Cross-border insolvency of groups of companies under the EU Regulation 2015/848

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I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.

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Abstract

This dissertation Thesis was written as part of the Master of Laws (LL.M.) in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

Having regard to the complicated nature and structure of multinational corporate groups, and the inherent difficulties entailed when it comes to their insolvency, the present Thesis aspires to offer as comprehensive as possible within the limits of a dissertation an analysis of the new legal framework concerning cross-border insolvency of groups of companies, as introduced by the European Regulation 2015/848 on insolvency proceedings (Recast).

The new provisions establishing the mechanisms of coordination and cooperation, and amending the determination of the ‘Centre Of Main Interests’ (COMI), constitute the core of the research. The ultimate purpose of this venture is to address and discuss the effects, feasibility and utility of the innovative, but also ‘conservative’, new regulatory provisions in the context of efficient debt-restructuring procedures. In addition, the implications on the interests of creditors and the legal concerns with regard to the forum shopping phenomenon are also considered.

Keywords: Insolvency, Groups of companies, Recast EIR, coordination, cooperation, COMI

Theodora Kostoula,
February 16th 2018
Preface

Intrigued by my keen interest in Commercial and in particular Insolvency Law, acknowledging its importance in ensuring the proper functioning of the EU market and taking into account the increase of complicatedly structured corporate forms, I decided to undertake a legal research investigating the challenges arising from the newly introduced European legal framework of cross-border insolvency of groups of companies.

The research work ending in the dissertation Thesis has been performed despite the difficulties encountered during the research process, due to the innovative nature of the new Regulation and the lack of similar regulatory frameworks within the European Union.

The contribution and support of a group of people who assisted me in conducting this Thesis must be acknowledged. First and foremost, I need to express my heartfelt appreciation to my supervisor, Professor Anna Veneziano, for her insightful comments, useful suggestions and her assistance in conducting and presenting a structured and satisfying result.

In addition, I would like to express my gratitude to the professors at the International Hellenic University, who provided me with the essential academic knowledge, and above all, to my mentors, Prof. Dr. Em. Athanasios Kaissis and Ass. Prof. Komninos Komnios, for their continuous support and guidance.

Last, but not least, a special debt of gratitude is devoted to my parents, my brother, my partner Matteo, as well as to my colleagues and my friends for their endless emotional encouragement in pursuing my goals, their invaluable help and the patience they demonstrated during my efforts.
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INTRODUCTION

Cross-border business activity constitutes a significant driving force on economic integration and market completion within the European Union, reflecting the continuing transnational expansion of trade and investment. Nevertheless, the insolvency of undertakings engaged in cross-border operations can inhibit the proper functioning of the internal market, especially when it comes to bigger structures, i.e. groups of companies, which operate in a larger area and to a higher volume.

Proliferation of multinational company groups carrying out cross-border activities, in combination with the global financial crisis and the subsequent rapid growth of insolvencies, brought new challenges to insolvency proceedings, and increased the need for legal protection of businesses going insolvent and of the interests of their creditors. Indeed, those insolvencies entail practical difficulties as they regard not mere individuals but various complex structures of corporate groups operating with multiple levels of companies on a transnational level and thus, they concern many areas of law and various different national legal systems that often claim international jurisdiction for the same debtor.

The need for harmonised rules at EU level with regard to cross-border insolvencies of groups of companies in the light of the strong presence of multinational corporate groups was acknowledged by the European legislators who recast the European legal regime by adopting the European Regulation 2015/848 on Insolvency Proceedings (Recast), as successor of the European Insolvency Regulation 1346/2000 (in the following, EIR).

The Recast Regulation made a significant leap towards the effective administration of insolvency proceedings of corporate groups and the establishment of legal certainty in the market economy by promoting cooperation and coordination of the relevant proceedings without deeming the group members as a single entity, but retaining their separate legal personality, as envisaged in insolvency law. In addition, having regard to
the increasing number of companies which have experienced failure of businesses after the economic crisis, it adopted a restructuring approach as a key objective by giving the debtor a ‘second chance’, while protecting creditors’ interests.

In light of the above, the present Thesis aims to provide a thorough analysis of the new European legal framework as shaped under the Recast EIR, by closely examining the feasibility and efficiency of its provisions concerning the management of cross-border insolvencies of multinational corporate groups, taking into due consideration its main aims; combat of forum shopping and preservation of viable commercial business.

 Accordingly, this Thesis will start by presenting in Chapter I the evolution of European Insolvency Law by setting the historical framework leading to the adoption of the Recast Regulation. The following step will entail the analysis of the main objectives and features of the Recast EIR, which reflect the gaps of the previous legal framework, and thus, justify the need for the introduction of the new Regulation.

In order to better understand the rationale for the establishment of the relevant framework on corporate group insolvencies, in Chapter II the Thesis will proceed with the presentation of the problematic situation of the insolvency of more than one companies belonging to the same corporate group. It will then continue with providing a definition and interpretation of the concept and legal status of the multinational groups of companies. An analysis of the re-shaped and clarified concept of the Centre of their main interests, as the connecting factor to determine international jurisdiction in cross-border insolvencies, will follow.

Further on, Chapter III will be dedicated to the provisions of the Recast EIR regarding the new mechanisms for the administration of the insolvency of groups of companies, namely the cooperation and coordination of the relevant proceedings. In particular, a detailed analysis of the cooperation and communication obligation as well as of the insolvency practitioners involved will be provided. The coordination procedure will be also analysed. Accordingly, the procedure of opening of the group coordination proceedings and the ‘opt-out and opt-in
mechanisms’ will be illustrated, while a determination and description of the role, tasks and powers of the coordinator will also be provided along with the presentation of the coordination plan.

The last chapter (IV) will be structured around a critical examination of the innovative but at the same time, as we will see, conservative provisions concerning the insolvency of corporate groups. Special focus will be put on the approach chosen by the EIR to establish mere coordination and avoid consolidation of the proceedings, the voluntary nature of the newly introduced mechanisms, and the potential abusive forum shopping situations, with implications on the interests of creditors.

In light of these issues, that are currently under examination by legal practitioners and academics, the main question arises as to whether the new cooperation and coordination procedures are designed properly, constitute a suitable and effective mechanism for the treatment of insolvencies of group members in the pursuit of the objectives set by the EU, and are in line with the ‘rescue-friendly’ culture. In this direction, a comparison between the two mechanisms is deemed to be useful. Accordingly, implications on the contribution of the Recast EIR to the enhancement of legal certainty, its practical efficiency and utility, and its response to the expectations, will constitute the backbone of this research.

As far as the methodological aspects of the research are concerned, it must be firstly pointed out that the innovative nature of the Recast Regulation entailed difficulties in the research process. Indeed, the Regulation was recently introduced and incorporated into the national legislations, and thus, has not brought new case law and practical examples to the surface which could offer guidance in determining the feasibility of the new provisions. Hence, a theoretical approach is adopted, involving a comparison and contrast of a wide variety of sources, including the examination of the relevant literature, the study of the relevant legislative sources, and the approaches already developed by the Court of Justice case-law.
CHAPTER I. LEGAL FRAMEWORK OF INSOLVENCY PROCEEDINGS IN THE EUROPEAN UNION

1. Historical Background: The path towards the adoption of the Recast European Insolvency Regulation

Within the internal market of the EU, founded on the principles of free movement, security and justice, internationalisation and harmonisation have been stimulated by eliminating obstacles to the functioning of the market, but also by actively promoting its development. Although the completion of the internal market was a goal already set in 1958 by the Treaty of Rome in terms of the common market\(^1\), harmonisation in the field of European insolvency legislation had been rather fruitless for decades. This notwithstanding the fact that the absence of harmonized rules on insolvency proceedings was viewed as a lack in the legal protection of persons and businesses, and thus the insolvency of undertakings was conceived as affecting the proper functioning of the internal market\(^2\).

The EU’s interest in insolvency matters is long-standing, with the initiative dating back to 1968 when the Brussels Convention was adopted towards harmonisation in the field of jurisdiction and recognition and enforcement of judgements. However, the European legislator deemed that insolvency law should be dealt with separately, through a separate legislative tool, due to inherent particularities of the cross-border insolvencies, and therefore insolvencies were excluded from the scope of the legislative texts\(^3\). In the meanwhile, the allocation of international jurisdiction in cross-

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\(^1\) Jean Noël and Jacques Lemontey, *Report on the Convention Relating to Bankruptcies - Composition and Analogous Procedures*’ (1970) 16.775/XIV/70-E (EU Commission Working Document), p. 8: “The intention of the Member States of the European Economic Community is to establish between themselves a genuine and vast internal market conforming to the rules of free competition. Everything must therefore be done not only to eliminate obstacles to the functioning of this market, but also promote its development.”

\(^2\) Ibid pp. 3, 8-9, 11.

\(^3\) Article 1(2) of the (Brussels) Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ 1972, L 299/32. See also Noël, Lemontey (n 1) p. 1, where it is stated that the 1970 Draft Bankruptcy Convention “supplements” the Brussels Convention, thus confirming both
border insolvencies was left to the regulatory scope of the national rules of private international laws, and the recognition of court judgements was highly dependent on the discretion of national courts, based on the ‘territorialism’ approach.

The need for harmonisation in the area of European insolvency law became more urgent when the cross-border activities started increasing in the 1980s, leading up to the 1987 Draft Liquidation Directive, the Draft EEC Bankruptcy Convention, and to the subsequent 1990 ‘Istanbul Convention on Certain Aspects of Bankruptcy’ with narrower scope - all eventually abandoned before ratification.

The long and conflicted effort on the creation of harmonised insolvency rules was intensified and led up to the 1995 Convention on Insolvency Proceedings, which was eventually not timely ratified. Gradually, the idea of a Convention was abandoned and the adoption of a Regulation was deemed more suitable. The 1995 Convention,

the non-applicability of the latter on insolvency/bankruptcy matters, and the effort of the EC legislators to create a separate legislative tool dealing with these issues.

4 The ‘territorialism’ approach is discussed further in Sub-chapter 2.

5 Draft Proposal for a Liquidation Directive [1987] DOC XV/43/87. Eventually it was not further developed and adopted as the national legal systems presented similarity on liquidation matters and thus, it was not considered essential.


9 It failed to acquire the necessary political consensus, as it was not ratified by the UK in the designated time due to political controversies. The delay lies on the refusal of the United Kingdom to sign it in time in protest against the European Commission’s deny to lift the embargo on British beef and cattle imposed during the mad cow disease threat, as well as on the distorted relations between the UK and Spain regarding the sovereignty over the territory of Gibraltar. See also Wessels Bob, ‘The European Union Regulation on Insolvency Proceedings (Recast): The First Commentaries’, (2016) European Company Law, vol. 13, no. 4, p.6.

10 See Resolution of the European Parliament on the Convention on Insolvency Proceedings of 23 November 1995, (n 8), calling the Commission ‘...to put forward a proposal for a directive or a regulation on bankruptcies involving companies which operate in several Member States...’.
though, to a large extent, was considered to be the main influence of the UNCITRAL Model Law\textsuperscript{11} and it constituted the basis of a new proposal\textsuperscript{12} which developed it into the EC Regulation 1346/2000 on insolvency proceedings\textsuperscript{13}.

The Regulation 2000, based on ex Articles 65 and 67 of the EC Treaty (Article 81 TFEU), entered into force in 2002 with general force on all Member-States\textsuperscript{14}, regulating intra-Community cross-border insolvency procedures. It constituted a revolutionary step, as it abandoned the negative term of ‘bankruptcy’. Besides, it set forth a recognisable legal framework for cross-border insolvency proceedings within the EU with the objective to maintain legal certainty and protect creditors’ rights.

The underlying rationale for the original Regulation was extensively analysed in the Virgós/Schmidt Report\textsuperscript{15} and reflected the need for harmonisation of conflict-of-law rules\textsuperscript{16} and the combat of forum shopping situations in cross-border insolvency within the EU\textsuperscript{17}. Its most important contribution was the provision of rules to determine the proper jurisdiction for the opening of insolvency proceedings\textsuperscript{18} by inserting the concept of ‘Centre of Main Interests’ as the connecting factor\textsuperscript{19}. The Regulation 2000


\textsuperscript{12} The new proposal, based on the initiative of Germany and Finland, contained an amended version of the 1995 Convention and developed the latter into the Regulation 1346/2000. For the similarities between the 1995 Convention and the EIR 2000, See Opinion of the Economic and Social Committee no. C75/01 of 2000, para. 1.1.

\textsuperscript{13} Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1. Hereinafter referred to as ‘Regulation 2000’, ‘original Regulation’ or ‘EIR 2000’. The Regulation 2000, arising out of the failed negotiations for a Bankruptcy Convention, was issued in 2000 and came into force on May 31, 2002 in all Member States. According its Recital (8), it constitutes a Community Law measure and as such it shall be binding and directly applicable in all Member States, except Denmark that opted out.

