Comments to the new EU regulation on insolvency proceedings

Insolvency of members of a group of companies

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Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings has replaced Council Regulation (EC) No 1346/2000 of 29 May 2000.

This new Regulation, which will apply to insolvency proceedings opened after 26 June 2017 (art. 86), contains relevant changes. In this paper we will address one of the most significant: the inclusion of specific rules concerning the treatment of insolvency proceedings of the members of a group of companies (new discipline contained in Chapter V of the Regulation, comprising arts. 56-77).

1. Background

Regulation 1346/2000 did not contain specific rules for groups of companies. Each company in the group was regarded as a separate debtor ("single company").

Of course, this meant that nothing in said regulation allowed for the treatment of the group as a single debtor (just like now with Regulation 2015/848), which is consistent with the distinct legal personality that is recognised to each group company and its correlative corporate autonomy. But there were no rules either expressly setting out coordination mechanisms for the different insolvency proceedings that could be opened in different States with respect to each one of the different members of a group of companies (an absence of coordination channels which did nothing to facilitate an efficient management of the reorganisation and restructuring of these "polycorporate" or "conglomerate" enterprises). From the point of view of Regulation 1346/2000, the insolvency proceedings of a group company that were opened in a Member State were conducted independently of the insolvency proceedings opened in another Member State with respect to another member of the same group.

The above did not prevent some scholars, however, from suggesting the appropriateness of applying by analogy (always with appropriate safeguards) the rules of Regulation 1346/2000 that provided for systems of coordination of (main and territorial) proceedings if insolvency proceedings were opened in respect of two or more members of the same group in different Member States. To some extent Regulation 2015/848 has followed this criterion because, as discussed below (*infra*, II.2.A), some provisions reproduce, in the case of groups of companies, "cooperation" solutions envisaged in relation to the hypothetical opening of main proceedings and one or more secondary proceedings.

2. Groups of companies in Regulation 2015/848

2.1. Overview

The treatment given to the insolvency of members of groups of companies has significantly changed following the publication of Regulation 2015/848. Indeed, based on the thought that "[t]his Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies" (recital

[51]), specific rules have been introduced for that purpose.

Naturally, this new Regulation does not attach personality to the group of companies for the purposes of making it the subject of application. That is to say, it does not intend to regulate anything like the "insolvency of the group" as if it were an entity with its own legal personality, its own debt payable on distribution and its own assets available for distribution. An approach of this nature would have meant ignoring the separate legal personality of each company and adopting a position foreign to the general principles prevailing in the legal systems of the member countries. Neither does Regulation 2015/848 provide for the possibility of joining (voluntarily or necessarily) the different insolvency proceedings opened in different Member States in respect of two or more group companies. Nor does it provide for the consolidation of the insolvent companies' estates (a case that is provided for in Spanish legislation, albeit exceptionally: art. 25 ter(2) art LC). In fact, art. 72(3) of Regulation 2015/848 provides, with regards to the group's "coordination plan" (to which we will refer later: infra, 2.3), that it "shall not include recommendations as to any consolidation of proceedings or insolvency estates."

Thus the treatment Regulation 2015/848 reserves for cases where insolvency proceedings relating to different members of the same group of companies have been opened in more than one Member State (recital [62]) is specified in the establishment of a unique system of cooperation, communication and coordination. The fundamental elements of such a system are detailed in sections 2.2 and 2.3.

All of which must be understood without prejudice to the fact that the main / secondary proceedings scheme for the management and coordination of the different insolvency proceedings that may eventually be opened relating to the same debtor continues in effect (without prejudice to the possibility of the insolvency practitioner in the main insolvency proceedings giving the undertaking under art. 36 of the Regulation in order to avoid secondary insolvency proceedings). Hence, the opening of territorial proceedings - for each group company – is possible (in accordance with the provisions of Chapter III of the Regulation and to the extent that the company in question has establishments in the territory of Member States other than the one where it has its centre of main interests). This means, in short, that an overlap of the mechanisms of cooperation and coordination provided for insolvency proceedings concerning different members of a group and the mechanisms for ensuring coordination between the different (main and secondary) proceedings that may be opened in respect of any one of said group companies is perfectly feasible.

