**In what circumstances will a stay on enforcement of rights in rem in Member State A affect holders of these rights in Member State B of the EU?**

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1. **Introduction**

The main purpose of this paper is to study the effectiveness of guarantees over rights in rem when starting negotiations between parties prior to or during a restructuring process in cases where the creditor has the these guarantees over rights in rem in a different EU country to his domicile. In this context we will analyse if a stay has any effect over the possibility of such creditor to enforce these guarantees when the guaranteed obligation is defaulted by the debtor.

1. **Content**
2. **Applicable Law**

When a financially troubled business possesses assets in one Member State and its liabilities are subject to the laws of another Member State, the involved parties in the restructuring negotiations become concerned about the effectiveness of the restructuring process across borders. This matter is governed by the European Insolvency Regulation, specifically Regulation 848/2015. Depending on the type of assets being protected, such analysis becomes crucial under the framework of preventive restructuring and second chances.

Such an analysis becomes particularly relevant when the parties involved in the restructuring process are interested in ensuring its cross-border effectiveness. This interest arises due to the potential risk of dissenting creditors attempting to enforce their claims on the debtor's assets located in another Member State, or on guarantees provided by subsidiary companies incorporated in a different Member State. Additionally, it may be necessary to undertake this analysis if there is an attempt to initiate bankruptcy proceedings against the debtor in another Member State, claiming that the debtor's main center of operations or establishment is located there.

The REI bis sets forth standardized rules for cross-border bankruptcy procedures. It is a binding legal document that applies directly to all Member States except Denmark. The Regulation establishes uniform regulations concerning (i) international jurisdiction for initiating insolvency proceedings and related actions, (ii) the applicable law for insolvency proceedings, (iii) mutual recognition and enforcement of decisions made in such proceedings, and (iv) coordination of insolvency procedures. The Regulation's scope also includes preventive restructuring procedures, which aim to rescue financially viable debtors facing difficulties that may lead to bankruptcy (see Art. 1).

The REI bis follows a concept known as "mitigated universalism." In principle, the courts of the Member State where the debtor's center of main interests (COMI) is located have jurisdiction to commence insolvency proceedings (Art. 3). This procedure, called the main proceeding, typically has a universal reach, encompassing all of the debtor's assets regardless of their location, and allows all creditors to assert their claims in the proceedings. However, the REI bis also permits the opening of territorial insolvency proceedings in Member States where the debtor has an establishment. These proceedings only cover assets situated within that specific Member State (Art. 3).

Moreover, the Regulation establishes uniform conflict-of-law rules. As a general rule, the law of the Member State where the insolvency proceedings are opened (lex fori concursus) applies (Art. 7). This law determines the procedural and substantive effects of the insolvency proceedings on the debtor, its assets, and its obligations. The Regulation provides several exceptions to safeguard specific interests, such as property rights, retention of title, compensation, real estate contracts, employment contracts, payment systems and financial markets, registered rights, voidable transactions, third-party purchasers, and ongoing procedures (Arts. 8-18). Additionally, the REI bis includes uniform rules to ensure a minimum level of protection for foreign creditors and the publicity of insolvency proceedings (Arts. 24-30, 53-55).

Furthermore, the Regulation ensures the mutual recognition and enforcement of decisions issued by the courts of the Member State where the insolvency proceedings were initiated (Arts. 19-33). It provides for automatic recognition of resolutions related to the commencement, progress, and conclusion of insolvency proceedings, as well as the appointment of a bankruptcy administrator and closely related resolutions. The grounds for refusing recognition and enforcement are limited to public policy exceptions.

Finally, the REI bis establishes a comprehensive framework for cross-border coordination and cooperation when multiple insolvency proceedings are opened in different Member States, both involving the same debtor (Articles 41-52) and different companies within the same group (Arts. 56-77). These rules apply to both courts and bankruptcy administrators.

The DR serves as a comprehensive legal instrument that harmonizes substantive and procedural laws. Its primary focus is on establishing uniform standards for three key aspects: (i) preventive restructuring frameworks, (ii) second chance opportunities for insolvent entrepreneurs, and (iii) measures to enhance the efficiency of restructuring, insolvency, and second chance procedures. For the purpose of this discussion, we will only address the first aspect.

As outlined in its recitals, the primary objective of the DR is to provide a framework for restructuring financially distressed yet viable companies before they face bankruptcy, thereby preventing it. This enables European Union companies to restructure their financial obligations before reaching insolvency and, in turn, continue their operations either in full or in part (see points 2 and 3).

The preventive restructuring regime introduced by the Directive requires the involvement of either a court or an administrative authority and is structured into various phases or measures, which can be combined into one or more procedures at the discretion of each Member State. The cornerstone of the preventive restructuring frameworks established by the DR rests on two essential components: the moratorium and the restructuring agreement or plan.

During the negotiations of the restructuring agreement, the debtor retains control over its assets and continues managing the company (referred to as a non-disempowered debtor or debtor in possession, using Anglo-Saxon terminology). The DR allows Member States to require, in certain cases, the appointment of a mediator or supervisor (referred to as a "restructuring administrator" under Article 5 of the DR).

