Group Coordination Proceedings

A European Approach to Coordination of Insolvency Proceedings of Members of a Group of Companies

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Esipuhe

Tässä yhdistelmäniteessä julkaistaan kaksi kunnianhimoista ja kiinnostavaa tutkimusta insolvenssioikeuden alalta. Toinen käsittelee yksityishenkilön velkajärjestelyä ja toinen yhtiöryhmien insolvenssimenettelyä. Toisen kohteena on kansallinen oikeus, toisen eurooppalainen insolvenssioikeus.

Kirsti Panulan tutkimus Maksuohjelman muuttaminen velallisen maksukyvyn heikentyessä yksityishenkilön velkajärjestelyssä selvittää sekä ohjelman muuttamisen edellytyksiä että menettelyä. Tutkimus osoittaa, että sääntely on ohutta ja käytännöt muuttamismenettelyssä ovat muodostuneet vaihteleviksi. Panula katsoo, että maksuohjelman muutoshakemuksen sisällöstä ja käsittelystä sekä muutosohjelman sisällöstä tulisi säätää täsmällisemmin velkajärjestelylaissa. Panulan mukaan lainsäädännön tulisi mahdollistaa velallisen maksuvaikeuksien ratkaiseminen tuomioistuimen ulkopuolella ja ensisijaisesti maksuaikaa pidentämällä. Panulan mukaan velallisen maksuvelvollisuutta ei tulisi tuomioistuimessa toteutettavassa muutoksessa leikata maksuohjelman päättymiseen asti kertyvään velallisen maksuvaraan, kuten tuomioistuimissa yleensä tehdään.

Oona Fromholdtin tutkimus Group Coordination Proceedings – A European Approach to Coordination of Insolvency Proceedings of Members of a Group of Companies sijoittuu kansainvälisen insolvenssioikeuden alalle. Tutkimus käsittelee ryhmäkoordinointimenettelyä eli menettelyä, jolla pyritään edistämään velkavastuun tehokasta toteutumista yhtiöryhmien (group of companies) insolvenssimenettelyissä. Monimutkaisilla yhtiörakenteilla voi olla huomattava vaikutus insolvenssimenettelyihin, mutta insolvenssioikeudessa yleensä ja myös eurooppalaisessa insolvenssioikeudessa yksittäisten yhtiöiden väliset suhteet ovat jääneet vähälle huomiolle. Ryhmäkoordinointimenettelyn avulla pyritään lisäämään yhteistyötä ja tehokkuutta yhtiöryhmien maksukyvyttömyystilanteissa.

Tutkimukset liittyvät Helsingin yliopiston oikeustieteellisen tiedekunnan prosessi- ja insolvenssioikeuden oppiaineen syventävien opintojen insolvenssioikeusaiheisissa projekteissa hyväksyttyihin OTM-tutkielmiin. Tutkielmat on julkaistu pääosin muuttamattomina lähinnä kielellisiä korjauksia lukuun ottamatta. Projektien opettajana toimi yliopistonlehtori Heidi Lindfors.

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1 Introduction

1.1 BACKGROUND

Effective coordination of insolvency proceedings of multinational groups of companies is the most important unsolved problem of cross-border insolvency.[1] Nowadays, groups of companies are the most common form of business entities. Groups of companies may operate only in a national level, but it is also common that groups of companies are multinational, i.e. the members of the group operate in various different countries. Groups of companies may be structured in many different ways and when these complex structures face insolvency, the impact may be substantial.[2]

When the EU Insolvency Regulation[3] was drafted the presumption was that multinational groups of companies were structured in a simpler way where several establishments existed but they were all owned by one legal entity. However, the reality of today departs from this point of view.[4] The structures of groups have evolved and the manner in which groups of companies are operated has changed since the EU Insolvency Regulation first came into force.[5] As regards to the cross-border aspect, it should be noted that the problems concerning cross-border insolvency have been discussed on the European level for over fifty decades. Cross-border insolvency in itself deals with complicated issues. Because both of the above-mentioned aspects, the group aspect and the cross-border aspect, have been seen as complex enough on their own, dealing with cross-border problems concerning groups of companies has been postponed.[6]

1. Bufford 2012, p. 687.
2. Briefing Note 2011, p. 4.
3. Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. OJ L 160, 30.6.2000, p. 1–18.
4. Tollenaar 2011, p. 52.
5. Asimacopoulus 2011, p. 48.
6. Wessels 2004, p. 178- 179.

The EU Insolvency Regulation has been criticised for not acknowledging the insolvency of groups of companies in an appropriate manner.[7] It has been suggested that the EU Insolvency Regulation should be amended so that it would take modern group structures into consideration and provide special provisions for the insolvency of groups of companies.[8] The lack of rules has an impact on preserving the value of the company.[9] Furthermore, it has been argued that the EU Insolvency Regulation has not provided suitable system that would maximise the likelihood of promoting rescue of the groups of companies and that would allow preserving the going concern.[10]

However, the European Union has now taken regulatory steps towards more modern rules and provisions on insolvency of group of companies. First, the definition of a group of companies was included in the recast version of the EU Insolvency Regulation[11]. Second, a new Chapter V concerning insolvency proceedings of a group of companies was included in the Recast Regulation. This chapter is divided into two parts: the first part, Section 1, establishes rules on cooperation and communication as regards to insolvency proceedings of a group of companies. The second part, Section 2, introduces a whole new solution for coordination of insolvency of a group of companies called the "group coordination proceedings". The new Recast Regulation shall apply from 26 June 2017, thus the Member States have time to prepare before the Recast Regulation and the rules concerning the group coordination proceedings apply.

This thesis concentrates on the rules concerning the group coordination proceedings. The hope is that the group coordination proceedings can lead to more effective and efficient coordination of insolvency proceedings opened in respect of different group members. However, it shall be established in this thesis that the group coordination proceedings do not suit to all kinds of insolvency

7. See for example Tollenaar 2010.
8. Moss – Paulus 2005, p. 12.
9. Asimacopoulus 2011, p. 48.
10. Asimacopoulus 2011, p. 50.
11. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings . OJ L 141, 5.6.2015, p. 19–72. From hereinafter "the Recast Regulation".

cases and that the use of said proceedings shall probably be more of an exception than a rule.

1.2 SCOPE OF THE THESIS

In some Member States the study of insolvency of groups of companies has evolved to its own specialised branch of research. Such specialisation is not unheard of, as many branches of law include, at best or worst, several specialised fields.[12] In national context, the study of group insolvency takes into consideration the relationships between different group members in insolvency and studies if and how the linkage between the group members should affect the course of the insolvency proceedings opened in respect of said group members.[13] In Finland, there is research on insolvency of groups of companies, but it has not evolved to a special field of research.

It is traditional that legal research studies quite simple, basic situations and cases.[14] The research of insolvency usually concentrates on one bankruptcy or restructuring procedure, disregarding the possible relationships between the companies in insolvency or the linkage of the respective proceedings.[15] When studying the coordination of insolvency of multinational groups of companies examining one procedure is not, however, possible. Furthermore, one needs to balance between various different layers of company law principles, insolvency goals, cross-border insolvency approaches and in the context of this study, EU law. Cross-border insolvency is a specialised field of law that concentrates on the study of multinational insolvency cases. Usually cross-border insolvency investigates two questions: first, how can the debtor's liability for debts be realised in other countries than in the country that has the jurisdiction to open insolvency proceedings and secondly, how can the insolvency practitioners and courts cooperate in order to achieve

12. Koulu 2013, p. 16 – 17.
13. The study of groups of companies examines the legal relationships between group members, as well as legal relationships with external quarters. See Koulu 2013, p. 17.
14. Koulu 2013, p. 13.
15. Koulu 2013, p. 14 – 15.

effective and efficient realisation of the debtor's liability for debts.[16] The theme of this thesis revolves around the second question, as the group coordination proceedings established in the Recast Regulation are examined. Furthermore, the focus is in procedural rules concerning the group coordination proceedings.

To illustrate the scope of this thesis the best way possible, a short introduction to group coordination proceedings is needed. Group coordination proceedings may be divided into five stages:

1. Request to open group coordination proceedings
2. Examination of prerequisites
3. Possibility to opt-out
4. Decision to open group coordination proceedings
5. Drafting of coordination plan

First of all, any insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group may request the opening of group coordination proceedings before any court having jurisdiction over the insolvency proceedings of a member of the group. After the request to open group insolvency proceedings has been made, the court seised shall give notice of this request to insolvency practitioners appointed in relation to the members of the group as soon as possible if a few prerequisites are fulfilled. When the insolvency practitioners have received the notice, they have 30 days within the receipt of the notice to object either the proposed coordinator or the inclusion of the insolvency proceedings of that group member within the group coordination proceedings. After the above-mentioned period has lapsed, the court may open the group coordination proceedings. In its decision, the court appoints a coordinator and decides on the outlines of the coordination. Next, the coordinator shall plan the actual coordination and draft a coordination plan.

The aim of the group coordination proceedings is to facilitate the efficient and effective administration of the insolvency proceedings opened

16. Koulu et al. 2009, p. 969.

in respect of the group members. In addition, the group coordination proceedings should strive to have a generally positive impact for the creditors.[17] However, the separate legal nature of members of a group of companies should not be forgotten as it is a fundamental principle in the system of the Recast Regulation.[18]

The rules concerning group coordination proceedings established in the Recast Regulation apply only in situations where proceedings relating to different members of the same group of companies have been opened in more than one Member State.[19] The new rules do not apply when all of the proceedings are begun in the same Member State nor do they apply to proceedings opened elsewhere than in a Member State. Thus in this thesis, when insolvency of a group of companies is discussed, it is assumed that insolvency proceedings have commenced in respect of at least two different group members operating in different Member States.[20] Hence, the aim of this study is not to research groups of companies on the brink of insolvency. In addition, cases where only one member of a group of companies faces insolvency are not relevant for the purposes of this thesis, as the focus is in coordination of multiple insolvency proceedings.

1.3 RESEARCH PROBLEM

As stated above, for the first time it is possible to study an actual European solution for coordination of insolvency proceedings of multinational groups of companies, as the European Union tries to solve the problems of group insolvency by establishing rules for coordination of insolvency proceedings. The challenge of this thesis is to place the group coordination proceedings in a relevant theoretical framework. Hence, as the topic of this thesis includes various different aspects and layers,

17. Recital 57 of the Recast Regulation.
18. Recital 54 of the Recast Regulation.
19. Recital 62 of the Recast Regulation.
20. Insolvency cases that concern groups of companies may be divided into two categories: first, only one of the group members is insolvent. Second, a number of group members face insolvency. See Mevorach 2009, p. 128.

it is important to build the relevant framework in order to analyse the group coordination proceedings.

