

# NEW RULES ON CROSS-BORDER INSOLVENCIES IN NORWAY

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## I. Introduction

The number of cross-border insolvencies has increased in Europe, so the EU adopted the European Cross-Border Insolvency Regulation (Reg. 1346/2000)<sup>1</sup> in 2000, which was recast in 2015 (Reg. 848/2015).<sup>2</sup> Reg. 1346/2000 does not apply

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<sup>1</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency proceedings.

<sup>2</sup> Regulation (EU) No 848/2015 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast).

in Norway, nor will Reg. 848/2015 once it is in full force within the EU.<sup>3</sup> The current rule on cross-border insolvency proceedings in Norway does not allow the recognition of foreign proceedings without an international agreement.<sup>4</sup>

On 1 April 2016, the Ministry of Justice and Public Security proposed new rules on cross-border insolvencies.<sup>5</sup> On 17 June 2016, the Parliament unanimously adopted the proposal. The date of entry into force of the new rule is yet to be determined.

The new rules amend the Norwegian Bankruptcy Act, Part 4, and concern matters arising from foreign and national cross-border insolvency proceedings. These matters include international jurisdiction, choice of law, and the recognition and enforcement of foreign insolvency proceedings.

The aim of this paper is not to provide readers with a complex analysis of the new rules but to give an overview of these rules and, to some extent, compare them to EU law.

## **II. Scope of the New Rules**

### **A. Introduction**

The new rules cover judicial collective insolvency proceedings. Most of these rules concern main proceedings as opposed to proceedings with a limited territorial scope (secondary bankruptcies). Such procedures will be briefly discussed in Section V below.

### **B. Personal Scope**

The new rules only cover insolvency proceedings for legal persons and exclude natural persons/consumers and one-man businesses/self-employed persons,<sup>6</sup> even if the same types of insolvency procedures apply to them as those to legal persons in

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<sup>3</sup> Norway is a part of the European Economic Area (EEA), so some EU laws are applicable in Norway. However, the EEA Agreement does not extend to judicial cooperation.

<sup>4</sup> Section 161 of (unamended) Bankruptcy Act No. 58/1984. In Rt. 2013, p. 556, the Norwegian Supreme Court rejected a plea to establish such rules without express legislative basis. However, Denmark, Finland, Norway, Sweden, and Iceland are governed by the Nordic Bankruptcy Convention of 1933, which provides for the recognition of Nordic bankruptcies, etc. The convention is referred to in Art. 85(1)(j) of Reg. 848/2015. Available translations of Norwegian legislation can be accessed at <http://app.uio.no/ub/ujur/oversatte-lover/english.shtml>.

<sup>5</sup> Prop. 88 L (2015-2016) Amendments to the Bankruptcy Act, etc. (Cross-Border Insolvencies).

<sup>6</sup> Section 163(1)(e) of the new rules.

the foreign country (as is the case in Norway). However, these proceedings are to be covered by another proposal that the Nordic States are currently developing.<sup>7</sup>

In addition, Section 163(2) of the new rules excludes insurance undertakings, credit institutions, investment firms, institutions and undertakings covered by Directive 2001/24/EC as amended as well as collective investment undertakings. This exception is in accordance with Art. 1(2) of Reg. 848/2015. Pension funds are also excluded.

### **C. Substantive Scope**

Section 163(1) of the new rules applies to foreign insolvency proceedings, such as bankruptcy, liquidation and winding-up proceedings, and compulsory or voluntary debt settlement (e.g., restructuring), which include all of the debtor's assets. Insolvency under Norwegian law does not include the debtor's inability to pay his debts as they fall due, unless the equity is negative.<sup>8</sup> Still, foreign proceedings are included even if they relate to debtors with a positive equity that are in financial difficulties.<sup>9</sup>

In the following, we will refer to bankruptcy proceedings for the sake of simplicity.

