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**Treatment of Corporate Groups in Insolvency under EU Law**

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*"Every year in the EU, 50,000 companies are faced with cross-border insolvency proceedings – equating to one in four of all insolvency proceedings in the EU. Currently, each year, an estimated 400,000 people lose their jobs due to cross-border insolvencies. Today's political agreement is an important milestone on our path in creating the best possible environment for growth and investment in Europe. We have risen to the challenge of the financial crisis and we now will have insolvency rules that will reinforce the Single market"*

Věra Jourová, EU Justice Commissioner, Brussels, 04 December 2014 during the preparation works concerning the new Recast Directive<sup>1</sup>.

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<sup>1</sup> [http://europa.eu/rapid/press-release\\_IP-14-2322\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-14-2322_en.htm?locale=en)

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## INTRODUZIONE

L'analisi svolta in questo lavoro ha ad oggetto le procedure adottabili in caso di fallimento, quando esse coinvolgono società costituite in gruppi di impresa. È una questione non recente che ha tuttavia avuto la sua consacrazione nel panorama internazionale solo negli ultimi anni.

Negli anni novanta, infatti, quando si parlava di gruppi di società, ci si riferiva spesso a società multinazionali, ritenute “*too big to fail*”, e pertanto non si avvertiva il bisogno di emanare una disciplina accurata in tale ambito. Anche il Legislatore Europeo aveva ommesso ogni disciplina nel primo grande Regolamento<sup>2</sup> riguardante le procedure fallimentari transfrontaliere, nonostante l'ampio dibattito in materia.

Tuttavia, recentemente, la grande crisi finanziaria del 2008 ha fatto sorgere la necessità di emanare nuove specifiche regole, anche in ragione del fatto che la sempre più incisiva integrazione europea ha reso frequente il caso di gruppi di società operanti contemporaneamente in più Stati. Pertanto, l'obiettivo che questo lavoro si propone, è di analizzare tali regole, sia *iure condito* che *iure condendo*, per consentire al lettore di avere una panoramica chiara su come l'insolvenza di gruppo possa essere trattata.

Nel Capitolo 1, in particolare, ci si soffermerà sugli approcci teorici maggiormente persuasivi che hanno scatenato i maggiori dibattiti in materia, dopo una breve premessa sui gruppi di società. Il primo nodo da sciogliere è stabilire il luogo dove l'insolvenza deve essere trattata. Sul punto emergono due visioni contrapposte: *l'universalism* e il *territorialism model*, l'una che propende per la trattazione di tutte le insolvenze delle società appartenenti al gruppo in una unica giurisdizione, l'altra che all'opposto predilige il trattamento delle insolvenze dinanzi a giudici diversi in diverse giurisdizioni.

Si analizzerà poi la questione riguardante la *consolidation* tra le diverse procedure, ovvero l'integrazione tra i vari procedimenti. Nello specifico, una parte della dottrina ha richiesto che fosse adoperata in caso di fallimento un'integrazione fortissima tra le varie società del gruppo, in modo da

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<sup>2</sup> Regolamento CE 1346/2000 sulle insolvenze transfrontaliere.

accomunare tutti i singoli *asset* in un grande patrimonio<sup>3</sup>. Tale visione tuttavia, è stata fortemente criticata, in quanto poco rispettosa dei principi di autonomia delle singole società, ed è quindi stata proposta una forma meno invasiva, che procedesse ad accomunare unicamente i vari procedimenti, lasciando intatta l'autonomia patrimoniale<sup>4</sup>. Queste due teorie, così semplificate, ma oggetto di tanti particolarismi, sono rispettivamente la *substantial consolidation* e la *procedural consolidation*, ed hanno una importanza notevolissima all'interno della discussione ad oggetto, poiché l'adozione di una o dell'altra, implica conseguenze completamente diverse.

Tale questione, approfondita nel corso della trattazione, è la premessa per procedere all'analisi del primo grande regolamento europeo sulle insolvenze transfrontaliere, cioè il Regolamento CE 1346/2000. Esso è uno dei temi principali affrontati da tale lavoro, e si caratterizza per il fatto che, sebbene non tratti esplicitamente dei gruppi di imprese, è applicabile anche a tali organismi. I gruppi di impresa, infatti, vengono disciplinati solo in modo indiretto, ovvero trattando le singole società autonomamente, e ciò è causa di numerosi problemi pratici che costituiscono l'oggetto della seconda parte del Capitolo 1.

In tale ambito, si discute innanzitutto sul luogo ove la procedura fallimentare dovrebbe essere aperta secondo il Regolamento CE 1346/2000. La regola generale stabilisce che la giurisdizione spetta *unicamente* al giudice dello Stato membro in cui si trova il Centro degli Interessi Principali del debitore ("COMI", secondo l'acronimo inglese), che si presume per le società essere il luogo in cui si trova la sede statutaria. Senonché, tale regola ha generato non poche perplessità per i gruppi di impresa, i quali generalmente essendo composti da diverse società godono teoricamente di diversi "Centri degli Interessi Principali" (COMI), ognuno appunto, riferibile ad una singola società del gruppo.

L'atteggiamento più frequente, pertanto, guidato anche dalla necessità di garantire l'efficacia e l'efficienza della procedura, è stato quello di individuare il COMI per tutte le società del gruppo in un unico luogo, in modo da trattare tutte procedure dinanzi allo stesso giudice, raggiungendo una sorta di *procedural consolidation*. Tale soluzione, tuttavia, è stata oggetto di forte critica da parte dei vari giudici degli Stati Membri, nonché dalla stessa Corte di Giustizia europea, a causa del fatto che

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<sup>3</sup> Substantial consolidation.

<sup>4</sup> Procedural consolidation.

non vi era alcuna norma in grado di stabilire chiaramente quando l'unificazione poteva essere operata e quando invece no.

Così, a seguito di numerose interpretazioni della Corte di giustizia europea, spesso anche divergenti tra loro<sup>5</sup>, si è giunti alla conclusione che, seppur tra molte incertezze, la migliore strada per l'individuazione del COMI è nella differenza tra gruppi fortemente integrati e quelli non.<sup>6</sup> Per i primi la regola di cui sopra è applicabile, ovvero un unico COMI per tutte le società del gruppo, e per i secondi invece, non vi è alcuna unificazione dei Centri di interessi principali, e quindi ogni società è soggetta ad una autonoma determinazione della giurisdizione. Orbene, tale approccio, è il risultato di numerose sentenze, e altrettanti conflitti, come i casi Eurofood, Interedill e Daisytek, che sono oggetto di specifica ed autonoma trattazione nell'ultima parte del Capitolo I.

Tuttavia tale divergenza nelle interpretazioni ha generato numerose incertezze, in quanto secondo la *priority rule*, la “*procedura di insolvenza principale aperta da un giudice di uno Stato membro deve essere riconosciuta dai giudici degli altri Stati membri, senza che questi possano controllare la competenza del giudice dello Stato di apertura*”<sup>7</sup>. Ciò ha creato da un lato una corsa tra le differenti Corti per l'apertura di tutte procedure nella propria giurisdizione, spesso anche *contra legem*, al fine di configurare una preclusione per le altre Corti eventualmente competenti; dall'altro ha spinto i debitori a sfruttare le medesime incertezze per trasferire i procedimenti giudiziari da un Paese a un altro nell'intento di migliorare la propria situazione giuridica (*forum shopping*). Tale ultimo comportamento è il secondo grande problema del Regolamento 1346/2000.

L'ultima grande questione sempre concernente il Regolamento di cui sopra, attiene alle regole sostanziali in un contesto dove il panorama giuridico all'interno dell'Unione Europea si presenta molto vario, con molte e notevoli differenze tra gli Stati. Queste, discutibilmente sono spesso lasciate alla libertà delle legislazioni nazionali e differiscono da Stato a Stato. L'esempio tipico sono le *avoidance rules*, che mancano di una disciplina unitaria e sostanziale a livello europeo, e che invece sono soggette alla legislazione dove il procedimento è aperto. Ciò è causa, come si vedrà, di numerosi

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<sup>5</sup> Si vedano le differenze tra il caso Interedill e Eurofood.

<sup>6</sup> Bisogna tuttavia tale conclusione è oggetto di una lunga riflessione, poiché la dottrina e la giurisprudenza non sono unanimi nel punto.

<sup>7</sup> Caso Eurofood.

inconvenienti<sup>8</sup> specialmente per i creditori, poco inclini a confrontarsi, in caso di gruppi non fortemente integrati, con numerose legislazioni.

In questo quadro, si è giunti all'emanazione del Regolamento 848/2015, entrato in vigore 26 giugno 2017, volto a colmare le lacune della precedente legislazione prevedendo anche una specifica regolamentazione dei gruppi di imprese.

Tali nuove regole saranno oggetto di trattazione specifica nel Capitolo II. In primo luogo al suo interno si analizza la nuova nozione di gruppo, insieme alle nuove regole sul COMI. Queste ultime, invero, nonostante le grandi discussioni, non presentano particolari novità, e sembrano invece confermare l'approccio secondo cui va effettuata la distinzione tra gruppi fortemente integrati e non. In secondo luogo si analizza il nuovo *plan* di coordinamento previsto dal legislatore. Esso è basato su una forma di procedural coordination, ovvero presuppone l'esistenza di diversi procedimenti, ma coordinati tra loro da un unico *coordinator*, con un espresso divieto di ogni *consolidation*. Tale *plan* tuttavia, è stato oggetto, ancor prima dell'entrata in vigore, di numerose polemiche, in quanto da un lato è discutibilmente proibita ogni forma di *consolidation*, e dall'altro i costi e la volontarietà della sua applicazione lo pongono sul piano dell'ineffettività. In terzo luogo, si procede all'analisi dei poteri conferiti ai liquidatori, che in passato potevano cooperare solo volontariamente e solo quando non era proibito dalla legge, e oggi invece godono di autonomi poteri. Nessuna norma poi, è stata dedicata alle regole sostanziali, come ad esempio nel caso di *avoidance rules*, che continuano ad essere soggette alle singole legislazioni nazionali e quindi alle loro differenze, non prospettandosi neppure all'orizzonte un tentativo di armonizzazione.

Tale analisi, quindi, effettuata lungo la trattazione del secondo Capitolo anche attraverso il confronto con la precedente legislazione, conduce a ritenere che il nuovo Regolamento europeo continua a presentare profili problematici. Le maggiori perplessità attengono all'adozione di un approccio "entity by entity", ovvero considerare ogni società singolarmente. Ciò ha disatteso notevolmente le aspettative, in quanto, nell'ambito dei gruppi, si era invocata la possibilità di adottare un unico singolo COMI per tutte le società, al fine di colmare le lacune, ed evitare i conflitti in merito alla sua individuazione. Ancora più problematica è stata poi la scelta del legislatore europeo di non prevedere

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<sup>8</sup> Es. *forum shopping*.



regole armonizzatrici, o sovranazionali, almeno nelle materie oggetto di maggiori conflitti come le *avoidance rules*. E con riferimento al nuovo *plan*, pone delle riserve in quanto: adotta la *priority rule*, come criterio per la determinazione della Corte competente; lascia alla libertà dei liquidatori la scelta di aderire o meno al *plan*, senza alcuna regola in grado di vincolare tale scelta, con un alto rischio quindi di conflitto di interessi; prevede la possibilità in ogni momento di uscire da tale *plan*, facendo sorgere quindi grossi rischi di ineffettività, tali da far scappare qualsiasi creditore; vieta ogni *procedural consolidation*, obbligando quindi le parti esclusivamente ad un incremento dei costi, senza i corrispettivi vantaggi.

La terza ed ultima grande parte invece tratta, attraverso una prospettiva riformatoria, le possibili soluzioni alle problematiche prima proposte. Infatti, si ritiene, che le medesime lacune potranno essere colmate solo attraverso un nuovo intervento innovatore del legislatore europeo, che - da un lato - proceda ad un'armonizzazione degli aspetti sostanziali delle diverse discipline, con il duplice effetto di armonizzare le regole relative alle *avoidance rules* ed evitare il *forum shopping*; e - dall'altro - consenta l'individuazione di un unico COMI di gruppo volto a scoraggiare ogni *race* tra le parti coinvolte.

Tale intervento riformatore poi, deve riguardare anche il nuovo *plan*, in considerazione del fatto che esso sarà presto applicato da molti operatori, generando più problematiche che benefici. Si auspica quindi l'adozione di un nuovo modello di piano di coordinamento, pur simile a quello attuale, ma che - ad esempio - includa il concordato preventivo, una procedura adottabile nell'ordinamento italiano con riferimento ai gruppi, e che ha dato soddisfacenti risultati. Tale concordato, sebbene adottato nell'ambito della procedura fallimentare italiana in tempi diversi rispetto al piano europeo, potrebbe essere un'ottima soluzione per colmare le lacune individuate, senza far perdere alle parti in gioco la propria autonomia. In questo senso, infatti, la procedura dovrebbe basarsi sull'adozione volontaria, ma successivamente vincolante di un *plan*, che potrebbe essere proposto anche da una società del gruppo, con un voto da parte dei creditori, includendo una forma di consolidazione processuale. Ciò, dovrebbe consentire che la competenza per la procedura ricada nella Corte nel luogo in cui è definibile la giurisdizione della capogruppo, permettendo la trasformazione di tutti gli altri procedimenti in

procedimenti secondari<sup>9</sup>, dove i singoli creditori possono proporre azioni che sono trasmesse attraverso mezzi informatici alla Corte centrale.

Tuttavia, tale soluzione si presenta come provvisoria, in quanto le grosse perplessità emerse lungo tutta la trattazione possono essere superate solo a seguito di una reale ed effettiva armonizzazione delle regole sostanziali e procedurali che sono lo *step* necessario per giungere ad un'effettiva integrazione europea in tale ambito.

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<sup>9</sup> localizzati nel luogo in cui il COMI delle singole società è rinvenibile, attraverso la presunzione secondo cui è questo individuato nel luogo della sede legale.

## CHAPTER I

### ***A BRIEF OVERVIEW OF THE INSOLVENCY OF CROSS BORDER-GROUP PRIOR TO THE NEW EU REGULATION.***

#### 1. A brief overview of groups.

In modern reality, the vast majority of undertakings are organized as groups of companies,<sup>10</sup> most of which are multinational. This is primarily because such structuring presents legitimate advantages<sup>11</sup> for entrepreneurs, such as the reduction of corporate risks and the diversification of investments and profits. However, it may also present specific risks for creditors and shareholders.<sup>12</sup>

Furthermore, the situation is more complex than it may first appear because on the one hand, many States have enacted only a few general rules, while on the other, “corporate law is a matter of each State” (Forum Europaeum Corporate Group Law, 2000). Thus, among Member States, groups differ greatly as to structure, organization and ownership (Klaus, 2015, p. 2), and these differences may concern aspects of primary importance.<sup>13</sup>

Moreover, another essential challenge is the possible inconsistency of approaches among regulators, because the current divergence across Member States is a central issue. The question is “whether a regulator should provide for an organizational law<sup>14</sup> (*organisatorisches Recht*), or whether a regulator should only provide for a protective law (*Schutzrecht*)<sup>15</sup>”. The latter approach aims at dealing with a group of companies in order to protect minority shareholders, while the former aims

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<sup>10</sup> For further information see: Panzani, (2013), page 1; Forum Europaeum Corporate Group Law, (2000); The High Level Group of Company Experts (2002), p. 94.

<sup>11</sup> For further information, see UNICITRAL (2010) part C. “Reasons for conducting business through enterprise groups”.

<sup>12</sup> The High Level Group of Company Experts, (2002)

<sup>13</sup> For instance, the liability of a company’s group (See *Salomon v Salomon* case for liability in UK; or *Lewis Holdings Ltd vs Steel & Tube Holdings Ltd* [2014] for liability in Germany).

<sup>14</sup> Reinhard Bork (2016) on page 19, names it ‘organizational approach’ and ‘protective approach’.

<sup>15</sup> Bork & Mangano, (2016) on page 277.

only at regulating the organization itself. There can be several consequences based on these differences, and they inevitably influence insolvency regulations<sup>16</sup>.

However, the main issue is that there is not a common unique definition of what groups of companies are, and each scholar is therefore left to give his or her own opinion. For instance, Presti & Rescigno (2015) and Klaus, (2015) argue that “Groups of companies are aggregations of formally independent undertakings but under the same direction”, while Reinhard Bork, (2016)<sup>17</sup> argues that groups are “characterized by a number of legal entities running the same enterprise”, and others.<sup>18</sup> However, the main point seems to be the same: there is “*one entity from an economic viewpoint, and different entities from a legal viewpoint*”<sup>19</sup> (Campobasso, 2010, p. 289), In other words, the primary characteristic is that the different companies have a shared brain, but they are legally distinct<sup>20</sup>. This explains the very general common definition<sup>21</sup> of groups in Europe as an economic “*unitas*” and a “*legal multiplex*”.

Some scholars go beyond these classical approaches and take a philosophical point of view, but this leads to the same result. In particular, von Hoe (2014) argues that: “enterprise groups are neither a (mere) collection of separate entities, nor a single enterprise” and that “singularity of enterprise groups is precisely the dynamic and permanent interplay between Unity and Plurality”.

To functionally define what constitutes a group, one must focus on the definition of control and the relationship between undertakings. These concepts have primary importance, because it is commonly accepted that a groups’ companies use their ability to control or influence one another, both directly

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<sup>16</sup> “The EU approach to company law harmonization has focused on the protection of members and third parties” (The High Level Group of Company Experts, 2002, p. 8); for instance: the choice between procedural and substantial consolidation.

<sup>17</sup> p. 274.

<sup>18</sup> Another: ‘several independent incorporated companies connected mostly by a chain of participations to form what is practically one commercial unit’ (Forum Europaeum Corporate Group Law, 2000).

<sup>19</sup> The same conclusion is given by Irit Mevorach, in INSOL Europe’s proposals on groups of companies (in cross-border insolvency: a critical appraisal, International Insolvency Review, 21(3), Copyright © 2012, INSOL International and John Wiley & Sons, Ltd. <http://onlinelibrary.wiley.com/journal/10.1002/%28ISSN%291099-1107/>)

<sup>20</sup> It is important also to focus on the concept of the interests of groups, which cannot be examined in this work. (See page 100 of The High Level Group of Company Experts, 2002). A modern regulatory framework for company law in Europe., Brussels: s.n.

<sup>21</sup> Reinhard Bork (2016) uses them for example, in page 19 and page 274. It is taken from Teubner in ‘Corporate governance in Group Enterprise’ [https://www.jura.uni-frankfurt.de/43829637/Unitas\\_Governance.pdf](https://www.jura.uni-frankfurt.de/43829637/Unitas_Governance.pdf)

and indirectly; this is a prerogative of the head of the group, or of a company at higher level than another.

Directive 2013/34/EU on annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and Council and repealing Council Directives 78/660/EEC and 83/349/EEC, plays an important role in this matter. In Article 22, the directive defines a number of cases in which one undertaking is considered to be under the control of one another, for example, when an undertaking “has a majority of the shareholders' or members' voting rights in another undertaking” or when “it has the right to exercise a dominant influence over an undertaking” and others.

However, groups usually operate across Europe, and there is a wide variety of possibilities in the way they are organized, managed, and financed as well as the relationship between companies (Wessels, et al., 2009, p. 126). Indeed, the group structure “*may be simple or highly complex*” (UNCITRAL, 2010)<sup>22</sup>. In this sense, a first distinction should be made between groups that have a vertical structure, and those that have a horizontal structure. In a vertically structured groups, company A directly controls company B, B directly controls C, and so on. In horizontally structured groups, on the other hand, all companies operate on the same level. Moreover, they can be summarized in four types: Clique, Star, Pyramid, and Circle (Windolf, 2002, pp. 53,54). The most used is the “Pyramid form”, which is characterized by the fact that, as in a pyramid, the head of the group<sup>23</sup> must be at the top: and it controls the companies below, called *subsidiary companies*, which in turn control the others below them, and so on. This type of organization can be linked with a common form usually cited by Italian scholars: the chain form (Campobasso, 2010, p. 289) (Panzani, 2013, p. 344). This form is represented by a line, without branches, on which all the companies are respectively one under another, in a hierarchy.

Another structure used is the “Star form”, occurring where: one dominant firm is surrounded by a number of satellite companies over which it exercises control. (Windolf, 2002, p. 54). In addition, primary importance should be given to the “Circle form”, in which the firm A controls firm B, B

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<sup>22</sup> UNCITRAL(2010) “Enterprise group structures may be simple or highly complex, involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub-subsidiaries, sub-holding companies, service companies, dormant companies, cross-directorships, equity ownership and so forth”.

<sup>23</sup> It is usually termed a “parent company”.

controls C, and C controls A. Finally, the “Clique form”, used mainly in Germany and the UK, occurs where companies are tied to each other because of reciprocal relationships, with no one of them dominating the others (Windolf, 2002, p. 53).

Although this classification is not exhaustive, it is an example of how complex groups’ structures can be. In particular, it could be useful for giving an idea of how the links between groups work, because in insolvency proceedings the different groups’ forms are usually irrelevant, but the relationship among the firms is very important. As previously stated, the differences between groups “should play a role when new principles or rules are being discussed” (Wessels, et al., 2009, p. 126) and must be kept in mind.

## 2. A brief overview of the treatment of corporate groups in insolvency

The treatment of groups reflects a common issue in insolvency regulations; considering that corporate-group insolvency is the main type of cross border insolvency, the question has become very pressing (Pannen, 2011).<sup>24</sup> This is because, “the use of separate companies for the business located in one country” is very common, meaning “that cross-border group insolvencies have more in common with each other than with purely national group insolvencies” (Hirte, 2008).

It is a very odd phenomenon, because although there is a widespread incidence of groups of companies<sup>25</sup> with a high risk of insolvency, there are few or no rules on such matters. This is particularly true at the European as well as the national level of law, because clear, harmonized legislation has not yet been developed. As we will see, in practice this could cause significant difficulties, such as jurisdiction and coordination issues, and it could certainly be a real barrier to the achieving of insolvency goals.

Actually, this is not a new problem, although it has been perceived since the turn of the twentieth century. Indeed, in 1995 the House of Lords of the United Kingdom of Great Britain and Northern Ireland refused to sign the European Convention on Insolvency Proceedings (1995), and one reason was the fact that the Convention failed to deal with groups of companies.

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<sup>24</sup> Similarly, Galen (2003).

<sup>25</sup> Some may call them “multinational enterprise groups”; I choose the European Union definition.

That event obviously means that the issue has been discussed for over forty years, and as Wessels, (2003) correctly noted European legislative bodies rather than facing the problem, chose to postpone “group insolvencies” to a later date<sup>26</sup>. There are a number of good grounds for this decision: first, the effort of choosing a unique definition of what a group is, how it operates (*Infra*. I, 1.), and how the jurisdiction (*Infra*. I, 4.1) should be determined, and second, the difficulties of facing the significant debate concerning the different approaches that could be used<sup>27</sup>.

One should bear in mind that all these aspects are strictly connected, and an analysis of how group insolvencies could optimally be treated is certainly necessary.

The necessary premise is that a company, or a group of companies, is insolvent<sup>28</sup> for the purpose of the law if it is unable to pay its debts.<sup>29</sup> However, insolvency proceedings could be administered in different ways; indeed, conceptually the theories that could be adopted consist in *territoriality* or the *universality* approaches. The *territorialism model* assumes that each country has exclusive jurisdiction over all a debtor’s assets, with little or no regard for foreign proceedings. In this case, every proceeding is subject to the law of the opening court and it should refer only to assets and creditors located in that State. The main effect is that there are a number of proceedings, one in each State in which assets are located. The *universality approach*, in contrast, assumes that one worldwide court administers the insolvency of a debtor on a worldwide basis, and it would be universally recognized in the countries in which a debtor has its assets. The proceeding would be brought in the debtor’s country,<sup>30</sup> and it is administered pursuant to a single set of laws.

However, these two approaches are not distinctly divided, because in practise insolvency laws adopt aspects of both. In this sense some authors<sup>31</sup> recognize *hybrid* approaches of a less extremist nature. They have been defined differently; for instance, Westbrook (2000) in the introduction argues that “*contractualism*, as an alternative to universalism, is not workable domestically or internationally”. Similarly, Wessels, et al.<sup>32</sup> (2009) talk about *modified universalism*, which includes a number of

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<sup>26</sup> Similarly (Mevorach, 2009) at page 93.

<sup>27</sup> “The regulator should provide for an organizational law (organisatorisches Recht), or whether the regulator should only provide for a protective law (Schutzrecht)”. (Reinhard Bork, 2016, p. 277).

<sup>28</sup> This is the general definition; however, laws assume different specific requirements.

<sup>29</sup> Similarly, (Finch, 2009) at page 146 and (Goode, 2011).

<sup>30</sup> In this case the COMI definition applies.

<sup>31</sup> For instance (Westbrook, 2000).

<sup>32</sup> Page 49.

alternative theories. The common feature of these theories is that they discard the territoriality approach, preferring different forms of *modified universalism*. Indeed, “*universalism in one form or another commands virtually undisputed superiority over territorialism*”,<sup>33</sup> and in the same way Westbrook (2000) argues “*Universalism is the future of international bankruptcy*”.<sup>34</sup>

While this consideration is quite true, its supremacy is not itself evident; indeed, States are accustomed to administering insolvencies according to the *territoriality* approach<sup>35</sup> simply because it does not require any cooperation or coordination between different courts, and it ensures the independence of each system. Nevertheless, efficiency is compromised in such procedures, because costs are higher due to multiple proceedings, and any attempt at rescuing or restructuring is quite impossible. In other words, administering that approach is not manageable.<sup>36</sup> On the contrary, although very common in supranational structures,<sup>37</sup> States avoid the *universalist approach* because it obligates judges to recognize foreign proceedings and laws.