To facilitate agreement negotiations and mitigate the risk of opportunistic behaviour by dissenting creditors, the DR grants the debtor access to a moratorium, which suspends individual enforcement actions. The DR stipulates provisions regarding the duration, extension, and lifting conditions of the moratorium. Furthermore, during the moratorium, the debtor is not obligated to initiate bankruptcy proceedings. The DR also includes additional measures to ensure a standstill, facilitating the debtor's business continuity during the plan negotiation process. For instance, contracts cannot be suspended or terminated solely based on the debtor's initiation of negotiations or request for a moratorium (or even prior defaults), as long as the debtor meets its contractual obligations. This renders so-called "ipso facto" clauses ineffective (Articles 6-7 of the DR).

The DR enables the adoption of restructuring agreements or "plans" by a majority of the affected parties. These plans can be extended to dissenting creditors within the same class (horizontal drag or "intra-class cram-down") and/or to other classes (vertical drag or "cross-class cram-down"), subject to specific circumstances and confirmation by a judicial or administrative body (Articles 8-16 of the LAW 11089/2019). The DR also establishes minimum protections for (i) new financing required for plan implementation, (ii) provisional financing used to ensure business continuity during negotiations, and (iii) other operations related to the restructuring (Articles 17-18 of the LAW 11089/2019).

The DR allows interested parties to selectively utilize the tools it provides. As emphasized in the Commission's Proposal, "preventive restructuring frameworks may consist of one or more procedures or measures, provided that a debtor can combine all the elements listed in them."

Fundamentally, the REI bis and the DR are compatible and complementary legal frameworks. They are compatible because the REI bis contains rules of private international law, while the DR comprises substantive norms. They are complementary because the REI bis establishes the private international law regime applicable to the preventive restructuring procedures implemented in Member States when transposing the DR. The primary function of the REI bis is to ensure the cross-border effectiveness of national preventive restructuring procedures provided under the NS.

For the REI bis to apply to the preventive restructuring procedures adopted by Member States in accordance with the NS, these procedures must be included in Annex A of the REI bis. Otherwise, they would be governed by national rules of private international law. It should be noted that Member States are not obligated to request the inclusion of a particular insolvency procedure, including the DR restructuring procedures, in Annex A. They have the freedom to decide whether or not to notify such procedures for inclusion (see final paragraph of Article 13 of the LAW 11089/2019).

However, the case of DR restructuring procedures should be different because they are based on EU law rules. The objective of the Directive is to provide viable EU companies facing financial difficulties with an effective national restructuring procedure that allows them to continue operating. This is crucial for the proper functioning of the internal market. When a financially troubled company possesses assets in another Member State or is subject to liabilities governed by the law of another Member State, the effectiveness of such procedures may depend on their recognition in those other Member States. This recognition is ensured by the REI bis, so it would not be reasonable to make the applicability of the REI bis dependent on the goodwill of Member States. If the DR requires Member States to adopt effective preventive restructuring procedures, it should also require them to ensure cross-border effectiveness and include the procedures in Annex A. This would provide greater legal certainty and ensure a uniform private international law regime in the EU. It would have been advisable for the Directive itself to mandate Member States to request such inclusion or empower the Commission to do so ex officio. However, this has not been the case.

Nevertheless, including procedures in Annex A may raise some issues based on the definition of insolvency proceedings in Article 1 of the REI bis. For instance, confidential restructuring procedures are not covered by the REI bis regime, and therefore, their effects may not be recognized under the Regulation (although they may be recognized under national law). Similarly, non-collective restructuring proceedings are not encompassed by the REI bis. While the DR allows flexibility in these regards, it remains essential to determine whether such procedures fall within the scope of the REI bis. In our view, the answer is affirmative, as the key element is not whether the procedure affects all or a significant part of the debtor's creditors, but rather whether it has the potential to do so according to the applicable legal framework. This is why Annex A references "legal categories." Otherwise, there could be incentives to involve as many creditors as possible to benefit from the application of the REI bis, even if it is not necessary for the restructuring process.

If the REI bis is applied to the preventive restructuring procedures implemented by Member States in transposing the DR, it will determine (i) the international jurisdiction for commencing, developing, and concluding such procedures; (ii) the applicable law; (iii) the recognition of these procedures in other Member States; and (iv) the rules for coordination and cooperation.

In the subsequent sections, each of these elements will be further elaborated with respect to the instruments comprising the legal framework established by the DR, namely the moratorium and the restructuring plan. It is important to note that, from the perspective of the REI bis, each of these instruments, if operating independently, would be classified as "insolvency proceedings."

1. **The execution of the Applicable Law In Moratorium Processes**

According to Articles 2 and 6 of the DR, the suspension of individual enforcement actions must be ordered by a judicial or administrative authority and can be either general, affecting all creditors, or limited, affecting only specific individual creditors. The international jurisdiction to grant such a moratorium with universal effect lies with the courts of the Member State where the debtor's center of main interests (COMI) is located, in accordance with Article 3 of the REI bis. The courts of the Member State where the debtor has an establishment also have the authority to grant a moratorium, but in this case, it will only have effect within the territory of that particular Member State (Article 3).