The requirement of "debtor's insolvency" excludes interim proceedings,<sup>10</sup> unlike Art. 1(1) of Reg. 848/2015.<sup>11</sup> Insolvency proceedings because of "non-insolvency" grounds are not recognized,<sup>12</sup> even if the liquidation proceeding is the same as if the debtor were insolvent. This limitation applies, for example, to liquidation under insolvency procedures due to failure to submit annual financial statements or annual reports to the authorities.<sup>13</sup>

The foreign main insolvency proceeding must be "collective" and include all of the debtor's creditors,<sup>14</sup> which means that individual actions that are commenced by one creditor only for his sole benefit (e.g., execution liens) will be precluded. The requirement of collective proceedings in the new rules differs from Art. 1(1) of Reg. 848/2015 in that it does not allow for debt settlements or reorganization proceedings if these only include "a significant part of a debtor's creditors."<sup>15</sup> Reviewing whether such a requirement is being fulfilled could be difficult

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<sup>7</sup> U.R. BANG-PEDERSEN, *Nordisk gjældssanering, TemaNord 2010:598* contains a proposal for a Nordic regulation of debt relief. An English summary is available at p. 41-42.

<sup>8</sup> Bankruptcy Act, Section 61.

<sup>9</sup> Prop. 88 L (2015-2016), p. 59, compare Reg. 848/2015 recital 17.

<sup>10</sup> In Prop. 88 L (2015-2016), p. 59, an emphasis that the proceeding must have been "opened" is made.

<sup>11</sup> See recitals 10 and 17 of Reg. 848/2015.

<sup>12</sup> Prop. 88 L (2015-2016), p. 59.

<sup>13</sup> Section 16-15(1)(4) of the Limited Companies Act No. 44/1997.

<sup>14</sup> Section 163(1)(b) of the new rules.

<sup>15</sup> Art. 2(1) and recital 14 of Reg. 848/2015.

because the term “significant part” is rather vague.<sup>16</sup> Moreover, this standard would be consistent with the all-inclusive collective insolvency procedures in Norway.<sup>17</sup> Hence, collectiveness makes a separate requirement redundant in Norway that the proceedings should be public.<sup>18</sup>

Furthermore, a requirement that the debtor must be “totally or partially divested of his assets”<sup>19</sup> exists, and this explains the requirement to “appoint an insolvency practitioner” in Section 163(1)(d). This measure causes the debtor to fully or partially lose the power of management that he has over his assets, and the insolvency practitioner will either administer or liquidate these assets. The new rules do not include debtor-in-possession proceedings, in which the debtor keeps control over his assets and proceedings that do not require the appointment of an insolvency practitioner.<sup>20</sup>

### III. International Jurisdiction

The new rules introduce a significant change in the area of international jurisdiction and embrace the concept of center of the debtor’s main interests (COMI) in accordance with Art. 3 of Reg. 848/2015. Main insolvency proceedings can only be opened in the COMI of the debtor.

Sections 161 and 163(1)(a) of the new rules implicitly refer to the European concept,<sup>21</sup> which recognizes that it has an autonomous meaning and must be interpreted in a uniform way.<sup>22</sup> This action will unify international jurisdiction between the new rules and Reg. 848/2015 to avoid parallel proceedings. Case law of the European Court of Justice will determine and develop the COMI for both Norwegian and foreign insolvency proceedings.<sup>23</sup>

However, Norwegian courts may examine the jurisdiction and deny recognition if the state of the opening proceedings does not have jurisdiction in accordance with Norwegian law (e.g., if proceedings have been wrongfully commenced in another state).<sup>24</sup> This scrutiny applies even if such proceedings are binding to the Member States of the EU under Reg. 848/2015. The recognition does not depend on the use of any formal procedure, such as an exequatur procedure, so the creditors or debtor would need to challenge the COMI in Norwegian courts with the

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<sup>16</sup> Prop. 88 L (2015-2016), p. 21.

