

# O Captain(s)! My Captain(s)!<sup>1</sup> – Why and How Courts Should Start Appointing Groupwide Insolvency Practitioners under the Recast EIR

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## 1. Introduction

1. Insolvency law is traditionally understood as an instrument to maximize the value of an insolvent debtor's assets (and, with it, its enterprise). It prevents creditors from pursuing individual remedies over those assets and breaking up the assets in a piece-meal recovery. Instead, it streamlines debt-collection efforts in a single, coordinated procedure.<sup>3</sup> In that sense, laws dealing with the insolvency of 'groups of companies'<sup>4</sup>, or group insolvency laws, could conceptually be approached as an instrument to achieve the same result for a similar problem, with a distinct difference.<sup>5</sup> Where individual debtors' insolvency

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1 After Walt Whitman's renowned 1865 poem 'O Captain! My Captain!'.

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3 See e.g., Jackson: *"The basic problem that bankruptcy law is designed to handle, both as a normative matter and as a positive matter, is that the system of individual creditor remedies may be bad for the creditors as a group when there are not enough assets to go around. Because creditors have conflicting rights, there is a tendency in their debt-collection efforts to make a bad situation worse. [...]"* Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (HUP 1986) 10.

4 See for the relevant definitions for 'group of companies' and 'parent undertaking' Article 2(13) and (14) Recast EIR. See further on their interpretation within the context of the Recast EIR, Sid Pepels, 'Defining groups of companies under the Insolvency Regulation (recast) –on the scope of EU group insolvency law' (2021) 30(1) IIR 96. Constituents of a group of companies will, within the context of this article be referred to both as 'group companies' and 'group members' interchangeably.

5 Cf De Weijts who identifies the ability of the individual group members' insolvency practitioners' to assume a holdout position in respect of a joint sale of the group as a challenge in group insolvencies (a so-called anticommons problem). He puts this in contrast with insolvency law's main challenge: the 'common pool problem'. Bankruptcy proceedings are traditionally intended to solve the problem that creditors may be incentivized to try and take recovery over their debtor's assets first, effectively dismembering a debtor. The anticommons problem he identifies in respect of group companies is "*not*

proceedings deal with a single pool of assets, to be realized for the benefit of and distributed among a single pool of hierarchically sorted creditors, insolvency proceedings concerning groups of companies deal with separate estates, per each individual group company.<sup>6</sup>

2. Group companies will often conduct their business in an integrated, or at least coordinated manner prior to the opening of insolvency proceedings. As a result, they will often have become dependent on each other for, for instance, the supply of services or goods that are necessary for the production process, access to back-office systems, to financing, to intellectual property (such as brands) or employees.<sup>7</sup> Disregarding such interdependencies by treating each insolvent group member's estate as wholly separate, standalone 'pools' of assets and debts can lead to sub-optimal results. Such an entity-by-entity, or 'single entity' approach to 'group insolvencies'<sup>8</sup> was, however, tightly woven into the fabric of the original European Insolvency Regulation (the **Original EIR**).<sup>9,10</sup> The Original EIR did not include any provisions of group insolvency law.<sup>11</sup>

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*the dismemberment, but the unwillingness of putting something back together: the group company, which was broken down by the opening of insolvency procedures."* See Rolef de Weijts, 'Harmonization of European Insolvency Law and the need to tackle two problems: common pool & anticommons' (2012) 21(2) IIR 67, 81-82 and in particular footnote 69.

- 6 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 2021-5, para 38.
- 7 Cf Michele Reumers, 'De curator en tegenstrijdige belangen bij groepsvennootschappen' (2021) 16 Ondernemingsrecht 759.
- 8 The term 'group insolvencies' is used to refer to cases where insolvency proceedings concerning more than one company pertaining to a group of companies and/or requests thereto are pending simultaneously. See for the relevant definition for 'group of companies' *supra* n 3.
- 9 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
- 10 See Pepels EIRJ 2021 (n 6) para 6 *ff*.
- 11 The European Commission described the reason for lack of rules on group insolvencies under the Original EIR to be threefold: "*when the Convention that later became the Regulation was negotiated in the 1980s and 1990s, the phenomenon of groups of companies was not as widespread as it is today. The drafters of the Insolvency Convention conceived multinational operations to be structured predominantly as "establishments" in other Member States rather than independent legal entities. Moreover, at that time, the reorganisation or rescue of companies was not a prevailing option in the domestic insolvency laws of Member States and liquidation was the norm. Finally, the creation of rules for groups of companies raised complex problems and it may have been considered politically and practically prudent to postpone it to a later date.*" See 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. 16. It is questionable whether group structures were actually not as widespread in the 1980s and 1990s. As referenced by the German legislator (Gesetz, n 99, p. 15), empirical studies indicate that as early as the 1990s, the overwhelming majority of companies (stock cooperations and limited liability companies) were affiliated with a group.

3. With the revision of the Original EIR into the European Insolvency Regulation (recast) (the **Recast EIR**),<sup>12</sup> rules on multinational group insolvencies were introduced into European insolvency law for the first time with the Recast EIR's new **Chapter V**. Although the European Union (**EU**)'s legislature opted to maintain the 'single entity approach' by-and-large,<sup>13</sup> Chapter V does provide several interesting group insolvency tools. As one of the most potentially impactful instruments, the Recast EIR now authorizes courts to appoint a single or the same insolvency practitioner(s) for multiple insolvency proceedings concerning different members of a group of companies, even when those proceedings emanate from different Member States.<sup>14</sup> The authorization for courts to do so is, however, not directly included in one of Chapter V's provisions, but rather hidden in its explanatory recitals. The option to appoint a single or the same insolvency practitioner(s) appears to lack awareness and occurrences of such appointments in practice are zero to none, to my knowledge.
4. This article aims to examine (i) whether, and if so how, such coordinated appointments can contribute towards more efficient restructurings of groups of companies (or, 'group restructurings'),<sup>15</sup> whilst simultaneously respecting the individual group members' legal separateness and (ii) which possibilities exist under the Recast EIR for coordinating the appointment of the same insolvency practitioner(s) in relation to various group members' insolvency proceedings.

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

13 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 (the **Commission Proposal**), p. 9 and 14. See Pepels EIRJ 2022 (n 58) para 15. See also Schmidt, who concludes, among other things in relation to group insolvencies under the Recast EIR, that although exceptions to the principle of '*eine Person, ein Vermögen, eine Insolvenz*' are being made, the principle is still 'alive and kicking' ('*quicklebendig*'), 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, 53.

14 The term 'Member State' refers to all Member States of the EU, with the exception of Denmark. As is clarified in recital 88 to the Recast EIR, Denmark has not taken part in the adoption of the Recast EIR and, as such, is not bound by it or subject to its application.

15 The concept of a 'group restructuring' in the framework of this research refers – in short – to measures that are aimed at restructuring the business of two or more members of the same group of companies in whole or part, that include changing the composition, conditions or structure of the group members' assets, equity and/or liabilities with the goal of protecting, preserving, realizing or enhancing the overall combined value of the relevant group members, both through so-called DIP proceedings and through other types of insolvency proceedings under the Recast EIR. See for a more extensive version of the definition for 'group restructuring' Sid Pepels, 'Group concerns and communication and cooperation between practitioners under the European Insolvency Regulation' (2023) 32(3) IIR para 1.

5. Both the German Insolvency Act (the *Insolvenzordnung*, or **InsO**) and the United Nations Commission on International Trade Law (**UNCITRAL**)'s 2019 Model Law on Enterprise Group Insolvency (the **Model Law on Groups**)<sup>16</sup> provide for rules on coordination in the appointment of the same person(s) as insolvency practitioner in relation to multiple group members' insolvency proceedings. The analysis will therefore include a comparison with both sets of (model) legislation.
6. This article will continue in Paragraph 2 with background on the necessity of coordination in group insolvencies and a more in-depth discussion of the Recast EIR's approach thereto. In Paragraph 3 the rules on coordinated insolvency practitioner appointments in the Recast EIR, Model Law on Groups and the *Insolvenzordnung* will be discussed, as well as the benefits and downsides to such appointments. Paragraph 4 will deal with the way such appointments can be conducted under the Recast EIR. Finally, Paragraph 5 will contain various proposals for amending Chapter V in respect of group insolvency practitioner appointments, in order to ensure such future appointments in line with Chapter V's goals.

## 2. Coordinated group insolvencies and the Recast EIR

### 2.1 Entity-by-Entity approach has pros, but also cons

7. Under the EU's cross-border insolvency framework, insolvency proceedings relating to groups of companies are traditionally opened and treated on an entity-by-entity basis: in principle, each group company is subject to its own proceeding, with its own estate, court *and* insolvency practitioner (if appointed).<sup>17,18</sup> This entity-by-entity approach stems from the 'legal separateness' of group companies<sup>19</sup> and was encapsulated by the Court of Justice of the Euro-

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16 The Model Law on Groups is available through <<https://uncitral.un.org/en/texts/insolvency>>, as well as all other referenced UNCITRAL documents. All websites included in this article have been last visited on 6 March 2023.

17 Also referred to as the principle of the 'five ones': one insolvent debtor, one estate, one insolvency proceeding, one court and one insolvency practitioner, or in German the principle of '*eine Person, ein Vermögen, eine Insolvenz*'. See Pepels EIRJ 2021 (n 6) para 6 *ff.*

18 In case of so-called DIP proceedings, the opening of insolvency proceedings does not necessarily involve the court-appointment of an insolvency practitioner. Pursuant to Article 76 Recast EIR, a debtor in possession, or DIP, also qualifies as 'insolvency practitioner' for purposes of Chapter V, where appropriate. See in more detail: Pepels (n 15) para 2.

19 The principle that companies constitute legal entities which are separate from, most importantly, their shareholders and, among other things, have the capacity to bear rights and obligations in their own name is viewed as a corner stone principle of European law. See Pepels EIRJ 2021 (n 6) para 6-7.

pean Union (CJEU)<sup>20</sup> in relation to Member States' courts' jurisdiction to open insolvency proceedings in its well-known Eurofood judgment. The CJEU considered therein that: *"in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction."*<sup>21</sup> When determining such jurisdiction, pursuant to the 'Centre of Main Interest' (or **COMI**)-concept, the Recast EIR contains a rebuttable presumption in the case of a company or legal person. Absent proof to the contrary, only the court of the Member State where a company's registered office is located has jurisdiction to open main insolvency proceedings with a universal scope.<sup>22</sup> The mere fact that a company's economic choices are or can be controlled by a parent company in another Member State is insufficient to rebut this 'registered office'-presumption if a company carries on its business at the location of its registered office.<sup>23</sup> In its 2011 Interedil judgment, the CJEU further limited the possibility to rebut the 'registered office'-presumption, by considering that, *"where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, [...] it is not possible that the centre of the debtor company's main interests is located elsewhere."*<sup>24</sup> In contrast, the CJEU referenced the example of a *"'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated"* as an example where a company's COMI and registered office could be located in different Member States.<sup>25</sup>

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*Cf* Irit Mevorach, who argues that the fragmented approach to multinational group insolvencies is not a consequence of the legal separateness of group companies, but rather a consequence of territorial inclinations of States.

20 At that time in 2006, its predecessor, the Court of Justice of the European Communities.

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

22 Recast EIR, Article 3. See Georg Ringe, para 3.18 ff, in Reinhard Bork and Kristin van Zwieten (eds.), *Commentary on the European Insolvency Regulation* (OUP 2022).

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

24 CJEU 20 October 2011, C-396/09 (*Interedil Srl*), para 50. The CJEU further held that, although the location of immovable property in another Member State than that of a debtor company's registered office and the existence in that Member State of a contract concluded with a financial institution may be objective factors that are in the public domain and thus ascertainable by third parties, such circumstances cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. See in particular para 53 and 59.

25 CJEU 2 May 2006, C-341/04 (*Eurofood IFSC Ltd.*), para 35.

8. As a result, when insolvency proceedings are opened concerning groups of companies whose constituents are located in different Member States,<sup>26</sup> the EU cross-border insolvency framework will often require those proceedings to take place in those different Member States and be opened by the courts of those Member States. Crucially for this article, where those proceedings also include the appointment of insolvency practitioners,<sup>27</sup> courts from those separate Member States will most likely appoint persons from their own jurisdiction.<sup>28</sup> Those individual insolvency practitioners will be predominantly guided by the interests of their own, separate estates' creditors.
9. This entity-by-entity approach does have benefits. It ensures that each individual group member's insolvency proceedings take place in, under the laws of and in the language of their individual home States. This, for instance, enables creditors to assess upfront where and under which laws insolvency proceedings will take place, which will enable them to assess credit risks *ex ante*. It also, for instance, warrants *ex post* that if insolvency proceedings are opened, the appointed insolvency practitioners will act in the separate group companies' creditors' best interest.
10. Such a fragmented approach to the group's insolvency can, however, also be problematic. Although the various constituents of a group of companies are legally separate entities, they will often economically, financially, administratively and/or operationally function as an integrated and interdependent business enterprise.<sup>29</sup> In the ordinary course of business, the coordinated conduct

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26 Note that, as recital 53 to the Recast EIR clarifies, if the COMIs of all group members are located in a single Member State, that Member State's courts are entitled to open proceedings for all those members in a single jurisdiction. In those cases, the provisions included in Chapter V do not apply as follows from recital 62 Recast EIR.

27 Note that this may be different in case of so-called Debtor in Possession, or DIP, proceedings, which do not necessarily include the appointment of an insolvency practitioner. If no insolvency practitioner is appointed, or that insolvency practitioner solely has supervisory powers, the group-related challenges highlighted in this article do not occur, or at least to a significantly lesser degree. See below, para 3.4.2.

28 See also Pepels EIRJ 2021 (n 6) para 6 ff. See also Thomas Himmer, *Das europäische Konzerninsolvenzrecht nach der reformierten EulnsVO* (Mohr Siebeck 2019) 296, who states that practice shows that courts will often appoint insolvency practitioners from their own jurisdiction (*Rechtskreis*), without coordinating on that appointment or, best case, appointing the same insolvency practitioner.

29 *E.g.*, because the group's back office functions or financial management are 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. See Pepels EIRJ 2022 (n 58) note 21.

of the various group companies which enables them to engage in a joint business is maintained by some form of ‘group discipline’, for instance a chain of command based on shareholder voting rights.<sup>30</sup> With the fragmented opening of insolvency proceedings in multiple Member States, the glue that kept the group companies together will, however, often dissolve.<sup>31</sup> That is particularly the case where the management of the group companies’ assets is (at least partially) transferred to court-appointed insolvency practitioners. With multiple insolvency practitioners ‘captaining’ separate pieces of a single integrated and interdependent economic unit, what remains is a complex matrix of potentially diverging decision-makers with different interests and different rules applicable to them.<sup>32</sup>

11. Although the entity-by-entity approach may suffice for some groups of companies, oftentimes a more group-oriented approach will be necessary to prevent inefficiencies. Breaking a business up in separate pools of assets and debts by appointing separate decision-makers, brings a high risk of losing the group’s ‘synergy value’, the added value that is included in the group’s business as a whole.<sup>33</sup> Treating each group company as an individual subject of insolvency law may additionally increase the ‘transaction costs’ related to insolvency proceedings, for instance by increasing information loss and duplicative work.<sup>34</sup> So, whilst the European legal rules prescribe fragmentation of multinational businesses in case of insolvency, the economic reality will often necessitate an approach that keeps the business together, as far as possible.

## 2.2 The EU’s group insolvency approach is lacking in fire power

12. In light of the above, it should not come as a surprise that, at the outset of the discussions on the revision of the Original EIR, various interest groups and

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30 Robert van Galen, ‘Insolvent Groups of Companies in Cross Border Cases and Rescue Plans’, in: Preadviezen 2012 (Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht) para 22, digitally available via <[www.nvrii.nl/publicaties](http://www.nvrii.nl/publicaties)>.

31 Cf UNCITRAL Legislative Guide 2010 (n 93) p. 85.

32 See also Himmer (n 28) 224.

33 In many cases, the value of the business as a whole will be worth more than the collection of its pieces, as the business than still has the continuing potential to earn profits. See Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009) 109; Pepels EIRJ 2021 (n 6) footnote 30.

