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Cross-Border Cooperation and Communication: How to Comply with Data Protection Rules in Matters of Insolvency and Restructuring

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Synopsis

The topicality of the issue of data protection in the European insolvency context comes from two considerations. First, capital structures of companies in the 21st century will be starkly different from those of the past century. Once driven by hard assets, such as real estate, natural resources and machinery, modern businesses become highly dependent and valued on the basis of intangible assets, including data. It is a fact of life that the cross-border information flows have intensified, and these flows will keep expanding in the future, transcending national borders, most often electronically. Second, current European Insolvency Regulation (recast) strongly supports communication and cooperation in cross-border insolvency cases. It is accepted that efficient administration of the insolvency estate and the effective realisation of the total assets require balanced and coordinated approaches.

With the entrance of the General Data Protection Regulation into force in May 2018, data protection has become a crucial factor to take into account, by both courts, insolvency practitioners, Member States and the European Commission. Against this background, we look at how the current EU insolvency regime deals with the pervasive and challenging matter of data protection.

Introduction: insolvency and privacy

Restructuring businesses or liquidating them is a tough job, which confronts you with many, often opposite interests and challenging tasks. Is there any room for protection of personal and other sensitive data?

Indeed, there is. As a demonstration, a case of some 20 years ago, playing out in England. Mr. Jonathan Aitken has been a member of the Conservative Party

in the British Parliament for 24 years and a former junior cabinet minister under Prime Minister Margaret Thatcher. In 1999 he was found guilty of perjury and sentenced to an eighteen-month jail term. He purportedly paid large sums as legal fees to assist him in these criminal proceedings and also in a civil case against the satirical magazine *Private Eye*, which persistently called him a 'serial liar'.

At a certain moment Mr. Aitken's money was gone and he was declared bankrupt. Prior to his bankruptcy, he had made diary entries for many years, with details of conversations with colleagues from the UK Parliament and with third parties, including members of the royal family, as well as notes of conversations with his, what he called, 'spiritual advisor'. The estimated value of the diary was around GBP 100,000. Can the insolvency practitioner (IP) claim this large sum or does such an action conflict with the personal interests of the debtor? Can the IP simply sell the juicy diary via a public auction? The English court did not give Mr. Haig, the trustee in bankruptcy of Mr. Aitken, permission to sell the diary holding that this would amount to a gross invasion of privacy.¹

Yet, in another case, this time from Germany, the court decided in favour of creditors.² The case concerned a doctor of psychiatry, who went bankrupt and had claims for the unpaid fees against some of his clients. He, as an insolvent debtor, refused to forward the information about his clients/patients to the insolvency administrator, arguing that such information was privileged. While ordering the disclosure of the patients' records, the court explained that under certain conditions limited impairment of the patients' personal rights was acceptable. The need to disclose patients' data to the insolvency administrator took precedence over the patients' claim to privacy. According to the court, this followed from the primary interest of the

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- ¹ *Haig v Aitken* [2001] Ch. 110; [2000] W.L.R. 1117; [2000] 3 All E.R. 80; [2000] B.P.I.R. 462 Ch D. See Ian F. Fletcher, *The Law of Insolvency* (London: Sweet & Maxwell, 5th ed., 2017), sec. 7-016 and 8-004.
- ² BGH, 05.02.2009 – IX ZB 85/08.

insolvency creditors in the transparency of their debtor's income.³

Rules applicable to cross-border insolvency cases

The conclusion is that 'privacy' can have a role in restructuring and insolvency law. The next question is: what is the situation in cross-border cases?

In June 2017, the European Insolvency Regulation (Recast) (EIR 2015)⁴ entered into force. It is the successor of the original European Insolvency Regulation 2000 (EIR 2000), which became effective in 2002. The aim of the EIR 2015 is to enhance the effective administration of cross-border insolvency cases. For this reason, it has established a common regulatory framework for the benefit of all stakeholders, in particular by setting up general rules on the international insolvency jurisdiction, applicable law, enforcement of foreign insolvency judgments, etc. Compared to the EIR 2000, the EIR 2015 has expanded in scope to cover various pre-insolvency proceedings that promote rescue of economically viable but financially distressed businesses.

