*European Insolvency and Restructuring Journal*
*Academic Article*
*EIRJ-2022-2*
*eirjournal.com*

# Group Coordination Proceedings under the Recast EIR in practice

*Sid Pepels, Associate at Jones Day & External PhD Candidate at Radboud University Nijmegen, the Netherlands*

**Abstract**

On 27 June 2022, at the passing of the European Insolvency Regulation (recast)'s lustrum, the European Commission will have to present a report on the application of the so-called group coordination proceeding. This proceeding was introduced into EU insolvency law in order to tackle coordinative problems that arise in cross-border insolvencies relating to groups of companies, for those cases were mere ad hoc communication and cooperation amongst insolvency practitioners is insufficient. Nearing this five-year anniversary, it has become apparent that the group coordination proceeding has not been applied in practice to date. The author sets out to review the added value of the group coordination proceedings, to analyze which reasons could exist for its lack of practical application and to evaluate which changes, if any, would improve the group coordination proceeding's usefulness as a group restructuring tool.

## 1. Introduction

1. On 27 June 2022 five years have passed since the European Insolvency Regulation (recast) (the **Recast EIR**)[1] entered into force and replaced the original European Insolvency Regulation (the **Original EIR**).[2] The Recast EIR introduced, for the first time in the history of European cross-border insolvency law, provisions on insolvency proceedings concerning groups of companies. These new provisions, included in Chapter V of the Recast EIR (**Chapter V**), are aimed at ensuring the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies (the 'group members'),[3] whilst simultaneously respecting their legal separateness.[4]

2. In addition to certain general rights and obligations to engage in (cross-border) communication, cooperation and coordination (**CoCo**) amongst the central players in group insolvency proceedings,[5] Chapter V has introduced the so-called Group Coordination Proceedings (**GCP**). This is a novel proceeding, separate from the already pending group members' individual insolvency proceedings, in which a group

1 Regulation (EU) 2015/848 of the European Parliament and of the Councel of 20 May 2015 on insolvency proceedings (recast).

2 Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings.

3 Recast EIR, recital 51. See for the Recast EIR's definition for 'group of companies' article 2(13) Recast EIR, as further expanded in article 2(14) Recast EIR. See also: Maximilian Eble, 'Auf dem Weg zu einem europaïschen Konzerninsolvenzrecht – die "Unternehmensgruppe" in der EuInsVO 2017' (2016) *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* 115; Alexandre de Soveral Martins, 'Groups of Companies in the Recast European Insolvency Regulation: Around and about the "Group"' (2019) *IIR* 354; Sid Pepels, 'Defining groups of companies under the European Insolvency Regulation (recast): On the scope of EU group insolvency law' (2021) 30 *IIR* 96.

4 See further on these goals that underlie Chapter V and the inherent tension between both objectives: Sid Pepels, 'Cross-border CoCo in group insolvencies under the Recast EIR and the existence of an 'overriding group interest' – One for all, and all for one?' (2021) *EIRJ* <https://eirjournal.com/content/EIRJ-2021-5>.

5 Recast EIR, articles 56-58, 60.

coordinator is appointed who is tasked with coordinating the insolvency proceedings of the group members and may make recommendations and propose a 'group coordination plan' that provides for an integrated approach to the resolution of the group companies' insolvency proceedings.[6]

3. The EU legislator was not alone in adding such a 'supra-procedural coordinative measure' to the restructuring practice's toolbox. The concept of the GCP is based on the German *Koordinationsverfahren*: a similar coordination proceeding which was developed by the German national legislator simultaneously to the legislative process concerning the Recast EIR.[7] The introduction of the *Koordinationsverfahren* to the German *Insolvenzordnung* (Insolvency Act, also: **InsO**)[8] on 21 April 2018 was part of a larger legislative reform to accommodate *Konzerninsolvenzverfahren* (group insolvency proceedings).[9] The GCP also shares similarities with the concept of the 'planning proceeding' as provided for in the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on Enterprise Group Insolvency from 2019 (the **Model Law on Groups**): the planning proceeding similarly provides for the appointment of a 'group representative' and the development and implementation of a 'group insolvency solution'.

4. The introduction of the GCP was however met with significant skepticism by both practitioners and academics. Many questioned its added value.[10] More than once, the GCP has been labeled a "blunt sword".[11] Apparently with one eye on the uncertain added value of the GCP, the Recast EIR prescribes that no later than 27 June 2022, the EU

6 Recast EIR, articles 60(1)(b), 61-77.

7 See Jessica Schmidt, 'Die Konzerninsolvenz im Rahmen der EuInsVO 2015 – kritische Würdigung und Vergleich mit dem neuen deutschen Konzerninsolvenzrecht' (2018) Zeitschrift für Insolvenzrecht 1, 7.

8 See § 269d ff *Insolvenzordnung.*

9 See the announcement for the so-called *Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen* in BGBl. I 2017, Nr. 22 21.04.2017, S. 871.

10 See e.g. on the GCP: Michelle L.H. Reumers, 'Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR' (2013) 10 European Company and Financial Law Review 588; Chris Laughton, 'Whats Next for the EIR?' (Spring issue 2014) Eurofenix 20; Stephan Madaus 'Koordination ohne Koordinationsverfahren? – Reformvorschläge aus Berlin und Brüssel zu Konzerninsolvenzen' (2014) ZRP 192; Stephan Madaus, 'Insolvency Proceedings for Corporate Groups Under the New Insolvency Regulation' (2015) IILR 235; Adrian Cohen, Reinhard Dammann and Stefan Sax, 'Final text for the Amended EU Regulation on Insolvency proceedings' (2015) IILR 117, 120-121; Christoph Thole and Manuel Dueñas, 'Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation' (2015) 24 IIR 214; Robert J. van Galen, 'The Recast Insolvency Regulation and Groups of Companies', in Rebecca Parry and Paul J. Omar (eds), *Reimagining Rescue* (INSOL Europe 2016), p. 53-67; Paul Oberhammer, Christian Koller, Katharina Auernig and Lukas Planitzer, 'Part 3: Insolvencies of groups of companies', in: Burkhard Hess, Paul Oberhammer, Stefania Bariatti (eds), *The Implementation of the New Insolvency Regulation, Improving Cooperation and Mutual Trust* (Nomos Verlagsgesellschaft 2017) 185, 217 ff; Marc D. Lienau, § 60.11, in Moritz Brinkmann (ed), *European Insolvency Regulation: Article-by-Article Commentary* (1st edn, C.H. Beck 2019); Irit Mevorach, 'A fresh view on the hard/soft law divide: implications for international insolvency of enterprise groups' (2019) 40 Michigan Journal of International Law 505; Thomas Himmer, *Das europäische Konzerninsolvenzrecht nach der reformierten EuInsVO* (Mohr Siebeck, 2019), 337-443; Ilya Kokorin and Bob Wessels, *Cross-Border Protocols in Insolvencies of Multinational Enterprise Group* (Edward Elgar Publishing 2021) para. 6.20. See less pessimistic about the GCP Jessica Schmidt, who wrote: "*Nun könnte man ganz ketzerisch fragen: Wozu brauchen wir das Gruppen-Koordinationsverfahren* [the GCP] *dann überhaupt? Ganz unberechtigt ist dies Frage wohl nicht. Indes: Das Gruppen-Koordinationsverfahren schafft immerhin einen klaren und unionsweit einheitlichen Rahmen für eine Koordinierung und das ist schon per se eine ganz wesentliche Errungenschaft, die nicht unterschätzt werden sollte.*" Schmidt (n 7) 1, 13. See also (more) optimistic: Adrius Smaliukas, 'Insolvency of Group of Companies in the scope of the new EIR: Lithuanian perspective' (2015) IILR 379; Jasper R. Berkenbosch and Kay Morley, 'Recast European Insolvency Regulation: Where is the Group Coordinator? New Framework for the Restructuring of European Group Companies' (2018) 4 INSOL World 30-32.

11 Thole and Duenas (n 10) 220; Himmer (n 10) 442 ("*ein stumpes Schwert*").

Commission (hereinafter the **Commission**) shall present a report on the application of the GCP, accompanied where necessary by a proposal for adaptation of the Recast EIR.[12] That is five years earlier than the report on the general application of the Recast EIR, which is due only on 27 June 2027.[13]

5. Whilst some scholars reasoned that the novelty of the GCP might have given it some sort of push in the first years after enactment,[14] the added value of the GCP indeed appears to have been very limited, if not non-existent to date. Research by the Conference on European Restructuring and Insolvency Law (**CERIL**) has recently shown that the GCP has not been applied in practice since its introduction in June 2017, at least not visibly.[15]

6. The *Koordinationsverfahren* has followed a similar path since its enactment in April 2018. It was received with a degree of skepticism, having been dubbed a "*zahnloser Papiertiger*" (a 'toothless paper tiger')[16] and has not been applied in practice to date, to the author's knowledge.[17]

7. The lack of practical application of the GCP could, amongst other things, find its explanation in unfamiliarity with this new type of proceedings or the relative low amount of large corporate bankruptcies since its introduction. This empirical finding may however indicate that there are more systemic reasons for the absence of these supra-procedural insolvency proceedings in practice. This article therefore aims to analyze the added value of the GCP to the ability of groups of companies to efficiently restructure,[18] taking into account any lessons from its German counterpart, the *Koordinationsverfahren* and UNCITRAL's planning proceeding.

8. The article starts in Paragraph 2 with a description of the GCP, the *Koordinationsverfahren* and the planning proceeding, after which it will set out to evaluate the benefits (Paragraph 3) and disadvantages (Paragraph 4) of the GCP in its current form. Paragraph 5 deals with the question whether, and if so, what amendments could be made to the GCP to render it a more useful tool for group restructurings.

---

12 Recast EIR, article 90(2).

13 And every five years thereafter. See article 90(1) Recast EIR.

14 See e.g. Thole and Duenas (n 10) 221, stating that "*In the beginning and in the first years after the regulation comes into effect in 2017, a certain marketing effect could occur, as insolvency practitioners will try to distinguish themselves as leading coordinators of group coordination proceedings. Thus, they might give the procedure a try for this very reason. But this effect might not last for long.*"

15 See Andreas Geroldinger, Myriam Mailly, Stephan Madaus and Nora Wouters, '*Annex to CERIL Statement 2021-2, Pros & Cons of EU Group Coordination Proceedings (Article 61 et seq EIR (Recast))*' (2021) 9 <https://www.ceril.eu/statements-and-reports>. Berkenbosch and Morley (n 10); Kokorin and Wessels (n 10) § 6.20;

16 Christoph Jensen, *Der Konzern in der Krise, Aktuelle Rechtsfragen im Kontext Deutscher und Europäisch-grenzuberschreitender Konzerninsolvenzen* (De Gruyter 2018) 221, note 254 and the literature mentioned there; Marco Wilhelm, *Konzerninsolvenzrecht* (Erich Schmidt Verlag 2018) 65; Andres / *Leithaus Insolvenzordnung*, 4. Aufl. 2018, § 269d, Rn 2. See slightly more optimistic, Fabian Schumann, *Die Unternehmensgruppe im Insolvenzrecht* (Nomos 2019) 341-369, who argues that the *Koordinationsverfahren* should at least be granted a chance to prove its worth to the restructuring practice.

17 See also Braun / *Esser* Insolvenzordnung, 9. Aufl. 2022, § 269d, Rn. 22.

18 I.e. by (better) preventing fragmentation of the group's governance that may result of the opening of (pre) insolvency proceedings, and, where possible, by (better) isolating economic and/or financial difficulties within one or several group companies.

## 2. Coordination in a group insolvency context

### *2.1 Why would one coordinate?*

9. Before discussing the GCP and its German and UNCITRAL counterparts more in-depth, it may be worthwhile to give some further background to the reasons for introducing coordination instruments concerning groups of companies involved in insolvency proceedings.

10. After having long been a topic of discussion, but not of legislation, groups of companies have steadily gained traction in (international) insolvency and restructuring laws over the last decade.[19] The introduction of the Recast EIR's Chapter V, UNCITRAL's Model Law on Groups and the new provisions on *Konzerninsolvenzen* in the German *Insolvenzordnung* are exemplary to that point.[20]

11. The reason for this increased attention may be found in (one of) the main objective(s) of insolvency law: the maximization of value available for creditors. While groups of companies comprise of legally separate group members, they will often economically, financially, administratively and/or operationally function as an integrated and interdependent enterprise.[21] In such a case, a group restructuring (whether entailing a going concern restructuring and/or reorganization of the companies' operations or (partial) liquidation of its assets will often only be successful where a solution is found for (part of) the group as a whole. The value of a group's joint assets will, for instance, often be higher if sold as a whole, compared to a piecemeal liquidation. Conserving or realizing this additional 'synergy value'[22] of the group as a whole is one of Chapter V's main objectives.[23]

12. Conserving such value is, however, often difficult in a European cross-border context. European insolvency laws have traditionally been tailored towards individual debtors as the objects of insolvency proceedings. As a consequence of the group companies' legal separateness, each group company has its own insolvency proceeding, its own insolvency practitioner (who has a duty of care specifically vis-à-vis the creditors of his specific group company), its own court, and most importantly, its own estate: its own pool of assets, available for repayment of its own pool of debt.[24]

---

19 Michael Weiss describes that "*It seems that headline insolvencies are the real driver of reform. With Maxwell, it became clear that cross-border insolvencies of groups of companies needed legislative attention, and Lehman Brothers was the straw that broke the camel's back, triggering calls for a review of European Insolvency Law.*" Michael Weiss, 'Bridge over troubled water: The revised insolvency regulation' (2015) 24 IIR 192.

20 It is also interesting to note that the Indian Working Group on Group Insolvency, constituted by the Insolvency and Bankruptcy Board of India (IBBI), taking inspiration from Chapter V and the *Insolvenzordnung*, prepared recommendations in 2019 to amend the Indian Insolvency and Bankruptcy Code, 2016 in order to accommodate group insolvency proceedings. The Working Group's report from 23rd September, 2019 is available via the website of the IBBI (www.ibbi.gov.in).