<sup>17</sup> For instance, Sections 23, 30, and 55 of the Bankruptcy Act.

<sup>18</sup> See Art. 1(1) and recitals 12 and 13 of Reg. 848/2015.

<sup>19</sup> Section 163(1)(c) of the new rules.

<sup>20</sup> Likewise, Art. 1(1)(b) and recital 10 of Reg. 848/2015.

<sup>21</sup> Prop. 88 L (2015-2016), p. 30.

<sup>22</sup> ECJ, C-341/04, *Eurofood IFSC Ltd.*, ECR [2006] I-3813, para. 31.

<sup>23</sup> Sections 146 and 161 of the new rules.

<sup>24</sup> Prop. 88 L (2015-2016), p. 60.

burden of proof that the COMI is located in another state. The court may grant interim measures while examining the jurisdiction in the foreign state.<sup>25</sup>

## IV. Applicable Law

### A. Starting Points

*Lex fori concursus* governs the rights of the debtor and which assets are a part of the proceedings.<sup>26</sup> However, the effect of foreign insolvency proceedings in Norway is, to some extent, still determined by Norwegian law.<sup>27</sup>

To determine the relevant Norwegian rules if Norwegian law applies in relation to a foreign bankruptcy, one needs to find the Norwegian procedure equivalent to the foreign one. Only a limited number of variants exist. Norwegian bankruptcy proceedings are likely to be analogous to foreign bankruptcy proceedings, as well as to liquidations and winding-up proceedings. Foreign debt settlements and restructuring proceedings are analogous to the Norwegian “debt negotiation” procedure.<sup>28</sup>

### B. Property

Norwegian law will apply to legal perfection<sup>29</sup> and avoidance in bankruptcy<sup>30</sup> of property situated in Norway and property registered in a Norwegian register, even if the property is subject to a foreign bankruptcy. Seemingly, even a foreign-country-registered ship that happens to be in Norway cannot be seized by a foreign bankruptcy estate unless Norwegian law allows it.

Similarly, *lex rei sitae* applies to rights of stoppage *in transitu*,<sup>31</sup> mortgages, and liens. Norwegian law will apply if the property was situated in Norway at the time when the rights were invoked, unless a basis for avoidance in bankruptcy exists.<sup>32</sup> These rules are very much in line with EU law.<sup>33</sup>

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<sup>25</sup> Part VII of Dispute Act No. 90/2005.

<sup>26</sup> Section 164(1) of the new rules.

<sup>27</sup> *Ibid.*

<sup>28</sup> Prop. 88 L (2015-2016), p. 68.

<sup>29</sup> Section 164(2)(a) of the new rules, similar to Art. 11 of Reg. 848/2015 on immovable property and some specific rules on movable property.

<sup>30</sup> Section 164(2)(b) of the new rules, which differs significantly from Art. 16 of Reg. 848/2015.

<sup>31</sup> Chapter 7 of the Satisfaction of Claims Act No. 59/1984.

<sup>32</sup> Section 164(2)(c) of the new rules.

<sup>33</sup> Art. 8 of Reg. 848/2015.

An act of legal perfection is generally necessary under Norwegian law for a disposition to be protected against the bankruptcy of the debtor. The act of perfection depends on the type of disposition and the type of assets involved. Rights in property subject to registration will typically be perfected by registration at the latest at the day before the opening of the bankruptcy.<sup>34</sup> By contrast, rights in moveable property typically obtain perfection by delivery from the debtor any time before the opening of the bankruptcy.<sup>35</sup> Perfection is required for full and partial rights, such as ownership, a lien, or a mortgage, as well as easements.

However, all problems are not solved even if Norwegian law applies. For example, the time of perfection must precede the opening of the bankruptcy, but the commencement of foreign insolvency proceedings may not necessarily be known in Norway. Two rules can address this problem.