Additionally, the EIR 2015 mandated Member States to create publicly accessible electronic registers with information concerning insolvency proceedings. The regulation went even further by facilitating the establishment of interconnection of such insolvency registers via the European e-Justice Portal, which should operate as a one-stop entry point (platform) or an EU-wide insolvency search engine. Furthermore, the EIR 2015 amended the rules concerning provision of the information to creditors and lodgement of claims. It also introduced mutual duties for courts and insolvency practitioners with the aim of facilitating cross-border coordination and cooperation between multiple insolvency proceedings opened against the same debtor or several debtors comprising one group of companies. Another novelty has been the introduction of specific rules for data protection.

Data protection under EIR 2015

Indeed, the EIR 2015 is set in today's mode of technological progress and data protection. Chapter VI 'Data protection' (Articles 78-83) is, compared with the provisions of the EIR 2000 (now replaced), entirely new. It is a logical consequence of the increased number of rules related to communication between insolvency practitioners and courts within the EU and the introduction of a system of interconnected insolvency registers. It is a fact of life that the cross-border information flows have intensified, and these flows will keep growing in the future, transcending national borders, most often electronically.

In the recitals to the EIR 2015, the principles which form the foundation for the rules on data protection are explained. The regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, amongst others by promoting their provisions concerning the protection of personal data. Recital 84 adds: 'Directive 95/46/EC of the European Parliament and of the Council and Regulation (EC) No 45/2001 of the European Parliament and of the Council apply to the processing of personal data within the framework of this Regulation'.

The allocation in the EIR 2015 of a separate chapter on data protection indicates the heightened importance of this topic at the EU level. In the cross-border insolvency context, there are three main scenarios in which the issues involving personal data may arise:

1. in relation to the insolvent entity itself (e.g. employee database or a list of the entity's clients and customers) or the insolvent natural person;
2. in relation to court-to-court communication, its scope and procedure;
3. in relation to an IP's activities:
 - a) information contained in insolvency registers and (standard) notifications and claim forms submitted by the creditors. Many times, this information will cover the name, postal address, e-mail address and personal identification number (if any) of a creditor, which all may constitute personal data;
 - b) in case that (a part of) a business is sold and that such business (or a part of it) includes

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- 3 In July 2018, the German Supreme Court recognised inheritance rights over social network accounts (user agreements for digital social media accounts) (BGH, July 12, 2018, Docket No. III ZR 183/17). The case did not concern insolvency issues, but its relevance for insolvency practice is obvious. If the account on Facebook or Instagram (including pictures, posts, correspondence, which are all covered by privacy protection) can be the object of inheritance, it is not unthinkable to imagine that such an account (as an asset) can be included in the insolvency estate and sold during insolvency. As a reality check: some of these accounts have more than 10 million subscribers and are therefore valuable assets themselves, resulting in an interesting example of the clash between privacy and insolvency law principles.
- 4 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). For a detailed commentary, see B. Wessels, *International Insolvency Law Part II* (Deventer: Wolters Kluwer, 5th ed. 2017)

information regarding debtors of the insolvent debtor or data of subscribers or clients of an insolvent debtor, e.g. a private health-care clinic⁵, a children day-care centre⁶, a fitness centre, or a list of clients from a shop or an employment agency.⁷

Under the EIR 2015 and the General Data Protection Regulation (see below), IPs and their advisors should ensure they are well aware of the data protection obligations and identify, pre-appointment, the relevant compliance issues to be addressed. Courts that may be involved in an IP's actions (approval, assistance, general supervision, etc.) should equally be aware of the applicable data protection standards. Insolvency is indeed privacy sensitive.

