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One for all, and all for one? On cross-border CoCo in group insolvencies under the Recast EIR and the existence of an 'overriding group interest'

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Abstract

In this article, the author examines to what extent insolvency practitioners and courts involved in insolvency proceedings concerning groups of companies, when engaging in cross-border communication, cooperation and coordination under the EU Insolvency Regulation (recast), should take an overriding group interest into account, or whether they may focus solely on the interests involved in their own specific insolvency proceedings. Based on an analysis of the underlying principle of 'efficiency' and the boundaries imposed on the pursuit for efficiency by the legal separateness of the individual group companies, the author concludes that, under certain circumstances and within limitations, the EU Insolvency Regulation (recast) does require insolvency practitioners and courts to take the overarching insolvent group of companies' interests into account.

Keywords

Recast EU Insolvency Regulation; cross-border insolvency of groups of companies; communication, cooperation and coordination

1. Introduction

1. It has already been almost six years since the European Union (**EU**)'s recast Insolvency Regulation (hereinafter, the **Recast EIR**)[1] was published in the EU's Official Journal.[2] The Recast EIR's newly-added fifth Chapter on 'Groups of Companies' (**Chapter V**) could safely be considered one of the most eye-catching novelties of the EU law instrument.[3] The addition of a legal framework to deal with insolvency of group companies had been a topic of discussion for some time prior to the revision. During the drafting of the original European Insolvency Regulation (hereinafter, the **Original EIR**)[4] and its (never-enacted) predecessor, the European Convention on Insolvency Proceedings 1995, the inclusion of provisions on groups of companies was deemed a bridge to far.[5] With groups of companies having become 'the prevailing form of European large-sized enterprises',[6] however, over the years prior to the revision of the Original EIR, a

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

[2] Official Journal of the European Union, L 141, volume 58, 5 June 2015, available via <https://eur-lex.europa.eu>.

[3] See e.g. B. Wessels, *International Insolvency Law – Part II European Insolvency Law* (Kluwer 2017) 671.

[4] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

[5] See *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), § 76; 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 ff.

[6] Although in headcount such groups represent a small number (only 0.2% of all European companies), they provide 30% of jobs in the EU and produce 41% of the gross added value. See European Commission Staff Working Document, Impact Assessment Accompanying the Commission Recommendation on a New Approach

significant number of scholars and practitioners had argued against its 'everyone for themselves' approach and/or had proposed alternative solutions for dealing with cross-border insolvency of groups of companies under EU insolvency law.[7]

2. One of the main difficulties in developing appropriate measures to deal with the insolvency of groups of companies lies in an inherent tension between insolvency law and company law. Although groups of companies are comprised of legally separate entities, they will often economically operate as one integrated enterprise, differing in intensity. The value of that enterprise in an insolvency proceeding will often be higher if a solution is found for all or several group companies, compared to a piecemeal liquidation on an entity-by-entity basis. Whilst the insolvency law principle of value maximization will thus often require a coordinated approach towards the group's financial distress, the legal separateness of the individual group members has long been interpreted as prescribing a segregated entity-by-entity approach.

3. With Chapter V, the EU legislature has attempted to strike a balance between these two seemingly opposing forces. On the one hand, the provisions are aimed at ensuring efficient conduct in the group members' insolvency proceedings by promoting communication, cooperation and coordination (**CoCo**) amongst the most important actors, while, on the other hand, respecting their legal separateness.

4. As will become apparent in the below, the pursuit for efficiency is deeply ingrained within the fabric of Chapter V. The Recast EIR does not, however, prescribe what 'efficiency' in the context of group insolvency proceedings means, which decisions it prescribes and where the quest for efficiency finds its boundaries in the group members' legal separateness. As such, it may be difficult for the addressees of its provisions, such as insolvency practitioners, to assess whether certain courses of action are allowed, or even compulsory, under Chapter V. For example, consider a situation where the sale of the group's entire business would generate higher proceeds for the group companies' insolvency proceedings as a whole, but would be detrimental with respect to one or more of the insolvency proceedings of individual member

to Business Failure and Insolvency SWD(2014) 61 final, of 12 March 2014, p. 20. See also UNCITRAL 'Legislative Guide on Insolvency Law, Part Three' 2010 (**UNCITRAL Legislative Guide 2010**) pp. 5-6, available via <https://uncitral.un.org/en/texts/insolvency>.

[7] See e.g. on this topic Robert van Galen, 'The European Insolvency Regulation and Groups of Companies' (2004) 13 Tijdschrift voor Insolventierecht; Robert van Galen et al., *Revision of the European Insolvency Regulation: Proposals by INSOL Europe* (INSOL Europe 2012) 91ff; Robert van Galen, 'Insolvent Groups of Companies in Cross Border Cases and Rescue Plans' in: *Preadviezen 2012* (Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht), digitally available via <www.nvrii.nl/publicaties>; Irit Mevorach, 'Centralising Insolvencies of Pan-European Corporate Groups: a Creditor's Dream or Nightmare' (2006) Journal of Business Law 468; Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009); Irit Mevorach, 'European Insolvency Law in a Global Context' (2011) Journal of Business Law 666; Gabriel Moss, 'Group Insolvency – Choice of Forum and Law: European Experience Under the Influence of English Pragmatism' (2007) Brooklyn Journal of International Law 1005; Christoph Paulus, 'Group Insolvencies – Some Thoughts about New Approaches' (2007) 42 Texas International Law Journal 819; Christoph Paulus, 'Wege zu einem Konzerninsolvenzrecht' (2010) Zeitschrift für Unternehmens- und Gesellschaftsrecht 270; Heribert Hirte, 'Towards a Framework for the Regulation of Corporate Groups' Insolvencies' (2008) ECFR 213; Bob Wessels, 'The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation' (2009) European Company Law 169; Nicolaes Tollenaar, 'Dealing with the Insolvency of Multinational Groups under the European Insolvency Regulation' (2010) 14 Tijdschrift voor Insolventierecht.

companies. Should such a sale transaction be consummated as being efficient?

5. This article discusses the implications of the concept of 'efficiency' within the context of cross-border insolvency concerning groups of companies, taking into account the limitations demanded by the group members' legal separateness. As will be further described below, the article proposes that, as a result of Chapter V's pursuit of efficiency, the Recast EIR has introduced an overarching, group-wide interest that must be considered by insolvency practitioners and courts involved in insolvency proceedings concerning group companies. Paragraph 2 discusses the traditionally perceived conflict between the legal and economic approaches towards group company insolvencies. Paragraph 3 briefly describes the provisions of Chapter V. Paragraph 4 discusses the concept of 'efficiency' within a cross-border insolvency context and, more specifically, in a group insolvency context. Finally, Paragraph 5 addresses the practical implications of this conclusion.