As for the actual research question, this thesis aims to answer the following ostensibly simple question: what are group coordination proceedings? Because the rules concerning group coordination proceedings are so new, this kind of basic research conducted in this thesis is in order, especially as there is no knowledge on how the group coordination proceedings work in real-life and there is no case law that would demonstrate how the rules concerning the group coordination proceedings should be interpreted.

Fortunately, one does not have to begin from point zero when the research relating to coordination of insolvency proceedings of group members is concerned. On a national level, the research concerning coordination of insolvency proceedings has concentrated on determining what kind of coordination is allowed under national laws.[21] At the international level, authors have suggested different solutions to be adopted in the European Union or at international level, thus there is material to be used in this thesis. To answer the research question stated above, Finnish legal literature is used alongside with the international material to investigate the group coordination proceedings. Where relevant, the references to national laws of the Member States will be discussed and Finnish insolvency law is used as an example. Furthermore, as the UNCITRAL[22] has done a great deal of work regarding insolvency of groups of companies, the material produced by UNCITRAL shall be also used in this thesis.

1.4 METHOD

The topic of this thesis is challenging when determining what method should be used to study the group coordination proceedings. The international research on the theme does not define very precisely its methods. The international research is intentional at best, as it tries to

21. Koulu 2013, p. 28.
22. United Nations Commission on International Trade Law, from hereinafter "UNCITRAL".

find appropriate solutions for the insolvency of groups of companies. It is usual that various measures are investigated in the context of the insolvency goals established in chapter 2.4 of this thesis in order to find a "meaningful approach to insolvency" of groups of companies.[23] However, this is not enough to analyse the group coordination proceedings, as now there are actual institutional rules for coordination of insolvency proceedings of groups of companies. Thus, the research conducted in this thesis is not purely intentional.[24] Other methods are needed in order to answer the research question stated above. Fortunately, appropriate methods may be found from Finnish legal literature. For example, Koulu uses both theoretical and practical legal dogmatics mixed with system analysis to investigate the insolvency of groups of companies.[25]

The very traditional core of legal research has been legal dogmatics which investigates the existing law. The purpose of legal dogmatics is to produce information on legal norms and its task is to interpret and systemise the existing law. Thus, legal dogmatics investigates the contents of existing legal norms.[26] Legal dogmatics starts with the premise that there is uncertainty concerning the contents and interpretation of the law and therefore legal dogmatics concentrates on the rules of the judicial system and to interpretation of these rules.[27] In this thesis, legal dogmatics is used as a method in order to produce takes on the interpretation of legal norms, more precisely the legal norms established in the Recast Regulation concerning the group coordination proceedings. Hence, the method can be described also as practical legal dogmatics, as the starting point of this thesis is not purely theoretical.[28] The aim is to generate arguments and conclusions on the existing law, not only to

23. See for example Mevorach 2009, p. 125 – 126.
24. Although the insolvency goals are not used as a starting point or as a basis for a method in this thesis, they cannot be ignored as they are universal of nature. The goals reflect certain aims or objectives that insolvency laws should promote as will be established later in chapter 2.4 of this thesis. As they result in efficient and effective insolvency proceedings, they are also relevant in the context of the EU, as the goal of group coordination proceedings is to promote efficient and effective coordination of insolvency proceedings.
25. See for example Koulu 2013, p. 34 – 35.
26. Hirvonen 2011, p. 21 – 22.
27. Husa – Mutanen – Pohjolainen 2008, p. 20
28. Hirvonen 2011, p. 25.

describe its contents.[29] However, a more theoretical legal dogmatics is used in order to systematise the rules concerning group coordination proceedings to an understandable ensemble.

System analysis is also used in order to provide a better picture on how the group coordination proceedings function and what problematics relate to the group coordination.[30] In modern research of insolvency law, system analysis often interlocks with legal dogmatic research questions.[31] System analysis studies the functioning of legal institutions and the tries to detect the defects of said institutions. In addition, usually the aim is to propose amendments to these defects. System analysis is used to determine what legal structures need to be considered when discussing the chosen legal institution, does the researched legal institution achieve its goals and what is the future of said institution.[32] In this thesis, system analysis is used as a method to form an overall picture of the group coordination proceedings and of the relevant framework, how the proceedings function and what defects may be found at this stage where there is no actual practical experience from the group coordination.

The decision to use the above-mentioned methods is well founded because of the fact that the rules regarding group coordination proceedings need to be systematised and interpreted in order to answer to the research question stated above. The rules concerning the group coordination are new, and there is not enough legal literature or legal praxis on these rules that would have already systematised or interpreted the provisions on group coordination proceedings. However, legal dogmatics without the system analysis does not provide enough answers to the research problem established above.

29. Hirvonen 2011, p. 25. According to the author, legal dogmatics has been stated as being descriptive research, as the aim is to illustrate the contents of the existing law. However, the statements made are not only descriptive because legal dogmatics aspires to make statements for example on the interpretation.
30. According to Koulu, system analysis may be seen as a form of assessment studies (Koulu 2013, p. 34).
31. Koulu 2013, p. 34.
32. Koulu 2009, p. 125.

1.5 STRUCTURE OF THE THESIS

The following chapter 2 is dedicated to establishing a relevant theoretical framework for the group coordination proceedings so that the reader understands the context that needs to be considered when discussing the group coordination proceedings. Said chapter includes analysis on the definition of a group of companies in the context of the Recast Regulation. Furthermore, the separate legal nature of group members shall be discussed and the opposing theories, the theory of legal separateness and the theory of unification shall be examined. In addition, the cross-border aspect of the thesis shall be investigated. The fundamental theories of cross-border insolvency, universalism and territorialism, are discussed keeping the group coordination proceedings in mind. Furthermore, universal insolvency goals that all insolvency regimes should promote are examined.

The following chapter 3 discusses different ways to coordinate insolvency proceedings opened in respect of different group members. In the thesis, these different ways are divided into three different categories: coordinated cooperation, joint administration and substantive consolidation. In chapter 3, it shall be also pondered if coordination of insolvency proceedings of different group members is even needed.

The chapters before the conclusions are dedicated to the specific rules concerning group coordination proceedings. Thus, opening of the group coordination proceedings as well as the tasks of the coordinator shall be discussed. Not all the problematics shall be introduced as the length of the thesis is quite limited.

2 Theoretical Framework for Group Coordination Proceedings

2.1 DEFINITION OF A GROUP OF COMPANIES ESTABLISHED IN THE RECAST REGULATION

The first part of establishing the relevant framework for the group coordination proceedings is to determine which types of entities or undertakings may be part of the group coordination proceedings. Because the focus point is in cross-border insolvency, a group of companies is in essence a structure that comprises of two or more undertakings which are considered as related entities because of a link exists that binds these undertaking together. This link may be, for example, equity-based of contractual. When the two undertakings operate in different countries, the group of companies is defined as multinational.[33] Fortunately, it is not necessary to create a precise definition for related group members in the European Union from nowhere, as the Recast Regulation provides a definition for groups of companies. This definition shall be analysed in the following paragraphs.

According to Article 2(13) of the Recast Regulation, "group of companies" means a parent undertaking and all its subsidiary undertakings. "Parent undertaking" means an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of

33. Mevorach 2009, p. 10.

the Council[34] shall be deemed to be a parent undertaking.[35]

It may be argued that a problem with the definition of a group of companies is that the term "undertaking" is not defined. The term "undertaking" is quite vague, but usually it means an entity engaged in business. For example, the above-mentioned Directive 2013/34/EU provides an annex that includes a list of different undertakings that fall within the scope of said directive. However, a precise definition of an undertaking is not necessarily needed, as the Recast Regulation provides an annex on the insolvency proceedings that are within the scope of the Recast Regulation. It is for the Member States to report which insolvency proceedings are relevant in the context of the Recast Regulation, thus the national laws determine the relevant undertakings in respect of which the insolvency proceedings may be opened.[36] Thus, the relevant undertakings are defined in national insolvency laws and in my opinion definition for an undertaking does not need to be included in the Recast Regulation.

Only groups that consist of one parent undertaking and one or more of its subsidiary undertakings are groups of companies meant in the rules concerning the group coordination proceedings. The relationship

34. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC. Text with EEA relevance. OJ L 182, 29.6.2013, p. 19–76 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV). Special edition in Croatian: Chapter 17 Volume 003 P. 253 – 310.

35. According to Article 2 of said Directive, parent undertaking means an undertaking which controls one or more subsidiary undertakings; subsidiary undertaking means an undertaking controlled by a parent undertaking, including any subsidiary undertaking of an ultimate parent undertaking; and group means a parent undertaking and all its subsidiary undertakings.

36. Probably because of this, the use of the term "undertaking" has not been problematized in insolvency law the same way as for example in State aid questions. Where State aid is concerned, the concept of an undertaking includes every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. (see for example Court of Justice of the European Union case-law: Case C-41/90, Höfner and Elser v. Macrotron GmbH [1991] ECR I-1979 para 21, Case C-35/96, Commission v Italy [1998] ECR I-3851 para 36, Case C-244/94 Fédération Française des Sociétés d'Assurances and Others v Ministère de l'Agriculture et de Le Pêche [1995] ECR I-4013, para 14; and Case C-55/96 Job Centre [1997] ECR I-7119, para 21.)

between the parent and its subsidiary undertaking is defined by the existence of a control element. However, the control is only defined by stating that the control may be either direct or indirect. The lack of a definition for "direct or indirect control" may cause problems when determining which undertakings may form groups of companies in the eyes of the Recast Regulation. Often when the parent-subsidiary relationship is defined by using the controlling position of a parent undertaking, the term "control" is defined. It has been stated that "control" usually indicates direct or indirect actual control or the ability to control decision-making of the subsidiary, whether the decision-making is financial or operative. The ability to control means that the parent undertaking has the potential to control the subsidiary - actual controlling is not demanded, only the possibility to control suffices.[37]

There are various ways to obtain control. The parent undertaking's control over the subsidiary may be obtained by ownership or through agreements that state the ability to control the subsidiary. In addition, the legal form is not necessarily the decisive factor in determining whether or not a parent undertaking and the other group members form a group of companies by definition, but the true nature of the relationship between the parent undertaking and the group members.[38] Hence, every time group coordination proceedings are commenced it needs to be examined if the assumed parent undertaking really had, before the insolvency proceedings were commenced, either direct or indirect control over the other group members. In principle, the court first seised decides whether or not the group coordination proceedings may be opened, thus it is for the court seised to determine if the assumed parent undertaking has been in a controlling position in respect of the assumed subsidiary undertakings.[39]

Determining whether the element of control exists is not always easy. However, there are various factors that may illustrate the existence of control. First, an entity may have a capacity to affect the com-

37. UNCITRAL Legislative Guide 2010, p. 15.
38. UNCITRAL Legislative Guide 2010, p. 15.
39. On the competent court, please see chapter 4.3.

position of the board of directors of another entity. Second, a situation where an entity has the ability to appoint or remove directors may indicate the existence of control. Third, an entity may be able to control the majority of the votes that are cast at a meeting of the board of another entity. Fourth, an entity may have the ability to cast or regulate the casting of a large part of the votes cast at a general meeting. It has been argued that certain documents or information may be relevant when assessing the above-mentioned factors. This includes, for example, documents of incorporation, strategic decisions of a group member, management agreements and details of bank accounts and their administration.[40]

Based on the above-mentioned factors the court first seised shall determine whether the group members in question are even eligible in respect of the group coordination proceedings. However, it should be kept in mind that the rules for the group coordination proceedings do not state that one of the respective group members of whose insolvency proceedings are included in the coordination needs to be the parent undertaking. It is also possible that insolvency proceedings concerning the parent undertaking have not been commenced, thus based in said factor its insolvency proceedings cannot be included in the group coordination proceedings. In conclusion, even if the parent undertaking is not insolvent, the subsidiary undertakings' insolvency proceedings may be included in the group coordination proceedings.