21 E.g. because the group's back office functions or financial management is centralized (e.g. via cash pooling), because business units comprise of employees of multiple group companies (which may e.g. be the case in groups where companies are separated along geographical lines) or because one group company depends on products or services provided by another group company in order to produce or service itself.

22 The additional value that may be included in the enterprise as a whole and would be lost if the enterprise's individual components were dismantled.

23 Recast EIR, recital 52.

24 Phillip Blumberg, *The Multinational Challenge to Corporation Law, The Search for a New Corporate Personality* (OUP 1993) 4; See also UNCITRAL 'Legislative Guide on Insolvency Law, Part Three' 2010 (**UNCITRAL Legislative Guide 2010**) 16 <https://uncitral.un.org/en/texts/insolvency>; Jessica Schmidt, 'Das Prinzip "eine Person, ein Vermögen,

Jurisdiction to open insolvency proceedings and to render subsequent related judgments is assessed on an entity-by-entity basis (the 'single entity approach'),[25] also when the debtor is a member of a group of companies.[26] Insolvency proceedings concerning multinational groups of companies may end up fragmented over multiple Member States, with multiple courts and insolvency practitioners involved, rendering a group restructuring significantly more difficult, if not entirely unfeasible.[27] In other words: insolvency proceedings are often conducted on a fragmented, singly entity basis that often does not correspond with the way the business was managed prior to the opening of those proceedings. Communication, cooperation and coordination amongst the main parties in insolvency proceedings (the insolvency practitioners and the courts) are instruments to try and mitigate the negative value impacting effects of this fragmentation.

### *2.2 An overview of the GCP*

13. The initial Commission proposal from 2012 to amend the Original EIR (the **Commission Proposal**) did not include provisions on the GCP.[28] In the Commission Proposal, the Chapter on groups of companies (only) proposed four provisions on CoCo between insolvency practitioners,[29] courts and insolvency practitioners and courts involved in group members' insolvency proceedings,[30] modelled after the Original EIR's CoCo provisions for parallel proceedings concerning the same debtor.

14. It was not until the European Parliament (**EP**)'s legislative resolution in response to the Commission Proposal (the **EP Response 2014**)[31] two years later that the concept of a group coordination proceeding was formally introduced to the legislative process concerning the Recast EIR.[32]

15. The EU legislature, when negotiating the provisions on groups of companies in the Recast EIR, deliberately opted for instruments that

eine Insolvenz" und seine Durchbrechungen vor dem Hintergrund der aktuellen Reformen im europäischen und deutschen Recht' (2015) Zeitschrift für Insolvenzrecht 19.

25 See articles 3 of the Original EIR and the Recast EIR.

26 The Court of Justice of the EU emphasized this in its landmark Eurofood judgment, as early as 2006: "*[…] 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 its own court jurisdiction*." See CJEU 2 May 2006, C-341/04 (*Eurofood IFSC Ltd.*), para. 30. See also para. 36.

27 Note that courts may open insolvency proceedings for several or all companies belonging to the same multinational group in a single jurisdiction, where they find that the Centre of Main Interest (COMI) of all the relevant companies are located in a single Member State. See also recital 53, Recast EIR. In order to centralize proceedings, group companies may thus, for instance, try to 'shift' their COMI to the same Member State. See Recast EIR, recital 28, stipulating that "[…] *in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course* [may be required]*, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means*." Although not within the context of a group of companies, 'COMI shifting' was for instance applied in the well-known Interedil case, CJEU 20 October 2011, C-396/09 (*Interedil*).

28 COM(2012)0744 final - 2012/0360 (COD), the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings.

29 At the time of the Commission Proposal still referred to as 'liquidators'.

30 Commission Proposal, articles 42a-42d.

31 See articles 42da ff of 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)), <www.eur-lex.europa.eu>.

32 For an extensive discussion on the legislative proceeding concerning the Recast EIR, see Weiss (n 10).

maintain the single entity approach by-and-large.[33] Although proposals to that extent were included in the EP's initial 2011 recommendations concerning the revision of the Original EIR (**EP Recommendations 2011**),[34] instruments that have a further reaching impact on the legal separateness of the individual group members have all been left outside Chapter V. Examples of such further reaching instruments are substantive consolidation (the treatment of the assets and liabilities of two or more group companies as if they were part of a single insolvency estate),[35] procedural consolidation (the opening of a single insolvency proceeding regarding multiple group members, whilst maintaining the separation between assets and debts of each group member), the option to open insolvency proceedings before a single court[36] and/or appoint a single insolvency practitioner even where the debtors are located in different jurisdictions (both considered aspects of procedural consolidation).[37] As explained in 2012, the Commission preferred a system of coordination through general cooperation mechanisms (as is the case under Chapter V), over procedural consolidation, because amongst other things, with the opening of all group members' proceedings before a single court, creditors of subsidiaries (including employees, social security and tax authorities) would lose all possibility to open a local insolvency proceeding governed by the law of the state of the subsidiary,[38] an important aspect of the single entity approach. Amongst other things, the ranking of creditors would then no longer be determined by the law of the seat of the company with whom he established a legal relationship.[39]

16. With the GCP, the EU legislator has aimed to provide a structural context for centralizing coordination efforts amongst the individual insolvency proceedings that goes one step further than straightforward CoCo amongst the insolvency practitioners, but does not interfere with the single entity approach. The GCP is designed

33 See e.g. the Commission on its position in the Explanatory Memorandum that is part of the Commission Proposal, p. 9: "*This proposal creates a specific legal framework to deal with the insolvency of members of a group of companies while maintaining the entity-by-entity approach which underlies the current Insolvency Regulation*".

34 See the Resolution of the European Parliament of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), consideration P, <https://eur-lex.europa.eu>.

35 See on the topic of substantive consolidation e.g. Yan Hong, *Materielle Konsolidierung bei Konzerninsolvenz* (Nomos 2019); Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009) 215-229; Jensen (n 16) 46-64; UNCITRAL Legislative Guide 2010 (n 24) 59-74. The application of substantive consolidation has been proposed by multiple scholars as a treatment to insolvency within highly integrated groups of companies. Whilst unarguably rendering the conduct of group companies' insolvencies proceedings more efficient, substantive consolidation can have a significant redistributive effect on the distribution of value: as assets and debts of the group companies are pooled, creditors of group companies with a relatively high asset value will receive less as a result of the pooling, and vice versa. European scholars therefore generally consider substantive consolidation as a measure which – if at all – should only be applied in very specific circumstances (e.g. in case of abuse of corporate identity or intermingling of estates to the extent that independent treatment of the insolvencies is inefficiently burdensome).

36 See recital 53, Recast EIR, which prescribes that courts may: "[…] *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.* […]."

37 Although not included in the Recast EIR's body of text, the EU legislature did foresee the relevance of this mechanism. See recital 50, Recast EIR: "*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.*"

38 See The Commission Staff Working Document: Impact assessment concerning the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, SWD(2012)416, p. 43.

39 *Idem*.

as a supra-procedural coordination framework: it functions as a distinct proceeding, separate from and atop the already pending individual group members' insolvency proceedings. It is intended to allow for a better coordination amongst group members' insolvency proceedings, ensuring the efficiency of the coordination, whilst simultaneously maintaining the legal separateness of the group members:

> "*With a view to further improving the coordination of the insolvency proceedings of members of a group of companies, and to allow for a coordinated restructuring of the group, this Regulation should introduce procedural rules on the coordination of the insolvency proceedings of members of a group of companies. Such coordination should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality.*"[40]

17. This objective of the GCP is further emphasized in the recitals to the Recast EIR, where it is indicated that:

> "*Group coordination proceedings should always strive to facilitate the effective administration of the insolvency proceedings of the group members, and to have a generally positive impact for the creditors. […]*"[41]

18. Any of the insolvency practitioners appointed in a proceeding regarding a group member may request the opening of a GCP.[42] In this regard, it is worthwhile to note that the provisions of Chapter V, if referencing the 'insolvency practitioner', also apply to a so-called 'debtor in possession' (or **DIP**)[43] involved in so-called DIP proceedings (see below) to the extent appropriate.[44] As such, a DIP should also be deemed authorized to request the opening of a GCP.

19. A GCP can be opened by any court in a Member State having opened an insolvency proceeding regarding one of the group members on a first come, first served basis: the court first seized for the opening of a GCP has jurisdiction,[45] unless at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of group members have agreed that another court presents a more appropriate forum.[46] Such a choice must be made within 30 days after the initial court has received the request to open the GCP.[47]

---

40 Recast EIR, recital 54. See similarly the German legislator: "*Das Koordinationsverfahren soll die Abstimmung der Einzelverfahren verbessern, ohne deren Selbständigkeit in Frage zu stellen.*" See the *Gesetzentwurf der Bundesregierung*, *Entwurf eines Gesetzes zur Erleichterung der Bewältigung von Konzerninsolvenzen* (BT-Drs. 18/407) 18.

41 Recast EIR, recital 57. Note that, although strictly speaking, there is a difference between the terms "effective" and "efficient", they are used interchangeably within the context of the Recast EIR. See e.g. CJEU 12 February 2009, C-339/07 (*Deko Marty*), § 22; Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia 2017) 79; Himmer (n 10) 237.

42 Recast EIR, article 61(1).

43 See article 2(3) Recast EIR for a definition of 'debtor in possession'.

44 Recast EIR, article 76. *See* Jessica Schmidt, 'Chap V Insolvency Proceedings of Members of a Group of Companies', in Reinhard Bork and Kristin van Zwieten (eds.), *Commentary on the European Insolvency Regulation* (OUP 2016) § 76.08, arguing that the only relevant provisions of Chapter V that should not be read as encompassing the debtor in possession is article 71(1) on the eligibility to be appointed as a coordinator in group coordination proceedings.

45 Recast EIR, article 62. Arguably, this option to shop for the 'coordination forum' may provide the requesting insolvency practitioner (who may also be a debtor-in-possession, see article 76 Recast EIR) opportunities to arbitrage differences between relevant fora. The EU legislature has tried to tackle this by granting two/thirds of the insolvency practitioners an option to agree on another more appropriate forum (see *infra*). Given the non-intrusive nature of the GCP and it only being a coordinating measure without far-reaching substantive consequences, any potential negative consequences of shopping for the most favorable coordinating forum seem limited.

46 Recast EIR, article 66(1). The EP Response 2014 (n 31) originally prescribed in case of multiple simultaneous requests to open a GCP at different courts that the GCP should be opened in the Member State where the most crucial functions within the group of companies were performed. See EP Response 2014, article 42da(2).

47 Recast EIR, article 66(2).

20. The seized court will open the GCP if it is satisfied that:[48]

    (i) the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members;
    (ii) no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and
    (iii) the proposed group coordinator is (a) a person eligible under the law of a Member State to act as an insolvency practitioner, and (b) is not one of the insolvency practitioners appointed to act in respect of any of the group members and has no conflict in respect of the group members, their creditors and the other insolvency practitioners appointed in respect another group member.

21. The 'group coordinator' is the GCP's protagonist. Its main duties consist of identifying and outlining recommendations for coordinating the group members' insolvency proceedings and proposing a 'group coordination plan' which provides for an integrated approach to the resolution of the group companies' insolvency proceedings.[49] The group coordination plan may include proposals for:

    (i) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;[50]
    (ii) the settlement of intra-group disputes on intra-group transactions and avoidance actions;[51] and
    (iii) insolvency agreements (or protocols) between the insolvency practitioners of the insolvent group members.

22. The EU legislator's emphasis on the legal separateness of the individual group members is reflected in the group coordination plan: it is a 'framework plan', or 'master plan' that requires implementation in the group companies' individual insolvency proceedings in order to gain effect[52] and may not contain any recommendations on substantive consolidation or procedural consolidation.[53] The plan thus, for instance, cannot propose the pooling of the insolvent group members' joint assets for the benefit of all their respective creditors, or the offering of a single restructuring plan to all creditors of all group companies.

23. In order to support its coordinative efforts, the group coordinator is granted the authority to, *inter alia:*

    (i) be heard and participate, in particular by attending creditors' meetings, in any of the group members' proceedings;[54]
    (ii) mediate disputes arising between insolvency

48 Recast EIR, articles 68(1) in conjunction with articles 63(1) and 71(1) and (2).
49 Recast EIR, article 72(1).
50 Such measures may include the increase of equity capital, the simplification of the group's financial structure, the elimination of deficiencies in intra-group cash pooling, reorganization of the group structure, changes in business activities, the divestment of certain business units, changes in the management and reduction of personnel. See Schmidt (n 44) § 72.18-19; Himmer (n 10) 273
51 E.g. a proposal on the procedure under which intra-group disputes may be settled. The plan itself cannot settle disputes due to its non-binding nature, Schmidt (n 44), § 72.20-21.
52 Schmidt (n 44), § 72.26-28. Himmer (n 10) 393 ("*Referenzplans*").
53 Recast EIR, article 72(3).
54 Recast EIR, article 72(2)(a).

practitioners of group members;[55]

(iii) request information from any insolvency practitioner in respect of any group member where that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings;[56] and

(iv) request a stay of insolvency proceedings regarding a group member for a maximum duration of six months[57] if that is necessary to ensure the proper implementation of the group coordination plan and would be to the benefit of the creditors in the proceedings for which the stay is requested,[58] with the aim of creating a protected timeframe for promoting the plan.[59]

24. The group coordinator and the insolvency practitioners of the group members that are included in the GCP are obligated to cooperate which each other, within certain limitations.[60]

25. Participation in the GCP is fundamentally voluntary.[61] First, whilst as a starting point all insolvent members of the group of companies are included in the GCP, insolvency practitioners of the individual members (and debtors in possession) may opt-out of the GCP by objecting to the inclusion of their insolvency proceedings therein within 30 days after receipt of the notice of the request for the GCP's opening.[62] If an insolvency practitioner has opted-out of the GCP,[63] its respective proceedings are not included in the GCP and as such, the powers of the court petitioned to open the GCP and the group coordinator have no effect concerning the relevant group member and its proceedings and entail no costs for it,[64] whilst the coordinator's tasks and rights do not extend to the relevant group member and its proceedings.[65] Second, even if included in the GCP, the participating insolvency practitioners are not obliged to follow the recommendation and group coordination plan prepared by the group coordinator and may deviate therefrom on a comply-or-explain basis.[66] They must only consider them "*[w]hen conducting their insolvency proceedings*".[67]

