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TRANSNATIONAL PROTOCOLS: A COOPERATIVE TOOL FOR MANAGING CROSS-BORDER INSOLVENCY

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(Article 1(1)) and the automatic processing of personal data (Articles 2(1) and 4(1)). The impact of these provisions will be notable in relation to natural persons acting as creditors in various insolvency proceedings.

Specifically, conflicts may arise between the aims being pursued by the two Regulations. On the one hand, Article 41(2)(a) of EIR 2015/848 requires insolvency practitioners to supply information that 'may' be relevant, 'provided appropriate arrangements are made to protect confidential information'. Meanwhile, Article 5(1)(c) of GDPR requires insolvency practitioners to minimize the data they supply.

Furthermore, pursuant to Article 6(1) of GDPR, data processing will only be lawful if at least one of the conditions listed there is met. With regard to insolvency practitioners, the lawfulness of the processing of the data they handle can be based on two precepts. On the one hand, according to the provisions of Article 6(1)(c) GDPR, processing shall be lawful where it is 'necessary for compliance with a legal obligation to which the controller is subject'. This legal obligation may derive from either Union Law or the laws of the Member States (Article 6(3) GDPR). Thus, in the majority of cases, insolvency practitioners are entitled to process personal data belonging to both the debtor and the creditors. On the other hand, Article 6(1)(e) of the Data Protection Regulation is also applicable, which determines the lawfulness of the processing where it is 'necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller'. Certainly, the mission to administer the assets of the debtor (and the resulting processing of the data of the debtor and the creditors) would undoubtedly appear to be a task carried out in the public interest. Furthermore, it can be easily argued that insolvency practitioners carry out semi-jurisdictional tasks (i.e. tasks that in some manner exercise public powers).

With the exceptions set out in this section, protocols ought to be able to contain any provision, provided that this helps to realize and develop cooperation across different insolvency proceedings underway in respect of the assets of one single debtor.

Protection, now repealed and replaced (from May 2018) by the Data Protection Regulation 2016/679, automatically applicable in all Member States.

CHAPTER VI

INSOLVENCY PROTOCOLS: A COOPERATIVE TOOL FOR MANAGING CROSS-BORDER GROUP INSOLVENCY *

1. Issues related to the restructuring of insolvent companies. The specific features of the multinational group

A. Hitherto, there has been substantial research interest – in tools and mechanisms that are able to safeguard the business continuity of the distressed enterprises, such as protocols. Protecting distressed businesses is now recognized as a "value" to be protected in and for itself and no longer an ancillary function to the insolvency process. The use of instruments and mechanisms which avoid the most harmful effects to communities is therefore encouraged. Whilst the initial purpose

* This contribution is a result of the ToP research project. This Chapter is authored by Daniele Vattermoli (§§ 1, 2, 5 and 7), Professor of Commercial Law, Università degli Studi La Sapienza di Roma, Federica Pasquariello (§§ 6, 6.1, 6.2 and 7), Professor of Commercial Law at Università degli studi di Verona, and Claudia Tedeschi (§§ 3, 4 and 7), Professor of Commercial Law, Università degli Studi La Sapienza di Roma.

d) Finally, it should be pointed out that when configuring the content of the agreements, the parties must necessarily take into account the ultimate objective - let's say, the legally relevant function - for which they are contemplated in the texts previously reported, i.e. to facilitate the efficient management of the assets of the insolvent companies of the group, in the interest of creditors (*recte*: of all creditors involved) [100].

More specifically, the cost/benefit analysis carried out primarily by the representative of the insolvency proceedings and preparatory to the decision as to whether or not to participate in the cooperation process through the use of the protocol must lead to the result that, compared to the "independentist" alternative - or, in any case, the alternative given by the lack of agreement - no creditor in the administered proceedings is damaged by coordination, according to the well-known formula "*no creditors worse off*" [101]. Any agreement that does not pursue this objective must therefore be considered illicit.

6. Insolvency Protocols versus Group Coordination Proceedings. An introduction

Having outlined the essential features of insolvency protocols, it's worth analyzing them more deeply by comparing

practitioners who have been involved with their use as the key to developing appropriate solutions for particular cases, without which a successful conclusion to the proceedings would have been very unlikely. Their increasing use suggests that in time they may become the norm in cases with a significant international element, although their use is not ubiquitous, currently being limited to a handful of States».

[100] L. Fumagalli, *I protocolli tra le procedure nella disciplina transfrontaliera dell'insolvenza*, in Leandro, Meo, Nuzzo, *Crisi transfrontaliera di impresa: orizzonti internazionali ed europei*, Bari, 2018, 196.

[101] Explicit on this point, albeit with more general reference to cooperation, Recital n. 52 EIR 2015/848: «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».

them with the other voluntary commitments provided by EIR 2015/848 for the most efficient management of the multinational group's crisis: in particular, the following analysis will focus on Group Coordination Proceeding, according to arts. 61 and following EIR.

One of the key innovations introduced by the Recast Insolvency Regulation is undoubtedly the modulation of "Group Coordination Proceedings", which were not present in the previous version of the Regulation. Such an innovation is seen as a significant step forward and, as such, is very much welcome as it addresses group insolvency, which was never approached before. Furthermore, EIR allows areas of contractual freedom and self-regulation encouraging other voluntary commitments in three different scenarios: first of all, art. 61 EIR states that Group coordination proceedings may be applied in the case of several local proceedings of group companies [102]. This "super-coordination" proceeding is aimed at improving the effects of the procedural coordination.