First, the problem may be that the debtor may enter into agreements and/or other arrangements with his creditors and third parties after having lost his authority. Under the new rules, a party in good faith can rely on the authority of the debtor, even with respect to the assets seized by the insolvency estate, if legal perfection is obtained no later than the day before the announcement of the foreign insolvency proceedings in Norway.<sup>36</sup> In domestic matters, third parties are not protected even before the announcement of the bankruptcy. However, in Art. 19 of Reg. 848/2015, a somewhat similar rule limited to registered property can be found.

Second, the problem may be the time that defines the period before the bankruptcy, in which dispositions may be more easily avoided than usual by the bankruptcy estate. In Norway, this period is typically the last three months before the filing for bankruptcy.<sup>37</sup> The new rules determine that the defining point should not be before the foreign bankruptcy has been announced in Norway.<sup>38</sup> Apparently, this applies even if foreign bankruptcy law applies (if a defining point is relevant at all under the applicable law).

The new rules disadvantage foreign proceedings because creditors could win the debtor's assets by individual actions even after the opening of the proceedings. This effect of the rules urges the insolvency practitioner to register and demand an announcement of the foreign proceeding without delay.<sup>39</sup>

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<sup>34</sup> See, for example, Section 23 of the Land Registration Act of 7 June 1935, No. 2, Section 6-11 of the Housing Cooperatives Act No. 39/2003, and Section 3-31 of the Aviation Act No. 101/1993.

<sup>35</sup> For example, Section 3-2 of Mortgage Act No. 2/1980.

<sup>36</sup> Section 164(1)(3)(a) of the new rules.

<sup>37</sup> Sections 1-1 to 1-3 of the Satisfaction of Claims Act.

<sup>38</sup> Section 164(1)(3) of the new rules.

<sup>39</sup> Section 172 of the new rules.

### **C. Debts**

The Norwegian rules on a creditor's right to set-off in bankruptcy are quite liberal. Still, no special choice of law rules that point to foreign law with regard to such set-offs exists.<sup>40</sup> Therefore, Norwegian law will be applied quite frequently.

Obviously, Norwegian law in this respect will apply in Norwegian bankruptcies. However, if the claim of the creditor demanding a set-off is considered to be in Norway, Norwegian rules apply.<sup>41</sup> Such is the case if action must be brought against the creditor in Norway<sup>42</sup> or the claim, otherwise, must be considered to be in Norway, for example, because the creditor has his COMI in Norway.<sup>43</sup> The *travaux préparatoires* even suggest that Norwegian insolvency law with respect to set-off should apply if action could have been brought in Norway, save for the creditor's foreign bankruptcy.<sup>44</sup>

In Norwegian law, the right to set-off in bankruptcy is limited if the debtor's estate decides to fulfil the debtor's unfulfilled current contracts, or if the related transactions are void in bankruptcy.<sup>45</sup> The choice of law rule is correspondingly limited.

Similarly, no special rule on the applicable law with respect to payment systems exists. The Regulation here points to the law of the payment systems.<sup>46</sup> However, the *travaux préparatoires* assume that this is the same choice of law that follows from the EU law implemented in this field.<sup>47</sup>

### **D. Employment Contracts**

The effects of foreign insolvency proceedings on employment contracts and employment relationships shall be governed solely by the law of the state as applicable to the contract of employment.<sup>48</sup> The Norwegian choice of law often reflects Rome I Regulation,<sup>49</sup> but not always.<sup>50</sup>

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<sup>40</sup> Compare Art. 9 of Reg. 848/2015.

<sup>41</sup> Section 164(1)(3) of the new rules, Prop. 88 L (2015-2016), p. 63.

<sup>42</sup> There could be a venue in Norway, for example, based on Section 4-4 of the Dispute Act or Section 1-9(1)(d) of the Enforcement of Claims Act of 26 June 1992, No. 86.

<sup>43</sup> Prop. 88 L (2015-2016), p. 63.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Art. 12 of Reg. 848/2015.