It should be noted that more precise definitions for a group of companies were suggested and they all included a more strict definition for the control-element. The definition was discussed closely in the process of drafting the Recast Regulation. First, in its original proposal for the Regulation[41] the Commission used the term "parent company" instead of the term "parent undertaking" and defined the element of control. It was proposed that parent company would mean a company which:

40. UNCITRAL Legislative Guide 2010, pp. 15 – 16.

41. Proposal for a Regulation of Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings. Strasbourg, 12.12.2012 COM(2012) 744 final.

1. has a majority of the shareholders' or members voting rights in another company or
2. is a shareholder or member of the subsidiary company and has the right to
    a) appoint or remove majority of the members of the administrative, management or supervisory body of that subsidiary or
    b) exercise a dominant influence over the subsidiary company pursuant to a contract entered into with that subsidiary or to a provision in its articles of association.[42]

The definition proposed by Commission is far more detailed than the definition provided in the Recast Regulation as the aspect of control is defined by using more precise situations where the prerequisite of control is fulfilled. The definition of the Recast Regulation was chosen, because the European Parliament found the definition suggested by the Commission too strict and stated that a more flexible proposal for the regulation of the insolvency of groups of companies was needed.[43] The definition for groups of companies proposed by the Commission was too precise and the definition established in the Recast Regulation is more successful, as it gives room for interpretation and thus allows more leeway. Due to the diversity of multinational groups of companies, it is important that the insolvency regime for groups takes different structures into consideration. The definition for a group of companies should not be too strict, because when a narrow definition is chosen the relevance of the insolvency regime suffers as it applies to a restricted pool of groups.[44]

Interestingly enough, the Commission was not the only quarter to propose a more precise, or strict, definition for a group of companies. For example, INSOL suggested that the parent company would be:

42. Report on the proposal 2013, p. 19 - 20.
43. European Parliament Resolution 2011, annex to the resolution, part 3.
44. Mevorach 2009, p. 127.

"(i) the company which has a majority of the shareholders' or members' voting rights in the other company; if no company meets such definition it is (ii) the company that has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the other company and is at the same time a shareholder in or member of that other company, respectively (iii) the company that has the right to exercise a dominant influence over another company of which it is a shareholder or member, pursuant to a contract entered into with that other company or to a provision in its memorandum or Articles of association."[45]

As for the "company versus undertaking" choice, in my opinion the use of the word "undertaking" reflects better all the entities in respect of which insolvency proceedings may be opened, thus the choice made in the Recast Regulation is well-founded. For example from the Finnish point of view, the scope of the Bankruptcy Act and the Restructuring of Enterprises Act includes other entities than companies meant in the Limited Liability Companies Act[46]. According to chapter 1 section 3(1) of the Bankruptcy Act, a private individual, a corporation, a foundation and another legal person may be declared bankrupt. A legal person may be declared bankrupt even if it has been removed from the relevant register or dissolved. Also a decedent's estate and a bankruptcy estate may be declared bankrupt.[47]

45. INSOL Europe 2012, V.9. This definition is based on the definition of the parent company as stated in the Seventh Council Directive 83/349/EEC of 13 June 1983. On the proposal of INSOL Europe, see Mevorach 2012.

46. According to chapter 8 section 12 of the Limited Liability Companies Act, If a limited liability company exercises control over another domestic or foreign corporation or foundation, as referred to in chapter 1, section 5, of the Accounting Act (1336/1997), the limited liability company shall be the parent company and the other corporation or foundation a subsidiary. The parent company and its subsidiaries form a group. A limited liability company exercises control over another corporation or foundation also in the event that the limited liability company, together with one or several of its subsidiaries, or a subsidiary or several subsidiaries together exercise control over that corporation or foundation, as referred to in chapter 1, section 5, of the Accounting Act.

47. As for the restructuring proceedings, a private entrepreneur, a general partnership, a limited partnership, a company, a co-operative, a housing company or an association engaged in economic activity may be the subject of restructuring proceedings (chapter 1 sec-

Thus, the word "company" is not enough to define all the entities that may be subject to insolvency proceedings.

2.2 THE SEPARATE LEGAL NATURE OF GROUP MEMBERS

The second step in establishing the relevant framework is to determine how groups of companies are treated in insolvency law, or more precisely in the Recast Regulation. In addition, it shall be also discussed if the approach adopted in the Recast Regulation is well-founded in today's economic reality. The way how countries treat groups of companies in their legislation may vary a great deal. The fundamental question that should be resolved in legislation regarding groups of companies is whether the separate legal nature of group members is respected and to what extent.[48] In this thesis, the term "theory of legal separateness" shall be used to reflect the theory which establishes that different group members are treated as separate legal entities. On the other hand, the term "theory of unification" is used to describe the theory in which the group itself is treated in some situations as it was a legal entity.[49]

The problems caused by group structure are a result of the fact that the common interest of the group collides with the interest of the separate group member. From a legal point of view the interest of a group member comes first.[50] However, the group is a part of a group member's economic environment. A group member may get economic advantage from belonging to a group, for example in a form of getting financing easier.[51] Nevertheless, a broader analysis on the colliding interests is not possible in the length of this thesis, as it is interesting from the point of view of this thesis is to examine how insolvency laws should handle group of companies.[52]

tion 2(1) of the Restructuring of Enterprises Act.

48. Mevorach 2009, p. 32.

49. In Finnish, these theories are referred to as "erillisteoria" (theory of legal separateness) and "yhtenäisteoria (theory of unification).

50. Koulu 2013, p. 77.

51. Immonen – Villa 2015, p. 94.

52. For a broader analysis, see for example Koulu 2013, p. 77 – 85. A broader analysis is not possible because of the fact that the group-interest is a very vague concept at best, as it may

From the point of view of company law, the theory of legal separateness includes many layers, but it may be summarised in one idea: each group member is a separate legal person. This means, that a group member is separate from other group members but also from its shareholders. A group member is able of having its own rights and duties which may differ from those of other members in a same group.[53] In addition, the theory of legal separateness relies on limited liability of the shareholders of each member of the group and that each separate group member has its own directors.[54] The theory of legal separateness represents the traditional outlook on companies. The distinct personality and limited liability of shareholders must be respected.[55] Theory of legal separateness also allows assets partitioning, which means that every member in a group is liable for its own debts. This also means that when granting credit for a particular group member, the creditors do not need to examine the creditworthiness of other members of the group.[56]

However, in some situations it may be commercially unwise to follow the theory of legal separateness to the letter. A very integrated group may be operated in a way where the group members' assets and liabilities are completely intermingled.[57] Problems may arise when all group members are treated as separate entities, because the legal structure of separateness does not necessarily reflect the way on which the group is really operated. Thus, the theory of unification recognises that it may be beneficial to take into consideration the relationships between group members.[58] In addition, the approach recognises that the group itself may be seen as a relevant entity in some situations.[59] From the two approaches, the theory of legal separateness is more prevalent and more

vary depending on how the group is structured and operated (Koulu 2013, p. 82). Thus, for the purposes of this thesis, it is not sensible to pay more attention to said topic.

53. Mevorach 2009, p. 33.

54. UNCITRAL Legislative Guide 2010, p. 16. The purpose of limited liability is to protect shareholders investing in a company, see Mevorach 2009, p. 38.

55. Mevorach 2010, p. 375.

56. Mevorach 2010, p. 375.

57. Mevorach 2009, p. 34. On integration, see also Mevorach 2008.

58. Mevorach 2010, p. 375.

59. Mevorach 2009, p. 38.

common than the theory of unification.[60] As stated above, the theory of legal separateness represents a very traditional way of thinking, i.e. respecting the separate nature of group members and the limited liability of shareholders.[61]

So how do these theories present themselves in insolvency law? The theory of unification, in its purest form, results in one joint insolvency proceedings, one common estate and joint administration of the insolvency proceedings. [62] This is often referred to as consolidation.[63] As there are no different insolvency proceedings, there is no need for rules concerning cooperation or coordination. In situations where insolvency proceedings in respect of all the group members are commenced, the pros of the theory of unification are apparent as it makes the estate administration more efficient. However, when only some group members face insolvency, it is clear that the theory of legal separateness approach is a more suitable solution.

Contrary to the theory of unification, the theory of legal separateness leads to separate insolvency proceedings and separate insolvency estates, as the insolvency of the group as a whole is not recognized.[64] The prerequisites and impediments to open insolvency proceedings are evaluated separately for each group member and said evaluation done in respect of other group members does not affect the evaluation of other group members. When theory of legal separateness is chosen, insolvency proceedings concerning different group members may be commenced in different times and different courts. It should be noted that when applying the theory of legal separateness, nothing replaces the group structure in insolvency proceedings: group members are merely separate entities. Although the parent undertaking has had control over its subsidiaries, it no longer has that control when the insolvency proceedings are commenced. For example, the group members settle disputes just as undertakings with no connection with one another. Hence, disputes between group

60. UNCITRAL Legislative Guide 2010, p. 16.
61. Mevorach 2009, p. 38.
62. Koulu 2013, p. 103 – 104.
63. Consolidation in the context of the Recast Regulation shall be discussed in chapter 6.
64. Hirte 2008, p. 214.

members are very common in insolvency proceedings of group of companies.[65]

The insolvency laws of Member States are traditionally based on the theory of legal separateness.[66] For example the Finnish insolvency laws follow strictly the principles of the theory of legal separateness, because the insolvency of a group is not recognised.[67] In addition, the Supreme Court has established that each group member has its own assets and liabilities and that transfers of assets between group members may be subject to the recovery of assets to the bankruptcy estate. In addition, the Supreme Court stated that the possible detrimental nature of transactions shall be examined in respect of each separate group member.[68]

However, it may be difficult to recognise which of the two above-mentioned theories is followed in the national legislation. This is because of the fact that groups are treated very differently in national legislation.[69] Due to the complexity of the structures and how groups of companies are operated, it is common that national laws of the Member States of the European Union do not recognise groups of companies in a uniform manner. In the Member States where group of companies are mentioned in the legislation, it is usual that provisions on groups of companies are included in the legislation concerning taxation or accounting.[70] For example, the Finnish Limited Liability Companies Act (624/2006) establishes a definition for "a group" by referring to the definition stated in the Accounting Act (1336/1997).