Secondly, art. 36 EIR allows the Insolvency Practitioner (IP) in the main proceeding to give a unilateral commitment in order

[102] On this issue see S. Bariatti, *Reg. UE 2015/848 20th May 2020 regarding the insolvency proceedings (refusion) first glance*, www.ilfallimentarista.it, 9.9.2015; L. Boggio, *Introduction to the new EU law regarding insolvency and pre-insolvency*, Giur.it., (2018), I, 222; R. Bork–K. Van Zwieten, *Commentary on the European Insolvency regulation*, Oxford, 2016; R. Bork-R. Mangano, *European Cross border Insolvency law*, Oxford, 2016; P. De Cesari–G. Montella, *Il nuovo diritto della crisi d'impresa*, Giappichelli, 2017; CERIL (Conference of European Restructuring and Insolvency Law), www.ceril.eu, June 2014; H. Eidenmüller, *A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond*, Maastricht Journ. Eur. & Comp. Law, (2013), 147; A. Leandro, *Regulation (EU) n. 2015/848 and group of companies: choice between cooperation and coordination', in 'Cross-border business crisis: European and International borders*, Cacucci, Bari, 2018; F. Mucciarelli, *Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?*, Eur. Com. Fin. Law Rev., (2016), 26; S. Madaus, *Insolvency proceedings for Corporate Groups under the new Insolvency regulation*, International Insolvency law Review, 6 (2), (2015), 235-247; G. Vallar, *The Crisis of multinational banking groups*, Padova, 2017; R. Van Galen, *The European Insolvency regulation and Groups Company*, (2008), http://iii.global.org; D. Vattermoli, *Gruppi multinazionali insolventi*, Riv. dir. comm., (2013), 585; A. Van Hoek, C. Van der Plas, A. Salomons, R. de Weis, *Dutch report on cross border Insolvency proceedings*, in *European and national Perspectives on the application of the European insolvency Regulation*, Roma, 2017.

to avoid the opening of secondary insolvency proceedings [103]; while respecting assets located in the Member State in which secondary insolvency proceedings could be opened, and here the IP will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. In other words, by means of the undertaking, the IP will act "as if" he leads a non-main proceeding, also called Virtual Territoriality, [104] as they were formerly known in Common Law Countries. [105] These were, for the most part, applied or used in

[103] That's based on the assumption, declared *expressis verbis* in whereas 41 EIR: "Secondary insolvency proceedings may also hamper the efficient administration of the insolvency estate "; while "Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings to the other Member States where the assets are located. For that reason, the insolvency practitioner in the main insolvency proceedings may request the opening of secondary insolvency proceedings" (art. 40). Actually, in order to avoid a non-main proceeding, the EIR also provides for the possibility that the court temporarily stays the opening of secondary insolvency proceedings, "when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings, in order to preserve the efficiency of the stay granted in the main insolvency proceedings. The court should be able to grant the temporary stay if it is satisfied that suitable measures are in place to protect the general interest of local creditors. In such a case, all creditors that could be affected by the outcome of the negotiations on a restructuring plan should be informed of the negotiations and be allowed to participate in them" (Whereas n. 45).

[104] About *Syntetic proceeding*, or *Virtual Proceeding* see G. Moss, I. FLETCHER, S. ISAACS, *The EU Regulation on Insolvency Proceedings*, Oxford, 2016, 59 and 66; R. DAMMANN-M. KOHMANN, *Le nouvel attelage entre procédures principale et secondaire(s), Le nouveau règlement insolvabilité: quelles evolutions?*, by Jault-Seseke & Robine, Paris, 2015, 106; P. LAUKERMANN, *Instruments to avoid or postpone secondary proceedings*, Introductory paper for the kick-off conference of the EU project "Implementation of the New Insolvency Regulation", Vienna, 17/18 april 2015, JUST/2013/JCIV/AG/4679; C.W. MOONEY, *Harmonizing Choice-of-Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests*, Brooklyn Journ. Corp. Fin. & Comm. Law, (2014), 121; B. WESSELS, *Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation*, in Brooklyn Journ. Corp. Fin. & Comm. Law, (2014), 236; J. L. WESTBROOK, *A Global Solution to Multinational Default*, 98, Mich. L. Rev., (1999-2000), 2300.

[105] See Collins & Aikman Europe, SA, the High Court of England and Wales, Chancery Division, (2006), EWCH 1343 (Ch), www.bailii.org

cases of insolvency of multinational groups. Where these are used, the undertaking shall specify the factual assumptions on which it is based, focusing, in particular, on the value of the assets located in the Member State concerned and the options available to wind up such assets and then seek the approval of the majority of the known local creditors. Nevertheless, it does not turn into a proper bilateral agreement. [106] At the same time, it must be considered that a non-main proceeding is not excluded and it may occur within a company group, if the holding itself – or even another group company – has an establishment placed in a different member State; however, this scenario is not different compared to the basic case (i.e.: relationship between main and non-main proceeding of a single debtor).

Finally, yet importantly, insolvency protocols are supposed to coordinate proceedings and improve cooperation both in a vertical relationship, between main proceedings and non-main proceedings regarding a single debtor and in a horizontal relationship between proceedings involving different group companies. Actually, the EIR recast (namely n. 41), enhances cooperation and communication between Insolvency Practitioners (art. 41 EIR), Cooperation and communication between Courts (art. 42 EIR) and Cooperation and communication between Insolvency Practitioners and Courts (art. 43 EIR). The same is also stated in relation to proceedings involving several group companies (Articles 56-57-58 EIR).
Overall, in relation to all three institutions envisaged by the Regulations - Unilateral undertaking; Protocol; Group Coordination Proceeding - while the civil law jurist assists in the institutionalization of negotiation practices that have been atypical to date, the common attitude of the same to express, in a single synoptic framework, the collaborative logic for the most effective crisis management and eventual reorganization of companies interested reveals a covenant matrix, which however can only lead to the formalization of a real programmatic document on the action of the procedure.