Data protection and cross-border insolvency communication and cooperation

The system of the EIR 2015 allows for the opening of several parallel insolvency proceedings against the same debtor. In this context, Recital 48 rightly points out that the efficient administration of the insolvency estate and the effective realisation of the total assets require proper cooperation between the actors involved in all the concurrent proceedings. Proper cooperation implies the various IPs and the courts involved cooperating closely, in particular by exchanging a sufficient amount of information.

It must be noted that the EIR 2000 contained only one article mandating insolvency practitioners in main and secondary proceedings to communicate information to each other (Article 31 EIR 2000). In contrast, the EIR 2015 introduces a comprehensive framework for cooperation and communication between insolvency practitioners (Article 41 EIR 2015), between courts (Article 42 EIR 2015), and between insolvency practitioners and courts (Article 43 EIR 2015). This improved communication and cooperation framework shall make administration of parallel insolvency proceedings more efficient. Inevitably, it will also stimulate the cross-border exchange of information and raise

data protection concerns. In this respect, the EIR 2015 imposes an obligation on IPs and courts to comply with mandatory rules of each jurisdiction involved in communication, protect confidentiality of information and (for IPs) avoid any conflict of interest.

A recent report, produced by the working group of the Conference on European Restructuring and Insolvency Law (CERIL), concluded that some European jurisdictions have already introduced specific rules further realising the details, necessary for a smooth process in which to communicate or cooperate.⁸ The report states that, for example, in France the law requires an IP to inform the supervising judge (*juge commissaire*) of any requests for cooperation and communication he or she receives from an IP appointed in proceedings abroad. Additionally, communication of confidential information requires the permission from the supervising judge and notification of the public prosecutor. French law also obliges the IP to submit for the approval of a supervisory judge any agreement or protocol negotiated with IPs appointed in foreign insolvency proceedings. Similar court-supervised process for cross-border insolvency communication and cooperation prevails in Italy.⁹ In contrast, however, Finland, Germany and the Netherlands do not specify or overburden the obligations under Articles 41-44 EIR Recast.

The degree of court involvement and supervision over communication between IPs and IPs and foreign courts vary among EU jurisdictions. Even courts themselves have different approaches towards communication with foreign courts and IPs. The reasons for such divergence may come from different national (legal) traditions. For instance, the Irish constitutional principle that justice must be administered in public¹⁰ can make it considerably more difficult to engage in direct (without prior open court hearing involving affected parties) communication with courts in other Member States. To what extent this complies with the goal of enhanced cooperation, underpinning the EIR Recast, and whether additional requirements (read impediments) for communication and cooperation promote better data protection, remains unclear.

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- 5 As an example, in the first half of 2018, one of the largest private hospital firms in Germany, Paracelsus-Kliniken Deutschland, confirmed a successful sale to Swiss-based Porterhouse Health AG. Paracelsus-Kliniken initiated the self-administration as a result of financial concerns. The transfer of its 40 hospital facilities across 22 locations in Germany was unanimously agreed by the creditors committee and approved by the courts in April 2018.
- 6 In May 2018 the UK baby goods retailer Mothercare announced that its insolvency rescue package would include the closure of 50 stores across the country. In addition to the store closures, Mothercare enters a Company Voluntary Arrangement (CVA) as part of its recovery plan. The voting on the CVA took place in June 2018.
- 7 See, in Dutch, M.A.R. Martens, 'De verkoop van klantenbestanden door de curator' (2018) *Tijdschrift voor Insolventierecht* 2018/9.
- 8 CERIL Report 2018-1 on Insolvency Regulation (Recast) and National Procedural Rules, 4 June 2018, p. 13 <www.ceril.eu/uploads/files/20180604-ceril-report-2018-1-final-version.pdf>, 5 November 2018.
- 9 *Ibid.*
- 10 Article 34(1) of the Constitution of Ireland.