As for the legislation of the EU, the Recast Regulation follows the theory of legal separateness.[71] In addition, the separate legal nature of group members is recognised by the Court of Justice of the European

65. Koulu 2013, p. 103 – 104.
66. One of the earliest cases establishing the theory of legal separateness in general was Salomon v. A. Salomon & Co., Ltd., [1897] A.C. 22.
67. Furthermore, the Finnish insolvency laws do not even provide a definition for a group.
68. KKO:2004:69.
69. Mevorach 2009, p. 51.
70. UNCITRAL Legislative Guide 2010, p. 14.
71. The separate legal nature of group members has been recognised before the Recast Regulation, see for example Virgos – Schmit 1996, p. 52.

Union[72]. In *Eurofood*[73], Eurofood's registered office was located in Dublin, Ireland. It was a company limited by shares and it was owned by Parmalat SpA which was registered in Italy.[74] On 24 December 2003 Parmalat SpA was admitted to extraordinary administration proceedings on 24 December 2003 and an extraordinary administrator was appointed.[75] On 27 January 2004, an application concerning insolvency proceedings was delivered to the High Court in Ireland. This application was based on the claim that Eurofood was insolvent.[76] On the same day the High Court appointed a provisional liquidator. This liquidator had the authority for example to manage the company's affairs and take possession of its assets.[77]

The High Court of Ireland decided that the insolvency proceedings concerning Eurofood had been opened according to Irish law in Ireland on the same date on which the application was delivered. In other words, the High Court of Ireland stated that the COMI of Eurofood was in Ireland and that the opened proceedings should be considered as main proceedings. The High Court of Ireland also stated that the Irish courts were entitled to refuse recognising the decision of the Italian court.[78] However, because of the unclarity concerning the location of the Eurofood's COMI, The High Court of Ireland decided to refer questions to the CJEU for a preliminary ruling.[79] The CJEU established that in the system of EU Insolvency Regulation, each debtor constitutes a distinct legal entity which is subject to its own court jurisdiction.[80]

The debate on which of the theories is better in insolvency context is ever ongoing. It is easy to see the pros of the theory of unification if all of the group members begin insolvency proceedings at the same time. When insolvency proceedings are commenced at the same time, one estate and one administration would certainly lead to more efficient and

72. From hereinafter the "CJEU".
73. Case C-341/04, Eurofood IFSC Ltd. See also for example Wessels 2007.
74. Case C-341/04, Eurofood IFSC Ltd, para 17.
75. Case C-341/04, Eurofood IFSC Ltd, para 18.
76. Case C-341/04, Eurofood IFSC Ltd, para 19
77. Case C-341/04, Eurofood IFSC Ltd, para 20.
78. Case C-341/04, Eurofood IFSC Ltd, para 23
79. Case C-341/04, Eurofood IFSC Ltd, para 24.
80. Case C-341/04, Eurofood IFSC Ltd, para 30.

effective resolution of the insolvency estate. It is true that in some cases respecting the separate legal nature of group members is unrealistic in respect of the modern business world. Conducting global business in a form of a corporate group often does not take into account the separate nature of the different companies in a group.[81] However, there is no empirical research which would prove that it is more common that insolvency proceedings in respect of group members are opened at the same time.[82] Thus, in my opinion, the rules for coordination of insolvency proceedings should somehow take into consideration that insolvency proceedings in respect of group members may be commenced at different times if the theory of legal separateness is followed. As a rule, all of the insolvency proceedings commenced in respect of different group members should be included in the coordination. However, if the insolvency proceedings are in different stages and the inclusion of one insolvency procedure would not be appropriate considering the effectiveness of the coordination, the rules concerning the coordination should allow that said proceedings are not included in the coordination.

Nevertheless, neither of the theories need be followed to the letter and combinations between the two are also possible.[83] It has been argued that an ideal solution for groups of companies should take both theory of legal separateness and theory of unification into consideration.[84] G. Moss and C. Paulus establish in their article that the fact that no rule has been provided for insolvency of groups of companies has been a major defect of the EU Insolvency Regulation. The authors argue that the theory of legal separateness does not reflect economic realities and that the problem is emphasised when reorganisation of groups of companies is concerned. The authors propose that in some cases, the theory of unification should be adopted, thus insolvency proceedings should recognise the existence of the group itself. It was suggested that the EU Insolvency Regulation should establish provisions on the ability of one Member State to open main proceedings for all the group mem-

81. Moss – Paulus 2005, p. 11.
82. Koulu 2013, p. 106.
83. Koulu 2013, p. 106.
84. Mevorach 2009, p. 61.

bers when the group is operated in a way that the separate legal nature of different group members is not recognisable and the group has been operated in one integrated entity.[85] In my view, taking into account both of the theories would reflect better the economic reality in which groups of companies operate. Furthermore, the theory of legal separateness does not have to lead to total independence of the insolvency proceedings.[86]

The group coordination proceedings is a good example of an approach where the theory of legal separateness is followed. The separate legal nature of group members is respected, but the Recast Regulation establishes institutional support for the coordination of separate insolvency proceedings of group members. At first glance, it would seem that the European Union has taken a step towards a more modern approach. However, as will be established later in this thesis, this is not quite the case. Although the Recast Regulation allows coordination of insolvency proceedings in a form of a mutual coordinator, it does not allow any kind of consolidation and the insolvency proceedings remain totally separate with different insolvency practitioners.[87]

2.3 UNIVERSAL OR TERRITORIAL PROCEEDINGS?

Cross-border insolvency proceedings may be based on two very different approaches: universalism and territorialism.[88] Hence, when discussing cross-border insolvency, one cannot avoid discussing these two main approaches to cross-border insolvency. One theory concentrates on a global view and the other emphasizes territoriality and state sovereignty. Stating the differences between universal and territorial insolvency proceedings is needed, because both kinds of insolvency proceedings may be included in the group coordination proceedings.

Hence, whether the insolvency law should follow the principle of universalism or territorialism is the fundamental issue in cross-border

85. Moss – Paulus 2006, p. 4 – 5.
86. Koulu 2013, p. 107.
87. Different ways on how the insolvency estate may be administered are discussed in chapter 3. The prohibition of consolidation shall be discussed in chapter 6 of this thesis.
88. Koulu 2004, p. 47.

insolvency.[89] First, countries have not considered insolvency of a multinational group of companies as a global phenomenon, but as a construction where assets located in a particular state belong to said state's exclusive jurisdiction.[90] This approach is called territorialism. Territorialism emphasises state sovereignty and considers that national legal regimes should preserve their distinctive features.[91]

According to a territorialist view, insolvency proceedings shall be commenced in the place where the assets are located. This means that the assets are administered in local proceedings by local courts. If more than one insolvency proceeding is commenced, the parallel proceedings have no relations with each other.[92] Furthermore, only the opening State has jurisdiction over the insolvency proceedings. Because of the territorial focus, the insolvency practitioner appointed in those proceedings does have powers only in said jurisdiction and assets in other States are not affected by the opening of territorial insolvency proceedings. Territorialism reflects State sovereignty, thus a State controls exclusively its own territory.[93]

It has to be pointed out that the principal defect of territorialism in international insolvency is that it does not solve cross-border issues. Territorialism does not allow effective insolvency proceedings for multinational groups of companies. National proceedings do not have enough power to gather all assets and claims of international groups and, on the other hand, it does not take into account that purely national solutions for international problems are not relevant, because they may lead to disfavouring of foreign interests.[94]

Universalism may be described as the opposite approach to cross-border insolvency cases. It is based on the principle that insolvency requires a collective process.[95] Insolvency should be resolved in a universal manner, where the rules concerning procedural and substantive

89. Eidenmüller 2013, p. 17.
90. Wessels – Markell – Kilborn 2009, p. 40.
91. Mevorach 2014, p. 109.
92. Wessels – Markell – Kilborn 2009, p. 41.
93. Ghio 2015, p. 160.
94. Wessels – Markell – Kilborn 2009, p. 46.
95. Mevorach 2014, p. 109.

aspects govern all interests involved.[96] Universalism is based on the fact that one court is considered as the primary court. This court administers the whole insolvency case. Following from this "one-court" approach is the fact that the insolvency law of the primary jurisdiction governs all the aspects of the insolvency case, wherever the creditors or assets are located.[97] Basically, this is universalism in its purest form.

The universalist approach is argued as being more popular amongst legal scholars concentrating on cross-border insolvency. However, the supporters of universalism recognise that this approach has its drawbacks, thus a compromise was developed until a consensus regarding the adaptation of universalist approach on an international level is reached. This solution is called "modified universalism".[98] Modified universalism, like pure universalism, deals with insolvency cases with a cross-border aspect from international point of view, i.e. the scope of the proceedings should be international and not limited to only one territorial procedure. However, the modified nature results from the fact that said approach takes into account the differences in national insolvency laws. Furthermore, modified universalism recognises that in some cases different territorial insolvency proceedings may have to be opened in various countries.[99]

The trend worldwide is not towards to purest forms of universalism or territorialism, but towards the above-mentioned modified universalism. Modified universalism is based on the principle that single main insolvency proceedings with a worldwide effect may be opened, but there is also a possibility to commence secondary proceedings which has only local (or national) effects. Both UNCITRAL Model Law on Cross-border Insolvency and the Recast Regulation follow this approach.[100] It has been states that territorialism in reality is more realistic approach than universalism. This is because of the fact that when a Member State opens

96. Wessels – Markell – Kilborn 2009, p. 49.
97. Howcroft 2007, p. 370.
98. Universalism may also be supported by contractualist approach which essentially states that full effect should be given to the parties' choice. This approach has not gained much support, although "ad hoc contractualism" may be used in international insolvency, i.e. the coordination is done by using "protocols" (Mevorach 2014, p. 112.).
99. Mevorach 2009, p. 68 - 69.
100. Eidenmüller 2013, p. 18.

insolvency proceedings that have cross-border elements, national interests in other States are affected and the opened insolvency proceedings shall face difficulties because interests in other States.[101]

The system of the Recast Regulation is a good example of modified universalism. Two kinds of proceedings may be opened according to the Regulation: main proceedings and secondary proceedings.[102] Main proceedings have a universal scope, thus it does not matter where the debtor's assets are located since the insolvency proceedings affect all the assets of the debtor. Only one main proceeding may be opened, but secondary proceedings may be opened in another Member State. However, these secondary proceedings affect only the assets that are located in said Member State.[103] The rules concerning group coordination proceedings do not differentiate main and secondary proceedings[104].