In a very clear analysis Vattermoli (2013) points out that the most efficient and cited approaches are *modified universalism* and *cooperative territoriality*.<sup>38</sup> The main difference between these two approaches seems to be that “*universalism seeks cooperation through ex ante commitments whereas cooperative territorialism seeks cooperation on an ex post basis*”<sup>39</sup> (Rasmussen, 2007).<sup>39</sup>

In further detail, *modified universalism* provides for one principal proceeding opened in the place where the centre of main interests is located, as well as for different subordinate proceedings. These are opened in each state where assets are located, with the aim of protecting local interests. *Cooperative territoriality*, instead, is based on the existence of different main parallel proceedings balanced by rules of coordination and cooperation.

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<sup>33</sup> (Wessels, et al., 2009, p. 67).

<sup>34</sup> at page 2328.

<sup>35</sup> The Italian system seems to adopt this theory, indeed art 9 l. Fall. points out that “Il trasferimento della sede dell'impresa all'estero non esclude la sussistenza della giurisdizione italiana”.

<sup>36</sup> For instance: one has to bear in mind selling of the entire group.

<sup>37</sup> See UNCITRAL Model Law.

<sup>38</sup> Contractualism is also widespread, it is based on the fact that is the same company is established under the statute where the insolvency will be brought.

<sup>39</sup> A view shared by Vattermoli.



The European idea follows *modified universalism*, “with territorial elements incorporated within its scheme” (Mevorach, 2009).<sup>40</sup> Indeed, it allows local parallel proceedings to take place, in the form of secondary proceedings, and they are integrated into the overall process of administering an insolvency. However, in the case of groups of companies (*infra*. I, 4.1; and II, 3.1) no provision has been enacted, and thus each company should be dealt with<sup>41</sup> in its own proceeding; consequently, in such cases European Regulation 1346/2000 seems to adopt a form of *modified territorialism*.

Additionally, groups of companies must specifically face another technical aspect, in that the question arises whether companies should be treated all as one single entity (*substantive consolidation*<sup>42</sup>), or whether the regulator should respect the plurality of legal entities (*procedural consolidation or coordination*).

More specifically, *substantive consolidation* is achieved when assets and liabilities are pooled and inter-entity claims are eliminated. Thus, creditors of the separate entities become creditors of the consolidated entity<sup>43</sup>. This is an approach usually used in the U.S. Bankruptcy Code, in which the court has discretion to consolidate the assets of a group of companies. Moreover, United Kingdom law has a very similar rule,<sup>44</sup> but it is rarely invoked with success (Goode, 2011, p. 789).

However, at first glance the applicability of any *substantive consolidation* seems unreasonable, and indeed it contradicts the principles of risk diversification and asset partitioning that form the grounds of corporate law.<sup>45</sup> On the contrary, a careful examination shows that the reality is different from what happens in practice, because the *economic unitas* of groups might be quite strengthened, which could neutralize such principles before any insolvency consolidation. Indeed, in many cases centralizing the treasury entails complex intragroup transactions, where the same centralization could be reached through *cash pooling*.<sup>46</sup>

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<sup>40</sup> In others words it is “grounded on universalism while accepting ‘legal realism’ and therefore containing territorialistic elements” (Mevorach, 2009)

<sup>41</sup> As we will see, this is not always true.

<sup>42</sup> This is a concept derived from US law, referring to separate corporate entities treated as one; the UNCITRAL Working Group V recommends the substantive consolidation doctrine, see chapter 6, section 6.3.2.

<sup>43</sup> The definition adopted derives from (Seligson & Mandell, 1968).

<sup>44</sup> “alter ego doctrine”

<sup>45</sup> The large majority of scholars follow this sense, see for instance (Virgos & Garcimartin, 2004).

<sup>46</sup> Also, service and cost sharing agreement could be made, however they are not as common as cash pooling. For further information see: (Gilardi, 2013).

Cash pooling is a group contract usually made for the rationalizing cash management; it provides that one company<sup>47</sup> (the *pooler*) becomes the centralized treasury and manages the current account balance of the other companies (the *participants*).<sup>48</sup> There are two different forms of such a contract: *virtual* cash pooling and *effective* cash pooling. The first is based on the virtual centralization of the assets' pools through a *software*; the second, instead, is based on the actual transfer of such assets into a centralized bank account.<sup>49</sup>

Many expressed doubt about these practices, although they are discussed primarily for their fiscal aspects.<sup>50</sup> Indeed, as Ruggeri, (2011) correctly noted, cash pooling assets concerning a group's insolvency could create a situation of company depletion and/or of economic illusion.<sup>51</sup>

However, it has been noted that when it does not convert into a pathological form,<sup>52</sup> treasury centralization is permissible.<sup>53</sup> In other words, it is simply the case that, especially when companies are under crisis, they are administered from a single economic point of view, and insolvency proceedings should be conducted in the same way. Indeed, *substantive consolidation* might have real application. Nevertheless, denying limited liability as a rule appears too extreme, and it violates cardinal principles of due process of law.<sup>54</sup> Consequently, it has been stated that the regulator should provide for this approach only in particular cases - for example, when the organisational form of a group of companies has been manifestly abused or if there is no genuine group at all (Bork & Mangano, 2016, p. 278).

A more careful approach is the *procedural* consolidation. It is a middle course between *substantive consolidation* and *limited liability*; it implies that assets should remain separate and distinct, and the legislator simply should *consolidate* each company's proceeding, and let the same court conduct them.<sup>55</sup> Consequently, "there is no merging of assets and liabilities nor the elimination of inter-entity claims" (Seligson & Mandell, 1968).

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<sup>47</sup> Usually the holding company.

<sup>48</sup> For further information see (Gilardi, 2013).

<sup>49</sup> For further information see: (Ruggeri, 2011).

<sup>50</sup> The most famous judgment was enacted by the Bundesgerichtshof (BGH) on 24.11.2003.

<sup>51</sup> Indeed, a company without the sufficient resources could work through the financing of others companies in the group.

<sup>52</sup> For an analysis of these aspects see Daccò (2002) Chapter IV.

<sup>53</sup> See (Daccò, 2002) at page 256.

<sup>54</sup> In this sense see (Seligson & Mandell, 1968).

<sup>55</sup> In this sense see (Blumberg, 2007) and way Bork & Mangano (2016) pag. 277.

The main risk of this approach is fragmentation; indeed, it could make the reorganization more difficult and inefficient than *substantive consolidation*, because courts should find a solution that fosters cooperation. Moreover, it requires recognizing different countries' laws, which could set a very high bar.

However, in recent times, a less invasive approach, *procedural coordination*, has been discussed; although it usually is incorporated in *procedural consolidation*<sup>56</sup> it could also be implemented independently. It is characterized by the fact that it does not provide for any consolidation, however, insolvency goals are reached only through cooperation and coordination between different courts.

From an overarching view, these three different approaches could be imagined as a pyramid. The most invasive theory, *substantive consolidation*, would be at the top; the least invasive, *procedural coordination*, would be at the bottom, and *procedural consolidation* would be in the middle.

Another debated aspect deals with jurisdiction and administration. The solutions in these cases seem to be derived from the above conclusions. Indeed, jurisdiction, when insolvency proceedings are conducted under a *consolidated* approach, has been located in the *group's centre of main interests* (COMI), despite the high debate around it (infra. I, 4.1 ). In the case of no-consolidation, it has been located in each country where a company has its assets.

Regarding administration, consolidation entails having one administrator for the whole procedure; this has been seen - especially in the German literature - as a potential risk of conflicts of interests.<sup>57</sup> Indeed, it has been said that "to nominate the same person in different proceedings is at least permissible", however "appointing the same person as trustee in bankruptcy for different members of a company group may cause a conflict of interest" (Hirte, 2008). This last aspect cannot be avoided and it should be taken into account when analysing the rules that insolvency practitioners have to follow during the proceeding.

In addition, there are further practical problems that are only recently emerging. It is undeniably noteworthy that in many cases the insolvency of the group of companies implies the insolvency of most companies of the group. This happens because, as accumulated experience shown, in most cases

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<sup>56</sup> In this sense UNCITRAL, Part Three.

<sup>57</sup> In this sense (Hirte, 2008).

not all members of a group are insolvent at the same time, but the bankruptcy of one company implies a *domino effect* that involves also the other companies in the group. However, this is not necessarily true. In some practical cases, only the subsidiary or only the parent company is insolvent, and thus does not result in the insolvency of the entire group. This implies that the legislators should verify each company's condition, and they should also take care to impose discipline on the restructuring plan,<sup>58</sup> and for instance, this is one of the requests contained in the Recommendation of the European Commission, enacted on 12 March 2002. Additionally, issues referred to applicable national laws and their harmonization have arisen. Indeed, on the one hand, each State has its own liability rules for debts, and on the other hand each adopts different forms of companies. Thus, it is reasonable in some cases that the parent company is liable for all debts of the subsidiary company, while in other cases the separation between members' liabilities should be strictly maintained. These are not serious issues; however, such remarks show that combining companies for insolvency purposes is not appropriate.

Moreover, there are differences between corporate laws across States having to do with efficiency. Indeed, efficiency usually comes to have different meanings; on one hand "some laws declare as their highest priority the best possible satisfaction of the creditors". On the other hand, "some say almost the contrary—namely to give the debtor the chance of a fresh start, or to foster entrepreneurship in general" (Paulus, 2007). This means that choosing one side over another surely implies surely that the position of creditors and/or other stakeholders is undervalued, because the trend is to prefer one interest to another. However, our pole star should be the statement that "insolvency law is governed by the (moral) principle of common interest<sup>59</sup>" that involves the interest of creditors and the interest of stakeholders (van Hoe, 2014) and they must be balanced.

In this light, both interests seem to be protected in *procedural consolidation*<sup>60</sup>, and certainly in favour of a *universalist* approach. Consequently, the entire administration is more effective for creditors and shareholders when made through a consolidated and universalist approach. While *substantive*

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<sup>58</sup> For further information see (Hirte, 2008) at pag 230.

<sup>59</sup> One common interest is in the sale of an ongoing business where "the price obtained is generally higher if the liquidators are able to sell the group as a whole" (Menjucq & Dammann, 2008).

<sup>60</sup> Regarding some pathological cases substantive consolidation must be allowed.

*consolidation* is too invasive, because “legal personality cannot be ignored by bankruptcy law” (Hirte, 2008)<sup>61</sup>, *procedural* consolidation attains the same goals without destroying corporate principles.

Some empirical data are also relevant: under the Working Commission Staff (2014) an average of 200,000 firms went bankrupt each year in the EU, and a quarter of them affected creditors and debtors in more than one EU Member State. Large companies, which are the most common form of company that may be subject to group insolvency, although only representing 0.2% of European companies, provide 30% of jobs in the EU and produce 41% of its gross added value.

Consequently, “the international group of companies has become the prevailing form of European large-sized enterprises, in which business activity is typically organised and conducted through a multinational network of subsidiaries. About 20% of large enterprises (ca. 8,500) have foreign subsidiaries or joint ventures. There are more than one million enterprises in Europe which have subsidiaries or joint ventures abroad” (Working Commission Staff, 2014).

In summary, as one might surmise, insolvencies of groups of companies are evolving and their related problems will increase as time passes. Indeed, a number of scholars have increasingly demanded a “European corporate insolvency law” that would harmonize legislation, clarifying and simplifying a group insolvency’s proceedings in particular.

This is especially true in cases in which there is an integrated business: this is when a single business is conducted by a number of companies that have divided the various tasks among themselves (Hess, et al., 2014, p. 153).

### 3. Parallel legislation and relevant documents.

There are different pieces of legislation around the world dealing with cross border insolvency, and it is important to focus on such different approaches to better analyse the phenomenon. These could be an interesting point of view for how to structure insolvencies.

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<sup>61</sup> However, Hirte reaches a different conclusion.

### 3.1. The Istanbul Convention.

Initiated in 1980 the Istanbul Convention was one of the first attempts made by the European Council,<sup>62</sup> in other words by almost all States located in the European geographical area. A committee of governmental specialists was set up with the ambitious goal, as the preamble shows, “to guarantee a minimum of legal co-operation by dealing with certain international aspects of bankruptcy”. The signing of the so-called Istanbul Convention was on 5 June 1990, although Cyprus was the only State that ratified it, and thus the Convention “must be regarded as a failure” (Pannen, 2011).

However, it was not totally useless. On one hand “the Istanbul convention provided a symbolic demonstration that a multilateral convention was a possibility between states with different legal traditions and different fundamental approach” (Israel, 2005), and on the other hand it established for the first time the link between “main and the optional independent territorially insolvency proceeding” (Pannen, 2011).

It is important to mention *Article 4*: “The courts or other authorities of the Party in which the debtor has the centre of his main interests shall be considered as being competent for opening the bankruptcy”. In other words, it was the first attempt to enact a principle of international competence based on COMI (centre of main interest).

One should bear in mind that there were no provisions about groups of companies, because at that time the problem was rare and unusual.

The Convention was the necessary premise of the Regulation (EC) 1346/2000<sup>63</sup>.

### 3.2. UNCITRAL documents: the Model Law and the Legislative Guide on Insolvency Law.

The UNCITRAL Commission is an organization of the United Nations that formulates and regulates international trade in cooperation with the World Trade Organisation. It enacts several

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<sup>62</sup> One should remember that European Council is a separate and independent body from the European Union, and it promotes the cooperation between every country in Europe.

<sup>63</sup> Similarly the Virgos-Smith Report: “Notwithstanding, the text of the 1990 Istanbul Convention remains important since it introduced more flexibility into the underlying principles of unity and universality”.

relevant documents that deal with insolvency law: 1) “Model Law on Cross-Border Insolvency and Guide to Enactment and Interpretation”, 2) “Legislative Guides and Recommendations”, and 3) “Explanatory texts”.

These documents are commonly defined as soft-law, thus non-binding for national judges, although they guide regulators, judges, and scholars. Furthermore, they were the first provisions that directly concerned groups of companies.

The *Model Law on Cross-Border insolvency* was approved by the General Assembly of the United Nations on 15 December 1997, and it was an instrument created to harmonize the laws of the various States. It is an international agreement, and it has been adopted by a large number of States, as well as by some members of the European Union<sup>64</sup> and numerous foreign countries such as Mexico, Eritrea, the USA, and others.

The goals of the Model Law are to recognize foreign insolvency proceedings, improve cooperation between courts, and simplify access to the courts by foreign creditors (Pannen, 2011). It deals with issues such as access, recognition, relief, and cooperation between States. The main difference with the other procedures is that it does not provide for an automatic recognition of foreign insolvency proceedings; rather, if certain requirements are fulfilled the Court has an obligation to recognize it. However, it does not resolve questions about the insolvency of different group members in different States.

Another important document is the *Legislative Guide on Insolvency Law*. As the introduction shows “it is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations”. That is to say, it “assists the reader to evaluate different approaches available and to choose the most suitable one in the national or local context”.

### 3.2.1. Treatment of enterprise groups in insolvency

In 2010, the UNCITRAL published its “Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency”, which focuses on the treatment of enterprise groups

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<sup>64</sup> Uk, Poland, Greece, Slovenia, Romania.

in insolvency. It is made up of three chapters: the first deals with general features of enterprise groups; the second focuses on the insolvency of group members in a domestic context; the third resolves the cross-border insolvency of enterprise groups. The last chapter contains several recommendations concerning the cooperation in such insolvency. In fact this section discusses this matter from different points of view; it focuses first on promoting cooperation, and it then deals with the cooperative relationship between courts on the one hand, and on the other hand cooperation between the insolvency's representative.

It adopts a system based on *procedural consolidation*, which is defined as “*the coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct*”. However, it may not only facilitate obtaining of comprehensive information, it is also strongly mitigated with elements of *consolidation*.<sup>65</sup> This is the most relevant difference with the new European Recast Regulation.

### 3.2.2. The relationship between the Model Law and the EU Regulation on insolvency

The Model Law and the EU Insolvency Regulation are two of the major texts regarding insolvencies, and as one might guess, there are some differences between them. They can be summed up in the fact that the Model Law is voluntarily applied and tries to cover a broad number of States, while the EU Insolvency Regulation is binding and refers only to Member States of the European Union.

The relationship between the Model Law and EU regulation is therefore strong. Indeed, on one hand, the authors of the Model Law took into account the European approach to insolvency, which can be observed by the fact that they use the same idea of COMI to determine jurisdiction.

On the other hand, the Model Law seems to be yet another instrument for European scholars in the cross-border insolvency field. Indeed, the Model Law at Chapter I, letter B (11) claims, “the Model

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<sup>65</sup> For instance: “cooperation between them might include, for example, coordinating the holding of hearings and sharing and disclosure of information”.



Law offers to States members of the European Union a complementary regime of considerable practical value that could address the many cases of cross-border cooperation not covered by the EC Regulation”.

Thus, EU Institutions should cooperate with UNCITRAL; at least it would be desirable that each take into account the other’s approach in order to find the best practices for insolvency proceedings.

### 3.3.ALI Principles

In 2002, the American Law Institute (ALI) published the “Principles of Cooperation in International Insolvency Cases”. They began from the ALI’S Transnational Insolvency Project, which had the goal of providing a non-statutory basis for cooperation in national insolvency cases between USA, Mexico and Canada<sup>66</sup>.

Furthermore, in 2002 the International Insolvency Institute (III) accepted these principles and promoted their use<sup>67</sup> (Wessels, 2013).

It is important to note that the first part of this work was created to facilitate an understanding of the insolvency law of each State involved among all participants, because it is about comparing the insolvency systems of Mexico, the USA, and Canada. As one can guess this understanding should make it far easier for them to cooperate in particular proceedings,<sup>68</sup> and in the light of European Insolvency Law it could be a good starting point.

However, according to these principles, an automatic recognition of insolvency did not exist; it is necessary to follow a separate recognition procedure in each of the contracting States (Pannen, 2011).

Also in the ALI Principle, there are no provisions directly applicable to groups of companies. Originally, it created some issues, and indeed it was stated that “*special difficulties encountered in insolvencies of multinational groups of companies are in urgent need of attention*” (Fletcher, 2008) Nevertheless, scholars quickly found a solution. Westbrook (2002) claims that ALI Principles “put a toe in the water” of this difficult problem. According to him, Article 23 should be interpreted as

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<sup>66</sup> They are usually named as NAFTA States (North American Free Trade Agreement between Canada, USA and Mexico).

<sup>67</sup> For a further analysis see Fletcher (2008).

<sup>68</sup> For an analysis of the Transnational Insolvency Project see Westbrook (2002).

allowing opening insolvency proceedings of a subsidiary company in the parent company's home country. In other words, it allows that the group can be reorganized administratively into one jurisdiction. Instead, in his theory Article 24 should claim that a corporate group should be reorganized from a worldwide prospective, just as with a single company. He then attempts various ways to overcome the so-called theory of groups as an economic '*unitas*' and a '*legal multiplex*'.

Recently Wessels (2013) has argued, after the publication of the UNCITRAL principle, that it is unnecessary to undertake a parallel exercise as part of the Global Principles Project. He claims that in line with Principles 23 and 24, "it should be permissible to commence an insolvency proceeding for an insolvent subsidiary in the same jurisdiction as the parent's insolvency, and to have either substantive or procedural coordination under applicable law." Thus, it seems to be a universally recognized interpretation of ALI Principles.

Added to ALI's Transnational Insolvency Project, Cooperation among NAFTA Countries Principles is an Appendix relating to "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases". It contains 17 Guidelines that were the results of general experiences and practices resulting from 15 cross-border cases, and they have the goal to serve as tools that could be utilized in specifically complex cases (Wessels, 2007).

### 3.4. Chapter 15, Title 11, United States Code

Chapter 15 of the United States Bankruptcy Code is the provision that deals with cross-border insolvencies in United States. It has replaced Section 304, although the major results of case law under &304 will be reflected in the interpretation of Chapter 15 provisions (Wessels, 2015). Specifically, that Chapter is titled "Ancillary and Other Cross Border Cases" and its aim, as the premise shows, is "to provide effective mechanisms for dealing with cases of cross-border insolvency". In very general terms, it allows cooperation between national and foreign courts, and for international insolvencies it incorporates the UNCITRAL Model Law on cross-border insolvencies<sup>69</sup>.

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<sup>69</sup>Perhaps this is why they are very similar to the European insolvency provisions, indeed there is the same concept of COMI, with the differences of main and non-main<sup>69</sup> proceedings.

However, this Chapter is strongly criticized because on the one hand, according to some scholars it increases the risk of international forum shopping.<sup>70</sup> On the other hand, Chapter 15 does not point out any provisions that deal with the jurisdiction of a company's group. An interpretative solution was offered by the scholars, because they seem to approve the idea that "it is necessary to administer economically integrated group members together in the COMI of the integrated group" (Soh, 2007, p. 898), with a *substantive consolidation* approach.

This is mainly because the approach generally used by the U.S. Bankruptcy Courts in cases of national groups' insolvencies is *substantive consolidation*. Actually, such an approach is not explicitly authorized by the Bankruptcy Code, however it is defined as an equity principle, and in a Common Law system it cannot be discarded without a specific Congressional law (Johnson, 2005). However, it is limited by the fact that before any consolidation, Courts typically applies a two-part balancing test, where "the proponent of substantive consolidation must show that there is a substantial identity between the entities to be consolidated and that substantive consolidation is necessary to avoid some harm or to realize some benefit" (Hirte, 2008, p. 222). This test has been viewed as the necessary premise, and it should also apply in case of international insolvency proceedings.

One should bear in mind that while this approach is strongly criticized in the European Union, it is usually used for national cases in the United States,<sup>71</sup> and this difference will perhaps lead to a different outcome.

### 3.5. Nordic Bankruptcy Convention

The Nordic Bankruptcy Convention of 7 November 1933 is a treaty signed by Denmark, Finland, Iceland, Norway, and Sweden. The main goal is to implement a general principle of recognition in case of insolvency; indeed, a bankruptcy declared in one country is automatically effective in the other countries (Pannen, 2011). These principles referred to both individuals and corporations<sup>72</sup>.

It applies the "*lex concursus* throughout the territory and assigns to the administrator wide ranging powers exercisable in all five countries" (Wessels, 2007, p. 32). In other words, it simply states that

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<sup>70</sup> For further information, see (Soh, 2007).

<sup>71</sup> For further information, see (Brasher, 2006).

<sup>72</sup> This opinion is given primarily by (Pannen, 2011). In contrast, (Wessels, 2007, p. 32) argues that the principles are referred only to individual and legal persons, and corporate reorganizations do not fall within its scope.

the applicable law is the law where proceedings are opened, as was provided in Article 4 of the 1436/2000 Regulation. However, it does not enact any form of consolidation.

However, pursuant to Art 44 (1) of the Regulation (EC) 1346/2000 on Insolvency, the convention between Finland and Sweden<sup>73</sup> has been repealed, and it has been replaced by such Regulation<sup>74</sup>.

### 3.6. Bustamante Code

The Bustamante Code, also known in Spanish as Código de Derecho Internacional Privado or Havana Convention on Private International Law<sup>75</sup>, was placed into force in 1928 by 15 Central and South America Countries during the 6th Pan American Congress held in Cuba. It is a treaty that deals with common rules for private international law in the Americas.

However, it seems to be a failure; indeed many countries such as the USA and Mexico quit during the negotiations, and other States signed the treaty with significant reservations.<sup>76</sup> In particular: these reservations allow the involved States to not apply the Code when it is in difference with national legislation. As one can guess, a similar approach affects the nature of the Treaty, which for this reason has no real value.

Chapter I ('Unity of Bankruptcy or Insolvency') should be analysed in light of the above. It in fact provides a double rule: on one hand where the debtor has only one civil or commercial domicile, there can be only one proceeding; on the other hand, whether the debtor has "various commercial establishments entirely separate economically" in different States, there should be as many proceedings as there are commercial establishments (Wessels, 2007, p. 29). It is a very simple principle that could be easily applied for groups of companies, with all its related problems.

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<sup>73</sup> Denmark is exempted from this European regulation, and Iceland and Norway are not part of the EU.

<sup>74</sup> Regulation 1346/2000

<sup>75</sup> This definition was given by (Wessels, 2007).

<sup>76</sup> If you want know more about these reservations, see the official site at: <http://www.oas.org/juridico/english/Sigs/a-31.html>.

### 3.7. Uniform Act of OHADA.

OHADA is the acronym for the Harmonization of Business Law in Africa. It is the name of an organization formed by 17 African States for the main purpose of harmonizing the laws. It was founded in 1993 in Port – Louis, Mauritius Island, and it was revised in 2008.

According to the treaty, OHADA operates mainly through the Uniform Act, a legal act that could be compared with the EU Regulation, because it is directly applicable without the necessity for national implementation measures.

The first Uniform Act was enacted in 1999; it contains ten provisions in relation to international insolvency proceedings, with the main goal of introducing a uniform regime.

On 10 September 2015, a new Uniform Act<sup>77</sup> on Insolvency was adopted that went into force on 24 December 2015. It introduces new provision with the main goal of “speeding up and strengthening the efficiency of insolvency proceedings, facilitating the safeguard of viable companies and the substantial payment of creditors, and thereby leveraging access to better financing for business.”<sup>78</sup>

One should bear in mind that a new cross-border insolvency regime is provided in the new Uniform Act,<sup>79</sup> however it does not deal with the insolvency of groups of companies. In this case as well the source of inspiration is the UNICITRAL Model Law (OHADA, 2015).