2.2. Instruments of cooperation and communication

2.2.1. *Cooperation between insolvency practitioners, between courts and between each other*

As stated in recital (52) of Regulation 2015/848, "[w]here insolvency proceedings have been opened for several companies of the same group, there should be proper cooperation between the actors involved in those proceedings. The various insolvency practitioners and the courts involved should therefore be under a similar obligation to cooperate and communicate with each other as those involved in main and secondary insolvency proceedings relating to the same debtor. "

[1] Obviously, the Regulation does not prevent a Member State with international jurisdiction over two companies belonging to the same group (for example, because both have their centre of main interests in its territory) from opening insolvency proceedings for each one (recital [53]). In this case the domestic law of such State may freely provide for the joint opening of both insolvency proceedings or their joinder and coordinated hearing (cf., for instance, arts. 25, 25 bis and 25 ter LC).

On these lines, the Regulation devotes several articles to the cooperation and communication between insolvency practitioners (art. 56), between courts (art. 57) and between the former and the latter (art. 58). Some remarks (without limitation) can be made in respect of this discipline:

a) The provisions mentioned (arts. 56, 57 and 58) bear some similarities (although they differ in many specific aspects) with arts. 41, 42 and 43, respectively (which refer to the cooperation among the actors involved in the main and secondary insolvency proceedings). Apart from other differences, an obvious one should be remembered: in the case of insolvency proceedings of companies belonging to the same group, there are no main and secondary proceedings (such relationship cannot even be asserted between the proceedings opened for the parent undertaking and those opened for its subsidiary undertakings).

b) The duty to cooperate of insolvency practitioners includes (but is not limited to): (i) the obligation to communicate relevant information to each other; (ii) the duty to coordinate the administration and supervision of the affairs of the group members where possibilities exist for such coordination; and (iii) the duty to coordinate the proposal and negotiation of a coordinated restructuring where possibilities exist for the restructuring of all or part of the members belonging to the group (art. 56). For the purposes of (ii) and (iii), the insolvency practitioners may agree to grant additional powers to an insolvency practitioner appointed in one of the proceedings or to allocate certain tasks amongst them (where such agreement or allocation of tasks is permitted by the rules applicable to each of the insolvency proceedings).

c) In addition to the exchange of information, the cooperation between courts may take the form of coordinated administration and supervision of the assets and affairs of the group members subject to insolvency proceedings or the coordinated conduct of hearings (art. 57). Notably, the courts of different Member States may cooperate by coordinating the appointment of insolvency practitioners whereby they may appoint a single insolvency practitioner for different members of a group of companies, provided that this is compatible with the rules applicable to each of the proceedings and, in particular, with any requirements concerning the qualification and licensing of the insolvency practitioner (recital [50]).

d) The insolvency practitioner appointed in insolvency proceedings concerning a member of a group of companies shall cooperate and communicate with any court before which a request for the opening of proceedings in respect of another member of the same group of companies is pending or which has opened such proceedings. And he or she may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed (art. 58).

e) The duty of mutual cooperation incumbent on the insolvency practitioners in insolvency proceedings opened in respect of members of the same group in different Member States exists only to the extent that such cooperation: (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 (art. 57(1), *in fine*).

As the aforementioned recital (52) explains, the above means that "[c]ooperation between the insolvency practitioners should not run counter to the interests of the creditors in each of the proceedings, and such cooperation should be aimed at finding a solution that would leverage synergies across the group." And of course, the above implies that the cooperation should be developed without violating the national legal regime on the duties of the receivers.

f) The same three conditions are laid down in connection with the duty of cooperation between the courts before which insolvency proceedings for different members of the same group have been opened (or of those seised of a request to open such proceedings) and with regards to the duty of cooperation between insolvency practitioners and courts (arts. 57(1) and 58, last paragraph).

g) The cooperation between insolvency practitioners and courts can be formalised by entering into agreements or protocols. Recall that, according to recital (49), "*insolvency practitioners and courts should be able to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings. Such agreements and protocols may vary in form, in that they may be written or oral, and in scope, in that they may range from generic to specific, and may be entered into by different parties. Simple generic agreements may emphasise the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements may establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved, where the national law so requires. They may reflect an agreement between the parties to take, or to refrain from taking, certain steps or actions*." In practice there are non-binding agreements or protocols which work as codes of conduct that, to the extent that they specify the expected or generally accepted content of the duty to cooperate, can become relevant in determining whether an insolvency practitioner has breached or not the general duty of cooperation imposed by the Regulation when non-conformity of his conduct to the protocol's content is without good cause.