34 Pepels EIRJ 2021 (n 6) para 14; Sid Pepels, ‘Het Nederlandse internationaal groepsinsolventierecht – cause for concern?’ (2022) 40(2) NIPR 303, 305-308. Cf, among others, Van Galen (n 30) para 20; Irit Mevorach, ‘Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge’ (2014) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 226, 233; Himmer (n 28) 224-225; Ilya Kokorin, ‘Conflicts of interest, intra-group financing and procedural coordination of group insolvencies’ (2020) 29(2) IIR 32, 35-36; Reumers (n 7) 759.

insolvency specialists,<sup>35</sup> as well as the European Parliament<sup>36</sup> argued in favour of far-reaching instruments to tackle the fragmentation challenges that occur in group insolvencies.<sup>37</sup> Good arguments were made in favour of, for instance, rules on an EU-wide group COMI to open insolvency proceedings concerning group members from various Member States before the court of a single Member State,<sup>38</sup> on the appointment of a ‘group insolvency officer’ who would be assisted by local representatives,<sup>39</sup> on the opening of ‘group main proceedings’,<sup>40</sup> and on a single pan-‘European Rescue Plan’ that would cover multiple group members.<sup>41</sup>

13. In an attempt to balance the efficient treatment of group insolvencies with the entity-by-entity approach,<sup>42</sup> the European legislature opted, however, for a lighter approach.<sup>43</sup> The provisions of Chapter V maintain the principle of a single insolvency proceeding per group company, whilst advancing cooperation, communication and coordination (or **CoCo**)<sup>44</sup> between those separate

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35 See e.g., Nicolaes Tollenaar, ‘Dealing with the insolvency of multinational groups under the European Insolvency Regulation’ (2010) *Tijdschrift voor Insolventierecht* 2010/14, 94 ff; Robert van Galen et al., *Revision of the European Insolvency Regulation: Proposals by INSOL Europe* (INSOL Europe 2012), Ch V and VI; Irit Mevorach, ‘INSOL Europe’s Proposals on Groups of Companies (in Cross Border Insolvency): A Critical Appraisal’ (2012) 21 *IIR* 183; Samuel Bufford, ‘Coordination of Insolvency Cases for International Enterprise Groups: A Proposal’ (2012) 86 *American Bankruptcy Law Journal* 685.

36 See the European Parliament’s 2011 recommendations on the revision of the Original EIR, in particular Part 3 of the Annex thereto, European Parliament document P7\_TA(2011)0484, V 15.11.2011.

37 See also Pepels EIRJ 2022 (n 58) para 13 ff.

38 Bufford (n 35).

39 Tollenaar (n 35).

40 Van Galen et al (n 35), Ch V.

41 Van Galen et al (n 35), Ch VI.

42 Cf e.g., the Commission in the Commission Proposal (n 13) 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.*” Note that this Commission Proposal did not already include the GCP, which was only included in the draft legislation at a later stage.

43 See for a discussion of the legislative procedure concerning the Recast EIR: Michael Weiss, ‘Bridge over Troubled Water: The Revised Insolvency Regulation’ (2015) 24(3) *IIR* 192.

44 The concepts of ‘communication’, ‘cooperation’ and ‘coordination’ are used interchangeably within the Recast EIR, with communication and coordination sometimes being referred to as a form of cooperation (see e.g., Articles 56(2)(a)-(c), 57(3)(a)-(e)), whilst at other times referencing cooperation as an instrument to facilitate coordination (Article 42(1) Recast EIR). According to Wessels, this is consistent with international best practices in which these terms are used broadly and sometimes overlap, see Bob Wessels, para 41.52, in Reinhard Bork and Kristin van Zwielen (eds.), *Commentary on the European Insolvency Regulation* (OUP 2022). For purposes of this article, communication is understood as ‘the exchange of information’, cooperation as ‘the act of working together with someone or doing what they ask you’ and coordination as ‘the process of organizing the different activities or people involved in something so that they work together effectively’.



proceedings.<sup>45</sup> The EU legislature's struggle with the tension between 'value maximization' and 'legal separateness' becomes apparent when reviewing the recitals to the Recast EIR.<sup>46</sup> These explanatory considerations to the regulation expressly specify that the provisions in Chapter V should on the one hand "*ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies*"<sup>47</sup> and result in "*the various insolvency practitioners and the courts involved cooperating closely [...]*"<sup>48</sup> in a manner that "*should be aimed at finding a solution that would leverage synergies across the group*". On the other hand, whilst striving to ensure efficiency, the recitals also specify that "*each group member's separate legal personality*" should be respected.<sup>49</sup>

14. Chapter V's provisions (Articles 56-77 Recast EIR) are distributed in two distinct sections. Section 1 (Articles 56-60 Recast EIR) first sets off by imposing 'cooperation and communication' duties on and granting rights to insolvency practitioners and courts involved in group members' insolvency proceedings. With these provisions, the Recast EIR extends to 'CoCo'-obligations in insolvency proceedings regarding the same debtor to a group insolvency context.<sup>50</sup>

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45 As is apparent from recital 61 to the Recast EIR, the provisions as included in Chapter V "*only apply to the extent that proceedings relating to different members of the same group of companies have been opened in more than one Member State.*" They do not apply if various insolvency proceedings concerning various group members are opened in the same Member State, nor if various proceedings (i.e., main and secondary insolvency proceedings) concerning the *same* group company have been opened in various Member States. See on the scope of EU group insolvency law: Pepels IIR 2021 (n 4) para 3.

46 As is also referenced in footnote 19, a second potential struggle for the EU legislature may lay in Member States' perceived inclination to have insolvency proceedings concerning their citizens dealt with pursuant to their own, domestic laws (*i.e.*, territoriality). On the basis of the Recast EIR and its legislative history, it is difficult to what assess the extent to which this factor has played a role in the rules on group insolvency law. In any event, Member States have accepted that 'their' companies' COMIs are not necessarily located in the same territory as their registered offices and that jurisdiction to open main insolvency proceedings under the EU cross-border insolvency framework may therefore rest with foreign courts.

47 Recast EIR, recital 51.

48 Recast EIR, recital 48, 2<sup>nd</sup> sentence in conjunction with recital 52, 2<sup>nd</sup> sentence.

49 Recast EIR, recital 54. Although this recital only references the coordination of group members' insolvency proceedings, which implies it could be construed as mainly relating to the provisions in Section 2, Chapter V on the group coordination proceeding, it does convey the EU legislature's general approach to group insolvencies.

50 Recast EIR, recital 52, 2<sup>nd</sup> sentence.

As a key feature, insolvency practitioners<sup>51</sup> and courts<sup>52, 53</sup> involved in insolvency proceedings concerning a member of the same group of companies are obligated to cooperate with each other,<sup>54</sup> under certain prerequisites. Group members' insolvency practitioners may also agree to grant additional powers to or allocate certain tasks among all or some of the group members' insolvency practitioners.<sup>55</sup> Finally, they are granted standing to be heard or to request a stay of realization measures in other group members' insolvency proceedings.<sup>56</sup>

15. Second, Section 2 (Articles 61-77 Recast EIR)<sup>57</sup> provides for procedural rules on the coordination of group members' insolvency proceedings through a group coordination proceeding (**GCP**). The GCP is a 'supra-procedural' or 'meta' proceeding, separate from the already pending group members' individual insolvency proceedings.<sup>58</sup> It is intended as a coordination platform for those group insolvencies that require a more structural context for centralized coordination efforts than straightforward cooperation and communication among the insolvency practitioners (and courts).<sup>59</sup> As a main feature, the GCP includes the appointment of a coordinator, who, among other things, is tasked with developing recommendations for the coordinated conduct of the participating group members' proceedings and developing a 'group coordination plan'<sup>60</sup>. As the GCP is not intended to interfere with the legal separateness of the individual group members, the coordinator's plan cannot "*include recommendations as to any consolidation of proceedings or insolvency estates.*"<sup>61</sup>

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51 Recast EIR, Article 56. See extensively on cooperation, communication and coordination by group members' insolvency practitioners under the Recast EIR, Pepels (n 15) and Part II which will be published in the International Insolvency Review (2024) 33(1).

52 Recast EIR, Article 57, stipulating court-to-court CoCo.

53 Recast EIR, Article 58, stipulating CoCo between courts and insolvency practitioners.

54 And, if appointed, insolvency practitioners must cooperate with a coordinator in a group coordination proceeding. See Article 74 Recast EIR.

55 Recast EIR, Article 56(2).

56 Recast EIR, Article 60(1).

57 See also Article 60(1)(c) Recast EIR, authorizing group members' insolvency practitioners to request the opening of a GCP.

58 See extensively on the GCP, Sid Pepels, 'Group Coordination Proceedings under the Recast EIR in practice' (2022) EIRJ 2022-2.

59 Pepels EIRJ-2022 (n 58) para 16.

60 Recast EIR, Article 72(1). A group coordination plan "*identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies.*" See Article 72(1)(b) Recast EIR.

61 Recast EIR, Article 72(3). See Pepels EIRJ-2022 (n 58) para 22.

16. The GCP's added value as an instrument to tackle the challenges particular to multinational group insolvencies is questionable, to say the least. Among other things, (i) participation in a GCP is voluntary,<sup>62</sup> (ii) the coordinator's recommendations and group coordination plan are non-binding,<sup>63</sup> (iii) insolvency practitioners are generally not incentivized to request the opening a GCP,<sup>64</sup> and (iv) the costs associated with the opening of another proceeding and the appointment of an additional insolvency professional generally set a high bar for the opening of a GCP.<sup>65</sup> These and other characteristics of the GCP will likely have contributed to the GCP non-appliance in practice to date, to my knowledge.<sup>66</sup>
17. The overall absence of effective coordination mechanisms in Chapter V that go a step further than CoCo between individual insolvency practitioners and courts in group members' separate proceedings (albeit a good first step)<sup>67</sup> is unsatisfactory.<sup>68</sup> The 'efficiency goal' that underlies Chapter V and, more broadly, the Recast EIR as a whole,<sup>69</sup> would mandate a more effective approach.
18. In group insolvencies where multiple insolvency practitioners are appointed, CoCo efforts between those insolvency practitioners will generally need to be tremendous in order to realize the group's 'synergy value'.<sup>70</sup> Insolvency practitioners will have to be in constant contact to exchange information and coordinate their actions in order to do justice to a group's economic integration.<sup>71</sup> As Bufford argued, the large number of entities of which a group may consist, combined with the entity-by-entity approach, "*can make a coordination effort difficult or impossible, if their insolvency cases are commenced in the States of their*

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62 Recast EIR, recital 56.

63 Recast EIR, Article 70(2), which imposes a comply-or-explain mechanism.

64 See Pepels EIRJ-2022 (n 58) para 77-78.

65 Cf recital 58, 1<sup>st</sup> sentence Recast EIR, which prescribes that "*The advantages of group coordination proceedings should not be outweighed by the costs of those proceedings.*"

66 See for an extensive discussion of the issues associated with the GCP: Pepels EIRJ-2022 (n 58) para 72 ff.

67 Cf UNCITRAL Legislative Guide (2010) (n 93), p. 86, where it is stated that "*The first step in finding a solution to the problem of how to facilitate the global treatment of enterprise groups in insolvency might be to ensure that existing principles for cross-border cooperation apply to enterprise group insolvencies.*"

68 Cf Ries, who argues that cooperation between group members' insolvency practitioners under German law, actually, is a fallback solution for cases where for instance the appointment of a group insolvency practitioner is not possible. Karsten Schmidt / Ries Insolvenzordnung, 20. Aufl. 2023, §56b para 6.

69 See recital 3 to the Recast EIR, which describes that "[t]he proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective [...]."

70 Cf Vallender / Vallender EulnsVO, 2. Aufl. 2020, §57 para 34 "*Nur wenn die Verwalter zur engen Kooperation bereit sind, können i. R. der Verfahrensabwicklung Synergien freigesetzt und genutzt werden.*"

71 Gesetz (n 99) 30.

respective COMIs.”<sup>72</sup> Those difficulties are only further exacerbated by the great time pressure under which a group restructuring often has to be negotiated and formalized.<sup>73</sup> Delays in the decision-making process resulting from the necessary CoCo efforts can directly lead to reduction of the estates involved.<sup>74</sup> Even when insolvency practitioners try their best, information gaps and inefficiencies are difficult to avoid, as the German legislator has noted.<sup>75</sup>

### 3. Coordinated appointments as a solution to group insolvency challenges

#### 3.1 Appointing a group insolvency practitioner is already possible under the Recast EIR

19. It is therefore good news that the European legislature provided the restructuring and insolvency practice with one very valuable coordination tool. Member States’ courts are authorized through Article 57 Recast EIR to appoint a single or the same person as insolvency practitioner in multinational group insolvencies, albeit somewhat covertly. This Article 57(1) Recast EIR imposes a general obligation on Member States’ ‘courts’<sup>76</sup> which have opened insolvency proceedings relating to a group member,<sup>77</sup> to cooperate with any other Member State’s court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings:<sup>78</sup>

*“Where insolvency proceedings relate to two or more members of a group of companies, a court which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent that such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to them and does not entail any conflict of interest.”*

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72 Bufford (n 35) 690.

73 Nicholaes Tollenaar, ‘Proposal for Reform: Improving the ability to rescue multinational Enterprises under the European Insolvency Regulation’ (2011) IILR 252, 253.

74 Andres/Leithaus/Andres Insolvenzordnung, 4. Aufl. 2018, §56b para 4.

75 Gesetz (n 99) 30.

76 ‘Court’ is a defined term in the Recast EIR. See Article 2(6)(ii) Recast EIR.

77 See e.g., Himmer (n 28) 295; Vallender / Vallender EuInsVO, 2. Aufl. 2020, Article 57 para 13; Jessica Schmidt, Article 57 para 04, in Reinhard Bork and Kristin van Zwieten (eds.), *Commentary on the European Insolvency Regulation* (OUP 2022); Walter Nijmens, *Cooperation and Communication Obligations in European Insolvency Law* (Wolters Kluwer 2023) 114 ff.

78 See on the scope of the provisions of Chapter V *supra* footnote 45.

20. In order to give substance to this generally formulated obligation, the EU legislature included a non-exhaustive<sup>79</sup> catalogue of various means of CoCo that courts could engage in, in Article 57(3)(a)-(e) Recast EIR. That catalogue includes (directly) communicating information, coordinating the administration and supervision on the group members assets and affairs, conducting coordinated hearings and coordinating the approval of protocols.<sup>80</sup> Most notably, as is a key aspect of this article, it references the option for group members' courts' to coordinate "*the appointment of insolvency practitioners*" in Article 57(3)(a) Recast EIR.<sup>81</sup>
21. Article 57 Recast EIR does not further elaborate on what such coordination could entail. Upon further review, it becomes apparent through recital 50 to the Recast EIR that when coordinating pursuant to Article 57(3)(a) Recast EIR, courts of different Member States<sup>82</sup> involved in different group members' proceedings may under certain conditions appoint a single insolvency practitioner for those different proceedings:

*"Similarly, 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*

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79 Dominik Skauradszun & Andreas Spahlinger, para 57.19, in Moritz Brinkmann (ed), European Insolvency Regulation: Article-by-Article Commentary (1<sup>st</sup> edn, C.H. Beck 2019); Himmer (n 28) 295; Vallender / Vallender EuInsVO, 2. Aufl. 2020, Article 57 para 17; MüKolsnO / Reinhard EuInsVO, 3. Aufl. 2021, Article 57 para 06; Braun / Honert Insolvenzordnung, 9. Aufl. 2022, EuInsVO Article 57 para 14; Schmidt (n 77) Article 57 para 05.

80 Recast EIR, Article 57(3)(b)-(e).

81 As various scholars have argued, this also includes subsequent appointments, dismissals and resignations. See Vallender / Vallender EuInsVO, 2. Aufl. 2020, Article 57 para 34; Uhlenbruck / Deppenkemper EuInsVO, 16. Aufl. 2023, Article 57 para 23. See similar on coordination in the appointment of insolvency practitioners in relation to parallel proceedings concerning the *same* debtor: Skauradszun & Spahlinger (n 79) Article 42 para 25.

82 As recital 53 to the Recast EIR clarifies, the introduction of rules on group insolvencies in the Recast EIR is not intended to limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the COMI of those companies is located in a single Member State. As the recital clarifies, in such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them. It should be noted that the Recast EIR stipulates that its rules on CoCo in group insolvencies only apply if insolvency proceedings relating to different members of the same group have been opened *in more than one Member State*. See recital 62 Recast EIR. As such, cases where the proceedings are opened in a single jurisdiction are not covered by Chapter V's provisions.

with any requirements concerning the qualification and licensing of the insolvency practitioner.”