### 3.8. The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes.

In 2001, the World Bank developed the Principles<sup>80</sup> for Effective Insolvency and Creditor/Debtor Regimes. This is a collection of international best practices, and the response “to a request from the international community in the wake of the financial crisis of the late 1990s”.<sup>81</sup> At that time, the

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<sup>77</sup> [http://www.ohadalegis.com/anglais/AUProcedColl\\_gb.pdf](http://www.ohadalegis.com/anglais/AUProcedColl_gb.pdf).

<sup>78</sup> For further information, see <http://www.insideafricalaw.com/publications/ohada-uniform-act-on-insolvency>

<sup>79</sup> Art 247 e seq.

<sup>80</sup> See here for further information: <http://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>.

<sup>81</sup> This definition is given on the official site of the World Bank.

principles constituted the first internationally recognized standard to evaluate domestic insolvency systems.

They were revised in 2005, 2011, and 2015. The second revision incorporated the updates made to the UNCITRAL Legislative Guide on Insolvency Law; in particular, two new Principles were added: C16 about the Insolvency of Domestic Enterprise Groups, and C17 about the Insolvency of International Enterprise Groups.

Article C17 lists a number of principles<sup>82</sup> of primary importance that should be used in every regulation on such a topic. They are:

- 1) *Access to Court and Recognition of Proceedings*: the system should recognize foreign insolvency proceedings, and should provide the access to the Court for such representatives and foreign creditors.
- 2) *Cooperation involving Courts*: national Courts should be permitted to communicate and cooperate with foreign Courts and representatives.
- 3) *Cooperation involving insolvency representatives*: this is the same principle about cooperation between courts, but from the side of insolvency representatives.
- 4) *Appointment of the insolvency representative*: this is the most important principle, because according to it, the system must allow to nominate “a single or the same insolvency representative for enterprise group members in different States”.
- 5) *Cross-border insolvency agreements*: the system should allow the creation of agreements between courts or representatives for better coordination of insolvency proceedings.

As one should bear in mind, these are very common principles expressed very broadly. These principles are an attempt that can surely be appreciated and the idea of only one international insolvency representative seems especially very persuasive.

**Furthermore, it is remarkable that the approach chosen appears to be oriented towards *procedural consolidation*.** If we take a look at principle C16.3 referring to the group’s insolvency at the national level, it is easy to note that *substantive consolidation* is considered an extraordinary

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<sup>82</sup> For further information see: <http://documents.worldbank.org/curated/en/518861467086038847/pdf/106399-WP-REVISED-PUBLIC-ICR-Principle-Final-Hyperlinks-revised-Latest.pdf>.

method. Indeed, it reflects the opinion of many scholars, because it starts by saying that “the system should respect the separate legal identity of each of the enterprise group members”, which moreover should be applied only in two cases:

- “Assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay”;
- In the case of unlawful activity, and separate legal entities are used for this reason.

Compared to the United States code, and bearing in mind that both are made considering the UNCITRAL documents, this shows how from the same premises different methods can be derived.

In addition, the World Bank, in conjunction with the United Nations Commission on International Trade Law (UNCITRAL), and in consultation with the International Monetary Fund (IMF), designed the Insolvency and Creditor Rights Standard (the “ICR Standard”).

The ICR Standard is defined as an assessment tool made to assist Countries in their efforts to evaluate and improve insolvency and creditor/debtor regimes;<sup>83</sup> however, it seems to be a more schematic repetition of the World Bank principles (2011) and the recommendations from the UNCITRAL Legislative Guide on Insolvency Law (2010).

### 3.9. The Virgos-Schmit Report on the Convention on Insolvency Proceedings.

The Virgos-Schmit Report is an explanatory report produced by Professor Miguel Virgos and Magistrate Etienne Schmit, accompanying the Convention on Insolvency Proceedings and published in 1995. It was not formally approved by the Council of Ministers, nor was it ever published in the Official Journal of the European Union, although it exists as a document of the Council of the EU of 8 July 1996 – 6500/1/96.

It has considerable authority for courts and scholars in Member States; however, the definitions contained in it are not directly binding. That seems to say that no one has sufficient authority to deviate from it, unless he or she has very strong reasons.

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<sup>83</sup> See [http://www.fsb.org/2011/01/cos\\_051201/](http://www.fsb.org/2011/01/cos_051201/).

Indeed, one should bear in mind the opinion of Advocate General Jacobs in the case of Eurofood IFSC Ltd, in point 2: “In those circumstances I consider that the explanatory report on the Convention written by Professor Virgós and Mr Schmit (‘the Virgós-Schmit Report’) may provide useful guidance when interpreting the Regulation”.

It is noteworthy that the Virgos-Schmit Report claims that at the *point 76* “the Convention offers no rule for groups of affiliated companies”, and furthermore it provides a clear, generally used interpretation of group insolvency, in which “jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity”. No scholars doubted that.

### 3.10. Final observations

This section is a very useful tool because it reveals another point of view in insolvency law. First, it came to light that European regulation on insolvency is an authentic milestone in international insolvency matters, because any attempts at a binding and uniform supranational insolvency law failed. Indeed, the only relevant and applied provisions are those enacted by UNCITRAL, however they are not mandatory and are incorporated on a voluntary basis.

Secondly, American Law shows that a different approach is possible, and that *substantive consolidation* is applicable under certain conditions. However, on the other hand, *procedural consolidation* is definitely preferred by the large majority of systems, such as the World Bank Principles and UNCITRAL’s provisions.

## 4. Regulation (EC) 1346/2000 on Insolvency proceeding

Regulation (EC) 1346/2000 on Insolvency proceeding (EIR) is a milestone over the course of insolvency proceedings. It went into force on 31 May 2002, which was the first time that the recognition of insolvency proceeding was ensured throughout the European Union. The Regulation is also the first authentic attempt to resolve jurisdictional conflicts in cross border insolvency cases by promoting cooperation among Member States. It should apply when the debtor has a cross border dimension, and has its centre of main interests (COMI) in any Member State.<sup>84</sup> The approach chosen

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<sup>84</sup> except Denmark.



by the European Union is *mitigated* or *modified universality* (*infra.* I, 2), because it permits the opening of insolvency proceedings in the State where the debtor has its centre of main interests; this is on a worldwide basis, although different rules are established for mitigating the universalist model (Virgos & Garcimartin, 2004).<sup>85</sup>

However, it does not contain rules on how insolvencies that affect groups of companies should be dealt with.<sup>86</sup> This “does not mean that the EIR does not have specific legal consequences in insolvency scenarios involving group of companies” (Hess, et al., 2014, p. 153), because, according to the regulation, an insolvency proceeding must be opened in relation to each individual company<sup>87</sup> of the group, but this could be done without any *consolidation* established by law. Indeed, it should be noted that there are no rules directly applicable to groups; every undertaking must be treated as an independent company, and subsequently as an independent insolvency case. This causes significant problems for creditors, and these are particularly acute in the case of reorganization proceedings.

The European Commission reached the same conclusion, when on 12 December 2012, in accordance with Article 46 of the Regulation, it presented to the EU Parliament and to other EU entities an assessment concerning the application of Regulation<sup>88</sup> (EC) 1346/2000. In that report, the Commission argues that “*although a large number of cross-border insolvencies involve group of companies, the Regulation does not contain specific rules dealing with the insolvency of a multinational enterprise group*”.

According to the report, the main weakness regards cooperation and coordination. Indeed, as has been stated, separate proceedings must be opened for each individual member of the group, and there is no coordination of the independent proceedings opened in each state. Furthermore, neither the liquidators nor the courts involved in the various proceedings concerning members of the same group are under a duty to cooperate and communicate. In addition, the issue became difficult for judges because they cannot cooperate in the absence of a legal basis expressly authorizing them to do so, and no Member State has legislation of this kind.

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<sup>85</sup> For further information see (Virgos & Garcimartin, 2004) at page 15.

<sup>86</sup> Indeed, “in the legal view of all Member States, insolvency is the inability to pay not of an organization, but of a person, natural or juridical” (Virgos & Garcimartin, 2004) on page 46.

<sup>87</sup> (Virgos & Schmit, 1996) point 76.

<sup>88</sup> For further information, see [http://ec.europa.eu/justice/civil/files/insolvency-report\\_en.pdf](http://ec.europa.eu/justice/civil/files/insolvency-report_en.pdf).

The second main weakness concerns jurisdiction, and in particular the determination of the centre of main interests (COMI). This can be a source of various issues, such as the determination of the location of each company's COMI,<sup>89</sup> or an increasing in forum shopping practices.

One should bear in mind that the forum and the applicable law depend on the COMI definition, but in some cases the debtor, seeking to obtain a more favourable legal position, moves the centre of main interests from one Member State to another, thus changing the jurisdiction over insolvency proceedings. If this is successfully achieved, a "forum shopping"<sup>90</sup> event happens, and as one can imagine, this is prohibited<sup>91</sup>. The notorious case of *Daisytek-ISA*<sup>92</sup> is an early example of this situation, because these phenomena increased in the cases of groups of company.

However, the Commission does not assess another aspect: not all involved companies necessarily have their COMI in a Member State (Hess, et al., 2014, p. 154). This is especially true in many multinational groups that have a parent company in Asia, or in the US or in other places outside the European Union, for instance in tax havens. In this case international coordination is desirable, or at least communication between the parties involved.

Moreover, one should bear in mind that the effects are more serious than represented, because separate proceedings could cause a considerable loss of value for the creditor. Additionally, difficulties are compounded by the problems deriving from very different laws. For instance, a small creditor that extended credit to two companies within the same group must go to different countries to make two similar claims.

It is precisely for these reasons that the European Court of Justice, the judges of States, and scholars have tried to fill this void through different interpretative solutions. However, they are not sufficient and show that (new) rules are necessary.

Finally, one should show in detail the most debated aspects of Regulation (EC) 1346/2000.

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<sup>89</sup> For further information, see (Moss, et al., 2009).

<sup>90</sup> For details, see Wolf-Georg Ringe (2009).

<sup>91</sup> This is prohibited by Article 4 of the Regulation.

<sup>92</sup> Further information on this matter will be provided in a dedicated section on Case Law.

#### 4.1. Centre of main interest (COMI) and cross-border groups of companies.

*Article 3 of the Regulation EC 1346 (2000): International jurisdiction*

*“1. The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. [...]”*

Generally speaking, the Centre of Main Interests (COMI) is the key factor for assuming international jurisdiction to open insolvency proceedings (Pannen, 2011, p. 89) and, according to Article 4(1) of the Regulation, for determining the law applicable to such proceedings. This is not expressly defined in the Regulation, and there is a lively debate between legal scholars about the objective criteria to ascertain where it is effectively located.

However, under Recital 13 of European Community Regulation 1346 (2000), the COMI “*should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties*”. Regarding companies and legal entities, Paragraph 1 of Article 3 states that the COMI is presumed to be where the registered office is.

A further help is given by the Virgos & Schmit (1996) report, and in fact in point 75 it argues that the concept of COMI 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*”. Furthermore, the report continues that “*by using the term ‘interests’, the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities*”, and “*the expression ‘main’ serves as a criterion for the cases where these interests include activities of different types, which are run from different centres*”.

Consequently, one must conclude that two factors must be reached in understanding COMI: first, that it deals with the place where the companies manage their commercial, industrial, professional, and economic activities, and second, that this condition should be recognized by creditors.

It is commonly accepted<sup>93</sup> that under the Regulation a company has only one *centre of main interests*, and for this reason it is possible to open only one *main insolvency proceeding*. However, without any limitation in number, further action can be opened territorially in the place where a debtor has an establishment; these are the so-called *subsidiary proceedings*. In other words, the Regulation for companies establishes a hierarchical scheme of main or primary, and secondary or subsidiary, jurisdictional competence.

It is important to keep in mind that there are several primary effects of opening a main proceeding. First, the proceeding is governed under the laws of the country in which it is opened. Second, according to the *principle of priority*<sup>94</sup>, a proceeding is directly recognized in every Member State without further formalities and produces the same effects in all other Member States as under the law of the State in which the proceedings are opened. Moreover, it implies that if a court accepts the jurisdiction and accordingly opens an insolvency procedure, it is irrelevant whether it is right or wrong<sup>95</sup> because it *in limine* precludes the opening of the same main proceeding for the others national courts. The last effect is that an administrator is appointed in the main proceeding and he or she has powers throughout Europe.

In contrast, regarding secondary proceedings, they are opened “to assist and support the main proceeding and to protect the local creditors” (Bufford, 2006).

However, **no provision was enacted regarding groups of companies; consequently, according to Article 3 the jurisdiction should be determined separately for each individual company in the group, and it should be located in the place where the registered office is found.** Above all, it is commonly accepted that a subsidiary cannot constitute an establishment, and that the COMI should then be determined independently for each company in the group. However, in practice, national courts frequently locate the centre of main interests of all companies in their own jurisdictions, because they attempt to take over all proceedings, including those concerning the other companies in the group. This has been defined as the “race to first” among creditors and courts to choose the most favourable jurisdiction (Moss, et al., 2009, p. 259).

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<sup>93</sup> (Pannen, 2011) and (Bufford, 2006).

<sup>94</sup> Someone call it, priority rule.

<sup>95</sup> In this sense (Hirte, 2008).

Indeed, one should consider that billions of euros can be involved in such insolvency cases, and the fact that EC Regulation does not provide for any consolidation or coordination of the different proceedings could create a numbers of issues. From the points of view of the undertakings, the insolvency of one company in the group usually also has an effect on the business of the other associated companies; this is also a limit on reorganizing the group, as well as in achieving insolvency goals. Moreover, according to the *principle of priority*, the applicable law is determined by the opening Court, and while this could create advantages for a particular class of creditors, it inflicts enormous damage on companies and others creditors.

In this matter, as one might imagine, there are a number of decisions by the European Court of Justice and by national courts that have tried to solve the riddle.<sup>96</sup> However, each Court's approach is different, because on one hand the presumption of Article 3(1) in which the COMI is located at the registered office has lost ground, and on the other hand different theories<sup>97</sup> have arisen that are used in ascertaining the COMI in the case of groups of companies.

Pannen (2011) classifies three approaches used:

- i. The *mind of management approach*<sup>98</sup>: pursuant to this approach, the place where the so-called head-office functions are being discharged is decisive for ascertaining the COMI - for example, the place where strategic decision are made. In groups of companies this is in the headquarters of the groups, and in effect this results in a unified group jurisdiction. In sum, if the parent company effectively manages the other companies, the COMI of a subsidiary company is located at the COMI of its parent company. For some scholars<sup>99</sup> another requirement should be respected, that the COMI should be identified by the creditors.
- ii. *Conciliatory approach*: this varies according to the group structure. If the group is a centralized group whose decisions are directed and controlled by the parent company, it would appear correct to place the COMI at the place of the parent company. However, if it is a

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<sup>96</sup> For instance: Eurofood/parmalat, Daisitek, Nortel etc..

<sup>97</sup> One should bear in mind that in many cases, the judgments across the European Union were conducted without any logical reasons; for example, criteria such as the administrator's nationality were adopted (Mazzoni, 2011).

<sup>98</sup> This is called also "head office" theory (Hess, et al., 2014).

<sup>99</sup> This opinion was given by Christoph Paulus in (Moss & Paulus, 2006).

decentralized group, the COMI of the subsidiary should be located at the registered office of each subsidiary.

- iii. *Business-activity approach*: this locates the centre of main interests at the place of the business's economic activities. It is based on the assumption that international jurisdiction should be in the place the creditors know, thus enabling them to estimate legal and economics risks.

These theories are alternatives and are used differently by each Court, broadly discussed. Actually, the European Court of Justice applied the *business-activity approach* in the case *Eurofood/Parmalat*, because it ascertained that it was necessary to examine each company's COMI individually, and there cannot be an automatic presumption of localization according to which the COMI of the subsidiary is the same of parent company. In particular this judgement is about Article 3(1)EIR, and the Court pointed out that the presumption laid down by the Regulator could be rebutted only in extraordinary cases - for instance, in the case of a "letterbox company". Furthermore, the opinion of some scholars is that the ECJ in this case leaves to the national court the possibility of further developing criteria that meet the COMI "objective and ascertainable" test by third parties (Wessels, et al., 2009).

In contrast, Hess, et al. (2014) strongly criticizes the Eurofood case: "with respect to the notion of COMI [...] it is a typical example of the old saying that hard cases make bad law". In his opinion the Court chose highly formalistic standards that cannot be shared. Furthermore, he argues that the Court abandoned those narrow and formalistic methods soon after in the *Interedill* decision. Indeed, the Court in *Interedill* argued that it is "possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State". According to Hess, this judgement claims that the existence of contracts and the presence of company assets in a Member State other than those in which the register office is situated could result in denying of presumption of Article 3(1) EIR.

At first glance, the *Interdill* case seems to draw upon the *mind of management* theory. It is in accordance with the English UK court in *Daisytek* and the French court in *Eurotunnel*. These are two important judgements in which national courts choose such a pragmatic approach: the COMI are in the single headquarters of the group.

This is widely discussed, because such a method seems to have been adopted for non-legal reasons, primarily to resolve the problem of the company group's insolvencies. Indeed, it appears to be the specific result of a guilty regulator. Additionally, using this approach, the additional factors that justify the COMI's position cannot effectively be ascertained by creditors, who may suppose that the centre is located in another place over the course of their business affairs. As one can guess, this affects the certainty of legal relations, which is a central point in modern business law.

As long as there is not a precise law that can regulate the COMI, the *mind of management theory* could provoke unpleasant consequences. Indeed, the Court tried to use a narrower interpretation in the *Interdill* case as well, but it seems to be quite far from fully admitting this theory, because it can be used only within persuasive and legislative limits.

In this context, Pannen gives a convincing solution. He discards the *mind of management approach* and the *conciliatory approach* and argues that the *business-activity* is the only convincing approach. His opinion repeats what has already been said, and it seems persuasive because, “the mind of management approach creates a group jurisdiction only for the purpose of insolvency proceedings without legal basis, and it is not correctly ascertainable for the creditors”. Rather, “the conciliatory approach gives to creditors only a minimal protection”, especially to small creditors and employees, and they are not in a position to enforce their rights in another Member State.

However, the *economic business activity* approach, although it appears as the closer interpretation of the law, remains a very drastic conclusion, that is not followed completely by Courts. Indeed, while the general criteria adopted in the ECJ in *Eurofood/Parmalat* case are “followed by the vast majority of European courts in the context of group of companies” (Wessels, et al., 2009, p. 126), when the European Court of Justice is determining specifically if the presumption of Article 3(1) is applicable it usually refers to the *Interdil* case rather than *Eurofood*. This is confirmed by the Judgment *Rastelli Davide e C*<sup>100</sup>, *Leonmobili and Leone*<sup>101</sup>, and in the *Nortel* case.

As a result, at first glance one could be tempted to simply conclude that thus *business-activity approach* is the criteria chosen. However, the European Court of Justice usually recalls the official criteria adopted in *Interdill*, but in practice evaluates if the case regards an highly integrated group or

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<sup>100</sup> C-191/10, EU:C:2011:838, points 31 e 33.

<sup>101</sup> C-353/15.

not<sup>102</sup>. In the first case happens that companies are subject to the same COMI<sup>103</sup>, in the second not. It is a theory very similar to the *conciliatory approach*<sup>104</sup> with all the already examined issues.

Actually, the real solution seems to be something else, and this is foreseen in Moss & Paulus (2006). The authors argue that “a proper definition” of COMI is essential “because no question is likely to create more international conflict between Member States than the COMI one”. Therefore, the new European Regulation on insolvencies should give a real answer.

#### 4.1.1. The proposals made

The common opinion that a solution is needed has resulted in a number of proposals on where the COMI should be located. Leaving out the main theories that are already being argued, one should now focus on the more interesting approaches based principally on *procedural consolidation*.

Horst Eidenmüller adopts a model of *constrained forum choice*,<sup>105</sup> in which the company is subject to the law chosen for the adoption of its legal form. In other words, if the company does not have a legally registered office, the COMI should be determined according to the laws where the company was incorporated. This theory has as its main value the prevention of forum shopping and certainty for the creditors. However, it does not resolve the problem of the group’s insolvency, because while it is easier to locate the COMI, if the members voluntarily choose different jurisdictions, this would create different fora (Wessels, et al., 2009, p. 128). Moreover, some have said<sup>106</sup> that jurisdiction should be determined according to insolvency law, and because corporate law is something different it should not be applied. Furthermore, it could happen that a company is incorporated in Bulgaria, and operates principally in Germany without a registered office, and thus according to this theory the COMI should be in Bulgaria. As one might imagine, this creates the opposite effect than the sought by regulators.

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<sup>102</sup> Merlini (2016)

<sup>103</sup> In this case secondary proceedings could be opened in the place where a company has the legal seat. C-327/13 - Burgo Group.

<sup>104</sup> One should remember that according to the *priority rule* “the decision taken by the court of a Member State to open main proceedings in respect of a debtor company, and the finding, at least by implication, that the centre of the debtor company’s main interests is situated in that Member State, cannot, in principle, be called into question by the courts of the other Member States” C-327/13 - Burgo Group.

<sup>105</sup> This has been defined also as the *lex societatis* rule. (Mazzoni, 2011).

<sup>106</sup> (Mazzoni, 2011).



Christoph Paulus points out another opinion that is in the middle of the principally cited theories. He argues that in the case of companies the COMI is in the place where the debtor conducts the administration of his interests on a regular basis<sup>107</sup> and which it is ascertainable by third parties, except when the group operates as an economic unit. In that case, the centre is in the place where the head office functions are carried out (Wessels, et al., 2009, p. 127). This seems to be a very convincing theory, because he recognizes the possibility of *substantive consolidation* only in a particular case. Furthermore, Moss & Paulus (2006) argue that where other States had opened main proceedings in relation to the same group, “the liquidator of a parent company should apply to a court which has opened main proceedings in respect of subsidiary to convert those in secondary proceedings”. “Such process would be assisted by the ability to have court to court communication”. In other words, it establishes a system in which the liquidator of the parent company has the power to convert main proceedings into secondary proceedings.

A very similar theory was given by Menjucq & Dammann (2008), defined as “virtual secondary proceedings”. This theory is based on the fact that the proceedings of subsidiary companies should be treated as secondary proceedings. It does not require any new legislation, and according to the authors, it offers many advantages. First, it eliminates the risk of forum shopping and clarifies that the law applicable to secondary proceedings is the local law. Furthermore, “centralisation of the main proceedings for the group as a whole allows the best economic solution for the group (continuation plan or sale of the ongoing business)” and the relationship between main and secondary proceedings reflects the same hierarchy within a group of companies. However, one could observe that any clear definition of the COMI avoids the risk of forum shopping, and the same is true for the other point. Furthermore, this theory does not offer any solution in the cases in which there is a horizontal group, that is, in which the companies are all on the same level.

It is important to keep in mind that the UNICITRAL Model-Law has adopted in Article 16(3) a presumption similar to that of the European Union, that the COMI in cross-border insolvency is located in the place of the registered office. However, Working Group V (Insolvency Law) (2013) concluded that such a presumption was not directly applicable in the contexts of enterprise groups. Consequently, according to the Working Group it is necessary to provide a rule, based on the

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<sup>107</sup> This is the business-activity approach.

presumption of Article 16, that could determine the seat of the controlling group member in the cases in which this presumption is not applicable. The Working Group, while ensuring that the function of such a centre is *procedural* and not *substantive*, seems to be preoccupied more about the fact that there should be a coordination centre, rather than on the strict rules that identify it. Indeed, the approach used in the previously cited UNCITRAL Legislative Guide on Insolvency Law, Part Three, is based primarily on an increased use of coordination and cooperation. This approach is followed by several countries; for instance, the German minister issued a discussion on enterprise groups that draws inspiration from it (Working Group V (Insolvency Law), 2013). Consequently an approach based on the seat of the controlling group as the coordination centre, without moving the COMI's location, is rather persuasive.

#### 4.1.2. Considerations on forum shopping and migration.

One of the main risks of group insolvency<sup>108</sup> is forum shopping. This has to do with a debtor that searches for the most favourable jurisdiction in which to be judged with the most favourable decision, and then subsequently moves its COMI.

This behaviour is simpler in case of a group of companies, because this could be easily done by moving the legal seat to the different offices, or - if we adopt the *mind of management* approach – by moving the group's headquarters. Indeed, the appropriate moment to establish relevant jurisdiction is when the application to open insolvency proceedings is filed<sup>109</sup>, for the reason that the European Insolvency Regulation does not require a specific period of time to pass in order to fix the centre of main interests.<sup>110</sup> Moreover, one should bear in mind that this phenomenon is closely connected with the definition of the COMI because “the risk of forum and law shopping does exist since judges have a large amount of discretion when interpreting the notion of COMI” (Menjucq & Dammann, 2008, p. 149).

As one can expect, forum shopping is a big problem, because it involves the risk assessments of the creditors and the internal market of the European Union.

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<sup>108</sup> This is especially true in the mind management theory.

<sup>109</sup> (Virgos & Garcimartin, 2004) at page 49.

<sup>110</sup> (Virgos & Garcimartin, 2004) at page 49.