2. Trying to balance the group companies' legal separateness and value maximization

6. The benefits linked to organizing businesses as groups of companies, such as risk management and fiscal planning,[8] are to a large extent based on the assumption that companies constitute separate legal entities.[9] The principle of legal personality, a "*core principle of European law*",[10] is generally understood to entail that a company is recognized as a separate legal unit in the sense that, among other things, it has the capacity to bear rights and obligations in its own name (also referred to in this article as 'legal separateness').[11] In short, a company can legally act distinct from its shareholders. The legal separateness of companies allows business enterprises to own assets that are distinct from the assets of other persons involved in that business (e.g. their shareholders), as a result of which creditors of the company have structural priority over its assets and over the personal creditors of the shareholders.[12]

7. Being a building block of company law, this principle is deeply rooted in our thoughts on insolvency law. It is precisely in times of insolvency that stakeholders have to rely on the legal separateness of companies for purposes of recovery of

[8] See UNCITRAL Legislative Guide 2010 (n 6) 11 ff, extensively discussing the reasons for modern-day enterprises to organize as a group of companies.

[9] Although 'limited liability' is a second important reason for enterprises to organize as a group of companies, an extensive discussion thereof is outside the scope of this article.

[10] See e.g. Hirte (n 7) footnote 28 (referencing the Court of Justice of the European Union (also previously: the Court of Justice of the European Communities, hereinafter: the **CJEU**) judgment in the Überseering case, CJEU 5 November 2002, C-208/00 (*Überseering BV*)). See also Reinier Kraakman et al., *The Anatomy of Corporate Law, A Comparative and Functional Approach* (OUP 2004) 1, 5, stating that legal personality is one of the five characteristics that almost all large-scale business firms share.

[11] Kraakman et al. (n 10) 6-8; Daniel Zimmer, 'Legal Personality', in: Ella Gepken-Jager, Gerard van Solinge and Levinus Timmerman (eds.), *VOC 1602-2002, 400 Years of Company Law* (Kluwer Legal Publishers 2005) 267, 270-271; UNCITRAL Legislative Guide 2010 (n 6) 5. The principle that a company constitutes a separate legal entity has been part of legal doctrine for centuries, with English literature referring to legal personality as early as 1628. See Phillip Blumberg, *The Multinational Challenge to Corporation Law, The Search for a New Corporate Personality* (OUP 1993), 3-4.

[12] Kraakman et al. (n 10) 7.

their claims.[13] As a result, groups of companies in insolvency proceedings have generally been treated in a singular manner under most European insolvency laws: the 'entity-by-entity approach', which can also be referred to as the 'single entity approach'. Under this entity-by-entity approach, which was deeply embedded in the Original EIR, each insolvent debtor 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.[14] This premise has also been dubbed the principle of the 'five ones',[15] or as it has long been expressed under German insolvency law: "*eine Person, ein Vermögen, eine Insolvenz*"[16]

8. The CJEU[17] has confirmed the single entity approach in two important ways in its landmark Eurofood judgment, as early as 2006.[18] First, the CJEU held that: "[…] *in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject its own court jurisdiction.*"[19] Second, the CJEU further emphasized the importance of the single entity when determining the basis for court jurisdiction on that individual basis. As is well known, the 'Centre of Main Interest' concept, or **COMI**, plays a key role within the Original EIR's and Recast EIR's system for determining jurisdiction. Both the Original EIR and the Recast EIR prescribe that only the courts of the Member State where a debtor's COMI is located have jurisdiction to open main insolvency proceedings with a universal scope.[20] In case of companies or legal persons, the COMI was and is presumed to be located at the place of the registered office, absent proof to the contrary.[21] In the Eurofood judgment, the CJEU held it that the mere fact that a company's economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the registered office presumption.[22] In short: jurisdiction to open proceedings is also based on an entity-by-entity basis.

9. This single entity approach to group insolvency, however, often clashes with one of insolvency law's main principles:

13 According to Van Galen, the "*prevailing view is – rightly – that this basic premise* [of legal personality] *should be maintained in insolvency proceedings.*" See Van Galen 2012 (n 7) 22.

14 Blumberg 1993 (n 11) 4; UNCITRAL Legislative Guide 2010 (n 6) 16; Jessica Schmidt, 'Das Prinzip "eine Person, ein Vermögen, eine Insolvenz" und seine Durchbrechungen vor dem Hintergrund der aktuellen Reformen im europäischen und deutschen Recht' (2015) Zeitschrift für Insolvenzrecht 19. In French, the principle that a company is deemed an autonomous and independent entity is referred to as '*principe de l'autonomie des personnes morales*'.

15 One insolvent debtor, one estate, one insolvency proceeding, one court and one insolvency office holder per group company. See Bob Wessels, 'Corporate Groups: Bringing Insolvency Law and Corporate Law Together' (2018) 2 European Company Law Journal 41.

16 Translated roughly as "One debtor, one estate, one proceeding", also referred to as "*ein Schuldner, ein Vermögen, ein Verfahren*", see Schmidt 2015 (n 14) 19. Schmidt observes that, in light of the vast amount of exceptions to this principle, one could question what is currently left of "*eine Person, ein Vermögen, eine Insolvenz*".

17 See *supra* n 10.

18 See CJEU 2 May 2006, C-341/04 (*Eurofood IFSC Ltd.*).

19 See CJEU 2 May 2006, C-341/04 (*Eurofood IFSC Ltd.*), para. 30.

20 Original EIR and Recast EIR, articles 3(1). See on the universal scope of main insolvency proceedings: Recital 12 Original EIR and Recital 23 Recast EIR.

21 *Idem.*

22 See CJEU 2 May 2006, C-341/04 (*Eurofood IFSC Ltd.*), para. 36.

value maximization.[23] Traditionally, insolvency law is considered an instrument to prevent individual creditors from trying to seize individual assets and prevent any solution that would leverage the value of the debtor's joint assets, and by ensuring collective action in a collective procedure, aims to maximize the value of a debtor's assets, for the joint benefit of the creditors involved.[24]

10. Although groups of companies consist of legally separate entities, they will often economically operate as an integrated business enterprise. In the ordinary course of business, the legal entity-by-entity reality and the economic integrated business reality will generally be kept in place by some form of 'group discipline', often based on a chain of command which is founded on shareholders' voting and instruction rights and/or unified management across the relevant group companies. However, this chain of command is generally broken once bankruptcy proceedings are opened, as management of the company's assets is transferred to an insolvency practitioner.[25] The disciplining instruments that would normally allow for coordinated conduct are then no longer effective, as insolvency practitioners act independently of top-down control. Moreover, with the opening of insolvency proceedings, the focus will generally shift from the group's best interests to the interests of the creditors of the individual group companies. The result: fragmentation of the group's assets and management.

11. In order to battle this fragmentation, the European insolvency practice had developed several methods under the Original EIR to centralize insolvency proceedings before single courts and allow the appointment of a single insolvency practitioners, also in cases where not all group companies' COMI's necessarily would be considered located in the same Member State at the offset of the insolvency. A group of companies could, for instance, argue that their individual COMI's are all located in a single jurisdiction (often at the group's headquarter), both for the companies that are actually located in that jurisdiction as well as 'foreign companies',[26] on the basis that they are centrally managed from that jurisdiction.[27] This group approach to COMI is also known as the 'head office functions'. Whilst the Eurofood judgment has arguably rendered it significantly more difficult to maintain a 'head office functions' approach or similar group approaches to COMI,[28] allowing methods that provide for more centralization will

[23] See e.g. the German *Insolvenzordnung*, which prescribes creditor satisfaction as the main purpose of insolvency proceedings in its first provision, § 1 InsO.