22. This recital only references the appointment of a single person as insolvency practitioner for different group members. But coordinating in the appointment of insolvency practitioners can also include other forms of coordination. Courts could, for instance, appoint the same multiple persons as insolvency practitioners in the various group members’ proceedings, as shown in the group structure in Figure 1 below:

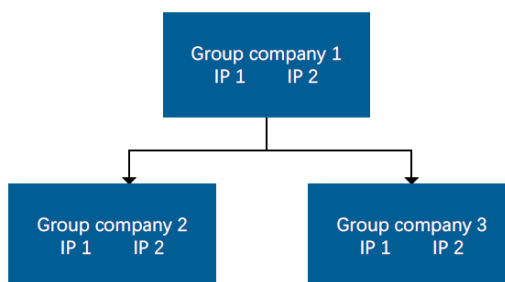


Figure 1

23. Coordinated appointments can also involve appointing one person as insolvency practitioner in all group members’ proceedings to function as a ‘linking pin’, in addition to a different insolvency practitioner per insolvency proceeding. Dutch judges Geradts and De Vos have referenced this type of coordinated appointments in a domestic Dutch context.<sup>83</sup> This form of coordinated appointments is shown in Figure 2 below:

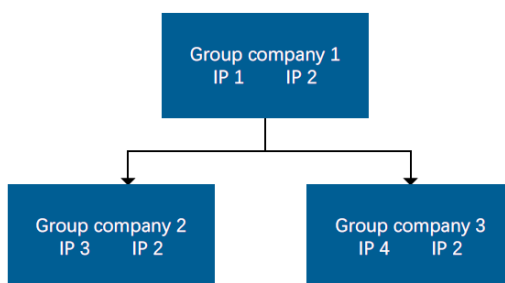


Figure 2

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83 See for examples in Dutch group insolvencies: Marie José Geradts and Elsbeth de Vos ‘Het concern en de faillissementsrechter’, in: Flip Schreurs et al. (eds) *De Curator en het Concern* (Wolters Kluwer 2017) 551, 555-556.

24. For purposes of this article, the concept of ‘**group insolvency practitioner**’ refers both to a single, or the same multiple persons as well as a linking pin practitioner who has or have been appointed as ‘insolvency office holders’<sup>84</sup> in different proceedings relating to different members of a group of companies.
25. As alternatives to a group insolvency practitioner, courts could also consider coordinating appointments through insolvency practitioners who are employed by the same law firm,<sup>85</sup> or who have showcased in previous cases or have expressed that they can cooperate successfully.<sup>86</sup>
26. When further discussing the appointment of a group insolvency practitioner, it is important to bear in mind that it is a form of CoCo between separate courts involved in various group members’ proceedings. A coordinated appointment does not impact the separateness of each individual group member’s proceeding. The administration of their insolvency estates as such remains separate.<sup>87</sup> Each group member maintains its own proceeding, its own estate, with its own court. And, a group insolvency practitioner maintains a separate duty of care as insolvency practitioner towards the stakeholders in each individual proceeding. Although practically ensuring procedural coordination by converging the role of the group members’ insolvency practitioners in a single or the same persons, such an appointment leaves the separateness of group companies unaffected.

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84 The term ‘insolvency office holder’ is used to refer to the wider group of court-appointed persons and bodies that are involved in (pre-)insolvency proceedings, including but not limited to ‘insolvency practitioners’ as listed on Annex B to the Recast EIR.

85 Non-EU examples include the cases of the Greater Beijing First Expressways Limited (GBFE) and Pegegrine Investments Holdings Limited. In both cases, insolvency office holders from the same international firm had been appointed both in proceedings in Hong Kong and Bermuda. See the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, Annex I, paras 12 and 30. See in relation to German law: Kübler/Prütting/Bork/Jacoby/Thole *Insolvenzordnung*, 98. EL. December 2023, §56b para 35.

86 Cf Schmidt (n 77) Article 57 para 18. These forms of coordinated appointments, although potentially valuable to practice, will not be discussed further in this article.

87 Cf Article 72(3) Recast EIR, which prescribes that a group coordination plan “*shall not include recommendations as to any consolidation of proceedings or insolvency estates*”. Although this provision only relates to the group coordination plan, it does show the principle underlying the Recast EIR that it does not allow for procedural or substantive consolidation. See Pepels (n 58) para 22. See on German law Fabian Schumann, *Die Unternehmensgruppe in Insolvenzrecht* (Nomos Verlagsgesellschaft 2020) 245-246.

### 3.2 Usefulness of Group Insolvency Practitioners is recognized internationally – and for good reasons

27. The Recast EIR is not alone in its promotion of coordinated appointments. Both the Model Law on Groups and the German *Insolvenzordnung* also include mechanisms for the appointment of a group insolvency practitioner. In contrast with the Recast EIR, however, those two (model) laws have opted to include specific provisions in their body of text.
28. As a short introductory note, the Model Law on Groups was adopted by UNCITRAL in July 2019.<sup>88</sup> It provides a modern model for cross-border insolvencies within groups of companies (or ‘enterprise groups’)<sup>89</sup>, that reflects international consensus.<sup>90</sup> The Model Law on Groups is a set of model provisions which States can incorporate in their national laws, at their discretion.<sup>91</sup> These and other aspects are clarified in the accompanying Guide to Enactment to the Model Law on Groups (the **Guide to Enactment**).<sup>92</sup> In addition to providing a framework for cross-border cooperation, coordination and recognition for multinational group insolvencies, the Model Law on Groups also includes provisions on domestic insolvency law concerning two or more group members’ proceedings in the enacting State. The recitals to the Recast EIR specifically reference UNCITRAL’s body of insolvency-related work, including UNCITRAL’s Legislative Guide on Insolvency Law – Part three: Treatment of enterprise groups in insolvency 2010 (**UNCITRAL Legislative Guide 2010**)<sup>93</sup> as a source of inspiration for European insolvency practitioners and courts.<sup>94</sup>

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88 The United Kingdom currently is the first and only State that has publicly committed towards implementing the Model Law on Groups in its national insolvency law to my knowledge.

89 The Model Law on Groups refers to the concept of groups of companies as ‘enterprise group’. See for the definition for ‘enterprise group’ Article 2(b) Model Law on Groups.

90 According to the Guide to Enactment (n 92), in addition to the 60 State members of UNCITRAL, representatives of 31 observer States and 34 international organizations participated in the deliberations of the Commission and the Working Group. See Guide to Enactment para 7.

91 In contrast with the Recast EIR, which is directly applicable and binding in its entirety, and has precedence over national laws. See *infra* footnotes 197 and 198.

92 The Guide to Enactment is an integral part of the Model Law on Groups (available through the link in footnote 16) as ‘Part Two’ thereof. See Guide to Enactment, para 10 *ff*.

93 The UNCITRAL Legislative Guide 2010 is available through the link included in n 16.

94 Recast EIR, recital 48, last sentence.



29. The Model Law on Groups, in its Article 17, prescribes that both in a domestic and a cross-border context,<sup>95</sup> courts *may* appoint a single or the same ‘insolvency representative’<sup>96</sup> in multiple ‘enterprise group members’<sup>97</sup> proceedings:

*“A court may coordinate with other courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group.”*

30. This Article 17 of the Model Law on Groups is based on UNCITRAL’s preceding 2010 recommendation that insolvency laws should permit the appointment of a single or the same insolvency representative, specifically also in cross-border contexts:<sup>98</sup>

*“The insolvency law should permit the court, in appropriate cases, to coordinate with foreign courts with respect to the appointment of a single or the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the insolvency representative is qualified to be appointed in each of the relevant States. To the extent required by applicable law, the insolvency representative would be subject to the supervision of each of the appointing courts.”*

31. The German legislation on group insolvencies was included in the *Insolvenzordnung* through the *Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen* (the **Gesetz**),<sup>99</sup> which entered into force on 21 April 2018. Contrary to the provisions in Chapter V and the Model Law on Groups, the provisions of the Gesetz exclusively deal with domestic matters. Also, as the Recast EIR has preference over Member States’ national laws, the provisions of Chapter

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95 As the Guide to Enactment (n 92) para 98 clarifies, “Article 17 is intended to apply both when multiple proceedings take place in the enacting State, as well as when this happens in a cross-border context.”

96 Although that does not entirely do justice to the differences amongst both concepts, the ‘insolvency representative’ could be characterized as the Model Law on Groups’ equivalent to the ‘insolvency practitioner’ under the Recast EIR.

97 The Model Law on Groups refers to ‘enterprise groups’ as its equivalent for ‘groups of companies’, and its constituents as ‘enterprise group members’. See Pepels (n 4) para 3.1.2 on the definition for ‘enterprise group member’.

98 UNCITRAL Legislative Guide 2010 (n 93), Recommendation 251. This recommendation explicitly relates to multinational group insolvencies. See Recommendation 231 for the equivalent recommendation in a domestic context.

99 See the *Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Erleichterung der Bewältigung von Konzerninsolvenzen*, BT-Drs. 18/407.

V have priority to those of the Gesetz. When, for instance, the European provisions on cooperation and communication apply to a certain group company, its German equivalent does not.<sup>100</sup>

32. Pursuant to §56b, subsection 1 of the German Insolvency Act (*Insolvenzordnung*),<sup>101</sup> if applications to open insolvency proceedings concerning members of the same group (*gruppenangehörige Schuldner*) have been filed at multiple courts (*Insolvenzgerichte*), those courts are *obligated*<sup>102</sup> to jointly consider whether it is in the interest of the creditors to appoint one person as insolvency administrator (*Insolvenzverwalter*):

*“(1) Where a request is made to open insolvency proceedings against the assets of debtor companies in a group of companies, the insolvency courts applied to must reach agreement as to whether it is in the creditors’ interests to appoint only one person as insolvency administrator. When reaching such agreement they are, in particular, to discuss whether this person is able to maintain the necessary independence regarding all the proceedings against debtor companies in the group of companies and whether possible conflicts of interest can be avoided by appointing special insolvency administrators.”*<sup>103</sup>

33. As is apparent from its wording, §56b InsO only provides for an obligation to *consider* whether appointing one person as insolvency administrator is in the interest of the group members’ creditors.<sup>104</sup> §269b, subsection 3 InsO subse-

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100 See both recital 61 of the Recast EIR and Artikel 102c, §22 of the *Einführungsgesetz zur Insolvenzordnung* (EGInsO), the German implementation act in relation to the Recast EIR and its predecessor. As is clarified in recital 61, Member States are encouraged to establish supplemental national rules on cooperation, communication and coordination for group insolvencies, “provided that the scope of application of those national rules is limited to the national jurisdiction and that their application would not impair the efficiency of the rules laid down by this Regulation.” See Pepels (n 4) para 3.2.1.

101 In the Netherlands, although lacking an explicit legal basis, courts will often be inclined to appoint the same insolvency practitioner when requested to open proceedings concerning multiple Dutch debtors. See Geradts and De Vos (n 83) 555-556. See for the legal basis to appoint the same insolvency practitioner under Czech law § 25(4) of the Czech Insolvency Act (*Zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení (insolvenční zákon)*).

102 Graeber refers to § 56b InsO as “forcing the insolvency judges” to jointly consider the appointment of a group insolvency practitioner (“[...] zwingt die Insolvenzrichter zu einer solchen Abstimmung.”). MüKoInsO / Graeber *Insolvenzordnung*, 4. Aufl. 2019, §56b para 02.

103 Translation through [https://www.gesetze-im-internet.de/englisch\\_inso/englisch\\_inso.html#p0358](https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html#p0358).

104 §56b entered into effect on 21 April 2018. The appointment of the same insolvency administrator for all group companies was, however, already a long-standing practice in Germany. See Madaus, who states that “In Germany, prominent cases of insolvent groups like Kirch Media, Babcock-Borsig, BenQ, Arcandor/Quelle, Praktiker, Schlecker were handled by opening all the proceedings of a group before the same court

quently obligates the German courts involved to cooperate with each other, in particular in the appointment of the insolvency administrator,<sup>105</sup> similar to Article 57(3)(a) Recast EIR.

34. It is no coincidence that the Recast EIR, the Model Law on Groups and the *Insolvenzordnung* all allow for the appointment of a group insolvency practitioner, albeit in varying degrees of explicitness. It has great benefits. If insolvency proceedings require the appointment of insolvency practitioners, courts can restore or maintain the chain of command that was in place prior to the opening of a group's insolvency proceedings to a certain extent through a group insolvency practitioner.<sup>106</sup> Placing a single (or the same) captain(s) at the helm of the ship remedies the risk of a piecemeal approach to group insolvencies where a group restructuring would be possible and beneficial to the creditors.<sup>107</sup> Also, it significantly reduces the necessity for time-consuming CoCo between actors in proceedings, in turn significantly reducing transaction costs related to the group insolvency.<sup>108</sup>
35. UNCITRAL and the German legislator both clearly communicate the benefits of including specific provisions on group insolvency practitioners. According to UNCITRAL, "*the insolvency representative plays a central role in the effective and efficient implementation of the insolvency law, with day-to-day responsibility for administration of the insolvency estate of the debtor. Thus, the insolvency representatives will play a key role in ensuring the successful coordination of multiple proceedings concerning enterprise group members by working with each other and*

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*or appointing one insolvency practitioner for all the group companies.*" Stephan Madaus, 'Insolvency proceedings for corporate groups under the new Insolvency Regulation' (2015) IILR, 235, 236.

105 Gesetz (n 99) 20. See AG Hamburg 7 March 2023 NZI 2023, 416 for an example in which a group insolvency practitioner was appointed in proceedings relating to 24 group companies.

106 Cf. Himmer (n 28) 225, who argues that cooperation between group members' proceedings brings about the largest benefits when it attempts to recreate those synergy potentials that have been lost through the fragmentation of proceedings. As such, he argues, the aim of cooperation is therefore to compensate, to the extent possible, for the disadvantages that arise due to the multiplicity of decision-makers.

107 Cf Himmer (n 28) 298, arguing that in case of a coordinated appointment, it is inconceivable that in one group member's proceeding a liquidation strategy will be applied, where that contradicts the restructuring goal of another group members' proceeding. Whilst there could be cases where such divergent strategies could be appropriate nonetheless, it is correct that the likelihood of its occurrence is significantly less likely.

108 Himmer (n 28) 297; Reumers (n 7) 759; Willem Jan van Anandel, 'Over belangenconflicten bij faillissementen van groepsvennootschappen – Enkele beschouwingen naar aanleiding vna het faillissement van Imtech', in Ben Schuijling et al (eds.), *Het Bancaire belang – Opstellen aangeboden aan mr.ing. H.J. Damkot* (Wolters Kluwer 2023) 501, 503.

*with the courts concerned.*<sup>109</sup> Whilst maintaining the separateness of administration of each of the relevant group members' proceedings, *"an appointment of a single or the same insolvency representative could help to ensure coordination of the administration of the various enterprise group members, reduce related costs and delays and facilitate the gathering of information on the enterprise group as a whole."*<sup>110</sup> It *"has the potential to greatly facilitate cooperation between the different proceedings and the reorganization of the group as a whole."*<sup>111</sup>

36. Similarly, the German legislator has stated that *"[t]he best possible coordination of the individual insolvency proceedings with minimal communication requirements is most likely to be achieved if the same person is appointed as insolvency administrator for the group members. This person can then develop and implement an overall strategy for the optimal handling of the group insolvency without actually and legally complex coordination processes with other administrators."*<sup>112</sup>

### 3.3 Coordinated appointments are not all sunshine and roses

37. As is apparent from the above, the appointment of a group insolvency practitioner can be an efficient instrument to ensure coordination in group insolvencies, without necessarily subverting the group members' legal separateness. But it is not a panacea. The German legislature, for instance, purposely refrained from a general duty to always appoint a group insolvency practitioner in group members' insolvency proceedings. Instead, it is left up to the discretion of the German courts involved to determine whether that would be advisable under the given circumstances.<sup>113</sup> According to the German legislature, courts must establish that a coordinated appointment appears appropriate to limit the losses incurred by the group companies' creditors, which will not always be the case.<sup>114</sup> Among other things, the level of integration of the group companies and the group's business structure prior to the opening of insolvency proceedings determines whether it actually is beneficial to appoint

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109 UNCITRAL Legislative Guide 2010 (n 93), p. 103. See similarly, the German legislator stating that (unofficial translation): *"If the success of insolvency proceedings for the parties involved generally depends on the person and the strategy of the insolvency administrator, this is particularly true when dealing with the insolvency of debtors belong to groups. [...]"* Gesetz (n 99) 30.

110 See para 100 of the Guide to Enactment (n 92). See also UNCITRAL Legislative Guide 2010 (n 93), p. 76, in conjunction with p. 106.