In the *Intrédill* judgement, the court examined the transfer of the debtor's centre of interests and claimed that "the Regulation does not contain any express provisions concerning the specific case involving the transfer of a debtor's centre of interests."<sup>111</sup> Furthermore, "the last place in which that centre was located" before a request to open insolvency proceedings "must therefore be regarded as the relevant place for the purpose of determining the court having jurisdiction to open the main insolvency proceedings".<sup>112</sup>

In other words, an undertaking can move its COMI before the insolvency proceeding against him is lodged, and this could happen, also according to the presumption of Article 3(1) EIR, by transferring the registered office from one place to another. The only action that creditors could bring is to demonstrate that the presumption is "rebutted by evidence that the centre of main interests has not followed the change of registered office".

This seems to be a very difficult approach, because it is easy to imagine how a member of a group, in difference with other companies without a strong European or international network, might simply move its centre of main interest from one place to another, for purely commercial reasons, all of which could harm its creditors. Indeed, it seems to be necessary to provide new rules in this matter as well - for example, by establishing a period of time, say, one year, before the COMI's movement takes effect.

#### 4.2. Coordination and cooperation.

Another central issue concerns coordination and cooperation, and this too is closely coupled with the COMI definition. It is harder to discuss because any serious consideration about cooperation and coordination cannot be made, or is at least limited, prior to having a clear definition of where the COMI is located.

In addition, before any analysis, several questions must be clarified. First, a secondary proceeding cannot be opened for a subsidiary company because, such kind of proceeding is admitted only for an establishment of the same company, and a subsidiary is not an establishment for a number of reasons. One is that the establishment cannot be an independent legal entity, and it is not faced against the

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<sup>111</sup> Point 53.

<sup>112</sup> Point 54.

creditor of an independent company, but only against the creditor of the main company. Another is that a company in a horizontal group is at the same level as the others and this is not possible for establishments.

This is a commonly accepted opinion,<sup>113</sup> however Menjucq & Dammann (2008) argue that “it is necessary to adopt a broad interpretation of Articles 2 and 3 of the Regulation to allow the opening of secondary proceedings in the Member State where the registered office of the subsidiary is located”. This approach was actually followed by the Court of Cologne in the Automold case and by the Courts of Nanterre, Eisenstadt, Brussels, Warsaw, and Mannheim in the EMTEC case. It could be a solution, but it is not established by law.

The necessity of coordination, cooperation, and further communications between parties involved in insolvency procedures is a well-known problem.<sup>114</sup> Under European Regulation 1348 (2000), parties can cooperate only on a voluntary basis: this would be simple for liquidators but quite impossible for judges. Indeed, the latter usually need a specific provision to cooperate, because without a stated rule any such behaviour is unlawful. However, although liquidators have more freedom to cooperate, they are subject to different kinds of problems. Indeed, issues arise when others practitioners do not cooperate and when many states are involved. In such cases, without central coordination, it could be a very difficult, and perhaps impossible, job. The *Eurofood* case is the best example, because it shows the hostility of liquidators and the relative consequences.

Creditors have similar problems. They may have only operated through one company; however, in practice they did business with others companies in the group. One must consider the business conducted through a company that operates only as an intermediary, but without guarantees. In this event, a creditor involved in the case must work with the different law systems of every country in which it operated in practice; for small or little undertaking<sup>115</sup> this could be very difficult work.

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<sup>113</sup> As Menjucq & Dammann (2008) admit on page 151.

<sup>114</sup> See (Blumberg, 2007) (Bork & Mangano, 2016) (De Luca, 2016) (Hess, et al., 2014) (Klaus, 2015) (Moss, et al., 2009) (Mevorach, 2012) (Mevorach, 2012) (Moss, et al., 2009) (The High Level Group of Company Experts, 2002) (Virgos & Garcimartin, 2004) (Wessels, et al., 2009) (Westbrook, 2000) (van Galen, 2003).

<sup>115</sup> In addition, consumers could be involved in these proceedings.

These points of views show that the internal market of the European Union is also involved. Of course, this is true only from a secondary prospective, but it is one of the main points of the Union, and the fact that it could be harmed requires significant, effective measures.

As previously mentioned, either substantive or procedural consolidation or *procedural coordination* could be adopted to confront this problem. Actually, this is not a real question, because substantive consolidation eliminates the coordination problem of treating the group as a one large company, while procedural consolidation or coordination requires one coordination centre and one global liquidation coordinator.

However, what arises in practice is that, with some improvement, the best example of coordination seems to be the relationship between *main* and *secondary* proceedings. In the Regulation 1346, the secondary proceedings are referred to the establishments of same company, but the correlation between them shows how courts can cooperate. It is reasonable that with an EU level harmonization of insolvency procedures, and some improvement, this approach could certainly be used for groups of companies, as Menjucq & Dammann argue.

#### 4.3. Avoidance provision in intra-group transactions

In the area of insolvency of groups of companies, scholars usually underestimated a common difficulty. This concerns intra-group transactions, which – due to the selfish behaviour that is part of human nature – can be made fraudulently to shield assets from insolvency or unjustly enrich certain stakeholders.

Avoidance rules were created to counter this behaviour, because the main goal of administering the an insolvent company's business<sup>116</sup> is to accumulate as many assets as possible to repay the creditors as much as possible. Such rules originated very early; in Roman times they were known primarily as *actio pauliana*, and their central features have survived to the present day (Keay, 2016).

Today, every country in the European Union has developed its rules differently; however, as one would expect, they have many commonalities. Indeed, avoidance rules have the primary objective of investigating all transactions between companies in a group prior to insolvency. At that time they

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<sup>116</sup> In this thesis we discuss group of companies, however this is also true in the case of an individual person.

were legal, because it is within the scope of an undertaking to administer its assets; however, in the light of an insolvency procedure there may be reasons beyond simple administration.

A persuasive overview of the different variations of avoidance provisions is given by the UNCTRAL Legislative Guide, which mentions the three most common types of avoidable transactions in different national legal regimes. These are transactions intended to defeat, hinder, or delay creditors from collecting their claims; undervalued transactions; and transactions with certain creditors that could be regarded as preferential.<sup>117</sup> Such transactions are usually avoidable in most Member States when the intent of the debtor is proved, or when the value received by the debtor as a result of the transaction was either non-existent, such as a gift, or much lower than the market price, and when they are made in a suspect period (Mevorach, 2009, p. 288).

However, when the proceedings are different, the decision as to which transaction avoidance laws are applicable may depend on different factors. Indeed, the two different approaches used to determinate the jurisdiction, namely territoriality and universality, also play a role in this case<sup>118</sup>. Consequently, under a strictly territorial system, the only factor used to determine jurisdiction is the location of company assets. In contrast, under a strict system of universality a single set of insolvency laws would apply in a single formal insolvency process applicable worldwide. In this case, avoidance actions should be conducted under national law, and for this reason they are usually unlinked by all nations, that have given different priorities to preferential and secured creditors (Parry, et al., 2011).

It is mainly for this reason that the European insolvency regulation leaves the duty to regulate this matter to Member States' laws. It adopts a system of modified universalism<sup>119</sup> with territorial elements incorporated within its scheme. Indeed, while *Article 4* provides that the law of the State where the proceeding is opened must apply, *Article 13* provides for an exception that could be brought when it was proved that “the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case<sup>120</sup>”. This implies that in the case of a group of companies such rules have a

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<sup>117</sup> This classification is made by (Mevorach, 2009) on page 287.

<sup>118</sup> In this sense see (Parry, et al., 2011) on page 546.

<sup>119</sup> Some scholars talk about modified territorialism. (Parry, et al., 2011), instead, prefer modified universalism, although they specify that “while based on universality, these proceedings lack ‘unity’”.

<sup>120</sup> For more information about this point, see the case *Lutz v Bauerle* by the European Court of Justice.

double face: if in fact the COMI for all companies is located in the same place<sup>121</sup> one set of laws must apply; in contrast, and this is the most likely eventuality, they are subject to the different laws of each State.<sup>122</sup> In practice, it happens that “only the rules of the law of the forum will apply”, this because in the case of an exception “the debtor can defend the transaction showing that it is valid and unimpeachable according the law by which it is properly governed” (Mevorach, 2009, p. 322) and it produces the opposite effect of protecting the avoidable transaction rather than eliminating it<sup>123</sup>.

Moreover, one should bear in mind that the problem is very difficult. In the group structure, all economic operations between members are doubtlessly very numerous and difficult to trace back, furthermore, when members are international such transactions could be easily concealed. In some cases, *group opportunism*<sup>124</sup> behaviours could arise, and indeed it may happen that a particular subsidiary is consciously located in a very favourable jurisdiction in order to avoid liability; furthermore, when it is outside the European Union, the international context sets up additional obstacles (Mevorach, 2009). Consequently, absent any European provisions in this matter, national law surely cannot be sufficient, and the differences between national systems could cause various issues (*infra*. II, 3.2.5).<sup>125</sup>

In addition, creditors could also face many issues. Indeed, when the proceedings are different, they must deal with the problems of COMI localization, and for each company involved they must require an annulment of the transaction; this is particularly difficult due to the fact that transactions are usually treated differently in different countries. Moreover, they do this without any coordination or communication between Courts or regulators, and this can result in very unpleasant consequences. This is particularly true if we keep in mind that the localization of COMI, therefore of jurisdiction, is already subject to many issues. In contrast, in a less frequent eventuality, when the COMI of all companies are located in the same place, creditors must require an annulment of transaction using different laws than those of their own national system.

Thus, harmonization is desirable in this matter, because it is commonly accepted that on one hand transactions between group members normally have a commercial justification, and thus they are

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<sup>121</sup> For highly integrated groups.

<sup>122</sup> In this sense, the Court in Eurofood. (Bailey & Groves, 2007)

<sup>123</sup> For further information, see (Mevorach, 2009) at page 322.

<sup>124</sup> This definition was given by (Mevorach, 2009) at page 323.

<sup>125</sup> It has been discussed in the next chapter because it involves the current legislation.

particularly hard to discuss, especially in cases of *cash pooling*<sup>126</sup> (*infra.* II, 2.); on the other hand, as has been stated, in the group scenario the possibility of such behaviours increases, because these transactions might have a plausible justification. Moreover, the problem increases because liquidators do not have any power to investigate movements of the various assets.

This is why only a clear European provision that also provides also for a harmonizing of the various laws can solve the riddle. Mevorach (2009) argues that the regulator should answer two questions: whether “any transactions among group members should be all attacked under any available provisions” and whether “in case of relevance of this transaction these should be judged with additional scrutiny.”<sup>127</sup> The first question may be readily answered, because it claims that a universalist concept of a single law and forum is the best choice of law in terms of predictability. Consequently, the law of the home country of the debtor bankruptcy should apply, and this approach should be endorsed. In contrast, the latter question merits further considerations, despite an additional scrutiny is preferable in any group transaction.

Moreover, two other approaches seem persuasive and they should already be in use today. First, in the case of a group that operates as a single entity, *substantive consolidation should apply* - , which we cannot share in a general provision - and then all the intra-group transactions are eliminated in a figurate way. Secondly, the transactions between members of groups must usually be covered in all legislation by a presumption of connected persons under less strict conditions<sup>128</sup> than are usually provided.

In conclusion, one should bear in mind, that also in this case as well a clear harmonization between the various national insolvency laws is more than necessary.

#### 4.4. Group insolvency provisions in Member States

The European Insolvency Regulation went into force in Member States on 31 May 2002, and it does not require any ratification or enactment to become the law of the States.

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<sup>126</sup> Or similar behaviours.

<sup>127</sup> In his book (Mevorach, 2009) gives his answer to this question.

<sup>128</sup> For further information, see (Mevorach, 2009) page 288.



Furthermore, one should bear in mind that the Insolvency Regulation is a primary legislation, and any law in contrast with its provisions is automatically repealed. However, in practice this is not always true, because such a law requires further provisions to be just as effective, and in order to make the legislation compatible with the European Regulation.

Moreover, on 12 March 2004 the European Commission enacted a Recommendation to Member States on a new approach to business failure and insolvency. In particular, the Commission argued, “national insolvency rules vary greatly in respect of the range of the procedures available to debtors facing financial difficulties in order to restructure their business”. Consequently, it faces a new harmonization that could allow such a restructuring framework and mitigate the consequences of insolvency through two main points: on one hand “facilitating negotiations on restructuring plans”, and on the other hand giving entrepreneurs a second chance. It is worth quoting point 1, letter c) in which the Commission requires laws to “remove the difficulties in restructuring cross-border groups of companies”; that is one of the particular aims of this recommendation.

In this context, every State enacted a number of provisions, and some of them used such rules to improve national legislation regarding group insolvency. It is noteworthy that national laws are a necessary step forward to imagine a new Regulation. In particular, in this section a rapid overview is given of German law for its influence on the Regulation 848/2015, as well as at Italian law, because it provides for something similar to a coordination plan. Moreover, one should bear in mind that, although different national solutions have been adopted regarding insolvencies, the large majority of States do not treat company groups as a unique entity;<sup>129</sup> and in fact insolvency proceedings are conducted separately.<sup>130</sup>

#### 4.4.1. The Italian case and the “Ddl Rordorf”.

Italian insolvency law (“legge fallimentare”) does not establish any rule in the matter of company groups (Di Majo, 2012). Indeed, in case of supranational insolvency cases, the only relevant provision is the Article 9.3 l.f. that also allows the opening of a procedure in Italy also when entrepreneur is already subject to another foreign procedure. Such a system has been strongly criticized, although it

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<sup>129</sup> For further information see (Goode, 2011) at page 788.

<sup>130</sup> In this sense also England.

is not incompatible with European provisions, because it has been said that, in the matter of international private law, Italy “possesses old fashioned and ineffective rules” (Wessels, 2009, p. 41). This critique does not refer as much to what has been established, but rather to what has not been enacted<sup>131</sup>. However, this does not mean that cross border insolvency proceedings regarding groups cannot be opened, but that they are usually administered applying domestic insolvencies.

Domestic group insolvencies are administered under d.lg 279/1999 (*Prodi-bis* law), d.lg 39/2004 (*Marzano* law), or the *concordato preventivo*. These rules are the result of a historical evolution. In fact, in 1942<sup>132</sup>, the regulator did not enact any rules on groups of companies because such insolvencies were a very little-known phenomenon. However, as one might surmise, the need for new rules was demanded by the market, and the first solution adopted by the courts was the *concordato preventivo*. Nevertheless, some years later, two laws were enacted: first the “Prodi law,”<sup>133</sup> and later the “Legge Marzano”.<sup>134</sup> These established the extraordinary administration for insolvent groups, although they seem to have been enacted more to solve specific cases than to provide for a general framework<sup>135</sup>.

In 2014 a government commission was created, and its main task was to draw up reforms and systematically arrange insolvency procedures. The commission was presided by Mr. Rordorf, and in accordance with the European Recommendation of 2004 its goals were to harmonize the insolvency legislation and make it more compliant with EU law. Indeed, during a panel discussion with Italian congressional representatives,<sup>136</sup> Mr. Rordorf argued that there is a strict necessity to re-think the insolvency procedures about group because our legislation was designed for individual entrepreneurs, while the majority of insolvency cases dealt with companies, and in most cases groups.

Such a proposal has led to the “*legge delega*”<sup>137</sup> draft n. 3671-bis, where the *Article 3* points out that the government should provide in the delegated law:

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<sup>131</sup> In this sense (Vattermoli, 2013) at page 40.

<sup>132</sup> In this time Legge Fallimentare was enacted.

<sup>133</sup> It was modified by the Prodi Law bis - Dlgs. 270/1999.

<sup>134</sup> Dlgs 247/2003.

<sup>135</sup> Indeed, *amministrazione straordinaria* was enacted for the Parmalat case.

<sup>136</sup> (Rordorf, 2016).

<sup>137</sup> enabling act.

- i. A clear group definition. This is because, the Italian system does not provide for any express definition of groups; however, this was usually done according to the Article 2359 of the Italian civil code, which deals with corporate control<sup>138</sup>;
- ii. Particular obligations, for instance the obligation to adopt a group balance sheet;
- iii. More powers to the competent Court, in particular the power to request information from others authorities, such as CONSOB.
- iv. The duty of cooperation and collaboration between the various parts in the case of different procedures, including when these are located in other EU States. The latter is a very important point, because it finds a solution to the problem of coordination and cooperation at the national level, and it gives at the national authorities the power – which could perhaps become a genuine obligation – to cooperate and collaborate.

In addition, the draft deals with the hypothesis of *procedural consolidation*. Indeed, it provides for single management of insolvency procedures in the case of *concordato preventivo di gruppo* and *liquidazione giudiziale di gruppo*. Regarding the former, the enacted “legge delega” should establish one judge and one practitioner, however many different and simultaneous plans might be voted on by the different creditors of the companies. In contrast, the *liquidazione giudiziale di gruppo* should provide for one Judge and one practitioner, and different committees of creditors. Moreover, rules on costs should be established, and various powers should be given to the liquidator. Such powers deal with the avoidance rules, liability actions and the insolvencies of the other companies in the group.

However, prior any enactment, the tools usually applied today are the “*concordato preventivo*” and the “*amministrazione straordinaria delle grandi imprese insolventi*.”

The *concordato preventivo* is the simpler solution. It is a voluntary procedure that starts with a request made by an entrepreneur when he or she is in crisis or in an insolvency situation. The request should provide for a plan that includes restructuring the company and debt payment. That plan must be approved by the majority of creditors<sup>139</sup> and afterwards by the competent court,<sup>140</sup> when approved it is binding on all parties involved. The main characteristics of this procedure are that the entrepreneur continues to administer the undertaking, however the supervision of the administration and of

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<sup>138</sup> For further information see (Campobasso, 2010) at page 292.

<sup>139</sup> The majority is evaluated according to the numbers of credits.

<sup>140</sup> For further information see (Campobasso, 2010).

conformance to the plan are under the control of the *commissario giudiziale*. In case of groups such a plan is usually used to made procedural *consolidation*<sup>141</sup>, and in fact the procedures are all conducted by the same Court<sup>142</sup> and usually only one liquidator is appointed.<sup>143</sup> It appears to be the most suitable solution for all parties involved because on the one hand creditors can obtain the best satisfaction,<sup>144</sup> and on the other hand the procedure is quickly resolved.<sup>145</sup> However, one should bear in mind that, although there may be some attempt in this sense, it is commonly agreed that *procedural consolidation* cannot become *substantial*, because the assets of the companies must remain separated. Indeed, a relevant precedent<sup>146</sup> laid down “the needed to consider differently the assets and passiveness of each company and to obtain different approval by the creditors of each company for the plan”, although the Court must evaluate such plan as a single proceeding. However, the law is not uniform, because the local Court of Crotona<sup>147</sup> pointed out that one procedure is opened for all companies in the group and one approval by all the creditors is allowed. Thus, this means that the majority of all creditors<sup>148</sup> is required for the plan approval, although a majority for single companies is lacking.<sup>149</sup>

Mazzoni (2011) illustrates an anonymous case in which an Italian parent company, and two French and one German subsidiaries, requested a *concordato preventivo* in a local court in Tuscany, arguing that the COMI of all companies were situated there. The court allowed opening the of procedure while no creditors of any nation involved brought actions, and no procedures were opened in the other States. Thus, four procedures were opened and were successfully conducted, and as provided by the plan the entire group was sold. The only relevant question arose regarding the applicable law in the case of mortgage rights, and the Court correctly pointed out that they are subject to the law of the home state.<sup>150</sup>

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<sup>141</sup> According to relevant literature substantive consolidation is prohibited (Cagnasso & Panzani, 2016) at page 3362..

<sup>142</sup> It is discussed if the proceeding has to be distinct or the can merge in one big proceeding. However, in both cases the asset must be separated.

<sup>143</sup> In this sense (Cagnasso & Panzani, 2016).

<sup>144</sup> For example, through the selling of the entire group.

<sup>145</sup> This is a big advantage for the entrepreneur.

<sup>146</sup> Local Court of Pavia, 1 June 2004, case Yomo Group.

<sup>147</sup> Local Court of Crotona, 28 May 1999, in Giust. Civ., 2000, 1, 1533.

<sup>148</sup> It follows the group interest.

<sup>149</sup> For further information, see (Di Majo, 2012).

<sup>150</sup> For further information, see (Mazzoni, 2011) at page 908.

The *amministrazione straordinaria delle grandi imprese insolventi* is instead a procedure established for the largest companies, usually groups; it is based mainly on an administration procedure and on a recovery plan. In this sense, different kinds of plans could be adopted, and they are very similar to the *concordato preventivo*, because they lead to satisfying creditors by selling and/or restructuring the companies. Nevertheless, one should bear in mind that<sup>151</sup> according to the Legge Marzano for the largest companies, in cases of extreme crisis, a similar but faster procedure is established.<sup>152</sup> Indeed, in both cases the plan is carried out by one or three “*commissario straordinario*” (“extraordinary practitioner”), and they administer all companies in the group.

It is noteworthy, that such a procedure is not incompatible with the Regulation 1346/2000, and it is often applied even in cases of multinational groups. Indeed, Mazzoni (2011) illustrates an anonymous case in which a parent company located in Italy, and a subsidiary company located in Poland were admitted to “*amministrazione straordinaria*” (“extraordinary administration”). The rational justification was given by the fact that the court argued that the COMI of each of the companies is located in its own jurisdiction, although the capital of the parent undertaking is owned by a purely Polish holding company. As Mazzoni correctly noted, in such a procedure Italian law is kept up to date quite well, and it could be taken as an example by other Member States.

Conversely, when none of these procedures is chosen, each company must be treated independently in its own proceeding. It is whether the courts are the same or different, because no coordination or consolidation is provided, although the liquidators could cooperate voluntarily, with no requirement to do so.

This is why, although the *concordato preventivo* and *amministrazione straordinaria* appear to be very effective tools, the proposal of Rordorf Commission proposal is a necessary step forward on the oath of resolving insolvency.

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<sup>151</sup> It is the decreto Marzano, and it was enacted to face the Parmalat insolvency.

<sup>152</sup> it does not show any relevant difference.

#### 4.4.2. The German case and the Art 102 Sec 1 of the German EGIInsO.

What has been previously said about the necessary provisions to allow implementing an EU Insolvency Law is especially true for Germany. In fact, on 14 March 2003 the Bundestag enacted an Act amending Article 102 Introductory Act to the Insolvency Code (Einführungsgesetz zur Insolvenzordnung, EGIInsO<sup>153</sup>) regarding international insolvency law<sup>154</sup>.

Article 102 section 1, third paragraph claims, “each domestic insolvency court shall have jurisdiction for judgements or other measures in accordance with Regulation (EC) No 1346/2000 in whose district assets of the debtor are situated”.

Initially, the interpretations made by the National Courts of Article 102 EGIInsO provided that, when the German courts<sup>155</sup> determine COMI pursuant to Article 3 (1) of EIR they must take “economic interests” into consideration. This means that the subsidiary companies, although their registered offices are situated in a different country, are nevertheless fully controlled by the “managerial authority” of the parent company situated in Germany (Pannen, 2011, p. 562).

However, this approach has been changed, and the dividing line was the *Eurofood* case. In other words, German courts initially had a tendency to locate the COMI of a foreign company inside the territory, when the key management decisions are made by the parent company located in Germany.<sup>156</sup> After this judgment, the COMI was established using the *business-activity approach*. Thus, when the presumption of Article 3 EIR paragraph three is not applicable, the centre is where the economic activity is carried out.

Regarding its approach at the national level, Germany was quite anachronistic. Indeed, at first different courts were competent for each company, and then different liquidators were appointed for each proceeding.

However, in 2013 a lively debate started, and it was paralleled by the discussion at the European Level, in which Germany pressured the European Parliament and the Council to adopt an approach

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<sup>153</sup> For an English version of the EGIInsO see [http://www.gesetze-im-internet.de/englisch\\_eginso/index.html](http://www.gesetze-im-internet.de/englisch_eginso/index.html).

<sup>154</sup> BCBI vol I, 345.

<sup>155</sup> The German Courts can use the European provision only when COMI cannot be determined under the national law (Pannen, 2011, p. 562).

<sup>156</sup> For further information, see (Hess, et al., 2014, p. 118).

very similar to the draft of the domestic German reform (*infra.* II, 3.2). That draft<sup>157</sup> was officially proposed on 30 January 2014, and it laid out three elements: a group coordination plan, a coordinator Court, and an insolvency coordinator. The main goals were to prevent corporate groups from insolvency and give them an opportunity to restructure.

This is way, although the German proposal is domestic in scope that, in the matter of group insolvencies both, the new Regulation 2015/848 (*infra.*, II, 3.) and the Statute, are very similar. Indeed, they do not apply any *consolidation*, and the entire procedure is based coordinating different proceedings. However, although the discussion began at the same time, the German proposal required more time to be enacted. Indeed, it was recently approved on 13 April 2017, and it will enter into force on 21 April 2018. This difference in time should mean that German law was more careful in the most criticized prescriptions regarding group insolvencies<sup>158</sup>.

Indeed, there are a number of differences that we should take into account. It has been said<sup>159</sup> that the German definition of “group” is more appropriate because the it refers to firms in a broader sense; on one hand the definition is independent of Directive 2013/34/EU (*Infra.* I, 1.; and II, 2.1), and on the other hand it includes horizontal groups<sup>160</sup>.

Moreover, Paragraph 3a of the InsO lays down that the insolvency proceedings could be opened before a single Court, however without any *substantial consolidation*. In this sense, the German act is very detailed, and it provides for a set of rules in case of disagreement between courts. One relevant aspect is the fact that para 56b InsO allows the same Insolvency Practitioners to be appointed for all the proceedings<sup>161</sup>.