h) The Regulation does not regulate the liability of insolvency practitioners for breach of ("non-compliance with") their duties of cooperation. This question is

thus referred to domestic law applicable to the insolvency proceedings in which the person concerned has been appointed insolvency practitioner.

i) Finally, it should be noted that the costs of the discussed cooperation and communication measures incurred by the insolvency practitioner or the court will be regarded as costs and expenses incurred in the respective proceedings (art. 59). The same applies to the costs arising from the measures provided for in art. 60 of the Regulation, to which I next refer.

2.2.2. *Powers of the insolvency practitioner*

For members of a group of companies which are not participating in group coordination proceedings (vide infra, 2.3.3.), the Regulation also provides for alternative mechanisms to achieve a coordinated restructuring of the group (recital [60]).

These mechanisms take shape in the powers given by art. 60 of the Regulation to the insolvency practitioners appointed in proceedings relating to a member of a group of companies (powers conferred on them "to the extent appropriate to facilitate the effective administration of the proceedings"). Thus, on the one hand, they are entitled to be heard in any of the proceedings opened in respect of any other member of the same group and to apply for the opening of group coordination proceedings (infra, 2.3.2.). On the other hand, and probably this is more striking, they may request a stay of any measure related to the realisation of the assets in the proceedings opened with respect to any other member of the same group. The latter merits further consideration.

Indeed, note that the court hearing the proceedings for which a stay on measures is requested, shall order such stay whenever it is satisfied that the following conditions are met: (i) a restructuring plan for all or some members of the group for which insolvency proceedings have been opened has been proposed under art. 56(2)(c) and presents a reasonable chance of success (vide supra, II.2.A, sub [b]); (ii) such a stay is necessary in order to ensure the proper implementation of the restructuring plan; (iii) the restructuring plan would be to the benefit of the creditors in the proceedings for which the stay is requested; and (iv) neither the insolvency proceedings in which the requesting insolvency practitioner has been appointed nor the proceedings in respect of which the stay is requested are subject to "coordination proceedings" (vide infra, II. 3). In any case, the court may require the requesting insolvency practitioner to take any suitable measure available under national law to guarantee the interests of the creditors in the proceedings for which a stay of any measure related to the realisation of the assets is sought.

The initial period of the stay will have the duration the court considers appropriate, but in no case in excess of three months (although the period can be extended, provided that the aforementioned conditions continue to be fulfilled and that the total duration of the stay - the initial period together with any extensions - does not exceed 6 months).

2.3. Coordination mechanisms (the group coordination proceedings)

2.3.1. *General comments*

As pointed out by recital (54), "[w]ith a view to further improving the coordination of the insolvency proceedings of members of a group of companies, and to allow for a coordinated restructuring of the group, this Regulation should introduce procedural rules on the coordination of the insolvency proceedings of members of a group of companies. Such coordination should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality. "

For this purpose, Regulation 2015/848 regulates what it refers to as "group coordination proceedings". The idea is to have a tool that allows insolvency proceedings opened in different States in relation to different members of a group of companies to be heard in a coordinated manner. This coordination is established only at the level of insolvency practitioners (not courts), operates, as we will see below, on a strictly voluntary basis and revolves around the concept of "coordinator".

The opening of "coordination proceedings" will entail, among other consequences, the appointment of a group coordinator, who will identify and outline recommendations for the coordinated conduct of the insolvency proceedings and will propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies (art. 72(1)).

2.3.2. *Proceedings*

The group coordination proceedings must be opened by a court decision. In this regard, arts. 60(1)(c) and 61(1) of the Regulation give any insolvency practitioner in insolvency proceedings opened in respect of a member of a group of companies the power to apply for or request the opening of coordination proceedings before any court having jurisdiction over the insolvency proceedings of a member of the group. This request must be made in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed (art. 61(2)), which means that where the law applicable to the insolvency so requires, the insolvency practitioner must obtain the necessary authorisation before making such a request.