[24] See on this topic e.g. Rolef de Weijs, 'Harmonization of European Insolvency Law and the need to tackle two problems: common pool & anticommons' (2012) 2 IIR 67, 68ff.

[25] Robert van Galen, 'The Recast Insolvency Regulation and Groups of Companies', in: R. Parry and P.J. Omar, *Reimagining Rescue* (INSOL Europe 2016) 53, 55.

[26] 'Foreign companies' within this context refers to companies with their registered offices and a substantial part of their operations and assets in another state than the state in which their main insolvency proceedings is being contemplated or has been opened.

[27] Or 'shift' the individual group companies' COMI's to a single Member State, as was for instance used in the Interedil case, when Interedil Srl's registered office was transferred from Italy to England (by deregistering the company from the Italian company registry and registering it as 'foreign company' in the United Kingdom's company registry). See CJEU 20 October 2011, C-396/09 (*Interedil*).

[28] This method for centralization was particularly popular in the first years after the Original EIR entered into force. See for examples of cases where a group COMI was argued: *In re Daisytek-ISA Ltd* [2003] BCC 562; *Re Criscross Telecommunications Group* (unreported, 20 May 2003, Ch. D.); *Re MG Rover Espana SA* [2005] BPIR 1162 (In Administration); *Collins & Aikman Corporation Group* [2005] EWHC 1754 (Ch); *Eurotunnel Finance Ltd* (Tribunal de Commerce de Paris, 2 August 2006). Moss has argued that, notwithstanding

often be beneficial from a value maximizing context, particularly in cases of more integrated and/or interdependent groups of companies.

12. Almost two decades old, the insolvency of the KPNQwest group still provides a valuable and well documented case study of the negative impact that such fragmentation may have. KPNQwest N.V. was the Dutch holding company for a pan-European glass fibre network which ran through 15 European countries and was directly linked to a similar network in the United States (which was operated by Qwest). It was exploited by a multitude of legal entities from different Member States: at least two companies in nearly every jurisdiction it ran through. The network was organized in multiple 'rings', with e.g. one ring running through Germany, France, Belgium and the Netherlands.[29] The company was a prime example of an integrated business which was divided amongst geographical lines, with interdependent group companies jointly operating a pan-European network. When KPNQwest N.V. was declared bankrupt in 2002, in the middle of the 'dot-com crash', many of its subsidiaries soon followed suit. In the absence of any instruments to coordinate the multiple insolvency proceedings across the borders, it proved difficult to realize any synergy value (the added value that is included in the enterprise as a whole, which would be lost if the value of the individual components were instead realized piecemeal). As one of the insolvency practitioners proved unwilling to cooperate in the sale of the network in its entirety, the group companies' assets were sold in a piecemeal liquidation. Although it is difficult to assess what value would have been realised if the entire network had been sold as a whole, it is generally assumed that the value would have been (significantly) higher.[30]

13. The single entity approach also leads to complexities in cases where no insolvency practitioner is appointed to liquidate the company's assets, but the debtor remains (partially) in control of its assets and affairs during the insolvency proceedings—so-called debtor in possession (or DIP) proceedings.[31] The inclusion of such proceedings within the scope of the Recast EIR is another important new feature.[32] In DIP proceedings, the management of each group company (partially) maintains control of its respective business.[33] With the group's chain-of-command largely

the Eurofood judgement, the CJEU's case law still allows for group COMI findings on the basis of the 'head office functions', as long as this can be substantiated by objective evidence and is ascertainable to third parties. See Gabriel Moss, 'Group Insolvency - Forum - EC Regulation and Model Law Under the Influence of English Pragmatism Revisited' (2014) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 250.

29 Van Galen 2004 (n 7) 57ff.

30 Van Galen 2004 (n 729) 57ff; Van Galen 2012 (n 7) 21; Van Galen 2016 (n 25) 55; Irit Mevorach, 'INSOL Europe's Proposals on Groups of Companies (in Cross-Border Insolvency): A Critical Appraisal' (2012) 21 IIR 183, 189; Irit Mevorach, 'Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge' (2014) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 226, 233. A sale of an intact business generally results in higher proceeds than a piecemeal liquidation of its assets. The business as such then still has a continuing potential to earn profits. See Douglas Baird & Robert Rasmussen, 'The End of Bankruptcy' (2002) 55 Stanford Law Review 751. See also Van Galen et al. 2012 (n 7) 91. See the Collins & Aikman case for a successful example of a group liquidation in which the surplus value was achieved, In the Matter of Collins & Aikman Corporation Group [2006] EWHC 1343 (Ch).

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

32 See recital 10, Recast EIR. Under article 1(1), Original EIR, only the traditional liquidation types of insolvency proceedings were eligible to be included on its Annex A: 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.

33 DIP proceedings offer debtors and in some cases creditors an instrument (e.g. a plan of reorganization) to impose the restructuring on dissenting stakeholders whose

intact, fragmentation is significantly less than in liquidation proceedings, but not non-existent. Coordination of such proceedings is often necessary in a group context to prevent a domino effect of subsequent insolvency proceedings and to implement a group-wide solution. Such coordination will, however, often prove difficult in relation to cross-border groups of companies due to, among other things, differences in timing of the opening, conduct during and closure of such proceedings. Multiple courts may be making their own, sometimes deviating, important decisions regarding the eligibility of group members to enter such proceedings, the availability and duration of a moratorium on creditors' actions, voting procedures and the confirmation of restructuring plans. With all these difficulties in mind, Van Galen noted in 2012 that, to his knowledge, "*no plan involving continuation of the business of group companies has even been accepted in three or more jurisdictions.*"[34]

14. It is easy to see how a strict single entity approach to insolvency proceedings concerning groups of companies can result in inefficient management of insolvency proceedings. Among other things, such an approach (a) may result in a loss of synergy value; (b) leads to information loss and duplicative work by insolvency practitioners in different proceedings; and (c) may render it difficult to implement a cross-border group restructuring via a series of related restructuring plans.

3. Chapter V prescribes communication, cooperation and coordination

15. Chapter V was added to the Recast EIR in order to combat the challenges particular to group insolvencies within a cross-border EU context. In Section 1, Chapter V begins by imposing duties and rights of cooperation and communication among insolvency practitioners and courts in group company insolvency proceedings, similar to the provisions on cross-border CoCo concerning insolvency proceedings regarding the same debtor.[35] In particular, insolvency practitioners and courts in insolvency proceedings concerning a 'member of a group of companies'[36] are

cooperation or acquiescence is necessary for an effective restructuring, under the protection of a stay on creditors' actions. In order to regain financial health, an instrument approved in a DIP proceeding can contain provisions altering the composition of the company's assets, debt structure and equity structure (e.g. a partial claim write-off by creditors, sometimes together with a debt-for-equity swap, extended maturity dates for certain debt and/or a (partial) divestiture of assets).

