

New concept in the recast European Insolvency Regulation:

The coordinating insolvency office holder



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The recast EIR (2015/848) offers practitioners new tools in answer to their expectations. The collective coordination proceedings which appoint a coordinating insolvency office holder ('the coordinator') is a good example of how can be treated the insolvency of groups of companies.¹

Before studying of the status of the coordinator, who becomes the real 'conductor' of this new type of proceedings, let us see what the legal context which led to its creation is like.²

The EIR n°1346/2000 did not include a rule concerning the insolvency of groups of companies or an obligation of cooperation between the office holders appointed for each member of the group of companies.³ Though in practice there was a tendency to fill these loopholes by placing all the legal actions dealing with the foreign subsidiaries under the jurisdiction of the country where the mother-company was situated, this "possibility of consolidated proceedings"⁴ was limited by the European Union's Court of Justice. The Luxembourg court has indeed tried to strengthen the rule of the registered office,⁵ thus obliging the courts to minutely motivate the fact that the proceedings were placed together,

based on the COMI of the entire group.

The absence of rules adapted to the bankruptcy of a group of companies reduced indeed the usefulness of the EIR n° 1346/2000, thus limiting the possibility of a global solution in a recent case, *Fagor-Brandt*.⁶

The authors of the recast EIR took care to integrate these critical views, so that the EIR n° 848/2015 includes now a chapter V, concerning the members of a group of companies. This chapter is divided in two parts, one of which being dedicated to the new coordination proceedings⁷ conducted by a new actor, the "coordinator".

In order to better understand the legal status of the coordinator, one must first see the framework of his intervention (I), then the means he has at his disposal in order to work (II).

The framework of the coordinator's intervention

The EIR 2015/848 proposes a number of measures which allow for the treatment of insolvencies related to groups of companies encountering difficulties.⁸

The group coordination proceedings will be mostly reserved to groups of companies which are not completely integrated and whose treatment in case of difficulties cannot be

ensured by a number of main proceedings opened at the court of the State where the mother-company is situated.⁹

The intervention of the coordinator supposes that one or more of the subsidiaries which are situated in other States than the one of the mother-company are the objects of main proceedings. Such a situation can justify the opening of group coordination proceedings at the demand of an insolvency practitioner appointed in proceedings opened in relation to a member of a group of companies.¹⁰