Regarding company groups, both Protocols and Group Coordination Proceeding are provided for. We now intend to

[106] See R. BOKE-R. MASSARO, *European Cross border Insolvency law*, Oxford, 2016; 248; R. DAMMANN-M. KOHMANN, *Le nouvel attelage entre procédures principale et secondaire(s), Le nouveau règlement insolvabilité:* [illegible] Paris, 2015, 103

consider the new regulation on Group Coordination Proceeding, to then compare it to the second tool provided by EIR: Insolvency Protocols for group cooperation. [107] It must be said that a further implementation of the solutions to the problem is achieved according to the so-called Anglo-Saxon approach. In fact, in the presence of groups of companies, the national courts try to open, in the State of the headquarters of the parent company, main procedures also against foreign affiliates, overcoming the presumption laid down by art. 3, on the assumption that the group's COMI was located in the State of the Forum [108]. The latter orientation of the national jurisprudence has received a legitimacy from EIR 2015/848, in particular by the enactment of Preamble provision n. 28 and 30, which reflect the interpretative principles elaborated in the Eurofood, Interedil and Rastelli sentences [109]. Preamble provision n. 53 states that: "The introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them".

Should different proceedings be opened in the same Member State against group companies having the same COMI, national *lex concursus* may apply for a consolidation.

[107] With reference to EIR 2015/848, art. 90 provides that within 27 June 2027 and, later, every five years, the Commission should present a report on the application of the regulation together with an amendment proposal. For the procedure related to the coordination of the group, the said report on the application and a probable amendment is fixed for 27 June 2022.

[108] In Italy see Trib. Isernia, 10 April 2009, in *Fallimento*, 2010, 59; Trib. Milano, 26 luglio 2011, available at www.ilcaso.it.; Cass., Sez. un. ord. 6 February 2015, n. 2243). In France: Tribunal de commerce, Paris, 2 August 2006 (*Eurotunnel;* in *LexisNexis-Jurisclasseur*); Tribunal de commerce, Roubaix-Turcoing (France) 21 April 2008 (Illochroma); Tribunal de commerce, Meaux (France), 1° October 2008; in UK, High Court of Justice (England & Wales), Chancery Division, 14 January 2009 (*Nortel Networks SA*).

[109] See CJEU, 2 May 2006, C-341/04, *Eurofood*; CJEU, 20 October 2011, C-396/09, *Interedil;* CJEU, 15 December 2011, C-191/10, *Rastelli.*

6.1. Group Coordination Proceeding

Broadly speaking, it must be said that even the Uncitral Model Law Model Law on Cross-Border Insolvency [110] provides for group insolvency; however, the recognition of a group plan, the so-called planning procedure, takes place always and only on the basis of the legislation of the State that makes the recognition. In any case, planning proceedings include coordination and organization tasks, even if it can lead to the issuing of reconnaissance and disqualification measures (relief) in the State in which recognition is required.

According to EIR 2015/848 through Group Coordination Proceedings, which are added to the individual parallel proceedings, a new procedural space is created [111] so as to put cooperation and coordination in the hands of a single person, instead of the drafting of an insolvency protocol *ad hoc.*

At least four steps are required in order to succeed in opening a Group coordination proceeding: - the IP's request; - the Court assessment and notice; - eventual IP's objection; - the court decision; - the IP's opt in (possible).

According to EIR, Group Coordination Proceedings can be requested by any appointed IP or debtor in possession before any Court having jurisdiction over the insolvency proceedings of a member of the group according to the law applicable in the State, where he/she was appointed. Any other IP may lodge objections [112] so apparently, the IP is not supposed to file his request to his own national jurisdiction and every court having jurisdiction for a local proceeding can file the request. This request is accompanied by a proposal as to the person to be nominated as the group coordinator; instead, no description

[110] UNCITRAL, Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 2014, www.uncitral.com. On the Model Law see IMF, *Orderly & effective insolvency procedures. Key issues*, Washington, 1999, 6 ff; F. DEANE-R. MASON, *The UNCITRAL Model law on Cross-border Insolvency and the Rule of Law*, International Insolvency Review, (2016), 138.

[111] Which indicates the criteria for identifying - as well as the judge and the administrator, as seen above, also - the language to be used in internal communications, the forms of cooperation, the distribution of expenses (art. 73-77, Reg).

[112] Commission Implementing Regulation 12th June 2017, (EU) 2017/1105, Annex III, provides for the standard notice form to be used for the lodgement of objections in group coordination proceedings.

concerning the group map is required – although this is likely to be given [113].

It is worth highlighting that, apart from the right to apply for coordination proceedings, two more "extra powers" are given to the IP in proceedings concerning members of a group company, according to art. 60 EIR: (a) the right to be heard, (b) the right to request a stay [114] - and, precisely, (c) the right to apply for a coordination proceeding.

A priority rule is established for the Court first seized, according to art. 62 EIR: where the opening of group coordination proceedings is requested before courts of different Member States, any court other than the court first seized shall decline jurisdiction in favour of that court.

A Group Coordination Proceeding is not opened unless three conditions are all fulfilled: (a) it is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members; (b) no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and (c) the proposed coordinator is eligible under the law of a Member State to act as an insolvency practitioner; he or she is not one of the insolvency practitioners appointed to act in respect of any of the group members, and has 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. Should one of these conditions be lacking, no Group Coordination Proceeding can be opened, so any court decision should be challenged according to national law.

The seized court shall give notice of the request to any Insolvency Practitioner appointed in other proceedings as soon

[113] For instance, according to art. 289 CCI, Italian Bankruptcy Code, in force in September 2021, information about group is to be given at the same time the petition is filed.

[114] Such a stay can be requested provided that: (i) a restructuring plan for all or some members of the group for which insolvency proceedings have been opened has been proposed under point (c) of Article 56(2) and presents a reasonable chance of success; (ii) such a stay is necessary in order to ensure the proper implementation of the restructuring plan; (iii) the restructuring plan would be to the benefit of the creditors in the proceedings for which the stay is requested; and (iv) neither the insolvency proceedings in which the insolvency practitioner referred to in paragraph 1 of this Article has been appointed nor the proceedings in respect of which the stay is requested are subject to coordination

as possible; within the following thirty days, each IP is allowed to object before the court the inclusion within group coordination proceedings of the insolvency proceedings in respect of which it has been appointed; or the person proposed as a coordinator. Therefore, the decision will have no effect upon the proceeding whose inclusion in Group Coordination Proceeding has been objected. Once the proceeding is opened, a duty of Cooperation between insolvency practitioners (or the debtor in possession, just in case) and the coordinator is appointed, according to art. 75 EIR.