According to Article 3(1) of the Recast Regulation, the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

In addition to the main proceedings, secondary territorial proceedings may be opened in respect of a company. According to Article 3(2) of the Recast Regulation, where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the ter-

101. Ghio 2015, p. 160.

102. It should be noted in this context that also the EU Insolvency Regulation allowed opening of both main and secondary proceedings

103. Iriarte Ángel – Casado Abarquero 2010, p. 20.

104. This shall be discussed later in the chapters concerning the actual rules of group coordination proceedings.

ritory of that other Member State. Where main insolvency proceedings have been opened by a court of a Member State and recognised in another Member State, a court of that other Member State which has jurisdiction pursuant to Article 3(2) may open secondary insolvency proceedings in accordance with the provisions set out in Chapter III of the Recast Regulation. Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened. The effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of the Member State in which those proceedings have been opened.[105]

2.4 INSOLVENCY GOALS

In this chapter, it is time to study the insolvency goals that insolvency laws should promote. The insolvency goals examined in this thesis reflect the insolvency goals established in UNCITRAL Legislative Guide on Insolvency Law.[106] Being the product of truly international deliberations, the following goals reflect a wide consensus on the aims of insolvency systems.[107] Thus, it is only natural that these goals are discussed in the context of this thesis, although they do not, by themselves, provide a method for legal research.[108] However, as these goals are universal, investigating the group coordination proceedings while keeping in mind the insolvency goals, generates valuable information on the functioning of the group coordination proceedings and how efficient and effective the group coordination proceedings really are. Hence, the goals shall be discussed in this chapter and where relevant, references to said goals shall be made in the following chapters.

The following key objectives or insolvency goals are established in the first part of the Legislative Guide:

105. For a more detailed examination of main and secondary proceedings, see for example Wessels 2014.
106. UNCITRAL Legislative Guide 2004.
107. Mevorach 2010, p. 374,
108. See for example Koulu 2013, p. 32.

1. providing certainty in the market to promote economic stability and growth;
2. maximization of value of assets;
3. striking a balance between liquidation and reorganization;
4. ensuring equitable treatment of similarly situated creditors;
5. achieving timely, efficient and impartial resolution of insolvency;
6. preservation of the insolvency estate to allow equitable distribu tion to creditors;
7. ensuring a transparent and predictable insolvency law that con tains incentives for gathering and dispensing information; and
8. Recognition of existing creditor rights and establishment of clear rules for ranking of priority claims.[109]

It has been stated in the Legislative Guide that insolvency laws should for example enable the restructuring of viable companies, efficient closure and assessment of credit risks both internationally and nationally. In addition, national laws should promote transfer of assets of failed companies. Thus, the objective of enhancing certainty in the market and promoting economic stability and growth should be taken into consideration when implementing said insolvency goals to insolvency regimes.[110]

Probably the most important insolvency goal in the context of this thesis is the maximization of value of assets.[111] It is for the interests of all participants in insolvency proceedings that a maximum value for the assets is accomplished, as the higher the value of assets, the larger distributions the creditors shall get in the insolvency proceedings. In order to achieve this goal, the insolvency law must also contain provisions on how the risks are balanced between the parties of the insolvency proceedings. Furthermore, achieving of this goal entails that a balance exists between the use of liquidation and use of reorganisation, as different situations demand different measures used in order to maximize the

109. UNCITRAL Legislative Guide 2004, p. 10 - 13.
110. UNCITRAL Legislative Guide 2004, p. 10.
111. Bufford 2012, p. 693. Bufford states that said goal is the most important especially when discussing reorganisation of companies, no matter if the scope of the insolvency proceedings is national or international.

value of assets.[112] One important aspect of this goal is to keep to costs of the insolvency proceedings in a moderate level.[113] In international context, cross-border situations where for example assets are situated in multiple countries pose problems to achieving this goal. As for the coordination of insolvency proceedings of group members, when the insolvency proceedings of group members are coordinated in an effective and efficient manner, it is more likely that the value of assets of the debtor can be maximised.[114] This is because of the fact that through coordination, the business of the debtor could be sold as a going concern instead of selling separate bits and pieces which does not result in the best value of assets.

The insolvency goal of maximization of value has a close connection to the goal of striking a balance between liquidation and reorganization. The insolvency regime should "balance the advantages of near-term debt collection through liquidation (often the preference of secured creditors) against preserving the value of the debtor's business through reorganization (often the preference of unsecured creditors and the debtor)". Every insolvency regime should offer the possibility for reorganisation (or restructuring) of the debtor, especially in situations where the value of the debtor is higher to the creditor as the debtor usually remains a going concern in reorganisation proceedings.[115] Furthermore, as the misuse of the possibility of reorganization should be avoided, the insolvency regime should also provide provisions on how to shift from proceedings to another when necessary.[116] EU has paid special attention to promoting rescue, especially emphasizing that restructuring proceedings should be began early enough, not when the company is on the brink of bankruptcy proceedings.[117]

As mentioned above, the fourth insolvency goal is ensuring equitable treatment of similarly situated creditors. Creditors which are situated

112. UNCITRAL Legislative Guide 2004, p. 11.
113. Mevorach 2009, p. 107.
114. Bufford 2012, p. 693.
115. See Eidenmüller 2005, p. 429.
116. UNCITRAL Legislative Guide 2004, p. 11.
117. See for example Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency.

similarly or have similar legal rights should be treated fairly in collective proceedings. This means that similarly situated creditors should receive a distribution on their claim that is based on the ranking of claims. It should be noted that not all creditors need to be treated equally, as only the creditors whose claim belongs to the same class of ranking should be treated in a same way.[118]

The fifth insolvency goal is achieving timely, efficient and impartial resolution of insolvency. For the purposes of this thesis, said goal is one of the most relevant along with the goal of maximizing the value of the assets of the debtor. According to the Legislative Guide:

> *"Insolvency should be addressed and resolved in an orderly, quick and efficient manner, with a view to avoiding undue disruption to the business activities of the debtor and to minimizing the cost of the proceedings. Achieving timely and efficient administration will support the objective of maximizing asset value, while impartiality supports the goal of equitable treatment. The entire process needs to be carefully considered to ensure maximum efficiency without sacrificing flexibility. At the same time, it should be focused on the goal of liquidating non-viable and inefficient businesses and the survival of efficient, potentially viable businesses."*[119]

Achieving this goal requires that the access to insolvency proceedings is easy and based on clear and objective criteria. Furthermore, an insolvency regime should provide a suitable supervision and administration of the insolvency proceedings.[120] In my view, achieving this goal presents challenges especially in international cross-border cases concerning group of companies because debtors, assets and creditors are located in different countries. Thus, a proper coordination method is needed in order to ensure that the insolvency proceedings are conducted in an efficient and effective manner.

As for the sixth goal, the insolvency estate should be preserved to

118. UNCITRAL Legislative Guide 2004, p. 11 - 12.
119. UNCITRAL Legislative Guide 2004, p. 12.
120. UNCITRAL Legislative Guide 2004, p. 12.

allow equitable distribution to creditors. According to the Legislative Guide, an insolvency law should "prevent premature dismemberment of the debtor's assets by individual creditor actions to collect individual debts". This kind of premature dismemberment may reduce the value of assets of the debtor or may prevent the sale of the company as a going concern. A stay on actions is needed in order to properly map the financial situation of the debtor. It is usual that insolvency laws provide exceptions where it comes to stay of actions and secured creditors.[121] It has been stated that when group members are concerned, the creditors expect to be treated equally in insolvency proceedings opened in respect of the group member with which they have done business. However, the creditors do not have same expectation where it comes to the insolvency proceedings of other group members.[122]

The following insolvency goal is also very important in the context of this thesis. The insolvency law should be transparent and predictable and contain incentives for gathering and dispensing information. The transparency and predictability is needed to ensure that the parties to insolvency proceedings understand what happens in course of the insolvency proceedings and what is needed to ensure, for example, the maximization of the value of assets. In addition, the creditors need to be able to assess their position when the debtor faces financial difficulties or becomes insolvent. When the insolvency regime is formulated in a transparent way, the number of disputes relating to insolvency proceedings is lower as the parties know their rights and may predict how the insolvency regime is applied. Furthermore, if the insolvency law refers to other laws, these references shall be done in a clearest way possible. In addition, the insolvency law should ensure that the parties to the insolvency proceedings get all the relevant information they need.[123] In international context, it is essential that the parties in insolvency pro-

121. UNCITRAL Legislative Guide 2004, p. 12.
122. Bufford 2012, p. 694. The separate legal nature of group members is discussed above in chapter 2.2.
123. UNCITRAL Legislative Guide 2004, p. 13.

ceedings know what law to apply to the proceedings. Furthermore, the exchange of information in cross-border insolvency is crucial as it helps to achieve the best value for the assets of the debtor and speed the proceedings.[124]

The last insolvency goal is recognition of existing creditor rights and establishment of clear rules for ranking of priority claims. The insolvency law should recognize the rights which the creditors had before the insolvency proceedings commenced. This shall create certainty in the market as the rights of the creditors are taken into consideration and creditor can predict the way their claims are treated in the insolvency proceedings.[125]

It has been stated that insolvency goals are achieved more easily if insolvency proceedings commenced in respect of different group members are coordinated.[126] However, some of the above-mentioned goals are not necessarily achieved, at least to the full extent, when group coordination proceedings are concerned. The appointment of an outside coordinator does not result necessarily result in efficiency and effectiveness, especially because the group coordination proceedings are voluntary and the group members are not obligated to participate in said proceedings. In my opinion, the appointment of an outside coordinator may even prolong the insolvency proceedings and increase the costs of the proceedings.