General Data Protection Regulation (GDPR)

At the moment of the EIR 2015 adoption (20 May 2015), there were two major European instruments dealing with issues of personal data protection, i.e. the Directive 95/46/EC (Data Protection Directive, DPD) and Regulation (EC) No. 45/2001. The former applies to the processing of personal data by a 'natural or a legal person, public authority, agency or any other body', while the latter has a narrower scope and applies to processing of personal data by the Community institutions and bodies. The EIR 2015 in its Chapter VI refers to both instruments, while providing clarifications in light of the (cross-border) insolvency context.

Three years after finalising the text and close to a year after coming into force of the EIR 2015, as from 25 May 2018, the General Data Protection Regulation (GDPR) (EU) 2016/679 has come into effect.¹¹ The GDPR repeals the Data Protection Directive with effect from 25 May 2018. Unlike the latter, which required transposition into national laws, the GDPR introduces a single set of mandatory rules and is directly applicable throughout the EU. By unifying rules on data protection, the GDPR should lead to more certainty and facilitate the free flow of personal data within the EU. While the Regulation (EC) No. 45/2001 stays in force, its application should be adapted to the principles and rules established in the GDPR and applied in its light (Recital 17 GDPR).

Repeal of Data Protection Directive and Transition Period

The GDPR does not leave any doubt that the Data Protection Directive is repealed.

First, the formal heading of the GDPR provides that it touches on its topic of: 'protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)'.

Second, Recital 171 GDPR, first line, could not be clearer: 'Directive 95/46/EC should be repealed by this Regulation'. It then contains a reference to the transition provision: 'Processing already under way on the date of application of this Regulation should be brought into conformity with this Regulation within the period of two years after which this Regulation enters into force. Where processing is based on consent pursuant to Directive 95/46/EC, it is not necessary for

the data subject to give his or her consent again if the manner in which the consent has been given is in line with the conditions of this Regulation, so as to allow the controller to continue such processing after the date of application of this Regulation. Commission decisions adopted and authorizations by supervisory authorities based on Directive 95/46/EC remain in force until amended, replaced or repealed'.

Third, Article 94 ('Repeal of Directive 95/46/EC') provides in section 1: 'Directive 95/46/EC is repealed with effect from 25 May 2018'. Article 94, section 2, then tries to merge the two sets of rules: 'References to the repealed Directive shall be construed as references to this Regulation. References to the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC shall be construed as references to the European Data Protection Board established by this Regulation'.¹²

Responsibilities of Member States

As follows from Article 94 GDPR, references to the Data Protection Directive in the EIR 2015 shall be understood as references to the GDPR. In principle, both instruments seek similar objectives in terms of data protection and should not contradict each other. Acting as *lex specialis*, the EIR 2015 adds insolvency-specific provisions, building on top of rather general rules of the GDPR. Leaving aside the different but somewhat overlapping scope of the EIR 2015 and the GDPR, now the 'who is doing what' question should be addressed. In practice the duties regarding processing of personal data will remain a topic of concern.

The responsibilities related to processing of personal data within the operation of the EIR 2015 are divided between Member States and the European Commission (EC). Article 79(1) EIR 2015 obliges Member States to communicate to the EC the name of the natural or legal person, public authority, agency or any other body designated by national law to exercise the functions of controller with a view to its publication on the European e-Justice Portal. Such a controller shall be responsible for processing of personal data in the national insolvency register. For example, national data controllers include the Federal Ministry of Justice in co-operation with the Federal Computing Centre (Austria), the Ministry of Justice (Estonia) and the Council for the Judiciary (the Netherlands).¹³ According to the

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11 For text of the General Data Protection Regulation, see <eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528874672298&uri=CELEX%3A32016R0679>, 5 November 2018. See also the official European Commission's Data Protection portal <ec.europa.eu/info/law/law-topic/data-protection_en>, 5 November 2018. For a general account of what IPs should be aware of pre-appointment or during their appointment, see <ion.icaew.com/insolvency/b/weblog/posts/the-gdpr---faqs-for-insolvency-practitioners>, 5 November 2018.