Later, if at least two-thirds of all IPs appointed in insolvency proceedings of the members of the group have agreed that a Court of another Member State having jurisdiction is the most appropriate Court for the opening of a Group Coordination Proceeding, that Court shall have exclusive jurisdiction (art. 66 EIR) and shall appoint a coordinator, even deciding on the outline of his coordination function.

Each national IP is given a chance for opting out, since he/she may object to the inclusion within group coordination proceedings of the insolvency proceedings in respect of which it has been appointed, or to the person proposed as a coordinator (art. 64 EIR). No objection is allowed against other companies being included inside the group area; on the other hand, not-included companies can join the group proceeding at any time, by filing an opt-in petition (art. 69 EIR).

Prior to taking the decision on whether to participate or not in the coordination, an Insolvency Practitioner shall obtain any approval which may be required under the law of the State of the opening of proceedings for which he/she has been appointed. Actually, the decision-making process about whether to join group coordination proceedings or leave them is not specifically covered in EIR: thus, some Member States provide national rules in this respect that often aim at safeguarding the involvement of the creditors' committee [115].

Regarding the applicable law, the full validity of the individual local laws in relation to the individual procedures remains unchanged [116], and any substantial consolidation effect

[115] See CERIL (Conference of European Restructuring and Insolvency Law), www.ceril.eu, June 2014.

[116] See P. De Cesari-G. Mortellaro, *Il nuovo diritto della crisi d'impresa*, Giappichelli, 2017; CERIL (Conference of European Restructuring and

is excluded [117]. Besides, the "entity by entity" approach also implies that there is no room for a global evaluation aimed at ascertaining the insolvency of a group as a whole.

The process of the initiative for the opening of the Group Coordination Proceeding, its admission, the election of the competent Court, the procedure for choosing the national judge to whom to assign international jurisdiction, any objections of the administrator of a single procedure to exercise opt-out; cost sharing; data protection etc., is so detailed that any in-depth analysis is not recommended, here [118].

Nevertheless, it is worth noticing that a group coordination plan has to be set up by the coordinator. It identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. In particular, these contents are so listed: "the plan may contain proposals for:

(i) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;

(ii) the settlement of intra-group disputes as regards intra-group transactions and avoidance actions;

(iii) agreements between the insolvency practitioners of the insolvent group members" [119]. In order to create a time frame and ensure the proper implementation of the plan, the coordinator may request a stay for a period of up to six months for any proceedings opened in respect of any member of the group.

The major difficulty in drafting such a plan will probably be

Insolvency Law), www.ceril.eu, June 2014., 177 ff.; G. GRACI, *UE e disciplina dell'insolvenza (II parte). Le procedure di insolvenza di società facenti parte di un gruppo di società*, Giur. It., (2018), 480.

[117] See art. 72, § 3, EIR.

[118] See Artt. 61-77 EIR. Above these items cfr. S. BARIATTI-G. CORNO, *Il Regolamento (UE) 2015/848 del Parlamento Europeo e del consiglio relativo alle procedure di insolvenza (rifusione). Una prima lettura*, available at www.ilfallimentarista.it, 9 sett. 2015; P. FAZZINI-M. WINKLER, *La proposta di modifica del regolamento sulle procedure di insolvenza*, Dir. comm. internaz., (2013), 163; G. MOSS-T. SMITH, *Commentary on Regulation 1346/2000 and recast regulation 2015/848 on Insolvency proceedings*, in MOSS, FLETCHER, ISAACS, *The EU Regulation on Insolvency Proceedings*, Oxford, 2016, 515; C. THOLE-M. DUENAS, *Some observations on the New Group Coordination Procedure of the reformed European Insolvency Regulation*, International Insolvency Review, (2015), 220.

[119] See art. 72, EIR.

encountered when trying to link the conservative and liquidation process about the different group companies [120].

The coordinator is supposed to act impartially and with due care, and to share information with national IPs. Besides, according to art. 72 EIR, specific Coordinator's tasks and rights are meant to identify and outline recommendations so as to coordinate and conduct the insolvency proceedings. The coordinator may also: "(a) be heard and participate, by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group;

(b) mediate in 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; and

(e) request a stay for a period of up to 6 months" (as mentioned above).

Art. 75 EIR lays down that the court – on its own motion or at the IP's request – can revoke the appointment of the coordinator if he/she acts to the detriment of the creditors of a participating group member.

Notwithstanding the great role of the plan in enhancing procedural coordination, it has to be noted that - according to art.70 EIR - insolvency practitioners are free to decide whether or not to follow the coordinator's recommendation and the content of the group coordination plan.

If the recommendations are not followed, the IP is expected to give reasons for not doing so to the persons or bodies to whom he is to report under national law, and to the coordinator, in compliance with existing rules. The IP can exercise this choice not only for convenience and opportunity; it goes without saying that IPs have to act in line with their own national law (i.e. rules applicable to the proceeding for which they have been appointed), so they simply must ignore any coordinator's recommendation, should it result in a law violation.

[120] The same is true for the group-restructuring plan mentioned in Art. 60 EIR 2015 which is, in essence, a group coordination plan proposed by an IP in one of the proceedings instead of a coordinator.

Although the IP is requested to give reason for not following the coordination plan, it is equally true that the EIR does not provide for any system for checking the soundness of these reasons.