34 Van Galen 2012 (n 7) 52. Multinational groups of companies therefore have increasingly resorted to single jurisdiction options in the last decade: restructuring legislation that would allow them to open insolvency proceedings concerning all relevant group companies, both domestic and foreign, in one jurisdiction, such as the English Scheme of Arrangements. The English Scheme of Arrangements has proven particularly valuable as a cross-border restructuring tool for European groups of companies over the last decade or so, as it was argued to be outside the scope of the Original EIR and thus not included on the list of proceedings in Annex A to the Original EIR. As a result, jurisdiction for opening an English Scheme of Arrangements concerning non-English debtors could be assumed by English courts on a less stringent base than the COMI-approach as used under the Original EIR. See extensively on this topic Johan Jol, 'The Future of International Restructurings after the Implementation of WCO II and the Amendment of EIR: Is the Best yet to Come?' in: *Preadviezen 2015* (Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht), digitally available via www.nvrii.nl/publicaties. See for a more recent example the Syncreon case, in which both UK and Dutch members of a group of companies have been restructured via an English Scheme of Arrangements.

35 Recast EIR, articles 41-44.

36 The Recast EIR refers to the concept of the group as a 'group of companies' (article 2(13) Recast EIR). Each of the individual constituents of such a group of companies is referred to as a 'group member' or, 'member of the group'. A group member is only considered as such, if insolvency proceedings within the meaning of article 2(4) Recast EIR have been opened in relation to them. Regarding the definition of 'groups of companies', see e.g. Alexandre de Soveral Martins, 'Groups of companies in the Recast European Insolvency Regulation: Around

obligated to cooperate with each other, and if one is appointed, with a group coordinator in a so-called Group Coordination Proceeding (a **GCP**)[37], to the extent that cooperation (i) is appropriate to facilitate the effective administration of the proceedings, (ii) is not incompatible with the rules applicable to such proceedings and (iii) does not entail any conflict of interest.[38] Insolvency practitioners of group members may agree to grant additional powers to all or some of the group members' insolvency practitioners to (consider whether possibilities exist for) coordinate (i) the administration of, and supervision on, the group companies' insolvency proceedings, and (ii) the restructuring of group companies, and/or to allocate certain tasks amongst themselves.[39] They also have standing to appear before foreign EU courts that have opened insolvency proceedings regarding other group members[40] and can request a stay of measures related to the realization of assets in insolvency proceedings of other group members for the benefit of a proposed group solution, provided that group solution has a reasonable chance of success.[41]

16. Chapter V, Section 2 deals with the GCP, a separate proceeding from the already pending group members' individual insolvency proceedings, in which a group coordinator is appointed to develop a solution for the group members' insolvency.[42] The concept of the GCP is based on the German *Koordinationsverfahren*: a similar 'meta proceeding' that has been developed by the German national legislator simultaneously to the Recast EIR.[43] Any of the insolvency practitioners appointed in an insolvency proceeding regarding a group member may request the opening of a GCP.[44] The group coordinator is tasked with coordinating the insolvency proceedings of the group members and may propose recommendations and a 'group coordination plan' that provides for an integrated approach to the resolution of the group companies' insolvency proceedings.[45] Seemingly with an eye toward the primacy of the individual group members' proceedings, participation in the GCP is voluntary.[46] Insolvency practitioners may elect not to

and about the "group"' (2020) 28 IIR 354; Sid Pepels, 'Defining groups of companies under the Insolvency Regulation (recast) – on the scope of EU group insolvency law' (2021) IIR, digitally available (Open Access) via https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1402.

37 Recast EIR, article 74.

38 Recast EIR, article 56-58.

39 Recast EIR, article 56(2).

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

41 Recast EIR, article 60(1)(b).

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

43 See § 269d ff *Insolvenzordnung*.

44 Recast EIR, article 61(1).

45 Recast EIR, article 72.

46 *Cf.* recital 56 Recast EIR. As a result of this voluntary participation, the GCP will often not have any added value as a restructuring tool, as it will lead to additional costs, whilst generally not providing any tools to enforce the group restructuring over reluctant group members' insolvency practitioners. Other centralization tools such as opening of proceedings before a single court or, where possible, the appointment of a single insolvency practitioner, will often be more suitable to achieve a value maximizing solution for the group's (impending) insolvency. The fact that to date, to the authors knowledge, no GCP has been applied, as well as its German counterpart, goes a long way in exemplifying that point. See also Jasper Berkenbosch & 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, and on the German *Koordinationsverfahren* e.g. Braun / *Esser* Insolvenzordnung, 8. Aufl. 2020, InsO 269a, Rn. 22.

participate in the GCP[47] and, when participating, the group coordinator's recommendations and the group coordination plan are not binding in the group members' proceedings.[48]

4. Efficiency within the context of the Recast EIR

4.1 Chapter V in pursuit of efficiency…

17. The Recast EIR is not secretive about the objective of Chapter V: it prescribes cross-border CoCo amongst the most important actors in group members' insolvency proceedings in order to improve the efficiency of those proceedings. The Recast EIR's recitals state that: "*This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies.*"[49] And "[…] *Such coordination should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality*."[50]

18. This pursuit of efficiency fits the larger framework of objectives of EU cross-border insolvency law. The Recast EIR and its predecessors are based on the premise that the creation of an internal market as envisaged by the EU (and previously, the European Community and the European Economic Community) will lead to an increase in insolvency proceedings that "*extend beyond the frontiers of a single State.*"[51] As the Recast EIR reminds us in its own recitals, the proper functioning of the EU's internal market requires that cross-border insolvency proceedings are operated efficiently and effectively.[52] Both the Original EIR and the Recast EIR are thus designed to ensure that cross-border insolvency proceedings satisfy this mandate.[53]

19. The provisions of Chapter V, including the obligation of insolvency practitioners and courts involved in group members' insolvency proceedings to engage in CoCo, should be viewed within this framework. Their efforts should, first and foremost, ensure the efficient administration of the proceedings. Chapter V expressly contemplates this. The provisions of Chapter V, Section 1 impose an obligation on insolvency practitioners and courts to engage in CoCo if, among other things, such is appropriate to facilitate the effective administration of the relevant proceedings.[54] As 'efficiency' and 'effectiveness' are used interchangeably within the context of cross-border EU insolvency law,[55] that

47 Recast EIR, articles 64, 65.

48 Recast EIR, article 70(2).

49 Recast EIR, recital 51.

50 Recast EIR, recital 54, second sentence.

51 J. Noel and J. Lemontey, 'Report on the convention relating to bankruptcies, compositions and analogous procedures. 16.775/XIV/70-E', 8.

