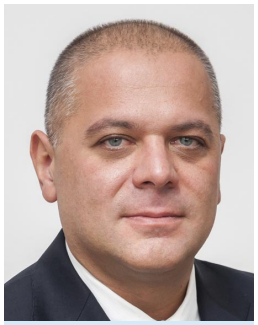
Judgment of 14 November 2018, C 296/17, Wiemer & Trachte – is the CJEU right?[1]

Angel Ganev, Simeon Simeonov, Valentin Bojilov present a case study on a 2018 judgment



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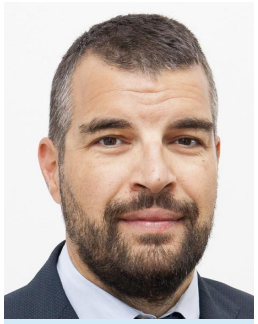

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The purpose of this article is to present and analyse a 2018 judgment of the Court of Justice of the European Union (hereinafter referred to as the "Court" or "CJEU")[2], delivered upon a referral for a preliminary ruling of the Bulgarian Supreme Court of Cassation and aimed at the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (hereinafter the "EIR 2000")[3] and, more specifically, the jurisdiction of the courts of the Member States to hear cases which derive directly from insolvency proceedings and which are closely connected to them.

The article briefly presents the factual background of the case and the CJEU judgment itself and offers some critical comments on certain serious flaws of the judgment in the light of the principles and provisions of EIR 2000.

Factual background

Wiemer & Trachte ("W&T") is a limited liability company whose registered office is in Dortmund, Germany. Since 2004, W&T had a registered branch in Sofia, Bulgaria. In 2007, the local court in Dortmund, Germany, in the context of opening insolvency proceedings against W&T, appointed a provisional liquidator and ordered that no disposals of assets by the company could be effected without the consent of that liquidator. By two more additional orders, made later on, the German court placed a general prohibition on W&T to dispose of its assets and the provisional liquidator acquired the status of a permanent one. All three orders were rendered and entered into the German register in 2007. After that, amounts of EUR 2 149.30 and EUR 40 000 were transferred from W&T's account by the managing director of the Bulgarian branch to a Bulgarian citizen, to satisfy a 'declaration of travel expenses' and an 'advance on business expenses', respectively.

The appointed liquidator of W&T therefore brought an action against that third person (the "**Defendant**") before the Sofia City Court in Bulgaria, claiming that those banking transactions were invalid because they had taken place without the consent of the provisional liquidator appointed in Germany, i.e. in contradiction to the preservation measures, ordered by the German court under the insolvency proceedings. It sought repayment of the amounts paid, together with statutory interest, to the insolvency estate of W&T.

The Defendant raised two main objections against the claim - that the Bulgarian courts of law *lacked jurisdiction* to hear the case and that the amount corresponding to the advance on business expenses had not been used and had been repaid to W&T on 25 April 2007. The objection of a lack of jurisdiction was rejected by the national court, affirming with *res judicata* that the Bulgarian courts of law have jurisdiction to hear such type of cases.

The case on the merits was initially favoured by the first instance court, but the Court of Appeal set aside that judgment and dismissed the claim as unfounded and unsubstantiated, on the grounds that the insolvency decision had not been published in the Commercial Register at the behest of W&T's Bulgarian branch within the relevant statutory term, so that the interim relief measures could not be presumed to have become known to third parties acting in good faith. Therefore, the court found that the Defendant should be discharged from liability for failing to reimburse the disputed money transfers.

The case was referred for a final review to the Supreme Court of Cassation. As part of its cassation appeal, W&T requested a referral to the CJEU for a preliminary ruling on questions concerning the interpretation and meaning of Articles 18(2), 21 and 24 of EIR 2000 in the light of the requirement to publish the decision for the opening of the main insolvency proceedings.[4]

Quite surprisingly, the Bulgarian Supreme Court itself added to the referral another question, namely whether Article 3(1) of EIR 2000 shall be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set a transaction aside is exclusive[5], although it was indeed the same court that had already ruled very clearly on this issue in

the sense that the Bulgarian courts of law have jurisdiction to hear the case.

CJEU's judgment and reasoning

With a judgment dated 14 Nov 2018 the CJEU decided that "*Article 3(1) of Regulation No 1346/2000 must be interpreted as meaning that the jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened to hear and determine an action to set a transaction aside by virtue of the debtor's insolvency which has been brought against a defendant whose registered office or habitual residence is in another Member State is exclusive*."

As the rest of the questions assumed, contrary to the implications of the answer given to the first question, that an action to set a transaction aside may be brought before a court of the Member State in which the defendant has his registered office or habitual residence, the CJEU found that there is *no need* to answer those questions.