6.2. Group Coordination Proceeding versus Protocols

A. Both Group Coordination Proceeding and Insolvency Protocols share common issues.

a) Firstly, they are based on a "multiple enterprises approach" (or "separate entity approach"), so that they strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality [121] so that they provide for procedural consolidation techniques based on a cooperative territorialism approach yet never allowing any substantial consolidation ending [122]. This is implicit in relation to Insolvency Protocols and explicit in relation to Group Coordination Proceedings according to art. 73 EIR.

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[121] See K. ANDERSEN, *The cross-border insolvency paradigm: a defense of the modified universal approach considering the Japanese experiment*, 21 University of Pennsylvania Journal of Economic Law, (2000), 679 ("one advantage of [...] modified universalism is that it retains some of the efficiencies of pure universalism while incorporating the flexibility and discretion of the [...] territorial approaches described above"); L. BARTLED, *Cross-Border Bankruptcy and the Cooperative solution*, 9 Int'l L. & Mgmt. Rev. 27, (2012-2013), 29; R. BORK-R. MANGANO, *European Cross-border Insolvency Law*, Oxford, 2016, 27; A.B. DAWSON, *Modularity in Cross-border Insolvency*, 93, Chi-Kent Law Rev. 677, (2018); P.A. DE MIGUEL ASENSIO, *Reestructuración e insolvencia transfronteriza: claves del nuevo Reglamento europeo*, RcP, n° 27, (2017), 1-23 (versión Smarteca); M. FLORES, *Los concursos conexos*, Thomson Reuters-Aranzadi, 2014; B. HESS, *The Implementation of the New Insolvency Regulation*, Luxembourg, 2017; A. KAMALNATH, *Cross-Border Insolvency Protocols: A Success Story?*, International Journal of Legal Studies and Research (IJLSR), vol. 2, no.2, (2013); L.M. LOPUCKI, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 Mich. L. Rev., (2000), 2216; B. WESSELS, *A Global Approach to Cross-Border Insolvency Cases in a Globalizing World*, The Dovenschmidt Quartely, (2013), Issue I; J.L. WESTBROOK, *Global Insolvency Proceedings for a Global Market: The Universalist System and the choice of a Central Court*, 96 Tex. L. Rev., (2018), 1473.

[122] On the issue of substantive consolidation, see I. MEVORACH, *INSOL 'Europe's Proposals on Groups of Companies (in Cross-Border Insolvency): A Critical Appraisal'*, 21 Int. Insolv. Rev. 183, (2012), 195; D. VATTERMOLI, *Gruppi insolventi e consolidamento di patrimoni (substantive consolidation)*, RDS, (2010), 602.

In this procedural consolidation view, the content of the procedural plan and protocol are equally flexible so that in both cases a variable can be added to allow possible integration in proceedings. As seen above, this content might deal with many items [123], such as:

i) the setting of the methods and timing of the information flows within the procedures [124];

ii) the link in transactions relating to bulk settlements;

iii) the establishment of joint hearings, which are suggested especially in relation to the assessment of the liability in liquidations or approvals in the agreements with creditors [125];

iv) the identification of the conflict rules on the applicable law, where they do not preclude mandatory principles of international private law, but precisely, where there are areas of self-determination [126];

v) the sharing of strategies regarding the execution of recovery or liability actions or regarding choices to take in relation to pending contracts;

vi) the appointment of a unique insolvency practitioner playing a supervisory role. Such appointment is necessary in

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[123] Relating to contents of Protocol, see *Checklist* by *European Communication and Cooperation Guidelines for Cross-border Insolvency-INSOL Europe.*

[124] The exchange of information between the bodies of the procedure is a crucial value in the view of the EU legislator, as established by whereas 48: "Adequate cooperation implies that the various insolvency professionals and the courts involved cooperate closely, in particular by exchanging a sufficient amount of information". The interest in sharing information must find a non-fundamental balance in the protection of the debtor's privacy rights and subjective legal positions. On this item, see *Guidelines Applicable to Court-to-Court Communications in Cross-border cases, American Law Institute*, 2000).

[125] Thereby, facing the numerous and not secondary technical and operational formalities imposed by the practice, and related - for example - to the use of remote video communication methods or the involvement of official translators. The transposition of Dir. 1023/2019 has its effects: by 17 July 2021 (art.34, paragraph 1), the Member States will be required to adopt and publish the laws, regulations and administrative provisions envisaged to comply with the directive, with the exception of the legislation on the use of electronic means of communication, also in cross-border situations, pursuant to art. 28, par. 1, lett. a), b) and c), provisions that must be provided and published by 17 July 2024 at the latest.

[126] See arts. 8 and 11 EIR, related to *lex rei sitae* in rights *in rem* and immoveable property; art. 18 about *lex fori processus* (see CJEU, 6 June 2018, n. 250, Tarago); art. 13 about *lex contractus* in Contracts of employment and art. 12, EIR about Payment systems and financial markets.

case of Group Coordination Proceedings and possible in the case of Protocols. In the latter, they may appoint a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies, provided that this is compatible with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency practitioner. In fact, the latter is a rather delicate aspect, and a possible source of complications, since it is not obvious that the procedures are well synchronized, so as to allow – together with the protocol - the designation of a common IP; and, moreover, the requirements for the appointment could be divergent in the various national systems involved [127].

b) Secondly, Protocols and Group Coordination Proceedings both show a voluntary basis and share an optional and eventual character as well as, broadly speaking, a negotiating nature, it being a procedural body's choice not only for the "if" but also for the "how" when finding the solution, in line with the conditions envisaged in the Regulation. This is understood if we consider the Protocol as a sort of "contractual" tool. On the contrary, the same cannot be said for Group Coordination Proceeding" which could have been seen, in principle, as mandatory. The soft option to ensure the voluntary nature of Group Coordination Proceedings is justified for various reasons: regardless of the difficulties, on an international level, to agree to any interference with domestic system, the varied context in which the group company operates suggests flexible solutions. In fact, the recent amendment to the Italian Regulatory Framework, applies the same regulatory choice in providing for an alignment between liquidation programs, respectively drafted for group company and concordant plans "mutually connected and interfering" [128].

c) Furthermore, these tools are subject to the same limit, under

[127] D. VATTERMOLI, *Gruppi multinazionali insolventi*, Riv. Dir. comm., (2013), 585.