52 Recast EIR, recital 3. See also Original EIR, recital 2. In its proposal to amend the Original EIR, the European Commission stated that "*[t]he overall objective of the revision of the Insolvency Regulation is to improve the efficiency of the European framework for resolving cross-border insolvency cases in view of ensuring a smooth functioning of the internal market and its resilience in economic crises.*" See the European Commission Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, 12 December 2012 COM(2012) 744 final, 3.

53 See CJEU 2 May 2006, C-341/04 (*Eurofood IFSC Ltd.*), para. 48; CJEU 22 November 2012, C-116/11 (*Bank Handlowy*), para. 45.

54 See *supra* para. 15.

55 Strictly speaking, there is a difference between the two terms. However, as 'effective' means 'appropriate to accomplish a certain effect', and as EU cross-border insolvency law aims to ensure that cross-border insolvency proceedings are conducted in an efficient manner, the two may indeed be used interchangeably in this context. See e.g. CJEU 12 February 2009, C-339/07 (Deko Marty), para. 22; Reinhard Bork, *Principles of*

could equally be read as meaning 'appropriate to facilitate the *efficient* administration of the relevant proceedings.'

20. The Recast EIR is not alone in its endeavour for efficiency. Other instruments governing cross-border insolvency law, such as the Global Principles for Cooperation in International Insolvency Cases commissioned by the American Law Institute and the International Insolvency Institute (the **Global CoCo Principles**),[56] and both the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on Cross-Border Insolvency (1997)[57] and its Model Law on Enterprise Group Insolvency (the **Model Law on Groups**)[58] emphasize efficiency as one of their core objectives.

21. Although being an important driver behind the Recast EIR (and its predecessor), the regulation does not clarify what 'efficiency' means, and thus which behaviour it prescribes amongst the addressees of its provisions. In 2007, Paulus proposed, as a working hypothesis, to define 'efficiency' within the context of the Original EIR as: "*asset maximization by preserving the debtor companies to the utmost while obtaining the best possible satisfaction of the creditors*".[59] Ten years later, Bork proposed a similar, slightly more nuanced approach, starting from the procedural legal perspective that the principle of 'efficiency' means that proceedings must be shaped in such a way as to ensure that the legal protection which the procedure seeks to provide can be granted as quickly and as comprehensively as possible.[60] As Bork rightfully argues, efficiency is no end in and of itself within the context of cross-border insolvency law. Rather, it is a procedural principle that is servient to insolvency law's more substantial principles, such as the optimal realization of the debtor's assets.[61] Communication, cooperation and coordination, in turn, are generally considered valuable instruments to obtain more efficient conduct in cross-border insolvency proceedings.[62] As such, Bork has devised a hierarchy of principles within the context of international insolvency law. That hierarchy starts with the principle of communication and cooperation, which serves the principle of efficiency, which in turn is servient to the

Cross-Border Insolvency Law (Intersentia 2017) 79; Thomas Himmer, *Das europäische Konzerninsolvenzrecht nach der reformierten EuInsVO* (Mohr Siebeck Verlag 2019) 237.

56 See Principle 1.1, available via https://www.ali.org/publications/show/transnational-insolvency/.

57 See Preamble (c) of the Model Law on Cross-Border Insolvency (1997), which is available at https://uncitral.un.org/en/texts/insolvency. See e.g. Look Chan Ho (ed.), *Cross-Border Insolvency, A Commentary on the UNCITRAL Model Law* (Globe Law and Business 2017), extensively discussing multiple national implementations of this model law (such as Chapter 15 of the US Bankruptcy Code).

58 See Preamble (d) of the Model Law on Groups, which is available at https://uncitral.un.org/en/texts/insolvency. For a more extensive analysis of the Model Law on Groups, see 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 504.

59 Paulus (n 7) 821.

60 Bork (n 55) 78.

61 Bork (n 55) 79.

62 See e.g. UNCITRAL's Guide to Enactment to the Model Law on Cross-Border Insolvency 1997, para. 211, which clarifies that the main objective of its provisions on CoCo "[…] *is to enable courts and insolvency representatives from two or more countries to be efficient and achieve optimal results.*" The Guide to Enactment is available via <https://uncitral.un.org/en/texts/insolvency>. See also: Kirsten van Zwieten, 'Introduction' in Reinhard Bork and Kirsten van Zwieten (eds), *Commentary on the European Insolvency Regulation* (OUP 2016) para. 0.13.

principle of optimal realization of the debtor's assets.[63]

22. Taking into account insolvency law's substantial goal of 'maximization of the value available to creditors',[64] it is clear the goal of efficiency prescribes a procedure which ensures that creditors are paid as quickly and as comprehensively as possible.[65] In a practical sense, the conduct of parties involved in cross-border insolvency proceedings should thus be considered more efficient if it results in lower realization costs, greater proceeds or faster distribution on claims (taking the time value of money into account).[66] In cases where certain conduct would, for example, result in greater proceeds, but also higher costs, or lower costs, but later repayment, it should be determined whether there is an overall improvement taking all factors into account. As is generally the case under the Recast EIR, when engaging in CoCo, insolvency practitioners and courts should opt for the course of action that is most efficient.[67]

4.2 …but how should efficiency be measured within a group context?

23. With efficiency being a main objective of Chapter V, it is paramount to understand the implications of that concept within a group insolvency context. The abovementioned understanding of 'efficiency', however, does not simply extrapolate to cross-border group insolvency proceedings one-on-one. Whilst it will be obvious that insolvency practitioners and courts are under an obligation to engage in CoCo where that would better the outcome in their own respective group companies' proceedings, conduct that may be considered efficient from the perspective of one group company, or the group as a whole, may be inefficient viewed in the context of another group company's insolvency proceeding. Contrary to singular insolvency proceedings, there is no concurrence of creditors' claims over the same 'pool' of assets and thus no concurrence of creditors' interests throughout the group.[68]

24. The legal separateness of companies plays an important role in interpreting 'efficiency' within a group insolvency context: as is the case with the German

63 Bork (n 55) 82. Bork also highlights Principle 1.1 of the Global CoCo Principles, which includes a similar hierarchy.

64 The principle of 'maximization of the value available to creditors' is used interchangeably with the term 'optimal realization of the debtor's assets'. Concerning this principle, see UNCITRAL 'Legislative Guide on Insolvency Law, Part One' 2004, 10-11, available via <https://uncitral.un.org/en/texts/insolvency>; Mevorach (n 7) 107; Samuel Bufford, 'Coordination of Insolvency Cases for International Enterprise Groups: A Proposal' (2014) Penn State Law Research Paper 11, digitally available via http:ssrn.com/abstract=2382123; Bork (n 46) 129-138, 141.

65 Bork (n 55) 78.

66 A general principle in finance is that, assuming a discount rate that is higher than 1, the present value of receiving one Euro now is higher than receiving that same Euro in one year's time, taking the earning capacity of that one Euro into account, or *vice versa* where a negative discount rate is concerned.

67 In general, insolvency practitioners will already be under such an obligation under their national insolvency regimes, which generally require them to maximize value in their respective proceedings. See e.g. under German law Bundesgerichtshof 12 March 2020, IX ZR 125/17 ECLI:DE:BGH:2020:120320UIXZR125.17.0.