\textsuperscript{14} According its Recital (8), it constitutes a Community Law measure and as such it shall be binding and directly applicable in all Member States, except Denmark that opted out.


\textsuperscript{16} Council Regulation 1346/2000, Recital 23.

\textsuperscript{17} Ibid Recital 4.

\textsuperscript{18} Ibid Articles 1-15.

\textsuperscript{19} Ibid Recital 13. Hereinafter ‘Centre of Main Interests’ will be also referred to as ‘COMI’.
also established rules for the applicable law\textsuperscript{20}, the recognition of these proceedings\textsuperscript{21}, cooperation between the relevant jurisdictions\textsuperscript{22}, and the role of the liquidator\textsuperscript{23}.

Additionally, the Regulation adopted a combined method, the so-called ‘modified universalism’\textsuperscript{24}, being in principle within the sphere of ‘universalism’ approach\textsuperscript{25} by introducing main insolvency proceedings\textsuperscript{26} with universal effect and centralised administration upon all debtor’s assets and creditors. At the same time it permitted parallel secondary proceedings which cover only the portion of assets located in the specific jurisdiction\textsuperscript{27}, thus retaining elements of the principle of ‘territoriality’\textsuperscript{28}, necessary to protect specific local interests.

However, despite its noble intentions, the Regulation 2000 did not resolve all the crucial issues\textsuperscript{29}. On the contrary, it was intended as a short term political compromise,

\begin{footnotes}
\item[21] Ibid Articles 16-26.
\item[22] Ibid Articles 39 - 42.
\item[23] Ibid Article 18.
\item[25] According to Recital (11) of the Regulation 2000, due to the significant disparities existing in EU substantive laws, the adoption of a pure universalist approach would not be practical due to the difficulties in the efficient management of insolvencies having cross-border effects. The universal model envisages the existence of a single bankruptcy (insolvency) forum which, in the course of unified proceedings, would apply a single bankruptcy law of universal scope, and would include the totality of the debtor’s worldwide assets in one insolvency proceeding. See also Irit Mevorach, ‘Cross-border insolvency of enterprise groups: The choice of law challenge’ (2014) Brooklyn Journal of Corporate, Financial & Commercial Law, vol. 9, p. 108; Neil Hannan, Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law (2017) Springer, p.2.
\item[26] Council Regulation 1346/2000, Article 3 (1).
\item[27] Ibid Articles 3 (2) and 34-38.
\item[28] According to the default and traditional rule of national sovereignty, reflecting the insolvency framework prior to the adoption of the Regulation 2000, transnational bankruptcies were governed by the principle of territoriality, meaning that every Member State had exclusive jurisdiction over the portion of the insolvent debtor’s assets and creditors located within their territory. Hence, under the so-called ‘territorialism’ approach, insolvency proceedings often involved multiple fora and several bankruptcy laws, applying simultaneously upon a single debtor, thus, creating problems in cases of multinational corporations. See Hannan (n 25) p.3.
\item[29] During the period of the studies for the 10-year anniversary and the conduct of a report for the effectiveness of the Regulation 2000, 13 of the 26 participating Member States considered that overall, the original Regulation was efficient and effective, two Member States were unsure, and 11 considered that it was not. See Samantha Bewick, ‘The EU Insolvency Regulation, Revisited’ (Winter 2015) International Insolvency Review, Vol. 24, p. 173.
\end{footnotes}
which was supposed to be reviewed ten years after its operation in order to determine its feasibility considering its internal deficiencies deriving from its restraint scope and the ‘liquidation’ approach\(^{30}\), as well as the serious reservations expressed during the approval process\(^{31}\). Besides, it was reflecting different needs and interests responding to a different historical and economic context. More specifically, it was oriented to address the issues of a world which was different commercially, technologically and legally, before the increase of cross border activity and complex structures of corporate groups involved in mega bankruptcies; at a time when insolvency proceedings were mainly oriented, in most legal systems, to simple liquidations, not restructuring\(^{32}\).

Especially, the notion of the COMI was left vague leaving room for abusive relocation and forum shopping\(^{33}\), while no special provisions for groups of companies were included\(^{34}\), making cross-border insolvency proceedings problematic for such companies in the EU\(^{35}\). Moreover, it lacked an effective mechanism for transparency and creditor participation.

Under the need of effective harmonization of procedural insolvency law, in 2012 the European Commission submitted proposals for the amendment of the Regulation 2000\(^{36}\). Following extensive tripartite discussions between European Commission, European Parliament and Council\(^{37}\), the Regulation (EU) 2015/848 on insolven
cy

\(^{30}\) Under the original Regulation the sole purpose of insolvency proceedings was liquidation, as its scope extended only to collective insolvency proceedings entailing the divestment of the debtor. See Recital (10) and Article 1(1) of the Regulation 2000.


\(^{32}\) Ibid p. 11.


\(^{37}\) The European Commission originally proposed an amendment to the existing Regulation, but the changes proposed by the Council proved too complicated to implement through an amendment format, which led to the adoption of a recast version of the Regulation 2000 in a form of a new Regulation.
proceedings was adopted on 26 June 2015, with direct effect on Member States applying to insolvency proceedings opened after 26 June 2017. The EIR is an update and an enhancement of EU rules on cross-border insolvency procedures, as a successor of the Regulation 2000, and as part of the 2020 EU Strategy on economic growth, constituting the new legally binding instrument, directly applicable to all Member States, regulating insolvency proceedings of cases where the debtor has assets or creditors in more than one Member States.

2. Scope and objective of the Recast Insolvency Regulation

The Recast Regulation does not entirely alter the insolvency landscape, but it reshapes it by expanding and clarifying some provisions of the Regulation 2000, while introducing a number of substantially innovative rules.

Its importance lies especially in the fact that its provisions are more in line with the current market’s needs and priorities of national insolvency laws. In concrete terms, it enhances legal certainty and reorganization by shifting away from the traditional ‘liquidation’ approach to an ‘economic rescue approach’, which is now prevailing in national insolvency reforms. It embraces and promotes a rescue-friendly culture towards a restructuring approach by giving the debtor a ‘second chance’, without disfavouring creditors’ claim. This approach is reflected in the adoption of a neutral

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38 Regulation 2015/848 of 20 May 2015 of the European Parliament and of the Council on insolvency proceedings (recast), OJ 2015 L 141/19. Hereinafter also referred to as ‘Recast Regulation’, ‘Recast EIR’ or merely ‘Regulation’ or ‘EIR’. The new Regulation the will be subject to a full review after 10 years of applicability (i.e. 2027) and then every 5 years after that. The application of the group coordination sections will be reviewed after 5 years (2022), and proposals for amendments may be considered then.


40 Denmark opted out again.


vocabulary which limits references to liquidation; for instance, secondary proceedings are no longer conceived merely as ‘liquidating proceedings’ while the term ‘liquidator’ is replaced by ‘insolvency practitioner’\(^{43}\).

A number of changes are intended to contribute to the overall objective of the Regulation, in particular: enhanced cooperation between proceedings opened in several Member States\(^{44}\), mechanisms to minimise the need to open secondary proceedings\(^{45}\), the establishment of national insolvency registers to promote transparency and publicity of the proceedings\(^{46}\), and the new framework for the management and administration of multiple insolvency proceedings relating to a group of companies, with the aim to achieve coordinated proceedings and thus, more possibilities for group rescue\(^{47}\).

Another, more traditional key objective of the recast EIR is to prevent fraudulent or abusive forum shopping\(^{48}\), by establishing the \textit{lex concursus} as the conflict rule\(^{49}\), though with a number of exceptions\(^{50}\). Further developments include greater legal certainty regarding the method of determination of the business’s ‘centre of main interests’ in order to prevent malpractices and abusive forum-shopping in respect with the rules on jurisdiction, recognition and applicable law.

\(^{43}\) Regulation (EU) 2015/848, Article 2(5), wherein the relevant definition of insolvency practitioner is provided, in contrast to Council Regulation (EC) 1346/2000, Article 2 (b). Hereinafter insolvency practitioners are also referred to as “IPs” in brief.

\(^{44}\) Regulation (EU) 2015/848, Recitals 48-50, Articles 41-43.

\(^{45}\) This is achieved by enabling any decision to postpone or refuse the opening of secondary proceedings to be challenged by local creditors. See Recitals 23-24, 41-43, 45, 48 – 50 of the Recast Regulation.

\(^{46}\) The national insolvency registers are supposed to be interconnected via the e-Justice portal. See Article 24 of the Recast Regulation. The establishment of national insolvency registers will not come into force until 26 June 2018, with the requirement for an EU interconnected register by 26 June 2019.


\(^{48}\) Regulation (EU) 2015/848, Recital 5.

\(^{49}\) Ibid Recital 66: “The law applicable to both main and territorial insolvency proceedings and their effects shall be, unless otherwise stated in the Regulation, the law of the Member State in which such proceedings have been opened”.

\(^{50}\) To ensure legal certainty of transactions in States other than where the proceedings have been opened, the Regulation provides for exceptions from the main principle of \textit{lex concursus}, addressed in Articles 8-18.
In addition, the decision of the Court of Justice\textsuperscript{51} in \textit{Gourdain}\textsuperscript{52}, later confirmed in \textit{DekoMarty}\textsuperscript{53}, has now been codified\textsuperscript{54}, thus providing courts that have international jurisdiction to open insolvency proceedings, also with jurisdiction for actions or disputes deriving directly from the insolvency proceedings, such as avoidance actions. An important improvement in line with the ‘second-chance approach’ constitutes the wider, \textit{ratione materie}, scope of the Recast EIR, applying more categories of insolvency proceedings\textsuperscript{55} as it is not limited to purely established insolvency, but covers ‘hybrid/debtor-in-possession’ proceedings, ‘pre-insolvency restructuring’ proceedings, and proceedings granting debt-relief or debt adjustment\textsuperscript{56}. Thus, the Regulation becomes applicable to collective judicial or administrative proceedings, including interim proceedings\textsuperscript{57}.

It must be further noted that also the EIR, like its predecessor, opted for the ‘modified universalism’. Moreover, it provides for rules to be used to determine which substantive provisions of insolvency law would govern proceedings\textsuperscript{58}, thus avoiding harmonising substantive insolvency law. Such harmonisation would require the harmonisation of some or all aspects of other laws relating to the provision of lending and credit, especially corporate law, trust law, and property law. Therefore, it preserved (and expanded) the exceptions laid down in the original Regulation, according to which, all matters arising within the insolvency were to be dealt with under the law applicable in the Member State in which the main proceedings were opened\textsuperscript{59}.

\textsuperscript{51} Formerly European Court of Justice (ECJ), since 2009 renamed to the Court of Justice of the European Union (CJEU).
\textsuperscript{52} Case C-133/78, \textit{Henri Gourdain v Franz Nadler} [1979] ECR 1979, para. 4.
\textsuperscript{53} Case C-339/07, \textit{Christopher Seagon v Deko Marty Belgium NV} [2009] I-00767, para. 21.
\textsuperscript{54} Regulation (EU) 2015/848, Article 6.
\textsuperscript{55} Ibid Recital 10.
\textsuperscript{56} Ibid Article 1(1); See also Gerard McCormack, ‘\textit{Something Old, Something New: Recasting the European Insolvency Regulation}’ (1 March 2016) Modern Law Review, vol. 79, issue 2, pp. 121–146.
\textsuperscript{57} Ibid Recital 15. These proceedings are based on a law relating to insolvency and in which, for the purpose of avoidance of liquidation, adjustment of debt, reorganisation or liquidation, the debtor is totally or partially divested of his assets; instead, an insolvency representative is appointed, or the assets and affairs of the debtor are subject to control or supervision by a court.
\textsuperscript{58} Bewick (n 29), p. 173.
\textsuperscript{59} Regulation (EU) 2015/848, Article 7.
CHAPTER II. CROSS-BORDER INSOLVENCY OF MEMBERS OF GROUPS OF COMPANIES

For a proper analysis and understanding of the new framework on cross-border insolvency of groups of companies, it is vital to provide some background information relating to the context of the term ‘group of companies’, and the inherent difficulties especially when it comes to the insolvency of members of company groups belonging to different Member States. In addition, it is necessary to investigate the approach adopted by the new Regulation to reduce the abusive forum shopping phenomenon by resolving jurisdiction problems in such insolvency proceedings arising from the ‘cross-border’ element and the complex structure of the groups of companies.