[128] In the context of Italian Crisis Code, in force from September 2021, the coordination objectives are indicated in arts. 284 and 287 CCI: *ex multis* AA.VV., *I gruppi nel codice della crisi*, NIGRO-VATTERMOLI (eds.), Pisa, 2020; G. D'ATTORRE, *I concordati di gruppo nel codice della crisi d'impresa e dell'insolvenza*, Fallimento, (2019), 27; M. FABIANI, *Il diritto della crisi e dell'insolvenza*, Bologna, 2017, 620; G. GUERRIERI, *Il nuovo codice della*

penalty of invalidity; the limit of compatibility "with the rules applicable to each procedure" [129] but also the respect of the creditors of each of the companies involved. The general clause can be expressed in the slogan "no creditors worse off" [130], aiming at not causing, through these spontaneous tools, prejudice to other creditors, according to art. 63 EIR ("no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings"). The issue is certainly complex, both for the intrinsic difficulty in selecting the creditor who may be "financially disadvantaged" from the inclusion of the company in the group procedure, and for identifying the remedy, in the event of effective and harmful inclusion [131].

In other words, credit protection remains a typical function of Insolvency proceedings, as established both in Preamble 52 EIR ("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") and in Italian regulation [132].

Moreover, while Group coordination proceedings and

(2016), 1153; G. SCOGNAMIGLIO, *I gruppi di imprese nel CCII: fra unità e pluralità*, Società, (2019), 41. The same in Art. 25 of Spanish Ley concursual, as modified by Ley n. 38/2011

[129] See art. 7 EIR "Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the 'State of the opening of proceedings')". Relating to protocols see also Artt. 41- 43 e 56-58, EIR.

[130] The parameter "no creditors worse off" was declared for the first time level of EU legislation by Art. 34, co 1, lett. g, Dir. UE 59/2014 on the recovery and resolution frameworks of credit institutions and investment firms ("no creditor shall incur greater losses than the ones expected if the [resolution] entity ... had been wound up under normal insolvency proceedings").

[131] See D. LATELLA, *La crisi dei gruppi di società nella riforma dell'insolvenza transfrontaliera: profili generali*, Giur. It., (2018), 480.

Insolvency protocols aim at facilitating the effective administration of the insolvency proceedings of the group members, they are supposed to have a generally positive impact for the creditors; furthermore, the advantages should not be outweighed by the costs. This principle has been clearly established both in relation to Group coordination proceedings [133] and in relation to Protocols [134].

Furthermore, Group proceedings may result in a costs growth [135], so they are expected to be worth the costs: "Where the coordinator considers that the fulfilment of his or her tasks requires a significant increase in the costs compared to the cost estimate (...), and in any case, where the costs exceed 10 % of the estimated costs, the coordinator shall: (a) inform without delay the participating insolvency practitioners; and (b) seek the prior approval of the court opening group coordination proceedings" (art. 72, § 6, EIR). The EIR establishes that costs evaluation has to be performed three times: before the opening of the procedure, during the procedure and at the end of the procedure.

d) Finally yet importantly, Insolvency Protocols and Group Coordination Proceedings play a crucial role in the development of the business continuity plan for all or for some of the companies, which are insolvent/in crisis, or for their branches. Namely, it plays a crucial role in coordinating reorganization plans already put forward as well as, in cases of liquidation, managing the provisional business of the companies and, in some cases, it measures the margins of convenience for creditors which effects the possibility to project itself in a supplement active phase. If, as possible and desirable, the different conservative/continuity approach, use sophisticated techniques in order to reorganize companies by increasing the capital and excluding the right of option as well as conveying the credit capital into a risk capital or other extraordinary

[133] See Whereas 57 EIR: "Group coordination proceedings should always strive to facilitate the effective administration of the insolvency proceedings of the group members, and to have a generally positive impact for the creditors. This Regulation should therefore ensure that the court with which a request for group coordination proceedings has been filed makes an assessment of those criteria prior to opening group coordination proceedings".

[134] Art. 44 EIR.

[135] See. L. STANGHELLINI, R. MOKAL, C.G. PAULUS, I. TIRADO (eds.), *Best practices in European restructuring. Contractualised distress resolution in the shadow of the law*, 2018, Milano, 75, 85.

methods, then the "reconstruction of the group, especially if having a multinational dimension, could hardly take place in the absence of a *cross-border insolvency agreement* between the representatives of the various pending procedures against the individual components of the same" [136]. Indeed, in the event of insolvency or crisis of cross-border importance, any strategy of debt restructuring, including methods of reorganization of the debtor, requires that we explore ways of coordination between a possible plurality of local procedures. the growing centrality of the issue of business continuity in bankruptcy - measurable at the level of both domestic [137] and unionistic [138] legislation - further urges unitary visions and coordinated actions in crisis management, in search of effective ways to achieve the conservation objective (in an objective or subjective key), according to a strategy highly complicated by the transnational dimension of the companies involved. Moreover, these objectives of efficient synergy between local procedures can hardly be pursued through statutory regulations: hence the crucial opportunity, in the restructuring and reorganization of cross-border companies, to recognize space for the more flexible instruments of the autonomy of the parties in the broad sense, search for common operational solutions for the management of (companies in) crisis or insolvency procedures.

[136] See D. VATTERMOLI, *Gli insolvency protocols nelle operazioni di ristrutturazione del gruppo di imprese in crisi*, Diritto della banca e del mercato finanziario, (2019), 11, where it is added that "Indeed, it would be practically impossible to be able to formulate a single plan or several connected and interfering plans, or to "align" the timing of the presentation of the proposals and their vote, without there being a specific agreement between the heads of the various procedures; just as it would be impossible to proceed with the indirect consolidation, that is, through the aggregate disposal of the group assets, in the absence of similar agreements".