<sup>47</sup> Prop. 88 L (2015-2016), p. 63, referring to Section 4-3 of Payment Systems Act No. 99/1999 and Section 3 of Stock Exchange Act No. 74/2007.

<sup>48</sup> Section 169 of the new rules, which is in accordance with Art. 13(1) of Reg. 848/2015.

<sup>49</sup> Arts. 8 and 9 of Reg. (EC) No 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I); Prop. 88 L (2015-2016), p. 73-74.

### **E. Pending Lawsuits or Arbitral Proceedings**

Section 165 of the new rules is consistent with Art. 18 of Reg. 848/2015, such that foreign insolvency proceedings have the same effects on pending lawsuits or arbitral proceedings in Norway as the equivalent Norwegian procedures. Hence, foreign debt settlement, restructuring proceedings, and analogous proceedings will have no effect on pending cases. However, bankruptcy and analogous proceedings will have an effect on pending cases if “the estate of the claimant is declared bankrupt and the subject matter of the dispute forms part of the bankrupt estate”<sup>51</sup>; the action should then be stayed.

### **F. Honoring Obligations to the Debtor**

Norwegian law governs situations in which a person honors an obligation to the debtor instead of the insolvency practitioner.<sup>52</sup> The obligation is deemed to have been discharged if the person can prove that he did not know nor ought to have known that the insolvency proceedings had commenced.<sup>53</sup> This rule also applies to the submittal of a dismissal or a similar notice to the debtor in a case in which such a notice must be entered within a certain time. The provision differs from Art. 31(2) of Reg. 848/2015 but is accordance with Norwegian domestic bankruptcy law.

### **G. Powers of the Insolvency Practitioner**

The insolvency practitioner’s powers are not governed by *lex fori concursus* in the new rules.<sup>54</sup> As a main rule, the insolvency practitioner has the same powers in Norway as a Norwegian insolvency practitioner, and he will be able to administer, control, and liquidate the debtor’s assets.<sup>55</sup> Norwegian authorities may require a copy of the document affirming the appointment of the foreign insolvency practitioner.<sup>56</sup>

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<sup>50</sup> The Norwegian Supreme Court recently applied the law of the flag in an employment conflict (HR-2016-1251-A).

<sup>51</sup> Section 16-16(1)(c) of the Dispute Act.

<sup>52</sup> Section 166 of the new rules.

<sup>53</sup> Section 100 of the Bankruptcy Act.

<sup>54</sup> Sections 164 and 171 of the new rules.

<sup>55</sup> *Ibid.*

<sup>56</sup> Section 171(2). Similar rules can be found in Art. 22 of Reg. 848/2015 and Art. 15(2)(b) of the UNCITRAL Model Law.

## V. Recognition and Enforcement

The foreign insolvency proceedings defined in Section 163 of the new rules are recognized in Norway without the use of any formal procedure, such as an *exequatur*.<sup>57</sup> The same applies to particular decisions in the insolvency proceedings.<sup>58</sup> However, the choice of law rules may still give Norwegian law precedence.<sup>59</sup>

The new rules require that reciprocity should be ensured.<sup>60</sup> The reciprocity requirement is fulfilled if the foreign state recognizes the corresponding proceedings that are opened in Norway.

Recognition and enforcement may be denied if the effects of such a recognition or enforcement would be manifestly contrary to public policy.<sup>61</sup> Such limitations in recognition are in line with Art. 33 of Reg. 848/2015, but the Norwegian exception is wider.

## VI. Territorial Insolvency Proceedings

In addition to the main insolvency proceedings, a territorially limited proceeding may be opened. The idea is to facilitate and distribute the proceedings and, perhaps, to apply the local law to the best extent possible.