In Finland, this worry is shared by the Legal Committee as it has stated its doubts on the group coordination proceedings. In a statement made in 3 June 2014, the Legal Committee has stated that considering the powers and rights of an outside coordinator, it is possible that the coordinator does not add value to the insolvency proceedings.[127] Furthermore, it has been stated that despite the fact that coordination of insolvency proceedings concerning group members can be organised in

124. This applies also in the group context. See also Bufford 2012, p. 693 – 694.
125. UNCITRAL Legislative Guide 2004, p. 13.
126. Mevorach 2010, p. 374.
127. LaVL 12/2014 vp, p. 4.

46 multiple ways, the most efficient way to coordinate the insolvency proceedings is where the proceedings are handled in the same court and by the same insolvency practitioner.[128] The group coordination proceedings do give a possibility to coordinate the insolvency proceedings by a single court, but the separate insolvency proceedings are not, however, handled by this court. To elaborate on the previously-mentioned, the need for coordination and different ways of coordination shall be discussed in the following chapters.

128. Mevorach 2013, p. 374.

3 Different Ways to Coordinate Insolvency Proceedings

3.1 ARE RULES REGARDING THE COORDINATION EVEN NEEDED?

Although the need for ways to coordinate insolvency proceedings of groups of companies is quite apparent, it has been argued that provisions for multinational groups of companies may be seen as unnecessary, as cross-border insolvency mechanisms dealing with international insolvency already exist.[129] For example, the UNCITRAL Model Law[130] has been adopted in 39 States in a total of 40 jurisdictions.[131] Furthermore, insolvency practitioners have coordinated insolvency proceedings of members of groups of companies on a voluntary basis for a long time.[132]

For example, M. Menjucq and R. Damman have suggested in their article that the EU Insolvency Regulation need not necessarily be amended and that precise rules for insolvency of multinational groups of companies should be left to the national laws of Member States or rather to the national courts' case law. It would be for the CJEU to supervise how the national courts interpret EU Insolvency Regulation when groups of companies are concerned. In the article, the authors recognise that since the EU Insolvency Regulation was adopted, the legal and economic environment on which the groups of companies operate has changed. In addition, the authors argue that a political decision of multiple Member States does not lead to a suitable solution,

129. Mevorach 2010, p. 366.
130. UNCITRAL Model Law on Cross-Border Insolvency (1997).
131. The status of the UNCITRAL Model Law on Cross-Border Insolvency (1997) can be found in http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (as visited 5 October 2015).
132. Hirte 2008, p. 215.

but will result in an inflexible system.[133]

On the other hand, the fact that Member States have adopted very different solutions on how to deal with insolvency of multinational groups of companies has been seen as a problem and thus the lack of explicit rules has been a major concern in the European Union.[134] In my opinion the lack of clear rules for coordination of insolvency proceedings of multinational groups of companies may result in unforeseeable outcomes. For example, the goal of predictability is not fulfilled when one cannot predict the outcome of the coordination or how the coordination is implemented.[135] In addition, it is very rare that insolvency laws of Member States provide any solutions for insolvency of groups of companies. On the contrary, the provisions concerning insolvency of groups of companies are usually micro level rules concerning very minor aspects of insolvency of groups of companies. Hence, national insolvency laws often do not provide clear rules on how to treat issues concerning for example group liabilities or consolidation of proceedings opened in respect of different group members.[136] To provide an example, Finnish Bankruptcy Act (120/2004) establishes only a few minor rules regarding insolvency of groups of companies.[137]

The insolvency case concerning KPN Qwest is a good example of the need for institutional rules on coordination as it demonstrates well what may happen when insolvency proceedings of group members are not coordinated. The failure of KPN Qwest resulted in losses to the share-

133. Menjucq - Damman 2008, p. 145 – 158.

134. Eidenmüller 2013, p. 19.

135. Mevorach 2010, p. 366.

136. Mevorach 2009, p. 58. Procedural and substantive consolidation in the context of the group coordination proceedings shall be examined later in this thesis in chapter 6.

137. These rules concern the competent court and joint administration. According to chapter 7, section 2(2) of the Bankruptcy Act, if the debtor is a part in a group of companies, a matter pertaining to an order of bankruptcy may be heard by another court with jurisdiction over a bankruptcy matter of another debtor in the same group of companies, if it is expedient to hear the matter in this latter court. As for the joint administration, a person who has been appointed or nominated as an estate administrator may be appointed as the estate administrator also for another debtor in bankruptcy belonging to the same group of companies or otherwise to the same economic entirety, if this can be deemed expedient for the administration of the bankruptcy estates and if there is reason to believe that the functions can be performed without conflicts of interest that would cause an essential disturbance therein (chapter 6, section 3 of the Bankruptcy Act).

holders, creditors and employees.[138] KPN Qwest was a telecommunications group which had expanded all over Europe and the United States. The group included for example French and German subsidiaries.[139] The Dutch holding company failed and left many subsidiaries in need of protections of a court. As every subsidiary filed for protection in the jurisdiction which in they were incorporated, no one had the means or competence to coordinate the proceedings as a whole, which ended in losses.[140] The bankruptcy of KPN Qwest also happened to be the first to fall under the scope of the EU Insolvency Regulation.[141] To sum up, it seems apparent that at least in the European Union rules on coordination of insolvency proceedings are needed in order to ensure a uniform approach to group insolvency.

The way the group was operated before the insolvency proceedings were commenced may also be relevant when discussing how the rules on coordination should be formulated. For example, if the group members have operated as strictly separate units, only loose, if any, coordination is needed.[142] In these situations the insolvency proceedings may be conducted totally separately, as the insolvency has not broken the relationships between group members. However, it is more common that group members have some kind of link with each other and may be even highly integrated.[143] The structures of groups of companies have evolved since these entities started to emerge. First the single-entity enterprises began to expand through legal or economic control. These group members may have conducted business in the same market, but later, as the structures came more complex, group members expanded their businesses for example to different locations all over the world or to different branches, for example manufacturing other products.[144] De-

138. Briefing Note 2011, p. 7.
139. de Vette 2011, p. 216- 217.
140. Briefing Note 2011, p. 7.
141. van Galen 2004, p. 2.
142. Mevorach 2014, p. 115 – 116.
143. Mevorach 2014, p. 115 – 116.
144. UNCITRAL Legislative Guide 2010, p. 6. The reasons why business is conducted through groups of companies shall not be discussed more closely, as the length of this thesis is limited. ON the advantages of using a group structure, see for example Mevorach 2009, p. 13 - 14.

spite the expansion, the members of the group have kept their separate legal natures.[145] This separateness has been retained in insolvency, as was discussed above.[146]

Nowadays, the ways on how the groups are operated may vary a lot. When discussing insolvency of multinational groups of companies, the level of integration and independence among the group members cannot be disregarded.[147] Whether the legal structure is based on equity or contractual linkages, the close relationships of the members may create a structure that may be described as an integrated group of companies.[148] Integration may occur in various different forms. For example, it is possible that the parent undertaking has created a common policy which is followed by the whole group. On the other hand, it is possible that a group of companies is integrated when assets are concerned.[149] In this context, where a group is very integrated, there may be problems relating to intermingling of assets and liabilities of different group members.[150] Furthermore, it is possible that a group of companies is integrated financially. This entails that there may be parent guarantees; intercompany claims or that all the group members are liable to the same common financial institutions.[151] It should be also kept in mind that often the true nature of the group structure is more complicated than the apparent public image of the group of companies. Different entities of a group are treated legally as separate entities but this does not without fail depict the true nature of how the business is managed within the group.[152] Furthermore, most of the international cases concern integrated groups. This is because of the fact that these kinds of groups are more vulnerable to the "domino effect": the insolvency of one member causes an impact through the whole group and members fall into insolvency one by one.[153]

145. UNCITRAL Legislative Guide 2010, p. 6.
146. See chapter 2.2.
147. For an extensive outlook on different types of integration, see Mevorach 2009.
148. Mevorach 2009, p. 128.
149. Van Galen 2012, p. 378.
150. Mevorach 2009, p. 131.
151. Van Galen 2012, p. 378.
152. Briefing Note 2011, p. 5.
153. Mevorach 2014, p. 115 – 116.

In summary, the differences in the level of integration of multinational groups of companies should be kept in mind when suitable solutions for coordination of insolvency proceedings opened in respect of group members are investigated, because the level of integration may have an effect on how the insolvency proceedings opened to different group members should be coordinated.[154] The need for coordination is not always a given, as sometimes the insolvency proceedings opened in respect of group members need not be coordinated.[155] The rules should take this into consideration by allowing the coordination to be tailored to suit the specific insolvency case at hand.

3.2 COORDINATED COOPERATION

There are various ways to coordinate the administration of the insolvency estates. To understand the nature of group coordination proceedings, these options shall be discussed in this chapter as well as in the following chapter.

The different options examined in this chapter are:

1. Coordinated cooperation;
2. Joint administration[156]; and
3. Substantive consolidation.[157]

All of the above-mentioned ways of coordination have their pros and cons.[158] As regards to coordinated cooperation, insolvency estates remain separate and different insolvency practitioners shall be nominated

154. Mevorach 2009, p. 128 - 131.

155. On current problems and trends in the administration of insolvency estates, see Sexton 2012.

156. This is sometimes referred to as "procedural consolidation". Briefing Note 2011, p. 11. Also the Recast Regulation uses the term "procedural consolidation".

157. Options 2. and 3. are discussed more shortly in this chapter than the coordinated cooperation, as said options shall be discussed also in chapter 6 when examining the prohibition of consolidation stated in the Recast Regulation.

158. Furthermore, all of these options discussed are institutional, thus voluntary forms of coordination shall not be investigated.

to each of the insolvency proceedings opened in respect of different group members. However, the insolvency law requires that the insolvency practitioners and court cooperate and change information on the insolvency proceedings.[159] Joint administration, on the other hand, means that as in coordinated cooperation, the insolvency estates remain separate, but they are administrated in a coordinated way for example through one insolvency practitioners administering the insolvency estates. Lastly, Substantive consolidation means that the assets and liabilities of two or more group members are treated as if they were part of the same insolvency estate.[160] When bankruptcy proceedings or liquidation is concerned, the assets are pooled in order to meet the creditors' claims.[161]

Coordinated cooperation is the lightest form of coordination or administering the insolvency estates. This kind of coordination may be based on a law or on a contract. When based on a contract, coordinated cooperation is very flexible and the form of the coordinated cooperation may be structured to suit the needs of a specific case.[162] On the other hand, the strength of law-based coordinated cooperation is that the insolvency practitioners do not need to determine how the cooperation should be done as the framework for coordination is already established. Furthermore, the cooperation does not depend, as such, on the relationships between the different insolvency practitioners as the coordinated cooperation is mandatory by law.[163] However, if the insolvency practitioners are in bad terms, it might affect the efficiency of the coordination despite of the obligatory cooperation.