[137] In addition, not only in the competition, within the framework of the reformed CCI; but also at the level of general business principles, since the revised art. 2086 c.c. expresses the duty of the entrepreneur to take the measures aimed at overcoming a crisis and the "recovery of business continuity". On this last issue, M. CIAN, *Crisi dell'impresa e doveri degli amministratori: i principi riformati ed il loro possibile impatto*, NLCC, (2019), 1160.

[138] Finally, this perspective was confirmed in the EU Directive 2019/1023, 20 June 2019: in which art. 4 indicates that the debtor has access to a preventive restructuring framework that allows him to restructure, in order to prevent insolvency, ensure economic sustainability, so as to protect jobs and preserve entrepreneurial activity (e v. also Art. 3, par. 1, Dir. UE 2019/1023).

B. Doubts regarding the effectiveness of Group Coordination Proceeding rest on a very complex number of conditions and requirements. In most cases, it should be treated with considerable care as it could very well turn out to be a "significant layer of cost and unnecessary complexity" [139].

Besides, what weakens the Group Coordination Proceeding is the power to opt-out, which is recognized to each group company and the non-binding character of the coordination plan, although voluntarily accepted by each IP.

Indeed, this aspect is in some way common to the instrument of protocols, which presumes a voluntary adherence; however, the signed protocol is more binding between the parties.

On the other hand, the Group Coordination Proceeding has a more marked judicial character compared to the contractual instrument broadly envisaged in the protocol although it could result as being more familiar for civil law operators [140].

The major disincentive in using Insolvency Protocols is the fact that it is a new instrument, unknown by operators and full of uncertainties; in particular, there is doubt on how protocols may fit within unknown dogmatic categories. Moreover, a further difficulty is that the judge will need to become familiar with the terms of the protocol, given that the negotiation relations of the parties, the judge plays a possible role of "coordination in the approval of protocols where necessary." (art. 57 EIR), without being called to resolve a conflict or affix an approval check to the agreement itself.

In both cases, however, the success and effectiveness of the chosen coordination solution remain entrusted to the goodwill and initiative of the individual parties involved; besides, any Group Coordination effort is the more likely to succeed the more negotiation skills are shown by the Coordinator.

The complexity of these cooperation and coordination processes cannot be hidden and are aimed at absorbing and

[139] C. LAUGHTON, *The European Insolvency Regulation: Amendment proposals from the European Commission and the European Parliament – What next?*, Eurofenix, (Spring 2014), 20, 23; G. MCCORMACK, *Reforming the Europe-an Insolvency Regulation: A Legal and Policy Perspective*, 10 JPIL, (2014), 41, 58.

[140] See C. PAULUS, *Judicial cooperation in Cross border Insolvencies. An outline of some relevant issues and literature*, (Global Judges Forum 2006), World Bank, available at www.worldbank.org: "generally speaking, common law courts are in favor of direct communication, and civil law courts are in opposition to, or at least reluctant to embrace it".

containing the physiological antagonism between individual procedures which can be taken into consideration when attempting to unite the respective interests (*recitus*: a composition of the other creditor's interests) and want to trace them to a shared framework of antithetical positions [141]: it is sufficient to think that each IP is required to protect creditors of their own procedure from issues of *mala gestio* responsibility or intercompany claims as well as intra-company revocations or intra-company loans and guarantees.

7. Final Remarks

In general terms, the adoption by EIR 2015/848 of the theoretical model of cooperative territorialism has to be welcomed. Realistically and without prejudice to substantive law and the full force of each single local law, the EIR provides for the best results that could have been obtained: it avoids the imposed choice between territorialism and total closure on one hand, and an excessive openness and waiver of a State own sovereignty with an uncertainty of the subjective legal situations, on the other.

Actually, assuming that the coexistence of a local group proceeding may occur it is undiscussed that the plurality, if not the antagonism or the eventual lack of homogeneity between procedures has proved, already in the application of the previous Regulation, one of the most critical points of the entire regulatory framework: and it is in light of this consideration [142] that the Protocols and Group coordination Proceedings show their own utility.

Overall, cooperative territorialism allows quite a wide

[141] Actually, art. 56-57-58 Reg. state that it is key that cooperation and coordination between the organs of group procedures "do not involve conflict of interest"

[142] See J. LUBBEN-S.P. WOO, *Re-conceptualizing Lehman*, New York University Law and Economics Working Papers, Paper 347, (2013), available at http://lrs.nellco.org, 300: ("Moreover, by concentrating on the core entities in the financial institution, we reduce the number of countries that need to be parties to such a global resolution system. For example, in Lehman we suggest that an agreement to implement our suggested system only need to involve the United States and the United Kingdom. Resolving this problem is substantially easier than worrying about the many jurisdictions dealing with Lehman insolvency cases. We call this model the "turtle" approach to reorganization, inasmuch as we suggest that financial

margin of manoeuvre for the single procedures with regard to the "an" and "quomodo" to coordinate their activities. It can be stated that EIR Regulation reflects a modest approach with regards to its rules on corporate groups, so it results in a hardly effective outcome in solving group insolvency problems [143].

That is even more relevant considering the strict group concept stated in Art. 2, n.13 and 14 EIR 2015 that restricts the new rules to insolvent corporate groups consisting of a parent company and at least one subsidiary company (vertically integrated groups) [144]. Which evidently reduces the possibility of using the cooperation instruments illustrated above.

Moreover, European case law shows many cases in which the group taken into consideration to commence proceedings in a member country is only a single part, the European part, of a larger reality. In these cases, the holding company of the group is not the real parent company, but the company in Europe that puts together the companies operating in our continent, namely a subholding [145]. In this regard, it should be noted that it is not beneficial for the success of the procedure to artificially limit the perimeter of the group because, at least in the case of cross-border procedures, this could reduce the chances of success of the proposed crisis settlement [146].

