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Annex to CERIL Statement 2021-2

Pros & Cons of EU Group Coordination Proceedings

(Article 61 et seq EIR (Recast))

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The following provides an overview of pros and cons of the EU Group Coordination Proceedings:

PROS	
Time/Stay	As mentioned under "Cons", a preliminary stay is possible. If a plan proposal for the group with considerable support is circulated and the respective court dealing with the request for a stay considers the plan to be promising, a stay can also be a good tool to **protect promising coordination efforts**.[2]
Respect for the coordinator	The group coordinator may be (especially in the new EU member states) of additional value since there is a high chance that domestic courts **respect** him as someone **impartial and independent**, who is working for the greater good of all creditors of the group.[3] A group coordinator can play an essential role in educating local courts on foreign laws and practices and translate different legal concepts as a way to gain trust from these local courts and local creditors.
Securing the value of group companies	There is a chance that **additional value** of a group of companies can be **secured** by a reorganization across the group or by other coordinated measures.[4]
Compromise of centralization and individuality	Several authors consider the coordination proceedings to be a **good compromise** between the need to centralize the coordination process in order to achieve as much coordination as possible, while at the same time preserving the autonomy of the individual proceedings and avoiding litigation amongst the different local insolvency practitioners [5]

[2] *Madaus*, Insolvency proceedings for corporate groups under the new Insolvency Regulation, IILR 2015, 243; see also *Reith*, In Kraft: Die neue europäische Insolvenzordnung, RdW 2015, 762.
[3] *Smaliukas*, Insolvency of Group of Companies in the scope of the new EIR: Lithnuanian perspective, IILR 2015, 382; *Madaus*, Koordination ohne Koordinationsverfahren – Reformvorschläge aus Berlin und Brüssel zu Konzerninsolvenzen, ZRP 2014, 194.
[4] *Madaus*, Koordination ohne Koordinationsverfahren – Reformvorschläge aus Berlin und Brüssel zu Konzerninsolvenzen, ZRP 2014, 194; *Lieanau* in *Brinkmann*, European Insolvency Regulation (2019) Art 61 No 6.
[5] *Schmidt* in *Bork/van Zwieten*, Commentary on the European Insolvency Regulation (2016) Art 61 No 61.02.

Motivation of participants	The coordination proceedings may be considered as a tool to **motivate the participants**, rather than an institution that prescribes a list of procedural obligations.[6]
Tool for very specific cases, pan-European presence	Concerning **large multinationals, particularly corporations with a pan-European presence**, this institution might be an effective way in which to handle insolvency proceedings.[7] *Bělohlávek* mentions "good examples from the past" which include insolvencies of air carriers and companies in the automotive sector.[8] Moreover, group coordination proceedings may work rather in financial restructurings, as in asset dispersed, operational groups.[9] The effectiveness of group coordination proceedings is limited to very few specific, **well prepared and high-profile cases** in practice. In most cases, it should be treated with considerable care as it could turn out to be especially a "significant layer of cost and unnecessary complexity".[10]
Strategy for a coordinated solution	Another positive aspect could be efficient administration of several insolvency proceedings and a **strategy for a coordinated resolution** of the insolvency of the corporate group.[11] Moreover, group proceedings may work if national laws mandate specifically that insolvency practitioners and courts should coordinate and communicate best practices and guidelines.[12]
Automatic recognition	**Automatic recognition** is considered to be a positive effect.[13]
Additional advantages	Group proceedings may work, if there is an outstanding group of very experienced seniors. Moreover, it would be an advantage if courts could appoint a special "intermediary" or mediator type of person ex officio. Beyond that, using certain elements of UNCITRAL's Model

[6] *Bělohlávek*, EU and International Insolvency Proceedings II (2020) Art 61 No 61.03.
[7] *Bělohlávek*, EU and International Insolvency Proceedings II (2020) Art 61 No 61.05.
[8] *Bělohlávek*, EU and International Insolvency Proceedings II (2020) Art 61 No 61.05 (no further sources provided).
[9] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[10] *Madaus*, Insolvency proceedings for corporate groups under the new Insolvency Regulation, IILR 2015, 235 (241).
[11] *Madaus*, Insolvency proceedings for corporate groups under the new Insolvency Regulation, IILR 2015, 236.
[12] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[13] *Cohen/Dammann/Sax*, Final text for the Amended EU Regulation of Insolvency proceedings, IILR 2015, 119.