The new provisions are directed towards the efficient administration and management of insolvency proceedings involving different members of a group of companies, in accordance with the main objective of the Regulation to achieve the rescue of the corporate group as a whole and facilitate its debt recovery.\(^{60}\)

1. **Determination of the concept and legal status of ‘groups of companies’**

Despite the lack of a common definition in the literature, it has been generally accepted that the notion of ‘group companies’ - also referred to as an ‘enterprise or corporate group’ - includes a set of legally autonomous companies which operate business under common entrepreneurial or financial control\(^ {62}\) and pursue common

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\(^61\) Hereinafter also referred to as ‘GoCs’.

purposes\textsuperscript{63}. This term covers different forms of economic organisations that come in various sizes, different legal and operational structures, and different degrees of complexity and integration\textsuperscript{64}, thus requiring special legislative treatment that could properly accommodate the diverse types\textsuperscript{65}. This kind of structure may operate across multiple jurisdictions through the ownership or control of a bundle of linked undertakings in multiple jurisdictions, thus constituting ‘multinational enterprise group’\textsuperscript{66}, subject to diverse national laws\textsuperscript{67}.

The Recast Regulation fills the gap of its predecessor and provides for a concrete definition for the GoCs, by determining them as a number of companies consisting of parent and subsidiary companies\textsuperscript{68}, in the sense that the latter is being controlled (directly or indirectly) by the first, and each undertaking (both parent and subsidiaries) is a ‘member’ of the group\textsuperscript{69}. An undertaking that prepares consolidated financial statements in accordance with the EU Accounting Directive (2013/34/EU) is deemed to be a parent undertaking\textsuperscript{70}. With this new definition referring only to parent and

\begin{footnotesize}

\textsuperscript{64} In contrast to the notion of ‘group of companies’, the term of a ‘single company’ refers to enterprises operating \textit{per se}, without incorporating separate legal entitles; See Irit Mevorach, Insolvency within Multinational Enterprise Groups (2009) Oxford University Press, p. 10; Peter Muchlinski, Multinational Enterprise and the Law (2007) Oxford University Press (2nd edn) p. 6.


\textsuperscript{68} Regulation (EU) 2015/848, Article 2 Para. 13.

\textsuperscript{69} Similar is the definition provided by the UNCITRAL Legislative Guide on Insolvency Law Part Three (n 65), p. 15; Bob Wessels, ‘The EU Regulation on Insolvency proceedings (Recast); The first commentaries’ (April 2016) European Company Law, vol. 13, no. 4, pp. 129-135.

\textsuperscript{70} Regulation (EU) 2015/848, Article 2 Para. 14. This may allow for a broader (mis)interpretation considering the broad, \textit{ratione materie}, scope of Article 22 (7) of the EU Accounting Directive (n 66), which states that Member States may require undertakings, which are managed on a unified basis or
\end{footnotesize}
subsidiary companies, the Recast Regulation limits the applicability of the provisions of Articles 56-77 concerning groups of companies to the ‘vertically integrated groups’, excluding ‘horizontally integrated groups’ groups that are made up by companies on the same level\textsuperscript{71}.

Corporate groups constitute the most commonly encountered business structure – preferred usually for strategic reasons or due to the benefits of managing the risks by limiting the group’s liabilities for subsidiaries’ debts\textsuperscript{72}. The latter derives from the doctrine of separate legal personality\textsuperscript{73}, meaning that each member belonging to a group maintains its distinct legal personality and is subject to its own jurisdiction\textsuperscript{74}, separately from its managers and shareholders. The separability principle constitutes the main approach that the new Regulation supports - in line with the \textit{Eurofood} case findings of the CJEU-\textsuperscript{2}, and it aims at providing legal certainty in business, in the sense that the rights and obligations of all parties involved need to be clear, predictable and stable\textsuperscript{75}.

Nevertheless, despite the maintenance of separate legal identities within an enterprise group, its components, function and management are often interlinked\textsuperscript{76}, while dominant influence especially of the parent company over the subsidiary is usually apparent\textsuperscript{77}. This is mainly the form of ‘equity-based’ multinational enterprises,

\footnotesize{have a common administrative, managerial or supervisory body, to draw up consolidated financial statements. See Max Planck Institute, ‘The Implementation of the New Insolvency Regulation: Recommendations and Guidelines’ (2013) JUST/2013/JCIV/AG/4679, p. 109.


\textsuperscript{73} The separate legal personality doctrine was established in the English case Salomon v. Salomon & Co. Ltd. [1897] AC 22 (HL) 30).

\textsuperscript{74} Case C-341/04 (2006), Eurofood IFSC Ltd. ECR 2006 I-3813, para. 30.

\textsuperscript{75} Gopalan and Guihot (n 67), p. 449.


meaning a corporate group having ownership structure\textsuperscript{78}, with the typical example of an integrated business being carried out by a company group, where the member companies have divided certain tasks between themselves\textsuperscript{79}. The other basic type of the corporate groups is the ‘contractual-based’ form which entails contractual (looser) links between companies\textsuperscript{80}, involving joint ventures and special control rights\textsuperscript{81}.

2. An outline of the problem

A problem arises when a multinational corporation, partly or wholly, goes into insolvency\textsuperscript{82}, as the process is more complicated, expensive and uncertain, in comparison to insolvency of individual entities. Indeed, the assets and creditors of multinational corporate groups are dispersed across different jurisdictions\textsuperscript{83}, and, consequently, and it is difficult to determine the applicable insolvency law\textsuperscript{84}. Also, the related entities have separate legal status, with a separate body of shareholders, diverse creditors, and (usually) separate assets\textsuperscript{85}. Besides, insolvency of a related corporate entity usually means that the whole group is facing financial difficulties, and thus, the fact that insolvency has historically been conducted on an individual legal


\textsuperscript{79} The simplest and most commonly encountered example is the one of a parent company producing goods, while subsidiaries located in different Member States are distributing these goods. See e.g. Rover case, High Court of Justice Birmingham [30.3.2006] NZI 2006, p.416, annotated by Mankowski.

\textsuperscript{80} Such structures can be achieved in various ways, for instance via the establishment of distribution franchise alliances, or by licensing production rights as part of a production franchise package. See Mevorach, ‘The “Home Country” of a Multinational Enterprise Group Facing Insolvency’, pp. 429-430.


\textsuperscript{82} The term ‘Insolvency’ derives from the term ‘insolvent’. An individual/company becomes insolvent when it can no longer meet its financial obligations with its lender(s) and debts become due. Thus, insolvency is the state of inability to pay the debts or where the outstanding liabilities of the company exceed the assets’ measurable value. Insolvency is often referred to as ‘bankruptcy’, although the latter is currently being avoided as the ‘rescue-company’ approach is preferred. See Ian Fletcher, 'Insolvency Law in Private International Law' (2005) Oxford University Press (2nd edn), pp. 1-4.


entity basis, without treating corporate groups as a whole may increase the possibility of a domino effect within the group.

In addition, as soon as insolvency proceedings are opened against a company member of the group, the existing organizational and managerial framework of the corporation seizes to function and the business is undertaken by the liquidator. Thus, insolvency law reduces significantly the influence of the management in the company. Usually the liquidator has to follow the separate national insolvency law rules which might be detrimental to the functioning of the business as a whole and might not serve the interests of all member companies, especially when not all of them necessarily need to become insolvent. Such scenarios constitute an obvious impediment to the effective liquidation or successful restructuring of the business as a whole, especially in transnational cases.

It must be taken into account also the fact that groups of companies come in all shapes and sizes, even with different shareholders involved in different levels of the group of companies to achieve economic or geographical advantages. Problems are, though, created when it comes to structures more complicated than that of a fully integrated business in the form of the ‘parent-subsidiary’, e.g. when involving intermediary companies, sometimes not operative but constituting mere investment vehicles serving economic or administrative purposes.

Such complex situations require a special treatment which not all the national insolvency laws had developed until the adoption of the new Regulation, and at least not with a similar approach. This disparity (or often absence) of rules treating GoCs

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87 In this context, a scenario would be, for example, when the parent company wants to stay in the market of the subsidiary, but the liquidator must shut down the latter, following its obligations under insolvency law, or when only the parent or an intermediary company becomes insolvent, or when the whole group needs to become insolvent but without a coordinated proceeding it might be harmful for the interests of creditors, the employees etc.
88 The ‘Heidelberg-Vienna Report’ (n 77), p. 222.
90 The ‘Heidelberg-Vienna Report’ (n 77), p. 225. The significant detrimental omission of the original EIR not to take into account the status as a member of a group of companies was the result of the absence
and the separate legal personality doctrine, along with practical problems and the fear for potential damage to creditors, employers and shareholders, prevented legislators from reaching a consensus and follow a comprehensive approach to provide for a coherent set of rules dealing with insolvency of group of companies per se. However, the absence of such rules generated an expanding body of case law, along with the market practice, with special focus on the highly disputable issue of how to ascertain the so called ‘Centre of main interests’ in the case of cross-border group insolvencies.

3. Specifying the concept of COMI of the groups of companies

In both the Recast and the original Regulation international jurisdiction for the opening of insolvency proceedings is linked to “the focal point of the debtor’s core activity”. This refers to the location with which the debtor has a real connection, as addressed in Article 3(1) Recast EIR with the English term ‘centre of main interests’, the concept of which, as the ‘connecting factor’ establishing a Member State’s international jurisdiction, has an autonomous meaning and is to be interpreted uniformly, independently of national rules of the Member States.

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91 European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)).
92 Case law was developed on both national (national courts) and supranational level (Court of Justice).
95 This term had been already used with identical wording in Article 4(1) of the Istanbul Convention of the European Council of 1990. The Regulation 1346/2000 in Recital 13 states that the ‘centre of main interests’ “should correspond to the place where the debtor conducts the administration of his or her interests on a regular basis and is therefore ascertainable by third parties”; According to its Article 3 paragraph 1 of Regulation EC 1346/2000 this is presumed to be the location of the company’s registered office.
96 Eurofood case (n 74), para. 31.
Having regard to the ambiguity of the notion of the COMI under the Regulation 2000 resulting often to abusive forum shopping, the Recast EIR attempted to waive the legal uncertainty created, by ratifying and codifying the jurisprudence of the Court of Justice\textsuperscript{97}, as well as by taking into due account the \textit{Virgós/Schmidt Report}\textsuperscript{98}.

The recast EIR left unchanged the basic concept of a debtor’s COMI; however, a revised and more precise definition in alignment with the CJEU case law has now been provided, this time in Article 3, which constitutes a substantive provision and, thus, has a binding legal concept\textsuperscript{99}. Accordingly, the new definition stipulates a presumption that a company’s COMI is to be found at the registered office, namely in the place of incorporation\textsuperscript{100}. Anyhow, the presumption of the current registered office\textsuperscript{101} does not apply in case of relocations of the registered office within a period of 3 months prior to the opening of proceedings\textsuperscript{102}. In this way, the Regulation establishes a ‘look-back’-namely a ‘suspect’- period on the application of the registered office presumption\textsuperscript{103}. In such an occasion, the presumption will continue to apply for the place of the former registered office.


\textsuperscript{98} Miguel Virgós, Etienne Schmidt, \textit{Report on the Convention of the Insolvency Proceedings} (1996) [6500/96], para. 75: “The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties” which was transposed into recital (13) of the EIR 2000. The Report offered for the first time a concrete explanation of the COMI, recognized as the “main interpretative tool’ of the current COMI concept and therefore, was directly transposed into the recitals of the EIR.

\textsuperscript{99} Regulation (EU) 2015/848, Article 3(1). The definition of the COMI is now a substantive provision in the Recast Regulation and not merely a concept in the preamble like in the original Regulation (Recital 13), thus, finally it has a binding legal concept.

\textsuperscript{100} Regulation (EU) 2015/848, Article 3 (1) and its sub-paragraph 2. For individuals exercising an independent business or professional activity, the COMI is presumed to be the “place of principal business”, and for other individuals the COMI is presumed to be the “place of habitual residence” (Article 3 (1) sub-paragraphs 3 and 4).

\textsuperscript{101} Referring to the principal business or habitual residence, respectively.

\textsuperscript{102} Regulation 2015/848, Article 3(1)(4). This also applies to independent business owners, with the only difference that COMI is to be identified in accordance with the state in which the head office is located (Article 3(1)(5)–(6) of the Recast EIR). For natural persons, the presumption applies to their state of residence, and relocations during the 6 months prior to insolvency are disregarded (Article 3(1)(7)–(8)) EIR.

\textsuperscript{103} Peter Mankowski, \textit{‘The European World of Insolvency Tourism: Renewed, But Still Brave'} (2017) Netherlands International Insolvency Review, vol. 64, no. 1, p. 100.
It must be pointed out that adopting the registered office presumption, the Regulation seems to be in line with the incorporation theory which states that the company is subject to the law of the country where it has been incorporated.\textsuperscript{104}

However, the Recast EIR seems to follow also the imperative of the ‘real seat’ theory\textsuperscript{105} by deeming the central administration, and thus the actual seat of the business as a factor able to rebut the registered office presumption. More specifically, it stipulates that the presumption of the registered office is rebuttable if a comprehensive assessment of all the relevant factors establishes, in a manner that is “ascertainable by third parties”\textsuperscript{106}, that the company’s actual centre of management and supervision is located on a regular basis in another Member State; \textit{id est} if the genuine activities of the company are being pursued in the territory of another Member State.\textsuperscript{107} Thus, for the proper determination of jurisdiction in the context of insolvency, the Recast EIR establishes the so-called ‘COMI criteria’ or ‘COMI-test’, proposed in the Eurofood case.

