Group Insolvency Proceedings Under the Revised EU Insolvency Regulation

Introduction

Restructuring an international group of companies is still quite a challenge in Europe. While companies can move freely across European borders, the coordination between stakeholders involved in a cross-border restructuring has proved to be difficult. Regrettably, an attempt at a cross-border restructuring of a group often gets bogged down in a multitude of various individual liquidation proceedings, spread out over the different countries in which the group is active. This is often the result of differing legislation of the various EU Member States in which debtors may be active, conflicting interests between debtors and/or court-appointed insolvency practitioners in group insolvency proceedings, or a lack of communication between the stakeholders.

The EU legislator has acknowledged this issue; a revised version of the EU Insolvency Regulation (“Revised IR”) will enter into force on 26 June 2017. After 15 years of service, the European Commission thought it was time to retire the original EU Insolvency Regulation (“Original IR”) and mark a new chapter in integrating its Member States’ procedural insolvency frameworks. One of the new main features in the Revised IR is the new Chapter V on “Insolvency Proceedings of Members of a Group of Companies”. This chapter provides for rules on cross-border cooperation and coordination between courts and insolvency practitioners in insolvency proceedings concerning group companies.

Below we summarize the provisions of Chapter V and briefly explain why we believe they will enhance the ability to successfully restructure groups.

Changes Regarding Groups Under the Revised IR

First, it is important to acknowledge that—as was the case with the Original IR—the Revised IR as a rule (i) regulates intracommunity matters only and (ii) does not impact the individual EU Member States’ national (material) insolvency laws.

The Revised IR still provides for rules on jurisdiction, applicable law, recognition, and provision of information to creditors. As mentioned above, the newly added Chapter V provides rules on cooperation and coordination regarding groups of companies as well.

A fundamental principle that governs the provisions on cooperation and coordination, is that it should not run counter to the interests of the creditors in each of the proceedings. Cooperation and coordination should be aimed at finding a solution that would leverage synergies across the group; it should lead to a win-win situation.

The new articles (i) obligate insolvency practitioners of individual group companies, as well as the courts involved in insolvency proceedings concerning these group companies, to cooperate and coordinate with
Cooperation and Coordination Between Insolvency Practitioners and Courts. Cooperation and coordination is mandatory not only between insolvency practitioners of group companies and between the courts that have opened the respective insolvency proceedings separately, but also collectively between insolvency practitioners and the courts. From 26 June onwards, insolvency practitioners and courts have to share information and try to agree on protocols regarding a coordinated approach to the insolvency proceedings. Additionally, insolvency practitioners of group companies are obligated to consider whether it is possible to coordinate the administration and supervision of the group companies’ affairs. If so, they must implement such coordination. The Revised IR also imposes an obligation on insolvency practitioners to first consider whether the group members (or the group members’ debts) can be restructured and coordinate the proposal and negotiation of a cross-border restructuring plan if possible. Moreover, insolvency practitioners may address foreign courts that have opened insolvency proceedings regarding group companies.

Requesting a Stay Regarding Assets of Another Group Company. An insolvency practitioner of a group company may request a stay of any measure regarding the realization of the assets in insolvency proceedings with respect to another group company if—in short—the insolvency practitioners of the group companies have proposed a cross-border restructuring plan for the benefit of the group’s creditors and a stay is required to ensure the implementation of the plan.

Group Coordination Proceedings. The Revised IR also provides for the opening of group coordination proceedings in which a coordinator is appointed. He is tasked with coordinating the insolvency proceedings regarding these group companies. The coordinator cannot be one of the insolvency practitioners of the group companies, as he represents the interests of the group as a whole. As such, the coordinator must work towards a coordinated conduct of the insolvency proceedings of the group companies and propose an integrated approach to the resolution of the group members’ insolvencies (e.g., a plan regarding the sale of the entire group). The coordinator may interfere in the insolvency proceedings of group companies, for example, by attending creditors’ meetings. He may also request a stay of insolvency proceedings opened in respect of any of the group companies if he has proposed a group coordination plan and the stay is required to ensure its implementation.

A group coordination proceeding is a voluntary instrument that will only be applied upon the request of an insolvency practitioner of one of the group companies. Insolvency practitioners of the other group companies may opt out entirely. Moreover, if they agree to group coordination proceedings, insolvency practitioners may refuse to follow, in full or in part, any recommendation made by the group coordinator or his or her group coordination plan.