68 The problem of a solution benefitting the group as a whole, but being detrimental to a single or some individual participants of that group, occurs in other subfields of insolvency law as well. See for instance on this issue from the view of imposing a restructuring plan on dissenting creditors: Nicolaes Tollenaar, *Het pre-insolventieakkoord, Grondslagen en Raamwerk* (Wolters Kluwer 2016) 29ff.

Insolvenzordnung[69] and the Model Law on Groups,[70] the Recast EIR's pursuit of efficiency finds its limits in the legal separateness of companies. CoCo among parties involved in group companies' insolvency proceedings should not run counter to the interests of the creditors in each of the proceedings, and each group member's separate legal personality should be respected.[71] As such, the application of Chapter V's provisions should not result in the stakeholders in one of the group companies' proceedings being worse off than they would have been had there been a segregated approach to that company's insolvency.[72] If the relevant insolvency practitioner would engage in such CoCo nonetheless, he would act contrary to the interests concerning which he has a duty of care under his relevant *lex concursus*. As the German legislature has stated: "*Da die Grundlage der Kooperation in der Pflicht zu suchen ist, den Wert der Masse in bestmöglicher Weise zu maximieren, findet sie auch dort ihre Grenze, wo es um Kooperationsmaßnahmen geht, die der Masse zum Nachteil gereichen. Eine Pflicht zur Aufopferung im Interesse anderer Konzerngesellschaften oder deren Gläubigern lässt sich unter der Geltung der Grundsätze der Haftungstrennung und der rechtlichen Selbständigkeit der Konzern-gesellschaften nicht begründen.*"[73]

25. Employing this approach, it could be argued that whether certain CoCo is efficient should be determined simply by looking at the effect of that conduct on the individual group companies' insolvency proceedings. Only in cases where the individual proceedings would directly benefit from the envisaged CoCo (i.e. faster and/or more comprehensive repayment) should insolvency practitioners and courts engage in such CoCo. The German legislature has at times hinted that it favours this approach, stating that *Insolvenzverwaltern* (German insolvency practitioners) are not beholden to an 'overriding group interest'.[74] Instead, they should cooperate and/or communicate only if that would have a positive effect on the realisation of the assets of the proceedings for which they were appointed.[75] It has, however, been

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69 See e.g. the German legislature in the *Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Erleichterung der Bewältigung von Konzerninsolvenzen*, BT-drs 18/407, S. 21, 32.

70 For example, the Model Law on Groups' Preamble states as one of its objectives the adequate protection of the interests of the creditors of each enterprise group. See Model Law on Groups, Preamble (g). In addition, regarding the importance of legal personality during the drafting of the Model Law on Groups, see e.g. UNCITRAL Working Group V 'Facilitating the cross-border insolvency of multinational enterprise groups, Note by the Secretariat' (11 February 2014) UN Doc A/CN.9/WG.V/WP.120, p. 4, which mentions '*Affirmation of the corporate identity and independence of group members*' as a guiding principle for its provisions on cross-border insolvency of groups of companies.

71 Recast EIR, recitals 52 and 54.

72 Similar 'no creditor worse off'- or 'best interest of creditors'-minima are also applied in other subfields of insolvency law that deal with similar collectivity issues when imposing a group solution on individual constituents of that group. See e.g. article 74 of Directive (EU) 2014/59 (Bank Recovery and Resolution Directive) and articles 2(6) and 10(2)(d) of Directive (EU) 2019/1023 (Restructuring Directive).

73 The German *Gesetzentwurf* (n 69) S 21, freely translated into: "As the basis of cooperation must be sought in the duty to maximize the value of the insolvency estate in the best possible way, it also finds its limits where cooperation measures are concerned which are to the detriment of the insolvency estate. An obligation to sacrifice in the interest of other group companies or their creditors cannot be justified under the principles of limited liability and legal separateness of the group companies." See also: Christian Brünkmans, *Münchener Kommentar zur Insolvenzordnung*, Bd. 3, Konzerninsolvenzrecht: §§ 1-131, 3. Aufl., München 2014. Rn 9-13.

74 The German *Gesetzentwurf* (n 69) 32.

75 The German *Gesetzentwurf* (n 69) 32.

noted that the intentions of the legislature on this point are unclear.[76]

26. Such a limited interpretation of 'efficiency' within a group context would, however, be detrimental to the goal to which it is servient: optimal realization of assets.[77] In cases where a proposed group solution would have a neutral effect on one group company's insolvency proceeding, but would increase the proceeds in other group companies' proceedings, it would be value destructive to assume that the insolvency practitioner and/or court involved in the first group company's proceeding should not be obligated to implement such a solution.

27. In assessing whether certain behaviour is efficient from a group of companies' perspective, multiple legal scholars have employed the concept of 'Pareto efficiency',[78] one of the most common standards for efficiency used by economists in the field of welfare economics.[79] Pareto efficiency describes a state of allocation of resources in which it is impossible to reallocate resources in a way that makes any one individual better off without making at least one individual worse off.[80] A Pareto improvement would take place if a reallocation of resources would improve at least one individual's position, without harming the other individuals involved. If no Pareto improvement is possible, the relevant resources are allocated in a Pareto efficient manner. Within the context of cross-border group insolvency, the concept of Pareto efficiency would dictate that CoCo among insolvency practitioners and/or courts should lead to an efficiency increase in at least one insolvency proceeding (e.g. an increase in proceeds) without being inefficient for any of the other group company's insolvency proceedings, compared to what stakeholders would receive in the absence of such CoCo (e.g. not leading to an increase of the costs incurred in such other insolvency proceedings).

28. Himmer has argued in favour of the so-called Kaldor-Hicks standard,[81] in determining whether certain behaviour is efficient from a group insolvency perspective.[82] The Kaldor-Hicks criterion for efficiency is similar to the Pareto criterion, with the exception that an outcome is considered an improvement in efficiency if any individual that improves its position as a result of the relevant behaviour could hypothetically compensate those individuals that are made worse off. In short, the relevant behaviour should allow for full compensation being paid, and yet result in a net advantage overall.[83] For certain

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76 See Uhlenbruck / *Vallender* Insolvenzordnung, 15. Aufl. 2019, InsO 269a, Rn. 26.

77 See *supra* para. 17ff. See also recital 52, 3rd sentence, Recast EIR.

78 See e.g. Horst Eidenmüller 'Verfahrenskoordination bei Konzerninsolvenzen' (2005) 169 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 528, 550 ff; Van Galen 2012 (n 7) 21 ff. Brünkmans argued that this standard of Pareto efficiency underlies the *Insolvenzordnung*'s provisions on group insolvencies, see Brünkmans (n. 73) Rn. 9-13. See also Christian Pleister, '§ 5 Sanierung eines Konzerns', in Lucas Flöther (ed), *Konzerninsolvenzrecht* (2. Aufl., Verlag C.H. Beck 2018), Rn. 23; Fabian Schumann, *Der Unternehmensgruppe im Insolvenzrecht* (Nomos Verlagsgesellschaft 2020) 173.