\textsuperscript{104} Within national laws there are two controversial theories to determine which national (company) law is applicable to a particular company, i.e. the incorporation theory and the real seat theory. According to the first one, adopted in common law jurisdictions including the UK, Switzerland, Ireland, Denmark and Netherlands, the company is subject to the law of the country where its registered office is located, thus in which it has been incorporated. According to the real seat theory, developed in France and applying in most civil law jurisdictions of continental Europe, the crucial point is the place where the company has its ‘real seat’ and actual administrative seat. This theory is more consistent with what is commonly referred to as the ‘objective proper law’ test: those in charge of the company's management are not free to choose the law which governs company law relationships. Thus, the ‘real seat’ doctrine often constitutes an obstacle to forum shopping abuses but is also accused of frustrating cross-border company mobility in Europe. For a brief overview and the relevant case law with regard to the two theories, see Jorge Miguel Ribeiro, ‘Free Movement of Companies within the EU – The Never-Ending Saga’ (17 February 2014), available at: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=645#_ftn2 (accessed 31 January 2018); Jorge Miguel Ribeiro, ‘Tensions between European Union Law and Private International Law – impact on cross-border mobility of companies’ (24 April 2017), available at: https://officialblogofunio.com/2017/04/24/tensions-between-european-union-law-and-private-international-law-impact-on-cross-border-mobility-of-companies/#_edn3 (accessed 31 January 2018).

\textsuperscript{105} Recital 28 of the Recast Regulation explicitly states that third parties should refer especially to creditors and their perception as to the actual COMI of the debtor, while providing also that this may require adequate and ‘in due course’ notification of creditors regarding potential shifts in COMI. Thus Recital 28 incorporates the doctrine of ISA Daisytex case (\textit{Re Daisytex – ISA Ltd and others} [2003] All ER (D) 312 (Jul)) that interprets ‘third parties’ as referring mainly to creditors, and of the Interedil case (n 97), according to which certain publicity requirements ought to be met. In this sense, ‘ascertainable’ does not mean that the creditors must have actual knowledge of all the relevant facts, but at least to obtain the basic information. For example, Recital 28 of the Regulation states that “...in the event of a COMI-shift, it may be required to inform the creditors of which the debtor is carrying out its activities (...), for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means”.

\textsuperscript{106} ibid. Recital 28 of the Recast Regulation explicitly states that third parties should refer especially to creditors and their perception as to the actual COMI of the debtor, while providing also that this may require adequate and ‘in due course’ notification of creditors regarding potential shifts in COMI. Thus Recital 28 incorporates the doctrine of ISA Daisytex case (\textit{Re Daisytex – ISA Ltd and others} [2003] All ER (D) 312 (Jul)) that interprets ‘third parties’ as referring mainly to creditors, and of the Interedil case (n 97), according to which certain publicity requirements ought to be met. In this sense, ‘ascertainable’ does not mean that the creditors must have actual knowledge of all the relevant facts, but at least to obtain the basic information. For example, Recital 28 of the Regulation states that “...in the event of a COMI-shift, it may be required to inform the creditors of which the debtor is carrying out its activities (...), for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means”.

\textsuperscript{107} ibid Recital 30.
as “a test in which the attributes of transparency and objective ascertainability are
dominant”\textsuperscript{109}.

The adoption of a combination of the two contrasting approaches developed for the
cross-border mobility of companies and the conflicts of laws rules, seems reasonable
and oriented to achieve a twofold result: on the one hand, with a more ‘head office’
oriented approach based on the Regulation attempts to preserve freedom of
establishment and a debtor’s flexibility to restructure and relocate COMI. On the other
hand, especially the non-application time limits and the possibility to rebut the
presumptions are intended to work as safeguards against fraudulent forum
shopping\textsuperscript{110} and the so-called ‘bankruptcy tourism’\textsuperscript{111}, in accordance with the explicit
mandate in Recital 29 of the recast EIR\textsuperscript{112}. The rationale of the latter lies under the
general objective of insolvency law to provide enhance legal certainty, in the sense
that “potential creditors must be able to ascertain in advance the legal system which
would resolve any insolvency affecting their interests”\textsuperscript{113}.

It must be noted that the role that courts play in determining COMI has been clarified
to provide for a minimum control by the competent court\textsuperscript{114}, by being obliged to
proactively examine the actual perception of creditors as to where the business is
administered, following the COMI criteria\textsuperscript{115}. Accordingly, the court seised of a request
to open proceedings will rule on jurisdiction of its own motion, and specify in the
judgment on which ground it retained jurisdiction\textsuperscript{116}.

\textsuperscript{109} Opinion of AG Jacobs the Eurofood case (n 74), para. 118.
\textsuperscript{110} Regulation (EU) 2015/848, Recital 31; Bork, ‘The European Insolvency Regulation and the UNCITRAL
Model Law on Cross-Border Insolvency: EU and UNCITRAL Cross-Border Insolvency’ (n 94) p. 256.
\textsuperscript{111} ‘Bankruptcy tourism’ refers to the phenomenon whereby debtors choose or favour one jurisdiction
over another (usually by relocating and re-establishing their ‘centre of main interests’) and attempt to
declare that they are located in that favourable jurisdiction in order to get the benefits of the relevant
insolvency law. See John Paul Tribe, ‘Bankruptcy Tourism in the European Union: Myth or Reality?’ (May
\textsuperscript{112} Regulation (EU) 2015/848, Recitals 29 and 31.
\textsuperscript{113} Opinion of AG Jacobs the Eurofood case (n 74) para. 118; Virgós-Schmidt Report (n 98) point 75.
\textsuperscript{114} Regulation (EU) 2015/848, Recital 27 and 30, Article 4.
\textsuperscript{115} ibid Recitals 27 and 30, Article 4; Bork, ‘The European Insolvency Regulation and the UNCITRAL Model
Law on Cross-Border Insolvency: EU and UNCITRAL Cross-Border Insolvency’ (n 94), p. 256.
\textsuperscript{116} Regulation (EU) 2015/848, Article 4.
Regarding especially the uncertainties pertaining to insolvency cases of GoCs, for which case law offered conflicting definitions of COMI, the Recast EIR does not attempt to raise them by establishing a new method for identifying the COMI, but instead it does so by enhancing the clarity of the notion of the COMI in general.

The Regulation rejects the initial solution adopted by the English courts in the Daisytek\textsuperscript{117} and Crisscross Telecommunications Group\textsuperscript{118} cases (followed by Italian Courts in the Cirio Del Monte case\textsuperscript{119}), which tended to be in favour of a single COMI as they considered group companies to be a single economic unit allowing for a whole group to be deemed to have its centre of main interest in one place\textsuperscript{120}. This approach seemed the principal management and control of the group to lay within the territory of that one place\textsuperscript{121}, thus applying exclusively the ‘mind of management’ imperative\textsuperscript{122}. This solution was perceived to favour abusive COMI-relocations\textsuperscript{123} and to be relevant only in a limited number of multinational groups where the management and activities of the group are centralized\textsuperscript{124}.

Instead, the idea put forward by the EU legislators, reflected in the Recast EIR\textsuperscript{125}, maintained the approach of the CJEU in the findings of the cases of Eurofood\textsuperscript{126},

\textsuperscript{117} Daisytek case (n 106).
\textsuperscript{118} Crisscross Telecommunications Group, Re High Court London, Chancery Division {UK} [2003].
\textsuperscript{119} Cirio Del Monte NV, Court of Rome, 2003. In this case the Italian court decided that two Italian companies and a Dutch subsidiary had their COMI in Rome.
\textsuperscript{120} This solution of a single COMI was not considered in principle as the best option for group insolvencies in the new Regulation. It is indicative that the Daisytek findings of the English Court had provoked reactions in Germany and France, See Bob Wessels, ’International Jurisdiction to open Insolvency Proceedings in Europe, In particular against (groups of) companies‘ (2003) Institute for Law and Finance (Goethe-Universität Frankfurt), Working Paper Series No. 17/2003.
\textsuperscript{121} See Robert van Galen, ’The European Insolvency Regulation and the groups of companies‘, (2004) International Corporate Rescues, vo. 1, issue 2, p. 3: “…These judgments achieved a better coordination of the insolvency proceedings in the respective groups, because all the proceedings were placed under the supervision of the same court and because the same liquidators were appointed for all the group companies….”.
\textsuperscript{122} Bork, ’The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency: EU and UNCITRAL Cross-Border Insolvency‘ (n 94), p. 256.
\textsuperscript{123} Heidelberg-Vienna Report’ (n 77), para. 2.4.
\textsuperscript{124} Van Galen ’The European Insolvency Regulation and the groups of companies‘ (n 121) p. 3; Irit Mevorach, ’Centralising Insolvencies of Pan-European Corporate Groups: a Creditor’s Dream or Nightmare?’ (2006) Journal of Business Law, No. 5, p. 469.
\textsuperscript{125} Regulation (EU) 2015/848, Article 3.
\textsuperscript{126} Eurofood case (n 74).
Interedil\textsuperscript{127} and Rastelli Davide\textsuperscript{128} that favoured the individual legal personality of each group member and promoted the idea that the COMI of each group member should be examined separately and independently from the COMI of the parent company. For example, the mere fact that a subsidiary conducts its administration within the territory of its registered office, but its economic choices are controlled by a parent company in another state is not sufficient to rebut the presumption of Article 3 EIR, as this fact normally lacks the attributes of transparency and objective ascertainably\textsuperscript{129}.

Consequently, the EIR refrains from creating a real ‘group COMI’ (single forum) approach which deems the group operating as a single economic unit. This seems reasonable considering that the opposite approach could be detrimental to legal certainty and perhaps to the interests of foreign creditors of other member groups. Besides, the variety and complexity of group structures makes it difficult to provide clear criteria for the ‘connecting factor’ in the recast EIR for whether a single (exclusive) forum is justified or not, considering that not all the companies of the same group have identical management, especially when the group companies are loosely connected and there may be intermediate shareholding members on different levels\textsuperscript{130}.

Under this consideration it should be stressed that the fact that the new Regulation does not provide for a single COMI in group insolvencies does not necessarily mean that this cannot be a possibility. On the contrary, the COMI of several or even all subsidiaries can be deemed to be the COMI of the parent company, if this is proven to be the case\textsuperscript{131}, after the judge applies the ‘COMI test’.

Besides, the recast EIR already explicitly allows for a certain degree of a group COMI approach; in case the individual COMI of several companies belonging to the same group is found to be in a single member state, the court is not limited and may open

\textsuperscript{127} Interedil case (n 97).
\textsuperscript{128} Case C-191/10, Rastelli Davide e C. Snc v Jean-Charles Hidoux [2011] ECR 00000.
\textsuperscript{129} Eurofood (n 74), para. 36.
\textsuperscript{130} UNCITRAL Legislative Guide on Insolvency Law, Part Three (n 65) paras. 6-16.
\textsuperscript{131} Regulation (EU) 2015/848, Article 3.
insolvency proceedings for them all\textsuperscript{132}. This is important for cases where the management of the group companies is interlinked and the supervision and the management of the interests of the subsidiaries is located in the Member State where the parent company resides\textsuperscript{133}.

\textsuperscript{132} Regulation (EU) 2015/848, Recital 53.
\textsuperscript{133} Ibid Recital 30; \textit{Interedil} (n 97), para. 59; \textit{Eurofood} (n 74), para 34.
CHAPTER III. THE NEW PROVISIONS ON INSOLVENCY PROCEEDINGS OF GROUPS OF COMPANIES UNDER THE RECAST EUROPEAN INSOLVENCY REGULATION

The new elaborated provisions in the recast EIR on group insolvency proceedings, inspired from the UNCITRAL Model Law and the rulings of the Eurofood case, came to fill in the gap related to the management of multiple cross-border insolvencies of group of companies by introducing the whole new chapter V, as expanded in Articles 56-77.\(^{134}\) Having regard to the particularities of the corporate groups, the increase of multinational enterprises and the need for uniformity in the field, the new regulatory framework foresees procedural rules for cooperation between the actors involved and lays down a new voluntary process for opening “group coordination proceedings”.\(^{135}\)

The underlying rationale for this is that the insolvency of a group of companies should be administered efficiently, with proper cooperation in order to strike a balance with the protection of creditors’ interests and to effectively encourage the rescue of the group as a whole, while retaining the doctrine of separate legal personality and the entity-by-entity approach expressed in Eurofood’s dictum.