Territorial insolvency proceedings in Norway can be opened if insolvency proceedings cannot be opened where the debtor has his main center of interest (COMI) or if a Norwegian creditor of the debtor's commercial activity<sup>62</sup> in Norway requests it. As regards foreign companies registered in Norway, territorial insolvency proceedings can also be opened in Norway if a main insolvency procedure at the debtor's COMI exists, but only at the request of a Norwegian creditor of the debtor's commercial activity in Norway or the insolvency practitioner.<sup>63</sup> For such insolvency proceedings, ordinary Norwegian insolvency law applies.<sup>64</sup>

Territorial proceedings in Norway are limited to bankruptcy proceedings,<sup>65</sup> so the possibility of territorial debt settlements, as prescribed in Art. 3 of Reg. 848/2015, is excluded. Nevertheless, to ensure uniformity, the foreign insolvency

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<sup>57</sup> See Section II.C above.

<sup>58</sup> Section 167 of the new rules.

<sup>59</sup> See Section IV above.

<sup>60</sup> Section 163(1)(f) of the new rules.

<sup>61</sup> Section 170 of the new rules.

<sup>62</sup> What constitutes a relevant activity in this context is not necessarily the same as what constitutes a relevant activity when main insolvency proceedings are established, see Prop. 88 L (2015-2016), p. 56.

<sup>63</sup> Section 161 of the new rules.

<sup>64</sup> Section 162 of the new rules.

<sup>65</sup> This rule is the same as that in Art. 3(3) of Reg. 1346/2000.

practitioner may request that the Norwegian secondary proceedings should attempt compulsory debt settlement if this is the outcome of the main proceedings.<sup>66</sup>

Foreign territorially limited insolvency proceedings are recognized in Norway.<sup>67</sup> Thus, Norwegian main insolvency proceedings will not attempt to seize the property seized in the foreign proceedings.

Any creditor and insolvency practitioner shall have the right to lodge their claims in any Norwegian main or territorial insolvency proceeding.<sup>68</sup> The payments of dividends are coordinated.<sup>69</sup> Any surplus remaining assets in a Norwegian insolvency proceeding will be transferred to the foreign insolvency practitioner.<sup>70</sup> A duty of cooperation with foreign insolvency practitioners exists.<sup>71</sup>

## VII. Concluding Remarks

The new rules are mainly inspired by Reg. 1346/2000 and Reg. 848/2015 (and thereby the UNCITRAL Model Law on Cross-Border Insolvency), but they contain some important differences. Thus, Norwegian courts may rebut international jurisdiction if the COMI is not situated within the jurisdiction of the commencing state. Still, the effect of Reg. 848/2015 is significant in some fields, such as the jurisdiction rule to ensure harmonization and avoid parallel proceedings.

The applicability of the new rules is a compromise between Art. 1 of Reg. 1346/2000 and Art. 1 of Reg. 848/2015. As such, debt settlements and reorganization procedures are included, but they leave out some of the key features of Art. 1 of Reg. 848/2015 (e.g., interim proceedings). The reason is to preserve the consistency between national and international proceedings.

The Norwegian choice of law rules differ significantly from Reg. 1346/2000 and Reg. 848/2015: *lex fori concursus* mainly governs the powers of the debtor and which assets are a part of the insolvency proceedings. Norwegian law governs nearly all the other effects and questions relating to Norway, and the foreign insolvency proceeding will have the same effects as an equivalent Norwegian insolvency proceeding. This includes staying of individual procedures to avoid individual actions against the debtor's assets. Some of the choice of law rules in Arts. 8-18 of Reg. 848/2015 are reproduced in the new rules, but not all.

The recognition and enforcement rules mostly operate according to Reg. 848/2015, but the choice of law rules reduce the need for foreign decisions. After all, Norwegian courts will have jurisdiction in most of the cases.

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<sup>66</sup> Section 162(2)(3) of the new rules.

<sup>67</sup> Section 168 of the new rules.

<sup>68</sup> Section 174 of the new rules.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> Section 173 of the new rules.