26. The coordinator's remuneration (e.g. fees and reasonable expenses) that arises out of its appointment will have to be paid from the group members' proceedings and be added on top of the costs for the already pending

55 Recast EIR, article 72(2)(b).
56 Recast EIR, article 72(2)(d).
57 The duration of the stay was originally intended to be three months in the EP Response 2014 (n 34), see article 42db(2)(d).
58 Recast EIR, article 72(2)(e).
59 Madaus 2015 (n 10) 242.
60 Recast EIR, article 74. Although this provision does not literally exclude insolvency practitioners of group members whose proceedings do not participate in the GCP from its scope, it should be assumed that those insolvency practitioners are, in fact, excluded. See articles 65 and 72(4) Recast EIR. See also Schmidt (n 44) § 74.4; Lienau (n 10) § 74.2.
61 See also recital 56 Recast EIR: "*In order to ensure the voluntary nature of group coordination proceedings, the insolvency practitioners involved should be able to object to their participation in the proceedings within a specified time period.*[…]".
62 Recast EIR, articles 64 (1) (a) and 65(1). This opt-out right was included following legislative debates in the EU Council, where concerns had been raised in relation to the GCP's "coercive nature". See Jessica Schmidt, 'The Opt-out and Opt-in Rules for Group Coordination Proceedings in the EIR: A Critical Evaluation and Focus on Large-Scale Insolvencies', in Parry and Omar (n 10) 87, 89.
63 Note that insolvency practitioners who have opted out of participation in the GCP, or whose proceedings have opened after the opening of the GCP may at a later stage opt-in under certain conditions. See article 69 Recast EIR. The Recast EIR does not include an option to opt-out following passing of the 30-days period. See extensively on the opt-in: See Schmidt (n 62) 93 ff.
64 Recast EIR, article 65.
65 Recast EIR, article 72 (4).
66 Recast EIR, article 70 (2).
67 Recast EIR, article 70 (1).

individual insolvency proceedings.[68] Being wary of these additional costs, the recitals to the Recast EIR explicitly specify that:[69]

> "*The advantages of group coordination proceedings should not be outweighed by the costs of those proceedings […]*"

27. In order to contain the GCP's costs, Chapter V includes a fairly restrictive mechanism: to allow the group members' insolvency practitioners to control the costs for the GCP from an early stage,[70] the request to open a GCP should already outline the estimated costs of the proposed group coordination and an estimation of the division of those costs amongst the group members.[71] If, at any point during the proceedings, the group coordinator considers that a significant increase in the costs is required for the fulfilment of his or her tasks, and in any case where the costs exceed 10 per cent of the original estimate, the coordinator will have to inform the participating insolvency practitioners without delay and will have to seek court approval for such a cost increase.[72] After having completed his or her tasks, the final statement of costs and division amongst participating proceedings shall be established via a procedure that allows the group members' insolvency practitioners to file objections and that requires court confirmation.[73]

### *2.3 A coordinated group restructuring under the Recast EIR absent a GCP*

28. The EU legislator did not intend for the GCP to be the only mechanism for coordination of a group restructuring under the Recast EIR; rather, the contrary as follows from its Recitals:

> "*For members of a group of companies which are not participating in group coordination proceedings, this Regulation should also provide for an alternative mechanism to achieve a coordinated restructuring of the group […].*"[74]

29. Insolvency practitioners (and courts) can also, and under certain conditions: are obligated to, engage in CoCo with insolvency practitioners appointed in insolvency proceedings concerning other group members under the provisions as included in Section 1 of Chapter V.[75] Such CoCo may entail straight-forward communication and coordination in a sales process, for example. Similar to the group coordinator, individual insolvency practitioners may also be heard in other group members' insolvency proceedings[76] and may request information from each other.[77]

30. Depending on the circumstances, CoCo outside of a GCP may also take

---

68 See e.g. Schmidt (n 44) and Lienau (n 10) on article 77 for an in-depth discussion on the basis of- and procedures on which the group coordinator's remuneration is determined. The EP Response 2014 originally prescribed that the costs for a GCP should be borne pro rata by the group members in relation to which insolvency proceedings had been opened at the time of the opening of the coordination proceedings, based on their asset value. See article 42df EP Response 2014 (n 31).

69 Recast EIR, recital 58, first sentence.

70 Recast EIR, Recital 58, third sentence.

71 Recast EIR, article 61(3)(d).

72 Recast EIR, article 72(6).

73 See article 77 Recast EIR. Cohen has argued, on the basis of this provision, that the group coordinator shall only receive payment of his costs at the end of the GCP. In cases where all participating insolvency practitioners agree to the apportionment of the costs and deem interim bills in compliance with the requirements of article 77(1) Recast EIR (i.e. adequate, proportionate to the tasks fulfilled and reflective of reasonable expenses), interim payments cannot already be made by the participating proceedings, assuming the court that has opened the GCP confirms such interim payments. See Cohen, Dammann and Sax (n 10) 121.

74 Recital 60, Recast EIR. See also Schmidt (n 44) § 61.08-09.

75 Recast EIR, article 56-60.

76 Recast EIR, article 60(1)(a).

77 Article 56(2)(a) requires insolvency practitioners to communicate potential relevant information to their counterparts in other group members' proceedings.

a more substantial form. In engaging in CoCo, group members' insolvency practitioners are, for instance, obligated to consider whether possibilities exist for restructuring group members which are subject to insolvency proceedings and if so, coordinate the proposal and negotiation of a 'coordinated restructuring plan'.[78] Similar to the group coordination plan that is proposed within a GCP, a coordinated restructuring plan should be understood as a coordinated framework approach to the group's restructuring.[79] If such a coordinated restructuring plan is offered, again, similar to the group coordinator in a GCP,[80] insolvency practitioners have the right to request a stay of any measures related to the realization of assets in proceedings concerning another group member, if that is required to ensure the proper implementation of the restructuring plan.[81]

31. For the purpose of coordinating the administration and supervision of the group members' affairs and/or considering, proposing and negotiating a coordinated restructuring plan, the group members' insolvency practitioners may even agree to either grant additional powers to one of them or to allocate certain tasks amongst them.[82] They could, for instance, centralize the task of developing a group restructuring to one or several of them, under certain conditions.[83]

32. In order to formalize these and other forms of CoCo, insolvency practitioners and courts involved in group members' proceedings may turn to the conclusion of 'agreements or protocols' for the purpose of facilitating cross-border cooperation of multiple group members' insolvency proceedings.[84] Having proven useful in a cross-border insolvency context,[85] the EU legislator has included a specific reference to these instruments in Chapter V[86] in order to acknowledge their practical importance and further promote their use.[87] They may, for instance, proof particularly helpful in cases with complex intertwining of the operations and/or financing amongst the group companies (e.g. a centralized cash

78 Recast EIR, article 56(2)(c).

79 Madaus 2015 (n 10) 10; Himmer (n 10) 272 ff; Vallender / *Hermann* EuInsVO, 2. Aufl. 2020, §56.56, 60.23; Uhlenbruck / *Hermann* Insolvenzordnung, 15. Aufl. 2020, §56.40- 41; Braun / *Honert* Insolvenzordnung, 9. Aufl. 2022, §56.17-19.

80 Recast EIR, article 72(2)(e).

81 Recast EIR, article 60(1)(b). See article 60 Recast EIR for the further requirements and procedure for such a stay of realization measures, including the requirement that neither the requesting insolvency practitioner´s proceeding nor the proceeding in respect of which the stay is requested are subject to a GCP (article 60(1)(b)(iv).

82 Recast EIR, article 60(2) last paragraph.

83 As Recast EIR article 60(2) last paragraph Recast EIR stipulates, the granting of powers or allocation of tasks should be compatible with the rules applicable to each of the relevant proceedings involved. As certain Member States' national insolvency laws may deem the exercise of the powers and the duties of insolvency practitioners to be of a highly personal nature, this form of coordination may require that such division of powers or tasks is conditional upon final approval of the other group members' insolvency practitioners. See e.g. Christian Brünkmans, 'Auf dem Weg zu einem europaischen Konzerninsolvenzrecht', (2013) Zeitschrift fur das gesamte Insolvenzrecht 797, 801; Jensen (n 10) 243-244; Himmer (n 10) 244.

84 Recast EIR, recital 49. See for an extensive study on cross-border insolvency protocols concerning groups of companies and their legal basis, contents, effects, major characteristics and limitations: Kokorin and Wessels (n 10). See also UNCITRAL Practice Guide (available via the link in n 24), Chapter III, p 27 ff.

85 Cases involving EU debtors in which protocols were put in place are, for instance, the Sendo insolvency (a protocol concluded between an English liquidator in main proceedings and a French liquidator in secondary proceedings), the worldwide Lehman Brothers collapse and, although not within the scope of the Recast EIR, Jet Airways (National Company Law Appellate Tribunal New Delhi 26 September 2019, JOR 2020/45, m.nt. Veder). These and other protocols have been included in for a database of online available cross-border insolvency protocols, the Universiteit Leiden's 'Insolvency Protocol Project': https://www.universiteitleiden.nl/en/research/research-projects/law/insolvency-protocols-project. See also Kokorin and Wessels (n 10).

86 Recast EIR, article 56(1).

87 Commission Proposal (COM(2012), 744 final), p. 9.

management system in which cash is shared), cases with different types of insolvency proceedings (e.g. both DIP proceedings (see below) and bankruptcy proceedings concerning members of the same group of companies) and cases where the appointment of insolvency practitioners is coordinated.[88]

33. As the Recast EIR prescribes in its recitals, agreements and protocols may vary in form from written to oral and in scope from generic to specific.[89] In such agreements and protocols, insolvency practitioners may, for instance, agree on certain principles or mechanics for information sharing,[90] claim lodgement and verification[91] or a joint approach towards liquidation of the assets.[92]

34. As such, absent a GCP and its group coordinator, group members' insolvency practitioners also have ample opportunity under the Recast EIR to take a coordinated approach to the group members' insolvency and even formalize such coordination, e.g. via a coordinated restructuring plan or a protocol.

35. Moreover and in addition to the Recast EIR and its Chapter V, in 2019 a second important EU insolvency law instrument was introduced which will also affect the landscape for cross-border group restructurings in the years to come: Directive (EU) 2019/1023 (the **Restructuring Directive**).[93] Under the Restructuring Directive, Member States are obligated to ensure that where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability and that debtors accessing such restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business (so-called debtor in possession proceedings, or **DIP proceedings**).[94] Whilst traditional bankruptcy proceedings are generally aimed at liquidating the company's assets, after which the company seizes to exist, DIP proceedings are aimed at (partially) restructuring distressed companies by their own management[95] and (partially) conserving the business.[96] DIP proceedings offer debtors and/or creditors an instrument to impose a

88 See for a more extensive list of circumstances that may generally contribute to the usefulness of agreements or protocols: UNCITRAL Practice Guide (available via the link in n 24), Chapter III, Para. A, Para. 2, p. 29-31.

89 Recast EIR, recital 49.

90 See e.g. the Lehman Brothers Protocol (para. 4-6), the Madoff Protocol (para. 4-5), the Jet Airways Protocol (para. 5) all included in Chapter 14 of Kokorin and Wessels (10).

91 See e.g. the Lehman Brothers Protocol (para. 8), the Jet Airways Protocol (para. 9) all included in Chapter 14 of Kokorin and Wessels (10).

92 See e.g. the Lehman Brothers Protocol (para. 7), the Madoff Protocol (para. 6), the Jet Airways Protocol (para. 8) all included in Chapter 14 of Kokorin and Wessels (10).

93 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

94 See articles 4(1) and 5(1) of the Restructuring Directive.

95 Which arguably has the benefit of monetizing on the sitting management's knowledge of the company, as opposed to appointing an external official who first has to get acquainted with the company and will have less understanding of the company's business, its market and the challenges it faces.

96 The Restructuring Directive defines 'restructuring' as meaning "*measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements;*", Restructuring Directive, article 2(1)(1).

restructuring plan on dissenting stakeholders who's cooperation is required for an effective restructuring under the protection of a stay on creditors' actions.

36. Within the context of groups of companies, DIP proceedings differ from traditional bankruptcy proceedings in a significant aspect: rather than providing for the appointment of an insolvency practitioner who takes control over the companies' assets and affairs, the group companies' managements (partially) stay in place (in possession). As such, and contrary to bankruptcy proceedings, the group of companies' chain of command that allowed it to function in a coordinated manner prior to the opening of the proceedings, remains (partially) intact in case of DIP proceedings.[97] Whilst fragmentation of group members' insolvency proceedings is still a significant challenge within the context of DIP proceedings,[98] the fact that the group's chain of command in principle remains (partially) effective, will often automatically ensure a certain degree of continuing coordination of both the group's business and restructuring during the proceedings.

### *2.4 The German Koordinationsverfahren*

37. As mentioned in the introduction to this article, the blueprint for the GCP stems from the *Koordinationsverfahren*, the German supra-procedural proceeding that was introduced in the German *Insolvenzordnung* in April 2018.[99] As the name already indicates, the *Koordinationsverfahren* (a coordination proceeding) is also a supra-procedural coordination mechanism, in which an additional proceeding is placed on top over the already existing individual insolvency proceedings, that includes the appointment of a *Verfahrenskoordinator* (a coordinator)[100] who is responsible for a coordinated approach to the relevant group members' insolvency proceedings, particularly by proposing a *Koordinationsplan* (a coordination plan).[101] The *Koordinationsverfahren* is intended, amongst others, to institutionalize the cooperation between insolvency practitioners and is deemed a middle option between loose cooperation amongst *Insolvenzverwalter* (insolvency practitioners) and the more far-reaching option to appoint the same person(s) as *Insolvenzverwalter* for multiple group companies.[102]

38. A request to open a *Koordinationsverfahren* can be made by any group company,[103] when

97 Note however that, pursuant to the Restructuring Directive, DIP proceedings may include the appointment of a so-called practitioner in the field of restructuring (or **PIFOR**), who may *inter alia* be tasked with taking partial control over the debtor's assets and affairs during the negotiations of a restructuring plan. A PIFOR may alternatively or additionally be tasked with supervising or assisting in the drafting or negotiation of a restructuring plan. See article 2(12)(c) Restructuring Directive. It should also be noted that based on Member States' national insolvency legislation, the directors' duty of care may e.g. shift at a certain point from the group, the individual group members and/or the shareholder towards the individual group members' creditors.