In addition, a coordination plan could be opened and a coordinator appointed, however such rules are very similar the the European provisions (*infra.* II, 2.). Indeed, the entire plan is non-binding, and the Insolvency Practitioners could deviate from it on a comply or explain basis (Mangano, 2017).

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<sup>157</sup>For further information, see [https://content.next.westlaw.com/2-501-6976?\\_lrTS=20170403173035762&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhpc=1](https://content.next.westlaw.com/2-501-6976?_lrTS=20170403173035762&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhpc=1).

<sup>158</sup> In this sense (Mangano, 2017).

<sup>159</sup> In this sense (Mangano, 2017).

<sup>160</sup> “All the firms operate under a single leadership” (Mangano, 2017).

<sup>161</sup> For further information see (Mangano, 2017).

Moreover, also in such case (*infra.* II, 3.2.4.1.) not any clear rules are enacted regarding the coordination and the insolvency practitioners' conducts.

## 5. Cases

Around the European Union there are many cases where jurisdictional conflicts have arisen, Eurofood, Interdill, and Daisytek are the most cited judgments, and they have been explained by the scholars in different manner. This is why they should be analysed from a neutral point of view strictly based only on the Courts' decisions.

### 5.1. Eurofood

Eurofood judgment is one of the most famous decisions of the European Court of Justice in the matter of group's insolvency. It shows an interesting conflict between two different Courts, and moreover it is the first case treated by the European Court of Justice concerning the jurisdiction in a case of a group.

Eurofood IFSC is a “*company limited by shares*” registered in Ireland in 1997 with the legal office in the International Financial Services Centre in Dublin. It is a wholly owned subsidiary of the Italian food giant Parmalat S.p.a. and its main goal is to provide economics resources to its parent company. It went in bankruptcy and a number of events conduct to the reference to the European Court. Indeed:

- On 24 December 2003, the Italian Minister of product activity admitted Parmalat S.p.a to extraordinary administration. and appointed Mr. Bondi as extraordinary administrator of this company.
- On 27 January 2004 the National Bank of America asked to the High Court of Ireland the opening of a “compulsory winding up by the Court” against Eurofood, and requested the appointment of a provisional liquidator. Consequently, in the same day, the Court nominated Mr. Farrell provisional liquidator with the power of administrate all assets of company.
- On 9 February 2004 the Italian Minister admitted Eurofood to the “*amministrazione straordinaria*”, and Mr. Bondi was nominated again in such case. A day after, a claim to declare the Eurofood's insolvency was filed at the Local Court of Parma, because it is the place where Parmalat had the legal statutory office.



- On 20 February 2004 the district Court in Parma ruled that the centre of main interests was in Italy and declared its jurisdiction.
- On 23 March 2004 the High Court of Ireland decided that the insolvency procedure, according to the art. 212 and 215 of Companies Act of 1963, had to be opened in Ireland, and it had to be the main proceeding. Moreover, it resolved that the circumstances in which the proceedings were conducted before the district Court in Parma justify the refusal of the Irish courts to recognise the decision of that court.
- Mr Bondi appealed the decision, thus the Supreme Court referred it to the European Court of Justice.

This is the way that conducted to the decision of the European Court of Justice, as we already noted, the most discussed judgment in this time.

The points fourth and third of the judgment contain the main questions. Indeed, in the fourth point the Court faced the the system that the Regulation established for determining the competence of the courts of the Member States, or rather the rule laid down by the Article 3 of such Regulation. It clarified that “each debtor constituting a distinct legal entity” then it “is subject to its own court jurisdiction<sup>162</sup>”, and moreover that “the concept of the centre of main interests [...] must be interpreted in a uniform way, independently of national legislation<sup>163</sup>”. In addition, the Court concluded that the presumption in the Article 3, in favour of the registered office of that company, can be rebutted only “only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated”<sup>164</sup>.

It means that the presumption can be rebutted mainly in the cases of a *letterbox company*, in other words “the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation<sup>165</sup>”

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<sup>162</sup> C-341/04 (30).

<sup>163</sup> C-341/04 (31).

<sup>164</sup> C-341/04 (37).

<sup>165</sup> C-341/04 (36).

Regarding the third question, it concerns the recognition system established by the Regulation: The Article 16 and the *priority rule*. Indeed, the referring court asked “whether the jurisdiction assumed by a court of a Member State to open main insolvency proceedings may be reviewed by a court of another Member State in which recognition has been applied for”.

The Court argued that relationship between courts is governed by the principle of mutual trust, that implies a simplified mechanism for the recognition and enforcement of decisions handed down in the insolvency proceedings. Then, “the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State<sup>166</sup>”. However, “If an interested party, taking the view that the centre of the debtor’s main interests is situated in a Member State other than that in which the main insolvency proceedings were opened [...] may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of that Member State<sup>167</sup>”.

## 5.2. The Interdil Case

The Interdil case is a judgment of the European Court of Justice that concerns the interpretation of Article 3, again. It has been viewed as a change of mind of the European Court, because the criteria for finding the COMI has been interpreted extensively than Eurofood.

Interdil is a company constituted in the legal form of a “società a responsabilità limitata” under Italian law and had its registered office in Monopoly (Italy)<sup>168</sup>, however on 18 July 2001, its registered office was transferred to London (United Kingdom). However, not long after, Interdil being acquired by the British group Canopus, and on 22 July 2002 it has been removed from the United Kingdom register of companies.

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<sup>166</sup> C-341/04 (44).

<sup>167</sup> C-341/04 (43).

<sup>168</sup> C-396/09 (10).

On 28 October 2003, Intesa filed a petition with the Tribunale di Bari for the opening of bankruptcy proceedings against Interedil<sup>169</sup>. After a big debate<sup>170</sup> that involved also the Corte di Cassazione, the Local Court of Bari referred it to the European Court of justice for preliminary ruling.

The question referred is very similar to the Eurofood case, however the Court seems to reach a different conclusion. Indeed, it pointed out that “a debtor company’s main centre of interests must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors which are ascertainable by third parties<sup>171</sup>”. This implies, under the Court opinion, that two different situations could happen:

- i. Where the management of a company is in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption contained in the Article 3 has to be applied. It is a very simple situation that cannot cause issues.
- ii. On the contrary, when the central administration is not at the same place as its registered office, it is possible that the COMI is located in the Member State where the company’s actual centre of management is. However, it is not sufficient the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated, but it needs a comprehensive assessment of all the relevant factors, that makes it possible to establish, in a manner that is ascertainable by third parties<sup>172</sup> that *the actual centre of management and supervision and the management of its interests* is located in such other Member State.

As can be seen, this decision appears as more inclusive than the Eurofood’s case, because it pointed out that not only in the case of letterbox company the presumption of Article 3 could be rebutted.

In addition, regarding the *forum shopping*, the Court decided that “where a debtor company’s registered office is transferred before that a request to open insolvency proceedings is lodged, the company’s centre of main activities is presumed to be the place of its new registered office”.

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<sup>169</sup> C-396/09 (12).

<sup>170</sup> For further information, see C-396/09.

<sup>171</sup> 65 (3) C-396/09.

<sup>172</sup> This two conclusion derive directly from the Interdill Judgment; however, they are not quoted because in some cases written in a more understanding manner.

### 5.3. The Daisytek case

The Daisytek proceedings came after the Eurofood's judgment and it is very relevant mainly for its extension, and for the parties involved.

Daisytek Inc. is a global distributor of computer supplies, office products and accessories, and professional tape media (Bloomberg, 2010). It had subsidiaries primarily in North America, and throughout Europe. On 7 May 2003 Daisytek went bankrupt, and a voluntary chapter 11 proceeding was opened in the U.S.A, at the Court of Dallas, Texas. However, the bankruptcy in Dallas did not include any of the sixteen European subsidiaries, which are located twelve in the United Kingdom, three in Germany and one in France.

On May 16, according to the management's plan, the High Court of Justice in Leeds, England opened a new main proceeding that is about the assets of all European subsidiaries. Opening the case in England was a choice of the Daisytek management presumably "because the English courts do not recognize the U.S. automatic stay<sup>173</sup>" and because they want "to take advantage of the EU-wide effect of the English automatic stay". (Bufford, 2006, p. 455)

The corporate structure of Daisytek group in Europe is very complex; in general terms one should bear in mind that the company ISA International Plc, located in Bradford, England is the parent company of ISA International Holdings Ltd., the holding company for the non-English companies.

Although the Court of Leeds found that six of the sixteen companies were dormant, it recognized that each of them was insolvent because each of them gave guaranties to the main European group financiers. Instead, for the others companies the Court found that they "were either already insolvent or likely to become within a short time" (Bufford, 2006, p. 456), and consequently Daisytek obtained administration orders for fourteen of the sixteen companies: the German and French company are included.

In this case, the Court used the *mind of management approach*: the COMI is in the place where the head-function office is being discharged. Indeed, the Court argued that while the English companies

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<sup>173</sup> An automatic stay in U.S. is an automatic injunction that halts actions by creditors; it is established by the section 362 of the United States Bankruptcy code.

enjoyed the presumption that the COMI is in the place of the location of their registered offices, the question for the other European companies must be faced differently. In these other cases the Court during its analysis must consider “*both the scale of the interests administered at a particular place and their importance, and then consider the scale and importance of its interests administered at any other place which may be regarded as its center of main interests*”. In addition the center of debtor main interests must be “*ascertainable by third parties*” and the most important third parties are the “*potential creditors*” (Bufford, 2006, p. 457)

The evidence that support what tied the management of each of the German companies to England are different, and according to the Court they are eight<sup>174</sup>. One should consider some of these but essentially, they simply try to demonstrate that the administrative functions were conducted in England and this conclusion was ascertainable by third parties. First, that the business of each of these subsidiaries was made through a factoring agreement with English subsidiary of the Bank, and the information was compiled in accordance with English accounting principles, and all it is approved in Bradford. Second, that any purchase exceeding 5000 euros must be approved in Bradford. Third that all senior employees of the subsidiary were recruited in consultation with the parent company, and other reasons.

About the Daisytek-France the Leeds court come at the same conclusions, with very similar evidences, that demonstrate that the head-office functions are being discharged in England.

It is important to realize, that the Court argued that the COMI of each company was in England, thus a main proceeding of each of them can be opened exclusively in this Country. However, because many companies have registered offices in other Countries, the Court can consider these as *establishments* and secondary proceedings can be opened.

However, the German management also requested the opening of insolvency proceedings in Germany, nevertheless it missed “to inform the Court that main proceedings had been opened for each of these entities the previous week in England” (Bufford, 2006, p. 463).

On 19 May 2003, the AG Dusseldorf assumed jurisdiction and appointed a temporary administrator. Subsequently on 6 June 2003, the court issued a so called “clarification order” in which it set out that

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<sup>174</sup> For an exhaustive summary see (Bufford, 2006, p. 458).

the Leeds decision would have no binding effect on the Dusseldorf court “because the Leeds court did not either mention or follow the EU Regulation” (Bufford, 2006, p. 463)<sup>175</sup>.

After a big debate between courts, the German court referred the decision to the District Court that reversed the previous conclusions and remanded the matter for further proceedings. Then the Dusseldorf Court withdrew the prior order of opening a main proceeding and agreed to the debtor motion to open secondary proceedings.

On 23 May 2003, the Tribunal de commerce Pontoise opened main insolvency proceedings parallel to this. The Cour de cassation on 27 June 2006 citing the exact wording of Eurofood decision (Pannen, 2011, p. 148).

## 6. Conclusions

This chapter is the necessary premise that one should take into account before any analysis of the new Recast Regulation 848/2015 because it points out a number of questions that could influence whatever insolvency law. In this sense, given the complexity of the matter, some considerations have to be made.

First that the *consolidation* is surely needed, and the more correct solution appears to be the *substantive* consolidation for exceptional cases and the *procedural* consolidation as general rule. This is confirmed by the fact that such approach is usually adopted by different supranational structures as the Unicitral Model Law Part Three, and it is contained in the World Bank principles. However, one has to bear in mind that different forms could be adopted, and although the large critics on the Italian system, the *concordato preventivo* could be a very good point to start<sup>176</sup>. Indeed, it adopts such consolidation through a binding plan, and it safeguards the creditors rights through tied assets and voting. In contrast the German solution appears to be an attempt without the behaviour, because the non-mandatory nature of that plan was the last missed step for ensuring the effectivity of the proceedings.

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<sup>175</sup> This decision surprising because according to Bufford (2006) seems to be that the German Court did not have a copy of the published opinion in Leeds court issued on May 16, 2003.

<sup>176</sup> It is clear that it cannot mean that no further certain rules are needed, but the consideration is made on the general idea.

The second consideration regards the cooperation. As we have seen in the Eurofood and in other cases, a voluntary cooperation between liquidators or courts is very difficult to reach. Indeed, while in the domestic cases Courts have concern to cooperate, at the European level every State tries to administrate the insolvencies, because different National interests could be involved. However, cooperation through consolidation is in any case the best solution, because the other choice is the territoriality approach, that cannot be minded in a European context. In this sense the legislator should adopt a tool where the interests of all parties correspond.

The third consideration concerns the COMI definition. One should bear in mind that the link between the centre of main interest and the insolvency is a very clever solution, however in case of groups the different theories across the European Union are an obstacle for the economic interest of the all Union. Indeed, as we have seen, Local Courts frequently adopted different approach for very similar cases, and also the European Court of Justice is not properly clear. This is not acceptable from the creditors point of views, because such judgments in many cases have lost the reason and appeared more as a *roulette*. How could a cross border business work when creditors do not know where their credits will be treated in case of insolvency?

Moreover, the last consideration concerns the avoidance rules and the liquidator's conducts. They are two primary aspects that cannot be left to national rules. Indeed, such rules are different and then they are a huge obstacle in the reaching of insolvency goals.

However, despite all the critics, one has to bear in mind that the European Regulation is the only real insolvency binding system at a supranational level, because all the others attempt failed<sup>177</sup>. Such event shows how the balance between all the different cultures is very hard to reach, however it cannot be a justification. Indeed, groups are a reality and their insolvency has to be administered in a clear and proper matter

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<sup>177</sup> The only exception is made by the United States.

## CHAPTER II

### ***THE EU REGULATION 2015/848 ON INSOLVENCY PROCEEDINGS: IS IT THE FINAL SOLUTION TO THE GROUPS' INSOLVENCY MATTER?***

#### 1. Overview

The EU Regulation (2015/848) on Insolvency Proceedings was finally published on 20 May 2015, although the majority of its provisions<sup>178</sup> should apply from 26 June 2017. Indeed, the original European Regulation on Insolvency (EC) 1346/2000 (EIR) will continue to regulate the proceedings opened before this date.

The new regulation contains the basic structure of the EIR 1346/2000, and it can be viewed more as an update than as a new provision. Indeed, it will again provide for the 'main' or 'secondary' proceedings with the same effects<sup>179</sup>, and despite the complaints, it, regrettably, does not incorporate the United Nations Commission on International Trade (UNCITRAL) Model Law.

The real innovation is mainly the Chapter V that concerns the insolvency of the Groups of company. Other innovations are common in the regulation, for example the modernization of the Secondary Proceedings<sup>180</sup>, however they cannot modify the general structure of the Regulation and thus are not discussed in this work.

Regarding the companies group', the needs for specific rules were arising<sup>181</sup> both by the analysis of the previous regulation<sup>182</sup>, and from the entire legislative process.

One should bear in mind that the Article 46 of the Regulation 1346/2000 points out that "no later than 1 June 2012 [...] the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation". Then, on the 12

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<sup>178</sup> See Article 92.

<sup>179</sup> E.g. priority rule

<sup>180</sup> For more information see (Weiss, 2015)

<sup>181</sup> See also 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))

<sup>182</sup> Indeed, for what concern the previous regulation an analysis in deep was already made in the previous Chapter.



December 2012<sup>183</sup>, the European Commission presented its reports, and on the same date proposed the Recast Regulation's draft, and opened a public consultation.

Indeed, in the consultation<sup>184</sup> almost half of the respondents felt the EIR does not work efficiently for the insolvency of members of a multinational group of companies. In this sense it has been affirmed that “the lack of specific provisions for group insolvency often diminishes the prospects of successful restructuring of the group as a whole and may lead to a break-up of the group in its constituting parts.”<sup>185</sup>

In the same sense the European Economic and Social Committee, which argues that “much discussion and many practical measures are still needed in order to uphold creditors' rights [...], promote corporate restructuring, prevent forum shopping and improve the coordination of insolvency proceedings for groups of undertakings.”

However, what in detail is necessary has been noted in a very exhaustive analysis by Samantha Bewick<sup>186</sup>. She observes that “the areas cited most frequently as being of concern included the following:

- i. abusive relocation of the centre of main interests (‘COMI’; also known as “forum shopping”);
- ii. the restrictive nature of secondary proceedings, which could only be liquidation proceedings;
- iii. the lack of a central register of proceedings, meaning that it was difficult to discover whether an EU entity was subject to insolvency proceedings elsewhere in the EU;
- iv. issues of co-operation between any or all of courts and office-holders in differing jurisdictions; and the lack of any ability to deal with groups of companies as a single unit, as opposed to dealing with each legal entity separately”.

One should bear in mind that these complaints are mainly referable to the proceedings in general terms, however they have a specific application in the matter of the Groups' companies, and apparently they were taken into account by the European legislator.

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<sup>183</sup> COM(2012) 743 final

<sup>184</sup> COM(2012) 744

<sup>185</sup> COM(2012) 744

<sup>186</sup> in The EU Insolvency Regulation, Revisited

However, understanding what has been done for each topic is essential, because it could show better the differences with the previous regulation. Nevertheless one should note that in many cases the method chosen by the legislator is “not to decide”, and then the situation remains unchanged<sup>187</sup>.

- i. In the *forum shopping* topic, no specific measures were enacted, but at the opposite, the new cooperation rules seem to increase this behaviour<sup>188</sup>.
- ii. Point *ii* was taken seriously into account in many official documents, because actually in the original Regulation the focus was almost on the liquidation. On the contrary, the new approach acknowledges the importance of a rescue. In this sense, Věra Jourová, EU Commissioner for Justice, has noted that “with increased efficiency for insolvency proceedings concerning different members of a group of companies, there will be greater chances of rescuing the group as a whole”. In addition, the European Commission MEMO/12/969 states that “The revision of the EU Insolvency Regulation seeks to modernise the existing rules so that they support the restructuring of business in difficulties”.

This approach is clear in the Article 1, which concerns the scope of the regulation, that points out “Where the proceedings [...] may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities”.

It is a very appreciable method that in the case of companies' group it is obvious in the prospect to open restructuring plans.

However, it has been viewed as non-sufficient, and then a new *directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU*<sup>189</sup> has been proposed<sup>190</sup>, and probably it will replace any attempt made in this Regulation.

- iii. Point *iii* seems to be faced correctly, indeed a register of proceedings is made through the e-justice portal. The Recital (76) points out “In order to improve the provision of information to relevant creditors and courts and to prevent the opening of parallel insolvency proceedings,

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<sup>187</sup> The analysis in this work is made looking at groups of companies, although these can be referred also to the single companies..

<sup>188</sup> See the costs in the coordination procedure, or the questions on COMI.

<sup>189</sup> A glance will be given in the next part.

<sup>190</sup> COM(2016) 723 final

Member States should be required to publish relevant information in cross-border insolvency cases in a publicly accessible electronic register. In order to facilitate access to that information for creditors and courts domiciled or located in other Member States, this Regulation should provide for the interconnection of such insolvency registers via the European e-Justice Portal. Member States should be free to publish relevant information in several registers and it should be possible to interconnect more than one register per Member State”.

- iv. Concerning point *iv*, powers of communication and a coordination plan were enacted, however as we will see they have been strongly criticized (*infra* II, 3.2).

Moreover, a rapid glance should be given on the philosophy applied, that seems to be the same as the original. Indeed, according to the majority of scholars<sup>191</sup> this Regulation continues to adopt an idea of a modified universalism<sup>192</sup> (*infra* I.2), which means that the insolvency proceedings have a *universal scope* and contain all the debtor assets.

This is confirmed again by the *priority rule*, according to the acknowledgment of the procedure in the others States is automatic<sup>193</sup>, and by the fact that the differences between Recital 12 of the EIR, and the Recital 23 of the recast EIR, do not exist.

However, an idea of modified universalism is difficult to imagine applied in the new approach of group of companies. Indeed, it is probably not fair to call the European Regulation a “territorialist scheme with universalist pretensions” (McCormack, 2016, p. 124), undeniably because the new companies’ group method provides for a form of partial-binding cooperation with a high risk of not having the desiderated effect. Thus the definition made appears the most correct.

Moreover, one has to bear in mind that entire legislative discussion<sup>194</sup> started mainly<sup>195</sup> with the European Parliament resolution of the 15 November 2011 (2011/2006(INI)), and the final draft was approved in 2015. Four years of strong discussions and commitments produce this Regulation that, as we will see, has been strongly criticized.

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<sup>191</sup> (McCormack, 2016)

<sup>192</sup> (McCormack, 2016) at page 123 call it: Euro Universalism.

<sup>193</sup> (Vattermoli, 2013)

<sup>194</sup> The legislative process as we have previous noted, starts the 12/12/2012

<sup>195</sup> although a strong discussion outside the Parliament arose the day after the publishing the the EIR,

## 2. The new consideration on groups

Definitely, the new Regulation issues a clear description of what constitutes a group in the European insolvency cases, because a unique definition between the European legislation is missing, and it is intended to aid in interpretation of the Articles. Indeed, many difficulties in the previous regulation were mainly created by unclear definitions<sup>196</sup>, and the fact that these were not left to national legislations shows a very careful approach. However, it is not a foregone conclusion because this is a big step for a legislator that continuously must balance different laws' cultures.

This is why an empirical method was chosen, indeed the Art. 2 paragraph 13 of the EU Regulation 2015/848 (EIR) lays down that “‘*group of companies*’ means a parent undertaking and all its subsidiary undertakings”. Clearly, this seems to slip out from the different opinions to define a group as *unitas* or *multiplex* (*infra*. I, 1), to focus on an **entity based**<sup>197</sup> approach that avoids many interpretative questions. The title of Chapter V: “*Insolvency proceedings of members of a group of companies*” confirms this.

In addition, the following paragraph specifies, “‘*parent undertaking*’ means an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU<sup>198</sup> of the European Parliament and of the Council shall be deemed to be a parent undertaking”.

This latter paragraph is very important because through the specification of what should be considered a parent undertaking, the regulator adopts a **control-based**<sup>199</sup> definition. It expressly includes the direct and indirect control<sup>200</sup>, and with the reference to the Directive 2013/34/EU<sup>201</sup> that is the rule already used to by scholars to provide the definition of control at European Level, embraces a wide range of enterprises' groups.

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<sup>196</sup> For example the COMI's definition, also for what concerns individual companies.

<sup>197</sup> See Bork & Mangano (2016) at page 279, that wrote the legislator “did not go along with the proposal to define a group by stressing the multiplicity of legal entities rather than the unity of the business”.

<sup>198</sup> It will be analyzed in the next Chapter

<sup>199</sup> See Bork & Mangano (2016) at page 279.

<sup>200</sup> In this sense it should be included also the contractual control, provided by Article 2359 of the Italian Civil Code.

<sup>201</sup> It is referred to Article 22.

Furthermore, the formula of control employed by the *Article 3* is larger than the formula in such Directive, and it might lead one to think that the control concept should be interpreted in a broad manner, namely including not only the groups intended in a strict sense rather than the others entities. However, the title of Chapter V is at the exact opposite, it talks about “*Insolvency proceedings of members of a group of companies*”, then it seems to refer to these prescriptions to the companies, not to the other “entities”.

This is the case in which “all that glitters is not gold”<sup>202</sup> because this ambiguity gives rise to some interpretative problems. Indeed, there are some cases in which the member of a group is a *sole entrepreneur*, and might lead one to think that it is not governed by this Regulation.

The main case concerns the *personal holding*<sup>203</sup> under Italian law. It is a fiction employed by judicial decisions, and it applies<sup>204</sup> when a physical person holds the shares and administers one or more companies, but its involvement goes over the limits of simple participation as a shareholder, indeed, he exercises the control and management on such companies.

Although, the group normally consists of companies, it seems clear that if we do not account all kinds of entities in the definition of group it will result in a substantial avoidance of law. For these reasons, it appears reasonable to refer to this Regulation also to such kind of entity, and it could be supported by the fact that in Article 3 such Regulation deals with the word “undertaking” rather than company.

The same conclusion was given from Bork & Mangano (2016)<sup>205</sup>: Definitely “Chapter V, its title, and its contents are based on the *id quod plerumque accidit* principle and that the term ‘company’ is to be understood as a synonym of ‘legal entity’”

Furthermore, it should be noted that the definition of Art. 2 (13) limits the applicability of the new rules to vertical groups, indeed when the group is made up by companies all on the same level (horizontal groups), the applicability of Chapter V is excluded (Epeoglou, 2017, p. 52), and thus every

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<sup>202</sup> It is a Shakespearean quotation

<sup>203</sup> holding personale.

<sup>204</sup> “holding personale, che ricorre quando una persona fisica, attraverso la partecipazione ad una o più società di cui detenga le quote, esorbitando dai limiti che la partecipazione in qualità di socio gli consente, esercita il controllo e la gestione delle società medesime (holding pura), ovvero ne procura il finanziamento (holding operativa),” Cassazione civile, sez. I 13 marzo 2003, n. 3724 - Pres. De Musis - Est. Cultrera.