Other Methods of Simplifying Group Restructurings. The above-referenced additions under the Revised IR are mostly nonbinding in nature. The cross-border restructuring practice has also given rise to other methods that provide for effective group insolvency proceedings. For instance, in some countries, courts allow substantive consolidation within a group, allowing one insolvency practitioner and/or the debtor to liquidate or restructure all assets and liabilities of the group as though only one entity existed. Moreover, courts have allowed for a group COMI, where the COMI of an entire group is located in one country. This allows the court to appoint one jurisdiction that governs all individual insolvency proceedings, regardless of the fact that some of the group companies are established in another country. The EU legislator has stated that stakeholders can still use such instruments for effective cross-border restructurings if allowed under the respective circumstances.

Benefits of the Revised IR in Practice

We expect that stakeholders in cross-border restructurings of European groups will be able to benefit from the additions in the new Chapter V, as exemplified below.
Firstly, in preparing a cross-border restructuring, a debtor may use the courts’ obligation to cooperate to arrange the coordinated opening of insolvency or pre-insolvency proceedings. This could prove useful, for instance, in a cross-border pre-packed sale of the group’s assets in which timing is crucial. As insolvency practitioners of group companies are obligated to examine a coordinated restructuring at group level and execute it if possible, having a restructuring plan prepared upon opening the insolvency or pre-insolvency proceedings should expedite the insolvency practitioners’ commitment to a group level restructuring. The practitioners must review the plan.

Moreover, if one of the group members’ insolvency practitioners is unwilling to cooperate on a group level and/or going concern sale of the assets, stakeholders now have several instruments at their disposal. For instance by (i) opening a group coordination proceedings—albeit that the reluctant insolvency practitioner cannot be forced to take part in such proceedings since participation is voluntary or (ii) requesting a stay regarding a local sale (of part) of the assets. Furthermore, they can apply directly to the foreign court to instruct the foreign insolvency practitioner to act in the group’s interest, assuming the respective Member State’s laws so provide and this is in the interest of local creditors as well.

Thirdly, the courts’ obligations to cooperate and coordinate provides for the possibility to have terms for creditor voting, voting procedures, and other procedural issues streamlined across all jurisdictions concerned. This allows the group companies to ensure, for instance, that all key moments in a debt restructuring via creditors’ composition are the same throughout the group.

**Lawyer Contacts**

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

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A Step Forward

We expect that the new Chapter V will have a positive effect on the success rate of European cross-border restructurings. Where possible, insolvency practitioners and courts will have to coordinate group insolvency proceedings and focus on group restructurings, rather than on fragmented local liquidations. If insolvency practitioners are reluctant to cooperate in a group restructuring, their foreign colleagues can interfere in the interest of the group’s creditors. The right of insolvency practitioners to address a foreign court that has opened insolvency proceedings in another EU Member State may prove to be very helpful in that respect, encouraging insolvency practitioners not to withdraw within their own countries’ borders as was the tendency under the Original IR regime, but instead to look across borders and engage with fellow European insolvency practitioners. In conclusion, the Revised IR is a step forward for cross-border restructurings of European groups.
Endnotes

1 As defined in article 2(5) of the Revised IR.
2 Regulation (EU) 2015/848 on insolvency proceedings.
3 Regulation (EC) 1346/2000 on insolvency proceedings.
4 Other changes compared with the Original IR include a clarification of the jurisdiction assessment and the inclusion of pre-insolvency creditors’ compositions within the scope of the Revised IR.
5 Like the Original IR, the Revised IR only provides for the legal implications of insolvency proceedings within the European Union. This intracommunity effect has two main consequences: (i) the Revised IR only applies where the debtor’s Centre of Main Interest (“COMI”) is located in a Member State; and (ii) the Revised IR generally does not provide for the legal implications of insolvency proceedings regarding parties from third countries (i.e., non-EU Member States).
6 Consideration 52 to the Revised IR.
7 Article 56 of the Revised IR.
8 Article 57 of the Revised IR.
9 Article 58 of the Revised IR.
10 Article 56 of the Revised IR.
11 Article 60(1)(b) of the Revised IR.
12 Article 61 of the Revised IR.
13 Article 71(2) of the Revised IR.
14 Article 72(1) of the Revised IR.
15 Article 72(2) of the Revised IR.
16 Article 61(1) of the Revised IR.
17 Article 65(1) of the Revised IR.
18 Article 70(2) of the Revised IR.
19 Although we are not aware of any European examples, there are cases where courts have applied substantial consolidation to an international group in a cross-border context.
20 See the Daisytek (2003) and Eurotunnel (2006) restructurings in which the English and French courts decided that the COMIs of all group companies were located in England and France, respectively, regardless of the fact that several group companies were established abroad —effectively assuming a group COMI.