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European Council Regulation of 29 May 2000 on Insolvency Proceedings - the First Year From a Swedish Perspective

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1. INTRODUCTION

On 31 May 2002 the European Council Regulation on Insolvency Proceedings ("the Regulation") came into force. The Regulation is legally binding for all countries of the European Union with the exception of Denmark. In addition, we now also have the Directive on reorganisation and winding up of insurance undertakings and the Directive on the reorganisation and winding up of credit institutions ("the Directives")[1]. The Directives have to be implemented in each member state on 20 April 2003 and 5 may 2003 respectively.

The Swedish Ministry of Justice published in 2002 a memorandum; "European Insolvency"[2] regarding inter alia the necessary adjustments under Swedish law due to the Regulation and the Directives. Parts of the proposed amendments are summarised in section 2.

In section 3 the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy signed in Copenhagen on 7 November 1933, is discussed in a few words, since the existence of two parallel legal instruments, both dealing with cross-boarder insolvency, might lead to complications, considering that Finland and Sweden are bound by the Regulation whilst Denmark, Island and Norway are not.

From a Swedish perspective the Regulation has been discussed in the legal literature as well as in the legal journals but has not, so far, resulted in any extensive legal problems being revealed. Further, the Regulation has, to our knowledge only led to one court case in a higher court which dealt with the problem of declaring an individual in bankruptcy, without the individual having a "centre of main interest" or an "establishment". The case is briefly described in section 4 below.

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[1] Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding up of insurance undertakings and Directive 2001/24/EC of the European Parliament and the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.
[2] DS 2002:59

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2. NECESSARY AMENDMENTS IN SWEDISH INSOLVENCY LAW

The Swedish Ministry of Justice published in 2002 a memorandum on the topic ”European Insolvency”[3] regarding inter alia the necessary adaptations under Swedish law due to the Regulation. The memorandum also deals with the actions of incorporation needed in view of the Directives.

The Swedish rules concerning International insolvency jurisdiction are based on analogies to the regulations on local jurisdiction of a court in the Swedish Code of Judicial Process. In short, this means that a Swedish bankruptcy can be initiated in Sweden if the debtor has its domicile/habitual residence or registered office in Sweden. A secondary bankruptcy can be initiated in a number of cases where the connection to Sweden is weaker than a requirement for domicile/habitual residence or registered office, for instance, the existence of assets in Sweden. By the Regulation coming into force, the Swedish existing rules concerning the local jurisdiction of the courts are not fully legally valid. The Regulation only gives jurisdiction to a Member State in two cases, if the debtor’s main interests are situated in the Member State or if the debtor possesses an establishment within the territory of a Member State, restricted to the assets of the debtor in the latter case. Thus, the Member State cannot base its jurisdiction in respect of an insolvency proceeding on other circumstances. Since the Regulation is legally binding in Sweden, no further ruling would be required. However, considering that the Regulation makes a distinction between main proceedings and secondary proceedings it is important that a court establishes under which of the two categories an insolvency proceeding classified. It has therefore been proposed to adopt an act under Swedish law as a supplement to the Regulation, and that such act should include i.a. a provision whereby the court in each case will have to state which of the two categories of insolvency proceedings the European jurisdiction is based upon. This obligation would also apply to the applicant of bankruptcy or reorganisation.

According to Art 21.1 of the Regulation the liquidator may request that notice of the judgment opening insolvency proceedings etc. is published in any other Member State in accordance with the publication procedures provided for in that State. In Art. 21.2 a Member State may require mandatory publication, provided that the debtor has an establishment in

such Member State. It is proposed that the Swedish Patent- and Registration Office publishes the opening of insolvency proceedings in accordance with the existing rules on publication of a Swedish bankruptcy, and that such publication becomes mandatory in a situation where the debtor has an establishment in Sweden and a main insolvency proceeding has been initiated in another Member State.

Further it has been proposed that the supplementary Act also includes a provision on mandatory registration in Sweden in accordance with Art. 22.2 of the Regulation.

