The European Insolvency Regulation

14. Insolvency of international groups of companies

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Groups of companies – features relevant in insolvency law context

- growing role of corporate groups in the economy already from early 20th century
- limited liability of group members used to ringfence risks
- foreign subsidiaries used to benefit from regulatory advantages
- subsidiaries used to obtain tax advantages
- use of subsidiaries vs. use of establishments

Groups of companies – features relevant in insolvency law context

- various roles of subsidiaries
- running an independent business on their own
- specific function within a group (e.g. providing specific services to other group members)
- „special purpose vehicles" for specific purposes on the financial market, e.g. securitization
- various degrees of group integration – decentralization vs. hierarchization
- groups constituting a „single enterprise" from the functional perspective
- subsidiaries operating autonomously
- „groups of companies" or „enterprise groups"? → not only companies are included (also foundations, associations etc.)

Main issues to be addressed

- in highly integrated groups legal structure can be far from business reality
- liquidation – value loss involved in separate sale of group members and/or their assets → case for coordinating sales or, in some cases, sale of the entire group („package sale")
- restructuring – functions of the respective companies within the group need to be taken into account for a successful restructuring, in particular in integrated groups

Main problems

- The aims of wealth maximization (including preservation of the estate and value maximization), cost reduction and facilitation of restructuring would justify coordinating or even merging insolvency proceedings against members of a group, BUT:
- **distinct legal personality** of all entities in the group with distinct liability for debts → separate groups of creditors
- „piercing the corporate veil"?
- Intra-group claims between group members
- risk of fraudulent transfers
- specific rules for claims of shareholders or linked companies
- potential conflicts of interest between liquidators in the respective proceedings, need to protect confidential information
- not all group members are necessarily insolvent → should solvent group members be involved too (for example in restructuring measures)?

Possible approaches

- **substantive consolidation** – treatment of the whole group like one entity
- **procedural consolidation** – unification of proceedings while respecting distinct legal personalities
- **procedural coordination** – coordination between separate sets of proceedings against each group member
- **centralisation of proceedings** at one court or within a single jurisdiction

Substantive consolidation

- treating the whole group as one entity → one set of proceedings against all members
- advantage – efficient management of restructuring and liquidation measures, as no coordination between proceedings and/or jurisdictions is required
- disadvantages:
- total disregard for distinct legal personalities and related creditor rights
- difficulties with determining jurisdiction
- possible theoretical model: providing for separate valuation for each group member even if the group is sold as a whole (similarly to treatment of secured creditors under Polish law if the estate is sold as going concern, including assets used as collateral, Art. 314, Art. 319(4) BL)

Procedural consolidation

- one set of proceedings against the group but respecting distinct legal personalities of group members
- possible solutions: separate insolvency estates and distribution plans but joint case management (same court and liquidator)
- in Polish law – proceedings against multiple partners of a civil partnership or against a commercial partnership and its partners (Art. 215 BL), from 1.1.2016 also possible in case of proceedings against multiple linked companies (Art. 215(4) BL)
- controversial: modifications to the assessment of insolvency of members of the group? → can proceedings against solvent members of the group be opened in order to streamline the restructuring of the whole group? (not possible under Polish law)

Procedural coordination

- Separate sets of proceedings
- Cooperation and exchange of information between courts and liquidators in the respective proceedings, possibility of joint sales
- Possibility of appointing the same person as liquidator in the respective proceedings but acting always in separate capacities
- No modification of grounds for the opening of proceedings → insolvency of each group member to be assessed separately

Practical measures under the old EIR

- no provisions addressing enterprise groups in the old EIR
- concentrating COMIs of subsidiaries in the parent company (see „centralisation of proceedings") → easier after the Eurofood decision
- important obstacle – requirement that secondary proceedings be winding-up proceedings (see the Christianapol case)
- appointing the same person as liquidator in respect of all companies members in a group or both in main and secondary proceedings (→ problem: can a foreign liquidator be appointed? different solutions under laws of Member States)