<sup>205</sup> Page 281.

company must be treated as an autonomous company. This has been much criticized, because coordination problems could also arise in groups with a horizontal structure (Thole & Dueñas, 2015).

In conclusion, the definition made by the legislator seems to be quite good, even if on one hand it does not include the horizontal groups, and on the other hand there are very limited cases in which it is not clear. Indeed, it would be highly desirable to enact a new provision that should expressly provide for the inclusion of all kind of entity as above considered, to avoid any clash between Member States and to strengthen the **control-based** definition, a very clever approach.

### 3. The new Chapter V – structure and general scope

The new Chapter V is the real revolution of the Regulation 848/2015, because it is entirely dedicated to Group of Companies. It is divided in two sections: The Section I (Article 56-60) refers to the cooperation and communication. The Section 2 (Article 61 -70) refers to Cooperation and cooperation plan.

It does not provide for a group COMI, or group administrator, or group insolvency plan (Madaus, 2015), and for the most sections it is non-binding for the parties involved. However, it creates a specific legal framework for administrating insolvencies with an entity by entity approach, in which every proceeding has its own autonomy.

The main feature is the obligation to coordinate the different proceedings relating to different Members of the same group. It could be made through *plans*<sup>206</sup>, *agreements and the sharing of information*, with the aim of ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies<sup>207</sup>.

It is particularly true in the case of a *coordination plan* in which the court should make an assessment about the effective administration of the insolvency proceedings and about the impact that the plan has on creditors.

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<sup>206</sup> It is linked to the interpretation made in this thesis.

<sup>207</sup> Recital 51

In this sense any measure adopted according the *Chapter V* should always strive to obtain the best results for the creditors and in more in general for the proceedings<sup>208</sup>. The real issue arose when the interest of the creditors in the single proceeding fights with the general interests of the group's plan. The evaluation made by the Regulation appears very confusing, although there are no obligations that limits the insolvency practitioners. The *Recital 52* states that "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"<sup>209</sup>.

It seems to follow the interpretation according to which the best interest of the parties involved should be found in the group's interest, because the rule points down that "such cooperation should be aimed at finding a solution that would leverage synergies across the group". It means that the legislator does not imagine a case where both the interests fight each other, and this happens because the group interest consists in the best interest of single companies, then in this sense it is prevalent.

Nevertheless, it surely is not prevalent when the relationship between costs and advantages appears too excessive, in that case any coordination or cooperation cannot be done. Indeed, the *Recital 58* clearly points out that "The advantages of group coordination proceedings should not be outweighed by the costs of those proceedings".

However, to understand better the importance of the question, it is necessary to have a detailed procedural analysis of the aspects above considered.

### 3.1. The "new" COMI definition and the entity by entity approach

The Centre of main interests was one of the most discussed aspects in the previous Regulation, because as we have seen, a general definition for groups of companies was not provided and it created many issues with consequential Judgments too.

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<sup>208</sup> Recital 57.

<sup>209</sup> Recital 52.

In the Recast Regulation the problem was not issued better, indeed a general definition of group companies' COMI does not exist. The general definition was provided again by the Article 3, and substantially it is the same of the Regulation 1346/2000, with all the linked problems.

The only appreciable change consists in a presumption applicable in the case of an individual exercising an independent business or professional activity, that is irrelevant in a case of group companies'.

However, the missed definition, differently from the previous Regulation, “does not appear as lacuna but as a specific choice of policy which is consistent with the ‘entity by entity approach’” (Bork & Mangano, 2016, p. 282). This means that there are many COMIs as companies, and it is no less than the solution provided by the Court in the Eurofood case, where it states “that, in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdictions” (para. 30).

In other words, the Recast Regulation adopts a ‘**one-group-many COMI**’ approach, in which **every company of the group should be treated differently respecting each legal personality**. It implies that each proceeding has its own autonomy, however the place of jurisdiction in the *coordination plan*<sup>210</sup> will be determined according the *priority rule*<sup>211</sup> (*infra* II, 3.2.3) despite of any group-COMI. Thus, the court seized first is the group coordination court, with all the linked consequences.

However, this non-prescription creates a heavy debate, first because as Moss, et al., (2016) noted, it may significantly undermine the utility of the entire group’ procedures. Indeed, the priority rule assumes primary importance, and it implies simply a race between the parties, because not any criteria than the time could be used in the determination of the court seized. This “has a tremendous impact on the course of the proceedings”, because it increases the *forum shopping* practice. In this sense, the group coordinator is appointed by the court seized first, and the entire coordination proceeding is subject to the seized court’s national law.

In order to mitigate such an effect, the legislator, , has provided the opt-in (*infra* II, 3.2.3.1) or join out (*infra* II, 3.2.3) tool, that could actually determine an impasse rather than helping the proceeding,

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<sup>210</sup> And in every cases expressly provided by the law.

<sup>211</sup> Article 62



or more realistic a *plan* with one company; and moreover, it is a contradiction in itself, because these actions are subject to the jurisdiction of the seized court, which is the court non-recognized from the party.

In addition, in the same sense, another provision was enacted. It is in *Article 66 (1)* that allows the changing of court when “where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed”, however it appears to be very hard condition to reach, and then has a very limited range.

Actually, the approach, as requested by the majority of the literature, based on a consolidation technique where all the proceedings should be administrated by the same Court according to the COMI-group, could resolve all these problems, unfortunately the legislator did not chose this way.

The second very criticized issue regards the *Recital 53*. It lays down an eventuality where all the COMI are in the same jurisdiction without any specification of when it could happen. It is a very important eventuality, because in that case the court could appoint one insolvency proceeding for all the companies involved. Without going into unnecessary details that will be analysed in the provided section, it is important to note that the large majority of the literature has reached the conclusion that such provision should apply in the case of *highly integrated groups*<sup>212</sup>, as was made in the *Nortel* case (*infra*. II, 3.2.1). However, on the contrary, if we apply the Eurofood approach also regarding this Recital, it could conduct to the conclusion that one COMI – one group could be used only in extraordinary cases, for instance in the case of a “letterbox company”. It appears as a very drastic conclusion, that cannot be followed because it is strongly mitigated by the *Interdill* decision (*infra*. I, 4.1), that appears as the more convincing and acceptable solution.

However, this interpretation generates many issues, because on one hand, Recitals are not binding, indeed they provide only some guidance in the interpretation, and on the other hand Recital 53 uses the words “should not limit the possibility” that seems to define the provision as a possibility for the Courts involved.

It implies, as Bork & Mangano, (2016) correctly noted that “according to Art. 5(1), any creditors of the other companies [...] may challenge the decision on the ground that the EIR has endorsed [...]

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<sup>212</sup> In this case the COMI seems to be in the place of the parent company that makes the decisions.

‘the centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties<sup>213</sup>’.

It is a very disappointing choice, because although this Recital appears undoubtedly the first step for the establishment of a COMI-group and a procedural consolidation, it will create without any specification on its applicability, more confusions. Consequently, in the so confusing case of “highly integrated group” the court might use a COMI-group definition approach with the risk of an action by the creditors.

In conclusion, the new COMI approach appears undoubtedly as unsatisfactory, because it simply follows the choice not to decide: two different applicable approaches are provided, and they are attributable to the different considerations made in the Union linked to the fear of each State to lose its legislative autonomy. In other words, it re-creates a confusing condition, mirroring the precedent chaos, but today it is established by the law.

### 3.2. A closer look at the new provisions: The Coordination of national proceedings concerning single companies belonging to the same group (Artt. 61-77).

The group coordination proceedings have been introduced for the first time in the new Recast Insolvency Regulation, and it has been defined as the most significant change in the new regulation (Bewick, 2015, p. 186).

It is a procedure, that according to majority of scholars “reproduces the regulatory devices suggested by the most popular codes of best practices” (Bork & Mangano, 2016, p. 290), especially the UNCITRAL, *Legislative Guide on Insolvency Law*, Part Three. Its importance is confirmed by the fact that in such Guide,<sup>214</sup> the cooperation is viewed as “the first step in finding a solution to the problem of how to facilitate the global treatment of enterprise groups”, thus certainly it is hoped that these new rules are a significant step forward from the previous Regulation.

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<sup>213</sup> Article 3(1)

<sup>214</sup> It is important to note that it does not distinguish between a procedure of coordination or communication (Bork & Mangano, 2016, p. 290).

However, the genesis of the evolution of the cooperation' rules is long. The original Commission proposal<sup>215</sup> wanted to achieve coordination by granting to the insolvency practitioners mutual participation rights<sup>216</sup>, and furthermore thought the imposition of duties to cooperate<sup>217</sup> that may be subject to restrictions under the laws of the relevant Member States. On the other hand the Parliament requires “a flexible proposal for group insolvencies, distinguishing between groups where the ownership is rather clear cut and decentralized groups<sup>218</sup>” this giving more powers to the Coordinator which should be able to propose a group coordination plan. (Chaika, 2015, p. 11).

In addition, the proposal of the Commission has been heavily criticized by German delegation<sup>219</sup>, because it argued that in practice these rules might limit effectiveness for two reasons: the duties may well be constrained by national law and, the Proposal does not provide sanctions in case of noncompliance.

Moreover, in case of substantial disagreements, an uncoordinated use of participation rights might conduct to a logjam of the proceedings<sup>220</sup>, and furthermore these rights could be used “as leverage to push through inappropriate demands or even induce parties willing to cooperate to pay a ‘vexation premium’ for waiving such demands” (Bork & van Zwieten, 2016, p. 616).

It is for these reasons that Germany had pressured the European Parliament and the Council to adopt a different approach, that should be based on the ‘Koordinationsverfahren<sup>221</sup>’ that has been proposed in the draft<sup>222</sup> of domestic German insolvency reforms, which in turn is very similar to the regulatory devices suggested by the most popular codes of best practice<sup>223</sup>. The German idea “represents a compromise between the need to centralize the coordination process and to preserve the autonomy of

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<sup>215</sup> COM(2012) 744

<sup>216</sup> These rights are: to participate in the creditors' meetings; to propose a restructuring plan; to make procedural requests; to impose a stay on other proceedings.

<sup>217</sup> Articles 42a - 42c of the COM(2012) 744.

<sup>218</sup> The Commission's proposal did not provide this distinction.

<sup>219</sup> Proposal by the German delegation on the provisions on the treatment of company group, 15675/13

<sup>220</sup> “It is not excluded that the use of the mutual participation rights and powers will eventually lead to a blockade of restructuring efforts causing enormous costs and leading to severe delays in the restructuring process that could even jeopardize prospects for a successful restructuring” German delegation document 15675/13.

<sup>221</sup> In english: Coordination method.

<sup>222</sup> However, one has to bear in mind, that the German national reform was proposed in 2003, but only on 10 March 2017 the German Bundestag voted the bill to facilitate the handling of domestic group insolvencies (Gesetzes zur Erleichterung der Bewältigung von Konzerninsolvenzen) . (Nisi, 2017)

<sup>223</sup> See (I,4.4.2)

the single proceedings<sup>224</sup>” because it works through three elements: a group coordination plan, a coordinator Court and an insolvency coordinator.

The German complaints were taken into account and after the negotiations and several amendments, the proposal was approved. Today, these two laws show still big affinity, indeed both have “been introduced in order to facilitate the group restructuring, even though the participation of various practitioners is not binding and rests on a voluntary basis” (Nisi, 2017).

At the end, the final structure of the new Recast regulation is grounded on cooperation and communication duties<sup>225</sup> for insolvency practitioners and courts involved, and on the possibility to open group coordination proceedings, paying specific attention to the coordinated restructuring plans.

However also in this case the heavy debate on the *procedural consolidation* and *substantive consolidation* (I,2) arose. It is worth remembering that the only way to face groups’ insolvency seems to be the *procedural consolidation*, because according to the consideration made, the *substantive consolidation* should be admitted only in particular cases, for example in the cases provided in the proposal made by the UNCITRAL.

Nevertheless, the European Legislator seems not to follow this dispute, indeed the new rules have not tackled the difficult concepts of substantive or procedural consolidation, but they enacted a new concept of *procedural coordination*<sup>226</sup>. It mainly consists in the coordination of the single proceedings of the group members through the appointment of a Coordinator with special non-binding powers, however with an independent administration for each insolvency proceedings balanced with particular duties of communication and coordination. Thus, the main difference with the procedural consolidation consists in the fact that in this case there are many liquidators as the proceedings and only one Coordinator, that makes the coordination plan and non-binding recommendations, instead of one Judge and one liquidator for all the companies.

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<sup>224</sup> Supra 14

<sup>225</sup> See next Chapter.

<sup>226</sup> This definition has been given by Thole & Dueñas, (2015); in the same way Epeoglou, (2017) at page 50 which “argues that procedural coordination is the least interventionist and ambitious approach, protecting the Commission from exposure to the difficulties of substantive or procedural consolidation”. Furthermore the word procedural coordination may be misleading, indeed many authors sometimes get wrong because they use improperly the term “procedural consolidation” to be referred to “procedural coordination”: in this sense (Omar, 2016). Also “coordinate, do not consolidate!” (Madaus, 2015).

Another term used is “soft cooperation and coordination” and “procedural cooperation/coordination” (Chaika, 2015)

One has to bear in mind that the *group coordination plan* proposed by the Coordinator, is the core of the new provisions, but the legislator expressly prohibits<sup>227</sup> the inclusion of “any consolidation of proceedings or insolvency estates”. This consideration, although is one of the most criticized aspects of this procedure, is helpful, because in many documents<sup>228</sup> *procedural coordination* and *procedural consolidation* are used improperly as synonyms. Thus, it is important to remember, to avoid any confusion with the most discussed theories, that according to this rule in *procedural coordination*, no consolidation<sup>229</sup> is involved, and “the effects are limited to administrative aspects of the proceedings and does not touch upon substantive<sup>230</sup> issues<sup>231</sup>”. (Cooper, 2011).

This choice has been subject to many complaints by most scholars, which are clearly inclined to the *procedural consolidation* approach<sup>232</sup>. Indeed, the rule of Article 72(3)<sup>233</sup> of Recast Regulation has been interpreted restrictively, because it has been affirmed that the procedural consolidation in a group of companies’ case is not impossible<sup>234</sup> for the reason that in relation to highly integrated groups “the recast Regulation does not preclude the possibility of procedural consolidation<sup>235</sup>” (McCormack, 2016, p. 142). This analysis is partially correct, because according to Recital 53<sup>236</sup> if the court finds that the centre of main interests of those companies is located in a single Member State, it is allowed to the court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction, and to appoint the same insolvency practitioner in all proceedings concerned. It is the typical example of procedural consolidation, however, it is noteworthy that in this case the

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<sup>227</sup> Article 72(3) of Recast Regulation.

<sup>228</sup> For example UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency; “The UNCITRAL Legislative Guide includes the original definition of procedural consolidation in its description of procedural coordination” (Reumers, 2016)

<sup>229</sup> The consolidated approach is characterized by the fact that “it treats groups of related companies as a single entity, either for general liability purposes or for procedural convenience” (Henry, 2006)

<sup>230</sup> This consideration is much discussed because for some scholars there is always a substantive effect. See Seligson & Mandell (1958).

<sup>231</sup> This consideration is made to distinguish the procedural coordination, from any substantive consolidation.

<sup>232</sup> See (Epeoglou, 2017, p. 51)

<sup>233</sup> It prohibits the consolidation in a restructuring plan.

<sup>234</sup> See (Reumers, 2016)

<sup>235</sup> “existing practice in relation to highly integrated groups of companies to determine that the centre of main interests of all members of the group is located in one and the same place and, consequently, to open proceedings only in a single jurisdiction” COM(2012) 744 final – Explanatory Memorandum par 3.1.5. page 10.

<sup>236</sup> It 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”.

“rules on cooperation, communication and coordination [...] are not intended to apply” (Reumers, 2016), thus strictly speaking what McCormack argued, does not concern an interpretation of Article 72(3), but it is just a case where it does not apply<sup>237</sup>.

Starting from McCormack’s point of view, an interesting analysis is made by Reumers (2016) who maintains that also when the rules of Chapter V are applicable any consolidation cannot be excluded, indeed the duty of cooperate of the insolvency practitioners appointed in single proceedings entails in practice some forms of procedural consolidation. Undeniably, this is “when they decide to have joint or coordinated creditor meetings and to deliver joint notices to creditors” and furthermore when “the insolvency practitioners agree to grant additional powers or allocate specific tasks to one of them<sup>238</sup>”. Furthermore Reumers argues that the express prohibition of any consolidation of proceedings or insolvency is referred only to the coordination plan<sup>239</sup>, that must be distinguished from the ‘article 56-plan’<sup>240</sup>. In the case of the last-one “measures that ultimately amount to (partial) procedural or substantive consolidation” seems to be allowed. However, he concludes his theory arguing that “group coordination plans will probably quite often amount to at least some form of procedural consolidation, even though they shall not include any recommendations as to any form of consolidation<sup>241</sup>”. It happens because “this prohibition [...] should be interpreted to mean only that main or secondary proceedings opened in a member state cannot be transferred to another jurisdiction”<sup>242</sup>. It is an interesting point of view maybe too hasty in its conclusion.

In conclusion, one can assume that this new Regulation regarding the *coordination-plan* adopts surely a system of *procedural coordination*, because the regulator is quite clear in its provisions although this choice might not be shared. However, it does not mean that Article 72(3) cannot be interpreted partially in law, because the forms of procedural consolidation considered do not comply with the

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<sup>237</sup> It should be remembered that “these rules are intended to apply if proceedings relating to different members of the same group are (to be) opened in more than one member state” (Reumers, 2016).

<sup>238</sup> “in cases where this is permitted by the rules applicable to each of the proceedings”

<sup>239</sup> It is provided by article 70.

<sup>240</sup> See article 60(1)(b)(i) and (iv), and (c) EIR Recast.

<sup>241</sup> “It is, for example, very hard to imagine a group coordination plan holding an ‘integrated approach to the resolution of the group members’ insolvencies’, without proposed arrangements about coordinated deadlines for voting on plans in the different insolvency proceedings or about a coordinated sale of assets in case a going concern sale of an highly integrated business is envisioned” (Reumers, 2016).

<sup>242</sup> In addition it has been argued that the main reason of the protocols is to contribute to procedural consolidation (Reumers, 2016)

*phenomenon* realm, but they should be identified in the *noumenon*<sup>243</sup> area. In other words, in some cases<sup>244</sup> the consolidation deals with the same nature of coordination<sup>245</sup>, however the prohibition made by the legislator rather than a way to prohibit any form of consolidation seems to be an instrument<sup>246</sup> to avoid that scholars and judges could use these new rules to adopt an entire plan based on consolidation, and an example could be the case explained by Reumers<sup>247</sup>. Moreover it does not mean that the Regulation does not provide other cases in which the procedural consolidation is allowed, but surely in these cases all the coordination rules must not apply, with all the consequences<sup>248</sup>.

Additionally, there are other questions that are interesting. First, despite the heavy debate on the matter, the coordination regime gives importance to the COMI of the group only for what concerns where the initial application is filed<sup>249</sup> (*infra*. II, 3.1). Furthermore, we should also bear in mind that this provision of coordination is not mandatory, because as we will see, on one hand the insolvency practitioners of each insolvency proceedings of the group's members under some limits may accept or decline to join the coordination plan. On the other hand, the recommendations of the coordinator are not binding. Indeed it has been said that "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" (Weiss, 2015)

This last consideration adds to the other critics, however, a real judgment cannot be made without any in deep analysis on the coordination and cooperation' and the Insolvency Practitioners' rules. Nevertheless, at the first glance, it should be noted that the choice made by the Regulator is not properly clear, and it appears less useful.

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<sup>243</sup> These are two philosophical concept adopted by Immanuel Kant

<sup>244</sup> For example in the protocols, or in the

<sup>245</sup> In a sense the UNCITRAL definition which includes in the procedural consolidation the original definition of procedural consolidation in its description of procedural coordination.

<sup>246</sup> It should be noted that the concepts of procedural coordination and consolidation are usually confused.

<sup>247</sup> "main or secondary proceedings opened in a member state cannot be transferred to another jurisdiction"

<sup>248</sup> For example the appointment of a coordinator, or the opt-in right etc.

<sup>249</sup> (Chaika, 2015, p. 12)

### 3.2.1. The applicability of Coordination proceeding

Although some observation has been already made, a rapid glance to address better the question should be given on the applicability of the Coordination proceeding.

One should bear in mind that these provisions are applicable only when the proceedings related to different members of the same group are opened in more than one Member State, and only in cases of vertical groups.

Furthermore, as previous noted, an interesting question concerns the highly integrated groups<sup>250</sup>(*infra*. II 3.1.), which are defined as “groups acting like a single company with separate branches” (Merlini, 2016). Indeed, after we have rejected the theory of the letterbox company (*infra*. II, 3.1.), one should bear in mind that according to the Recital 53, it is possible “to open insolvency proceedings for” *highly integrated groups* “in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State”<sup>251</sup>.

“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”<sup>252</sup>.

This is a case of procedural consolidation, where the COMI will be find in at the seat of incorporation of the holding company, and in the place of residence of the groups’ companies different from the main, secondary proceedings might be opened.

It could be the most effective solution; however, such provision reserves two considerations: first, it seems to be a non-mandatory provision because such Recital uses the words: “should not limit the possibility”, and it has to be interpreted in the sense that the Court might apply the coordination rules. Thus, it is credible that in a case where there are more group’s companies that has the same COMI, the Court could choose to appoint different, or the same Insolvency Practitioners. In the first case it must follow the general coordination’ rules, and any consolidation is prohibited.

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<sup>250</sup> They are also defined integrated business (I,2).

<sup>251</sup> In the other Countries, secondary proceedings seem to be allowed.

<sup>252</sup> Recital 53



The second consideration is based on the fact that these new rules expressly provide the same approach of procedural consolidation used in the *Interedil*<sup>253</sup> case, thus for this kind of companies, nothing is changed.

Moreover, one has to bear in mind, that also the *Recital 50* lays down a very interesting provision. It states that “the courts of different Member States may cooperate by coordinating the appointment of insolvency practitioners. In that context, 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”.

It is a very unclear provision, because although relevant literature<sup>254</sup> confused it with the *Recital 53*, it appears more correct to define it as an autonomous and different principle. First, because *Recital 50* is applicable not only in the case of groups of companies, and second because it seems to provide an example of procedural consolidation during the cooperation. Thus, such provision appears referred more to *Article 56*<sup>255</sup>, than to *Article 72*. Consequently, in such case no coordinator could be appointed, no coordination plan or right to opt-in or stay out is allowed, but the practitioner could exercise the powers contained in *Articles 56* and next.

In addition, in this case, the *priority rule* could not apply, because the cooperation is not made moving the single COMI, but it is determined by thought the appointment of the same practitioner in all the proceeding. Then, any right of opt-in or joint out does not find any reasonable justification.

Moreover, this alternative-plan has one legislative application in the *Recital 60*. Such provision lays down that “for members of a group of companies which are not participating in group coordination proceedings” it is provided “an alternative mechanism to achieve a coordinated restructuring of the group”. In this case, the *Recital* continues, the Insolvencies Practitioner “should have standing to request a stay of any measure related to the realisation of the assets in the proceedings opened”. However, this plan “should only be possible [...] if a restructuring plan is presented for the members of the group concerned, if the plan is to the benefit of the creditors in the proceedings in respect of

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<sup>253</sup> Moreover, it is the same approach used in Nortel and Collins and Aikman case.

<sup>254</sup> See (Moss, et al., 2016, p. 497)

<sup>255</sup> The definition Article 56 is used to refer to Article 56-60 regarding the coordination and communication powers.

which the stay is requested, and if the stay is necessary to ensure that the plan can be properly implemented”.

This provision requires some important considerations: first that the group coordination proceeding is expressly excluded. Second, that it uses the word *plan*, third that the *request a stay* is a right recognized by *Article 60*, and fourth that the right to open such plan is clearly balanced by some conditions. All these considerations seem to confirm the theory according which an alternative-special-plan<sup>256</sup> could be made through the powers listed in *Articles 56-60*, although only in special cases when some conditions are satisfied.

The main consequence of these affirmations are that<sup>257</sup> the *Recital 60* should be considered as a general provision that allows the courts to appoint the same Insolvency Practitioner to all proceedings concern each company of the group. It is *de facto* a special plan, different from the coordination plan, based on modified procedural consolidation, and it is allowed only when there is a Courts’ agreement in choosing the same Insolvency Practitioner.

However, in the case of a restructuring plan, considering that the *Recital 63* is a legislative application of the *Recital 60*, other than its conditions, it is necessary an agreement by the Courts involved in choosing the single insolvency practitioner. When it is not possible, the coordination plan’s rules have to apply.

Although these last provisions are the most effective, they are in concrete very difficult to apply.

### 3.2.2. The Group Coordination Proceeding

The group coordination proceeding is the main method to face the insolvencies in the new Regulation. In sum, it consists in the appointment of a coordinator that supervises the insolvency proceedings or the restructuring of a group of companies, thought a *coordination plan*.

It must be differentiated from the provisions of Article 56 – 60, that concerns the cooperation and communication between IPs and Courts, because such proceeding is regulated primarily by Articles 71-77. It is a non-binding procedure, even if the insolvency practitioner has to join in, or not, because

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<sup>256</sup> Alternative plan from the coordination plan.

<sup>257</sup> This theory is very similar to the Reumers’ (2016) approach.

the entire plan can be at any time neglected. However, although it is not mandatory, one has to bear in mind, that all the procedure is subject to strict rules that parties involved must follow to avoid the sanctions under Nationals laws.