The cross-border element in the scope of application of these provisions is obvious as the rules apply only to the extent that insolvency proceedings relating to different

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\(^{134}\) Regulation (EU) 2015/848, Chapter V, Articles 56 to 77. Chapter V is divided in “Cooperation and Communication”, outlined in Section 1 (Art.56-60), and in “Coordination”, analysed in Section 2 (Art. 61-77).

\(^{135}\) Taking into account the absence of rules dealing with the insolvency of multinational groups of companies, the Commission was led to conduct the 2012 proposal and dedicate a completely new chapter dealing with groups providing for additional cooperation between officeholders. The Parliament’s proposal went one step further and introduced a voluntary group coordination proceeding - the concept of which is retained in the Recast Regulation; See European Commission, ‘Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceeding’, SWD (2012) 744 final, Strasbourg 12 December 2012.

\(^{136}\) Regulation (EU) 2015/848, Recital 51.


\(^{138}\) Regulation (EU) 2015/848, Article 71 and Recital 54.
members of the same group of companies have been opened in more than one Member States\textsuperscript{139}.

1. \textit{Cooperation and Communication in group insolvency}

1.1. General obligations to communicate and cooperate

The recast Regulation establishes a set of general obligations of communication and cooperation of all actors involved in insolvency proceedings which have been opened in different Member States in relation to at least two members of a group of companies\textsuperscript{140}. Such cooperation shall have the objective to naturally facilitate the effective administration of the proceedings, to the extent that it is compatible with \textit{lex concursus}\textsuperscript{141} and does not entail any conflict of interests.

The obligation for cooperation must be accomplished by any appropriate means, such as through the conclusion of an agreement or a protocol, for which no specific format is required; Recital 49 states that they can take any form, written or oral, may cover any scope, whether generic or specific, and may be concluded between different parties, for example between insolvency proceedings or between courts\textsuperscript{142}. The costs of the cooperation and communication shall be regarded as costs and expenses in the respective proceedings\textsuperscript{143}.

This obligatory cooperation laid down in the new Regulation constitutes itself a novelty, considering the inadequate (up until then) regulatory regime of the original Regulation which provided for cooperation only between liquidators involved in main

\textsuperscript{139} Regulation (EU) 2015/848, Recital 62.

\textsuperscript{140} Ibid Articles 56-59. With regard to the cooperation and communication duty, a set of guidelines developed under INSOL Europe could be proved useful: Bob Wessels and Miguel Virgós, "European Communication and Cooperation Guidelines on Cross-Border Insolvency" (2007) INSOL.

\textsuperscript{141} Meaning the law applicable to the proceedings.

\textsuperscript{142} Regulation (EU) 2015/848, Recital 49.

\textsuperscript{143} Ibid Article 59.
and secondary proceedings and only in relation to the insolvency of a single company.\textsuperscript{144}

The Recast EIR, clearly influenced by the UNCITRAL Guidelines\textsuperscript{145}, encourages cooperation between the appointed insolvency practitioners, meaning the authorised persons defined in Article 2(5), by means of protocols and tasks allocation agreements\textsuperscript{146}. Cooperation entails the communication of any relevant information to each other, with the objective of supervising the relevant affairs of the group, examining the possibility of coordinating the insolvency proceedings and cooperating in the elaboration of a rescue plan where appropriate\textsuperscript{147}.

By recital 52, cooperation between insolvency practitioners should be “aimed at finding a solution that leverage synergies across the group”, but must not “run counter to interests of any of the creditors in each of the proceedings”. At this context, any confidential information exchanged in the context of communication should be appropriately protected\textsuperscript{148}. Moreover, the allocation of tasks between the IPs is encouraged, as well as the grant of additional powers.

The Regulation introduces a similar obligation of cooperation and communication for courts that have opened proceedings for several members of the same group, acting beyond their national borders\textsuperscript{149} and aiming at the better coordination of the proceedings and the communication of relevant information. In particular this cooperation can be implemented by any means the courts consider appropriate, such the coordination of the appointment of the insolvency practitioner, the administration

\textsuperscript{146} Regulation 2015/848, Article 56.
\textsuperscript{147} Ibid Article 56 (2).
\textsuperscript{148} Ibid Article 56(2) (a).
of the assets, the conduct of the hearings, and the approval of any necessary protocols\textsuperscript{150}. It must be noted that judicial cooperation is based on the principles of sincere cooperation and mutual trust; principles that within the European Union are based on Article 4(3) of the TEU, Articles 67(1) (4), 81(2)(a) (c) of the TFEU.

In the same vein, the Regulation provides for cooperation and communication between IPs appointed in insolvency proceedings of a member of the group and the court before which a request for insolvency proceedings is pending or which has already opened such proceedings. Such cooperation covers the request of the IP for information concerning the insolvency proceedings of other members of the group, as well as the request for assistance concerning the proceedings\textsuperscript{151}.

It must be pointed out that during the revision process of the Regulation 2000, it was suggested that cooperation – coordination in group insolvencies should draw upon the model of main and secondary proceedings. The similarity of the mechanisms and the intention of the EU legislator are reflected in Recital 52 which explicitly refers to a “similar obligation to cooperate and communicate”\textsuperscript{152}. The general obligations introduced in Articles 56-59 are indeed similar to those for main and secondary proceedings in Articles 41-43. The main difference is that the first ones apply in cases of different debtors being part of the same group of companies, while the second ones apply in case where for the same debtor more than one court in different Member States has jurisdiction\textsuperscript{153}.

\textsuperscript{150} Regulation (EU) 2015/848, Article 57(3).
\textsuperscript{151} Ibid Article 58.
\textsuperscript{152} Ibid Recital 52: “...The various insolvency practitioners and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in the main and secondary proceedings relating to the same debtor...”.
1.2. Powers of the insolvency practitioners against other members of the group

In light of the cooperation obligation, a number of extra powers relating to the proceedings of other members of a group of companies are granted to the insolvency practitioners with the objective to facilitate the effective administration of the proceedings.

In particular, for companies which are not participating in group coordination proceedings\textsuperscript{154}, the Regulation also provides for alternative mechanisms to achieve a coordinated restructuring of the group\textsuperscript{155}, which take shape in the powers given to the appointed insolvency practitioners\textsuperscript{156}.

Such powers include the right to be heard in any of the proceedings opened in respect of any other member of the group, to attend creditors' meetings, and to propose a reorganisation plan in a way which would enable the relevant creditors' committee or court to consider it.

However, the most striking power conferred entails that in cases where a coordinated restructuring plan has been proposed under Article 56 (2) (c), and it presents reasonable chances of success, each IP is entitled to request a stay of any measure related to the realization of the assets in the proceedings opened with respect to any other member of the same group. The stay of measures may last up to three months, with a possibility of extension to up to 6 months, provided that the plan “would be to the benefit of the creditors in the proceedings for which the stay is requested” and such a stay is necessary to ensure the proper implementation of the plan\textsuperscript{157}. Such a stay can only be requested under the condition that neither the insolvency proceedings for which the requesting IP has been appointed, nor the insolvency proceedings in respect of which the stay is requested have been included in group coordination proceedings. It seems as though a coordinated restructuring plan under

\begin{itemize}
  \item \textsuperscript{154} As group coordination is provided in Article 61 of the Recast Regulation.
  \item \textsuperscript{155} Regulation (EU) 2015/848, Recital 60.
  \item \textsuperscript{156} Ibid Article 60.
  \item \textsuperscript{157} Ibid Article 60 (1) (b) (iii).
\end{itemize}
Articles 56 (2) (c) is an alternative to the group coordination proceedings (Article 61-72), and they cannot be pursued in parallel\textsuperscript{158}.

The court that has opened the insolvency proceedings, for which a stay is requested, shall grant the request for a stay in whole or in part, if it is satisfied that the conditions outlined above are fulfilled\textsuperscript{159}. It may further require the requesting IP to take appropriate measures to guarantee the interests of the creditors in the proceedings. Considering the wording of Article 60(2) strictly referring to the conditions laid down in Article 60(1)(b)\textsuperscript{160}, it seems as though the list of those conditions is exhaustive and the court is not allowed to scrutinize others. It is unclear though whether the court must examine the satisfaction of the conditions only as for their formalities or it can actually review them, and in particular the volatile term of “appropriateness”\textsuperscript{161}.

2. Coordination of group insolvency proceedings

2.1. The opening of group coordination proceedings

The most significant change in the Recast Regulation constituting a central piece for a successful restructuring of insolvent groups of companies\textsuperscript{162} (or at least for higher


\textsuperscript{159} As the condition are laid down in Article 60 (2) b of the Recast Regulation: “to the extent appropriate to facilitate the effective administration of the proceedings”.

\textsuperscript{160} Weiss (n 158), p. 209.

\textsuperscript{161} This is a condition laid down in Article 60 (1) subparagraph 1 of the Recast Regulation.

\textsuperscript{162} Jessica Schmidt, ‘The Opt-out and Opt-in Rules for Group Coordination Proceedings in the EIR: A Critical Evaluation and Focus on Large-Scale Insolvencies’ in Rebecca Parry and Paul J. Omar (eds), Banking and Financial Insolvencies: The European Regulatory Framework (2016) INSOL, p. 87; See also European Parliament (Legal Affairs Department), ‘Insolvency proceedings in case of groups of companies: prospects of harmonisation at EU level’ (2011) PE 432.762, p. 7, where it is stated that: “…Unless insolvency and restructuring proceedings relating to members of an economic interest group can be coordinated, it is unlikely that the group can be reorganized, with the result that it will be broken up into its constituent parts with resulting financial and employment losses…”.
revenue\textsuperscript{163}) is the introduction of group coordination by means of a specific voluntary procedure\textsuperscript{164}.

According to the newly introduced system of coordination, a request for coordinating the insolvency proceedings of more than one member of the group may be filed before any competent court having jurisdiction over the insolvency proceedings of a group member by the insolvency practitioner appointed there\textsuperscript{165}.

Such a request shall be made in accordance with the law applicable to the insolvency proceedings in which the requesting insolvency practitioner has been appointed\textsuperscript{166}, and must be accompanied by (a) a proposal and justification for the person nominated as a “coordinator”, (b) an outline of the proposed group coordination, (c) a list of all insolvency practitioners appointed over the members of the group, courts and competent authorities involved, and (d) an outline of the estimated costs and their distribution among the different estate\textsuperscript{167}.

In cases of parallel requests\textsuperscript{168}, the priority rule of Article 62 applies, granting the court first seized exclusive jurisdiction over the coordinated insolvency proceedings\textsuperscript{169}. The objective of the priority principle is to avoid forum shopping situations where the involved parties seek for the most convenient jurisdiction\textsuperscript{170}. However, this principle


\textsuperscript{164} Regulation (EU) 2015/848, Recitals 52–54, Articles 61(1), and 61 – 77. The coordination mechanism is based on an initiative by the German delegation (under the Proposal Doc. 15675/13) and reflects an effort of a similar procedure to be established within the domestic German law. Instead of the newly introduced coordination mechanism, the general rules for coordination between main and secondary proceedings (in particular Articles 41 et seq EIR-R) apply, in case main insolvency proceedings are opened against a subsidiary company at the COMI of the parent company (or another group company) while secondary proceedings are opened at the registered office of the subsidiary company. See Max Planck Institute, ‘The Implementation of the New Insolvency Regulation: Recommendations and Guidelines’ (2013) JUST/2013/JCIV/AG/4679, p. 111.

\textsuperscript{165} Regulation (EU) 2015/848, Article 61.

\textsuperscript{166} Ibid Articles 60 (1) (c), 61 (1) and 76.

\textsuperscript{167} Ibid Article 61 (3) (a-d), Recitals 55 and 56.

\textsuperscript{168} i.e. where multiple requests are filed at different courts having jurisdiction.

\textsuperscript{169} Regulation (EU) 2015/848, Art 66 (1). This rule provided by the Recast Regulation follows a concept similar to the one foreseen by European Procedural Law e.g. in Article 29 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351.

may be overridden when the court first seised seems less appropriate; the jurisdiction
can be transferred to another eligible court with a majority vote of two-thirds of all
insolvency practitioners appointed in insolvency proceedings of the members of the
group\textsuperscript{171}. Such a ‘choice of court’ agreement remains possible up until the decision of
opening group coordination proceedings\textsuperscript{172}.

Before opening group coordination proceedings, the court needs to make a
preliminary assessment and be satisfied that (a) such proceedings are appropriate to
facilitate the effective administration of the different proceedings, (b) no creditor of
any group member is likely to be financially disadvantaged by the inclusion in such
proceedings and (c) the proposed coordinator meets the requirements as laid by Art.
71\textsuperscript{173}. If the result of this assessment is positive, the court shall inform the insolvency
practitioners and offer them an opportunity to be heard\textsuperscript{174}.