12 On this Working Party, see E. Inacio, 'GDPR: The moment of truth?' (2018) 72 *Eurofenix* 12.

13 The information on national data controllers presently contained on the e-Justice Portal is incomplete and has not been updated since 7 December 2017.

definition given in Article 4 GDPR, a controller is a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data. Both the DPD and GDPR impose a primary obligation related to data processing on data controllers. Therefore, ascertainability of a controller is important to ensure legal certainty and lawful and fair processing of personal data within the EIR 2015 framework.

In addition, Member States are required to adopt technical measures to ensure the security of personal data processed in their national insolvency registers (Article 79(2) EIR 2015). Such measures should protect against unauthorised or unlawful processing and against accidental loss, destruction or damage of personal data. Concrete ways of reaching this goal are left for Member States to work out. Among additional duties assigned to them is the supervision over data controllers to guarantee that data kept in the insolvency registers is accurate and up to date. They should also provide information to affected persons to enable them to exercise their rights, and especially the right to the erasure of data. The existence of the latter right is among the most notable achievements of the GDPR (Article 17 GDPR).¹⁴ However, this right is not absolute and as long as personal data are necessary in relation to the purposes for which they were collected or otherwise processed (e.g. as long as personal insolvency proceedings are ongoing and publicity of the insolvency process or the individual bankruptcy status is mandatory), personal data shall not be erased from the insolvency registers.

At the same time, in order to grant sufficient protection to information relating to individuals not exercising an independent business or professional activity, Member States can make access to that information subject to supplementary search criteria such as the debtor's personal identification number, address, date of birth or the district of the competent court, or to make access conditional upon a request to a competent authority or upon the verification of a legitimate interest (Recital 79, Article 27 EIR 2015).

Responsibilities of the European Commission

The European Commission (EC), itself being a data controller, is entrusted with a number of obligations in connection with the processing of personal data. Like any other controller, it shall define the necessary policies and apply the necessary technical solutions to fulfil its responsibilities within the scope of the function of the controller (Article 80(2) EIR 2015). In particular, the EC must implement technical solutions required to ensure the security of personal data while in transit, that is, in any transit to or from the e-Justice Portal (Article 80(3) EIR 2015).

Importantly, the EC does not maintain its own insolvency register. Instead, it supports the system composed of the national insolvency registers and the European e-Justice Portal, which serves as a central public electronic access point to information in the system (Article 25(1) EIR 2015). Precisely because of this framework, the EC does not store personal data related to data subjects. This data is stored in the national databases operated by the Member States (Article 83 EIR 2015). This only covers the data protection as far as it concerns registers. The separation of duties and responsibilities between Member States and the EC when it comes to personal data protection largely puts all risks on Member States, as they bear the ultimate responsibility for data processing (e.g. correctness of data and timely removal of data) in the insolvency registers.

Insolvency practitioners – Codes of conduct

Insolvency practitioners, when processing (collecting, recording, storing, using, disclosing or transmitting¹⁵) personal data and in particular special categories of personal data,¹⁶ should be acquainted with the GDPR and fully comply with it.¹⁷ Failure to do so may trigger large fines of up to EUR 20 million (Article 83(5) GDPR). Compliance with the rules and principles of data protection ensures processing that is lawful, fair and transparent, limited in purpose and scope,