	Law on 'Enterprise Group Insolvency with Guide to Enactment' could add some more binding force.[14]

CONS	
Costs	The **costs of the proceeding** have to be paid at the end of the proceedings, particularly by the insolvency estates of the participating companies.[15] Any insolvency practitioner requesting group coordination proceedings is obliged to present an **estimation of costs**. This ex ante estimation of costs is very difficult to calculate for insolvency practitioners, as well as for the court to decide upon a request to open group coordination proceedings.[16] The costs do not only constitute of the direct expenses for the coordinator and the court, beyond that **indirect costs** resulting from a possible delay should be kept in mind. Therefore, there is a high chance of costs exceeding the benefits of a group proceeding by far. A risk may be that individual companies delay or dispute payment at a time they are no longer interested in the coordination proceedings and therefore **leave the coordinator exposed**.[17]
Time/Delay	With the aim of creating a protected timeframe for promoting his plan, the coordinator may impose a stay for a period of up to six months for any individual company member's proceedings while the group coordination proceedings are being pursued. In this case, coordination proceedings may **interfere with domestic proceedings** and preliminarily stop any liquidation of assets contrary to the concept of the coordinator. Nevertheless, in this respect one needs to be aware that such a delay may also occur outside of formal group coordination proceedings according to Art 60 EIR, as soon as a

[14] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[15] *Madaus*, Koordination ohne Koordinationsverfahren – Reformvorschläge aus Berlin und Brüssel zu Konzerninsolvenzen, ZRP 2014, 192 (195).
[16] *Madaus*, Insolvency proceedings for corporate groups under the new Insolvency Regulation, IILR 2015, 243.
[17] *Cohen/Dammann/Sax*, Final text for the Amended EU Regulation of Insolvency proceedings, IILR 2015, 117 (121).

	foreign insolvency practitioner requests a stay in order to protect a proposed group restructuring plan.[18] Nevertheless, this possible stay might act as a deterrent for supporting any group coordination proceeding. In order to **avoid the stay**, individual group companies could choose not to opt in, as the stay does not apply to those companies who have not agreed to take part in the group coordination proceedings.[19] Moreover, the court has to decide upon the request respective the stay. Doubts have been voiced that the **courts can be convinced** that the stay will not produce a financial disadvantage for the creditors.[20]
Person of Coordinator	Currently, only a handful of candidates would appear suitable according to the **formal and informal requirements**. The coordinator must be an independent insolvency practitioner under the law of any member state, any person who is not appointed to act in respect of any of the group members and does not have any conflict of interest (Art 71 EIR). But those formal requirements will probably not suffice. The coordinator also should be a person who is internationally recognized for his expertise and experience by all insolvency practitioners in the proceedings to be coordinated and must be widely respected in the field.[21] The necessity of being an 'insolvency practitioner' may be questioned.
Insolvency Practitioners	The role player's attitude of insolvency practitioners may also affect the group coordination proceedings, as they tend to feel **self-centred** (and fee-hungry) or play out that they present the most economically dominant company (especially relating to owning most assets or large parts of information, playing a central role in sales or having the key personnel).[22] Many times, insolvency practitioners **do not want to lose control**,[23] as the appointment of a group coordinator would necessarily imply a (self) limitation to their powers. Therefore, no coordination can be properly expected in this context due to a fear to lose the control of

[18] *Madaus*, Insolvency proceedings for corporate groups under the new Insolvency Regulation, IILR 2015, 243.
[19] *Cohen/ Dammann /Sax*, Final text for the Amended EU Regulation of Insolvency proceedings, IILR 2015, 121.
[20] *Reith*, In Kraft: Die neue europäische Insolvenzordnung, RdW 2015, 758 (762).
[21] *Madaus*, Insolvency proceedings for corporate groups under the new Insolvency Regulation, IILR 2015, 241.
[22] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[23] *Wessels*, Report on Four Interviews (15th – 21st March 2021).