98 See *infra*, para. 75-76.

99 InsO, § 269d – 269i. See extensively on the *Koordinationsverfahren* Christian Pleister and Ingo Theusinger, in Lucas F. Flöther, *Konzerninsolvenzrecht* (C.H. Beck 2018), § 365 ff; Fabian Schuman, *Die Unternehmensgruppe im Insolvenzrecht* (Nomos 2019) 337 ff. See also Felix Konold, *Konzerninsolvenzrecht* (Peter Lang 2017) § 158 ff; Jensen (n 10) 209 ff.

100 InsO, § 269e Abs. 1.

101 InsO, § 269f Abs. 1.

102 MüKoInsO / *Brünkmans* Insolvenzordnung, 4. Aufl. 2020, § 269d Rn 2.

103 There is debate under German scholars whether a group company that is not insolvent but belongs to the

insolvency proceedings concerning at least two *gruppenangehörige Schuldner* (debtors belonging to the group) have been opened.[104] A *(vorläufiger) Gläubigerausschus* ((provisional) creditors' committee) is also allowed to request the opening of a *Koordinationsverfahren*, if it unanimously resolved so.[105]

39. It is interesting to note that the original German proposal for legislation concerning *Konzerninsolvenzen* (insolvency of groups of companies) from January 2013 prescribed the appointment of the *Verfahrenskoordinator*[106] from the group of (provisional) insolvency practitioners in the group members' proceedings.[107] According to the explanatory note to the original legislative proposal, this would have the benefit that the *Verfahrenskoordinator* would already be familiar with at least a part of the group of companies.[108] As is the case with the group coordinator under the Recast EIR, the final provision as implemented in the *Insolvenzordnung* however prescribes that the *Verfahrenskoordinator* should be independent from the insolvency practitioners appointed in the individual group members' proceedings.[109] The *Verfahrenskoordinator* also cannot be one of the debtors themselves.[110] The German legislator explains this amendment to the original proposal by indicating that the functioning of the *Verfahrenskoordinator* is dependent on the *Insolvenzverwalter* (insolvency practitioners)[111] being open to accepting him as a coordinator.[112] By appointing a third party as coordinator, any appearence of a bias towards the *Koordinator*'s own proceedings is prevented. Where the individual *Insolvenzverwaltern* suspect such a bias, this could, for instance, hamper the exchange of information.[113] The German legislator however has opened a small door towards the appointment of one of the group members' *Insolvenzverwalter* as *Koordinator*: only if these disadvantages are not present or can be compensated by other advantages, such as special expertise and/or experience or disproportionate costs for appointing a third party.[114]

40. Almost identical to the group coordination plan, the Koordinationsplan can describe all measures relevant for a coordinated approach to the insolvency proceedings, including suggestions to restore the economic efficiency of the individual debtors belonging to the group and the group of companies, to resolve internal group disputes, and to contractual agreements between the insolvency administrators.[115] The *Koordinationsplan* as prepared by the *Koordinator* is not binding in the

group of companies concerning which the *Koordinationsverfahren* is requested, may also request the opening of insolvency proceedings. See in favor of granting this authority to solvent group companies e.g. Pleister and Theusinger (n 99) § 371; Uhlenbruck / *Mock* Insolvenzordnung, 15. Aufl. 2019, § 269d Rn. 10. See against: Braun / *Esser* Insolvenzordnung, 9. Aufl. 2022, § 269d Rn 15.

104 InsO, § 269d Abs. 1 and 2 S. 1.

105 InsO, § 269d Abs. 2, S. 2.

106 At this stage in the legislative procedure, the *Verfahrenskoordinator* was being referred to as the *Koordinationsverwalter* in the proposed legislative text.

107 See § 269e Abs. 1 of the *Diskussionsentwurf* of the *Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen* dated 3 January 2013 (the **Diskussionsentwurf**).

108 Diskussionsentwurf (n 107) 24.

109 InsO, § 269e Abs. 1 S. 2.

110 InsO, § 269e Abs. 1 S. 3. See in favor of this amendment to the Diskussionentwurf e.g. Pleister and Theusinger (n 99 )§ 375 and in particular fn 611.

111 Which also under German law should also be understood as the debtor in possession (*Schuldner in eigenverwaltung*) where DIP proceedings (*Eigenverwaltungsverfahren*) have been opened. See § 270d InsO. See also the *Gesetzentwurf* (n 40) 41-42.

112 The *Gesetzentwurf* (n 40) 35-36.

113 The *Gesetzentwurf* (n 40) 35-36.

114 The *Gesetzentwurf* (n 40) 36.

115 InsO, § 269h Abs. 2.

individual group members' insolvency proceedings.[116] It functions as a reference plan for the measures to be taken in the insolvency proceedings at the level of the individual group companies[117] and has no concrete legal consequences and requires implementation in the individual group members' proceedings.[118] The individual group members' *Insolvenzverwalter* are thus free to deviate from the plan in whole or in part.[119] They do however need to explain the *Koordinationsplan* to their respective creditors (if not already done so at the required time by the *Koordinator*) and justify if and why they wish to deviate from the *Koordinationsplan*.[120] The *Insolvenzordnung* thus takes a similar approach to the coordination plan as the Recast EIR: non-binding, on a comply-or-explain basis.

41. In order to support the *Verfahrenskoordinator,* and again, similar to the GCP, the individual group members' *Insolvenzverwalter* (insolvency practitioners) are obligated to cooperate with him or her, and share relevant information.[121]

42. The *Koordinationsverfahren*, however, also differs from the GCP on several interesting points, the most obvious of which is its territorial scope of application. Whilst the GCP may be applied in a cross-border setting, where 'insolvency proceedings' included in Annex A to the Recast EIR have been opened concerning different members of a group of company in two or more Member States,[122] the *Koordinationsverfahren* is only available in case of proceedings concerning *gruppenangehörige Schuldner* (debtors belonging to the group) with their *Mittelpunkt ihrer hauptsächlichen Interessen* (Centre of Main Interest) in Germany.[123]

43. Additionally, although the *Koordinator*'s plan is in principle non-binding on the individual group members' proceedings, the *Insolvenzverwalter* do not have the option of an opt-out of participation in *Koordinationsverfahren*.[124] The *Insolvenzordnung* also does not allow the *Koordinator* to request a stay of realization measures in individual group members' proceeding to safeguard the group restructuring,[125] but does require court confirmation of the *Koordinationsplan*.[126]

116 The *Gesetzentwurf* (n 40) 39; Wilhelm (n 16) 69; Schumann (n 16) 351; Braun / *Esser* Insolvenzordnung, 9. Aufl. 2022, § 269i Rn 11.
117 The *Gesetzentwurf* (n 40) 23.
118 Uhlenbruck / *Mock* Insolvenzordnung, 15. Aufl. 2019, § 269h Rn 16.
119 MüKoInsO / *Eidenmüller and Frobenius* Insolvenzordnung, 4. Aufl. 2020 § 269i, Rn 11.
120 § 269i Abs. 1 S. 1 and 2.
121 InsO, § 269f Abs. 2.
122 Recast EIR, recital 61.
123 See § 3e Abs. 1 InsO, which limits the provisions concerning *Unternehmensgruppe* (groups of companies) as included in the *Insolvenzordnung* to group members whose *Mittelpunkt ihrer hauptsächlichen Interessen* (COMI) is located in Germany. See on the scope of application of Chapter V's provisions and their relationship with the provisions on the *Koordinationsverfahren*: Pepels (n 3). See also MüKoInsO / *Brünkmans* Insolvenzordnung, 4. Aufl. 2020, § 269d Rn 4-5.
124 See e.g. Schmidt (n 7) 26. Schmidt is explicitly supportive of this choice: "*Allerdings hat der deutsche Gesetzgeber m.E. gut daran getan, das Modell des Opt-out und Opt-in gerade nicht zu übernehmen. Denn wie dargelegt führt es nicht nur zu einer weiteren Verkomplizierung eines ohnehin hochkomplexen Verfahrens, sondern könnte sich speziell für große Konzerninsolvenzen als echter »Hemmschuh« erweisen.*" See also: Braun / *Esser* Insolvenzordnung, 9 Aufl. 2022, § 269d Rn 7.
125 Apparently, this instrument was left out of the German legislation on *Konzerninsolvenzen* as it was feared that the potential of a stay could be used as means of blackmail and could lead to group members' insolvency practitioners mutually blocking each other's proceedings. See Wilhelm (n 16) 69.
126 InsO § 269h Abs. 1 S. 1. The *Koordinationsplan* also requires approval of a *Gruppen-Gläubigerausschusses* (a group-level creditors' committee) if instituted in a concrete case pursuant to 269c Abs. 1 S. 1 InsO. See 269h Abs. 2 InsO. Note that initially the EP Response 2014 also prescribed court

44. Interestingly, and going one step further than the Recast EIR, the *Insolvenzordnung* does provide the *Gläubigerversammlung* (creditors' meeting) of the individual group members the power to oblige their respective *Insolvenzverwalter* to present an *Insolvenzplan* in their respective insolvency proceeding based on the *Koordinationsplan*,[127] effectively obligating the *Insolvenzverwalter* to implement the *Koordinationsplan* to some extent.[128]

45. Although outside the scope of this article, it may be worthwhile to address the several other instruments to accommodate group insolvency proceedings which the German *Insolvenzordnung* provides for, including (i) the option to bring all group members' proceedings before the same court (the *Koordinationsgericht*) under certain conditions on the basis of group jurisdiction (*Gruppen-Gerichtsstand*) when they are located in different German jurisdictions,[129] (ii) the option to appoint the same insolvency practitioner in relation to the group members' proceedings, even when those proceedings are pending before different German courts,[130] and (iii) CoCo rights and obligations for *Insolvenzverwalter*, *Gerichte* (courts) and *Gläubigerausschüsse* (creditors' committees) alike those included in Chapter V, Section 1.[131] On a more substantive note, German restructuring law also allows the restructuring of group guarantees via a German restructuring plan since the entry into effect of the *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen (Unternehmensstabilisierungs- und –restrukturierungsgesetz*, or **StaRUG**) on 1 January 2021.[132] The German legislator has deliberately refrained from including measures such as full procedural consolidation and substantive consolidation in the *Insolvenzordnung*.[133]

### *2.5 The Model Law on Groups*

46. In expanding on its previous work on the well-known UNCITRAL Model Law on Cross-Border Insolvency (1997)[134] and the UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency,[135] UNCITRAL further

approval of group coordination plans as a requirement for it to take effect. See EP Response 2014 (n 31), article 42dc.

127 InsO, § 269i Abs. 2.

128 Under German law, the *Gläubigerversammlung* generally has the right to specify the goal of an *Insolvenzplan* when that is being prepared, pursuant to § 157 Abs. 2 InsO. The right under § 269i Abs. 2 InsO however goes one step further and allows the *Gläubigerversammlung*, depending on the level of detail as included in the *Koordinationsplan*, to actually determine the content of the *Insolvenzplan* to some extent. See Eidenmüller and Frobenius (n 119) § 269i, Rn 17 ff; Braun / *Esser* Insolvenzordnung, 9. Aufl. 2022, § 269i Rn 15-16.

129 InsO, § 3a-3e and 13a.

130 InsO, § 56b.

131 InsO, § 269a-c.

132 See inter alia § 2 Absatz 4 StaRUG. See similarly under Dutch law: article 372 *Faillissementswet* (Dutch Bankruptcy Act). See extensively on the impact that the StaRUG and the broader legislative act by which is was introduced, the *Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz* (SanInsFoG), on German group insolvency proceedings: Peter H. Hoegen and Christopher Kranz, 'Neue Möglichkeiten der Konzernsanierung durch SanInsFoG und StaRUG' (2021) Neue Zeitschrift für Insolvenz- und Sanierungsrecht 105.

133 The *Gesetzentwurf* (n 40) 2, 16-17. Full procedural consolidation was considered to be too far-reaching in many cases and not flexible enough as a general approach to group insolvencies. Substantive consolidation would have redistributive effects which run counter to creditors' expectations. According to Hong, the majority of German legal scholars opposes the concept of substantive consolidation, mainly as it would be too large of an infringement of the principles of limited liability (*Haftungstrennung*) and legal separateness (*rechtlichen Selbständigkeit*). See Hong (n 35) 112-120. See in agreeance with the German legislator: Jensen (n 10) 57-64; Konold (n 99) 46-55. Arguing in favor of substantive consolidation under German law: Christoph Paulus, 'Wege zu einem Konzerninsolvenzrecht' (2010) Zeitschrift für Unternehmens- und Gesellschaftsrecht 270, 291.

134 Which dealt with single debtors and does not consider group insolvencies.

135 See *supra* n 24 for these and other UNCITRAL documents.

concretized its contribution to the field of international insolvency law in 2019 with its Model Law on Groups and the accompanying Guide to Enactment (the **Guide to Enactment**).[136] In short, the Model Law on Groups is designed to equip States with modern legislation addressing the domestic and cross-border insolvency of 'enterprise groups' that they can implement in their domestic legislation.[137] Contrary to the Recast EIR, which is binding in its entirety and directly applicable in all Member States[138] and stipulates automatic cross-border recognition of insolvency proceedings and related judgements in other Member States,[139] the Model Law on Groups requires implementation and may thus vary per enacting State[140] and requires that foreign insolvency proceedings file for recognition before granting them status in the enacting State.[141]

47. The Model Law on Groups also provides for a coordinative proceeding, the 'planning proceeding': a 'main proceeding'[142] commenced in respect of an 'enterprise group member'[143] (*i.e.* in principle not a separate proceeding)[144] in which one or more other enterprise group members participate[145] for the purpose of developing and implementing a group insolvency solution, to the extent that the relevant enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution[146] and a 'group representative'[147] has been appointed.[148] A 'group insolvency solution' is "a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members".[149]

136 The Guide to Enactment is included in the same document as the Model Law on Groups.

137 *Cf.* Model Law on Groups, article 1 on the scope of the Model Law on Groups.