Under Article 70, and in accordance with the non-obligatory nature of the group
coordination, the IPs maintain the discretion to consider the recommendations made
by the coordinator and the content of the group coordination plan, while they conduct
the insolvency proceedings. Albeit they are not obliged to follow them in part or in
whole, a ‘comply-or-explain’ mechanism is established if they decide against following
it, meaning that the IPs should still give reasons to the group coordinator and, if
applicable, to the competent body under the applicable \textit{lex fori concursus}.

\subsection*{2.2. Opt-out and opt-in mechanisms}

The IPs of group members are granted the possibility to object wholly or partly to the
coordination proceedings within 30 days of receipt of notice of the opening of the
coordination proceedings\textsuperscript{175}, using a non-mandatory standard form\textsuperscript{176}. The decision to

\begin{footnotesize}
\begin{enumerate}
\item Regulation (EU) 2015/848, Article 66 (1).
\item Ibid Articles 66(2).
\item Ibid Article 63 (1).
\item Ibid Article 63 (1) and (4) and Recitals 56-57.
\item Ibid Article 63 para 1.
\item Ibid Article 64 and 88.
\end{enumerate}
\end{footnotesize}
open group coordination proceedings must not be made before this objection period has elapsed\textsuperscript{177}. In this way the IPs are given adequate – but not unlimited - time to raise their objections, while at the same time the provision guarantees that at the time of the decision of opening group coordination proceedings the court knows which group members would be included. The latter is important for the court to decide whether the conditions for opening are fulfilled, as in case too many group members have opted out and/or the ones which have opted out were of vital importance to the success of the group coordination proceedings, it may be concluded that group coordination proceedings would not be appropriate to facilitate the effective administration of the insolvency proceedings.

The right to object is limited exclusively to the IPs and the debtor-in-possession\textsuperscript{178}, excluding creditors, other courts or public authorities involved. The only (implied) exception is the IP who filed the request to open group coordination proceedings as it would be rather paradoxical if he were allowed to object to his own request\textsuperscript{179}.

The objection may concern either the inclusion of the company in the coordination proceedings or just the person proposed as a coordinator\textsuperscript{180}. In the latter case, the court has the discretion to refrain from appointing that specific person as a coordinator of the proceedings and at the same time invite the IP who objected to submit a new request in accordance with Article 61(3). In case of an objection to the inclusion of their company in the coordination proceedings, the proceedings in respect of which the IP has been appointed will be not included in the coordination proceedings and this member shall bare no costs related to the coordination\textsuperscript{181}. It must be noted that Article 64 EIR does not explicitly require a justification for the opt-out. Moreover, the IP, prior to making the decision on whether or not to participate in the proceedings, is subject to the approval requirements set under national law\textsuperscript{182}.

\textsuperscript{177} Regulation (EU) 2015/848, Article 68(1) 1.
\textsuperscript{178} Ibid Article 76.
\textsuperscript{179} Schmidt (n 162) p. 90.
\textsuperscript{180} Regulation (EU) 2015/848, Article 64.
\textsuperscript{181} Ibid Article 65.
\textsuperscript{182} Ibid Article 64 paragraph 3.
Such an objection will result automatically in that member’s exclusion (‘opt-out’) from the group proceedings, which will have no effects against the excluded member\textsuperscript{183}, relieving it also from bearing the costs of the proceedings. Nevertheless, the opt-out does not stop the opening of group coordination proceedings for the other members of the group. The latter may be achieved indirectly, though, in case the objecting IP gives convincing reasons for the opt-out that either all others will also opt-out or that the court will come to the conclusion that the conditions for the opening of group coordination proceedings\textsuperscript{184} EIR are not fulfilled\textsuperscript{185}.

Nevertheless, the decision to be excluded from group proceedings is not final, as Article 69 Recast EIR establishes the possibility of a subsequent “opt-in”\textsuperscript{186}, as a counterpart to the opt-out right, the admissibility of which will be decided by the coordinator. The latter may accede to it under certain conditions\textsuperscript{187} which intend to protect from any repercussions a subsequent opt-in may have for the entire coordination, namely under the condition that at that specific time the request is consistent and appropriate for the facilitation of the insolvency proceedings relating to the different group members, and that no creditor of the other group members is likely to be financially disadvantaged thereof. Alternatively, the request may be admitted if all the IPs consent, subject to their national law\textsuperscript{188}.

If the coordinator validly agrees to the request and there is no successful challenge\textsuperscript{189}, the group member participates \textit{ex nunc} from the time the coordinator’s decision becomes effective\textsuperscript{190}. It is in question, though, whether there is a possibility for a

\textsuperscript{183} Regulation (EU) 2015/848, Articles 65 and 72 (4) in combination with Art. 72 (3) which states that the tasks and rights of the group coordinator should not extend to the members of the group that are not participating in the group coordination proceedings.

\textsuperscript{184} As the conditions are set out in Article 63(1) of the Recast Regulation.

\textsuperscript{185} Schmidt (n 162) p. 91.

\textsuperscript{186} Regulation (EU) 2015/848, Article 69.

\textsuperscript{187} Ibid Article 63 (3) (a) and (b).

\textsuperscript{188} Ibid Article 69 (2). This apparently refers to any requirements of prior authorisation by a specific body (e.g. a creditors’ meeting or committee, a public authority, the court) before making such a request.

\textsuperscript{189} Regulation (EU) 2015/848, Article 69(4) and Recital 56. The challenge is to be made in accordance with the legal remedies available under the law of the State where the group procedure has been opened.

\textsuperscript{190} The time of the opt-in may be taken into account for purposes of the final allocation of the costs. See Schmidt (n 162) p. 96.
subsequent opt-out at this stage. Probably an opt-out possibility would be consistent with the voluntary nature of the group coordination proceedings – albeit an agreement by all insolvency practitioners might be required. On the other hand, though, given that the Regulation explicitly deals with a subsequent opt in but leaves open the question of subsequent opt out, it could be argued that an opt out is not possible.

Although neither formal requirements nor an obligation state the reasons to submit the opt-in request are required, for evidentiary purposes a textual written would certainly be advisable, containing a statement of reasons, since the admissibility of the request depends on persuading the coordinator or all the other IPs. Moreover, despite the absence of a specific time limit, it is obvious that the later the request is filed, the smaller its chances for success will most likely be, taking into account the stage that the group coordination proceedings have reached and the practical feasibility to include another group member.

2.3. The coordinator and the coordination plan

According to Article 71 (2), the coordination proceedings are to be administered by the insolvency practitioner, to be identified as the coordinator. Only a qualified insolvency practitioner – except for those appointed for the group members – may be eligible to be a coordinator. The coordinator must be impartial, act with due care and have no conflict of interest in relation to the respective group members, their creditors and the insolvency practitioners concerned.

The main task assigned to the coordinator is to propose a “group coordination plan”, containing agreements between the IPs on various issues, recommendations for the

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191 Regulation (EU) 2015/848, Article 69 (2); Bork, Van Zwieten (n 163) p. 94.
192 Schmidt (n 162) p. 94.
193 Regulation (EU) 2015/848, Article 71 (2).
194 Ibid Article 71 (1). The group coordinator has to be qualified to act as an insolvency practitioner “under the law of a Member State”.
195 Regulation (EU) 2015/848, Articles 71 (2) and 72 (5).
coordinated conduct of the insolvency proceedings\textsuperscript{196}, settlement of intragroup disputes where the coordinator is appointed to function as a mediator, and a comprehensive set of measures appropriate to an integrated approach to resolve corporate insolvencies and re-establish the financial soundness of the group\textsuperscript{197}. The group coordination plan establishes procedural coordination explicitly excluding any ‘consolidation of the insolvency estates’\textsuperscript{198}.

All this occurs on a voluntary basis without any legal binding effect\textsuperscript{199}, but in case the IPs refuse to follow the coordination plan they must provide justification to the competent national bodies and to the coordinator\textsuperscript{200}. Although the Regulation leaves the consequences open, it may be assumed that non-compliance with the coordination plan - in accordance with its voluntary nature - constitutes an opt-out. However, it is not clear how this could work from a procedural point of view and whether a court decision or a decision by the coordinator would be required, or just a communication of this refusal and its justification to the aforementioned authorities would suffice. Another possible consideration would be an amendment to the coordination plan or the recommendations until an accepted solution is found; albeit this may entail delay or result in a dead end.

In addition to the proposal of a coordination plan, the group coordinator is granted quite extensive rights and duties attributed to the position of a general administrator, namely to participate and be heard and informed\textsuperscript{201}, e.g. in creditors’ meetings, to resolve intra-group disputes and request information from IPs. The coordinator shall be also given the opportunity to persuade the companies and creditors to adhere to a restructuring approach. The coordinator may even lodge a request to the court having

\textsuperscript{196} Regulation (EU) 2015/848, Article 72 (1) (a) and (b).  
\textsuperscript{197} Ibid Article 72(1) (b) (i-iii).  
\textsuperscript{198} Ibid Article 72(3).  
\textsuperscript{199} Ibid Article 70 (2).  
\textsuperscript{200} Ibid Article 70 par. 3.  
\textsuperscript{201} Ibid Articles 72 (a) – (e) and 74.
opened the respective proceedings for a stay for a period up to six months of the proceedings if he deems it beneficial\(^\text{202}\).

In order to achieve a better result in coordinating the proceedings, Article 74 provides for the obligation of the appointed IPs to cooperate with the coordinator under the condition that such cooperation is not incompatible with the rules applicable to the respective proceedings and to communicate any relevant information.

Regarding the remuneration of the coordinator, this must be proportionate to the tasks fulfilled and reflect reasonable expenses\(^\text{203}\). Moreover, in case a significant increase of 10\% of the estimated costs\(^\text{204}\) is considered to be required for the fulfilment of their tasks, the coordinator has the obligation to inform the IPs and seek prior approval of the court opening group coordination proceedings\(^\text{205}\). This is in line with the Recital 58 of the Regulation that stresses that the advantages of group coordination proceedings should not be outweighed by the costs of those proceedings. Thus, the costs must be sustainable and in balance with the purpose of the coordination.

Lastly, it must be noted that the appointment of the group coordinator is not irrevocable. Indeed, Article 75 provides for the revocation of their appointment by the court on its own motion or at the request of an IP of a participating group member in case the coordinator acts to the detriment of the creditors or fails to comply with the tasks and obligations as assigned under the Regulation.

\(^{202}\) Regulation (EU) 2015/848, Article 72 (2). It is stipulated that such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the proceedings for which the stay is requested.

\(^{203}\) Regulation (EU) 2015/848, Article 77.

\(^{204}\) Ibid Article 61(3)(b).

\(^{205}\) Ibid Article 72 (6).
CHAPTER IV. CHALLENGES ARISING FROM THE RECAST REGULATION PROVISIONS ON CROSS-BORDER INSOLVENCY OF GROUPS OF COMPANIES

Although an explicit legal framework is finally set to deal with cross-border insolvency of groups of companies, by providing a more concrete regime for jurisdictional matters with the amendment of the COMI, and by establishing cooperation between the actors involved and coordination of the relevant proceedings, its effectiveness is doubtful and subject to criticism. Therefore, a further analysis is required, with special focus on the ‘soft’ nature of the two mechanisms deriving from their limitation to mere procedural issues, the similarities between the two mechanisms, as well as on the legal uncertainty caused from the voluntary, non-binding, regime. In addition, specific considerations on the forum shopping phenomenon and on potential implications of the provisions on the interests of creditors are to be set out.

1. The approach chosen by the Recast Regulation

The approach taken by the Recast EIR was to respect the separate legal personality of the members belonging to the same group of companies by retaining the strict “entity-by-entity” principle, and therefore it adopts a soft approach based on mere procedural cooperation/coordination, rejecting any kind of consolidation. Hence, it preserves the principle, that, although administered in a coordinated manner, each of the group members, including its assets and liabilities, remain separate and distinct. In this way, the integrity and identity of individual group members as well as the

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206 Regulation (EU) 2015/848, Recital 54.
207 Ibid Articles 56-72.
The substantive rights of claimants remain unaffected\(^{209}\). This mere ‘procedural coordination’ approach is intended to promote procedural convenience and cost-efficiency by facilitating the obtaining and exchange of comprehensive information on the business operations of the group members involved, and by assisting in the valuation of assets, in the identification of creditors and other parties in interest, and in avoiding duplication of effort\(^{210}\).

Accordingly, the coordination and cooperation provisions do not regulate any substantive issues but regard merely the conduct and administration of multiple individual proceedings, which remain – as a matter of principle – independent from each other\(^ {211}\). This is explicitly laid down in Article 72(3) of the Regulation, by not permitting the group coordination plan to recommend consolidation of the various estates, and thus, forbidding it to achieve substantive or procedural consolidation.