Furthermore, there are many controversial aspects, and more that have been criticized, and only an analysis of the procedural rules may face the question. One should bear in mind that the entire procedure happens through three periods: the request of opening, the right to claim objections and the final evaluation by the Court.

### 3.2.3. The opening of procedure and the Court's assessment.

The opening of the procedure needs a request from an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group and a resulting order by the seized Court.

More specifically, the request could be demanded before any court having jurisdiction over the insolvency proceedings of a member of the group<sup>258</sup> and it shall be accompanied by a proposal, which specify the essential elements of the coordination<sup>259</sup>. Indeed, it shall contain:

- i. the reasons of the procedure and its outline;
- ii. a list of the insolvency practitioners, Courts and competent authorities involved in the insolvency proceedings of the members of the group;
- iii. an outline of the estimated costs and the estimation of the share of those costs to be paid by each member;
- iv. the proposal concerning the person to be nominated as the group coordinator ('the coordinator').

Moreover, such request shall be made in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed, it means that

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<sup>258</sup> Article 61.

<sup>259</sup> Recital 55

where it is required by the law, “the insolvency practitioner should obtain the necessary authorisation before making such a request<sup>260</sup>”.

The proposal could be made in “any court having jurisdiction over the insolvency proceedings of a member of the group”, however it has been affirmed that it is reasonable that the Practitioner “will apply to the Court having jurisdiction over the insolvency procedure affecting that company which plays the most crucial role within the group” (Bork & Mangano, 2016, p. 292).

Moreover, it has been affirmed that the Court, according to the COMI<sup>261</sup> rules, may assess the appropriateness<sup>262</sup> of the choice of jurisdiction, however it seems to be determined exclusively under the *priority rule*, laid down in Article 62<sup>263</sup>. It provides that 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. In other words, the Court seized first became the group coordinator court.

It means that the entire procedure is governed by the law of the seized court. For example, the question of opt-in or opt-out are subject to the jurisdiction of this specific State, seized first.

The only exception is provided by the procedure made by Article 66(1), which points out an event of moving jurisdiction when “at least two-thirds of all insolvency practitioners 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 group coordination proceedings<sup>264</sup>”.

However, it is a condition very hard to reach.

Once the request was presented, the Court must verify that:

- i. the opening of such proceedings is appropriate;
- ii. no creditor is likely to be financially disadvantaged;

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<sup>260</sup> Recital 55

<sup>261</sup> It should imply that the Court must verify the COMI Group, however it does not appear as a convincing solution.

<sup>262</sup> (Bork & Mangano, 2016, p. 292)

<sup>263</sup> This has been defined by Bork & Mangano as a time limit for applying for coordination proceedings. Moreover another time limit is viewed in Article 61(3.b) that provides that the proceeding is incompatible where some proceedings had already accomplished their functions.

<sup>264</sup> The detail of this request are in Article 66.

iii. the proposed coordinator fulfils the professional requirements laid down in Article 71<sup>265</sup>.

If it is satisfied, the seized Court must give notice, as soon as possible, of the request for the opening of group coordination proceedings and of the proposed coordinator, to the insolvency practitioners, it shall be sent by registered letter, attested by an acknowledgment of receipt<sup>266</sup>.

The notice is necessary because, first the insolvency practitioners involved has the opportunity to be heard (Art. 63(4)).

Secondly, they may object to the inclusion within group coordination proceedings of the insolvency proceedings when he has been appointed; or make a complaint concerning the person proposed as a coordinator<sup>267</sup>.

These objections<sup>268</sup>, if it is required by National Law must be approved by the national court<sup>269</sup> of the Insolvency Practitioner, and they have to be lodged with the court referred for coordination within thirty days of the receipt of the above-mentioned notice<sup>270</sup>.

More specifically, if the objection made concerns the inclusion of the proceedings in respect of which it has been appointed in group coordination proceedings, the resulting consequence is that such proceedings shall not be included in the coordination procedure<sup>271</sup>. However if it concerns the appointment of a coordinator the court may refrain from appointing that person and invite the objecting insolvency practitioner to submit a new request<sup>272</sup>. This leads to several conclusions, because such rules establish that the coordinator has to be a person recognized by all the Insolvency Practitioners appointed. This implies, considering that the entire proceedings is not binding: where the parties involved chose to participate actively, these shall have an interest to do it with high care<sup>273</sup>.

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<sup>265</sup> It provides different requirements: “the coordinator shall be a person eligible under the law of a Member State to act as an insolvency practitioner. The coordinator 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”.

<sup>266</sup> Article 63.

<sup>267</sup> Article 64.

<sup>268</sup> According to Article 89, it will be defined by means of an implementation act.

<sup>269</sup> Article 64(3)

<sup>270</sup> Article 64(2)

<sup>271</sup> Article 65.

<sup>272</sup> Article 67.

<sup>273</sup> However one has to bear in mind that there is a procedure of opt-out.

After the term of thirty days has elapsed, the court may open group coordination proceedings<sup>274</sup>. Then the court appoints a coordinator; decides on the outline of the coordination and on the estimation of costs and the share to be paid by the group members. Additionally, the decision opening group coordination proceedings shall be brought to the notice of the participating insolvency practitioners and of the coordinator<sup>275</sup>.

For the sake of completeness, some consideration may be given on this provision. Indeed, as has been mentioned above, the Coordinator shall be determined in the proposal, thus the court simply verifies his eligibility and the existence of oppositions, without any discretionary power on its determination. Perhaps, the coordinator should be the resulting choice made by Insolvency Practitioners.

However, when the decision regards “the outline of the coordination” and “the estimation of costs and the share to be paid by the group members” the court has to make an evaluation into the substance of the request and, at least, to perform a cost-benefit analysis<sup>276</sup>.

In the case of a disagreement, or when any request is refused, it can be challenged in accordance with the law of Member State where the group co-ordination proceedings were opened<sup>277</sup>.

### 3.2.3.1. The opt-in and the opt-out

The opt-in is a procedure that allows any insolvency practitioner to request the inclusion of the proceedings in respect of which it has been appointed. It may take place in two circumstances:

- i. when the insolvency practitioner is excluded from the plan because he or she has made an objection to the inclusion of the insolvency proceedings within the group coordination proceedings; as we have already noted, the automatic effect of this objection is that the proceeding was excluded from the coordination plan.
- ii. When an insolvency proceeding with respect to a member of the group has been opened after the court has opened group coordination proceedings<sup>278</sup>.

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<sup>274</sup> Article 68.

<sup>275</sup> Article 68(2).

<sup>276</sup> This is the theory by (Bork & Mangano, 2016)

<sup>277</sup> This interpretation that I share is given by (Moss, et al., 2016)

<sup>278</sup> Article 69.

The request must be presented to the coordinator, who after consulting the insolvency practitioners involved, may accept where it satisfies the condition that it “should facilitate the administration of the proceedings and no creditor proves to be disadvantages” (Bork & Mangano, 2016, p. 294); or when all insolvency practitioners involved agree, subject to the conditions in their national law.

Concerning the opt-out instead, procedural rules have already been discussed (*infra*. II, 3.2.3). However, a debate arose about the range of objections practitioners could make. Indeed, the discussion is whether the objection could involve the elements of the proposal Art. 61 (3) or just the inclusion within group coordination proceedings.

Wessels<sup>279</sup> seems to argue that the right to object is limited<sup>280</sup> to the two situations above mentioned (Art. 64(1)(a) and (b)), however he asks himself: “what if the IP wishes to protest against the outline of the estimated costs and the share of the cost to be paid by each group member?”

The answer is that such objection should not be allowed, because “the regulation should not serve as an invitation to litigate” For the sake of completeness, one should bear in mind, that there is another way to make a complaint before the Court, because the insolvency practitioners involved have the opportunity to be heard (Article 63(4)), and it is in the Court competence to reject the insolvency plan.

However, as we already noted (*infra*. II, 3.1) the opt-in and the opt-out exist mainly because the legislator wants to mitigate the “race on the coordination Court”. Indeed, Weiss (2015) affirms that a “group member might, as a precaution opt-out to wait and see how the coordination proceedings take their course. If potential benefits are recognized, they can request to opt-in again”.

This example follows the extensive interpretation of such rights, but it does not appear completely persuasive. The main reason is the fact that, there are too many tools to reach this objective, without the exercise of the opt-in and opt-out rights. One should bear in mind for instance, that the plan is not binding, and in case of disagreement the practitioner simply could not follow what it is stated. Moreover, if we interpret the right in this sense it may conduct the plan to an impasse, where all the insolvency practitioners wait the moving of the others.

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<sup>279</sup> (Wessels, 2017)

<sup>280</sup> In the opposite way Esser, he supports the idea that objections cannot be limited. See (Wessels, 2017)

A more appropriate interpretation should be that, the opt-in and the opt-out must be considered in light of *cooperation*. In this sense the opt-out right could be used as a tool to reach an agreement regarding the coordinator designated, or when the inclusion in the proceeding is not permitted for any valid reason different from the specific coordination plan, a valid example could be the case of a company with a very small number of assets that does not necessitate a plan. This because a judgment on the appropriateness is already made by the seized Court, and what chances will a complaint have to be approved, if it must be judged again by the same Court? Thus, it appears more reasonable that an insolvency practitioner worried about the coordination plan, could encourage a Court decision through the right to be heard (Article 63(4)).

On the contrary, the right to opt-in shall be used when the opening of the proceeding is subsequent to the plan or when the conditions cited disappear for any reasons.

Indeed, any complaint strictly concerning the plan (Article 61(3)) must be brought before the seized Court, but it does not imply the exclusion of the entire plan, because the practitioner simply cannot follow<sup>281</sup> any specific provision that appears as less advantageous for the assets that he or she administrates. This means, that the right to opt-out with the consequent exclusion from the coordination plan, shall be exercised in three cases:

- i. In the case of complaints regarding the person proposed as a coordinator.
- ii. In the above mentioned cases: actually for any valid reason different from the *specific* coordination plan. It means that the COMI evaluation could be a valid reason, because it is different from what it is inside the plan. At the opposite, the costs' evaluations are excluded, and they can be suited at the end of the procedure (*infra*. II 3.2.4.2), or through a complain (Article 63(4)) before the Court.
- iii. In the exceptional cases of an unlawfully plan, or when the company cannot be considered as a member of the group.

This interpretation seems to be the most reasonable, and furthermore it could give sense to the entire procedure because when too many rights are recognized, the risk for the proceeding to become *de facto* completely inapplicable raises.

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<sup>281</sup> However, one should remember the duty of motivation in Article 70, but it does not seem a problem in this theory.



### 3.2.4. The coordinator and the coordination plan.

One of the potential source of conflicts in the new Regulation is the Coordinator. He or she<sup>282</sup>, as we noted above, is appointed, after the Court has verified his eligibility and that no-objection was made, according to the proposal of an insolvency practitioner<sup>283</sup>.

The eligibility of the coordinator is established in Article 71, which lays down: “The coordinator shall be a person eligible under the law of a Member State to act as an insolvency practitioner”; and moreover “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”.

This has been defined<sup>284</sup> as a twofold prescription because on one hand, Article 71(1) refers to the law of the Member State where the coordinator is to be appointed, and on the other hand, Article 71(2) points out a European rule “aimed at avoiding any conflicts of interests with the subjects involved”.

The role of the coordinator is to coordinate the insolvency proceedings affecting companies of the same group, and for this task, she may use many powers and rights. These are listed primarily in Article 72, in which the coordinator shall “identify and outline recommendations for the coordinated conduct of the insolvency proceedings”; and shall “propose a group coordination plan”. However, before taking any action, according to Bork & Mangano (2016), the coordinator must take into account the level of the group’s economic and financial integration<sup>285</sup>, because the Art 72(1) requires that the coordination plan “identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies”. Moreover, although the plan cannot “include recommendations as to any consolidation of proceedings or insolvency estates”, it may contain proposals for<sup>286</sup>:

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<sup>282</sup> For simplify the composition, in the next it will be used the pronoun he. In order to simplify the composition, pronoun “she” will be used hereafter.

<sup>283</sup> In the most cases, the IP that had started the procedure.

<sup>284</sup> See (Bork & Mangano, 2016, p. 295)

<sup>285</sup> 295

<sup>286</sup> Article 72(2)

- 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.

It is important to note that this Article contains a list of the potential contents of the plan, however the plan could also contain any other measures compatible<sup>287</sup> with the general criteria. However, it does not mean that it can become a ‘potpourri’ of various forms of uncoordinated measures, indeed these have to be compatible to establish integrated and efficient group coordination proceedings<sup>288</sup>.

In this context, the goal of the group coordination plan seems to be “the resolution of the group members’ insolvencies” (Bork & van Zwieten, 2016, p. 670), which can be done through a plan with the aim to restructure or liquidate the group.

Regarding the measures listed in Article 72(1)(b), some examples are useful, indeed Bork & van Zwieten make a list:

- i. Example for measures on the financial level: the increase of equity capital, simplification of the financial structure of the group and elimination of deficiencies in intra-group cash pooling.
- ii. Example for measures on the business level: reorganization of the group structure, exchange of the management and the personnel reduction.
- iii. The inclusion of a proposal to prevent avoidance action on the intra-group transaction.
- iv. Proposal for agreements between the insolvency practitioners concerning the intra-group disputes, or the implementation of a group coordination plan in the insolvency plan of the individual groups<sup>289</sup>.

However, as the large majority of the scholars had noted, what has been stated in Article 72(1) might be ineffective. Indeed, **these coordinator powers and the coordination plan have no binding effect**. According to Article 70, an insolvency practitioner shall not be obliged to follow in whole or in part the coordinator's recommendations or the group coordination plan, although she must consider

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<sup>287</sup> One has to remember the prohibition of any consolidation.

<sup>288</sup> (Bork & van Zwieten, 2016, p. 669)

<sup>289</sup> These examples are made by (Bork & van Zwieten, 2016, p. 671)

the recommendations of the coordinator and the content of the group coordination plan. The only duty bearing on the Insolvency Practitioner is to motivate non-compliance to the coordinator and to the persons or bodies whom he shall represent.

It has been defined the “comply or explain” mechanism, and its violation may lead to civil or criminal liability, and the revocation of the office according to the national rules.

Without any doubt, it is the most discussed part of the entire procedure, which could nullify all the rules established, also because although the Regulation follows the general scheme of the German draft on insolvency law, it operates differently from the German case where the plan is binding. However, the duty of motivation shall not be undervalued; indeed, although the Regulation does not provide for any system to check the effectivity of the reasons, it could be imagined as a tool to give to the Courts the power to criticize the insolvency practitioner’s conduct when it follows an egoistic behaviour. However, the range of justifications allowed is not clear, and potentially any reasonable motivation should be permitted, indeed a list made by the legislator with limits could be very helpful. In my opinion, the egoistic interest of the company is not a valid reason (*infra*. II, 3), and the European Court of Justice should clarify it.

In addition, the coordinator can use instrumental powers listed in the second paragraph<sup>290</sup>, the most relevant<sup>291</sup> are: the right to be heard and participate, in particular by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group and mediate any dispute arising between two or more insolvency practitioners of group members;

The right to 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 one of the most important, the right of request a stay for a period of up to 6 months of the proceedings opened in respect of any member of the group. It can be exercised when such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the

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<sup>290</sup> Article 72(2).

<sup>291</sup> For the other powers see Article 72(2).

creditors in the proceedings for which the stay is requested; or request the lifting of any existing stay<sup>292</sup>.

Furthermore, a rapid glance should be given on the relationship between coordinator and Insolvency Practitioners that is based on the mutual duty of cooperation, mainly through an obligation of communicate. However, on one hand, also this case follow the general nature of voluntary cooperation<sup>293</sup>, and thus no sanctions are provided. On the other hand, if it is read with Article 65(1)<sup>294</sup> it appears clear that for the IP that has not joined the plan, no duty can be imposed.

#### 3.2.4.1. The coordinator conduct.

The regulation lays down also rules for the conduct of the coordinator, indeed Article 72(5) provides that “the coordinator shall perform his or her duties *impartially* and with *due care*”.

The impartiality is a fundamental concept, and should be read in conjunction with Article 71(2) that prohibits any “conflict of interest”; to be sure: the latter case regards a characteristic of the coordinator, differently to what is provided in Article 72 that concerns the conduct.

Moreover, the due care is a general rule according with the coordinator acts with the diligence, prudence and caution required for an ordinary man to avoid any harm to others. The requirement needs a practical evaluation based on circumstances, and thus can be applied to a big variety of cases.

The consequences of an unlawful behaviour are in Article 75<sup>295</sup>. Indeed, when the coordinator acts to the detriment of the creditors of a participating group member or fails to comply with his or her obligations under the Chapter V, the Court may revoke its office. It can act by its own motion or after the request of any insolvency practitioners.

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<sup>292</sup> This is the same power employed for insolvency practitioners in the cooperation and coordination.

<sup>293</sup> (Bork & van Zwieten, 2016, p. 687)

<sup>294</sup> 1. Where an insolvency practitioner has objected to the inclusion of the proceedings in respect of which it has been appointed in group coordination proceedings, those proceedings shall not be included in the group coordination proceedings.

2. “The powers of the court referred to in Article 68 or of the coordinator arising from those proceedings shall have no effect as regards that member, and shall entail no costs for that member”.

<sup>295</sup> For further information see the (Bork & Mangano, 2016, p. 297)

### 3.2.4.2. The costs of the procedure and the remuneration of the coordinator.

Another point that should be emphasized regards the costs of the procedure and the remuneration of the coordinator, indeed they are a potential source of conflicts among the parties involved.

Regarding the coordination plan, the costs are supported through the distribution among the participants. Their evaluations are made before the opening, and during the procedure.

However, Article 72(6) provides that when the coordinator considers a significant increase in the costs compared to the cost estimate, and in any case, where the costs exceed 10 % of the estimated costs, he shall inform without delay the participating insolvency practitioners; and seeks the prior approval of the court opening group coordination proceedings.

At the end, when the coordinator, has completed his tasks, he shall establish the final statement of costs and the share to be paid by each member, and submit this statement to each participating insolvency practitioner and to the court opening coordination proceedings<sup>296</sup>. In the time of thirty days' objection can be made before the court in which the coordination proceeding has been opened.

The objection may be based on a wide variety of reasons as the amount of costs or the distribution among parties. This because the Recital 58, provides a very important principle, which establishes “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<sup>297</sup>”.

This principle is applicable also in the case of the coordinator remuneration that also it must be borne by each member of the plan, because it is included in the general costs. However, it creates a very unpleasant issue, because as one can guess, “the wage level among different European countries may vary heavily” (Thole & Dueñas, 2015, p. 225). For example, the compensation of an Italian

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<sup>296</sup> Article 77.

<sup>297</sup> In my opinion, this could be an example of a valid reason to reject the coordination plan.

coordinator is different from the compensation of a Bulgarian one, and can different parties borne the same costs?

Thus, it happens a phenomenon similar to the forum shopping, because “the insolvency practitioners could tend to open proceedings at the domestic courts, because that would – at least de facto – grant them prevalence over the group’s recovery strategy” (Thole & Dueñas, 2015, p. 225).

### 3.2.5. Avoidance provision in group’s insolvency.

The new Regulation on insolvency proceedings does not present any relevant change regarding the avoidance rules. The main provisions are the same and they are determined in Article 7<sup>298</sup> and 16.<sup>299</sup> The only innovation seems to be the provision in Article 72(2), which establishes that the coordinator in the coordination plan could provide for “the settlement of intra-group disputes as regards intra-group transactions and *avoidance* actions”.

What in practice this rule established is not properly clear, however scholars have made a reductive interpretation. It has been viewed<sup>300</sup> as a tool used to prevent avoidance action on the intra-group transaction during the coordination plan, without any consideration on transaction made before it. This seems to be the only solution, because it should be remembered that any consolidation is prohibited, thus the coordinator cannot provide in that sense.

Thus, today if an Insolvency Practitioner of a company of the group would attack a pre-insolvency transaction, he should act according to the law where the insolvency proceedings are opened. Furthermore, as the Court of Justice of the European Union has stated in *Lutz v. Bauerle*<sup>301</sup>, the provision refers to avoidance rules and not avoidance actions. In other words, it means that a court is able to decide<sup>302</sup> an action to avoid of a company whose registered office is in another Member State<sup>303</sup>. This rule is very important regarding the highly integrated groups, because in that case one Court has to decide also for the avoidance actions.

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<sup>298</sup> In the previous regulation was Article 4.

<sup>299</sup> In the previous regulation is Article 13.

<sup>300</sup> In this sense (Bork & van Zwieten, 2016)

<sup>301</sup> It is referred to the Regulation 1346/2000, but clearly, it is applicable also to the new insolvency regulation. Case C-557/13.

<sup>302</sup> *Seagon v. Deko Marty Belgium NV*, C-339/07

<sup>303</sup> (McCormack, et al., 2017, p. 134)

Furthermore, one should remember, that while INSOL Europe's report in 2010, *Harmonisation of insolvency law at EU level*<sup>304</sup>, concluded about the necessity of harmonization in this area, on the other hand the issue seems to be under-valuated. Indeed, as McCormack, et al., have noted the Insolvency Practitioners tend to refrain from instituting proceedings to avoid transactions because they have no idea of the avoidance rules in other Member States. Indeed ascertaining the foreign law is expensive and time-consuming and the outcome of litigation is unpredictable<sup>305</sup>.

The main effect of this state of affairs is to spur companies to move their COMI to seek a more favourable law. Thus, harmonization, although it could encounter a number of problems,<sup>306</sup> seems to be inevitable and particularly necessary.

### 3.2.6. Conclusion

In conclusion, one has to bear in mind that there are two different kinds of *plan*, one is subject to the coordination's rules with the prohibition of any consolidation, and the other is subject to the rules provided in the next section<sup>307</sup>, although an agreement between the Courts involved is necessary.

This approach could be viewed as the solution necessary to solve many of the problems arisen. This is particularly true, because the large majority of scholars through critics had attempted as a way to apply *procedural consolidation*, viewed as the necessary tool to face the group's insolvencies.

Indeed, the vast majority of the literature strongly criticize the entire regulation, for example Thole & Dueñas, (2015) argue that "the rules for the new group coordination proceedings can be useful in isolated cases". Moreover, these rules has been defined improperly "as mere guidelines with a programmatic, appellative character" (Thole & Dueñas, 2015), mainly because they create an increase of communication between courts and insolvency practitioners that may result in delays and logistical complications. In addition, Epeoglou (2017) argued that the complexity of the procedure adds to the

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<sup>304</sup> It is available at

[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/empl/dv/empl\\_study\\_insolvencyproceedings\\_/empl\\_study\\_insolvencyproceedings\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empl/dv/empl_study_insolvencyproceedings_/empl_study_insolvencyproceedings_en.pdf)

<sup>305</sup> German National Report p.13 in McCormack, et al., 2017, p. 170.

<sup>306</sup> For a detailed analysis see (McCormack, et al., 2017)

<sup>307</sup> In case of restructuring plan, Recital 60 must apply.

overall cost, because “the reimbursement of the coordinator as well as the extra cost borne by each Insolvency Practitioners will probably constitute a deterrent for opening coordination proceedings”.

Undoubtedly, in these complaints there is some truth but considering that it is expressly prohibited, these critics cannot be the way to reach any kind of procedural consolidation. In this sense, my interpretation is based on the fact that the regulator uses the *coordinating plan* only when there is a partial agreement between Courts, because each Court requests its autonomy. It is the most common case.

Clearly, this is not the best way, however it is better than nothing. One has to bear in mind that, before the Recast Regulation, any liquidator during the administration pursued its own interests<sup>308</sup>, however, without any communication or coordination, the single interest destroyed the common interest of the group, even if it appears that the last is best interest for all the parties involved. The *prisoner's dilemma* could have an extensive application also in this case, indeed it explains why two completely "rational" individuals might not choose the best way to face a common problem, and it happens primarily when any exchange of information is missing, and consequently it causes the worse choice for both.

Thus, although the cooperation plan misses any obligation on the parties to cooperate, today it is intended as the best way to obtain the highest result for all.

In this sense, Madaus (2015), although he affirms that “the effectiveness of group coordination proceedings can be expected to be limited to very few specific cases in practice”, continues saying that: “the introduction of group coordination proceedings sends a significant message as it represents the first modest step towards future European rescue proceedings for corporate groups”.

However, it does not mean that the regulation is perfect, because it is criticisable under others and many points of views. First, relevant literature has noted that the main weakness of the proposals may lie in the fact that even for the insolvency practitioners who have opted in to the group proceedings, the content of the group co-ordination plan is not binding (Wessels, 2016). Secondly it is not reasonable that the parties involved could choose to opt in or join out, without a clear explanation of when it could happen. Third, the criteria for the distribution of costs among group members are

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<sup>308</sup> It should be intended as the interest of the single company.



completely unclear, and thus it creates a phenomenon similar to forum shopping, where an insolvency practitioner chooses favourable legislation to propose the coordination plan. Fourth, the *priority rule* cannot be the only tool to determine the jurisdiction.

Moreover, the new EIR does not provide for an enforceable right against foreign insolvency practitioners or courts to provide information, or assistance, or to act in a coordinated way. If an IP or judge does not comply, the breach of duties may justify damages claims if the respective *lex fori concursus* provides for such liability and the respective requirements are fulfilled. (Madaus, 2015)

In addition, a serious issue regards the high differences between member States that create obstacles and problems for companies and parties involved. Especially, the avoidance provisions, where no harmonization has been made and where the differences seriously compromise the effectivity of an insolvency proceeding.