138 Treaty on the Functioning of the European Union, article 288.

139 Recast EIR, articles 19 ff and 32. See also in particular article 21 Recast EIR, which prescribes that the insolvency practitioner in main proceedings may, in principle, exercise his powers pursuant to the *lex concursus* in all other Member States.

140 Whilst the Guide to Enactment (§ 13) advises enacting States to implement the Model Law on Groups with as little amendments as possible, the enacting State is in no way bound to implement the model law in a certain way and may do so with all amendments it seems fit.

141 See for an extensive analysis of Chapter V and the Model Law on Groups Mevorach (n 10) and more generally on the Recast EIR and the original Model Law on Cross-Border Insolvency (1997): Reinhard Bork, The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency 26 (2017) *IIR* 246.

142 A proceeding taking place in the State where the debtor has its COMI. See Model Law on Groups, article 2(j).

143 The Model Law on Groups' equivalent of the 'member of a group of companies' under the Recast EIR. Article 2(d) of the Model Law on Groups defines the 'enterprise group member' as "*an enterprise that forms part of an enterprise group*" and the article 2(b) defines the 'enterprise group' as "*two or more enterprises that are interconnected by control or significant ownership*". See more extensively on the definition for 'enterprise group member' Pepels (n 3).

144 Whilst the definition for 'planning proceeding' as used in article 2(g) of the Model Law on Groups assumes that that proceeding is a main proceeding in relation to an 'enterprise group member', the additional text at the end of that definition indicates that a court could recognize as a planning proceeding a proceeding that is separate to the main proceeding, provided that the separate proceeding has been approved by the court with jurisdiction over the main proceeding.

145 An enterprise group member participating in another group members' main insolvency proceedings has the right to appear, make written submissions and be heard in that proceedings on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution. See article 18(4) Model Law on Groups.

146 As the Guide to Enactment describes: "*In other words, it should be apparent that the group insolvency solution in question could not be developed and implemented without the involvement of that particular enterprise group member.*" See Guide to Enactment § 46.

147 The Model Law on Groups' equivalent of the group coordinator, meaning "*a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding*". See article 2(e) Model Law on Groups.

148 Model Law on Groups, article 2(g).

149 Model Law on Groups, article 2(f). The group insolvency solution is intended to be a flexible concept

48. As is the case with its European counterpart, participation of group members in the planning proceeding is voluntary: enterprise group members may commence or opt out of such participation at any time.[150] In the words of Mevorach:

> "*Under both the [Recast] EIR and the [Model Law on Groups], a coordinated solution depends on group member initiative and agreement. […]*"[151]

49. The group representative is tasked with the representation of the planning proceeding and the development of a group insolvency solution (in contrast with the insolvency representative's task of administration of the individual enterprise group member's insolvency proceedings).[152] The group representative may seek recognition of the planning proceedings in States where group members have a presence (assuming those States have implemented the Model Law on Groups) and seek certain forms of relief (assistance) in relation to enterprise group members 'subject to- or participating in' a planning proceeding.[153] Examples of such relief include a stay of execution against the assets of an enterprise group member, staying the commencement or continuation of individual actions or -proceedings concerning the assets, rights, obligations or liabilities of the enterprise group member, staying its insolvency proceeding altogether, suspending the right to transfer, encumber or otherwise dispose of any assets of the enterprise group members, transferring the administration or realization (of some) of the enterprise group member's assets in the relevant state to the group representative (or another designated person), the approval of funding arrangements concerning the group member and the provision of financing thereunder and/or any additional relief that may be available under the relevant State's laws.[154]

50. The group representative may request such relief both in the State of the planning proceeding in relation to assets or operations of participating or subjected group members in that State,[155] as well as abroad, following (an application for) recognition of the planning proceedings in other States where those assets or operations are located.[156] The available relief is subject to certain provisions intended to protect the interests of group members that are not subject to insolvency proceedings[157], or whose COMI is located in another State than the State in which the relief is sought[158] and the interests of creditors and other interested persons.[159] Similar to the group coordinator's

in that it could be achieved in a variety of ways, including a reorganization, a sale as a going concern of (part of) the business, a sale of assets or a combination of a liquidation and reorganization of members of the enterprise group. See Guide to Enactment, § 42.

150 Model Law on Groups, article 18(3). See also the Guide to Enactment, § 47; Kokorin and Wessels (n 10) 67.

151 Mevorach (n 10) 526.

152 Model Law on Groups, article 19(1) 2nd sentence. See also Guide to Enactment, § 118.

153 The phrases "*subject to*" and "*participating in*" planning proceedings are used to distinguish between an enterprise group member who is the debtor in the main proceedings that led to the planning proceedings and an enterprise group member who is participating therein.

154 Model Law on Groups, articles 20(1), 22(1) and 24(1).

155 See Model Law on Groups, article 19(2) and (3) and article 20 on the authority of the group representative and the relief available to the planning proceeding in the State in which the planning proceeding was opened.

156 See Chapter 4 of the Model Law on Groups on recognition and the (interim) relief available in a host State following (an application for) recognition of the planning proceeding in that other State.

157 In contrast to the Recast EIR, the Model Law on Groups is designed in way that also allows group members that are not subject to insolvency proceedings to participate in the development of a group insolvency solution in a planning proceeding. See Guide to Enactment, § 47.

158 See articles 20(2) and (3), 22(4) and (5) and 24(3) and (4) Model Law on Groups.

159 See article 27 Model Law on Groups.

rights in the GCP,[160] the group representative can also participate in any proceedings relating to an enterprise group member in a State recognizing the planning proceeding.[161]

51. There are several noteworthy differences between Chapter V and the Model Law on Groups, in addition to the slightly broader range of relief available to the group representative. First, and fitting within the Model Law on Group's system of recognition and relief, the group insolvency solution requires local approval in the affected group members' States once finalized: the portion of the group insolvency solution that affects the relevant group member should be approved in the State in which that group member has its COMI or establishment.[162]

52. Second, a planning proceeding and its group representative are not necessarily independent from the individual group members' already pending proceedings: the planning proceeding is generally intended to be one of the group members' already pending main proceedings (which is 'promoted' to the planning proceeding)[163] and a group representative may be the same (legal or natural) person as the insolvency practitioner appointed in the main proceeding that led to the planning proceeding.[164]

53. Third, although not explicitly referencing these terms, the Model Law on Groups does not prohibit procedural or substantive consolidation and includes certain measures that are akin to those instruments.[165] As a result, depending on the circumstances at hand, measures resulting in lighter forms of consolidation may be implemented, for instance as a result of certain relief being granted (e.g. by entrusting the administration, liquidation or distribution of certain group members' assets to the group representative[166] or other relevant relief available in the enacting State[167]) or by granting an undertaking on the treatment of claims to prevent opening of other insolvency proceedings.[168]

54. This last form of procedural consolidation is particularly interesting. Similar to the Recast EIR,[169] an insolvency representative appointed in a main proceedings may give an undertaking to 'foreign creditors'[170] that their claims, which could otherwise have been brought in a non-main (or secondary) proceeding in another State, may be treated in

160 See article 72(2)(a) Recast EIR.

161 Model Law on Groups, article 25. Participation may typically include the ability to petition, request or make submissions to the court on issues such as protection, realization or distribution of assets of the group member or coordination with the planning proceedings. Where the 'proceeding' in which the group representative wants to participate would concern individual actions by or against the group member (as opposed to collective insolvency proceedings), participation would entail appearing in court and being heard. See Guide to Enactment, § 182.

162 Model Law on Groups, article 26. The group representative may directly apply to a court in the enacting state to be heard on issues relating to the approval and implementation of the solution.

163 See the definition for 'planning proceeding' article 2(g) Model Law on Groups and Guide to Enactment, § 44.

164 Guide to Enactment, § 41.

165 The Guide to Enactment cautiously suggests that, in order to further facilitate the development of a group insolvency solution, enacting States may also include provisions on joint application for commencement, 'procedural coordination' and, in limited circumstances, substantive consolidation as a form of available relief to planning proceedings taking place in the enacting State. See Guide to Enactment, § 115.

166 Model Law on Groups, articles 20(1)(d), 22(1)(e) and 24(1)(f) and (2).

167 Model Law on Groups, articles 20(1)(h), 22(1)(h) and 24(1)(i)).

168 See Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP 2018) 232.

169 See article 36 Recast EIR.

170 Creditors of an establishment of the relevant debtor, which is located in another State than the State in which the debtor's COMI is located and thus its main proceeding have been opened.

accordance with the treatment they would have received under the laws that would govern such non-main proceedings.[171] In other words, the insolvency representative in the main proceedings would treat 'foreign creditors' *as if* a local non-main proceeding would have been opened. The non-main proceedings are then 'synthetically' conducted within the framework of the main proceedings.[172] The added value of such undertakings lies in the authority for courts to stay or decline to commence an insolvency proceeding concerning the relevant debtor, if such an undertaking is given.[173]

55. Synthetic proceedings have been particularly helpful in a multinational group context, where the group's cross-border insolvency was treated centrally from a single jurisdiction,[174] and the synthetic treatment of 'foreign claims' was used to prevent the opening of secondary or non-main proceedings in other jurisdictions and the subsequent fragmentation that would result in.[175] As the Guide to Enactment lists, synthetic proceedings may have numerous benefits, amongst which cost savings by minimization of the number of proceedings; shorter time frames with fewer disputes and less competition between different proceedings; more efficient creditor participation; reduced need for coordination and cooperation between potentially numerous concurrent proceedings; and more effective cross-border reorganization.[176]

56. Whilst the Recast EIR limits the application of synthetic proceedings to cases of parallel proceedings concerning the same individual debtor and only prevents the opening of secondary (or non-main) proceedings, the Model Law extrapolates the concept to a group context in several interesting ways. First, the undertaking may also be given 'cross-debtor' if the (envisaged) insolvency proceedings relate to different enterprise group members,[177] *e.g.* a claim that could be brought in a non-main proceeding in one State relating to an enterprise group member that is participating in a planning proceeding

171 Model Law on Groups, article 28. As is clarified in the Guide to Enactment, *[f]or the purposes of article 28, the reference to "treatment" of the foreign claim means that when the insolvency representative giving the undertaking distributes assets or proceeds received as a result of the realization of assets, it will comply with the distribution and priority rights under the domestic law that governs those claims, thus according them the treatment they would have received in non-main proceedings.*" See Guide to Enactment, § 193 ff, quote from § 195.

172 *Cf.* Janger, who refers to the concept of 'virtual territoriality': "*Under virtual territoriality, in a cross-border case, a jurisdiction's bankruptcy procedure should, insofar as possible, be distinguished from that jurisdiction's law of substantive legal entitlements. The procedural bankruptcy laws of the "home" country should govern the case, but even in a case where all assets are administered centrally, the choice of substantive law should be determined by ordinary (non-bankruptcy) choice-of-law principles.*" See Edward J. Janger, 'Virtual Territoriality' (2009/2010) Columbia Journal of Transnational Law 401 for a more elaborate discussion on the theoretical framework of virtual territoriality. See also on a similar track in 2010 N.W.A. Tollenaar, 'Dealing with the Insolvency of Multinational Groups under the European Insolvency Regulation' (2010) TvI 14.

173 See inter alia article 29 Model Law on Groups. See similarly article 38(2) Recast EIR.

174 Which was presumed to be the 'home jurisdiction' (the 'COMI State') for all relevant group members, whether incorporated under the laws of that state or not.

175 See for European examples of such synthetic proceedings e.g. the cases of MG Rover (*In re* MG Rover Beluxl SA/NV, [2006] EWHC 1296 (Ch)) Collins & Aikman (*In re* Collins & Aikman Europe SA, [2006] EWHC (Ch) 1343) and Nortel (*In re* Nortel Network SA & ORS, [2009] EWHC (Ch) 206).

176 Guide to Enactment, § 197.

177 Guide to Enactment, § 202. It should be noted that the application of synthetic proceedings within a group context was already briefly discussed by Janger in 2010, who proposed that, in case of cross-border group insolvencies, "[*t*]*he cases could be administratively consolidated in the jurisdiction that was the COMI for the group. However, the COMI court would administer the cases of the various subsidiaries under the law of the COMI for the subsidiary. So, if the COMI of the debtor was jurisdiction A, but it had subsidiaries located in jurisdictions B and C, the court in A would be charged with, as much as possible, administering the cases of the subsidiaries as if they had been filed in the COMI of the subsidiary. This is merely an extension of the principles articulated for a single firm. […]*". See Janger (n 172) 434.

in the enacting State could be treated in the planning proceeding – a proceeding concerning *another* enterprise group member – in accordance with the treatment it would be accorded in a non-main proceeding. An undertaking, for instance, that the creditors of a certain subsidiary's foreign establishment would be treated in the planning proceeding (which often will be the main proceeding in relation to the group's parent company) as if proceedings in relation to that establishment had been opened in its own State could be grounds to stay or decline the commencement of non-main proceedings in relation to that subsidiary.[178]

57. Secondly, the Model Law on Groups also includes several supplemental provisions for States that wish to take a more extensive approach to synthetic proceedings,[179] also applying synthetic proceedings to prevent the opening of *main* insolvency proceedings if an insolvency representative (e.g. the foreign insolvency representative appointed in the relevant group company's non-main proceeding) or a group representative appointed in the enacting State has undertaken to treat the claims in his jurisdiction *as if* a main proceeding (i.e. in the COMI state of the relevant debtor) has been opened in the enacting state,[180] or absent such an undertaking, if the planning proceeding has been recognized and the court is satisfied that the interests of the affected enterprise group members' creditors are adequately protected.[181] This broad usage of synthetic proceedings allows a group of companies to effectively prepare and implement the restructuring from one central jurisdiction even in cases where not all enterprise group members have their COMI in the same State. If restructuring proceedings (e.g. schemes of arrangements) have been commenced concerning several native and foreign companies pertaining to the same group in a single jurisdiction (e.g. the United Kingdom), these supplemental provisions can be applied to prevent that centralized group restructuring from being fragmented by the opening of individual proceedings in the foreign group companies' home countries if centralization would lead to a better outcome.