In this way, the Regulation has adopted a model of ‘procedural coordination’ rejecting other alternative approaches, expressed in legal writing, and reflected in the Commission’s public consultation on the Future of the Insolvency Law\(^ {212}\), as being the prevailing ones in the legal literature and in national laws. In particular, it rejects explicitly the ‘substantive consolidation’ involving the mixing of estate assets and liabilities, and the ‘procedural consolidation’ aligning the relevant insolvency proceedings, while it implies also the non-application of the strict ‘group COMI’ approach.


\(^{211}\) Ibid pp. 27-28.

Substantive consolidation, more often discussed in the context of liquidation, entails the highest level of integration\(^\text{213}\) by allowing courts in specific circumstances\(^\text{214}\) to disregard the individual legal personality of each group member and consolidate their assets and liabilities to a single insolvency estate, from which all the creditors of the consolidated members obtain their payments\(^\text{215}\). This type of consolidation, although affirmed by the UK Supreme Court\(^\text{216}\), has been almost unanimously rejected\(^\text{217}\) as it overrides the ‘separability’ principle\(^\text{218}\). Indeed, the corporate independency with separate liabilities is a key aspect of an enterprise group, serving the different purposes and needs of the group members, and thus, its circumvention has several implications on many fields of law, especially on taxation and corporate law. Moreover, its adoption may lead to a massive reallocation of assets and, thus, undermine the general concept of liability, while affecting \textit{ex ante} legitimate expectations of creditors\(^\text{219}\) of a specific legal entity which they have contracted with\(^\text{220}\).

Procedural consolidation, on the other hand, adopted in the \textit{Re Daisytek-ISA Ltd} case\(^\text{221}\), implies that only the procedural aspects of the insolvency proceedings are to be consolidated, respecting the substantive division between the estates. Thus it aims at bringing the group insolvencies together under the umbrella of one proceeding, at

\begin{itemize}
  \item \textit{Re Daisytek-ISA Ltd} [2003] All ER (D) 312 (Jul).
  \item Thole, Dueñas (n 208), p. 219; UNCITRAL Legislative Guide on Insolvency Law, Part three (n 209), p. 59.
  \item Prest v Petrodel Resources Ltd, [2013], UKSC 34 [2012] 3 WLR1.
\end{itemize}
the same place, administered by a single insolvency practitioner, without any consolidation of assets, making the repayments to the creditors on an estate-by-estate basis\(^\text{222}\). This type of consolidation, although safer and softer by definition, may face practical problems with regard to distinguishing between the estates as well as to the application of foreign substantive rules on each estate which could lead to legal discrepancies\(^\text{223}\).

Another proposed tool of coordination is the use of jurisdictional requirements for the opening of insolvency proceedings, such as the ‘group COMI’ approach based on the idea that a subsidiary’s COMI should be located in the Member State of the parent company’s COMI in cases of a centralized management at the level of the parent company\(^\text{224}\). Accordingly, the insolvency proceedings against a parent company and such subsidiaries will be opened in the Member State of the parent company’s COMI, which facilitates coordination\(^\text{225}\). Although the EIR already allows for a certain degree of a group-COMI approach\(^\text{226}\), such an approach was early abandoned as being potentially detrimental to the rights of foreign creditors and too formalistic and restrictively applicable to specific types of group structures, especially those already obtaining a centralized management.

In light of the above, it may seem sensible that the recast EIR preserves the identity of group members and the substantive rights of claimants following the entity-by-entity doctrine. Considering also the absence of an agreement among Member States, it does not surprise that the European legislators enter into the new area of group insolvency law by implementing the least interventionist approach\(^\text{227}\). Such a soft approach merely attempts to achieve consistency across the insolvency proceedings of all of the members of the group through coordination. At the same time, it protects the


\(^{223}\) Thole, Dueñas (n 208), p. 215.

\(^{224}\) See also Interdil and Eurofood cases (n 218).

\(^{225}\) For instance, the same lex concursus applies to all the proceedings; See ‘Heidelberg/Vienna Report, p. 235.

\(^{226}\) Regulation (EU) 2015/848, Recital 30.

Commission from exposure to the difficulties of the other alternative tools, taking into account that it constitutes the outcome of compromise between Parliament and the Commission.\(^{228}\)

It is doubtable, though, whether group insolvencies will achieve meaningful outcomes, since the provisions fail to adapt to the reality of economically integrated groups and interrelated business activities.

At this point, and taking into account that substantial consolidation has been almost unanimously rejected\(^{229}\), and that the group-COMI approach is not suitable for all the situations, it seems that procedural consolidation would probably constitute the nearest feasible alternative to mere coordination. Indeed, it seems to be more effective to coordinate a multiplicity of proceedings by having the same individuals and court in charge of these proceedings, rather than providing for complicated and costly coordination mechanisms\(^{230}\), dividing the proceedings. The practical difficulty of the task is not a convincing argument able to justify the decision of the Commission to restrain itself from such an initiative\(^{231}\). Besides, the European Commission has acknowledged the virtues of procedural consolidation by allowing a kind of group-COMI approach and the opening of the insolvency proceedings in a single jurisdiction\(^{232}\).

Considering also that the results of the mere coordination mechanisms can be achieved by the cooperation and communication tools of Articles 56 – 60 EIR, a real reform and a step towards the harmonization of EU insolvency law to the benefit of the creditors while following the rescue-friendly orientation of the Regulation would be achieved by somehow centralizing the insolvency process. In this sense the single insolvency regime and forum would have the means of protecting creditors’ interests.

\(^{228}\) Thole and Dueñas (n 208), p. 215.


\(^{230}\) Eidenmüller (n 219).

\(^{231}\) Thole and Dueñas (n 208), p. 215.

and considering the entire group as a whole rather than looking at each part separately.\textsuperscript{233}

2. **Voluntary nature of the cooperation and coordination duties**

Although the obligation for cooperation and communication between the actors of the insolvency proceedings, namely the IPs and courts, is explicitly established, it is subject to several procedural limits and reservations,\textsuperscript{234} reliant on the IPs’ and courts’ initiatives.\textsuperscript{235} Given that neither legal remedy is provided cooperation results more or less voluntary. More specifically, the duty for cooperation only applies to the extent that such cooperation is appropriate to facilitate the effective administration of these proceedings, does not imply confidentiality issues, is compatible with the rules applicable to such proceedings \textit{(lex concursus)}\textsuperscript{236} and does not entail any conflict of interests, thus, leaving room for recalcitrant jurisdictions to refuse cooperation.\textsuperscript{237}

It appears that even though the duty to cooperate and communicate is a valuable guideline and business-rescue mechanism, it can be disregarded rather easily, since the broad reservations included in the Regulation give the chance to both courts and IPs to do so. For example, an IP can argue that the cooperation does not facilitate the effective administration of the proceeding or that certain information is too sensitive to be communicated. The creditors on their side can easily bring up the reservation of conflict of interest blocking or delaying any type of cooperation effort, if they choose to do so. Hence, cooperation and communication appear more of a guideline rather than

\textsuperscript{236} Regulation (EU) 2015/848, Articles 56(1) and 57(1).
an obligation. But still, the relevant provisions provide the IPs and courts with the means to act more efficiently; it is on their good will to use them in a beneficial manner.

Coordination, on the other hand, is clearly set on a voluntary basis by virtue of the Recital 56 of the Regulation. The concept of the voluntary nature of group coordination proceedings is also manifested in the liberal opt-out and opt-in mechanisms\textsuperscript{238}, the non-binding nature of the group coordination plan\textsuperscript{239}, as well as in the considerably low level of IPs’ actual powers\textsuperscript{240}. It is obvious that these indications provoke a certain degree of unpredictability and legal uncertainty, and limit dramatically the usefulness of the specific provisions, as it is doubtful to what extent they will be actually chosen by the actors involved.

In particular the opt-out right, apart from causing a 30-day delay to the opening of the group coordination proceedings\textsuperscript{241}, constitutes a very powerful weapon which may be used by individual IPs as “a strategic leverage in order to push through inappropriate demands or even induce parties willing to cooperate to pay a ‘vexation premium’ or bestow certain benefits to the disrupter as a consideration for not opting-out”\textsuperscript{242}. Furthermore, the EIR fails to clarify to what extent a court can scrutinise the appropriateness of a restructuring plan\textsuperscript{243} and does not address actions for disputes arising from the coordination\textsuperscript{244}. This uncertainty, along with the aforementioned points, could seriously hinder the restructuring of GoCs.

Nevertheless, the Regulation shows an effort to counterweight and minimise the liberal and voluntary nature of the coordination proceedings in order to promote legal

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{238}] Regulation (EU) 2015/848, Articles 64 and 70.
\item[\textsuperscript{239}] Ibid Article 70 par. 2. As noted by Weiss: “unfortunately, the group coordination plan can turn into a lame duck” as there is no obligation on the insolvency practitioner to follow any recommendation or the coordination plan: Michael Weiss, ‘Bridge over Troubled Water: The Revised Insolvency Regulation’ (2015) International Insolvency Review, vol. 24, issue 3, p. 212.
\item[\textsuperscript{240}] The coordinator is lacking powers to unilaterally make binding decisions for the entire group, which obviously significantly weakens its role.
\item[\textsuperscript{241}] Delay might prove to be crucial in cases, where time is important.
\item[\textsuperscript{243}] Weiss (n 239), p. 209.
\item[\textsuperscript{244}] Thole and Dueñas (n 208), p. 225.
\end{itemize}
\end{footnotesize}
certainty in insolvency proceedings of corporate groups. More specifically, the “comply-or-explain” obligation set out in article 70(2) EIR and the revocation mechanism provided in article 75 EIR could act as deterrent to any abuse of powers; it must be noted though that these mechanisms constitute a mere formality and there is no specification providing what such justification should contain and to what extent it can be approved by the coordinator, the court and the competent bodies outlined in Articles 70 and 75. The danger of abuse of powers is somewhat counterbalanced also by the requirement to obtain the prior approval pursuant to national law\textsuperscript{245}. Besides, the civil or even criminal liability that the IP usually faces in many jurisdictions along with the right of the court to revoke the appointment of the IP\textsuperscript{246} if their opt-out constituted a violation of their duties, aim also to prevent relevant abusive situations.

Moreover, the opt-out right is subject to a strict time limit\textsuperscript{247}, avoiding a constant threat that group members might opt out at any given moment\textsuperscript{248}. Regarding the delay caused by the opt-out mechanism, it may be supported that, although difficult in practice, a faster opening could be obtained if the IPs involved agreed to waive their opt-out rights\textsuperscript{249}. In addition, the opt-in mechanism, despite the complexity it adds, as long as in practice it will not delay the progress of the group coordination proceedings, can be welcomed as appropriate to enable effective group coordination proceedings, considering that it does not imply any danger of abuse comparable to the malpractices entailed in the opt-out mechanism.

It must be further noted, that the opt-in and opt-out mechanisms could be proved to be useful for the corporate groups in case of problematic situations of IPs colluding with local creditors and not acting in the benefit of the companies. Besides, ‘forcing’ unwilling group members to be included into coordination proceedings might prove deterrent to business restructuring.

\textsuperscript{245} Regulation (EU) 2015/848, Article 64 para. 3.
\textsuperscript{246} Ibid Article 75.
\textsuperscript{247} The opt-out right must be exercised within a 30-day-period before the actual opening of group coordination proceedings.
\textsuperscript{248} Schmidt (n 242), p. 90.
\textsuperscript{249} Ibid p.92.
It still remains, though, an open question whether these ‘safety devices’\(^{250}\) will be sufficient to effectively prevent abuse and counterbalance their layers of cost and complexity or constitute just a “blunt sword”\(^{251}\) and do not efficiently fulfil their purpose.

3. Forum shopping in the group insolvency

One of the key objectives of the recast Regulation is to improve legal certainty and prevent malpractices of fraudulent or abusive forum shopping. The means foreseen in order to achieve such a remarkable goal in the insolvency proceedings of corporate groups entail clarifications and improvements in the procedural framework for determining jurisdiction of insolvency proceedings\(^{252}\), as well as safeguards with regard to the performance of the cooperation and coordination duties. The efficiency of these means, however, is in question due to their inherent problematics.

In particular, under the ‘modified universalism’ system adopted by the Regulation, the ability to forum shop depends a lot upon the vulnerability of COMI, thus on the way the latter is formulated.

Ostensibly, the reforms on the method of determination of the business’s ‘centre of main interests’ would lead to a significant reduction of passive forum shopping, especially through the safeguards of the non-application time limits and the possibility to rebut the presumption of the registered office.

However, when reasoning further, one should conclude that the Recast EIR has essentially accepted forum shopping in cases of corporate groups, as it allows the relocation of COMI towards more favourable jurisdictions\(^{253}\); albeit, in this way the

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\(^{250}\) Schmidt (n 242), p. 97.