111 UNCITRAL Legislative Guide 2010 (n 93), p. 106.

112 Gesetz (n 99) 30. Unofficial translation.

113 Gesetz (n 99) 20-21, 30.

114 Gesetz (n 99) 21, 30.

a group insolvency practitioner.<sup>115</sup> If the group companies, for instance, were only loosely connected, there may not be any real synergy value to preserve through a coordinated appointment.<sup>116</sup>

38. The issue of conflicting interests is also often referenced as a challenge in appointing a group insolvency practitioner.<sup>117</sup> As mentioned, the appointment of a group insolvency practitioner does not impact the demarcation lines between the various estates. The estates remain separate pools of assets and debt, and thus separate ‘bundles of interests’. As a result, conduct that is beneficial for the group as a whole or for certain group companies, does not necessarily have to be beneficial for each individual group company.<sup>118</sup> A group insolvency practitioner’s duty of care vis-à-vis one group company’s creditors, could require it to do something that is contrary to the interests of another group company’s creditors.<sup>119</sup> The *Insolvenzordnung* therefore, among other things, requires courts to determine whether a group insolvency practitioner could handle all relevant proceedings with the necessary independence and without conflicts, when considering whether the appointment of a group insolvency practitioner is in the interest of the creditors.<sup>120</sup> UNCITRAL similarly

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115 Guide to Enactment (n 92) para 101.

116 Gesetz (n 99) 21.

117 See e.g., Van Galen (n 30) p. 42; Gesetz (n 99) 20-21, 30-31; Robert van Galen, ‘Belangenconflicten bij groepen van vennootschappen in faillissement’, in: Flip Schreurs et al. (eds) *De Curator en het Concern* (Wolters Kluwer 2017) 103; Guide to Enactment (n 92) para 104; Himmer (n 28) 299; Kokorin (n 34) 47; Reumers (n 7); Van Andel (n 108). See on German law e.g., Schumann (n 87) 254 ff.

118 See also Reumers (n 7) 764. See on German law: MüKoInsO / *Graeber* Insolvenzordnung, 4. Aufl. 2019, §56b para 07.

119 Similar interest collisions also occur in singular insolvency proceedings, with the insolvency practitioner being responsible for a multitude of interests of a multitude of creditors. In a single proceeding, national laws generally prescribe for the pooling of assets and debts and, to a large extent, provides a hierarchy of those interests. Creditors who have a prioritized interest in specific assets of the debtor (such as secured lenders or suppliers with retention of title) will generally be granted instruments to safeguard their specific interests. This enables insolvency practitioners to act in the interest of the ‘joint’ – or pooled – creditors. In group insolvencies, however, the group members’ legal separateness is generally understood to (almost entirely) prohibit the pooling of assets and debt (so-called substantive consolidation, see Pepels (n 58) footnote 35). As a result, the individual estates form separate bundles of interests, concerning which the insolvency practitioner has separate duties of care. This increases the risk of conflicting interests between estates.

120 InsO, §56b Abs. 1 S. 2. See Uhlenbruck / *Zipperer* Insolvenzordnung, 15. Aufl. 2019, §56b para 06. According to Blümle, with §56b InsO, the German legislator has attempted to achieve a balance between the often economically sensible appointment of a single insolvency administrator for the group companies and the legally necessary independence to protect the interests of the individual group companies’ creditors. Braun / *Blümle* Insolvenzordnung, 9. Aufl. 2022, §56b para 07. See also Schumann (n 87) 254 ff.

recommends that insolvency laws should specify measures to address any conflict of interest that might arise when appointing a single or the same insolvency representative with respect to two or more group members.<sup>121</sup>

39. The risk of conflicting interests is particularly present when the estate of a group company to a large extent comprises of disputed intra-group claims, as the German legislator remarked.<sup>122</sup> That could for instance be the case in relation to a cash-pool entity within the group,<sup>123</sup> or if group companies engaged in (potentially) voidable intra-group transactions prior to the opening of their insolvency proceedings.<sup>124</sup> Although outside the scope of the Recast EIR, the group insolvency of the Brazilian Oi Group provides a good example of such a case. The estate of the group's Dutch financing company, Oi Brasil Holdings Coöperatief U.A. (**Oi Coop**), comprised solely of several very substantial claims against Brazilian group companies, due to intragroup loans which were partly entered into shortly before the opening of insolvency proceedings. Oi Coop had received a substantial part of the funds that were necessary to make those intragroup loans from another Dutch group company (Portugal Telecom International Finance B.V.), which in turn was also declared bankrupt subsequently.<sup>125</sup> When Oi Coop's insolvency practitioner instigated legal proceedings to void some of those loans, a discussion ensued on the voidability and ranking of those claims among representatives of the various proceedings.<sup>126</sup>

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121 See in relation to the cross-border context, UNCITRAL Legislative Guide 2010 (n 93), recommendation 252. See also recommendation 233 in respect of the domestic context.

122 Gesetz (n 99) 30.

123 Kübler/Prütting/Bork/Jacoby/Thole *Insolvenzordnung*, 98. EL. December 2023, §56b para 26.

124 See also Reumers (n 7) 759; Olaf Spiekermann and Franziska Hackenberg, 'Anordnung und Durchführung von Sonderinsolvenzverwaltungen' *NZI* 2022, 153, 154.

125 Oi Coop's insolvency practitioner was not also appointed as insolvency practitioner for that second group company, due to the conflicting interests resulting from the intragroup loans. I was involved in this matter as lawyer for the Dutch insolvency practitioner of Oi Coop.

126 Oi Coop was simultaneously involved in a stand-alone Dutch bankruptcy proceeding, and in a Brazilian group restructuring proceeding. Whilst under Dutch law, the appointed insolvency practitioner was largely required to view the interests of Oi Coop and its creditors on a stand-alone basis, the Brazilian group restructuring proceeding largely prescribed that the assets and debt of Oi Coop and various group companies were pooled as if they were all a single, legal company (so-called substantive consolidation). See for a discussion with the Dutch insolvency practitioners involved in this case on which difficulties that plural reality brought: Eline Overduin and Jessie Pool, 'De curator in de spagaat: tussen Nederlandse taakuitoefening en het belang van een internationale herstructurering' (2020) *Tvl* 2020/9. See for a brief description of the matter also Ilya Kokorin, *Intra-group financing and enterprise group insolvency: Problems, principles and solutions* (diss. 2023) 12-16.

40. Conflicts of interest may also, for example, arise if the same insolvency practitioner is appointed in situations involving cross-guarantees, cross-collateralization or post-commencement financing<sup>127</sup> (in which case, for instance, sequencing of distributions can impact the amount that creditors can claim from individual group companies), if various competing group restructurings are achievable with different values being allocated to the group companies involved or if a group company potentially has a liability claim against another group company such as its shareholder.<sup>128</sup> Van Galen has also referenced the situation where the immediate liquidation of one group company's assets would be in the interest of its creditors, whilst that would hinder the potential for a going concern solution of another group company.<sup>129</sup>
41. The abovementioned considerations are relevant in both a national and a cross-border context. Cross-border appointments of group insolvency practitioners, however, also have some specific particularities that require discussion. In large part, those relate to the fact that they require at least one court to appoint a foreign insolvency practitioner.<sup>130</sup> If a group insolvency practitioner is appointed in proceedings in different States, they will be expected to operate on all States' 'insolvency *terroir*'.<sup>131</sup>
42. First, the principle of *lex fori concursus*<sup>132</sup> entails that they will be appointed under, have to comply with and have to apply the laws of all those States.<sup>133</sup> Substantive insolvency laws (still) differ significantly throughout the EU. Those laws will stem from national practice, will be built on experiences in prior cases and can be deeply culturally rooted. In practice, it will be difficult to locate

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127 Himmer (n 28) 299.

128 Cf under German law: Kübler/Prütting/Bork/Jacoby/Thole Insolvenzordnung, 98. EL. December 2023, §56b para 26.

129 Van Galen 2017 (n 117) 112. Under the enhanced Kaldor-Hicks standard which I proposed in a separate article (See Pepels EIRJ 2021, n 6), the first group company's insolvency practitioner could be held to cooperate to a group restructuring in the interest of the other group company or companies, as long as their proceedings are not worse off as a result of such a joint effort, where relevant post-compensation and also taking into account the time value of money. See Pepels (n 15) para 3.2.1.

130 See also Uhlenbruck / Deppenkemper EulnsVO, 16 Aufl. 2023, Article 57 para 23. Cf Vallender / Vallender EulnsVO, 2. Aufl. 2020, Article 57 para 34.

131 The term 'terroir' is often used under wine enthusiasts to refer, among others, to the combined environmental factors that influence grapes and lead to a certain wine's distinct taste, such as climate, soil, elevation and – according to some, even local traditions.

132 In a European context enshrined in Article 7 Recast EIR.

133 Cf UNCITRAL Legislative Guide 2010 (n 93), p. 106; Himmer (n 28) 296.

insolvency practitioners that are familiar with the detailed nuances and practices of all those insolvency regimes.<sup>134</sup>

43. Second, the same applies to the languages of those Member States.<sup>135</sup> The EU is characterised by substantial linguistic diversity and currently has 24 official languages.<sup>136</sup> It is not uncommon for insolvency practitioners to be able to read and communicate in two or three of those languages. But, anything more than that becomes increasingly unlikely.
44. Third, States generally have their own specific rules on and requirements for the appointment of insolvency practitioners, which may further complicate appointments of group insolvency practitioners.<sup>137</sup> As a note prepared for the European Parliament's Committee on Legal Affairs in 2010 indicated, the "*laws of EU Member States have different rules on the qualification and eligibility for the appointment, licensing, regulation, supervision and professional ethics and conduct of insolvency representatives*".<sup>138</sup> Whilst some Member States may require that insolvency practitioners (in particular liquidators) are qualified attorneys-at-law, others may allow for the appointment of (law) firms and/or certified accountants, and/or require a specific license to practice as (a certain type of) insolvency practitioner.<sup>139</sup> Also, broadly speaking, most Member States have tasked courts with appointing insolvency practitioners, but the level of involvement from creditors or other factors varies widely.<sup>140</sup> The spectrum goes from creditors being able to nominate or directly select a person to be appointed, to software programmes randomly selecting insolvency practi-

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134 Gerard McCormack, Andrew Keay and Sarah Brown, *European Insolvency Law – Reform and Harmonization* (Edward Elgar Publishing 2017) 83, referencing the lack of familiarity with national insolvency law as the "*main factor inhibiting the appointment of a foreign based IP*". See also Himmer (n 28) 298. Cf Van Galen (n 30) 43.

135 Cf Van Galen (n 30) 43.

136 Those languages currently are: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

137 Cf UNCITRAL Legislative Guide 2010 (n 93), p. 106.

138 Note on Harmonisation of Insolvency Law at EU Level (2010), prepared for the European Parliament's Committee on Legal Affairs by various members of INSOL Europe, p. 23.

139 See McCormack, Keay and Brown (n 134) 70 ff, for instance, referencing that whilst insolvency practitioners normally are natural persons, in Hungary insolvency practitioners can only be legal persons. They also reference various EU Member States which have introduced separate legal codes dealing with the licensing and registration of insolvency practitioners.

140 Cf Himmer (n 28) 297.



tioners from a predetermined set.<sup>141</sup> In the EU Directive 2019/1023 on restructuring and insolvency (the **Restructuring and Insolvency Directive**),<sup>142</sup> the European legislature relatively recently confirmed its intention to allow Member States to maintain those deviating selection and appointment procedures and -methods.<sup>143</sup> As is apparent from the Impact Assessment Report to the Commission's 2022 Proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law (the **Harmonisation Proposal**),<sup>144</sup> harmonisation of, among other things, licensing, registration, qualification and appointment of insolvency practitioners appears to have been considered at an earlier stage of the Harmonisation Proposal's drafting.<sup>145</sup> The political support that is necessary for major interventions to improve capacity and quality of domestic courts and insolvency practitioners is, however, currently lacking among Member States according to the Commission.<sup>146</sup>

45. Notwithstanding these various 'insolvency terroir'-related challenges, *"in the international context [the appointment of a group insolvency practitioner, author] has the potential to greatly facilitate cooperation between the different proceedings and the reorganization of the group as a whole."*<sup>147</sup>

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141 McCormack, Keay and Brown (n 134) 80-82. See for instance §56a InsO for the German mechanism on creditor participation in the appointment of insolvency administrators and §56b S. 2 InsO for the authority to deviate from creditor proposals in case of group insolvencies under certain circumstances. See on creditor involvement on appointments of group insolvency practitioners under German law: Georg Streit, 'Auswirkungen des §56b InsO im Rahmen des neuen Konzerninsolvenzrechts auf die Praxis der Bestellung von Insolvenzverwaltern' NZI-Beilage 2018, 14, 17.

142 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).

143 See Restructuring and Insolvency Directive, recital 88. See also Article 26 of the Restructuring and Insolvency Directive on several very general high-level principles concerning professional standards for practitioners.

144 The European Commission Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022 COM(2022) 702 final.

145 Commission Staff Working Document (SWD(2022) 395), Impact Assessment Report to the Harmonization Proposal 87.

146 Commission Staff Working Document (SWD(2022) 395), Impact Assessment Report to the Harmonization Proposal 32.

147 UNCITRAL Legislative Guide 2010 (n 93), p. 106.

## 4. The appointment of a group insolvency practitioner under Article 57 Recast EIR

### 4.1 Introductory remarks

46. By enabling appointments of group insolvency practitioners, the EU legislature has granted Member States' courts a valuable instrument for effectively administering group insolvencies, but also an instrument that should be applied with care. Courts *can* in theory appoint a group insolvency practitioner. But, *should* they in practice, and if so in *which* circumstances? These questions will be discussed in the following. In doing so, it is important to bear in mind that the appointment of group insolvency practitioners is a form of cooperation between 'courts' under Article 57 Recast EIR. That provision and its wider context, as discussed above, determine the framework within which the appointment of group insolvency practitioners can take place under EU group insolvency law.
47. Whether Member States' courts can in practice appoint a group insolvency practitioner<sup>148</sup> will depend on the circumstances of the matter.<sup>149</sup> The pros and cons related to such appointments need to be weighed.<sup>150</sup> On the one hand, they have the potential to bring significant efficiency benefits, but on the other hand can also raise conflicts of interest and various sorts of challenges relating to the appointment of foreign insolvency practitioners.
48. Fortunately, the framework of Article 57 Recast EIR is well-equipped to allow courts to make such an assessment in practice, particularly through three requirements included in Article 57(1) Recast EIR.<sup>151</sup> As follows from that provision, the obligation to cooperate and communicate is only imposed on group members' courts, to the extent that such CoCo (i) is appropriate to facilitate the effective administration of the proceedings, (ii) is not incompatible with the rules applicable to them and (iii) does not entail any conflict of interest.<sup>152</sup> In the below, the application of these three requirements when considering the appointment of a group insolvency practitioner will be discussed.

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148 Or, could revert to a lighter form of coordinated appointments, such as the appointment of insolvency practitioners who are affiliated through their firm or previous engagements.

149 See on German law (on § 56b InsO), MüKoInsO / *Graeber* Insolvenzordnung, 4. Aufl. 2019, §56b para 07.

150 See on German law (on § 56b InsO), Streit (n 141) 15-16.

151 See more extensively on these three requirements: Pepels (n 15) para 3.2.

152 Recast EIR, Article 57(1).

49. But before doing so, a couple of general remarks on these three requirements are due. Importantly, they are intended to safeguard the goals that underlie Chapter V. The first requirement is intended to ensure that the group members' proceedings are conducted efficiently. The other two are aimed at maintaining the group members' legal separateness and the entity-by-entity approach ensuing therefrom. They recognize the impact of the national laws under which the proceedings are opened and the fact that group members constitute separate estates, whose interests can conflict. When any of the three requirements is not met, courts and insolvency practitioners are thus not allowed to cooperate in the envisaged manner.<sup>153</sup> That would be contradictory to Chapter V's goals.
50. These requirements, however, should be applied in a restrictive manner. Courts and insolvency practitioners should be prevented from easily (mis) applying these three requirements to refrain from cooperation.<sup>154</sup> Although the EU legislature has left it up to the group members' courts' discretion to determine *how to cooperate* with each other, the wording of Article 57(1) makes it abundantly clear that, if these three requirements are met, those courts are *obligated to cooperate*. Instead of halting a certain form of cooperation if any of these requirements prohibits it, they should seek ways to remedy objections. That is particularly the case in light of the Recast EIR's instruction to cooperate closely.<sup>155</sup>

## 4.2 Coordinated appointment must be appropriate to facilitate effective administration

51. As a first requirement, cooperation under Article 57 Recast EIR must be appropriate to facilitate the effective (or: efficient) administration of the group members' proceedings. This requirement relates to the key goal of efficiency which underlies both the provisions of Chapter V and the Recast EIR as a whole.<sup>156</sup> I have previously argued that this entails that such cooperation should ensure 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

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153 Vallender / Vallender EulnsVO, 2. Aufl. 2020, Article 57 para 19; Pepels (n 15) para 3.2.