Notes

- 14 Previously this issue has been dealt with by the CJEU in Case C-131/12, *Google Spain SL*, ECLI:EU:C:2014:317 (May 13, 2014), which essentially recognised this right to exist under the Directive 95/46/EC.
- 15 Transfer of personal data is addressed in Chapter V GDPR 'Transfers of personal data to third countries or international organisations' and is predicated on the adequacy decision and appropriate safeguards. In *Re Bernard L. Madoff Investment Securities LLC* [2009] EWHC 442 (Ch), the court authorised transfer of data by the joint liquidators of the UK-based subsidiary to the trustee in its US-based parent company. The court reasoned that such a transfer was necessary for the investigation of a large-scale and complex fraud, and thus was of substantial public interest pursuant to the Data Protection Act 1998.
- 16 See Article 9 GDPR. Special categories of personal data include, inter alia, data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, biometric data and data concerning health.
- 17 It remains somewhat unclear when and to what extent IPs act as 'data controllers' or 'data processors'. The court in *In the Matter of the Southern Pacific Personal Loans Limited* [2013] EWHC 2485 (Admin) concluded that liquidators may act as principals when undertaking actions in their own capacity and not on behalf of the company of which they are the liquidators. Under these conditions, liquidators are data controllers and shall bear the respective duties. However, when acting as agents for the company in liquidation, they do not acquire the status of a data controller, which remains with the company itself. We shall note that this principal/agent distinction is problematic and can lead to legal uncertainty, as the duties of liquidators and the different capacities in which they may act are inherently linked and mixed. For a useful overview of the major GDPR provisions as applied to the IPs' practice, see P. Elliot, 'Practical aspects of the General Data Protection Regulation

accurate, carried out for only as long as necessary, secure, confidential and accountable (Article 5 GDPR).

Recitals 167 and 168 GDPR confer specific powers on the EC to ensure uniform conditions for the implementation of the GDPR. Recital 167 suggests that in that context, the EC should consider specific measures for micro, small and medium-sized enterprises. Recital 168 provides that an examination procedure should be used for the adoption of implementing acts on standard contractual clauses between controllers and processors and between processors; codes of conduct; technical standards and mechanisms for certification; the adequate level of protection afforded by a third country, a territory or a specified sector within that third country, or an international organisation; standard protection clauses; formats and procedures for the exchange of information by electronic means between controllers, processors and supervisory authorities for binding corporate rules; mutual assistance; and arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the Board.

Related to this long list, Article 40 GDPR (with 11 subparagraphs) foresees the development of codes of conduct. The Member States, the supervisory authorities, the European Data Protection Board and the EC shall encourage 'the drawing up of codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of

the various processing sectors and the specific needs of micro, small and medium-sized enterprises'. Article 40(2) GDPR calls for associations and other bodies representing categories of controllers or processors. They may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of the GDPR. In essence, codes of conduct are similar to practical guides providing easily understandable interpretation of the abstract rules of the GDPR.

In the world of restructuring and insolvency, national associations of turnaround managers, IPs, accountants and insolvency lawyers, as well as representative bodies, such as INSOL Europe should step forward. Data protection is certainly worth the effort and will play even bigger role in the future, with the full functioning of national insolvency registers and the establishment of a centralised search engine via the European e-Justice portal in mid-2019.

Capital structures of companies in the 21st century will be starkly different from those of the past century. Once driven by hard assets, such as real estate, natural resources and machinery, modern businesses become highly dependent and valued on the basis of intangible assets – claims, licenses, know-how and goodwill.¹⁸ Increased value of data (e.g. customers' databases) in debtors' insolvency estates together with the expansive process of digitisation and data collection (big data) bring data protection issues to the forefront of legal and insolvency practice.¹⁹

Notes

for insolvency professionals' LexisNexis, <www.cubismlaw.com/media/1284/practical-aspects-of-the-gdpr.pdf>, 5 November 2018.

- 18 For similar tendencies in the USA and its impact on corporate bankruptcy rules, see B. Wessels and R.J. de Weijs (eds.), *International Contribution to the Reform of Chapter 11 U.S. Bankruptcy Code. European and International Insolvency Law Studies 2* (The Hague: Eleven International Publishing, 2015).
- 19 Regarding the question whether the GDPR is enforceable in the USA and whether, for instance, a debtor in possession (DIP) or a trustee, which are in possession of an EU's individual's personal data must comply with the US as well as the EU's privacy rules, see C.L. Simmons, 'Privacy Law Compliance in Bankruptcy: The EU's New GDPR' (2018) *American Bankruptcy Institute Journal*, October 2018, 18ff.

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