	the national proceedings. For all these reasons, the request for the opening of coordination proceedings may be objected by the insolvency practitioner or also the supervisory judge, depending who is conducting the insolvency proceedings in the member state. An example would be the case *Orchestra Premaman Belgique*, where the global interest of the group was conflicting with the interests of national proceedings. Indeed, in that case the French insolvency practitioner did object to the request (from Belgium) to open collective coordination proceedings, because of the insolvency practitioner's strategy to liquidate the Belgium entities to save the French ones.[24]
Language	Art 73 EIR expressively addresses the issue of which language to use. In principal, a voluntary agreement on a common language is preferable. If participants are not able to agree, the coordinator has to communicate with each insolvency practitioner in the language they both agreed on, and in the absence of such an agreement, in the official language or one of the official languages of the institutions of the Union, and of the court that opened the proceedings for the respective group member.[25] Although there is a realistic chance that English will be accepted as the common working language, there is no guarantee that a common language for all included group members will be found. Moreover, a problem may be that especially courts miss language skills and will demand translations. As a result, court members will probably not understand the strategic, financial or commercial context behind certain actions.[26]
Lack of power	The EIR gives all individual insolvency practitioners taking part in the group coordination proceeding the chance to simply opt out, both at the commencement stage and also later on if they "dislike" the group proposals from the coordinator. Moreover, the EIR does not provide for particular sanctions if proposals from the group coordinator are disregarded.[27] The only obligation referring to insolvency practitioners is to give reasons if they do not follow the coordinator's recommendations.[28]

[24] *Mailly*, Report on One Interview (16th March 2021).
[25] *Madaus*, Insolvency proceedings for corporate groups under the new Insolvency Regulation, IILR 2015, 243.
[26] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[27] *Parzinger*, Die neue EuInsVO auf einen Blick, NZI 2016, 63 (67).
[28] *Lieanau* in *Brinkmann*, European Insolvency Regulation (2019) Art 61 No 6.

	Neither the court nor the group coordinator are able to **impose their will** on insolvency practitioners and companies in the group; thus, the group coordination proceeding in the EIR is unlikely to be particularly helpful, as it lacks certainty and predictability.[29] Furthermore, the lack of powers is also debilitating for the **implementation of the proposed coordination plan**. As in a second step (after the coordinator's proposal), individual plans for each group company have to be constructed and executed, it needs the willingness for cooperation from the majority of participants in the individual proceedings. If some **creditors** with a minor role but still **enough voting power** block the implementation, the group proceedings have no effect.[30] The result is that such proceedings lack any real force.[31] Doubts have been voiced that the group coordinator can "bring much to the table" to resolve conflicts between group companies and their insolvency practitioners, for instance on the distribution of assets. In each proceeding creditors as well as experienced insolvency practitioners with straight-forward mindsets and strategies are involved. Therefore, proposals of a third person **without an obligatory character** won't have much effect in those constellations.[32]
Less prescriptive ways / rules too detailed and inflexible	The provisions concerning group proceedings in the EIR are generally **too detailed and inflexible**, especially when it comes to the debate about where the COMI (center of main interests) is.[33] Moreover, the EIR includes less prescriptive ways for rescuing group companies where courts and insolvency practitioners are generally encouraged to **cooperate**. This includes agreements and protocols to cooperate and communicate, which might be more likely to be effective in practice and consist of fewer detailed requirements.[34]
Creditors' rights	In group coordination proceedings, **creditors** have no right to request those proceedings or **rights of participation**. They have to enforce

[29] *Cohen/ Dammann /Sax*, Final text for the Amended EU Regulation of Insolvency proceedings, IILR 2015, 120.
[30] *Madaus*, Koordination ohne Koordinationsverfahren – Reformvorschläge aus Berlin und Brüssel zu Konzerninsolvenzen, ZRP 2014, 194.
[31] *Cohen/ Dammann /Sax*, Final text for the Amended EU Regulation of Insolvency proceedings, IILR 2015, 120.
[32] *Madaus*, Koordination ohne Koordinationsverfahren – Reformvorschläge aus Berlin und Brüssel zu Konzerninsolvenzen, ZRP 2014, 194.
[33] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[34] *Cohen/ Dammann /Sax*, Final text for the Amended EU Regulation of Insolvency proceedings, IILR 2015, 121; *Parzinger*, Die neue EuInsVO auf einen Blick, NZI 2016, 68.

