

EU insolvency law and third countries: Which way(s) forward?

Luciano Panzani and Robert Van Galen summarise the outlook for groups of companies in light of the new regulations



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This text is an abstract of a more wider study presented by Luciano Panzani and Robert Van Galen at the Conference “EU Insolvency Law and Third Countries: Which Way(s) forward?” held in Kiel, 26 – 28 October 2023.

Main features of the group insolvency treatment in the EIR¹

The EIR 1346/2000 did not contain any provisions on groups of companies. When the Recast EIR 848/2015 (“Recast EIR”) was finally introduced, in Chapter V, the scope for intervening either directly or through the courts in the insolvency proceedings of group companies was limited. Chapter V also introduced the concept of a group coordinator, who could try to coordinate the negotiation of a restructuring plan. However, the group coordinator’s powers are very limited. The whole construct seems to rest on the premise that a restructuring plan should be reached by negotiation between the insolvency practitioners appointed in all the insolvency proceedings and possibly the group coordinator and by subsequent adoption in all these proceedings. Around the time of the adoption of the Recast EIR, in 2017, a similar regulation was adopted under German law² and incorporated as §§ 269a-i of the German *Insolvenzordnung*. The provisions of this regulation apply to local German groups of companies. Contrary to European law, under §§ 3a-3e of the *Insolvenzordnung*, insolvency proceedings can be opened in a

single court with respect to all group companies.³

Articles 56-60 Recast EIR⁴ concern cooperation and communication. These provisions are the complement to Articles 41-43, which provide for cooperation and coordination between insolvency proceedings with respect to the same debtor (main and secondary proceedings). Article 56 contains an obligation for an insolvency practitioner appointed in proceedings concerning a member of a group to cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group. An insolvency practitioner’s obligation to cooperate as provided for in Article 56 is subject to limitations which are more restrictive than those applying under the equivalent Article 41. Under Article 56:

- (i) the obligation to cooperate only applies to the extent that the cooperation is appropriate to facilitate the effective administration in the receiving proceedings;
- (ii) the cooperation should not be incompatible with rules applicable to the proceedings of that insolvency practitioner; and
- (iii) the cooperation should not entail any conflict of interest.

These limitations considerably weaken the obligation to cooperate. In insolvency situations, there are often conflicts of interests between group companies, because they have different sets of creditors.

Section 2 of Chapter V concerns group coordination

proceedings. According to Article 61(1), group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group. The group coordinator must not be one of the insolvency practitioners appointed in respect of any of the group companies. The group coordination proceedings will thus be opened by the court first seized. A limitation can be created by means of an opt-out, as discussed below. Solvent group companies cannot be included in the group coordination proceedings.

After the request for the opening of the group coordination proceedings has been filed, the court considers various criteria. If the court is satisfied that these criteria are met, it notifies the insolvency practitioners involved and gives them an opportunity to be heard.

Subsequently, there is a waiting period of 30 days, during which insolvency practitioners appointed in respect of group companies may object to the person of the proposed group coordinator. An insolvency practitioner may also opt out of the group coordination proceedings altogether (Articles 64(1)(a) and 65(1)), in which case the proceedings in which this insolvency practitioner is involved will not be included in the group coordination proceedings. Nevertheless, it is possible that some kind of informal consultation takes place.

Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of group companies

agree that the court of another member state having jurisdiction is the most appropriate court, that court will have exclusive jurisdiction over the group coordination proceedings.

The insolvency practitioners appointed in relation to group members and the group coordinator must cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings.

The essential tasks of the group coordinator are to make recommendations for the coordinated conduct of the insolvency proceedings and to propose a group coordination plan. A group coordination plan is not a rescue plan in the classic sense of a plan capable of modifying creditors' rights and resolving the insolvency. Instead, it is more about coordinating the proceedings. The insolvency practitioners must consider the recommendations of the group coordinator and the content of the group coordination plan, but are not obliged to follow the recommendations of the plan. However, if the insolvency practitioner does not follow the plan, he must give reasons for this. So, this is actually tantamount to a comply-or-explain rule.

Under Article 72(2), the group coordinator has various important rights, including the following:

- (i) the right to be heard and participate in any of the proceedings with respect to group companies included in the plan;
- (ii) the right to mediate any dispute arising between insolvency practitioners of group members;
- (iii) the right to request information from any insolvency practitioner in respect of any member of the group that is included in the plan; and
- (iv) the right to request a stay of proceedings opened in respect of any member of the group that is included in the plan, provided that such a stay is

necessary to ensure its proper implementation.

Efficiency of the EIR and of the MLEGI

The Model Law on Enterprise Group Insolvency (MLEGI) was adopted by UNCITRAL in 2019. So far it has not been enacted in any state.³ Similarly to the Recast EIR, the MLEGI provides for a group proceeding focused on the development of a group insolvency solution for the whole or part of an enterprise group (as explained by recital (c) of its preamble). Additionally, the MLEGI provides for cross-border recognition and implementation of the group insolvency solution in multiple States.

Substantively, to a large extent, the Recast EIR and the MLEGI take the same approach. The planning proceeding is the MLEGI equivalent to the EIR group coordination proceeding and the group representative is the equivalent to the EIR group coordinator.

The Conference on European Restructuring and Insolvency Law ("CERIL") issued a statement and a report on 29 June 2021 (CERIL Statement 2021-2)⁶ on EU Group Coordination Proceedings. Statement 2021-2 observes that as matter of fact the coordination proceeding provided by the Recast EIR was never used in any significant case of a cross-border insolvency.

There are two important reasons that explain why insolvency practitioners do not request the opening of coordination proceedings: the costs and the time involved with such proceedings. The stay that the coordinator may ask for according to Article 72 stops for six months any liquidation of assets which is irreconcilable with the coordination project. Costs are also important. Making a preliminary estimate of the costs of the coordination proceeding is difficult. To these costs must be added the indirect costs coming from the delay of the proceeding.

The more serious reason that convinces the insolvency

practitioner not to open the coordination proceeding is the lack of power of the coordinator. It has been observed that the group coordination proceeding in the EIR is unlikely to be particularly helpful, as it lacks certainty and predictability.⁷ The experience with the secondary proceeding where the EIR provides duties of cooperation between the insolvency practitioner of the main and secondary proceedings, shows that there are bugs and conflicts. The root of these conflicts comes from the creditors' interests that may differ from each other.

Spontaneous coordination between the insolvency practitioners of the group companies is possible, but in the more difficult situations coordination may be desirable, but the coordination proceedings need teeth and claws to be effective.

What has been created was a compromise solution that does not work. There is no interest to ask for the opening of the coordination proceeding. The stakeholders know that it does not provide an efficient solution. ■

Footnotes:

- 1 This text is an abstract of a more wider study presented by Luciano Panzani and Robert Van Galen at the Conference "EU Insolvency Law and Third Countries: Which Way(s) forward?" held in Kiel, 26 – 28 October 2023.
- 2 Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen.
- 3 These provisions pre-date the law of 2017.
- 4 References below to Articles are to those of the Recast EIR, unless stated otherwise.
- 5 The table of the status of UNCITRAL texts on the UNCITRAL website does not show the MLEGI.
- 6 Both the statement and the annexed report can be viewed at: www.ceril.eu/news/ceril-statement-2021-2-on-eu-group-coordination-proceedings
- 7 A. Cohen, R. Dammann and S. Sax, 'Final text for the Amended EU Regulation of Insolvency proceedings' (2015) IILR 117, 120.



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