154 Pepels (n 15) para 3.2 and in particular the literature mentioned in footnote 95.

155 Recast EIR, recital 48.

156 See *supra* para 2.2 and footnote 69.

that would have been worse off as result of such cooperation, receives as quick and comprehensive payment as they would have absent such cooperation.<sup>157</sup> In short: overall, the stakeholders in the group members' insolvency proceedings must benefit from CoCo, whilst none of the individual group companies' proceedings should be worse off (where relevant, after compensation has been paid).<sup>158</sup>

52. The efficiency gains from the appointment of a group insolvency practitioner will depend on the specific circumstances of the case. Appointing a group insolvency practitioner will require courts to make an estimation of the various pros and cons upfront to determine the appropriateness of appointing a group insolvency practitioner. There are multiple factors that could generally be taken into account when making such an assessment.
53. In general, whether a need for CoCo exists in relation to group members' insolvency practitioners, and if so, to what degree, will largely depend on the manner in which the group members' business was conducted prior to the opening of insolvency proceedings. The more the group companies conducted their business in a closely integrated manner and have become interdependent on each other, the more need there is for a coordinated approach to their financial difficulties.<sup>159</sup> The level of integration of the group companies' business and the interdependence between the individual group companies resulting therefrom is thus the first dominant benchmark for determining the appropriateness of appointing a group insolvency practitioner.<sup>160</sup>
54. Mevorach has identified three levels of integration and interdependency (levels of 'group unity')<sup>161</sup> that could be used to distinguish whether in certain cases a need for a more group-oriented approach exists:
  - a. "weak or non-integration", referring to loosely connected group companies conducting segregated businesses that operate on an autonomous manner, without any group discipline being exercised;

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157 See Pepels EIRJ 2021 (n 6) para 32 ff. See also Pepels (n 15) para 3.2.1.

158 See similarly on the appointment of group insolvency practitioners under German law: Kübler/Prütting/Bork/Jacoby/Thole *Insolvenzordnung*, 98. EL. December 2023, §56b para 21.

159 Uhlenbruck / Zipperer *Insolvenzordnung*, 15. Aufl. 2019, §56b para 06; Braun / Blümle *Insolvenzordnung*, 9. Aufl. 2022, §56b para 16.

160 Cf on German law: Braun / Blümle *InsO Insolvenzordnung*, 9. Aufl. 2022, §56b para 16.

161 See Mevorach (n 33) 130-133. See also Pepels IIR 2021 (n 4) para 2.4.

- b. “business integration”, referring to group of companies’ that operated their business with significant integration or interdependence, so that the group was unified in terms of its business; and
  - c. “asset integration”, referring to groups of companies whose assets and/or debts are intermingled, for example as a result of negligence or bad faith, which is unlikely to occur often in respect of multinational groups of companies.<sup>162</sup>
55. The level of integration and interdependency, Mevorach proposes, depends on various factors, including (i) the extent to which the group companies engaged in a common business, (ii) the degree of control exercised by a central management over group companies, (iii) the extent to which group companies rely on each other for vital functions,<sup>163</sup> (iv) the existence of group financing, (v) the extent to which personnel is rotated within the group and (vi) the group’s presentation to and perception by the public.<sup>164</sup> Mevorach further identifies varying degrees to which a group of companies can be centrally controlled, going from highly centralized and from a group-wide head office, to decentralized with a high level of autonomy or even heterarchical (non-hierarchical),<sup>165</sup> Although the degree of central control exercised is an important indicator towards the degree of integration and interdependency,<sup>166</sup> not necessarily all highly integrated and interdependent groups of companies are managed in a highly centralized manner from a group-wide head office.<sup>167</sup>

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162 Mevorach has argued that in case of asset integration, substantive consolidation would be a suitable manner to deal with the group’s insolvency proceedings. Substantive consolidation effectively entirely disregards the fact that group companies constitute separate legal entities, by treating their assets and debts as if they were owned and owed by a single legal entity. As such, it is difficult to see how substantive consolidation would be admissible in the context of Chapter V. Also, asset integration is unlikely to occur often in the case of multinational groups of companies. National laws will generally require companies to maintain their books and records on an entity-by-entity basis. Cf CJEU 15 December 2011, C-191/10 (*Rastelli Davide*), in which the CJEU held that insolvency proceedings can only be extended to include another debtor in a case of intermingled assets and debt if the COMI of both companies is situated in the same Member State. In cases where the COMI of both companies is located in the same Member State, the provisions of Chapter V do not apply (recital 62 Recast EIR).

163 Such as legal services, financing, accounting and/or warehousing.

164 Mevorach (n 33) 130-131.

165 Mevorach (n 33) 133-135.

166 See on German law: Braun / *Blümle* Insolvenzordnung, 9. Aufl. 2022, §56b para 16

167 Pepels IIR 2021 (n 4) para 2.3. It should be noted that, as a result from the definitions used for ‘group of companies’ and ‘parent undertaking’ in Article 2(13) and (14) Recast EIR, so-called ‘heterarchical’ groups of companies may be excluded from the scope of Chapter V. See Pepels IIR 2021 (n 4) para 4.

56. In case of loosely connected group companies that qualify as weak or non-integrated, limited exchanges between the insolvency practitioners appointed in their insolvency proceedings would likely be sufficient to ensure an efficient administration. They could, for instance, have to rely on each other to provide information. For those cases, regular cooperation between insolvency practitioners and courts pursuant to Articles 56-60 Recast EIR should suffice. But, once (a part of) a group of companies qualifies as either business or asset integrated, the necessity of further-reaching instruments to ensure an efficient, coordinated approach to the group members' financial problems increases significantly.<sup>168</sup> In those cases, it becomes increasingly more likely that (part of)<sup>169</sup> the group companies will benefit from the appointment of a group insolvency practitioner.<sup>170</sup>
57. The likelihood that a group restructuring can be achieved should be viewed as a second, very important factor in determining the appropriateness of a group insolvency practitioner's appointment.<sup>171</sup> The bigger the chances for a solution for (part of) the group as a whole are, the more benefit that (part of the) group can achieve by putting a group insolvency practitioner in charge of developing and negotiating that solution.<sup>172</sup> If, on the other hand, the group's business has already been terminated and a going concern solution that leverages the group's synergy value has become impossible, the necessity for a group insolvency practitioner would be significantly lower.<sup>173</sup>

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168 Cf Mevorach 2009, Chapter 6.

169 The varying levels of group unity proposed by Mevorach will not always apply to all members of a group company equally. It is very well possible that a 'group of companies' comprises of two business integrated units (e.g., two separate, business divisions within the group) or that the group also holds various Special Purpose Vehicles, or SPVs, which may be specifically designed to function on a standalone basis.

170 Reducing a difficult and varying reality to only three levels of 'group unity' may not always do justice to the diversity of the group phenomenon. It does, however, provide courts with a workable framework to base decisions on.

171 Cf on German law Andres/Leithauw/Andres *Insolvenzordnung*, 4. Aufl. 2018, §56b para 04, arguing that, if the group is in fact a conglomerate with little to no common business relationships among the group companies and a joint sale is not likely, the appointment of *separate* insolvency practitioners may even increase the probability of restructurings.

172 Note that under Article 56(2) Recast EIR, insolvency practitioners may also allocate tasks and grant powers to each other. In principle, that should allow them to appoint a 'head of the deal team'/'first point of contact' among them. In practice, however, it may be difficult to agree on such a division of tasks and powers under the given time constraints. See Pepels (n 51, Part II) para 4.1.

173 Albeit, not necessarily non-existent. Also in cases where the group's assets will be monetized through a piecemeal liquidation, the appointment of a single or the same insolvency practitioner may lead to lower transaction costs (e.g., through efficient information sharing, lower action costs etc.).

58. The ‘insolvency terroir’<sup>174</sup> is an important third factor in determining whether the appointment of a group insolvency practitioner would be efficient. If the group consists of group members in a multitude of states, with a large variety of languages and laws, the added costs associated with the appointment of a single insolvency practitioner may become significant. If there is no insolvency practitioner available who is proficient in the laws and languages of all Member States where proceedings are envisaged to be opened, a foreign insolvency practitioner may need local assistance from lawyers, accountants and/or translators to understand court documents, communicate with creditors and the court, determine a strategy and overall bring the insolvency proceedings to a fruitful conclusion. The added benefit of a group insolvency practitioner will have to outweigh those additional costs. Whether that is the case may, for instance, depend on the variety of jurisdictions involved (the less jurisdictions, the lower those added costs) and the proximity of those jurisdictions to each other. Alternatively, a ‘linking pin’ structure in itself ensures that, in addition to the group insolvency practitioner, a local insolvency practitioner is present in each group member’s proceeding who is proficient in the relevant law and language.
59. Other factors may also play a role. The type of proceedings, and in particular the role attributed to the insolvency practitioners therein may also impact the appropriateness of appointing a group insolvency practitioner. Such appointments were traditionally argued with liquidation-type proceedings in mind. It is, indeed, particularly appropriate for those proceedings where insolvency practitioners take full control over the group companies’ assets in order to monetize their value in favour of the group members’ creditors. The control over a joint business enterprise is then fragmented over various decision-makers, and into various ‘silos’ of debts and assets.
60. But, with its recasting, the EIR’s substantive scope has been significantly expanded compared to the Original EIR. The Recast EIR now also governs so-called Debtor in Possession-, or **DIP proceedings**. These generally are restructuring proceedings through which a debtor may offer a restructuring plan to its capital providers, and under certain conditions, impose it on non-consenting stakeholders (most importantly, creditors), where necessary under the protection of a stay of creditor actions. As a key difference to traditional bankruptcy proceedings, DIP proceedings do not necessarily involve

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174 See *supra* footnote 131.

the appointment of an insolvency office holder or the complete transfer of the rights and duties to administer the debtor's assets to such an appointee. Therefore, the debtor remains totally or at least partially in control of its assets and its affairs (the day-to-day operations of its business).<sup>175</sup> Per the Restructuring and Insolvency Directive, all Member States must make DIP proceedings available to debtors under their national laws.<sup>176</sup>

61. Whilst allowing the DIP to remain at least partially in control, DIP proceedings can nonetheless include the appointment of an insolvency office holder, the so-called 'practitioner in the field of restructuring' (or **PIFOR**). A PIFOR may be tasked with (i) "*assisting the debtor or the creditors in drafting or negotiating a restructuring plan*", (ii) "*supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority*", and/or (iii) "*taking partial control over the assets or affairs of the debtor during negotiations*".<sup>177</sup> The Dutch Scheme pursuant to the *Wet Homologatie Onderhands Akkoord* (or **WHOA**) for instance allows (and sometimes requires) the appointment of such PIFORs, the restructuring expert (*herstructureringsdeskundige*) or the monitor (*observator*). The restructuring expert in a Dutch scheme proceeding is tasked with developing and offering a restructuring plan,<sup>178</sup> whilst the debtor maintains full control over its assets and affairs.<sup>179</sup> Absent the appointment of a restructuring expert, a WHOA can alternatively include the appointment of a monitor, an insolvency office holder with a purely supervisory role.<sup>180</sup> Both Dutch PIFORs have been included on Annex B of the Recast EIR and thus qualify as 'insolvency practitioner' under the Recast EIR to the extent a public proceeding is concerned.<sup>181</sup>

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175 See Articles 1(1) and 2(3) Recast EIR. Under the Original EIR, only more traditional bankruptcy-type 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*", as followed from Article 1(1) Original EIR.

176 Restructuring and Insolvency Directive, Article 5.

177 See Article 2(12) Restructuring and Insolvency Directive for the definition of the 'practitioner in the field of restructuring'.

178 Dutch Bankruptcy Act, Article 371.

179 *Memorie van Toelichting, Kamerstukken II 2018/19, 35249, 3, p. 38.*

180 Dutch Bankruptcy Act, Article 380.

181 See Annex B as amended with Regulation (EU) 2021/2260 of the European Parliament and of the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B. Most Member States' PIFORs will be eligible to qualify as insolvency practitioner under the Recast EIR (by inclusion on Annex B of the Recast EIR), but that is not necessarily the case for all types of PIFORs. The Dutch restructuring expert and monitor in private Dutch Scheme proceed-



62. If multiple DIP proceedings are to be opened concerning various members of the same group, but no insolvency practitioner is appointed, there is, of course, no need or ground for the courts involved to coordinate the appointment of a group insolvency practitioner. The chain of command then – largely – remains in place.<sup>182</sup> That is different, however, if the opening of the group members' DIP proceedings includes the appointment of PIFORs who assume full responsibility of developing a restructuring plan (such as the Dutch restructuring expert). In those cases, the rationale to appoint a single (or the same) person as liquidator equally applies to the appointment of the PIFORs, or even *a fortiori* as the opportunity for a group restructuring will be significantly larger. Courts should then equally coordinate their appointment under Article 57 Recast EIR, as they would with traditional liquidator-insolvency practitioners.<sup>183</sup>
63. If the PIFORs are exclusively appointed to supervise the group companies and the development of restructuring plans during the DIP proceedings (similar to the Dutch monitor), the benefit of appointing a single person to those roles will often be (very) limited. The group companies – who remain in possession – then also remain equipped to ensure that any synergy value remains available to their creditors through a group restructuring, as they would have been outside insolvency proceedings.<sup>184</sup> The benefits of appointing a single or the same supervisory insolvency practitioners would be mostly limited to preventing costs associated with multiple insolvency practitioners. That will render it less likely that the potential difficulties related to appointing a foreign insolvency practitioner and conflicts of interest will be offset by efficiency gains. Whether or not in a given cross-border case, the appointment of a single person as group 'supervising PIFOR' will be overall beneficial, will depend on the circumstances of the case, including whether the insolvency practitioner would have any specific tasks and duties further than supervising the debtor.<sup>185</sup>

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ings, for instance, do not qualify as insolvency practitioner in the context of the Recast EIR, as private proceedings do not qualify as 'insolvency proceedings'. See Pepels (n 15) footnote 53.

182 See Pepels (n 51, Part II) para 4.2. f

183 To the extent they qualify as 'insolvency practitioners' within the context of the Recast EIR, in light of Article 57 Recast EIR's scope.

184 Cf similarly on German law: Streit (n 141) 17.

185 Cf Schumann (n 87) 273, who references the German *Sachwalter* who is tasked with supervising the debtor in a German *Eigenverwaltung* (self-administration) proceeding pursuant to §270 ff InsO. In addition to its supervisory task, the *Sachwalter* also has more traditional 'trustee duties', as Schumann states. *Sachwalter* are, for instance, also exclusively tasked with lodging certain liability claims and initiating claw back actions (§280 InsO) and dealing with claim verification proceedings (§283 Abs. 1 Satz 1

64. The overall assessment of these factors needs to result in a positive outcome for the various individual proceedings in which the group insolvency practitioner could be appointed, as well as overall for all the proceedings involved, for this form of CoCo to be 'appropriate to facilitate the effective administration of those proceedings'.<sup>186</sup> If for one or some of the proceedings the outcome is negative, the appointment of a group insolvency practitioner should be limited to the other proceedings.
65. It will often be difficult to comprehensively and conclusively analyse *ex ante* whether this requirement will be complied with.<sup>187</sup> In line with the 'the more, the merrier' approach to cooperation under the Recast EIR, courts involved in coordinated appointments should take a willing approach towards cooperation when assessing this requirement, as well as the other two.<sup>188</sup> They should not be expected to make a hundred per cent certain, clear cut analysis, but rather a prognosis that is prudent under the given circumstances.<sup>189</sup>

### 4.3 Coordinated appointment must be compatible with the applicable rules

66. Whilst court-to-court CoCo needs to be appropriate (and thus, efficient), it should also respect the entity-by-entity approach that ensues from each group member's legal separateness. As a second requirement, Article 57(1) Recast EIR therefore also requires that the appointment of a group insolvency practitioner is not incompatible with the rules applicable to the relevant group

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InsO). As such, he argues, there is still use in appointing a single person as *Sachwalter*. That reasoning is not without merit in a domestic context, in relation to the specific role of the *Sachwalter* and depending on the circumstances of the matter. In a cross-border context, the appointment of a foreign insolvency practitioner, however, adds a layer of difficulties and costs. This does render overall added benefits less likely in the context Schumann sets – although not inconceivable. Separately, if the tasks and duties of the group members' insolvency practitioner(s) would substantially differ among the various proceedings, it would be difficult to reconcile those in a single person. It is, for instance, difficult to combine the duty of supervising the development of a restructuring plan by group company 1's management with the duty to develop a restructuring plan concerning group company 2.

