorial proceedings; judicial communication; restructuring plan; disclosure; information sharing; cross-border cooperation.

Summary of Facts of the Case

The debtor was a parent company of a group of companies employing over 11,000 employees, operating in a complex sector with other companies worldwide. It was registered in Italy with an establishment in Romania. The Italian debtor company applied under the *concordato preventivo* procedure in Italy in the Bankruptcy Section of the Court of Rome with a view to formulating a proposal for a restructuring plan and was granted time to do so by the Italian court.

The Romanian creditors applied to open secondary and territorial proceedings in Romania and the Romanian judge duly notified the parties in the main proceedings in Italy pursuant to Article 38(1) of the EIR Recast. The Romanian judge also requested that the parties in the main proceedings in Italy provide information about the proceedings taking place there, including evidence of the state of play of the procedure and if the restructuring plan proposal had yet been made by the debtor and confirmed by the Italian Court. The parties failed to provide the evidence requested to the Romanian court, whereby the Romanian court then applied to the Court of Rome with a certified Italian translation (at the expense of the creditors) for the relevant information needed to assess the application by the Romanian creditors to open secondary and territorial proceedings in Romania. No information was ever received from the Italian court.

The Romanian legal representatives of the debtor company rejected the request made by Romanian creditors to open secondary or territorial insolvency proceedings, suggesting that such an application should be inadmissible based on an argument that the Italian *concordato preventivo* did not qualify as an insolvency proceedings as the restructuring plan between the debtor and the creditors was not confirmed by an Italian judge. The representatives of the Romanian creditors



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This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

fought this idea, relying in part on the argument that the procedure in question was included in Annex A of the EIR Recast.

While this case was on-going, out-of-court agreements were made between the Romanian creditors and the debtor company that were not notified to the Romanian Syndic judge. Subsequently, before the Bucharest Tribunal Civil Section VII the Romanian creditors made a request to waive the applications for the opening of secondary or territorial insolvency proceedings due to those out-of-court agreements.

Cooperation and/ or Coordination Issue

The cooperation issue in this case surrounds a request to open secondary proceedings brought by creditors in an ancillary jurisdiction (Romania) to the main proceedings and the certain requests for information from the main proceedings that were made to the Italian courts to help the Romanian judges assess the necessity of the secondary proceedings application. The information was not forthcoming, which indicates a failure of cooperation in this case.

In addition, the request to open secondary and territorial proceedings was initially rejected by the Romanian representative of the debtor company on the basis that the Italian *concordato preventivo* should not be considered an insolvency procedure, despite it being in the EIR Recast. This argument indicates the possibility that even though recognition is obligatory under the EIR Recast, arguments can still be made based on characteristics of a procedure. Although this case was terminated due to the out of court settlement, the arguments made by the debtor company to try to retain control over the proceeding as a whole are indicative of a competitive inclination to avoid cooperating in some circumstances.

Resolution

The Bucharest Tribunal Civil VII Section rejected the contention that the application for secondary proceedings was inadmissible in reliance on EIR Recast Articles 3(2) allowing a Member State with an establishment of the debtor present to open secondary insolvency proceedings where main insolvency proceedings have been validly opened elsewhere and 3(4) in relation to territorial proceedings. Rather, as the *concordato preventivo* is included in Annex A of the EIR Recast, the opening of main proceedings in Italy where the debtor has its COMI and the fact of the debtor having an establishment in Romania, complies with the requirements for the opening of secondary proceedings in Romania.

Applicability to Preventive Restructuring

This case is about an actual preventive restructuring procedure conducted in Italy, the *concordato preventivo*, which is contained in Annex A of the EIR Recast. The fact that there were arguments raised about the validity of this procedure as an 'insolvency procedure' under the EIR Recast, despite the fact that it has been included in Annex A and should therefore benefit from automatic recognition, is an indication of the issues that could be encountered as more and more Member States implement restructuring frameworks that include elements of informality and whose thresholds are more in advance of when a traditional insolvency proceeding may take place.

Applicability of Existing Rules and Guidelines

This case was heard under the provisions of the EIR Recast, with the Romanian creditors relying on the presence under the Regulation of the *concordato preventivo* in Annex A. That said, the Romanian representative of the debtor claimed that the procedure did not qualify as an insolvency procedure on the basis that it did not require court confirmation, *per se*. Even if the restructuring plan was not confirmed by an Italian court, the procedure was still in progress and covered by the EIR Recast. Even where the foreign judgment does not specify whether the proceeding open to the debtor is a main or secondary proceeding, it shall be automatically recognised under the terms of Article 19 and Article 31 of the EIR Recast.

Further, as long as the debtor had an establishment in Romania according to the definition under Article 2(10), secondary proceedings can be opened under the EIR Recast. In order to qualify as an 'establishment', it must be demonstrated that the debtor has a 'place of business' in Romania in which it carries out non-transitional economic activity with human resources and goods and services. Evidence of an establishment can include that the debtor has representatives in Romania that pay and conclude contracts with local creditors. Whether or not an economic activity is 'transitional' depends on the duration, frequency and nature of the economic activity. Activities such as the accrual and payment of debts in Romania would not be considered transitional if they have the character of a consistent business activity corresponding to the nature and type of activity that a debtor carries on generally. Interaction with third parties is also required to prove an establishment in a jurisdiction under the EIR Recast.

Further, the activities of the corporate debtor must have a perceptible effect on the local market and be publicly known with internal administration being insufficient. It must also be verified whether the debtor has regularly managed and conducted business relations with creditors, local and otherwise and finally the establishment must be ascertainable to third parties as being an established business in the jurisdiction. On the basis of these characteristics, it was clear in the instant case that there was an establishment in Romania and as the procedure in the main proceedings was included in Annex A of the EIR Recast, the creditors in Romania should have been recognised as having the right to open secondary proceedings in Romania.