In respect of the two Directives on the reorganisation and winding up of insurance undertakings and on the reorganisation and winding up of credit institutions, the content of the Directives corresponds to the Regulation in many respects. A great difference however is that the Directives do not make an exception from the universal principle, i.e. it is not possible to open a territorial insolvency proceeding. Thus, the administrative or judicial authorities in the home Member State are alone empowered to decide on the reorganisation or winding up measures. It is from a Swedish law perspective proposed that the two Directives are incorporated into one Act. It is also proposed that this Act is to come into force by the end of April 2003.

[3] DS 2002:59

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3. THE CONVENTION BETWEEN DENMARK, FINLAND, NORWAY, SWEDEN AND ICELAND ON BANKRUPTCY

On the 7 November 1933, the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy (the "Convention") was signed and was incorporated in Sweden in 1934 by the Act on bankruptcy which includes assets in Denmark, Finland, Iceland or Norway and by the Act on the consequences of a bankruptcy in Denmark, Finland, Iceland or Norway. The Convention text has been revised since then and in relation to Denmark, Finland and Norway, the "Act (1981:6) on bankruptcy which includes assets in another Nordic country" and also the "Act (1981:7) on the consequences/effect of a bankruptcy in another Nordic country"

Generally, the Convention is regarded as being a successful convention and has been considered to fulfil the need of handling bankruptcies covering more than one Nordic country.

In connection to the Regulation entered into force, there is a risk that the inter-Nordic bankruptcies could be more difficult to handle. In respect of the issues dealt with in the Regulation, these apply between Finland and Sweden, replacing the Convention. In respect of Denmark, Norway and Iceland, Art 44.3a of the Regulation states that the Regulation does not apply in any Member Sate, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from i.a the Convention. In respect of Denmark, it is not unlikely that Denmark in the end choose to join/enter into the Regulation, nor is it impossible that also Norway and Iceland, in the long run, would enter into the Regulation in its capacity as EEA-States.

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4. CASE-LAW

In October 2002 the Svea Court of Appeal dealt with an application for bankruptcy in respect of an individual. The applicant creditor claimed that there where several circumstances, such as certain assets, that proved that the debtor had his habitual residence in Sweden despite the fact that the debtor had stated that his home address was in Spain and that he, according to the Swedish Registrar's Office, was registered as emigrated to Spain. The Court of Appeal initially pointed out that according to the Regulation the debtor's centre of main interest must be within the European Union and states that the individual in this case must be considered to have its centre of main interest in either Spain or Sweden. The Court further considered that in order for a Swedish court to have jurisdiction to open insolvency proceedings, the individual must, according to Art. 3 of the Regulation have its centre of main interest or an establishment in Sweden. Since it was not clear whether the individual had its centre of main interest or an establishment in Sweden, the application was dismissed.

The above case possibly strengthens the theory that the requirements in the Regulation make it difficult to declare an individual, vagabonding in Europe and who cannot be proved to have a centre of main interest or an establishment in a certain Member State, in bankruptcy. This could result in i.a. individuals escaping liability for taxes and the risk of being declared bankrupt.

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5. PRACTICE

It still remains to be seen what impact the Regulation and the Directives will have on cross border insolvency within the EU but one interesting case, which clearly should have been far less complicated from a cross border insolvency perspective, should the Directives have been in force, is a bankruptcy case where, in May 2002, one of our colleagues at Setterwalls was appointed bankruptcy trustee in respect of an Insurance company, Folksam International (the largest Swedish bankruptcy ever) with its registered office in Sweden, and with its centre of main interests situated in Sweden but with a substantial branch in United Kingdom.

According to the Directive on the reorganisation and winding up of insurance undertakings, Art8.1, only the competent authorities of the home Member State (the Member State in which an insurance undertaking has been authorised) shall be entitled to make a decision concerning the opening of winding-up proceedings with regard to an insurance undertaking, including its branches in other Member States.

Due to the lack of any common rules regarding cross boarder insolvency, it was claimed, at least to a certain degree, that the Swedish bankruptcy proceedings should not cover the assets within the UK territory. The Swedish bankruptcy trustee on the other hand was of the opinion that this would be the case and that the Swedish bankruptcy would cover all assets, despite their location.

At present, the parties await the decision of the English Court.

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