

ECJ on international jurisdiction (rebuttal of presumption of the COMI for individuals) under the European Insolvency (Recast) Regulation, judgment of 16 July 2020, C-253/19 - Novo Banco

The Court decided, as had been proposed by AG Szpunar (see our post on the Opinion), that the first and fourth subparagraphs of Article 3(1) of the EIR(Recast) must be interpreted as meaning that the presumption established in that provision for determining international jurisdiction for the purposes of opening insolvency proceedings, according to which the centre of the main interests of an individual not exercising an independent business or professional activity is his or her habitual residence, is not rebutted solely because the only immovable property of that person is located outside the Member State of habitual residence.

MH and NI, a married couple who, since 2016, have been resident in Norfolk (United Kingdom) where they pursue an activity as employed persons, applied to the Portuguese courts to open insolvency proceedings against themselves. The court of first instance hearing the application declined international jurisdiction to hear that application on the ground that, under the fourth subparagraph of Article 3(1) of Regulation 2015/848, the centre of the main interests of the applicants in the main proceedings was their habitual residence, which was in the United Kingdom, and that consequently the courts of that Member State had jurisdiction to open insolvency proceedings. MH and NI lodged an appeal against the judgment given at first instance before the referring court claiming that that judgment was based on a misinterpretation of the rules laid down in Regulation 2015/848. They claim that the centre of their main interests is not their habitual residence in the United Kingdom, but rather it is in Portugal, the Member State where the sole immovable asset which they own is located and where all the transactions and all the contracts leading to their insolvency were conducted and

concluded. Furthermore, there is no connection between their place of habitual residence and the events that led to their insolvency, which occurred entirely in Portugal. MH and NI therefore ask that the Portuguese authorities be recognised as having international jurisdiction.

Article 3 of the EIR (Recast) provides:

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.

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.

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.

The Court explained:

„[24] ... [T]he relevant criteria for determining the centre of the main interests of individuals not exercising an independent business or professional activity are those connected with their financial and economic situation which corresponds to the place where they conduct the administration of their

economic interests or the majority of their revenue is earned and spent, or the place where the greater part of their assets is located.

[25] In the second place, it is necessary to clarify the scope of the presumption established in the fourth subparagraph of Article 3(1) of Regulation 2015/848. It follows from the actual wording of that provision, read in the light of the first subparagraph of Article 3(1) of that regulation, that individuals not exercising an independent business or professional activity are presumed, in the absence of proof to the contrary, to conduct the administration of their interests on a regular basis in the place of their habitual residence, since there is a strong possibility that that place corresponds to the centre of their main economic interests. It follows that, as long as that presumption is not rebutted, the courts of the Member States where that residence is located have international jurisdiction to open insolvency proceedings against that individual."

[26] However, the fourth subparagraph of Article 3(1) of Regulation 2015/848 provides that that presumption applies only until there is proof to the contrary, and recital 30 of that regulation states that it should be possible to rebut that 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.

[27] As the Advocate General stated in point 55 of his Opinion, the mere fact that circumstances referred to in that recital are present is not sufficient to rebut the presumption set out in the fourth subparagraph of Article 3(1) of Regulation 2015/848.

[28] Although the location of the debtor's assets is one of the objective criteria, ascertainable by third parties, to be taken into consideration when determining the place where the debtor conducts the administration of his or her interests on a regular basis, that presumption may be reversed only following an overall assessment of all the objective criteria. It follows that the fact that the only immovable property of an individual not exercising an independent business or professional activity is located outside the Member State of his or her habitual residence is not sufficient on its own to rebut that presumption."

The full text of the judgment is here.