79 Jules Coleman, *Markets, Morals, and the Law* (OUP 2002) 97.

80 *Idem.*

81 Named after economists Nick Kaldor and John Hicks. See Nick Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939), 49 Economic Journal 549; John Hicks, 'The Foundations of Welfare Economics' (1939), 49 The Economic Journal 696.

82 Himmer (n 55) 87.

83 Hicks (n 81) 706.

behaviour to qualify as a Kaldor-Hicks improvement, the benefited party does not actually have to compensate the parties that do not benefit. It is sufficient that the increase in value for the benefited individual is sufficient to hypothetically make such compensation possible. As Kaldor stated, the question whether compensation should in fact be given, or not, "*is a political question on which the economist, qua economist, could hardly pronounce an opinion.*"[84]

29. On the one hand, within the framework of CoCo in cross-border group company insolvency proceedings, judging conduct on the basis of the Pareto criterion would still be too stringent. In cases where all group companies but one benefit substantially from a coordinated approach toward the group's insolvency, whilst only one group company would incur limited negative impacted by it, it would be sub-optimal to neglect such additional value. It would also be contrary to the overarching principle that insolvency proceedings should aim at maximization of the value available to creditors and that CoCo should thus leverage synergies across the group.[85] The KPNQwest case discussed above is a good example thereof.

30. On the other hand, measuring the efficiency of, for example, an envisaged asset sale on the basis of the Kaldor-Hicks criterion could be at odds with the legal separateness of the group companies. The group company that would be worse off would not necessarily be compensated for its loss, potentially requiring that group company to sacrifice part of its estate for distribution in the other group companies' insolvency proceedings. That would directly interfere with one of the most important aspects of legal separateness in insolvency: companies form a separate individual pool of assets, available only to their own separate pool of creditors.

31. In further specifying the application of Pareto efficiency in a group insolvency context, Van Galen has proposed a 'group compensation rule', which prescribes that: "*an insolvent group company may agree to a scenario which is in the interests of other group companies but detrimental to its own creditors only if accompanying measures are taken to ensure that its creditors receive at least what they would have received under the likely stand-alone scenario for this company.*"[86]

32. Van Galen thus proposes what could be characterized as an 'enhanced Kaldor-Hicks' alternative for efficiency. According to this approach, CoCo should be considered more efficient in a group context, if such CoCo ensures faster and/or greater payment in at least one group company's insolvency proceeding, while not resulting in slower or less comprehensive payment in the other group companies' proceedings, where necessary after measures are implemented to ensure that (the creditors of) any group company that would have been worse of as a result of the CoCo, receive as quick and comprehensive payment as they would have in absence of such CoCo.

33. This enhanced Kaldor-Hicks standard is preferable to the Pareto and Kaldor-Hicks standards. In comparison to the somewhat

[84] Kaldor (n 81) 550. See also Hicks, stating that "*I do not contend that there is any ground for saying that compensation ought always to be given; whether or not compensation should be given in any particular case is a question of distribution* […]." Hicks (n 81) 711.

[85] Recast EIR, recital 52.

[86] Van Galen 2012 (n 7) 9-10.

rigid Pareto criterion, it allows for realization of surplus value in significantly more cases. At the same time, the enhanced Kaldor-Hicks standard requires that the stakeholders in group companies' proceedings that are negatively impacted by the CoCo are actually compensated. As such, and contrary to the Kaldor-Hicks criterion, the enhanced Kaldor-Hicks respects the group companies' legal separateness.

34. It could thus be argued that Chapter V, in its pursuit of efficiency, promotes an 'overriding group interest', to the extent that the relevant stakeholders in the group companies' proceedings are not negatively impacted and the position of the stakeholders in at least one other group company's proceeding improves. In the words of Hermann:[87] "*Egoismen sind auszuschliessen.*"

4.3 Distribution of the surplus value

35. As is apparent from the above, all mentioned efficiency standards only deal with the question of overall value maximization, and not with the subsequent question of value distribution amongst the participants. That is considered a question of policy, rather than efficiency.[88] When reviewing Chapter V, it is apparent that the EU legislature has included (only) one policy choice in relation to distribution of the value realized through CoCo: CoCo should not leave any of the group members worse off than they would have been absent such conduct.

36. For the remainder, Chapter V is silent on the subject of distribution of any surplus value and leaves it up to the insolvency practitioners and, where relevant, courts involved in CoCo to decide on that. It refrains from prescribing a certain distribution of the surplus value, or a general requirement of fairness of such distribution. Where a group's surplus value is monetized, the distribution thereof will thus depend on negotiations amongst the parties involved. Distribution can, depending on the aspects of the relevant case, for instance be determined on the basis of the proportionate value of the assets contributed by the respective proceedings to the group solution, their proportionate overall asset value or the proportionate amounts of debt as admitted in the proceedings.

37. Whilst the absence of any rules on the distribution of surplus value does provide ample flexibility, it also has the risk of enflaming lengthy and difficult discussions amongst those involved. The difference in value attribution between, for instance, applying the proportionate amount of debt or the proportionate value of assets may in practice turn out difficult to bridge, although the parties involved should be expected to do so nonetheless. Where certain measures are overall efficient, benefit all or some proceedings and do not harm any of them (where relevant, after compensation), the overall strive for efficiency would require them to find a solution, regardless of distribution issues. If, however, insolvency practitioners propose group measures that would, for instance, accumulate all or most of the additional value to their own proceedings, without any reasonable grounds,[89] those insolvency practitioners could be said not to engage in *bona fide*

[87] Vallender / *Hermann* EuInsVO Kommentar, Aufl. 2 2020, art. 56, Rn. 50.

[88] See *supra* para. 28.

[89] A reasonable ground could, for instance and depending on the circumstances of the matter, be that all surplus value is demonstrably realized as a result of assets contributed by that respective proceedings.

CoCo and as such, should not have to be cooperated with under the given circumstances. In cases where competing (sets of) measures are on the table that would result in different distributions of value, the insolvency practitioners and courts are obligated to opt for the overall most efficient (set of) measure(s), also where that would entail individual insolvency proceedings receiving less value than they would in the competing solution.