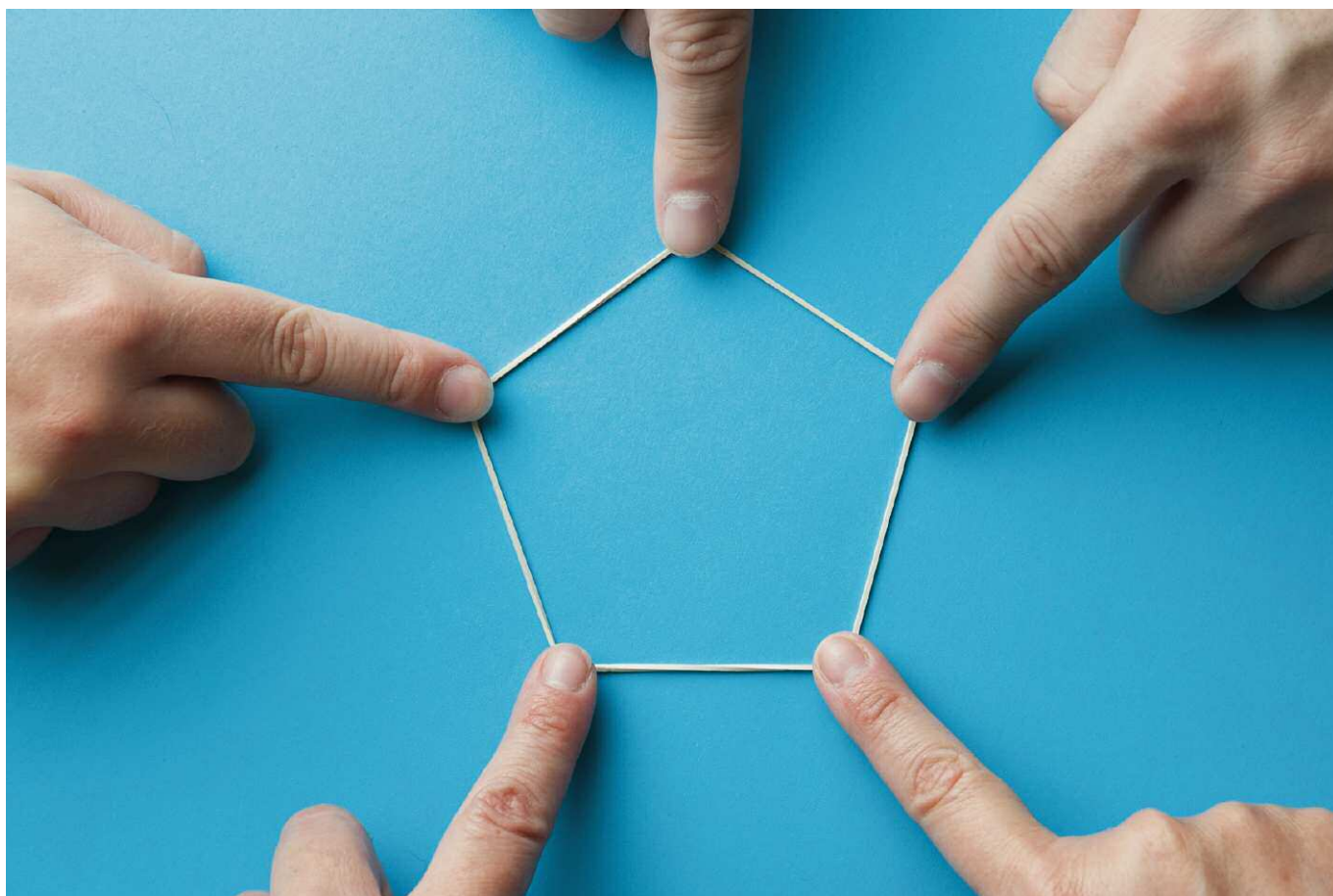
The identity of the coordinator proposed by the insolvency practitioner in the request¹¹ could be contested by another insolvency practitioner appointed in respect of any group member¹², the last one being able to propose another coordinator if the jurisdiction seized allows it¹³.

In the absence of an objection concerning the person proposed as coordinator, the group coordination proceedings are opened and the coordinator is appointed¹⁴. The EIR 2015/848 also describes the means of revoking the appointment of the coordinator¹⁵.

The Regulation indicates the conditions which this person should fulfil, first of all that of being eligible under the law of a

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Member State to act as insolvency practitioner. Article 71 adds that this person shall not be one of the insolvency practitioners appointed to act in respect of any of the group members and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members.

The cost of the group coordination proceedings, especially the coordinator's remuneration, is strictly defined by the recast Regulation. It is clearly stated that the coordinator's remuneration should be *adequate, proportional to the tasks fulfilled and reflect reasonable expenses*¹⁶. In all, no less than four articles are dealing with the costs and the coordinator's remuneration from the moment of filing for the opening of proceedings to the final court order, but also in the case costs increase during the

coordinator's mission till the final statement of costs¹⁷.

The means the coordinator disposes of

Within this new cooperation framework for the entire European Union, barriers between proceedings concerning subsidiaries located in different Member States will no longer exist¹⁸.

Better still, the existence of a coordinator will solve the absence of ranking of the different main proceedings. The coordinator will mainly rely on the means described in Article 72 of the Regulation.

The coordinator can define and establish recommendations for the way the proceedings must unfold. He or she can propose a group coordination plan in view of adopting the same kind of approach for the resolution of the difficulties of all the members of the group.