	their influence through relevant organs (for example in Germany: Gläubigerausschuss, Gläubigerversammlung).[35] Therefore, the role of creditors is cumbersome without the clear possibility to address a court.[36]
Different kinds of groups / different goals for each company	**Corporate groups often look very different**, from highly integrated vertical groups with cash pools to loosely cooperating companies in connected markets.[37] Moreover, corporate group members probably have very different assets (operational, only real estate, just tax functions, just R&D [research & development]) and may have different volumes of claims.[38] From a legal perspective corporate groups are multiple companies acting (contracting) individually and thus liable to their creditors separately. Therefore, it might appear difficult to **align coordination with national professional rules and develop a meaningful plan**, as a variety of requirements for commencing insolvency or restructuring proceedings exist. Also, in respect to workers, in an ongoing economic concern situation a restructuring takes away the 'we are working for the benefit of the whole group' feeling and changes to a sudden awareness for the company that hires you **('compartmentalisation')**.[39] Coordination may differ according to the **solutions foreseen for different group members**; coordination may be useful for example when the solution is to liquidate a whole group but may appear difficult in practice where there is a mix with different kinds of solutions (eg where there is a CVA prepack in UK, liquidation in Ireland, etc).[40] In the case *Maxitoys* (involving Belgium, France and Germany) the appointment of a group coordinator was not sought simply because a **global solution would have inferred** with the strategy of the director of the insolvent company and the local creditors. [41]
Different national insolvency laws	The national insolvency laws set out **different priorities** which will often not conform, as a variety of requirements for commencing

[35] *Parzinger*, Die neue EuInsVO auf einen Blick, NZI 2016, 68.
[36] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[37] *Madaus*, Insolvency proceedings for corporate groups under the new Insolvency Regulation, IILR 2015, 236.
[38] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[39] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[40] *Mailly*, Report on One Interview (16th March 2021).
[41] *Mailly*, Report on One Interview (16th March 2021).

	insolvency proceedings exist. National laws contain different rules for ranking of claims, including subordination of shareholders and do not have procedural rules to interrupt proceedings in order to allow group coordination proceedings. Furthermore, local authorities (like local and corporate tax and land registry authorities, registers of shares of security rights, local unions) are uncooperative.[42]
Complexity	A rising number of decision makers and consultants makes proceedings more complex and drives costs up.[43] Above all, it might be challenging to negotiate and agree on measures, as a consensus of all insolvency practitioners involved is required. Moreover, no court is competent to rule on all issues of coordination.[44] The coordination proceedings might also complicate the resolution of insolvencies of individual group members.[45]
General unfamiliarity / inexperience with EIR / reluctance to cooperate	As some countries have a quite small economy, not all courts and insolvency practitioners will understand the concept of coordination.[46] Mostly courts, sometimes even insolvency practitioners, have an inward culture and therefore won't constructively look and assist to go for cross-border solutions.[47] Judges und insolvency practitioners remain reluctant to (simply) cooperate.[48] Moreover, courts have a rather passive attitude, they only act with specific rules in law and their know-how of the EIR is low.[49] So far, no case of a successfully completed coordination has been reported.[50]

[42] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[43] *Madaus*, Koordination ohne Koordinationsverfahren – Reformvorschläge aus Berlin und Brüssel zu Konzerninsolvenzen, ZRP 2014, 195.
[44] *Lieanau* in *Brinkmann*, European Insolvency Regulation (2019) Art 61 No 3.
[45] *Bělohlávek*, EU and International Insolvency Proceedings II (2020) Art 61.
[46] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[47] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[48] *Mailly*, Report on One Interview (16th March 2021).
[49] *Wessels*, Report on Four Interviews (15th – 21st March 2021).
[50] *Labner* in *Koller/Lovrek/Spitzer*, Insolvenzordnung (2019) Art 61 EuInsVO Rz 1; *Mailly*, Report on One Interview (16th March 2021).