The courts must ensure ex officio their own jurisdiction in accordance with Article 3 of the REI bis to grant a general or limited moratorium (see Article 4 of the REI bis). This is true even if the moratorium is granted automatically, i.e., by operation of law. Additionally, any affected creditor can challenge the resolution if they believe that the court lacked jurisdiction (Article 5 of the REI bis).

When the moratorium covers only a limited number of individual creditors, a question arises as to whether "any" creditor can appeal the decision for lack of international jurisdiction (as per Article 5(1) of the REI bis) or only those specifically affected by it. It could be argued that if the moratorium is limited to certain individual creditors, other creditors are not affected (and therefore could initiate individual enforcement actions) and, therefore, they have no legitimate interest in challenging the moratorium on grounds of lack of international jurisdiction. However, even in cases where the suspension of individual enforcement actions is limited, it prevents the opening of insolvency proceedings in any Member State during its duration, not just in the state where the resolution originated (see Articles 7(1) and (2) and Recital 38 of the DR). Consequently, all creditors are indirectly affected by the moratorium and should have standing to challenge the resolution due to lack of international jurisdiction in accordance with Article 5(1) of the REI bis.

The applicable law for the moratorium is the law of the Member State whose courts have granted it, in other words, the "Member State in whose territory such proceedings are opened" as per Article 7 of the REI bis, known as the "lex fori concursus." According to the DR, this law determines various aspects, such as the necessity of appointing an administrator for the restructuring process, the powers of the administrator, the conditions for granting the moratorium (whether it is automatic or not), its extension, duration, renewal, and the conditions for lifting it. The law of the lex fori concursus also governs the consequences of the moratorium on contracts with pending performance obligations, even those subject to a different governing law. Generally, the effects of the moratorium on contracts pending performance obligations are determined by the lex fori concursus, irrespective of the applicable law governing the contracts. For example, ipso facto clauses are rendered ineffective even if the law governing the contract is that of a third country and recognizes the validity and effectiveness of such clauses.

The REI bis has been developed with reference to formal insolvency proceedings, and therefore, its application to restructuring proceedings requires certain conceptual adaptations. In principle, the decision ordering the moratorium constitutes a "resolution to open insolvency proceedings" (see Article 2(7) of the REI bis), and the moment it becomes effective, as determined by the lex fori, establishes the "moment of opening."

The exceptions to the application of the lex fori concursus established in Articles 8 to 18 of the REI bis also apply to the moratorium. For example, a dissenting secured creditor cannot be prevented from enforcing their rights (e.g., a pledge) if the asset to which the right attaches is located in a Member State other than the one where the proceedings were opened (Article 8). This exception may significantly reduce the effectiveness of the moratorium if the assets subject to such rights are of significant value or necessary for the debtor to continue its operations. Similarly, the effects of the moratorium on contracts related to real estate or employment contracts will be governed by the law designated in Articles 11 or 13, respectively, and not by the lex fori concursus.

The coordination and cooperation obligations established by the REI bis also apply in this context, whether the moratorium has been ordered in different Member States for the same debtor (universal and territorial moratorium) or for different members of the same group of companies. The REI bis explicitly confirms that these provisions apply to the debtor as a "debtor in possession" (DIP) (see Articles 41(3) and 76).

1. **Conclusion**

The relationship between the REI bis and the DR is generally harmonious. The Directive requires Member States to establish procedures in their national laws that enable the pre-bankruptcy restructuring of financially distressed companies, while the REI bis determines the cross-border recognition and effectiveness of these procedures (assuming their inclusion in the Annex to the Regulation). The REI bis ensures the mutual recognition of these procedures throughout the European Union (except Denmark), which is a significant advantage.

However, this relationship also presents some challenges. The REI bis safeguards security rights over assets located in a different Member State from where the main restructuring procedure was initiated, or it allows for the opening of territorial insolvency proceedings in a different Member State. Both of these circumstances can frustrate the objectives of the DR, which aims to facilitate restructuring plan negotiations and their implementation to prevent the debtor's bankruptcy. Another major drawback is the inability to initiate a preventive restructuring procedure that encompasses multiple companies within a group when not all of them have their center of main interests (COMI) in the same Member State. These challenges can lead to a paradoxical situation where Member States may prefer not to include their preventive restructuring procedures in the Annex to the REI bis, thereby foregoing its advantages while avoiding its drawbacks. This is exemplified by the approach taken by the Dutch legislature, which retains the option for a "confidential" preventive restructuring procedure for any company with a sufficient connection to the Netherlands, thereby reserving the ability to restructure an entire group of companies under the jurisdiction of the Netherlands. This raises a dilemma for each Member State on whether to adhere strictly to the European texts or explore alternative paths that may be more unorthodox but functional.

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