5. The practical implications of the enhanced Kaldor-Hicks standard in Chapter V's context

38. The adoption of the enhanced Kaldor-Hicks standard and an overriding group interest under Chapter V has significant implications for the EU insolvency practice. In a sense, the enhanced Kaldor-Hicks standard lifts the collectiveness-level on which insolvency proceedings aim to prevent value destructive behaviour,[90] from the single entity viewpoint to the group of companies as a whole. Instead of preventing single creditors from prohibiting a solution that would leverage the value of their individual debtor's joint assets in the benefit of the joint creditors, the enhanced Kaldor-Hicks standard should prevent individual insolvency practitioners and courts involved in group members' insolvency proceedings from behaviour that would negatively impact the outcome of the insolvent group companies' proceedings as a group. With Chapter V's – and, more broadly, the Recast EIR's – pursuit of efficiency, insolvency practitioners and courts involved in group companies' insolvency proceedings should be required to engage in CoCo not only when it is beneficial to their own proceedings,[91] but also when it has a neutral impact on their own proceedings (if required, post-compensation), but would improve the outcome for the group as a whole.[92]

39. Consider cases in which the orderly management of a group member's insolvency proceeding is dependent on the cooperation of insolvency practitioners in other group members' proceedings. If, for example, as may often be the case in large groups of companies,[93] one group company manages the digital servers or a storage or production facility for all or several of the group companies, it may be more efficient to keep those servers or that facility running, even if the group company managing it no longer needs it. If other group companies require access to those servers or facilities and are willing to apply the added value realized therewith to compensate for the associated costs, it would satisfy the enhanced Kaldor-Hicks standard and thus be efficient. Assuming that all other requirements for the application of article 56 Recast EIR have been met, the insolvency practitioner would be obligated to cooperate and provide access.

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90 See *supra* para. 9.

91 As they would already generally be under their respective national insolvency laws, see *supra* n 67.

92 Assuming that the other requirements for application of the relevant provisions have been met. See e.g. particularly article 60(1)(b)(iii) Recast EIR in relation to the stay of realization measures, which requires that the stay is "*to the benefit of the creditors in the proceedings for which the stay is requested*".

93 In the Lehman Brothers case, for instance, one UK subsidiary, by design of the group, possessed most of the documentation for the group's assets, rendering it necessary to restore the flow of information as much as is compatible with the relevant insolvency laws. See Stephan Madaus, 'Insolvency Proceedings for Corporate Groups Under the New Insolvency Regulation' (2015) IILR 235, para. C.

40. The same would apply in cases where a coordinated sales approach would result in greater distributions to creditors, as would for instance have been the case in the abovementioned KPWQwest bankruptcy. Assume that the total additional value generated by a coordinated group-wide sale of KPNQwest's glass fiber network would be EUR 100 million, that would flow to all but one insolvent group company, and that the latter would realize a loss in value of EUR 10 million as a result of the coordinated sale. If the insolvency estates benefitting from the group-wide sale were to compensate the estate that would lose EUR 10 million out of the additional value of EUR 100 million, the proposed coordinated sale would meet the enhanced Kaldor-Hicks test and be considered efficient. Again, assuming that all other requirements for the application of article 56 Recast EIR have been met, all insolvency practitioners would be obligated to cooperate with the joint sale. In absence of any rules on the distribution of the remaining EUR 90 million of value, that would be a matter of negotiation amongst the insolvency practitioners, e.g. on the basis of the proportionate value of the assets they are contributing.

41. In implementing Chapter V's provisions in practice, insolvency practitioners and courts should undertake a two-pronged approach when determining whether certain behaviour is efficient. First, they should assess the impact of the proposed CoCo on their respective group members' insolvency proceedings to determine whether it will result in faster and/or more comprehensive repayment to the creditors in their own individual proceedings. Second, they should analyse the impact of the envisaged measures on the group's proceedings as a whole. Uncertainties concerning the outcome of the envisaged CoCo should be discounted for in this analysis.

42. This approach may initially appear to place a heavy burden on insolvency practitioners and courts. In many cases, however, the added benefit of CoCo, or the lack of it, will be obvious, particularly with respect to courts. If the goal of a group of companies is to implement a cross-border group-wide restructuring by means of restructuring plans in each group member's separate insolvency proceedings, it will often clearly be efficient for the courts involved to communicate and coordinate regarding, among other things, the commencement of the relevant DIP proceedings, the duration of the collection moratoriums and confirmation of the restructuring plans.

43. In cases that are less clear, the principle of efficiency prescribes that it will depend on the impact of the envisaged measure to what extend a thorough *ex ante* analysis will be required. Where the impact of the envisaged CoCo-measures is limited, e.g. in case of sharing of information, an in-depth analysis of the consequences may be a waste of resources. If the ramifications for the group members' insolvency proceedings are potentially significant, however, for instance in case of a coordinated sale of the business or even more so: a coordinated implementation of restructuring plans, the insolvency practitioners and courts should be expected to be confident of the added value, taking the relevant uncertainties into account. An insolvency practitioner could then, for instance, be expected to have had external research confirm the group's approach.

44. If the CoCo is anticipated to result in a more efficient outcome in all proceedings,

it is mandatory, provided the other requirements of Chapter V have been satisfied. If the proposed CoCo is not efficient for all individual proceedings, but the overall added value outweighs its negative impact, the practitioners and courts involved in the proceedings that will benefit from the CoCo should consider, in collaboration with their counterparts in proceedings that would not benefit, whether compensation would be worthwhile.

45. Before engaging in a certain form of CoCo that will (likely) negatively impact the outcome of the proceedings, the relevant insolvency practitioner should ensure compensation that is at least adequate to neutralize the impact of such CoCo. Where the exact negative impact is uncertain at the time of the CoCo, for instance because the purchase price in a coordinated business sale is dependent on certain future milestones, parties can agree on equally flexible arrangements. The mere fact that the exact impact is dependent on uncertain future events, should in itself not be sufficient to withhold participation altogether. Where agreeing on such sufficient compensation is however impossible, as, for instance, the CoCo entails insolvency practitioners' participation in a coordinated restructuring that relies too heavily on uncertain long-term assumptions to determine value attribution and includes a big ask of insolvency practitioners of the potentially harmed proceedings, those insolvency practitioners should abstain from participating. Whilst Chapter V promotes an overriding group interest, insolvency practitioners must first and foremost comply with their duty of care vis-à-vis the creditors in their own proceedings.

6. Conclusion

46. With the newly added provisions of Chapter V on group insolvencies, the Recast EIR now allows and obligates insolvency practitioners and courts to engage in CoCo in cases of EU cross-border group insolvency proceedings. With these provisions, the Recast EIR aims to ensure an efficient conduct within those proceedings, whilst simultaneously respecting each group member's legal separateness.

47. In light of these objectives, this article has proposed that such CoCo should be considered more efficient from a group insolvency context if complies with the 'enhanced Kaldor-Hicks criterion', meaning that it ensures faster and/or greater payment in at least one group company's insolvency proceeding, while not resulting in slower or less comprehensive payment in the other group companies' proceedings, where necessary after measures are implemented to ensure that (the creditors of) any group company that would have been worse of as a result of the CoCo, receive as quick and comprehensive payment as they would have in absence of such CoCo.

48. The enhanced Kaldor-Hicks criterion towards cross-border group insolvency proceedings not only promotes CoCo by insolvency practitioners and courts where that would benefit their own insolvency proceedings, but also in favour of other group members' proceedings, if that does not result in slower or less comprehensive payment in their own proceedings (where necessary, post-compensation). It is therefore concluded that, with the inclusion of Chapter V and under the circumstance outlined in the above, the Recast EIR now purports a duty for insolvency practitioners and courts to act in favour of an overriding group-wide interest.