Changes in the recast EIR

- restructuring is possible in secondary proceedings, „synthetic secondary proceedings" (Art. 34, 36 EIR) → those measures facilitate actual centralisation of proceedings against subsidiaries
- enhancement of provisions on cooperation and communication between main and secondary proceedings (Art. 42-44 EIR)
- most significant change: provisions on proceedings against members of groups of companies, including **group coordination proceedings** (Art. 56-77 EIR)
- definition of „group of companies" in Art. 2(13) and (14) EIR – not limited to companies, includes other entities

Cooperation and communication under the recast EIR

- provisions similar to those applying to cooperation between main and secondary proceedings
- between insolvency practitioners (Art. 56 EIR). Conclusion of agreements or protocols explicitly allowed.
- between courts (Art. 57 EIR)
- between courts and insolvency practitioners (Art. 58 EIR)
- rights of insolvency practitioner in one set of proceedings in respect of other proceedings against other members of the same group (Art. 60 EIR)
  - right to be heard
  - right to request stay of liquidation (if restructuring measures are intended)
  - right to request the group coordination proceedings

Group coordination proceedings

- „meta-proceedings" added to proceedings against the respective group members and running in parallel
- request (Art. 61 EIR) can be lodged by insolvency practitioner appointed for a member of a group, to any court having jurisdiction in relation to a member of the group
- the first court seized retains jurisdiction to open group coordination proceedings (Art. 62 EIR), choice of court by a majority of 2/3 insolvency practitioners possible (Art. 66 EIR)
- notice of the request to insolvency practitioners appointed for other group members (Art. 63 EIR), right to raise objections (Art. 64 EIR) → resulting in excluding the proceedings concerned from the group coordination (Art. 65 EIR)

Group coordination proceedings

- conditions for the opening of group coordination proceedings (Art. 68(1) in conjunction with Art. 63(1) EIR):
- it is appropriate to facilitate the effective administration (i.e. both liquidation or restructuring)
- no creditor of any group member is expected to be financially disadvantaged by inclusion in the proceedings

- **the coordinator** (Art. 71 EIR):
- a person eligible as insolvency practitioner
- different from IPs appointed for group members, not having a conflict of interest
- subsequent opt-in by non-participating proceedings (Art. 69 EIR)
- no modification of grounds to open insolvency proceedings → only insolvency proceedings already opened under general rules of national law may participate in group coordination proceedings

Group coordination proceedings

- tasks of the coordinator (Art. 72(1) EIR):
  - identifying and outlining recommendations for coordinated conduct of proceedings
  - proposing a group coordination plan
- group coordination plan (Art. 72(1)(b) EIR):
  - restructuring measures to be taken
  - intra-group issues – disputes, transactions, avoidance actions
  - agreements between IPs of group members
  - NOT to be included: consolidation of proceedings or insolvency estates (Art. 72(3) EIR)
- rights of the coordinator (Art. 72(2) EIR)
- cost-sharing provisions (Art. 77 EIR)

Group coordination proceedings

- Languages of communication (Art. 73 EIR)
  - between coordinator and IPs – in the language agreed between them or, in absence of agreement, in the language of the court competent in respect to the group member in question
  - between coordinator and a court – official language of the court
- cooperation between IPs and the coordinator (Art. 74 EIR)
  - as long as it is not incompatible with rules applicable to the respective proceedings (mandates of the respective IPs to be respected)
  - communication of information

Insolvency of group of companies in the UNCITRAL Legislative Guide (Part 3)

- Part 3 of the UNCITRAL Legislative Guide adopted in 2010 (first two parts adopted in 2004), devoted specifically to treatment of enterprise groups in insolvency

http://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf

- recommended rules both in domestic and international context

Further reading

- I. Mevorach, Insolvency within multinational enterprise groups, Oxford University Press 2009
- Noémi Suri, Insolvent Groups of Companies in the European Union – Objectives of Establishing Group Coordination Proceedings, Bratislava Law Review Vol. 4 No. 2 (2020), https://blr.flaw.uniba.sk/index.php/BLR/article/view/179

[recommended to anybody with serious research or practical interest on the subject matter but NOT needed for the exam]