The application of the plan and its improvement on the way will be allowed thanks to the fluidity of his or her intervention in each of the main proceedings¹⁹. The Regulation gives the coordinator the right to request a stay, for maximum six months, of the proceedings opened in respect of any member of the group of companies, especially if such a stay is necessary for the proper implementation of the plan²⁰.

However, the coordinator's means of action are limited regarding their mandatory force and their extent.

That is, though the Regulation provides that the insolvency practitioner in the insolvency proceedings in respect of a member of the group of companies is supposed to conduct his or her action by considering the recommendations of the coordinator and the contents of the group coordination plan

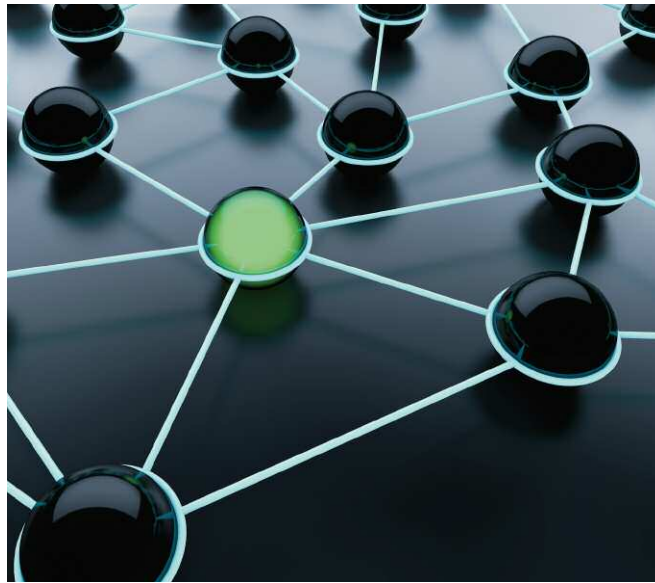


**THE ABSENCE
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THE DECISION TO BE INCLUDED IN GROUP COORDINATION PROCEEDINGS BELONGS TO THE INSOLVENCY PRACTITIONER APPOINTED IN PROCEEDINGS



devised, this principle is somewhat moderated by the idea that the insolvency practitioners shall not be obliged to follow in whole or in part the recommendations of the coordinator and of the group coordination plan²¹. Thus the recommendations of the coordinator and the plan fixed by him or her are not mandatory for the insolvency practitioners in charge of the main proceedings included in the group coordination proceedings.

The group coordination proceedings' extent is a determining factor because it also fixes the extent of the coordinator's powers. On reading Article 72.4 of the recast EIR, one is aware that the coordinator's tasks and rights do not influence in any way the situation of any member of the group not participating in group coordination proceedings.

As a consequence, the means of action the coordinator disposes of are also limited by the group coordination proceedings and their extent.

In fact, the decision to be included in group coordination proceedings belongs to the insolvency practitioner appointed in proceedings opened in respect of a member of the group, and not to the coordinator of the group coordination proceedings²².

Nevertheless, even with these moderating provisions, which cannot be ignored²³, the elaboration of a global solution for solving the difficulties of a European group of companies by the creation of the concept of a coordinator remains a reason for joy. ■

Footnotes:

- 1 The group coordination proceedings are also an answer to the need to reinforce cooperation between insolvency practitioners, to obtain a better coordination of the proceedings and, in a certain way, to consecrate *soft law*.
- 2 The new EIR 2015/848, Art. 92 will be in force starting from 26 June 2017.
- 3 The duty of cooperation and information already existing concerned only the main and secondary proceedings (EIR n°1346/2000, Art. 31).
- 4 Report of the European Parliamentary Commission to the European Council and the European Economic and Social Committee concerning the application of the EIR n° 1436/2000, page 16, 29 May 2000.
- 5 EUCJ, 2 May 2006, concerning the case C-341/04 (Eurofood) ; EUCJ, 20 Oct. 2011, case C-396/09 (Interedil).
- 6 On the difficulties encountered by the French trustee see the article "Inside the Fagor-Brandt case or How to deal with the absence of the notion of 'group of companies' in the European Union" by S. Trevino, T. Leonard and A.-S. Noury, in *Joly Entreprise*, 77, 2015.
- 7 Section 2 of the Chapter V – "Coordination" (Recast EIR, Art. 61-77).
- 8 H. Bourbouloux and A. Loste : « Towards the improvement of the treatment of the insolvency of groups of companies » in the *Collective Proceedings Review* 2015, File 8.
- 9 See above, concerning the difficulties of achieving this improvement because of the very strict case law emanating from the EUCJ regarding registered offices.
- 10 In order to open group coordination proceedings it will especially be necessary that the Court seized be sure that such proceedings would facilitate the effective administration of the insolvency proceedings relating to the different group members and that no creditor of any group

member would be financially disadvantaged by the inclusion of that member in such proceedings. (Recast EIR, Art. 63).

- 11 Recast EIR, Art. 61, 3 a).
- 12 Recast EIR, Art. 64, 1 b). The objections must be addressed to the court chosen within 30 days from the reception of the application for the commencement of the collective-coordination proceedings by the office holder.
- 13 Recast EIR, art. 67.
- 14 Recast EIR, Art. 68, 1 a).
- 15 Recast EIR, Art. 75 : "The court shall revoke the appointment of the of its own motion or at the request of the insolvency practitioner of a participating group member where: (a) the coordinator acts to the detriment of the creditors of a participating group member; or (b) the coordinator fails to comply with his or her obligations under this Chapter."
- 16 Recast EIR, Art. 77. Also see recast EIR, consideration 58: "The advantages of group coordination proceedings should not be outweighed by the costs of those proceedings. Therefore, it is necessary to ensure that the costs of the coordination, and the share of those costs that each group member will bear, are adequate, proportionate and reasonable, and are determined in accordance with the national law of the Member State in which group coordination proceedings have been opened. The insolvency practitioners involved should also have the possibility of controlling those costs from an early stage of the proceedings. Where the national law so requires, controlling costs from an early stage of proceedings could involve the insolvency practitioner seeking the approval of a court or creditors' committee."
- 17 Recast EIR, Art. 61; 68; 72.6; 77.
- 18 See, concerning the groups of companies especially, recast EIR, Art. 56; 57; 58. Also see consideration 52: "Where insolvency proceedings have been opened for several companies of the same group, there should be proper cooperation between the actors involved in those proceedings. The various insolvency practitioners and the courts involved should therefore be under a similar obligation to cooperate and communicate with each other as those involved in main and secondary insolvency proceedings relating to the same debtor. Cooperation between the insolvency practitioners should not run counter to the interests of the creditors in each of the proceedings, and such cooperation should be aimed at finding a solution that would leverage synergies across the group."
- 19 Recast EIR, Art. 72.2 : "The coordinator may also: (a) be heard and participate, in particular by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group; (b) mediate any dispute arising between two or more insolvency practitioners of group members; (c) present and explain his or her group coordination plan to the persons or bodies that he or she is to report to under his or her national law; (d) request information from any insolvency practitioner in respect of any member of the group where that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings;"
- 20 Recast REI, Art. 72.2 c)
- 21 Recast EIR, Art. 70.2
- 22 Recast EIR, Art. 69.
- 23 Note the remarks of Sergio Trevino, president of the Brandt Group: "The ideas proposed by the recast Regulation are very interesting (...). However, one is forced to notice that these innovations wouldn't be enough: the principles of cooperation and coordination are not utterly imposed and can be easily fail because of the rules that apply to main proceedings" in the article "Inside the Fagor-Brandt case or How to deal with the absence of the notion of 'group of companies' in the European Union" by S. Trevino, T. Leonard and A.-S. Noury, in *Joly Entreprise*, 77, 2015.