The coordinated cooperation may be conducted in different ways. First of all, it has been suggested that the insolvency practitioner of the parent undertaking should take control on the coordinated cooperation.[164] This would be natural as it is unlikely that the need for the group

159. Koulu 2013, p. 304.
160. UNCITRAL Legislative Guide 2010, p. 2. See also Sarra 2009, p. 566.
161. Sarra 2009, p. 566.
162. The coordinated cooperation based on contracts cannot be discussed in the scope of this thesis, but see example Koulu 2013, p. 330 – 334.
163. Koulu 2013, p. 325.
164. Koulu 2013, p. 326.

structure vanishes when insolvency proceedings are commenced, especially if the group is very integrated. It seems almost necessary that the "old" group structure is maintained in insolvency, especially if at least parts of the group are sold as a going concern.[165] An example of this kind of approach was included already in the EU Insolvency Regulation: the insolvency practitioner appointed in the main proceedings shall coordinate the cooperation of insolvency practitioners appointed in different secondary proceedings.

According to Article 31 of the EU Insolvency Regulation, subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings. Furthermore, subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other. In addition, the liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

These rules on cooperation were amended by the Recast Regulation. The duty to cooperation still exists, but the Recast Regulation provides a more precise set of rules concerning cooperation and communication between insolvency practitioners, cooperation and communication between courts and Cooperation and communication between insolvency practitioners and courts.[166]

These rules established in the Recast Regulation are very similar to what the Commission suggested for the groups of companies in its original proposal. In its original proposal for the Recast Regulation, the Com-

165. Koulu 2013, p. 326.

166. The rules concerning cooperation and communication in respect of main and secondary proceedings resemble a great deal the rules on cooperation and communication in respect of groups of companies. However, as these rules apply to groups of companies outside the group coordination proceedings, they shall not be investigated in this thesis.

 mission did not propose anything like the group coordination proceedings. It is stated in the proposal, that:

> *"The proposal introduces an obligation to coordinate insolvency proceedings relating to different members of the same group of companies by obliging the liquidators[167] and the courts involved to cooperate with each other in a similar way as this is proposed in the context of main and secondary proceedings. Such cooperation could take different forms depending on the circumstances of the case. Liquidators should notably exchange relevant information and cooperate in the elaboration of a rescue or reorganisation plan where this is appropriate. The possibility to cooperate by way of protocols is explicitly mentioned in order to acknowledge the practical importance of these instruments and further promote their use. Courts should cooperate, in particular, by exchanging information, coordinating, where appropriate, the appointment of liquidators which can cooperate with each other, and approving protocols put before them by the liquidators."[168]*

Furthermore, it was stated that each liquidator should get a standing in the insolvency proceedings of another group member. In addition, the proposal states that it is not its intention to prevent the existing practice of coordinating insolvency proceedings of group members.[169] For example in Collins & Aikman, the group was in deep financial difficulties and the location of the centre of its main interests (the "COMI") could have been in a number of different jurisdictions. However, the group was altered so that the COMI of each of the different companies was in England. After this, 24 companies filed for English administration in nine different jurisdictions. The aim was to preserve the value of the company and keep conducting business as a going concern. The relevant group

167. As can be seen, the Commission's proposal spoke of a "liquidator". This term was changed to "insolvency practitioner", probably because said term defines better the person administering insolvency proceedings based on liquidation, but also insolvency proceedings based on restructuring.
168. Proposal amending the EU Insolvency Regulation 2012, p. 9.
169. Proposal amending the EU Insolvency Regulation 2012, p. 9.

assets were sold to few buyers in order to maximise returns for creditors.[170] In addition, the case of Collins & Aikman was a good example of the coordination of administrators. The Commission considered various alternatives before finally proposing to encourage communication and cooperation between insolvency practitioners and courts.[171]

However, the European Parliament took a leap further and introduced a new concept called the "group coordination proceedings". As stated above, the coordination is conducted by an outside coordinator. It has been stated that this kind of approach has resonated in the international discussion on the insolvency of groups of companies.[172] However, this has not been the most popular approach for the European Union.[173] The task of the coordinator is to create a framework for the cooperation between different relevant parties, but the powers of the coordinator are quite limited.[174] In my opinion, the success of approach depends highly on how the respective insolvency practitioners follow the framework set by the coordinator or are they even obligated to do so. If the coordinator does not have the power to, for example, demand that the insolvency practitioner is released from his or her tasks because of the lack of cooperation[175], the coordinated cooperation may remain as a beautiful intention to coordinate the insolvency proceedings, rather than becoming an efficient and effective real-life solution. In addition, coordinated cooperation works best when the different insolvency proceedings are commenced at the same time, or at least conducted on a similar pace. The efficiency is lost when the insolvency proceedings are on different stages.[176] Thus, as stated before in chapter 2.2, in my view the rules for coordination of insolvency proceedings should somehow take into consideration that insolvency proceedings in respect of group members may be commenced at different times if the theory of legal separateness is followed.

170. Asimacopoulus 2011, p. 48.
171. Windsor – Hodgson 2015.
172. Koulu 2013, p. 327.
173. See for example de Vette 2011 for a compilation of the most popular suggestions.
174. Koulu 2013, p. 327.
175. Koulu 2013, p. 327.
176. Koulu 2013, p. 327.

3.3 OTHER WAYS OF COORDINATION

As stated above, coordination can be conducted also by using joint administration or substantive consolidation. Both of these ways of coordination in the context of the group coordination shall be discussed below in chapter 6 of this thesis. However, these ways of coordination shall be investigated shortly in this chapter, as it helps to form a general view on the possible ways to coordinate insolvency proceedings opened in respect of group members.

In joint administration, the insolvency administrations of insolvency proceedings opened in respect of different group members are unified in order to lower the costs and achieve efficient and effective insolvency proceedings.[177] Joint administration can be realised in two different ways: either the different insolvency administrations are combined to one mutual insolvency administration or the same insolvency practitioner is appointed to the separate proceedings opened in respect of members of a group of companies.[178] In both of these forms of joint administration, the assets and liabilities still remain separate as stated above. The advantages of both forms of joint administration are that the costs of the separate insolvency proceedings are reduced, as the insolvency practitioners do not perform overlapping tasks.[179] Furthermore, there is no need for rules concerning the communication between the insolvency practitioners as all of the information on the different insolvency proceedings is available to the same persons through the joint administration. However, joint administration has also its drawbacks as there is a risk that conflicts of interests occur.

To provide an example of joint administration, it is stated in Chapter 8 Section 3 of the Finnish Bankruptcy Act that a person who has been appointed or nominated as an estate administrator may be appointed as the estate administrator also for another debtor in bankruptcy belonging to the same group of companies or otherwise to the same economic entirety. The same person may be appointed if this can be deemed ex-

177. Mevorach 2013, p. 374.
178. Koulu 2013, p. 315.
179. Koulu 2013, p. 315.

pedient for the administration of the bankruptcy estates and if there is reason to believe that the functions can be performed without conflicts of interest that would cause an essential disturbance therein. According to Koulu, it is unclear what is meant by a conflict of interest in this context. However, a conflict of interest probably means that there is disagreement on the scope of a certain insolvency estates, i.e. that there are disputes concerning the assets and liabilities. Any kind of dispute can result in the estate administrator being incompetent due to the likelihood of bias.[180] However, it is possible that another estate administrator is appointed to handle disputes between the different group members.[181]

As for the substantive consolidation, in its purest form, substantive consolidation means that the separate assets of group members are combined into a one pool of assets. Substantive consolidation can be based on two main approaches: either the substantive consolidation is directly based on the law or the court orders the consolidation.[182] From the legislative point of view, the approach where the consolidation follows automatically from the applicable insolvency law is the easiest alternative and it is used in multiple national insolvency laws. This approach is predictable as the relevant parties may predict the effects of the consolidation. However, it does not leave a lot of room for case specific consideration.[183]

UNCITRAL Legislative Guide Part Three provides an example of the substantive consolidation decided by the court. It is recommended that the court could order the consolidation only in two specific circumstances:

> 1. Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or

180. Koulu 2013, p. 322.
181. Könkkölä – Linna 2013, p. 670.
182. Koulu 2013, p. 306.
183. Koulu 2013, p. 306.

2. Where the court is satisfied that the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity.[184]

The Legislative Guide provides a great deal of recommendations on who should be heard before the decision on consolidation is made, what should be included in the application concerning the substantive consolidation as well as situations where the substantive consolidation can be a lucrative form of consolidation.[185] The advantage of this approach is that, unlike the approach of joint administration discussed above, the decision on consolidation is made based on the specific features of the case in hand. However, the relevant parties cannot predict whether or not the decision on substantive consolidation shall be made, thus this approach is not very predictable.[186]

184. UNCITRAL Legislative Guide 2010, p. 72.

185. See UNCITRAL Legislative Guide 2010, p. 59 – 74.

186. Koulu 2013, p. 306. Substantive consolidation in the context of the group coordination proceedings shall be discussed in chapter 6, thus it will not be investigated more thoroughly in this chapter.

4 Opening of Group Coordination Proceedings

4.1 STAGES OF GROUP COORDINATION PROCEEDINGS

In the following chapters the actual rules on group coordination proceedings shall be examined closely. As stated above, through the method of legal dogmatics and system analysis, the aim is to compile a complete picture of the group coordination proceedings and to point its problematics keeping in mind the framework established in the previous chapters.

As a reminder, group coordination proceedings can be divided into the following stages:

1. Request to open group coordination proceedings
2. Examination of prerequisites
3. Possibility to opt-out
3. Decision to open group coordination proceedings
5. Drafting of coordination plan

As stated above, group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group, by an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group. This request shall state for example why the conditions to open group coordination proceedings are fulfilled. Where the opening of group coordination proceedings is requested before courts of different Member States, any court other than the court first seised shall decline

60 jurisdiction in favour of that court. However, the insolvency practitioners can also choose the court for the group coordination proceedings.

After the request has been made, the court shall examine whether or not the group coordination proceedings may be opened. If the prerequisites for opening the proceedings are fulfilled, the court shall notify the insolvency practitioners of the request. When the insolvency practitioners have received the notice, they have 30 days within the receipt of the notice to object either the proposed coordinator or the inclusion of the insolvency proceedings of that group member within the group coordination proceedings. After the above-mentioned period has lapsed, the court may open the group coordination proceedings. In its decision, the court appoints a coordinator and decides on the outlines of the coordination. Next, the coordinator shall plan the actual coordination and draft a coordination plan.