Considering that the EIR is open to spontaneous negotiation solutions, such an effort of deregulation is highly appreciated as it serves efficiency and thus provides for effective solutions which are more likely to fit the purpose of each specific case [147]. Flexibility is highly recommended when dealing with insolvency of corporate groups, since they often look very

institutions can be best saved by retreating into their core operating companies in times of crisis, leaving the so-called structurally dependent subsidiaries to their own faith").

[143] See A. LEANDRO, *Regulation (EU) n. 2015/848 and group of companies: choice between cooperation and coordination*, in *'Cross-border business crisis: European and International borders,* Cacucci, Bari, 2018.

[144] See S. MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, International Insolvency Review, (2015), 235 ff.

[145] In fact, the electronic registers of procedures, and their interconnection through the e-justice portal (art. 24 ff., Reg.) Are essential measures to facilitate administrators, as well as the ascertainment of the pending of procedures insolvency in which other group companies are involved or the identification of its exact perimeter.

[146] See G. MEO-L. PANZANI, *Procedure unitarie di gruppo nel Codice della Crisi*, (2019), available at www.ilcaso.it, 20 dec.

[147] See issue on "contract bankruptcy" or "bargained bankruptcy", and the recognition of negotiation autonomy in company crisis: see R.K.

different – from highly integrated vertical groups to less cooperating companies in connected markets. Furthermore, it is also relevant on a systematic level, especially in the eyes of Civil Law Scholars, who witness a steady institutionalization of negotiation best practises.

It is worth noticing that the negative consequences which are to be avoided may depend on unequal regulations of domestic substantive law, especially, in terms of credit claims order, priority rules, automatic stay, and on disharmonies between the managing, the timing, the effects and the purposes that single local proceeding can show.

It must be said, however, that any misalignment, already visible between different insolvency proceedings in the EU, is further reduced following the recasting of the Regulation on cross-border insolvencies, which has not limited the opening of secondary non-liquidation proceeding [148]. In other words, the major cause of inefficiency, which limited the use of non-main proceeding, has been overcome.

Moreover, it is necessary to consider that an important work of harmonization is expected as a result of this issue - and, later, of the transposition - of the EU Directive into insolvency proceedings, which aims to reduce the gaps between domestic Laws, in the substantial perspective of the internal Regulation within the Member States [149].

RASMUSSEN, *'Debtor's Choice: A Menu Approach to Corporate Bankruptcy'*, 71 Tex. L. Rev. 51, (1992), 100; ID., *Resolving Transnational Insolvencies Trough Private Ordering*, Mich. L. Rev., (2000), 2252.

[148] Whereas 10, EIR: "The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency and to proceedings which leave the debtor fully or partially in control of its assets and affairs (...)".

[149] See EU Commission Directive 2019/1023, 20 th June 2019 focusing on early *warning*, on the one hand, and *second chance*, on the other hand. See Relation to Directive Proposal 22 November 2016, COM/2016/0723 (*final*): "Along with key principles, more targeted rules are necessary to make restructuring frameworks more efficient. Rules on company managers' duty of care when nearing insolvency also play an important role in developing a culture of business rescue instead of liquidation, as they encourage early restructuring; prevent misconduct and avoidable losses for creditors. Equally important are rules on early warning tools. The proposal does not harmonise core aspects of insolvency such as rules on conditions for opening insolvency proceedings, a common definition of insolvency, ranking of claims and avoidance actions broadly speaking. Although such rules would be useful for achieving full cross-border legal certainty, as confirmed by many stakeholders in the public consultation, the current diversity in

In this context, it is then clear that the existence of a uniform model of Insolvency Protocol, which can be used indiscriminately by all operators, regardless of the legal system to which they belong, represents an obligatory step towards a cross-border insolvency law that is truly capable of effectively balancing all the interests involved, especially when the multinational company is organised as a group which is in a state of crisis.

Member States' legal systems over insolvency proceedings seems too large to bridge given the numerous links between insolvency law and connected areas of national law, such as tax, employment and social security law. Prescriptive harmonisation could require far-reaching changes to commercial law, civil law and company law, whereas flexible provisions risk not bringing about desired changes. Furthermore, the rules on filing and verification of claims mentioned in the Commission Communication of December 201214 are of rather low relevance given the improvements brought by the Insolvency Regulation. Instead, the focus of this proposal is on addressing the most important problems that could be feasibly addressed by harmonisation".

CHAPTER VII

PROTOCOLS IN THE RESTRUCTURING OF GROUPS OF COMPANIES *

SUMMARY: 1. Insolvency, groups and coordination. - 1.1. Approach to the issue. - 1.2. Unification of the treatment of the insolvency of group companies. - 1.3. Duty to cooperate as an alternative to unification. - 1.4. Duty to cooperate and the protocols. - 2. The problem of fragmentation in restructuring. - 3. A common plan for dealing with the insolvency of group companies. - 3.1. Designing a common plan for the group's insolvent companies. - 3.1.1. Coordinating initiatives and efforts to design a common plan. - 3.1.2. Avoiding opportunistic behaviour. - 3.1.3. Approving a common plan in the various insolvency proceedings. - 3.2. Implementation of the common plan. - 4. Distribution of value among creditors of the group's insolvent companies. - 5. Intercompany claims. - 6. Final consideration. - 7. References.

1. Insolvency, groups and coordination

1.1. Approach to the issue

The insolvency of corporate groups raises the issue of how to coordinate the proceedings of different companies within a group that are in or close to a state of insolvency, with the aim of achieving a solution that maximizes the aggregate value of the various estates and, therefore, the value of the claims that are to be met out of them. The aim is to prevent separate insolvency proceedings, opened in respect of the different companies in the group, from destroying the synergies between the companies in the group, in particular where the most valuable solution for the

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