\(^{252}\) Regulation (EU) 2015/848, Recitals 27-34.

\(^{253}\) Ibid Recitals 30 and 31, Article 3.
Regulation accepts only ‘good’ forum shopping, distinguishing from the ‘bad’ (abusive or fraudulent one) one\textsuperscript{254}.

Moreover, the omission of a group-COMI itself implicates difficulties with respect to the problem of forum shopping as it may be abused, while also the notion of the ‘COMI’ itself may lead to misinterpretation and manipulation, especially due to the volatile and vague notion of ‘third parties’ ascertaining the company’s actual centre of management\textsuperscript{255}.

At the same time, the priority rule\textsuperscript{256} concerning the coordination of insolvency proceedings of corporate groups could constitute an incentive for ‘a race to the courts’, in order to obtain a more favourable position in the group proceedings by keeping the insolvency proceedings on ‘home turf’\textsuperscript{257}. Besides, by permitting the party autonomy within European Insolvency Law and allowing ‘choice of court’ agreements\textsuperscript{258} - although hard to reach the provided majority - permits interlinked corporate entities to choose a different (central) forum\textsuperscript{259} and, using their synergy, to create more efficiency in cross-border insolvency proceedings\textsuperscript{260}. Thus, the Recast EIR seems to have embraced forum shopping for the benefit of the collective\textsuperscript{261}. It is quite possible that some of the appointed IPs under pressure from local creditors and stakeholders could tend to open proceedings at domestic courts, because that would – at least \textit{de facto} – grant them prevalence over the group’s recovery strategy. Such an event could lead to an exacerbation of the problems connected to forum shopping.

Albeit, the requirement of two thirds of the IPs to enable them to agree to change the competent court may act as a guarantee that the most appropriate court will be in

\textsuperscript{254} Robert Amey, ‘Reform to the European Insolvency Regulation’ (2016) International Corporate Rescue – Special Issue, South Square Articles, p. 18.
\textsuperscript{255} Regulation (EU) 2015/848, Article 3: “...ascertainable by third parties...”.
\textsuperscript{256} Ibid Article 62.
\textsuperscript{257} Thole, Dueñas (n 208), p. 216.
\textsuperscript{258} Regulation (EU) 2015/848, Article 66.
\textsuperscript{259} Ibid Article 66.
\textsuperscript{260} Ibid Article 52.
\textsuperscript{261} For a similar rationale, see also Recital (35) of the Recast EIR, where it is stated that: “the insolvency practitioner should be able to bring both actions in the courts of the defendant’s domicile if he considers it more efficient to bring the action in that forum”.

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charge, “avoiding the hijacking of the proceedings by a minority”\textsuperscript{262}. The Regulation, though, does not provide guidelines on how this selection of court is to be made, leaving room for legal discrepancies, subjective interpretation and hence, for malpractices\textsuperscript{263}.

It must be noted that the forum for the coordination has tremendous impact on the course of the proceedings. The group coordinator is appointed by the competent court and in accordance with the national law of that Member State. Furthermore, in absence of special provisions in the EIR, the group coordination procedure will be governed by the law of the court opening the proceedings; for instance, questions of opt-in and opt-out are subject to the jurisdiction of that specific Member State\textsuperscript{264}. As the group coordinator will most likely be based in the Member State whose court opens the proceedings, the coordination will practically be dominated by the customs, the common practice and the insolvency law of that particular State\textsuperscript{265}. Therefore, any abusive situations affect the proceedings to a great degree.

With regard to the aforementioned problematics, it is not certain whether the Regulation is actually able to pursue its objective of combatting abusive forum shopping, as its own rules may lead to the opposite results.

4. Effectiveness of the group coordination mechanism; Comparison with the general rules of cooperation

The similarity of the coordination and cooperation provisions, to the extent that the latter involves a coordinated effort under the cooperation rules, is more than obvious, considering especially the possibility of a coordination plan outside the coordination

\textsuperscript{262} As noted by van Calster [(n 237), para. 36, p.14], the possibility of having two-thirds of the insolvency practitioners agree regarding which court has exclusive jurisdiction is a welcome step for avoiding the hijacking of the proceedings by a minority and ‘effectively amounts to cram-down of choice of court of group coordination proceedings’.

\textsuperscript{263} Regulation (EU) 2015/848, Article 66.

\textsuperscript{264} Ibid Article 69 (4).

\textsuperscript{265} Thole, Dueñas (n 208), p. 224.
procedure, pursuant to Articles 56 (2) (c) and 60 (1) (b) (i)\textsuperscript{266}. Hence, it seems somehow paradoxical that a coordinator would be needed in a situation where cooperation already runs smoothly. Besides, its effectiveness is doubtful when an earlier attempt at ‘uncoordinated’ cooperation has already proven unsuccessful\textsuperscript{267}. It is not yet certain which is the practical utility of inserting both group coordination procedure and the general provisions on cooperation, creating the reasonable question on what can the complicated coordination procedure achieve that cannot be reached by the general rules on cooperation\textsuperscript{268}.

Having regard to specific aspects of the coordination procedure, its importance and potential prevalence over the cooperation duty could prove to be reasonable. Factors like political influence, public expectations or a familiar forum may prove favourable and effective when a domestic court could become the group coordination court and take initiative\textsuperscript{269}. It may also be argued that a coordinator might have the advantage of being an impartial and independent player in the negotiation, somehow supervising the procedures as well as the appointed insolvency practitioner. Besides, the more structured and organised coordination procedure might be more welcome and preferable than a general and volatile obligation to cooperate.

Nevertheless, the necessity of group coordination is not certain, as in many cases the obligations to cooperate and communicate will suffice, considering that they already foresee the possibility of having a coordinated restructuring plan in their framework. In addition, the voluntary nature of the coordination depending totally on the willingness, capacity and professionalism of the parties, along with the unnecessary bureaucracy and the overall cost\textsuperscript{270}, may be deterrent, especially for smaller groups.

\textsuperscript{266} The insolvency practitioners of the respective proceedings are obliged and empowered to consider and to negotiate a coordinated restructuring plan under Articles 56 (2) (c) and 60 (1) (b) (i) of the Recast Regulation.
\textsuperscript{267} Thole, Dueñas (n 208), p. 220.
\textsuperscript{268} Regulation (EU) 2015/848, Article 56.
\textsuperscript{269} Thole, Dueñas (n 208), p. 221.
\textsuperscript{270} Gerard McCormack, ‘Reforming the European Insolvency Regulation: A Legal and Policy Perspective’ (n 227) p. 58.
Additionally, the structure of the coordination proceedings is clearly administrative and quite formalistic entailing many requirements that render it complicated, lacking, though, the benefits of a real procedural consolidation.

In view of the above, the concept of coordination is theoretically a beautiful idea, but the situations where suchcoordination can be used are more an exception than the rule.

In practice, coordination proceedings would only make sense in isolated cases\(^\text{271}\); in particular, where, because of the volume, costs are a subordinate issue and can be undertaken, the different proceedings are interlinked so closely that an alternative resolution is less feasible, and all parties involved can agree upon one person suitable as coordinator, when especially this person is from outside. Thus, it is questionable whether such an elaborate procedure is really necessary for such a small area of application\(^\text{272}\). In the beginning and in the first years of the EIR’s implementation, though, the procedure could be implemented, mainly for marketing reasons arising out of its innovative nature, and due to the IPs themselves, who might try to distinguish themselves as leading coordinators of group coordination proceedings and establish their reputation.

\(^{271}\) Thole, Dueñas (n 208), p. 216.

\(^{272}\) Stephen Taylor in Conference on Reform of the European Insolvency Regulation, IILR 2011, 242, 247.
CONCLUSIONS

The present analysis attempted to shed light on the practical feasibility and effectiveness of the new legal framework concerning the cross-border insolvency of groups of companies, as established by the Recast Regulation 2015/848 with the aim to facilitate the efficiency of the insolvency proceedings. In order to address this central research question and come to a conclusion of whether the Regulation actually responded to the expectations, the research was conducted with a critical investigation of the main objectives of the EIR: the enhancement of legal certainty, combat of forum shopping and achievement of company rescue.

The findings of the foregoing analysis show that the new provisions were conceived with the intention to promote the aforementioned objectives, but eventually they managed to achieve only partially such a purpose, failing to reach their full potential scope. Accordingly, the positive developments brought by the Regulation will be presented below, followed by the identified debatable issues which appear to remain open.

First of all, the Regulation offers a concrete definition for the GoCs and inserts specific criteria for ascertaining their COMI and thus, the jurisdiction, with the objective to enhance legal certainty and reduce abusive relocations and forum shopping. Additionally, respecting the separate legal personality doctrine it does not explicitly adopt a group COMI, albeit it allows it in cases of centralised groups to achieve a group debt-restructuring in line with the ‘rescue-friendly’ culture.

Moreover, it introduces the mechanisms of cooperation-communication and coordination in order to enhance the efficiency of the independent insolvency

273 Although the Regulation may be compared to other ‘soft law’ instruments (such as the UNCITRAL Model Law on Cross-Border Insolvency) due to its rather soft approach concerning corporate groups, it is worth mentioning that for the first time a specific legal regime concerning groups of companies is backed by ‘hard law’ provisions in the binding form of a Regulation.
proceedings in a more centralised and coordinated manner, aiming to enhance legal certainty for the benefit of creditors and achieve a group restructuring.

Nevertheless, albeit the new legal framework of corporate groups constitutes a step into the right direction, it is questionable whether it actually achieves the objectives of the Regulation, as inherent discrepancies appear evident.

In particular, the scope of applicability of the new legal framework is limited to vertically integrated groups, thus ignoring other common corporate structures. The vulnerable concept of COMI containing volatile and subjective criteria might have the adverse results in the complicated situation of groups of companies where diverse COMIs exist. This may lead to manipulation and abusive forum shopping, thus affecting legal certainty and the predictability of the legal regime.

In addition, the efficiency of the cooperation and coordination provisions is in question, considering the increasing cases of corporate groups having subsidiaries outside the EU\(^\text{274}\). Moreover, the mere ‘procedural coordination’ approach of these new provisions along with their formalistic and voluntary nature, render it difficult to assume that the new regulatory regime is workable in practice, considering also the complexity, costs and delays entailed. Especially the utility of the non-binding coordination mechanism is questionable taking into account that its results can be achieved with the cooperation mechanism and the restructuring plan envisaged therein. In light of these, effective group debt restructuring is rather uncertain.

The efficiency of the new provisions though is not impossible. The mere existence of mechanisms aiming at the rescue of the group, namely the fact that such mechanisms are envisaged in law provisions and, thus, somehow ‘imposed’, may cultivate the

\(^{274}\) The Recast Regulation is only effective within the EU. Besides, neither is there another legislative tool appropriate for corporate groups having subsidiaries inside and outside the EU, considering that the majority of EU countries have not, to date, incorporated the UNCITRAL Model Law into their legislation. See Samantha Bewick, *The EU Insolvency Regulation, Revisited* (Winter 2015) International Insolvency Review, Vol. 24, issue 3, p. 190.
willingness and motivation of the parties involved to work together effectively. This will probably be sought in case of highly interconnected companies and promoted by IPs for marketing reasons. It remains to be seen how and to what extent they will be used by the actors involved upon whose discretion they ultimately rely.

Besides, ambiguities arising from the quite volatile concept of COMI and the soft nature of the new mechanisms will probably become more concrete by future case law, and later on reviewed and improved by the EU legislators according to the new needs. In this regard the fact that the Regulation already acknowledges the virtues of procedural consolidation by allowing a kind of group-COMI must be deemed positive for further review and development towards consolidation (even procedural).

It appears anyhow that, given the difficulties related to group insolvencies, other alternative solutions would be hard to implement at a European level at this moment. Therefore, the Regulation seems to constitute a sensitive compromise between the conflicting interests of improving efficiency and achieving a group rescue, on the one hand, while respecting the independency of insolvency proceedings and the creditors’ rights, on the other hand. Indeed, the potentially positively effective remedies proposed by the Regulation faced the hard obstacle of the achievement of political consensus in the crucial matters, thus the EIR constitutes a political compromise.

In conclusion, according to the results identified in the foregoing analysis, the flexible new regime introduced by the Recast Regulation, despite significant implementation issues, seems to have introduced useful tools for enhancing legal certainty, combating abusive forum shopping and achieving group rescue, thus shaping a new era for group insolvency. Nonetheless, it is hoped the Regulation will not represent the last step in

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276 A full review after 10 years of applicability of the Regulation and a partial review after 5 years regarding the application of the group co-ordination sections is foreseen, and thus, proposals for amendments will be considered.
this direction, and future legislative initiatives are expected to achieve a more effective viability of insolvency proceedings.
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