186 See further Pepels EIRJ 2021 (n 6) para 41 ff. See also on German law MüKoInsO / Graeber Insolvenzordnung, 4. Aufl. 2019, §56b para 07

187 See also on German law Schumann (n 87) 279.

188 See *supra* footnote 154.

189 See also Thole stating in reference to German law, that this efficiency analysis is a prognosis at an early stage of the proceedings and is not an exact science, and that German law allows courts to take a pragmatic approach, not necessitating a detailed prediction with (apparent) mathematical accuracy. Kübler/Prütting/Bork/Jacoby/Thole Insolvenzordnung, 98. EL. December 2023, §56b para 22. Cf Uhlenbruck / Zipperer Insolvenzordnung, 15. Aufl. 2019, §56b para 06, referencing that usually, only rough estimates are possible (when discussing the added costs related to so-called *Sonderinsolvenzverwalter*).

members' proceedings. It is generally assumed that those 'applicable rules' not only include the *lex fori concursus* of the relevant proceedings, but also other relevant rules and guidelines set by professional organisations to which the relevant actors in insolvency proceedings are subject.<sup>190</sup> The 'applicable rules' are also understood to entail requirements of approval of certain actions by the court, a public authority or another body, such as a creditors' meeting,<sup>191</sup> rules on the sharing of confidential information (e.g. rules on professional or corporate secrecy),<sup>192</sup> or legislation on data exchange such as legislation relating to the protection of computerized personal data.<sup>193</sup>

67. Crucially in respect of coordinated appointments, recital 50 Recast EIR references "*any requirements concerning the qualification and licensing of the insolvency practitioner*" as 'applicable rules'. As mentioned, the appointment of a group insolvency practitioner in a cross-border context will generally require at least one court appointing a foreign insolvency practitioner. The relevant requirements concerning qualification and licensing of insolvency practitioners of all Member States involved should overlap in a manner that allows the same person to be appointed as group insolvency practitioner. If, for instance, the rules applicable to the various group members' proceedings all require the appointment of a locally licensed insolvency practitioner, or allow for the exclusive appointment of different types of professionals (accountants versus lawyers), the appointment of a group insolvency practitioner becomes increasingly difficult.
68. At first glance, this appears to present a substantial hurdle for the appointment of group insolvency practitioners. Appointments of foreign insolvency practitioners, however, are not necessarily impossible. Article 57(1) Recast EIR requires that a certain form of cooperation is 'incompatible' with the rules

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190 See e.g., Skauradszun & Spahlinger (n 79) Article 57 para 10; Schmidt (n 77) Article 56 para 19; Bob Wessels and Stephan Madaus, *International Insolvency Law Part II – European Insolvency Law* (Wolters Kluwer 2022) para 10926f.

191 See e.g., recital 49, 3<sup>rd</sup> sentence Recast EIR referring to the potential requirement of court approval in relation to protocols. See also Himmer (n 28) 245-246; Skauradszun & Spahlinger (n 79) Article 56 para 15; Schmidt (n 77) Article 56 para 26.

192 Skauradszun & Spahlinger (n 79) Article 41 para 11; Schmidt (n 77) Article 56 para 26.

193 The Virgos/Schmit Report on the Convention of Insolvency Proceedings, para 231. The Virgos/Schmit Report can be downloaded via <<http://aei.pitt.edu/952>>. See Bob Wessels and Ilya Kokorin, 'Cross-Border Cooperation and Communication: How to Comply with Data Protection Rules in Matters of Insolvency and Restructuring' (2019) *International Corporate Rescue* 98. See also Skauradszun & Spahlinger (n 79) Article 41 para 12-14.

applicable to the proceedings. This threshold is, obviously, high. As I have argued previously, this justifies that only national rules of mandatory nature and that leave no discretion to insolvency practitioners and courts should restrict them from cooperating.<sup>194</sup> That is in particular the case as the Recast EIR is an EU Regulation, which is binding in its entirety, directly applicable in all Member States<sup>195</sup> and has precedence over national laws of Member States.<sup>196</sup> The sole absence of specific national rules allowing for the appointment of a foreign insolvency practitioner should thus be insufficient to deem such an appointment incompatible with the applicable rules.<sup>197</sup>

69. In that regard, research conducted by a team from the University of Leeds prior to the provisions of Chapter V having entered into effect provides an important observation. It showed that although very uncommon, the appointment of foreign insolvency practitioners was not thought to be precluded in the vast majority of Member States:

*“The vast majority of national reporters comment that they have not come across the appointment of an IP from another Member State, though the theoretical possibility of such an appointment is not precluded.”<sup>198</sup>*

70. The Leeds-team references an example of a Lithuanian bankruptcy concerning an internationally operating bank (AB bankas SNORAS), in which an insolvency practitioner from the United Kingdom was appointed, as a large part of the insolvency proceedings involved asset recovery in a common law ‘offshore’ Caribbean jurisdiction.<sup>199</sup>

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194 See Pepels (n 15) para 3.2.2.

195 Article 288, 2<sup>nd</sup> sentence of the Treaty on the Functioning of the European Union (TFEU).

196 The precedence principle was first established by the Court of Justice of the European Communities (now: the CJEU) in the Costa v. Enel case of 15 July 1964, Case No. 6/64.

197 Himmer (n 28) 239; Pepels (n 15) para 3.2.2. The Dutch Judiciary’s Guidelines on the appointment of bankruptcy trustees in bankruptcies and administrators in suspension of payment proceedings (version 1 January 2023) does not reference the possibility of appointing foreign insolvency practitioners at all, which does give insight into the very limited consideration given to this option. The Guidelines do, however, give into consideration that “[i]n exceptional situations, the court may decide in an individual bankruptcy to appoint (temporarily) a (second) bankruptcy trustee who is not on any list of bankruptcy trustees to be appointed. This may be the case, for example, when a bankruptcy requires specific expertise.” (unofficial translation). This does appear to open a route for appointments of foreign insolvency practitioners.

198 McCormack, Keay and Brown (n 134) 82.

199 McCormack, Keay and Brown (n 134) 82-83.

71. Some Member States' laws also explicitly allow for the appointment of a foreign insolvency practitioner. The Czech Insolvency Act, for instance allows for the appointment of a foreign (guest) insolvency practitioner by the president of the relevant insolvency court, if such an appointment is a temporary or occasional appointment that is appropriate in view of the insolvency proceedings so far, the debtor, the debtor's financial situation, and the professional competence of the guest insolvency practitioner who is to be appointed.<sup>200</sup> Similarly, as former German insolvency judge Heinz Vallender has pointed out in relation to Article 57 Recast EIR,<sup>201</sup> German law allows insolvency practitioners from other Member States to petition to be included on the 'pre-selection list' for insolvency practitioners who are eligible to be appointed by German insolvency courts.<sup>202</sup> Deppenkemper even appears to argue that the appointment of a foreign insolvency practitioner is even possible if the relevant person is not on that pre-selection list.<sup>203</sup>
72. The hurdle for group insolvency practitioners under the Recast EIR presented by national appointment rules is, thus, significantly lower than one might expect on first review. The threshold for prohibiting foreign insolvency practitioners from being appointed under Article 57 Recast EIR is high, and some Member States even expressly allow for the appointment of foreign insolvency practitioners. To further add to that, group members' courts are instructed to cooperate closely.<sup>204</sup> Where necessary, 'cooperating closely' could require them to strategize the 'home-State' of their appointee for group insolvency practitioner. Take, for instance, a group insolvency where one relevant court's Member State's rules allow for the appointment of a foreign insolvency practitioner, and another court's law does not. Those courts could then choose a person who is eligible to be appointed in the Member State which does *not* allow for foreign practitioners. That person could then also be appointed by the other Member State's court, which does accept foreign practitioners.
73. Additionally, as a second potential 'applicable rules'-hurdle, it must be the prerogative of the courts under the relevant rules to appoint an insolvency

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200 See § 21(3) and § 25(6) of the Czech Insolvency Act (*Zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení (insolvenční zákon)*).

201 Vallender / Vallender EulnsVO, 2. Aufl. 2020, Article 57 para 36.

202 Or from another State that is part of the European Economic Area, see Artikel 102a of the *Einführungsgesetz zur Insolvenzordnung* (EGInsO), the German implementation act in relation to the Recast EIR.

203 Uhlenbruck / Deppenkemper EulnsVO, 16 Aufl. 2023, Article 57 para 23.

204 Recast EIR, recital 48, 2<sup>nd</sup> sentence.

practitioner. If, for instance, creditors (or software programs)<sup>205</sup> have a mandatory, decisive influence on the choice for a particular insolvency practitioner, courts cannot decisively coordinate in their appointment.<sup>206</sup> Where creditors have a decisive vote, they could still be expected to seek the appointment of a group insolvency practitioner if that would benefit them by aligning their choice.

#### 4.4 Coordinated appointment cannot entail any conflict of interest

74. Third, Article 57(1) Recast EIR stipulates that cooperation thereunder should “not entail any conflict of interest”. As follows from the recitals to the Recast EIR, this requirement is intended to ensure that “[c]ooperation [...] should not run counter to the interests of the creditors in each of the proceedings [...]”.<sup>207</sup> In other words, courts have to assess whether a particular form of cooperation is in the interest of the bodies of creditors involved in the individual proceedings.<sup>208</sup> This third requirement aligns with one of the most fundamental aspects of the group members’ legal separateness: their estates remain separate pools of assets and debt, and thus separate bundles of interests.
75. In cases where the group conducted a business or asset integrated business prior to the opening of insolvency proceedings and where a group restructuring is still possible, the group companies will generally have an ‘overriding group interest’ in a coordinated approach.<sup>209</sup> At least with regard to achieving a group restructuring, their interests will thus often be aligned to a large extent. Additionally, this requirement should be applied restrictively, as is the case with the other two requirements for the application of Article 57 Recast EIR.<sup>210</sup> It is, nonetheless, not difficult to come up with examples where a group member’s interests conflict with those of others.<sup>211</sup>

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205 See *supra* para 3.3.

206 See also on parallel proceedings relating to the *same* debtor, Skauradzun & Spahlinger (n 79) Article 42 para 26.

207 Recast EIR, recital 52, 3<sup>rd</sup> sentence.

208 See also on the same requirement under Article 56 Recast EIR Pepels (n 15) para 3.2.3. See on German law: Kübler/Prütting/Bork/Jacoby/Thole Insolvenzordnung, 98. EL. December 2023, §56b para 19.

209 See on the relevance of the ‘overriding group interest’ under Chapter V, Pepels EIRJ 2021 (n 6). See on German law: Kübler/Prütting/Bork/Jacoby/Thole Insolvenzordnung, 98. EL. December 2023, §56b para 20.

210 See *supra* footnote 154. See also Andres/Leithaus/Andres Insolvenzordnung, 4. Aufl. 2018, §56b para 05, stating in relation to German law that, in case of doubt, it is in the interest of the creditors to appoint a group insolvency practitioner.

211 See *supra* para 3.3.

76. The existence of a conflict of interests<sup>212</sup> between group members' estates does not, however, take the appointment of a group insolvency practitioner off the table.<sup>213</sup> Rather, courts should seek ways of remedying those conflicts where possible.<sup>214</sup> There are plenty remedies conceivable. Some of those remedies could already be put in place at the commencement of proceedings. If appropriate, the most obvious solution would be to appoint a group insolvency practitioner for most group companies, and exempt the single or several group companies that have a conflicting interest.<sup>215</sup> The courts involved should jointly establish whether it is possible to isolate the conflict in this manner. That could, for instance, be sensible if a large part of the group would benefit from a joint approach, whilst one or several identifiable group companies would not. Depending on the further circumstances of the case, this approach could also be applied in cases such as that of *Oi Coop*,<sup>216</sup> where a certain estate comprises (almost) solely of challenged intragroup claims (and not of any further parts of the business).
77. An alternative solution could be replicated from German domestic group insolvency law. As mentioned previously,<sup>217</sup> the *Insolvenzordnung* requires courts to assess whether the appointment of a single insolvency practitioner is in the interest of the relevant creditors and whether a single person could handle the proceedings with the necessary independence. Where conflicts of interest arise, the *Insolvenzordnung* requires courts to analyse whether those can be avoided by appointing an additional 'special insolvency administrator', a so-called *Sonderinsolvenzverwalter*.<sup>218</sup> German insolvency courts can appoint

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212 I have previously argued in relation to this requirement that the mere appearance of a conflict should be deemed insufficient to prevent CoCo under the provisions of Chapter V, Section 1. See Pepels (n 15) para 3.2.3. Cf under German law, where an impending conflict is generally considered sufficient to assume the insolvency practitioner will not be able to act sufficiently independent, Gesetz (n 99) 30; Schumann (n 87) 254 ff, and in particular the literature and case law under footnote 1113.

213 As a somewhat nuancing remark on the relevance of conflicts of interest, it should be noted that in case of DIP proceedings, which may qualify as 'insolvency proceedings' under the Recast EIR as well, the sitting management remains in control over the group companies and their restructuring. It may, then, well be the case that the individual group companies' management consists of the same person(s).

214 See *supra* para 4.1. See also Skauradszun and Spahlinger, referencing "*irresolvable conflicts*", in relation to coordinated appointments in parallel proceedings concerning the *same* debtor. Skauradszun & Spahlinger (n 79) Article 42 para 24. See in relation to German law: Schumann (n 87) 258.

215 See in relation to German law: Kübler/Prütting/Bork/Jacoby/Thole *Insolvenzordnung*, 98. EL. December 2023, §56b para 35.

216 See *supra* para 3.3.

217 See *supra* para 3.2.

218 InsO, §56b Abs. 1 S. 2.

such special insolvency administrator with clearly defined duties and powers in their court order. The special insolvency administrator is then only authorized to take actions that are covered or encompassed by the court order and the scope of duties specified therein.<sup>219</sup> They can observe the interests of the relevant creditors.<sup>220</sup> Their appointment could be aimed at resolving a specific conflict, or be of a more general nature, for the duration of the proceeding.<sup>221</sup> The special insolvency administrator could, for instance, solely be assigned the task of dealing with relevant challenged intragroup claims or investigating whether grounds exist for holding other group companies liable.<sup>222</sup> In turn, the group insolvency practitioner could maintain all other duties and tasks, including to develop, negotiate and implement a group restructuring.

78. But, the appointment of a special insolvency practitioner also brings additional costs, both in form of remuneration and time spent on coordination with the other insolvency practitioner.<sup>223</sup> Those added costs should not ‘eat away’ the benefits of a group insolvency practitioner.<sup>224</sup> The more pronounced the conflicting interests and the more complex the underlying facts, the more difficult it will be for a group- and a special insolvency practitioner to efficiently cooperate in a manner that would benefit the creditors.<sup>225</sup> For the appointment of a special insolvency practitioner to be appropriate, the relevant conflicts

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219 Sebastian Harder, ‘Der Sonderinsolvenzverwalter – ein Überblick’ *NJW-Spezial* 2019, 469. Although referenced for consideration in §56b InsO, the *Insolvenzordnung* does not expressly regulate the appointment of *Sonderinsolvenzverwalter*. See further on the legal basis for the appointment of a *Sonderinsolvenzverwalter* and discussion of its application also outside of conflict-situations: Spiekermann and Hackenberg (n 124). See also Kübler/Prütting/Bork/Jacoby/Thole *Insolvenzordnung*, 98. EL, December 2023, §56b para 41.

220 Gesetz (n 99) 21.

221 UNCITRAL Legislative Guide 2010 (n 93), p. 77; Guide to Enactment (n 92) para 104.

222 Cf Zipperer, who references the assertion of individual claims, supervisory and control powers regarding transfers of the estate as well as the examination and filing of intra-group claims. Uhlenbruck / Zipperer *Insolvenzordnung*, 15. Aufl. 2019, §56b para 06. Cf also Spiekermann and Hackenberg, who state that the most common reason for appointing a *Sonderinsolvenzverwalter* is to verify lodged claims in cases where an insolvency practitioner is appointed in two related insolvency proceedings, for instance in case of group insolvencies or subsequent, second bankruptcy proceeding of the legal successor that had previously purchased the company’s assets from that same insolvency practitioner. See Spiekermann and Hackenberg (n 124) 153.

223 Streit (n 141) 16.

224 Uhlenbruck / Zipperer *Insolvenzordnung*, 15. Aufl. 2019, §56b para 02. See also Braun / Blümle *Insolvenzordnung*, 9. Aufl. 2022, §56b para 18.