58. Whilst undoubtedly efficient, UNCITRAL has included these supplemental provisions in a separate, supplemental part of the Model Law on Groups for a reason. The use of synthetic proceedings to prevent insolvency proceedings in the COMI State of a debtor can substantially interfere with stakeholders' expectations on the forum in, and the applicable procedural law under which the insolvency of their debtor would be dealt with.[182] According to UNCITRAL, departure from these principles should only be warranted if, amongst other

178 See article 28 (1)(a) Model Law on Groups. In such cases, the undertaking should be granted by the group representative and the relevant main proceeding's insolvency representative jointly. This joint undertaking is particularly relevant where the planning proceeding is conducted separate from the relevant main proceedings and, as such, does not have any assets of its own. See Guide to Enactment, § 203, describing that in such cases, *"where the undertaking is given jointly the assets of the insolvency estate to which the insolvency representative has been appointed can provide support for the undertaking […] and the undertaking will thus be binding upon that insolvency estate."*

179 Model Law on Groups, articles 30-32. See Guide to Enactment, § 211-212.

180 Model Law on Groups, article 30, 31.

181 Model Law on Groups, article 32(1). See also Guide to Enactment, § 218. An undertaking pursuant to article 28 or 30 of the Model Law on Groups would likely be (highly) conducive, but not necessary for the application of this provision, as follows from the use of the word "*particularly*".

182 Guide to Enactment, § 29.

things, the efficiency benefits outweigh the potential negative effect on creditors' expectations and on legal certainty in general.[183]

59. To date, the Model Law on Groups has not been implemented in any State's domestic legislation, to the author's knowledge.[184] The original Model Law (1997) was adopted by 50 States in a total of 54 jurisdictions at the time this article was finalized.[185]

## 3. The benefits of a Group Coordination Proceeding

60. All skepticism mentioned in the introduction aside, the addition of a specific coordination procedure for groups to the Recast EIR should be seen as a step in the right direction. During the drafting of the Original EIR and its never enacted predecessor (the 1995 Convention),[186] the inclusion of any provisions on groups of companies was still considered a bridge too far.[187] On first review, the GCP does have some characteristics that may make it a sympathetic solution to prevent fragmentation in group insolvency proceedings.

61. The first and most obvious benefit of a GCP lies in the appointment of the group coordinator: an officer who is specifically introduced to approach the group members' insolvency proceedings from a collective perspective. Whilst individual insolvency practitioners should also act in the interest of the group as a whole, within certain boundaries,[188] they may naturally be inclined to approach any group effort from the interests of their own proceedings. Their national laws will generally require them to do so: they will have a duty to maximize their estates in the interest of the creditors involved in their own proceedings.[189] There will also often be ample issues attracting their attention to their own proceedings. This natural inclination towards their own proceedings and interests amongst those proceedings may sometimes hamper effective cross-border exchange of information or limit the willingness to engage in extensive discussions on potential group efforts.[190]

62. In addition, the group companies' interests may not always be fully aligned. Take, for instance, a case in which the insolvency practitioner of one group company has communicated its intention to institute

183 *Idem*. The Guide to Enactment mentions that: "*[s]uch a departure would appear to be justified in only limited circumstances, such as:*
*(a) In jurisdictions where courts traditionally hold a large degree of discretion and flexibility in conducting insolvency proceedings;*
*(b) Where the enterprise group in question was closely integrated and there was, therefore, an obvious benefit in treating enterprise group member claims in the planning proceeding in lieu of commencing main proceedings in another jurisdiction (i.e., proceedings that would be conducted at the enterprise group member's COMI); and*
*(c) Where the use of the [non-supplemental] provisions […] (if available) could not achieve a similar result.*"

184 Contrary to the Model Law (1997) (see *infra*), the UNCITRAL website did not yet include an overview of jurisdictions that have implemented the Model Law on Groups at the time of publication of this article.

185 See for an up-to-date overview of the States that have adopted the Model Law (1997): https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.

186 The European Convention on Insolvency Proceedings of 23 November 1995.

187 See § 76 of the Virgós/Schmit Report, which accompanied the 1995 Convention on Insolvency Proceedings, available via <http://aei.pitt.edu/952>, last consulted 3 April 2022; European Commission, Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, COM(2012) 743 final, p. 14.

188 Pepels (n 4).

189 See e.g. under German law § 1 InsO.

190 Although, it should be noted that in light of article 56 Recast EIR, insolvency practitioners involved in group members' insolvency proceedings should not easily be allowed to shy away from engaging in CoCo with their counterparts involved in other group members' proceedings.

transaction avoidance actions[191] concerning a transaction between its group company and another insolvent group company. It is easy to imagine that from that point onwards, CoCo amongst the insolvency practitioners involved will become increasingly limited.[192] Chances of finding group-wide efficient solutions to the group's problems that leverage synergy value become increasingly low: a group approach requires cooperation and coordination, which, in turn, requires effective communication and (some form of) trust.

63. Insolvency practitioners may also keep their cards close(r) to their chests for more trivial reasons, such as clashing personalities, language barriers, cultural differences or long physical distance.

64. The introduction of a group coordinator can heavily impact such dynamics. The sheer presence of a group coordinator will put more focus on the interests of the group as a whole and create more momentum to work towards a coordinated approach. Whilst the individual group members' insolvency practitioners will often also have ample issues to deal with in their own proceedings, a group coordinator's only task is to ensure efficient coordination amongst the group members' proceedings. As such, its appointment may encourage further-reaching forms of CoCo than the insolvency practitioners would achieve outside of a GCP.[193] Channeling all coordination efforts into one person also takes away potential loss of information and creates a central point from which decisions about various intended measures may be taken.

65. The GCP thus creates a platform to develop a strategy for a coordinated approach, which should result in a more efficient outcome of the individual group members' proceedings and is to the benefit the group companies and their creditors.[194] With the GCP mostly setting out procedural rules and letting the group coordinator in principle free to determine the content of its recommendations and the group coordination plan,[195] the GCP provides a substantively flexible tool, allowing group coordinators to attend to the needs of every specific case.

66. In addition, the group coordinator is impartial[196] and independent from the group members, their creditors and their insolvency practitioners.[197] The group coordinator has no own estate in which interests it should act, or a duty of care concerning some of the group's creditors. Rather, the group coordinator acts in the interest of all group members' insolvency proceedings involved in the GCP and their creditors.[198] If, for instance, one group member's insolvency practitioner invokes transaction avoidance provisions in relation to a transaction entered into by 'its' group member with another insolvent group member, the insolvency practitioners involved may be hesitant to speak openly about the topic with each other. They may not want to give relevant

191 Such as the Dutch *faillissementspauliana* from article 42 ff *Faillissementswet* (Dutch Bankruptcy Act).
192 See concerning the *Koordinationsverfahren*, Schumann (n 16) 353.
193 CERIL Report (n 15) 3, also referencing Alexander Belohlávek, *EU and International Insolvency Proceedings II* (2020) § 61.03.
194 CERIL Report (n 15) 3.
195 Note however, that the recommendations and group coordination plan may not include proposals on substantive or procedural consolidation. See *supra* para. 0.
196 Recast EIR, article 72 (5).
197 Recast EIR, article 71 (2).
198 Recast EIR, recital 57, 1st sentence.

information away to 'the other side'. As the group coordinator has no other interest than ensuring efficient coordination amongst the proceedings, the insolvency practitioners will likely however feel free to exchange information more openly with the group coordinator, effectively allowing it to function as a forum for multilateral discussion and resolution of disputes (*e.g.* subject to certain confidentiality arrangements where relevant).[199] It is well conceivable that channeling such disputes via the group coordinator will in some cases result in (more) efficient solutions (out-of-court), than absent such an instituted mediator-like character.

67. Moreover, given its independent and impartial character, courts and insolvency practitioners could be expected to be more likely to accept proposals from the group coordinator or allow it to educate them on certain (foreign law) topics or facts.[200] Differing from the individual insolvency practitioners, the group coordinator will not likely be suspected of acting to the benefit of one (or some) of the proceedings or have a (potential) conflict of interest.

68. Taking the above into account, and particularly where a group coordinator is a senior and respected professional within the restructuring and insolvency field, it can function as a bridge-builder in ways that the individual group companies' insolvency practitioner cannot. The group coordinator can add value with its impartiality and independence.[201]

69. Whilst the group coordinator is to a large extent at the mercy of the group members' individual insolvency practitioners for the acceptance of his group coordination plan and recommendations,[202] differing from the *Insolvenzordnung*,[203] the Recast EIR grants him one weapon[204] to compel coordination: the power to request a stay of the individual group members' proceedings.[205] Somewhat similar to the individual group members' insolvency practitioners absent a GCP,[206] the group coordinator may request a stay of individual group members' proceedings for a period of up to six months, if that would be necessary to ensure the proper implementation of the group coordination plan as proposed by the insolvency practitioners.[207]

199 The German legislator on the German Koordinationsverwalter: "*Beispielsweise kann der Koordinationsverwalter ein zunächst informelles Forum zur multilateralen Erörterung und Lösung von Problemen schaffen, die sich – etwa in Bezug auf die Identifizierung, Bewertung und Behandlung von konzerninternen Transaktionen und Forderungssalden – in allen Verfahren gleichermaßen stellen und deren Lösung durch eine gemeinsame Methode und Verfahrensweise vereinfacht wird.*" Gesetzentwurf (n 40) 23.

200 Adrius Smaliukas, 'Insolvency of Group of Companies in the scope of the new EIR: Lithuanian perspective' (2015) IILR 379, 382; CERIL Report (n 15) 2.

201 Smaliukas (n 200) 382.

202 See on the German *Koordinationsverfahren* Brünkmans, who writes that "*Die Überzeugungsarbeit des Verfahrenskoordinators bezüglich der Verwalter und Gläubiger in den Einzelverfahren haben mangels Weisungs- und sonstiger Zwangsmittel schwerpunktmäßig mediativen Charakter.*" which informally translates to: "The persuasive work of the coordinator concerning the administrators and creditors in the individual proceedings is primarily of a mediative character due to the lack of means to instruct or otherwise bind." MüKoInsO / *Brünkmans* Insolvenzordnung, 4. Aufl. 2020, § 269f Rn. 7.

203 MüKoInsO / *Brünkmans* Insolvenzordnung, 4. Aufl. 2020, § 269f Rn. 9.

204 His *schärfstes Schwert*, MüKoInsO / *Reinhart* Insolvenzordnung, §72. 18.

205 Recast EIR, article 72(2)(e).

206 See *supra* para. 30 in relation to the group members' individual insolvency practitioners' power to request a stay of realization measures where that, *inter alia*, would be necessary to ensure the proper implementation of a coordinated restructuring plan as proposed by the insolvency practitioners. See for some differences between the two stays e.g. Lienau (n 10) § 72.19; Braun / *Fritz* Insolvenzordnung, 9. Aufl. 2022, §72.25; Vallender / *Fritz* EuInsVO, 2. Aufl. 2020, § 72.74 ff.

207 Recast EIR, article 72(2)(e), which additionally requires that the stay would be to the benefit of the creditors in

70. Secondly, it has been argued that the comply-or-explain mechanism for insolvency practitioners whose proceedings are included in the GCP but who do not wish to follow the group coordinator's recommendations or the group coordination, may not be as toothless as it is often portrayed.[208] Jessica Schmidt argued that it could be difficult for insolvency practitioners to successfully substantiate why they are unwilling to cooperate with recommendations or a group coordination plan if that is sensible and in the interest of all group companies.[209] One could argue that there is a certain degree of *psychologischen Bindungswerkung*: psychological binding force.[210] The comply-or-explain mechanism could have some indirect binding effect, as it results in insolvency practitioners being compelled to clarify *and*, more importantly, justify why they do not adhere to the group coordinator's findings and proposals.[211]

71. Given the insolvency practitioners' duties to maximize value, that psychological binding force may even be joined by some legal force if the coordinator's group coordination plan and/or recommendations would particularly result in a more efficient outcome for the deviating insolvency practitioner's proceedings (instead of e.g. a neutral outcome, only benefitting other proceedings),[212] potentially leading to measures of liability or dismissal.[213] The GCP could in practice potentially derive more binding power from the comply-or-explain mechanism than it has been painted to have.[214]

## 4. But, why has it not been applied, then?

72. Notwithstanding the above outlined benefits that a GCP may bring, and having been deliberated on in several actual cross-border group insolvency cases,[215] the GCP and its German counterpart have not been applied in practice to date, as far as observable.[216]

73. One could think of several potential causes for the lack of application of these coordination proceedings. The number of bankruptcies in the EU has, for instance, been relatively low following the end of the post 2007-2008 financial crisis recessions.[217] The potential for application of the GCP has been lower than it would have been if it had been introduced in times of economic downturn.

74. Within that already relatively low sample of cases, as a result of its design, the GCP will only provide a potentially helpful tool for a small portion of that sample. In light of Chapter V's general goal of

---

the proceedings for which the stay is requested. Note that, pursuant to this provision, the group coordinator may also request the lifting of any existing stay.

208 Schmidt (n 24) 42; Schmidt (n 44) §70.03; Schmidt (n 7) 11-12. See in relation to the *Koordinationsverfahren* Uhlenbruck / *Mock* Insolvenzordnung, 15. Aufl. 2019, § 269h Rn 17.

209 Moreover, as Schmidt argues, the comply-or-explain mechanism in contrast to top down decision power at the coordinator's level is a logical consequence of the deliberate compromise character of the GCP: it is an attempt to on the one hand attain as much coordination as possible, whilst simultaneously maintaining the individual autonomy of the individual group members' proceedings. See Schmidt (n 7) 11-12.

210 See concerning the *Koordinationsverfahren*, Schumann (n 16) 366.

211 Thole and Duenas (n 10) 218; Himmer (n 10) 424. Uhlenbruck / *Mock* Insolvenzordnung, 15 Aufl. 2019, § 269h Rn 17 on the *Koordinationsverfahren*.