The applicant must specify the essential elements of the coordination sought. According to art. 61(3) of the Regulation, the request must be accompanied by:

a) a proposal as to the person to be nominated as the group coordinator, details of his or her eligibility pursuant to art. 71 (*infra*, II.3.D), details of his or her qualifications and

[2] However, where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate court for the opening of group coordination proceedings (for instance, because the centre of main interests of the parent undertaking is located in that Member State), that court shall have exclusive jurisdiction, so that any court other than the agreed court shall decline jurisdiction in favour of that court (art. 66). The aforementioned choice of court is possible until the moment a court decision opening coordination proceedings is handed down, meaning that, in such a case, the jurisdiction of the court previously seised of a request to open coordination proceedings (if any) will lapse. The priority rule of art. 62 of the Regulation is thus altered in that particular case of choice of court by a qualified majority of the insolvency practitioners.

his or her written agreement to act as coordinator.

b) an outline of the proposed group coordination, and in particular the reasons why the conditions set out in art. 63(1) are fulfilled, namely: (a) the opening of coordination proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members; (b) no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in the coordination proceedings; and (c) the proposed coordinator fulfils the requirements laid down in art. 71 (*vide infra* 2.3.4.).

c) a list of the insolvency practitioners appointed in relation to the members of the group and, where relevant, the courts and competent authorities involved in the insolvency proceedings of the members of the group.

d) an outline of the estimated costs of the proposed group coordination and the estimation of the share of those costs to be paid by each member of the group.

Once the request for the opening of group coordination proceedings has been submitted, the court (provided it is satisfied that the conditions supra sub [ii] have been met) shall give notice as soon as possible of the request and of the proposed coordinator to the insolvency practitioners appointed in relation to the members of the group as indicated in the request. Upon expiry of the 30-day period the insolvency practitioners have to object to the inclusion in the group coordination proceedings of the member in respect of which they have been appointed or to the person proposed as coordinator (infra, II.3.C), the court of competent jurisdiction shall open coordination proceedings provided it is satisfied that the conditions of art. 63(1) are met (art. 68(1)). In this regard, recital (57) of the Regulation recalls that coordination proceedings should always strive to facilitate the effective administration of the insolvency proceedings of the group members, and to have a generally positive impact for the creditors. Hence the court with which a request for coordination proceedings has been filed should make an assessment of those criteria prior to opening said proceedings.

In the decision to open coordination proceedings, the court will appoint a coordinator, decide on the outline of the coordination and decide on the estimation of costs and the share to be paid by the group members (the decision shall be brought to the notice of the insolvency practitioners appointed in insolvency proceedings affected by the coordination – that is, the participating

[3] It should be noted that the estimation of costs (both the initial one made in the request and that determined by the court decision opening coordination proceedings) is taken into account by the Regulation when regulating situations arising from a significant increase in costs (art. 72(6)) or where an objection has been made to the final statement of costs or to the share to be paid by each member (art. 77(4)).

insolvency practitioners – and of the coordinator).

2.3.3. *Objections by insolvency practitioners (insolvency proceedings outside the coordination proceedings)*

The coordination proceedings cannot be coercively imposed. Without prejudice to what I will mention later on the possibility of a "subsequent opt-in ", where an insolvency practitioner has objected to the inclusion of the proceedings in respect of which he or she has been appointed in coordination proceedings, those proceedings shall not be included in the coordination proceedings.

Indeed, according to recital (56) of Regulation 2015/848, to ensure the voluntary nature of coordination proceedings, the insolvency practitioners involved should be able to object to their participation in the proceedings within a specified time period. This is precisely what art. 64, giving an insolvency practitioner appointed in respect of any group member 30 days to object to (i) the inclusion within coordination proceedings of the insolvency proceedings in respect of which he or she has been appointed, or (ii) the person proposed as a coordinator.

If read literally, art. 64(2) of the Spanish language version of the Regulation sets, as *dies a quo* of the aforementioned time limit of 30 days, the date of receipt of the court notice of the opening of coordination proceedings. However, the logic of the system and, above all, art. 68(1), require us to understand that the time limit will run from notice of the request for the opening of the proceedings under art. 63(1).