225 Gesetz (n 99) 21.



of interest must thus be limited to demarcated issues that can be sensibly resolved by appointing an additional practitioner.<sup>226, 227</sup>

79. The mirror image of ‘combined group- and special insolvency practitioner’ appointments would be to appoint a single, linking pin practitioner in all group members proceedings, in addition to local insolvency practitioners for the individual group members. The linking pin practitioner could be exclusively tasked with developing, negotiating and implementing a group restructuring. Courts could also include other topics on which coordination is required within the scope of the linking pin practitioner’s tasks, if they deem that appropriate.<sup>228</sup> The local insolvency practitioners could deal with the other, non-group specific duties and tasks within the group members’ proceedings. Article 56(2) 2<sup>nd</sup> paragraph Recast EIR allows for task divisions between the group members’ insolvency practitioners. In case of less pronounced conflict of interest risks, a linking pin practitioner could be appointed in addition to local insolvency practitioners with a less strict task division. In any event, a linking pin practitioner’s appointment ensures coordination between the various group members’ proceedings. And, if any conflicts arise, the local insolvency practitioners can then deal with those conflicts on behalf of their individual estates, without involvement of the linking pin practitioner. Dutch judges Geradts and De Vos reference that such a linking pin construction was implemented in the Dutch domestic group insolvency of the DSB (*Dirk Scheringa Beheer*) Group.<sup>229</sup>

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226 Streit (n 141) 16. Streit mentions, in contrast, situations where the conflict(s) is/(are) so substantial that the special insolvency practitioners in fact become ‘small insolvency practitioners’ in their own right. See also: Kübler/Prütting/Bork/Jacoby/*Thole* Insolvvenzordnung, 98. EL. December 2023, §56b para 43.

227 Cf Van Andel (n 108) 509-510, who argues in relation to the Dutch Imtech group bankruptcy that in that case, the appointment of an additional insolvency practitioner next to the existing group insolvency practitioners would have been insufficient to remedy a conflict of interests between the estates of Imtech UK Group B.V. and Royal Imtech N.V. He argues that, in light of the all-encompassing conflict he signalled, the only possible solution could have been the dismissal of the existing group insolvency practitioners as insolvency practitioners of Imtech UK and the appointment of a new insolvency practitioner. Van Andel argued that a new insolvency practitioner should be able to freely determine his point of view in relation to the conflict at hand, without having the group insolvency practitioners watching over its shoulder. This may be a somewhat cynical take on the ability of insolvency practitioners to do their jobs.

228 To a certain degree, a linking pin practitioner would have similar duties to a coordinator appointed in a GCP. In contrast with a linking pin practitioner who could directly represent and bind the individual group companies’ insolvency estates, a coordinator would have to prepare a ‘coordinated restructuring plan’ and recommendations that group members’ individual insolvency practitioners can then choose to implement, or not. Whilst the inherent voluntary nature of a GCP renders its added value (highly) limited, the linking pin structure could provide an effective mechanism to deal with group-related aspects. See for a discussion on the limited added value of the GCP Pepels (n 57).

229 Geradts and De Vos (n 83) 556.

80. German and Dutch practice are not alone in deeming the appointment of special or linking pin insolvency practitioners a valuable solution for conflicts of interest in group insolvency contexts. In its UNCITRAL Legislative Guide 2010, UNCITRAL also recommends “[...] *the appointment of one or more additional insolvency representatives [...] as a measure “to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members.”*”<sup>230</sup>
81. The appointment of special or linking pin insolvency practitioners would enable courts to remedy conflicts of interest that are evident at the commencement of proceedings, but also when those conflicts only become apparent further down the road.<sup>231</sup> They can be appointed at the outset of proceedings, if conflicts of interest are likely to present themselves or already have, or at a later stage if necessary to remedy any newly arisen conflicts.
82. But, it is also conceivable that courts would seek less impactful remedies. That could particularly be relevant where the impact of the conflict is very limited and the costs related to an additional special or linking pin insolvency practitioner would offset most (if not all) efficiency benefits realized with a group insolvency practitioner.<sup>232</sup> If possible under the relevant applicable regimes, courts could, for instance, order insolvency practitioners to disclose any newly arisen conflicts and seek direction from the court to that extent.<sup>233</sup> Another mechanism, promoted by Van Galen, would be to ensure consistent involvement of creditor committees.<sup>234</sup> That would ensure external oversight by the parties whose interests are at stake. Which of those mechanisms would be

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230 UNCITRAL Legislative Guide 2010 (n 93), Recommendation 233.

231 Reumers has argued in favour of replacing the group insolvency practitioner by a new insolvency practitioner in some or all proceedings as one of two main solutions for situations where conflicts materialize post-appointment. See Reumers (n 7), para 7. Such a measure would likely severely impact the efficiency gains achieved with the appointment of a group insolvency practitioner and should, thus, be avoided where possible. See also referencing this option in relation to German law, for cases where the appointment of a special insolvency practitioner does not resolve the conflict: Kübler/Prütting/Bork/Jacoby/Thole *Insolvenzordnung*, 98. EL. December 2023, §56b para 29. Note that, pursuant to Article 57(1) Recast EIR, courts should be expected to closely cooperate if any conflicts materialize post-appointment of a group insolvency practitioner.

232 Cf Reumers (n 7), para 7.

233 UNCITRAL Legislative Guide 2010 (n 93), pp. 77 and 107; Guide to Enactment (n 92) para 104. See, somewhat hesitant on that proposal: Reumers (n 7), para 5.

234 Van Galen 2017 (n 117) 106-107, 111. See for a discussion of Van Galen’s proposal Reumers (n 7), para 5. See also on the role of creditor committees in group insolvencies: UNCITRAL Legislative Guide 2010 (n 93), p. 28-29.

available, would depend on the instruments available to the relevant courts. In any event, Member States' national regulatory frameworks should provide for proper arrangements to deal with potential conflicts of interest, as recital 21 to the Recast EIR prescribes.<sup>235</sup>

#### 4.5 Various other (potentially) relevant factors for coordinated appointments

83. In addition to the three requirements referenced above, there are various factors that can potentially impact a group insolvency practitioner's appointment and, thus, demand discussion.<sup>236</sup> The first factor concerns whether insolvency proceedings have already been opened at the time when courts consider appointing a group coordinator. Requests to open proceedings could, for instance, be pending before multiple Member States' courts, without any of those proceedings having been opened. Alternatively, either one or several group members' proceedings could already be opened, or proceedings concerning all group members could be opened.
84. In relation to the first two scenarios, the wording of Article 57(1), 1<sup>st</sup> sentence Recast EIR appears to contain a very inconvenient limitation. Its general obligation to cooperate is only imposed on "*a court which has opened*" insolvency proceedings concerning a group company. Those courts should cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings. This wording appears to imply that the obligation and authorization for court-to-court cooperation under Article 57 Recast EIR only 'activates' once at least one proceeding concerning a group company is opened. If three requests to open insolvency proceedings concerning three members of the same group of companies are pending before three courts of three Member States, but none of those proceedings have been opened, it could be argued the courts would not be obligated to cooperate with each other under Article 57(1) Recast EIR. Similarly, if one group company's proceeding is opened, but the other two requests are still pending, Article 57(1) Recast EIR's wording appears to imply that the court which has opened proceedings is obligated to cooperate with the two other courts, but not the other way around.<sup>237</sup>

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235 Cf Reumers (n 7) para 2, who argues that the Netherlands is lacking such adequate arrangements.

236 Additionally, the provisions in Chapter V are subject to various general scope limitations, as outlined in Pepels IIR 2021 (n 4) para 3.

237 See also Nijnens (n 77) 109-110.

85. It is, however, precisely at the opening of proceedings that cooperation between group members' courts can make the most impact efficiency-wise, for instance, by coordinating the simultaneous opening of insolvency proceedings, the duration of certain key aspects of the proceedings (such as the duration of the stay) and/or establishing the respective group members' COMIs.<sup>238</sup> Excluding the timeframe between filing of the request and the opening of proceedings from the scope of Article 57 Recast EIR would substantially hinder its effectiveness. That is particularly the case as Article 57(3)(a) Recast EIR explicitly prescribes coordinated appointments as one of the main forms of court-to-court CoCo. Such appointments will generally only take place at the commencement of proceedings.<sup>239</sup> Surpassing its wording, the prevailing view is thus that Article 57 Recast EIR also applies to courts before which requests to open group members' proceedings are pending, even if none of the proceedings have been opened.<sup>240</sup>
86. A second factor that may impact the appointment of group insolvency practitioners: whether some or all of the group companies' proceedings already have an insolvency practitioner appointed to them. It could happen in practice that court-to-court cooperation only gains momentum once insolvency proceedings concerning some – or even all – group members have already been opened. Although most prominent at the opening of the proceedings, courts could also coordinate appointments after that initial moment in time under Article 57(3)(a) Recast EIR if that turns out to be appropriate. If only one insolvency practitioner has been appointed, other courts could for instance consider appointing that same person in 'their' respective proceedings. If insolvency practitioners have already been appointed in several or all group members' proceedings, courts could consider appointing an additional person as 'linking pin' practitioner.

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238 See also Himmer (n 28) 287; Vallender / Vallender EulnsVO, 2. Aufl. 2020, Article 57 para 06.

239 Himmer (n 28) 300; Vallender / Vallender EulnsVO, 2. Aufl. 2020, Article 57 para 06. See also Benjamin Webel, 'Die Zusammenarbeit der Gerichte im Rahmen des §269b InsO', NZI-Beilage 2018, 24, mentioning that the useful application of court-to-court coordination begins with the selection of the administrator.

240 See e.g., Himmer (n 28) 287, 300; Skauradszun & Spahlinger (n 79) Article 57 para 06; Uhlenbruck / Hermann Insolvenzordnung, 15. Aufl. 2020, Article 57 para 04; MüKoInsO / Reinhart EulnsVO, 3. Aufl. 2021, Article 57 para 02; Nijns (n 77) 109-110; Uhlenbruck / Deppenkemper Insolvenzordnung, 16. Aufl. 2023, Article 57 para 07. Cf Vallender / Vallender EulnsVO, 2. Aufl. 2020, Article 57 para 06. See contrary, seemingly relying on the wording of article 57 Recast EIR without any further argumentation: Honert in Braun, Insolvenzordnung, 9. Aufl. Article 57 para 07. Cf Konold, who appears to argue that an amendment of Article 57 is needed to obtain this result, Felix Konold, Konzerninsolvenzrecht (Peter Lang 2017) 123.

87. As a third factor, it is relevant if and how courts are aware of the opportunity to appoint a group insolvency practitioner. Stakeholders in the group members' insolvency proceedings could, for instance, petition the courts involved to consider appointing a group insolvency practitioner, courts could initiate such discussions on their own accord, or they could be entirely unaware of the other group members proceedings.
88. If courts recognize that they are dealing with an integrated group of companies, it would be advisable to at least engage with each other on the topic of coordinated appointments. That would be the case even if no stakeholder has requested them to do so. After all, the Recast EIR instructs them to cooperate closely,<sup>241</sup> "in particular" by coordinating in the appointment of insolvency practitioners.<sup>242</sup> But, it is important to note that, although the Recast EIR has been effective for some time now, there does not seem to be an established infrastructure for courts to engage with each other. How should a Polish judge become aware of a parallel pending request to open Dutch insolvency proceeding concerning a group member of the debtor in front of them, absent an obligation to include such information in the petition to open proceedings? And, how should the Polish and Dutch judge reach each other? What phone number would they even need to call and, absent an existing practice to that end, what should they expect from each other? From a practical standpoint, it may therefore appear somewhat illusory to expect judges to engage in coordination solely on their own accord. And in the end, it is up to the individual courts' discretion to determine the means through which they implement court-to-court CoCo under Article 57(1) Recast EIR.<sup>243</sup> Contrary to the *Insolvenzordnung*, the Recast EIR does not explicitly require courts to consider appointing a group insolvency practitioner when a request to open proceedings is pending. As a result, it is difficult to argue that they are generally obligated to consider a coordinated appointment, if no one brings such an appointment up for discussion.
89. That could be different if the appointment of a group insolvency practitioner is proposed by the relevant stakeholders in the group members' proceedings. It is well conceivable, and potentially even advisable, that stakeholders requesting the opening of insolvency proceedings raise the appointment of a

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241 Recast EIR, recital 48 2<sup>nd</sup> sentence.

242 Article 57(3) 2<sup>nd</sup> sentence in conjunction with 57(3)(a) Recast EIR.

243 As Article 57(3) 1<sup>st</sup> sentence Recast EIR stipulates: "*The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. [...]*".

group insolvency practitioner explicitly with the courts in their petition, with a reference to the court's obligations under Article 57 Recast EIR. Those petitioning stakeholders will generally either be the debtor or one or some of its creditors.

90. Alternatively, if other group members' proceedings are already opened, the insolvency practitioner in those other proceedings could also raise the topic with the court seized to open the proceeding. Pursuant to Article 58 Recast EIR, insolvency practitioners and courts involved in different group members' proceedings may also directly engage with each other. The appropriateness and implementation of appointing a group insolvency practitioner could be topics of such cross-function cooperation. Attentive insolvency practitioners may even deem themselves urged to request another group member's court for the appointment of a group insolvency practitioner by INSOL Europe's draft 2014 *"Statement of Principles and Guidelines for Insolvency Office Holders in Europe"*. Guideline 1.3 of this draft Statement prescribes that *"An [insolvency office holder] petitions the relevant court for the appointment of a single [insolvency office holder] in not-yet opened, but likely to-be-opened proceedings for group members or other closely related insolvent debtors if (s)he deems this in the interests of creditors of the estates involved. [...]"*<sup>244</sup>
91. If a request for a group insolvency practitioner is thoroughly substantiated, particularly in light of the three requirements discussed above, it should be difficult for courts to shelve such a request. Although it remains the courts' prerogative to determine whether such an appointment is appropriate, Article 57(3)(a) Recast EIR would mandate at least a discussion with each other.

#### 4.6 Towards more creative coordinated appointments under the Recast EIR

92. The Recast EIR authorizes Member States' courts to appoint a group insolvency practitioner as a means of court-to-court CoCo. But the above has shown that they do have several hurdles to take when considering doing so. First, courts

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244 INSOL Europe never formally adopted this draft Statement due to a limited number of responses from its members. As a result, it does not fall within the scope of recital 48 Recast EIR, which states that when *"cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law[...]"*. Also, this Statement was drafted under the Original EIR (and thus outside the scope of Chapter V, which now also provides rules for *multinational* group insolvencies). It nonetheless signals the need for active involvement on this issue towards insolvency practitioners.

need to be aware of the option to appoint a group insolvency practitioner. They can be informed of that opportunity, but otherwise it will oftentimes be difficult for them to engage in coordinated appointments.

93. Second, when aware of the opportunity, courts will have to establish whether the appointment of a group insolvency practitioner would actually result in a more efficient outcome in the relevant group members proceedings. Then, and only then, should courts further investigate whether the other two requirement can be complied with, where necessary after remedies have been implemented. In group insolvencies concerning a group of companies which is at least business integrated and where a group restructuring is possible, it will often be appropriate to appoint a group insolvency practitioner in some shape or form.<sup>245</sup> The ‘applicable rules’ requirement may pose a more challenging, third hurdle for courts to take when considering whether to appoint a group insolvency practitioner. As argued, however, EU law grants courts significant discretion over national laws, only prohibiting the appointment of foreign insolvency practitioners where that is incompatible with the rules applicable to the relevant proceedings. And, courts can strategize the home-State of their appointee to accommodate the various proceedings’ requirements on the qualification and licensing of insolvency practitioners. Member States’ courts also have a significant toolbox to remedy any conflicts of interest. Both the ‘applicable rules’ and the ‘no conflict of interests’ requirement thus often will not necessarily prohibit insolvency courts from appointing group insolvency practitioners.
94. Realistically, however, difficulties related to ‘insolvency terroir’ and conflicts of interests can raise high bars, at least absent a standing practice of cross-border group insolvency practitioner appointments. Although the appointment of a single person as sole insolvency practitioner for the entire group is

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<sup>245</sup> Cf Mevorach, who suggested “*that when the group is integrated (in terms of its business) group-wide solutions have the potential to better promote insolvency goals. [...]*” Irit Mevorach, ‘Towards a consensus on the treatment of multinational enterprise groups in insolvency’ (2012) 18 *Cardozo Journal of International and Comparative Law* 359, 372. Mevorach identifies various additional goals of international insolvency law, further than being solely concerned with translation of pre-insolvency positions to the insolvency process and ensuring a maximum return to creditors as a group. She references the somewhat vague ‘ultimate goal’ of substantive fairness (including allocating losses emanating from insolvency in a fair manner). In that regard, it is important to note that European group insolvency law as encapsulated in Chapter V in itself does not contain substantive rules on ranking and similar issues, but rather aims to facilitate CoCo. The goals of Chapter V are set by the recitals thereto: ensuring efficient outcomes whilst maintaining the group members’ legal separateness.

possible,<sup>246</sup> practice appears to indicate that courts deem the hurdles imposed by Article 57 Recast EIR and the broader context of Chapter V often too high to actually appoint a group insolvency practitioner. That might explain the apparent absence of reported coordinated appointments under Article 57(3)(a) Recast EIR since its entry into force.<sup>247</sup>

95. It may therefore be time to steer the focus more towards alternative group insolvency practitioner constructions mentioned above. Those appear to meet many of the bars which Article 57 Recast EIR set for appointment of a group insolvency practitioner, if not all. The appointment of a single person as group insolvency practitioner, where necessary combined with special insolvency practitioners could for instance be worth considering in smaller, and/or more local group insolvencies, if conflicts or difficulties are limited in their scope.<sup>248</sup> If the group, for instance, comprises of entities established in two Member States, it could be possible to locate an insolvency practitioner able to efficiently manage all those proceedings and deal with both sets of applicable laws, languages and customs. If any conflicts arise, a special insolvency practitioner could cover those specific topics.<sup>249</sup>
96. But particularly promising is the linking pin construction, especially in larger multinational group insolvencies. The added costs associated with appointing an additional insolvency practitioner next to the group members' local insolvency practitioners are less of an issue when large estates are involved, whilst its advantages can be significant.<sup>250</sup> This type of coordinated appointment

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246 Depending on the circumstances of the case, it could also be recommendable.