The core argument, set out by the CJEU, was that Article 3(1) must be interpreted as meaning that it also confers *exclusive* jurisdiction to hear and determine actions which derive directly from those proceedings and which are closely connected with them on the courts of the Member State which has jurisdiction to open insolvency proceedings. The Court referred, in support of this thesis, to its previous judgments under the *Seagon*[6] and *F-Tex*[7] cases, concluding that such concentration of jurisdiction was consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects, referred to in recitals 2 and 8 of EIR 2000.

Critical comments

The overall impression of the judgment is that it not only fails to fulfil the objectives of the preliminary ruling procedure due to the lack of answers to the more substantial questions asked by the national court, but also suggests a quite controversial answer to the main one, related to the exclusivity issue. In fact, the Court ruled on a *hypothetical* question, as it has been already decided by the national courts of law in Bulgaria in a final way.

The CJEU judgment in no way takes into account that the decision of the CJEU under the *Seagon* case should be interpreted in the sense that the competence of the court which opened the main insolvency proceedings is not exclusive, but only *optional*, so the liquidator has the choice to exercise its powers in the State of opening of the insolvency proceedings *or* in any other Member State upon fulfilment of the requirements set out in EIR 2000.

As the Advocate General under the *Seagon* case pointed out, in his opinion[8] the particular features of actions in the context of an insolvency to set a transaction aside show that jurisdiction for deciding such actions is rather *relatively* exclusive. It comes within the powers of the liquidator alone to bring the most appropriate actions in the course of the proceedings for the purposes of protecting the assets as a whole. The scope of the liquidator's power is consistent with the tasks he carries out during the insolvency proceedings, namely to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. In line with the strategic decisions which the liquidator must take, he/she shall have the right to *choose* between different jurisdictions when it comes to bringing actions to protect the interests of the creditors and to add assets to the insolvency estate.

> **THE SCOPE OF THE LIQUIDATOR'S POWER IS CONSISTENT WITH THE TASKS HE CARRIES OUT DURING THE INSOLVENCY PROCEEDINGS**

> IT IS VERY IMPORTANT THAT THE RULE OF JURISDICTION SHOULD NOT BE ABSOLUTE, BUT SHOULD DEPEND ON THE FACTUAL BACKGROUND OF EACH PARTICULAR CASE

Strong arguments in support of the aforesaid position could also be derived from the provision of Article 6 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the "**recast EIR**")[9], which now explicitly deals with the international jurisdiction for actions that are closely connected to insolvency proceedings. The interpretation of Article 6 of the recast EIR, leading to the conclusion of exclusive jurisdiction, should be rejected as this would limit the options of the insolvency practitioner unduly. At least, this could be the case where a particular avoidance action or another similar tool is not provided for by the law of the Member State which would have exclusive jurisdiction as per the CJEU's interpretation. In the latter case it would simply bar an equivalent action in the regular place where jurisdiction would otherwise exist.[10] The aim of both EIR 2000 and the recast EIR to improve the efficiency of insolvency proceedings could be hardly achieved if the insolvency practitioner is not in a position to choose which venue is best in a particular situation.[11]

Concluding remarks

While the CJEU Judgment brings some clarity with regard to the existing gap regarding the precise scope of international jurisdiction in both insolvency and civil/commercial matters, it also raises serious concerns about its further application by the national courts in terms of effectiveness.

Undoubtedly, concentrating different proceedings in one Member State may not always be in the interest of the creditors and the insolvency practitioner (as it seems at first glance) and does not necessarily facilitate the efficiency and acceleration of the insolvency proceedings, quite the contrary. This is why it is very important that the rule of jurisdiction should not be absolute, but should depend on the factual background of each particular case. Most importantly, as stated above, it should depend on the sole choice of the central figure in the administration of insolvency proceedings - the liquidator.

It is to be seen how such controversial judgment will be applied by the national courts on cross-border insolvency matters from now on, taking into account the missing answers to the more important and interesting questions of the referral. ■

Footnotes:

1 The Law Firm of Djingov, Gouginski, Kyutchukov & Velichkov represents the trustee of Wiemer & Trachte both before the CJEU and the Bulgarian courts of law

2 Judgment of 14 November 2018 under case C-296/17 *Wiemer & Trachte GmbH v Zhan Oved Tadzher* ECLI:EU:C:2018:902

3 OJ L 160/1, 30 June 2000

4 The original questions may be found here: https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2017.256.01.0014.01.ENG

5 ibid.

6 Judgment of 12 February 2009 under case C 339/07 *Christopher Seagon v Deko Marty Belgium NV* EU:C:2009:83

7 Judgment of 19 April 2012 under case C 213/10 *F Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"* EU:C:2012:215

8 Opinion of AG Ruiz-Jarabo Colomer, delivered on 16 October 2008 under the *Seagon* case, point 65, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-339/07

9 OJ L 141/19 June 2015

10 See Bork, *R.*, Van Zwieten, K., *Commentary on the European Insolvency Regulation,* (Oxford University Press, First Edition, 2016)

11 ibid. paras 6.37 - 6.38