In this context what has been said by Chaika, (2015) is highly persuasive: “To the criticism about the new rules, one could respond that the time for dramatic changes in cross -border insolvency has not arrived yet due to diverse approaches of national laws regarding group companies that make extensive harmonization an impossible task”.

### 3.3. The Cooperation and communications between the IPs and the courts involved (Art 56-60)

Until the new Recast Regulation, one of the main lackings in the previous provisions was the absence of any kind of cooperation and coordination between the Courts and the parties involved. Today, the question seems to be solved because co-operation and communication between any combination of courts and/or office-holders are mandatory, it is adopted in a similar way in the context of main and secondary proceedings

The new rules are set out in the Section I of Chapter V, Articles 56-60, which are referred exclusively to enterprises groups, although they have been deliberately similar to Chapter VI, Article 41-44, that is applicable in the relationship between main and secondary proceedings<sup>309</sup>.

At first glance, the matter is undoubtedly complicated to understand, however it basically consists in two main parts: the *duty of cooperation and communication and their limits and costs* and the *Powers of the insolvency practitioner in proceedings concerning members of a group of companies*

### 3.3.1. The duty of cooperation and communication and its limits

The *duty of cooperation and communication* is provided by Article 56(1) that establishes a general obligation on the insolvency practitioners appointed in the insolvency proceedings of members of the same group to cooperate one each other (Bork & van Zwieten, 2016, p. 594). It is a mandatory obligation<sup>310</sup> and it should be aimed to facilitate the effective administration of these proceedings.

Regarding the form of cooperation, the second part of such article provides that the cooperation *shall* take any form, for example written or oral, or it could consist in agreements or protocols. Specifically, the Insolvency Practitioners shall as soon as possible communicate to each other any information which may be relevant to the other proceedings. It is to be noted that this obligation is made in a very broad terms, thus in practice it obliges the exchange of any information.

Moreover, such Article lays down two implementation measures: on one hand, the practitioners shall account whether possibilities exist to coordinate the administration and supervision of the affairs of the group, and in case, to coordinate such administration and supervision. It has been viewed as the legal basis for the so called *56-plan*, different from the coordination plan (*infra.* II, 3.2.1), because it provides for the management of the company where it is continuing to trade, and the the realization of the assets where a group is being wound down<sup>311</sup>.

On the other hand, they should consider whether possibilities exist for restructuring group members which are subject to insolvency proceedings and, if so, coordinate with regard to the proposal and

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<sup>309</sup> This connection is relevant because it seems to be the primary reasons of different rules for the different part. E.g. an express provision for communication between insolvency practitioners, and express provision for communication between Courts and so on.

<sup>310</sup> Article uses the word “shall”.

<sup>311</sup> In this sense (Moss, et al., 2016, at page 501).

negotiation of a coordinated restructuring plan (Art. 56 (1c)). This measure is very appreciable, and it should be read in conjunction with the quoted *Recital 60 (infra, II, 3.2.1)*.

However, the Regulation points out that the duty of cooperation and communication is not absolute, but it must be within the conditions laid down. These limits consist in the fact that the cooperation and communication is prohibited when it does not facilitate the effective administration; second when it is not compatible with the rules applicable, and third when it entails a conflict of interests. These are very inclusive conditions to avoid any improper use, and they might be a source of problems because they are subject to the rules applicable to the relevant insolvency proceeding.

In addition, the last provisions in this topic are about the *protocols* and the *costs*. The former regards a general power of Court and Insolvency Practisers to conclude agreements and protocols. The latter provides that the cost of cooperation and communication “*shall be regarded as costs and expenses incurred in the respective proceedings*”<sup>312</sup>. It is relevant to note that such agreements and protocols are in practice the tool made to apply a procedural consolidation.

For the sake of the completeness, an issue, which must be taken into account, regards the Recital 48. As we know the Recitals are not mandatory, however they assume primarily importance for the scholars when they are used to define the general scope of the Regulation. Such Recital seems to be relevant because in its second part<sup>313</sup> sets out an explicit reference to the “*principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law*” that must be used by the insolvency practitioners. It sparked a heated debate among scholars because during the preparatory work many<sup>314</sup> of them had asked for the incorporation of the Model Law in the EU proceedings, but unfortunately to no avail. However, the solution chosen by the Regulator is very difficult to understand. The most convincing theory seems to affirm that we could assume that some guidelines for their broad and common application could be considered as general principles of law and thus used in complex cases. However, Bork & Mangano (2016) argue that Recital 48 should be interpreted in conjunction with Article 41(1)<sup>315</sup>, this

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<sup>312</sup> See article 59.

<sup>313</sup> The first part provides the cooperation and coordination’s principle with the main objective of administer groups’ insolvency as efficiently as possible (Bewick, 2015, p. 185)

<sup>314</sup> For example Bewick (2015)

<sup>315</sup> It is important to remember that Article 41 is referred to the relationship between primary and secondary proceedings; however, it is usually applied also in the relationship of group of companies’ insolvency.

rule establishes that the cooperation between Insolvency Practitioners may take any form, including the conclusion of “agreement and protocols”. Thus Recital 48 simply defines these agreements and protocols, that could include these international guidelines. The question about such protocols and agreements is more complex than it appears<sup>316</sup>, however undoubtedly all these two interpretations about Recital 48 could exist both at the same time, despite the recognition of some rules as general principles of law might facilitate the application of new recast Regulation, and could fill any lack in a case of plan (Art. 56(2)).

This is because, one should bear in mind that the benefit of use these kinds of principles and guidelines are many: firstly, a lot of States had already used it, thus they could solve all practical problems not already challenged by the European Regulation. Secondly they can be adopted and modified in a very quick manner, thus they face better the reality than any kind of law.

### 3.3.2. Powers and definition of the insolvency practitioner in proceedings concerning members of groups of companies.

An important innovation regards the opportunity<sup>317</sup> to appoint insolvency practitioners in proceedings concerning members of the same group. This is at the very heart in the new Regulation because it is one of the best way to ensure the efficiency in insolvency groups’ proceedings.

Actually as one can guess, the insolvency practitioners are not an original idea, they exist in most European Country with different names such as “administrators”, “trustees”, “liquidators”, “supervisors”, “office holders”<sup>318</sup>, etc. They are also in the previous European Insolvency Regulation 1346/2000, which defined liquidators as “any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs”<sup>319</sup>. Indeed, in this context the differences with the Recast Insolvency Regulation seems to be few but important. On one hand, the new Regulation opts for a more neutral definition calling them

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<sup>316</sup> For further information, see Bork & Mangano, (2016) at page 211.

<sup>317</sup> See Article 57

<sup>318</sup> For a more detailed list see McCormack, et al. (2017) pag 65.

<sup>319</sup> Article 2(b) Regulation 1346/2000

“insolvency practitioners throughout rather than liquidator<sup>320321</sup>” (McCormack, et al., 2017, p. 66), because the Regulation 1346/2000 “was drawn up in a context when insolvency proceedings were usually aimed at liquidating the insolvency estate<sup>322</sup>” (Bork & Mangano, 2016, p. 204). On the other hand, the insolvency practitioners have a wide range of powers in groups’ insolvency.

These powers, listed in Article 60, consist mainly in the *right to be heard*, in the *right to request a stay*, and in the *right to apply for coordination proceedings*. The main reasons of this new provision are different but the most convincing is that the exercise of this power is necessary because “mere cooperation between players in the proceedings concerning companies belonging to the same group is regarded as insufficient” (Bork & Mangano, 2016, p. 289). This is especially true if we look the Eurofood case, where cooperation failed.

*The right to be heard* is guaranteed to each insolvency practitioner in any of the proceedings opened in respect of any other member of the same group<sup>323</sup>. It was suggested by the so called U.N.I.C.I.T.R.A.L. “Legislative Guide on Insolvency law Part three”<sup>324</sup>, and it appears to be the one of “*most effective devices*” (Bork & Mangano, 2016, p. 287) in the communication between Courts. Indeed if this right is exercised properly, it can prevent any improper operation which could be incompatible with the others procedures<sup>325</sup>.

However, in the event that there is a lack of cooperation the Practitioners could exercise a more incisive power, this is primarily the *right to request a stay* that consists in the power to have enacted an order by the court to stop the Insolvency Practitioner’s activities, especially when it affects the

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<sup>320</sup> Article 2 (b) Regulation 2015/848 : “‘insolvency practitioner’ means any person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or in part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii); or (v) supervise the administration of the debtor's affairs.

<sup>321</sup> This theory is confirmed by the European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 — C7-0413/2012 — 2012/0360(COD)), in which the Parliament amends the at Recital(7) the word “liquidators” with the term “insolvency representatives”. At the end of the legislative process, the word became insolvency practitioners.

<sup>322</sup> Today, the insolvency may be aimed also to the reorganization of companies. Article 1 lays down: “1. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation”.

<sup>323</sup> Article 60(1)(a)

<sup>324</sup> Page 99, paragraph 38 et seq.

<sup>325</sup> Bork & Mangano, 2016 makes an example in a negative way, indeed this right is sufficient to restrain the other Insolvency Practitioners from performing any operation which could turn out to be incompatible.

company's assets. Nevertheless, this strong power could be exercised only when four conditions are met: (i) there is a restructuring plan for all or some members of the group for which insolvency proceedings have been opened [...]; (ii) the 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 [...] has been appointed nor the proceedings in respect of which the stay is requested are subject to coordination.

The Court in which this complaint is made should verify if these conditions are met<sup>326</sup>, without any discretionary power concerning the reasons of the request, thus it orders the request to stay. The only discretionary power given is on to the duration of the measure, because any other consideration is contrary to the whole intention of the law.

The last power that the Insolvency practitioners could exercise consists in the right to apply for the opening of group coordination proceedings in accordance with *Article 61*.

Article 60 contains a little range of powers that are conferred to insolvency Practitioners, indeed powers are provided through all the Regulation. For example, they can make the request to open group coordination proceedings<sup>327</sup>, or they can make objections about group coordination proceedings<sup>328</sup>. Furthermore, extra powers could be guaranteed by the conclusion of agreements by Member States.

Nevertheless, the Recast Regulation does not point out any rule on the requirements for liquidators, actually, they are appointed and regulated by each National law. This interpretation is based on Article 7(2c) which specifies, “The law of the State of the opening of proceedings shall determine [...] the respective powers of the debtor and the insolvency practitioner”. Moreover, Article 2 (5) establishes that an insolvency Practitioners could be a person or body, and it provides a sum of their functions; more suggestions are in the Annex B, which contains for each State a list in a very broad manner of who might be an Insolvency Practitioner, without any express provisions on its requirements. For

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<sup>326</sup> Article 60(2)

<sup>327</sup> This power was analysed in previous section.

<sup>328</sup> More powers are not referred directly to groups of companies proceedings, for example the powers provided in Article 41, or as right to request the opening of a secondary proceedings. Substantially, these powers do not change from the past Regulation.

example, about the Italian case, it includes people or bodies with different characteristics and requirements<sup>329</sup> from liquidators to self-employed people.

In this respect, in many EU Member States, there were “different rules on the qualification and eligibility for appointment, licensing, regulation, supervision, professional ethics and conduct of Insolvency Practitioners” (McCormack, et al., 2017, p. 66). Moreover, the European Parliament in the resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law observed that there are certain areas of insolvency law where harmonisation is worthwhile and achievable, especially regarding the general aspects of the requirements for the qualification and work of liquidators. The same conclusion is reached by the European Economic and Social Committee<sup>330</sup>, which affirms on one hand “the Commission to consider the proposals on harmonising the status of liquidators, such as those put forward in the European Parliament resolution of 11 October 2011”. On the other hand, it argues “the differences in national rules governing the status and powers of liquidators affect the smooth operation of the internal market by complicating cross-border insolvency proceedings”.

However, in the new Regulation the situation did not change, although UNCITRAL<sup>331</sup> and INSOL Europe had worked on principles for insolvency Practitioners that appeared convincing. Today, two main problems still exist, because on one hand the legislator should mainly face the fact that most EU Member States “do not have a separate Insolvency Practitioner profession, with its separate code of ethics and discipline” (McCormack, et al., 2017, p. 68). On the other hand, aside if this profession is in some way regulated<sup>332</sup>, some problems arise in relation to the complaints made against practitioners, because the liability rules in Member States are different<sup>333</sup>.

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<sup>329</sup> “Curatore; Commissario giudiziale; Commissario straordinario; Commissario liquidatore; Liquidatore giudiziale; Professionista nominato dal Tribunale; Organismo di composizione della crisi nella procedura di composizione della crisi da sovraindebitamento del consumatore; Liquidatore”.

<sup>330</sup> COD 2012/0360

<sup>331</sup> See UNCITRAL, Legislative Guide on Insolvency Law (2013) page 174-176.

<sup>332</sup> For example in Italy it is regulated mainly through “Avvocato” rules.

<sup>333</sup> McCormack, et al., (2017) at page 87, finds two approaches: “the first is to give the task of considering, investigating, adjudicating upon complaints to some official agency, but in this situation the agency must be properly motivated and resourced”. The second is the self-regulatory approach, where “complaints handlings dealt with by the relevant professional bodies, some independent element must be built into the investigatory and adjudicatory function to ensure rigour and objectivity and to maintain public confidence in the efficacy of the system”.

In conclusion, these new ranges of powers change the rule of Insolvency Practitioners with an increase of cross-border relevance, and it becomes clear that a harmonization is more than necessary and it might be made by the application of such international Principles, again.

### 3.3.3. Final observation.

These articles prove the fact that the legislator had taken into account all the complaints on the impossibility for the Courts to cooperate without any express provision that allows it. Indeed, the rules provided in the above provisions deal with a wide range of forms of cooperation and communication that the Courts and the Insolvency Practitioners can follow, with more or less invasive powers.

In addition, some observation should be made: first that the appointment of Insolvency Practitioners has been necessary because it defines a representative for each State and then they could communicate better with each other's, despite it is necessary to have a future harmonization on eligibility and requirement of Insolvency Practitioners.

Second, the fact that many provisions are referred to the restructuring plan is very fascinating because, as we noted, it agrees another way that Courts can and should follow in the group insolvency, and Courts must consider it. Furthermore, the possibility made by the Recital 60 of a restructuring plan seems to be very clever.

Third, that despite the regulator does not provide for an express implementation of the international guidelines, the recall made appears persuasive, and one should think that in most cases the scholars can certainly can use them as a general principle of law. However, clearly, in other cases it is not allowed, and the regulator should find a solution in a short time, and it is desirable but quite impossible. For example, if we think that the need of a harmonization for the Insolvency Practitioners is required from 2011, and today nothing is made, it appears more realistic to use the general principles, for example made by UNCITRAL, to bridge gaps. In addition, they could be used regarding the plan made according to Article 56(2)

In conclusion, an appreciable innovation in this section regards the fact that the legislator has provided a mandatory obligation to cooperate, that insolvency practitioners must follow. However, without a clear harmonization in the field of sanction, it probably becomes a non-binding guideline, then it will be *de facto* ineffective.



## CONCLUSIONS.

In conclusion, this work has sought to demonstrate that group insolvency continues to be a major issue, with a high risk of causing disastrous consequences to the internal national market. This last aspect is usually underestimated, because the majority of the literature considers this topic to be reserved exclusively to insolvency lawyers rather than as a common, primary problem of the European Union.

However, as Finch (2009) correctly noted, an insolvency produces effect on creditors, shareholders, group subsidiaries, directors, managers of the company, employees, suppliers, and customers, as well as on the entire economy. In fact, any long term investment in Europe should face the fact that the large majority of investors abstain from any investment if experience shows high levels of difficulty in case of insolvency.<sup>334</sup> Indeed, the law in such cases plays the greatest determinant role in a company's chances of survival or failure and in satisfying creditors.

Moreover, one should bear in mind that European integration increases the number of cases in which a group operates across different countries, which certainly makes the problem increasingly current. Indeed, as Good (2011) correctly notes, in recent times large cross-border insolvencies are quite common, including the Parmalat case, Iceland's banks<sup>335</sup> (the Kaupthing Bank, Glitnir Bank and Landsbanki Inslands), and Leman Brothers.

However, in the past the common justification for the lack of any group insolvency rules was that the large majority of groups of a cross-border nature were "*too big to fail*", and thus no specific rules were required. However, as is evident, such a statement is not absolutely right. The first example was the Maxwell Communication Corporation<sup>336</sup> case,<sup>337</sup> regarding one of the world's ten largest media groups and one of the most famous corporate collapses in modern-day business history. It was an unexpected bankruptcy that was provoked by fraud and other seriously unlawful behaviours. That is why it caused much debate, and for the first time legal practitioners were obligated to directly face

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<sup>334</sup> For instance: shareholders are unlikely to act if they will not recover sufficient funds from a director to pay creditors in full before taking their own share, and unsecured creditors are unlikely to pursue actions unless the company's available funds will pay creditors in full before them.

<sup>335</sup> One should bear in mind that this work does not consider rules concerning banks.

<sup>336</sup> It is a very famous case in the English literature.

<sup>337</sup> For further information, see <http://www.nytimes.com/1991/12/18/business/the-media-business-bankruptcy-explanation-by-maxwell.html>.

the problem of group insolvency.<sup>338</sup> However, since then, despite numerous debates, a common approach has not been chosen in the literature from among the wide variety of theories that could be adopted in the abstract, and thus the explanation and the applicability of such theories in the European context is one of the purposes followed in this work.

In this sense, the differences and the different implications were already being discussed, but it is noteworthy to remark that for efficiently administering group insolvency the course that one should follow is surely *procedural consolidation*. However, as this work shows, the different laws of the European Member States and the lack of rules regarding a unique group COMI definition<sup>339</sup> are a high barrier to reaching such a consolidation, and consequently, efficiency. This is due to the fact that if the applicable law is not clearly determinable beforehand, the only outcome is increasing forum shopping and others unlawful behaviours.

To face this problem two ways could be followed: the first is the adoption of a clear group COMI, and the second and most effective solution is the harmonization of substantive insolvency laws between States. This last consideration derives from the fact that, as Mevorach (2009) correctly argues, the *achilles heel* of universalism is the arguable indeterminacy of the home country rules, and thus a clear COMI definition would resolve the issue for only a brief time. The necessity of harmonization is also evident in two considerations. First, one should bear in mind that corporate bankruptcy usually results from external factors or internal deficiencies. The latter could involve directors taking unjustifiable risks or other unlawful activities that are pursued only under certain types of legislation, and thus, despite the common market in the Union, where legal actions are brought could determine different outcomes.

Second, what happens if, under one court's rulings, the parent company is responsible for the subsidiary's debt? In other words, if the proceedings are conducted according to the Recast Regulation and the lawyers must approach different courts in different States, it could happen that the responsibility of the parent is not recognized by the court that administrates its insolvency, but only by the court that administers the subsidiary's insolvency. The question is, which rule prevails in such

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<sup>338</sup> In fact the UK is usually unfavourable to any limitation of sovereignty; however, it adopted the Model Law, and it was the only State that refused to sign the Instabul Convention because it did not deal with group insolvency.

<sup>339</sup> One should bear in mind that this issue is not addressed better by the Recast Regulation 848/2015, that continues to adopt a confusing approach based on the centre of main interest (COMI) of singles companies.

a case? Actually, the priority rule is the only acceptable solution, because the law of the court that first opened the proceeding prevails; however, is this really a reasonable solution? The answer is negative, because it clearly harms the effectiveness and predictability<sup>340</sup> of any law.

In this sense, the only conclusion must be that a degree of harmonization in the area of international insolvency is more than desirable. However, to be realistic, the chances of rapid harmonization are low. This is why incorporating the Model Law at the European level is the first possible *step*; on the one hand it does not concern procedural systems alone, but avoidance and responsibility rules as well, which are – as again this entire work has shown – subject to the same issues, and on the other hand, the Model Law is a readily available tool that could be incorporated immediately.

The second main purpose of this work is to directly analyse the rules and approaches provided by the European Union during these years. First, we have considered Regulation 1346/2000, which was surely a great innovation because it was the first successful attempt to enact a binding law at the supranational level. Indeed, as we have seen, all attempts around the world at such a course failed, and the only relevant provisions concern voluntary rules, such as the Model Law, which is incorporated in only a few States.<sup>341</sup> However, despite its theoretical benefits, Regulation 1346/2000 lacked any rules on group insolvencies, and these were addressed through different interpretations across the European Union. This is why the European Recast Regulation 848/2015 is surely a step forward in the matter, because it attempts to address that question.

Nevertheless, if we take into account the debates in the literature, the judgments by different courts, and the time consumed by the entire legislative proceeding, things should have been better. Indeed, the Recast Regulation continues to adopt the rule by which insolvencies are conducted in the same Centre of Main Interests (COMI) for highly integrated groups, although the Regulation does not define such groups. More in detail, one should bear in mind that nothing has changed regarding the COMI definition, because the new rules are a consolidation of what has been interpreted in Regulation 1346/2000. Indeed, in practice, it so happens that forum shopping behaviours continue, and the *priority rule* applies in proceedings. This rule has a central role, as we have observed, and it is usually applied by European courts to determine jurisdictions or to resolve any conflicts between laws;

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<sup>340</sup> It is particularly true for creditors.

<sup>341</sup> However, it cannot be regarded as a failure.

although it is designed to prevent such conflicts, it generates a race between parties<sup>342</sup> with an increasing of it.

However, Recast Regulation 848/2015 also includes appreciable innovation. The first concerns insolvency practitioners. Indeed, a wide range of powers that should improve communication and coordination has been provided, and such powers could be useful to pursue unlawful behaviours, although they are not always effective. However, some doubts have arisen because it has been observed that some powers, e.g. opt-in and opt-out, are easily subject to conflict of interests, but the responsibility of each practitioner is left to the home state legislation with the related issues examined.

The second, which we view rather more guardedly, regards the new coordination plan. It is surely a necessary step and a partially good idea, although it seems to be insufficient. Indeed, as Italian experiences have shown, voluntary plans<sup>343</sup> could be effective when they might have a high chance of success; for this reason, if the new European plan is used correctly, it will find many applications. However, the prohibition on any consolidation, its non-binding nature, the lack of involvement by creditors, as well as the applicability of the priority rule to determine the coordinator court, are not understandable. Moreover, the coordinator could have a leading role, and considering the high risk of conflicts of interest, it is not reasonable that he/she be subject to the local laws of the opening Court;<sup>344</sup> this is because different provisions across Europe entail high uncertainties for small creditors. However, on the other hand the Article-56 plan, which has been considered in this work as a residual rule, could fill in some failings, although it was not thought out for such purposes, because it is a tool adopted only to coordinate better insolvencies.

In conclusion, the new Regulation approach is better than nothing; however, it is far from being the final rule that resolves coordination questions, and it is far from attaining the level of integration that we expect on the European level. The *procedural coordination* provisions in particular in the new *plan* might have positive results, but it is different from procedural consolidation, which is preferred by the large majority of scholars and by this work. This opinion is supported by the facts that the treatment of different companies' insolvencies within the same jurisdiction have obtained positive

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<sup>342</sup> Moreover, it is applied also in modern group's plan to determine the coordinator court, and in many other cases.

However, while in the case of single companies it could be reasonable, it seems to be unreasonable in case of groups.

<sup>343</sup> This refers to the concordato preventivo.

<sup>344</sup> It is referred to the Court that opened the proceeding plan.

results. Indeed, as Mevorach (2009) correctly argues, the experience of the 1346/2000 Regulation shows that several pan-European MEG restructurings have been successfully coordinated by placing all affiliated companies' proceedings under a single forum and a single law.

If this thesis is correct, the Italian experience could be the easiest way to achieve the European insolvency goals without destroying the autonomy of each State. It is not far from what has been provided by the European Union, however it contains some improvements that make the coordination plan really effective. Indeed, the *concordato preventivo*, if it is re-thought with specific rules on groups, is the easiest solution for many concerns at the European level. One should keep in mind that this is because it is conducted in one Court,<sup>345</sup> with the appointment of a single practitioner, and it requires the active participation of all parties. Indeed, it is proposed by companies, and it includes the votes of the creditors, thus it avoids any abusive use of the right of opt-in or opt-out. Moreover, as one might expect, when it is approved it is binding on the parties involved. In this sense, although under Italian legislation it could be adopted before the beginning of an insolvency, and thus at a different time from the European plan, and despite the improvements that could be made, in my opinion both plans could be efficiently meld. Indeed, they surely could create a more effective one, implementing the following points:

- The creditors' votes.
- The possibility of active participation by the companies in bankruptcy, because it simplifies the adoption of a restructuring plan.
- Binding the plan on all the parties involved. One should think that the Regulator avoids any obligation because it is feared that the plan will not be applied. However, experience has shown that creditors usually approve plans to maximise asset value rather than be limited because of the fear of any mandatory rule, which it is surely an advantage for all parties involved.
- Procedural administration by one Court within one legislation, such as a particular form of consolidation.

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<sup>345</sup> In this sense there are different interpretations, however this is the interpretation proposed by this work.

However, this idea cannot be attained if cooperation between Member State is lacking, and particularly if the path towards harmonization is never begun. Moreover, to prevent any conflicts, the priority rule cannot be applied in the case of groups; a group COMI definition, adopting the mind of management theory, is the solution.

In conclusion, in the next years the new Recast Regulation 848/2015 will be applied in many cases. However, it will suffer the same fate as Icarus: when it flies too close to the sun it will fall into the sea, and all its issues will surface. Indeed, the Regulation will not be able to face difficult insolvencies, and rather than declare the end of the group question, it will proclaim the start of a new debate.

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