212 See concerning the *Koordinationsverfahren*, Schumann (n 16) 366.

213 Schmidt (n 7) 11.

214 *Cf* Himmer (n 10) 441.

215 See CERIL Report (n 15) 6, 8.

216 See *supra*, n 17.

217 See e.g. for a graph outlining the EU-wide number of bankruptcies from 2015 onwards, the statistics available via Eurostat, https://ec.europa.eu/eurostat/cache/recovery-dashboard/.

efficiency,[218] the Recast EIR requires that the GCP will only be applied where its advantages outweigh the costs of those proceedings,[219] and thus, where it facilitates the effective administration of the group members' insolvency proceedings and has a generally positive impact for the creditors.[220] The court petitioned to open a GCP, will have to verify whether the opening of such proceedings is, in fact, appropriate to facilitate the effective administration of the different group members' proceedings.[221] As the opening of a GCP adds another proceeding to the already existing proceedings, including the appointment of an additional insolvency professional and all the costs and potential delays in timing involved therewith,[222] the bar for opening a GCP is set high.[223] The GCP will often be "too expensive to be attractive".[224] That is particularly the case as the insolvency practitioners can also coordinate their conduct in- and supervision on the proceedings as well as a potential restructuring outside a GCP, e.g. on the basis of a protocol. The counterfactual for analyzing the advantages of opening a GCP (i.e. lower realization costs, greater proceeds or faster distribution on claims) in relation to its costs should be the situation where the insolvency practitioners (and courts) are held to their CoCo obligations and apply their rights under articles 56-60 Recast EIR. If anything, the GCP is thus limited to large bankruptcies where coordination is complex and the administration costs may be relatively low in comparison to the total value of the estate.[225]

75. The GCP's scope of useful application is further limited to cases where the management (of some) of the group members' and their proceedings is transferred to different court appointed insolvency practitioners. The GCP appears to be designed with (solely) these traditional types of proceedings in the back of the mind. The GCP aims (to a limited extent) to centralize decision-making concerning the conduct of the insolvency proceedings and the restructuring of the group within a single person, the group coordinator. By doing so, it aims (again, to a limited extent) to counter the fragmentation that results from the transfer of the rights and duties to administer the group members' assets and business to different insolvency practitioners in insolvency proceedings concerning different group members. Insolvency practitioners are not subject to the chain of command that allows the group to function in a coordinated manner under regular business circumstances (such as shareholder voting rights or contractual agreements limiting board members in their decision authority).

76. In cases where DIP proceedings have been opened in relation to group members such fragmentation is less of a problem. The chain of command will largely remain intact as the

218 See e.g. recitals 51, 57 and 58 Recast EIR. See on the topic of efficiency as a goal of Chapter V's provisions: Pepels (n 4).
219 Recast EIR, recital 58.
220 Recast EIR, recital 57. Effective and efficient are used interchangeably in this context. See *supra* n 41.
221 See article 68(1) in conjunction with 61(1)(a) Recast EIR.
222 See also CERIL Report (n 15) 4.
223 As Chris Laughton analyzed in relation to the Commission's proposal to include the GCP in the Recast EIR early on in 2014, "[…] *it is a little surprising – and very definitely not in the interests of creditors – that the legislature should seek to introduce such a significant additional layer of cost and unnecessary complexity.*" See Laughton (n 10) 23. See also, referencing Laughton, Madaus 2014 (n 10) 195.
224 Oberhammer, Koller, Auernig and Planitzer (n 10) 218.
225 *Cf* Oberhammer, Koller, Auernig and Planitzer (n 10) 218.

existing management structures generally stay in place. The fragmentation problem with DIP proceedings in a multinational group insolvency context rather results from the difficulties attributed to those proceedings being conducted before different courts in different Member States and under deviating national insolvency laws, e.g. with differing requirements to opening proceedings, differing durations of stays of creditors actions, differing requirement for confirmation of restructuring plans and differing procedural rules.[226] The GCP does not provide a solution for this type of fragmentation, as the group coordination plan is (merely) a master plan that is developed on a supra procedural platform and that requires implementation in the individual group members' proceedings, under the respective governing laws and before the respective courts.[227] If a multinational group of companies is restructured through DIP proceedings,[228] the opening of a GCP will thus often have little added value in terms of coordination.[229] As one of the main characteristics of DIP proceedings lays within the fact that the debtor (partially) remains in control, the opening of a GCP with the appointment of an independent third party as group coordinator could even be presumed counter-efficient in most DIP restructurings.

77. In addition to its limited scope of usefulness, the GCP has several structural issues that will likely have contributed to its lack of application. The first of these issues may be found directly in the manner in which the proceedings can be opened: upon the request of the group members' insolvency practitioners. As a GCP includes the appointment of a group coordinator who assumes coordinative duties, the opening of a GCP would require insolvency practitioners to actively give away a certain degree of control over the process and work to another professional, the group coordinator. The CERIL Report mentions that insolvency practitioners may:[230]

> "*tend to feel self-centred (and fee hungry) or play out that they present the most economically dominant company (especially relating to owning most assets or large parts of information, playing a central role in sales or having the key personnel)*."

and

> "*do not want to lose control, as the appointment of a group coordinator would necessarily imply a (self) limitation to their powers.*"

78. Although this represents a rather cynical take on the character of insolvency practitioners, they may indeed find themselves incentivized to keep the work to themselves where possible. Under their national laws they will often be remunerated based on the time spent on the files. Transferring their work to the group coordinator may thus be commercially insensible, if they are capable of doing that work (undertaking coordinating

226 See CERIL Report (n 15) 8-9. See also Robert van Galen, 'Insolvent Groups of Companies in Cross Border Cases and Rescue Plans', in: Preadviezen 2012 (Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht), p. 52, digitally available via www.nvrii.nl/publicaties; EC, Directorate-General Justice and Customers, J. Villadsen, A. Maucorps, L. Todaro et al., *Impact assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law*, para. 3.2.

227 See *supra*, para. 0.

228 In case of DIP proceedings, the provisions of Chapter V that are applicable to the insolvency practitioner shall also apply to the debtor in possession, where appropriate. See article 76 Recast EIR.

229 Note that this may be different if one or multiple PIFOR's are appointed who take (partial) control over the group companies' asset and/or the restructuring process, see *supra* n 97.

230 CERIL Report (n 15) 5.

efforts) themselves, particularly where that contains interesting work. This effect may be enlarged as a result of the ample alternative opportunities for CoCo outside of a GCP that Chapter V offers: with, amongst others, (i) the obligation to consider and, where relevant develop a coordinated restructuring plan for the group, (ii) the option to divide tasks and duties amongst themselves and (iii) the possibility to formalize their CoCo in a protocol, the insolvency practitioners will often have a credible alternative in order to maximize efficiencies and synergy value amongst the group members' proceedings.[231] As the group members' insolvency practitioners are the only ones allowed to request the opening of a GCP,[232] the fact that they may find themselves incentivized *not* to open such proceedings already presents a substantial hurdle for the GCP's application.

79. Secondly, as a result of the GCP's double voluntary nature and the benefits of opting out of it (see below), the GCP does not provide solutions for the archetypical group insolvency case for which it appears to be built: situations where there is potential for a group restructuring, but one or several court appointed insolvency practitioners is/are unwilling to cooperate. If an insolvency practitioner is unwilling to cooperate with a (partial) group restructuring (e.g. a joint going concern sale of the group's enterprise), he can opt-out of the GCP before it has even opened.

80. From the perspective of insolvency practitioners at the outset of a GCP, opting out of that GCP could potentially have several benefits. First, they would not be bound to the comply-or-explain mechanism in relation to the group coordinator's recommendations and the group coordination plan. Outside of a GCP, the insolvency practitioner is free to determine the strategy for his or her insolvency proceeding. Second, the added costs resulting from participation in a GCP are spared. Third, the insolvency practitioner severely limits the risk of being confronted with a request for a stay concerning his own proceedings, and thus losing the control over their proceedings. They do not run the risk of the group coordinator requesting a stay of proceedings, as the coordinator may only exercise his powers in relation to the group members who participate in the GCP,[233] and, additionally, the insolvency practitioners involved in the proceedings who do participate in the GCP are also not allowed to request a stay of realization measures by virtue of their inclusion in the GCP.[234] Fourth, the insolvency practitioners in the proceedings that opted out of the GCP can still engage in cooperation, communication and coordination with the other group members' insolvency practitioners and courts, whether in- or outside the GCP, where such CoCo complies with the requirements for articles Recast

231 See *supra*, para. 28 ff.

232 See *supra*, para. 18.

233 See *supra*, para. 25. See Cohen, Dammann and Sax (n 10) 120-121, who also refer to the potential for a group coordinator to request a stay of proceedings as a reason for insolvency practitioners to withhold from participation to the GCP, although it should be noted that they do not refer to the option that another insolvency practitioner who has opted out of the GCP may then still request a stay under article 60 Recast EIR. See also CERIL Report (n 15) 5.

234 As the group coordinator cannot request a stay of proceedings concerning a group member´s proceeding that is not participating in the GCP (see article 72 (4) in conjunction with (2)(e) Recast EIR), and any insolvency practitioner of the group members included in the GCP may also no longer request a stay of realization measures under article 60 (see article 60(1)(b)(iv) Recast EIR).

EIR.[235] In comparison to the provisions included in Section 2, Chapter V, coordination outside a GCP, e.g. on the basis of a consensual protocol, offers insolvency practitioners significantly more flexibility in determining their strategy for group related measures.[236]

81. These benefits may make opting out all too appealing to insolvency practitioners in cases where they are not fully on board with the GCP.[237] That is a real problem for the GCP's effectiveness: it brings significant potential for blockades at the outset of the proceedings, and thus for creating nuisance, and may render a group restructuring (almost) impossible where an important group company or a substantial number of them opt(s) out of the proceedings.[238]

82. And, even when the insolvency practitioner does participate in the GCP, the comply-or-explain mechanism is the only factor binding doubtful insolvency practitioners to the group coordinator's recommendations and plan.[239] Apart from the authority to request a stay of participating insolvency proceedings, the group coordinator has no real stick to hit reluctant insolvency practitioners with.[240] The group coordinator has no final decisive power whatsoever. As Schumann has eloquently put it: the group coordinator can point the office holders and participants in the individual group members' insolvency proceedings towards an efficient solution, but they must travel this road themselves.[241]

83. Although not entirely toothless, as discussed above,[242] the GCP should definitely be typed as a blunt sword as a result of this double voluntary nature. Its effectiveness is still almost entirely dependent on the willingness of the individual group members' insolvency practitioners.[243] The voluntary nature of the GCP is one of its most fundamental issues.[244]

84. Whilst the additional costs of opening another proceeding will often be considerable, the added value of a GCP is uncertain at the outset of the proceedings, to say the least, as a result of the GCP's voluntary nature. As Cohen stated, the GCP "[…] *is unlikely to be particularly helpful, as it lacks certainty and predictability from*

235 Apart from the request for a stay of realization measures in another group member's proceedings, the CoCo provisions as included in Section 1 of Chapter V do not limit their scope to group companies outside a GCP.

236 CERIL Report (n 15) 7.

237 Although, as a counterweight, where the GCP results in a group coordination plan that would have (significantly) benefited the insolvency practitioner's group member's proceedings if it would have participated in the GCP, the insolvency practitioner could, potentially, have some explaining to do to its own creditors.

238 See also: Schmidt (n 7) 12.

239 See *supra*, para. 25.

240 See also: CERIL Report (n 15) 6-7.

241 In relation to the German *Verfahrenskoordinator*, free translation from Schumann (n 16) 351: "*Der Verfahrenskoordinator kann den Funktionsträgern und Beteiligten der Einzelverfahren lediglich Wege zu einer pareto-effizienten Verfahrensabwicklung aufzeigen, beschreiten müssenn sie diese Wege selbts*". See also Oberhammer, Koller, Auernig and Planitzer, who's research indicated that "*due to the considerably low level of actual powers of the group coordinator, the effectiveness of the new group coordination system could be questioned.*" Oberhammer, Koller, Auernig and Planitzer 2017 (n 10) 218.

242 See *supra*, para. 70-71.

243 See also Himmer (n 10) 441.]

244 See Schmidt on both the GCP and the *Koordinationsverfahren*, Schmidt (n 7) 27: "*Jenseits aller Unterschiede im Detail haben das deutsche und das europäische Konzept des (Gruppen-)Koordinationsverfahrens indes ein gemeinsames Grundproblem: Aufgrund seiner (grundsätzlich) nicht bindenden und rein freiwilligen Natur wird es letztlich nur dann funktionieren, wenn alle Beteiligten willens und in der Lage sind, effektiv zusammenzuarbeiten. Ungeachtet dessen ist abschließend nochmals zu betonen, dass die Schaffung eines klaren und insbesondere auch unionsweit einheitlichen Rahmens für eine Koordinierung schon per se eine ganz wesentliche Errungenschaft ist, die nicht unterschätzt werden sollt.*" (underlining added by author).

*start to finish."*[245] One or several of the insolvency practitioners whose participation to the GCP is required for it to be successful[246] could, after a long and thorough process, choose not to implement the recommendations and group coordination plan in their own proceedings. To counter this uncertainty and unpredictability, the insolvency practitioners involved should already have far-reaching agreement on the contours of the recommendations and the group coordination plan amongst themselves before requesting the opening of the GCP.[247] However, if all relevant insolvency practitioners are already on board prior to opening the proceedings, there will often hardly be any added value in opening a GCP.