If an insolvency practitioner objects to the inclusion in the coordination proceedings of the insolvency proceedings for which he or she has been appointed, such insolvency proceedings shall be left out of the coordination (art. 65(1)). This means that the measures of the court that orders the opening of the coordination proceedings, or those of the group coordinator, shall have no effect as regards the non-participating member (in particular, the agreed coordination shall entail no cost for the excluded insolvency proceedings: art 65(2)). Thoughts that are confirmed in art. 72(4) of the Regulation, according to which "*(t)he coordinator's tasks and rights as defined under this Article shall not extend to any member of the group not participating in group coordination proceedings*".

Where objections to the person proposed as coordinator have been received from an insolvency practitioner who does not also object to the inclusion in the group coordination proceedings of the member in respect of which he or she has been appointed, the court may refrain from appointing that person and invite the objecting insolvency practitioner to submit a new request (art. 67). Pursuant to the general rules, such request must be accompanied by the aforementioned documents provided in art. 61(3) (*supra*, 2.3.2.).

As expressed in recital (56), any insolvency practitioner who initially objects to inclusion in the coordination proceedings should be able to subsequently request to participate in them. Art. 69 of the Regulation gives response to this idea, which bears the heading "*Subsequent opt-in by insolvency practitioners*". This possibility of requesting participation in coordination proceedings after being opened by a court decision does not limit itself, however, to the cases where an objection

has previously been made to such inclusion (art. 69(1)(a)), but also extends to cases where the insolvency proceedings with respect to a member of the group have been opened after the court has opened coordination proceedings (art. 69(1)(b)).

If such a request is made, the coordinator may accede if: (i) he or she is satisfied that, taking into account the stage that the coordination proceedings has reached at the time of the request, the criteria set out in points (a) and (b) of art. 63(1) are met [*supra*, 2.3.2.]; or (ii) all insolvency practitioners involved agree. The coordinator shall inform the court and the participating insolvency practitioners of his or her decision and of the reasons on which it is based. Any participating insolvency practitioner or any insolvency practitioner whose request for inclusion in the group coordination proceedings has been rejected may challenge the decision before the court which has opened the coordination proceedings (art. 69(4)).

2.3.4. *The group coordinator*

The cornerstone of the coordination proceedings is the group coordinator. This appointment cannot fall on one of the insolvency practitioners appointed to act in respect of any of the group members, or on anyone with a conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members (art. 71(2)). Aside from this, the group coordinator must be a person eligible under the law of a Member State to act as an insolvency practitioner (art. 71(1)).

As mentioned above, the coordinator must identify and outline recommendations for the coordinated conduct of the insolvency proceedings and propose a *group coordination plan* that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies (for example, measures either to re-establish the economic performance and the financial soundness of the group or any part of it or to establish mechanisms for the settlement of intra-group disputes as regards intra-group transactions and avoidance actions). It must be stressed that the coordination plan *shall not include recommendations as to any consolidation of proceedings or insolvency estates* (art. 72(3)), which demonstrates that the coordination between insolvency proceedings of group companies can never reach such a degree of "integration".

The coordinator has other powers set out in art. 72(2) of the Regulation, of which we can highlight the following: (i) be heard and participate, in particular by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group; (ii) request information from any insolvency practitioner in respect of any member of the group where that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings; (iii) request a stay for a period of up to 6 months of the proceedings opened in respect of any member of the group, provided that such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the proceedings for which the stay is requested, or request the lifting of any existing stay.

The regulation also addresses the revocation of the appointment of the coordinator (art. 75), the remuneration for the coordinator (which will be borne by the members of the group subject to the coordination proceedings and which can be challenged by the insolvency practitioners in the terms of art. 77), the languages in which the coordinator shall communicate with the insolvency practitioner of a participating group member and with the court which opened the proceedings in respect of that group member (art. 73). It imposes, too, a duty of mutual cooperation between the participating insolvency practitioners and the group coordinator (art. 74).

2.3.5. *Scope of coordination: the value of the recommendations and coordination plan*

According to art. 70(1) of the Regulation, when conducting their insolvency proceedings, insolvency practitioners *shall consider the recommendations* of the coordinator and the content of the group *coordination plan* (*supra*, 2.3.4.).

This said, however, an insolvency practitioner *shall not be obliged* to follow in whole or in part the coordinator's recommendations or the group coordination plan (art. 70(2)). If such insolvency practitioner does not follow the coordinator's recommendations or the group coordination plan, he or she will have to, nonetheless, give reasons for not doing so to the persons or bodies that he or she is to report to under his or her national law, and to the coordinator.