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## Increasing efficiency in insolvency proceedings: The appointment of IPs

Frank Heemann considers legal tech in the public sector and asks, “what is the practical relevance of IT-based selection?”

The recently adopted Directive on restructuring and insolvency (the ‘Directive’) seems to indicate that IT might help running proceedings more efficiently. For example, in connection with the selection of practitioners, the Directive’s Recital 88 reads:

*“Member States should not be prevented from providing for a practitioner to be selected by other methods, such as random selection by a software programme, provided that it is ensured that in using those methods due consideration is given to the practitioner’s experience and expertise.”*

### Survey

In preparation of a panel at this June’s EECC conference in Slovenia the panellists<sup>1</sup> and I with the help of other insolvency professionals conducted a survey in order to get a picture of the practical relevance of IT based tools for the selection of IPs.<sup>2</sup> The survey spanned 18 jurisdictions, listed here:

|                |           |          |
|----------------|-----------|----------|
| Austria        | France    | Poland   |
| Belarus        | Germany   | Portugal |
| Bulgaria       | Hungary   | Russia   |
| Czech Republic | Italy     | Slovakia |
| England        | Latvia    | Spain    |
| Estonia        | Lithuania | Ukraine  |

### Questions

Insolvency professionals from these jurisdictions were asked to respond to the following three questions:

1. Does selection of IPs by software already exist in your jurisdiction?
2. If IT selection does exist – does it meet the criteria set in the Directive’s Recital 88?
3. If IT selection does not exist – are there any legislative initiatives to introduce it?

### Findings

Here are the findings from the responses to the survey’s questions and additional explanations:

- In 7<sup>3</sup> out of 18 polled jurisdictions, IT based selection of IPs already exists or is expected to be introduced shortly (see table opposite).<sup>4</sup>
- IT selection is most common in Central and Eastern Europe, Portugal being the notable exception in Western Europe.<sup>5</sup>
- All mechanisms but one use IT driven randomisers to select the IP for a particular case, thus certainly not meeting the requirements set out in Recital 88 of the Directive. Lithuania seems to be the only exception, where a more complex algorithm applying a number of selection categories and criteria attempts to match the most suitable IP for the particular debtor.<sup>6</sup> Even here, it is

disputable if the system would be in line with the Directive’s idea.

- The scope of application of the IT based selection varies considerably. While in some jurisdictions it is used for all proceedings,<sup>7</sup> in others IT selection is limited to particular types of proceedings.<sup>8</sup> In all relevant jurisdictions, judges are still charged to appoint by formal decision the IP selected by the system. Yet, jurisdictions vary with regard to the leeway the judge has for deviations from the IP that is proposed by the system. While in some jurisdictions, the IT-selected IP must be appointed save for very few exceptions,<sup>9</sup> in other jurisdictions, judges seem to have rather broad discretion to appoint an IP which they deem more suitable for the case than the IT-selected one.<sup>10</sup>
- In CEE jurisdictions, the overarching motive for introducing IT based selection of IP appears to be or at least have been the lack of trust – justified or not – of society in public institutions, including judges and the profession of IPs. The core motive in Portugal for the use IT, to achieve a more just distribution of cases among IPs, also plays a role in CEE, though significantly less pronounced.

### Conclusion

In conclusion the survey found that IT driven selection of IPs is not merely a theoretical topic or a fancy idea invented during the process of adoption of the

## IT based selection of IPs



Directive. Rather, IT driven selection has significant practical relevance, as ca. 40% of the polled jurisdictions already use or will in the near future use software solutions to select IPs. As the panel discussion at the EECC conference showed, this example of using legal tech in the public sector has the potential to trigger also in the future very intense and emotional discussions going to the core

of our legal system and the underlying foundations and ethical questions.

### Footnotes:

- 1 Kersti Kerstna-Vaks, Tartu Circuit Court (Estonia), Dmitry Konstantinov, Ilyashev & Partners (Russia), Hans-Georg Kantner, Kreditschutzverband von 1870 (Austria).
- 2 The survey with all contributors can be requested from the author at frank.heemann@bnt.eu
- 3 Hungary, Latvia, Lithuania, Portugal, Russia, Slovakia, Ukraine; in Belarus Parliament is debating a Bill that would introduce IT selection of IP.
- 4 In addition, it turned out, that some jurisdictions like Estonia use IT to allocate cases to insolvency judges. This related

topic was not further analyzed in the survey.

- 5 Hungary, Latvia, Lithuania, Russia, Slovakia, Ukraine, Belarus (Bill).
- 6 Cf also Heemann/Stonyts/Pikaly/Bodis 'IP Appointment Lottery: Experiences in Lithuania, Slovakia and Hungary with random IP selection systems', Eurofenix, Spring Edition 2018; Heemann/Gasparke 'Lottery and liability', Eurofenix 2015, Spring Edition.
- 7 E.g. Slovakia, Portugal; Belarus (bill).
- 8 E.g. Lithuania, Russia.
- 9 E.g. Lithuania.
- 10 E.g. Portugal.

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