85. And, even when all relevant insolvency practitioners are aligned, the group coordination plan would require separate implementation in the participating group members' proceedings, by virtue of it being a 'master plan'.[248] If, depending on the content of the plan and the relevant applicable national laws, the implementation of the plan would require creditors' consent, that drives another layer of *ex ante* uncertainty and unpredictability into the equation.[249]

86. In light of all the comments above, by its design the GCP appears to only be helpful in large, coordination heavy corporate bankruptcies where management of (part of the) group and/or its restructuring is transferred to court appointed insolvency practitioners and where there is a general willingness amongst the insolvency practitioners involved to coordinate their conduct and the restructuring and general upfront agreement about the contours of such coordination, but there are other reasons preventing them from doing so, e.g. because their time is consumed by their own proceedings, or because they require an outside party to settle disputes.[250]

87. Madaus has also pointed out that, as group coordinators should be a widely respected person in the field "*who is internationally recognized for their expertise and experience by all IPs in those proceedings to be coordinated,*"[251] only a handful of candidates would appear suitable when the formal requirements for appointment are taken into account.[252] Whilst the potential group of appointees will indeed be limited, it is difficult to imagine that as a reason for the GCP not having been applied in practice at all since it has become available to the restructuring and insolvency practice. As the group coordinator may be a person eligible to be appointed insolvency practitioner in *any* of the Member States, not necessarily in one of the group members' jurisdictions,[253] the

245 Cohen, Dammann and Sax (n 10) 120. See also CERIL Report (n 15) 7.
246 Such necessary involvement could, for instance, when their respective insolvency proceedings contain assets that are indispensable for the group's ability to continue on a going concern basis.
247 Note that, pursuant to article 61(3)(b) and (d), a clear understanding of the envisaged coordination is required in any event, as an outline of the proposed group coordination and the estimated costs associated therewith should be included in the request to open a GCP.
248 See *supra*, para. 0.
249 See also: Madaus 2014 (n 10) 194.
250 Although, in the latter case, the relevant insolvency practitioners could also simply enter into an agreement providing for alternative dispute resolution (e.g. mediation or binding advice).
251 Madaus 2015 (n 10) 241.
252 Those requirements being: (i) eligibility as insolvency practitioner in a Member State, (ii) not being one of the insolvency practitioners appointed in respect to any of the group members and (iii) no conflict of interest concerning from the stakeholders in the group members' proceedings. See article 71 Recast EIR.
253 Recast EIR, article 71(1): "*The coordinator shall be a person eligible under the law of a Member State to act as an insolvency practitioner.*" (underlining author).

pool of potential coordinators should be large enough not to limit the opening of such proceedings in the small sample of cases where that would be appropriate.

## 5. Potential for improvements to the GCP

88. As mentioned in the introduction, the Commission will have to provide a report on the GCP's application ultimately by 27 June 2022. Given the conclusion that the GCP has not been applied in practice so far, the question arises to what extent it would be worthwhile to amend the Recast EIR's provisions in relation to the GCP.

89. Apart from the already limited number of cases in which the opening of a GCP would be helpful, the authority to request the opening of the GCP is a key issue. As clarified above,[254] that authority lies with the insolvency practitioners appointed in the group members' proceedings, whilst in practice they may often find themselves incentivized not to do so. To counter this issue, one could, for instance, take the German approach and grant creditors the right to request the opening of a GCP. From a theoretical viewpoint, allowing either individual creditors or creditors' committees to petition courts for the opening of proceedings could provide a solution. The creditors are first in line to benefit from any surplus value that is realized. As creditors' involvement and the level of information they receive will likely differ amongst Member States, and assuming that only the well-informed, sophisticated creditors would apply this right in practice, it is however doubtful whether this would make a substantial difference in the GCP's application. The circumstance that, to the author's knowledge, there has not been any *Koordinationsverfahren* so far may be seen as a first indication to the contrary.

90. It may be worthwhile to consider also authorizing other parties to request the opening of a GCP, such as the group companies (represented by their board of directors), shareholders of the individual group members or the supervising courts. Granting the authority to petition courts for the opening of a GCP to the group companies themselves also in non-DIP insolvency proceedings[255] and/or to their shareholder(s) may have influence on the GCP's application. The group companies' director(s) and shareholder(s), being most closely involved in the group's business prior to the opening of the proceedings, are best positioned to assess where synergies within the group may exist. They will not be dependent on information from the insolvency practitioner to determine whether and, if so, how the group and its stakeholders would benefit from a coordinated restructuring approach. These parties will also often look on the fragmentation of the group post opening of the proceedings with a certain degree of dismay: the synergy value that was created under their administration is diminished. Additionally, in cases where shareholders and/or the (board of) directors are held liable for damages because of their involvement with the group companies prior to the insolvency proceedings, they may also have a personal interest in

254 See *supra* para. 77-78.

255 As, for purposes of Chapter V, references to the 'insolvency practitioner' of a group member should also be read to include the DIP in DIP proceedings relating to a group member where appropriate, the group member itself should also be deemed eligible to petition the opening of a GCP. See article 76 Recast EIR.

minimizing the financial deficit in their proceedings. As such, these parties may actually find themselves both in the position- ánd incentivized to petition for the opening of a GCP.

91. The supervising courts (the judicial bodies),[256] will by virtue of their duties and roles, often function at a greater distance from the proceedings than the insolvency practitioners, will only have a limited understanding of the group of companies and its business and will often be dependent on information from the insolvency practitioners. Granting them the authority to request the opening of a GCP will, again, likely not make any substantial difference in the GCP's application.

92. Granting these other parties the authority to petition for the opening of a GCP will, however, likely not be sufficient to render the proceeding (more) useful in practice. The GCP's fundamentally voluntary nature and, by extension, the lack of any substantial powers being granted to the group coordinator may still hinder a group solution: insolvency practitioners may opt-out or may choose not to follow the group coordinator's recommendations and the group coordination plan. Whilst the EU legislature has consciously designed the GCP in that manner with an eye to the group members' legal separateness, the above has made clear that the GCP has limited to no added practical value in most group restructurings in its current consensual form.

93. There are several obvious potential tweaks to counter the voluntary nature of the GCP. First, following the German example, the GCP's provisions could be amended to take away the right to opt-out of proceedings. Considering all the incentives for opting out of a GCP, and the uncertainty the opt-out creates at the outset of the GCP, it would make sense to do so. As a result, the group coordinator's tasks and duties would also extend to the group members that would otherwise been excluded from the GCP's scope. Those group members would then, however, also have to share in the costs related to the GCP's, which may lead to undesirable situations if the GCP has no added value for the relevant group members and their respective stakeholders. Such issues would have to be solved via the cost attribution system that is established in the beginning of the proceedings (although that may sometimes proof difficult in practice).

94. But the result of taking away the opt-out would, on its own, be limited: insolvency practitioners involved in the group members' proceedings would still be free to reject the group coordinator's recommendations or the coordinated restructuring plan on a comply-or-explain basis. An interesting option in that regard would be to allow other parties to obligate the insolvency practitioners(s) to implement the group coordinator's recommendations and coordinated restructuring plan. The *Insolvenzordnung* grants the creditors' committee the right to obligate the insolvency practitioner(s) appointed in respect of their debtor to implement the coordination plan and/or recommendations as devised by the group coordinator. As Schmidt wrote in relation to the *Koordinationsplan*,

[256] In the Netherlands, that would be the *rechter-commissaris.*

this relativizes, at least partially, the basic problem of the fundamental lack of legally binding effect.[257] Another option would be to grant the group coordinator the right to directly propose his recommendations and/or coordinated restructuring plan to the individual group members' proceedings.[258] Even without actually having to be applied in practice, both counterweights to the comply-or-explain mechanism could have a corrective effect on insolvency practitioners who are reluctant to comply with the group coordinator's proposals, particularly the latter. The mere option that the group coordinator could circumvent the group members' insolvency practitioners could make them more open towards adhering to the group coordinator.

95. As the German practice has shown, however, these amendments cannot be expected to function as a panacea for the GCP's problems: the *Koordinationsverfahren* also lacks practical application. Moreover, amending the provisions on the GCP to transfer more authority away from the group members' insolvency practitioners and making participation less voluntary may, however, make it (even) less appealing for them to open such proceedings. As such, granting the authority to request the opening of a GCP to other parties than the insolvency practitioners, as discussed above, would than become even more pressing.

96. The additional costs that the GCP brings is one of its other inherent problems. An option to lower the costs, mirroring particularly the Model Law on Groups, would be to allow the appointment of one of the insolvency practitioners of the already pending group companies' insolvency proceedings as the group coordinator. They are already familiar with the case and would require less costs. As, however, the little added value that the GCP brings to the table is mostly attributed to the group coordinator's impartiality and independence, that might be tantamount to throwing out the baby with the bathwater. The German legislator rightfully concluded that appointing the *Koordinator* from the pool of *Insolvenzverwalter* would only be sensible in exceptional cases.[259] There hardly seems to be any viable option to combat the issue of the additional costs.

97. Taking from the planning proceeding, there would be one other potential amendment that could render the GCP more useful in practice: the GCP could be used as a platform for broader application of synthetic proceedings, e.g. by allowing the group coordinator to prevent the opening of decentralizing separate insolvency proceedings by undertaking to treat the creditors of those group companies "as if" such proceedings had been opened. In addition to the GCP being a platform for the development of a group-wide approach, this would turn the GCP into a mechanism to prevent decentralizing individual group members' proceedings from being opened. The GCP in its current form, however, is a consensual supra-procedural platform for coordination and the group coordinator is a

257 Schmidt (n 7) 26.

258 *Cf* Commission Proposal 2012, article 42d(1)(c), which proposed to grant insolvency practitioners appointed in group members' insolvency proceedings the right to directly propose a rescue plan, a composition or a comparable measure for all or some of the insolvent group companies into the other group members' proceedings, similar to the rights of an insolvency practitioner appointed in main insolvency proceedings in relation to secondary insolvency proceedings under article 47 Recast EIR and 34 Original EIR.

259 See *supra*, para. 39.

mediator, without its own estate.[260] The group coordinator does not, for instance, have assets that it could apply to actually undertake such "as if" treatment to certain group creditors. The assets of certain group companies should then be applied by the group coordinator as collateral for an undertaking to creditors of another group company.[261] To find a balanced and systematic approach to such mechanisms would not only entail a full revision of the GCP, but also of synthetic proceedings within the context of the Recast EIR. That would go beyond the scope of this article and would warrant its own in-depth analysis.

98. Moreover, if a legislative move towards more centralized fora and binding top-down decision-making for group companies' insolvency proceedings would be made in lieu of more effective group restructurings, tinkering with the GCP in the above mentioned manner may not be the most favorable option. The inherent issues built into the GCP's constitution will likely continue to prohibit its broad application even after amendments are made. That will in any event be the case in relation to DIP proceedings which, as a result of the Restructuring Directive will likely become an increasingly important method for implementing group restructurings over the years to come. Even with amendments, the GCP will likely suffer the same fate in the future as it has since its introduction in 2017: little to no application.

99. Given Chapter V's and the Recast EIR's objectives of efficiency and effectiveness, it seems hardly an option to accept that the provisions as included in Chapter V lead to sub-par results in cases where a form of more structured and substantial coordination is required than CoCo amongst individual insolvency practitioners and courts based on a protocol. Therefore it may become time to shift the focus towards other mechanisms for dealing with cross-border group restructurings. Allowing group companies with COMI's in different Member States to open DIP proceedings before a single Member State's court would, for instance, greatly improve the ability of multinational groups of companies to efficiently restructure. It would take away the difficulties of coordinating multiple simultaneously pending proceedings under differing laws.[262] In insolvency proceedings where the management is (partially) displaced by court appointed insolvency practitioners (e.g. liquidation proceedings), additionally a mechanism that allow for the appointment of a single or the same insolvency practitioner(s) would in certain cases also be helpful to combat fragmented treatment of the group and the subsequent inefficiencies.[263] If it is ensured that the claims of the individual creditors are treated as if proceedings were

260 See *supra*, para. 65-66.

261 See *supra* n 178. The Guide only briefly touches upon this subject and does not entail a full analysis of the implications of such cross-debtor synthetic proceedings.

262 See e.g. Rapporteur Lehne for the EP's Committee on Legal Affairs in the EP's Report with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), A7-0355/2011 of 17 October 2011, p. 17-18: "*Ideally, the insolvency of groups of companies should be managed by a single court applying its own insolvency law. This solution facilitates coordination, the transmission of information, saves costs, maximizes assets value and facilitates rescue. […] This is possible in centrally controlled groups.*"

263 Note that, although the body of text of the Recast EIR does not include a provision allowing for the appointment of a single or the same insolvency practitioner(s), Recital 50 does mention it as a form of CoCo amongst courts.

opened in the relevant group members' COMI State and creditors are allowed to communicate in the language of that State, the individual group members' creditors' position should be sufficiently safeguarded against potential negative effects of such centralization.[264] That would take away the EU legislature's previous objections to these types of procedural consolidation[265] and leave little reason to maintain the added layer of complexity and costs that is the GCP.

## 6. Conclusion

100. When the GCP was introduced to the Recast EIR's legislative procedure, it was met with ample skepticism. As follows from the above, that skepticism may have been warranted. In its current form, the GCP contains several structural issues that prevent it from being a useful option in most group restructuring cases. Apart from its already limited potential scope of application by its design, the authority to petition for its opening and its voluntary nature, combined with the added layer of complexity and costs, render it a largely ineffective tool to combat the challenges particular to cross-border group restructurings. It does not prevent fragmentation within the group that results from the opening of insolvency proceedings, particularly not in cases where DIP proceedings are opened, but rather introduces yet another 'decision maker' to an already complex situation with many moving pieces.[266]

101. Taking from German *Konzerninsolvenzrecht* and UNCITRAL's body of work, there are several tweaks available that could increase its potential for application, e.g. by allowing other parties to the restructuring, such as creditors, debtors and shareholders to request the opening of a GCP and making participation therein (significantly) less voluntary. Whilst those amendments to the GCP would have the potential to (somewhat) render it a more useful instrument from a group restructuring perspective, they should not be expected solve the GCP's inherent problematic constitution. As such, after five years of no practical application, it may be time to conclude that, although an innovative idea, supra procedural coordination proceedings may not be very well suited for those cross-border group restructuring cases where more coordination is required than general communication, cooperation and coordination amongst individual insolvency practitioners and courts. For those cases, it may be more worthwhile to shift the focus to other instruments.

[264] Note that on the topic of claims lodgment, the European legislator has already implemented the necessary harmonization efforts, e.g. by providing a standard claims form that should be used throughout the EU. See articles 55 and 88 Recast EIR.

[265] See *supra* para. 15.

[266] *Cf.* Madaus 2014 (n 10) 195.