247 Although no extensive research to that end has been done, anecdotal evidence and publicly reported cases appear to suggest that Article 57(3)(a) Recast EIR has not been put to practice, or at maximum very little.

248 See *supra* para 4.4.

249 This assumes that appointments of additional insolvency practitioners with a specific, limited task are not incompatible with the applicable national insolvency laws. In the Netherlands and Germany, such appointments are permitted. Himmer (n 28) 299 appears less optimistic and states that the Recast EIR does not provide for the appointment of *Sonderinsolvenzverwalter*, as a result of which it would be up to the courts and insolvency practitioner(s) to exhaust the means available under national law to even ensure that appointments of group insolvency practitioners are possible. If national law would not provide for the option to appoint an additional insolvency practitioner with a specific task, courts could potentially also appoint an "*independent person or body to act on its instructions [...]*" pursuant to Article 57(1) 2<sup>nd</sup> sentence Recast EIR.

250 Cf Paul Oberhammer, Christian Koller, Katharina Auernig & 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 Coordination and Mutual Trust* (Nomos Verlagsgesellschaft 2017) 182, 217, arguing on the GCP that the opening of a GCP would "*cost time and money*



ensures that a single person can, for instance, negotiate a group restructuring for some or all group members, it ensures that information does not get lost between the various proceedings and it ensures an overall coordination-minded approach. A linking pin practitioner, on the other hand, always is appointed next to a local insolvency practitioner who is familiar with the local insolvency laws and practice. The presence of local practitioners takes away most, if not all concerns related to the ‘insolvency terroir’. They can ensure that the group members’ insolvency proceedings are overall conducted efficiently under the laws and the language of their relevant COMI-States. The local insolvency practitioners can communicate with local stakeholders in their respective languages, they can manage the claim verification process and they can cover any questions related to their national laws. In addition, if any conflicts arise, the local practitioners will be well placed to ensure that the interests of their relevant group companies are sufficiently taken into account. The linking pin construction balances the need for nationally anchored tasks and duties to be carried out by a local insolvency practitioner (and cater the entity-by-entity approach), with the necessity of an instrument to efficiently manage group aspects of group insolvencies.

## 5. Room for Improvement

97. As Reumers analysed, it is widely recognized that the appointment of group insolvency practitioners should be possible for reasons of efficiency.<sup>251</sup> The reiteration in the Recast EIR’s recitals of the option to make such appointments in multinational group insolvencies,<sup>252</sup> is a clear indication that the EU legislature takes the same view. The apparent lack of widely reported coordinated appointments under the Recast EIR, however, also appears to indicate that there is potential for improvement. In the below, several potential changes to EU insolvency law on the appointment of group insolvency practitioners will be discussed, keeping the goals of Chapter V in mind and taking inspiration from the *Insolvenzordnung* and UNCITRAL’s body of work.
98. A first, somewhat obvious, change to Chapter V would be to include a separate provision on the appointment of group insolvency practitioners. Including

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*without having convincing advantages*”. See also Pepels EIRJ 2022 (n 58) para 74. In contrast, the appointment of a linking pin practitioner may similarly result in additional costs, but would also save time and have convincing advantages.

251 Reumers (n 7) para 4.

252 Recast EIR, recital 50, 2<sup>nd</sup> sentence.

a specific provision in the Recast EIR has the potential to assist courts in engaging in coordinated appointments, taking away any doubts on that front. That would particularly be the case if such a provision would provide for a clear framework for such coordination.

99. The German model is especially commendable in that regard. Requiring courts to jointly *consider* appointing a group insolvency practitioner, but not *obligating* them to necessarily do so, appears to be a suitable approach. It provides courts with a clear, well-balanced and flexible framework, particularly by allowing courts to weigh the various pros and cons of a coordinated appointment under the given circumstances and consider whether any conflicts of interests require remedies. If the provisions of Chapter V would be revisited at some later stage,<sup>253</sup> it would thus be advisable to include a provision along the lines of §56b InsO.
100. Such a provision should explicitly obligate Member States' courts to consider appointing a group insolvency practitioner when requests to open insolvency proceedings in relation to multiple group companies are pending, as well as when one or some of those proceedings are already opened. If some proceedings have already commenced, the remaining courts petitioned to open proceedings could consider with the other group members' courts whether it would be appropriate to appoint the insolvency practitioner who is already involved as a group insolvency practitioner, or to appoint a new or additional group insolvency practitioner. It would also be worthwhile to specify that the courts' duty to consider coordinated appointments also relates to subsequent dismissals and resignations.<sup>254</sup>
101. As was discussed above, it will depend on the characteristics of the specific case what type of group insolvency practitioner would be most appropriate. In some local cases, the appointment of a single person may be appropriate, where necessary assisted by special insolvency practitioners. Larger multina-

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253 Pursuant to Article 90(1) Recast EIR, the Commission has to present a report on the application of the Recast EIR to the European Parliament, the Council and the European Economic and Social Committee no later than 27 June 2027 and every five years thereafter. Particularly concerning the application of the GCP, the Commission had to present such a report ultimately 27 June 2022. To my knowledge, no report on the GCP has been presented to date. That is not surprising in light of the extensive efforts that the Commission put into harmonizing the Member States' substantive insolvency laws following the recasting of the EIR. The general report on the application of the Recast EIR, due on 27 June 2027, may give rise to amendments of Chapter V.

254 See supra footnote 81.

tional group insolvencies may be best served through a linking-pin structure. The proposed provision should not limit Member States' courts to a certain form of coordinated appointments. Courts should have sufficient discretion to accentuate certain divisions of tasks and duties with the appointment and accommodate the specifics of the case.

102. Combining the contours of §56b InsO and Article 57 Recast EIR, such a provision could look something like the following:

"1. Where insolvency proceedings relate to two or more members of a group of companies, a court before which a request to open such proceedings is pending or which has opened such proceedings, shall consider the appointment of a group insolvency practitioner for some or all of those proceedings as a means of cooperation pursuant to Article 57(1) together with any other court before which such a request is pending or which has opened such proceedings. Where appropriate, courts must seek ways to remedy any potential infringements on the applicable rules and any conflicts of interest, if any and where possible, including by appointing one or more additional insolvency practitioners.

2. Where courts have appointed a group insolvency practitioner as a means of cooperation pursuant to Article 57(1), their duty to coordinate also extends to subsequent dismissals and resignations."

103. Additional mechanisms should be included to ensure that any conflicts of interest that are not apparent from the petitions to open proceedings or that arise after the appointment of a group insolvency practitioner can be properly dealt with. In line with UNCITRAL Recommendations 116 and 117,<sup>255</sup> an additional subsection could be added that requires the disclosure of any conflicts of interest to the courts:<sup>256</sup>

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255 Included in UNCITRAL Legislative Guide on Insolvency Law: Parts One and Two (2004) and referenced in para 104 of the Guide to Enactment (n 92), Recommendation 116 prescribes that insolvency laws should require the disclosure of a conflict of interest, a lack of independence or circumstances that may lead to a conflict of interest or lack of independence by – in short – a (proposed) insolvency representative or person (proposed to be) employed by the insolvency representative, with Recommendation 117 prescribing that insolvency laws should specify that the obligation to disclose such conflicts should continue throughout the insolvency proceedings and should specify the consequences of a conflict of interest or lack of independence.

256 Similarly under German law, insolvency practitioners are generally obligated to report conflicts of interest or a lack of independence (such as having advised the debtor prior to the opening of proceedings). See *e.g.*, BGH 24 January 1991 – IX ZR 250/89; BGH 17 March 2016, NZI 2016, 508; and referencing

“3. Where courts have appointed a group insolvency practitioner as a means of Article 57(1), or are considering doing so, (proposed) group insolvency practitioners shall disclose (potential) conflicts of interest to the courts that will open or have opened the proceedings in which they will be or are appointed. [...]”

104. Further in line with UNCITRAL Recommendation 117 and Recommendation 252,<sup>257</sup> the consequences of and measures to address a conflict of interest could also be specified in that subsection:

“[...] If a (proposed) group insolvency practitioner discloses any conflicts of interest, the relevant courts may take such measures they deem appropriate, including but not limited to the dismissal of the group insolvency practitioner, the appointment of one or more additional insolvency practitioners for the relevant proceedings and/or order the group insolvency practitioner to act in accordance with an instruction from the relevant court(s).”

105. Article 57(1) in conjunction with (3)(a) Recast EIR already provides the legal basis for the appointment of group insolvency practitioners. Like German law, the above proposed draft provision itself does not require the inclusion of such a legal basis, assuming Article 57 Recast EIR would remain intact.
106. Further, Member States’ courts should be facilitated in considering appointing a group insolvency practitioner. They will not necessarily be aware of parallel pending (requests to open) insolvency proceedings, particularly at the outset of proceedings. It is therefore crucial that courts are provided the necessary information to comply with their CoCo obligations. In order to ensure that courts have that information, parties petitioning for the opening of the relevant group members’ proceedings should be required to disclose the details of pending (requests to open) proceedings relating to other group members to the court. This should include the details of the courts and the proceedings, the names of the companies and of the insolvency practitioners, if any. Such an obligation could either be imposed through inclusion of a separate subsection in the above proposed draft provision to that end, or through an accompanying EU Directive that requires implementation in national legislation.

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that case law: Schumann (n 87) 263. See also Rule 13.3 of the Dutch INSOLAD Practice Rules for Insolvency Trustees. This rule requires insolvency trustees appointed in group insolvencies who identify a material conflict of interest between the estates, to notify the supervisory judge of that conflict and discuss solutions, as well as notify the creditors.

257 The latter is included in the UNCITRAL Legislative Guide 2010 (n 93).

107. Finally, various approaches have been suggested above to tackle the hurdle of Member States' courts having to appoint foreign insolvency practitioners. Those approaches should already enable courts to appoint group insolvency practitioners in many cases. Nonetheless, explicitly authorizing Member States' courts to appoint certain foreign insolvency practitioners as group insolvency practitioner<sup>258</sup> could prove crucial in achieving a substantial leap forward in coordinated appointments where that would be useful.<sup>259</sup> Including such authorization in Member States' laws is, thus, highly recommendable. That could, for instance, be done through stand-alone amendments of national rules on the qualification and licensing of insolvency practitioners, or – preferably – based on an EU Directive.
108. Additionally aligning Member States' rules on the qualification and licensing of insolvency practitioners could significantly increase the potential for appointments of foreign insolvency practitioners as a group insolvency practitioner. The smaller the differences in qualification and licensing of insolvency practitioners become, the easier the appointment of a foreign insolvency practitioner becomes for courts. The choice not to include harmonisation on such topics in the Harmonisation Proposal, as discussed above seemingly due to a lack of political appetite, is a missed opportunity that warrants reconsideration.
109. In that regard, it would similarly be highly advisable to make a list of European insolvency practitioners, experienced and knowledgeable enough to take cross-border appointments as group insolvency practitioners available to courts.<sup>260</sup> The national authorization to appoint a foreign person as group insolvency practitioner could then, for instance, only allow the appointment of listed insolvency practitioners as group insolvency practitioner. Such a list could, for instance, be prepared by INSOL Europe, through the individual Member States' insolvency practitioners' organisations or through cooperation of Member States' courts themselves. The institutionalisation of a list

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258 And not for other, national or standalone insolvency proceedings, although it could be useful to also explicitly allow such coordinated appointments in parallel proceedings concerning the same debtor under Article 42(3)(a) Recast EIR.

259 Similar to the coordinator in a GCP, the authorization to act as group insolvency practitioner could be linked to eligibility under the law of a Member State to act as insolvency practitioner (see Article 71(1) Recast EIR), and not necessarily of any of the Member States involved. See Pepels EIRJ 2022 (n 58) para 87.

260 It could simultaneously function as a list for potential appointees for coordinators in a GCP – if need be.

of EU appointees could help ensuring courts that a prospective group insolvency practitioner meets certain minimum standards. It would also have the added benefit of contributing to the further development of a pan-European cross-border insolvency practice. In doing so, it could, for instance, further incentivize the development of cross-border training programs for insolvency practitioners and of EU-wide insolvency practitioner practice rules and guidelines.

## 6. Conclusion

110. Cross-border appointments of a single person as insolvency practitioner for a multinational group of companies under the Recast EIR may appear somewhat like science fiction to some. As the above has shown, that should certainly not be the case. Albeit somewhat covertly, Article 57 Recast EIR already allows courts from different Member States, involved in insolvency proceedings relating to different members of the same group of companies to appoint a 'group insolvency practitioner', at least theoretically. There are good reasons for allowing such coordinated appointments, particularly as it warrants that the 'synergy value' that is encapsulated in the group's business as a whole is not negated to the detriment of the group's creditors.
111. The European legislature has made such coordinated appointments conditional on various requirements. Appointments of group insolvency practitioners must be appropriate to facilitate the effective administration of the group members' proceedings, must not be incompatible with the rules applicable to those proceedings and cannot entail any conflicts of interests. Applying those requirements, the above has hopefully shown that there is also ample room for coordinated appointments of group insolvency practitioners in practice.
112. The so-called 'linking pin' construction, in which a group insolvency practitioner is appointed in the group members' proceedings in addition to a local insolvency practitioner appears particularly promising. It balances the need for a coordinated approach with the legal separateness of the various group members. On the one hand, it enables a group restructuring where possible and prevents unnecessary loss of information among the various proceedings. On the other hand, the linking pin construction as proposed in this article ensures that there is always a national insolvency practitioner present to ensure compliance with local laws and customs and ready to safeguard the interests of the individual group member's proceedings where their inter-

ests would warrant such intervention. In light of their instruction to cooperate closely, group members' courts should start considering coordinated appointments more often, particularly by implementing a linking pin construction.

113. Although coordinated appointments are already possible under the Recast EIR, practice has yet to result in reported cross-border appointments of group insolvency practitioners under EU law. In order to further assist courts in applying this potentially valuable instrument to tackle the particular cross-border group insolvency challenges, this article includes a proposal to include a specific provision on group insolvency practitioners in Chapter V. Along the lines of the German *Insolvenzordnung*, it is proposed among other things to include an obligation for courts involved in group members' proceedings to jointly *consider* appointing a group insolvency practitioner. If they would determine that such an appointment would be appropriate under the given circumstances, they can subsequently do so pursuant to Article 57(1) in conjunction with (3)(a) Recast EIR. As other key changes, it is proposed to require parties petitioning for the opening of insolvency proceedings to disclose the details of pending (requests to open) proceedings relating to other group members to the court, and to authorize Member States' courts to appoint insolvency practitioners from other Member States, in any event in the context of group insolvency practitioner appointments. By making such changes, court would be further enabled to apply "*the most obvious manner, and the least far-reaching*" to recognise the connection between group members' insolvency proceedings.<sup>261</sup>

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261 Geradts and De Vos (n 83) 555 (informal translation, in respect of Dutch domestic insolvency law): "*In what manner can the court recognise the undeniable connection between the various insolvent parts of the group after the opening of insolvency proceedings? In case of several simultaneous or consecutive applications affecting a group of companies, the court will consider how to shape an efficient and expeditious management of the individual bankruptcies. The most obvious manner, and the least far-reaching, is to appoint the same bankruptcy trustee in all bankruptcies.*"