4.2 WHICH INSOLVENCY PROCEEDINGS MAY BE INCLUDED?

According to Article 1, the Recast Regulation applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

1. a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
2. the assets and affairs of a debtor are subject to control or supervision by a court; or
3. a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, pro vided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of

creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point 1 or 2.

Where the proceedings mentioned above may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities. The term "collective proceedings" means proceedings which include all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them.

Although different kinds of insolvency proceedings are stated in the Article 1 of the Recast Regulation, the Annex A shall determine all the proceedings that fall within the scope of the Recast Regulation. For example, in Finland the regulation applies to bankruptcy (Fi: konkurssi), restructuring (FI: yrityssaneeraus) and adjustment of the debts of a private individual (FI: yksityishenkilön velkajärjestely). For the purposes of this thesis, bankruptcy and restructuring proceedings are the relevant ones, as they may be commenced when a company is concerned. However, it should be noted that the Recast Regulation does not apply to insolvency proceedings that concern insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC or collective investment undertakings.

The fact that the definition for "collective proceedings" is quite wide makes the group coordination proceedings very complex in a worst case scenario. The coordinator cannot choose which proceedings are included in the group coordination proceedings[187], because the Recast Regulation presumes that all insolvency proceedings opened in respect of different group members are included in the group coordination proceedings, unless insolvency practitioners choose to opt-out from the proceedings.[188] Thus, both bankruptcy and restructuring proceedings may be included in group coordination, not to mention interim proceedings. However, as the competent court shall decide whether or not

187. Except in the cases of opt-in discussed in chapter 5.2.
188. The possibility to opt-out shall be examined in chapter 5.1.

62 the opening of group coordination proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members, I presume that if the set of insolvency proceedings that would be included in group coordination proceedings is not appropriate, the court decides that it is not wise to open group coordination proceedings. However, the mere fact that the proceedings are of different nature should not be an impediment of opening the group coordination proceedings, as the rules concerning insolvency of groups of companies should strike a balance between liquidation and reorganisation.[189] Hence, in my view, the group coordination proceedings are not designed for one kind of proceedings, for example bankruptcy proceedings, but they should include all kinds of proceedings if the coordination of insolvency of group members is more efficient and effective when said proceedings are included.

In addition as stated before, both main proceedings and secondary proceedings may be included in the group coordination proceedings. The following figure shall illustrate the scope of the proceedings:

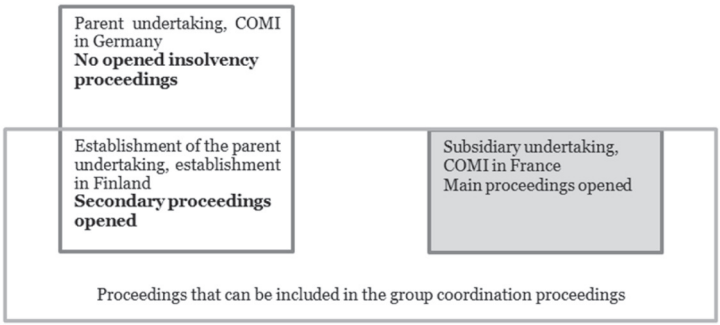

Figure 1[190]

189. See insolvency goals discussed in chapter 2.4.
190. Linna 2015

However, in a situation where insolvency proceedings would have been opened in respect the parent undertaking itself and not in respect the subsidiary undertaking, the group coordination proceedings could not be opened, as the rules concerning cooperation and communication between insolvency practitioners of main and secondary proceedings would apply.

4.3 COMPETENT COURT

The request to open group coordination proceedings shall be done to a competent court. However, before getting into the rules regarding the actual competence, it needs to be established what is meant by "a court" in the context of the group coordination proceedings, as the Recast Regulation states different definitions for different Articles. Thus when examining or discussing a certain article, it should be examined what "court" means in that context. According to the Article 2 point (6) a court means 'court' means:

1. in points (b) and (c) of Article 1(1), Article 4(2), Articles 5 and 6, Article 21(3), point (j) of Article 24(2), Articles 36 and 39, and Articles 61 to 77, the judicial body of a Member State;
2. in all other articles, the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings.

Hence, in group coordination proceedings, a court is the judicial body of a Member State. In coordination outside the group coordination proceedings, i.e. when discussing cooperation and communication but also powers of the insolvency practitioners, a court is the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings.

64 As for the competence, Article 61(1) of the Recast Regulation establishes that:

> *"Group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group, by aninsolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group."*

Thus, Article 61(1) of the Recast Regulation does not require that the requesting insolvency practitioner must file for group coordination in the court which has the jurisdiction over the insolvency proceedings in respect of which said insolvency practitioner has been appointed to. On the contrary, the request may be filed in any court having jurisdiction over the insolvency proceedings of any group member.[191] However, the request shall be made in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed, as stated in Article 61(2) of the Recast Regulation. Hence, it seems only natural that the insolvency practitioner requests opening of the group coordination proceedings before its "own" court, so to speak.

In addition, Article 62 establishes a priority rule for the opening of group coordination proceedings. Where the opening of group coordination proceedings is requested before courts of different Member States, the court where the request was made first has the jurisdiction. This entails that any court other than the court first seised shall decline jurisdiction in favour of that court. Hence, the court first seised shall investigate whether it has jurisdiction or not and make a decision on the matter. This is not typical to only group coordination proceedings, as for example the court seised shall of its own motion examine whether it has jurisdiction pursuant to Article 3 of the Recast Regulation, i.e. whether it has the international jurisdiction to open insolvency proceedings.

191. Stones 2015.

However, it is also possible that the insolvency practitioners choose the court that has jurisdiction over the group coordination proceedings. According to Article 66 of the Recast Regulation, 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, that court shall have exclusive jurisdiction.

It should be noted that this provision, nor other provisions of the Recast Regulation, place the insolvency practitioners in some kind of pecking order determined by the size of the group member or the insolvency estate. As regards to the insolvency goals, this reflects well the goal of impartiality, as equality in insolvency proceedings should be promoted. All of the group members, and insolvency practitioners, are equals in the eyes of the Recast Regulation. Furthermore, the above-mentioned also manifests clearly the theory of legal separateness studied in chapter 2.2, as the group members are treated as equal separate legal entities in insolvency. The equality also entails that even if the insolvency practitioner of the parent undertaking votes against the proposal on the competent court, if two-thirds decide that there is a more suitable court for the proceedings, this court shall be decided as the court having the jurisdiction. The choice of court shall be made by joint agreement in writing or evidenced in writing. The request for the opening of group coordination proceedings shall be submitted to the court agreed in accordance with Article 61 of the Recast Regulation. Any court other than the court chosen by the insolvency practitioners shall decline jurisdiction in favour of that court. However, the insolvency practitioners cannot vote on the competent court if the group coordination proceedings have been opened.

In my opinion, this rule is well-founded because of the fact that the changes of the competent court would only increase expenses and costs of the group coordination proceedings, as well as slow them down. The costs would not necessary remain in a moderate level, thus the goal of

66 maximising the value of the assets would not be achieved to the full extent.[192] In addition, the change of the competent court would also change the law applicable to the group coordination proceedings, thus the law applicable would change in the midst of the group coordination proceedings. Hence the change of the competent court would interfere with multiple insolvency proceedings, as a new court would make decisions on the group coordination proceedings and another law would be applied in the course of the proceedings than for example, when determining whether or not the coordination should even be begun. This would clearly interfere with predictability and certainty. In addition, as the change would increase costs, the goal of maximisation of value of assets would also be interfered with, as the aim of the group coordination proceedings should be keeping the costs in a moderate level.

4.4 REQUEST

To open the group coordination proceedings, a request shall be made to the competent court. This request can be made by any insolvency practitioner who has been appointed in insolvency proceedings opened in relation to a member of the group. In this context, "Insolvency practitioner" means any person or body whose function, including on an interim basis, is to:

1. verify and admit claims submitted in insolvency proceedings;
2. represent the collective interest of the creditors;
3. administer, either in full or in part, assets of which the debtor has been divested;
4. liquidate the assets referred to in point 3;
5. supervise the administration of the debtor's affairs.

The above-mentioned persons and bodies are listed in Annex B. However, it is stated in Article 76 of the Recast Regulation that the pro-

192. As stated before, keeping the costs in a moderate level is a important part of said goal.

visions applicable, under the Chapter concerning the insolvency proceedings of members of a group of companies, to the insolvency practitioner shall also apply, where appropriate, to the debtor in possession.

The rules stated in the Recast Regulation do not establish any rules on the form of the request, as the Article 61(2) of the Recast Regulation states that the 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. This Article is a good example of clear and transparent references to national law that are used in the Recast Regulation, as it clearly states that national law should have rules on how the request to open group coordination proceedings should be made.[193]

However, there are a few documents that need to be included in the request according to Article 61(3) of the Recast Regulation. First, a proposal for the coordinator must accompany the request. This proposal states the details of the proposed coordinator's qualifications and why he or she is eligible to act as the coordinator pursuant to Article 71 of the Recast Regulation. In addition, the insolvency practitioner who has requested the opening of the group coordination proceedings must also present a written agreement that establishes the proposed coordinator's consent to act as a coordinator in said group coordination proceedings. Thus, a suitable coordinator should be found before the request to open group coordination proceedings is made. The question of who may act as the coordinator shall be discussed later in chapter 4.5, hence it shall not be discussed in this chapter.

Second, the request shall also contain the outline of the proposed group coordination and why conditions of Article 63(1) are fulfilled. According to Article 63(1) of the Recast Regulation, the group coordination proceedings may be opened if the court is satisfied that:

1. the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members;

193. On insolvency goal of predictability and transparency, please see chapter 2.4 of this thesis.

2. 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 such proceedings; and
3. the proposed coordinator fulfils the requirements laid down in Article 71.[194]

It would seem natural that the proposed coordinator participates in planning of the outline of the coordination that is proposed in the request, as in the end, the coordinator is the person who realises these outlines by drafting to coordination plan. However, in my opinion this is not possible as it would lead to a conflict of interest and thus the goal of impartiality would not be achieved. In addition, it should be noted that the outline should take into consideration the theory of legal separateness. Even though the aim of group coordination proceedings is to promote efficiency and lower the costs of the proceedings, this cannot be done by disregarding the separate nature of members of a group, because the Recast Regulation clearly follows the theory of legal separateness, as did its predecessor, the EU Insolvency Regulation. The outline cannot include proposals on any kind of consolidation, i.e. the coordinator shall not propose that the proceedings of certain group members should be combined or that pooling of assets and liabilities should be made. The prohibition of consolidation shall be discussed further later in this thesis.

Third, a list of insolvency practitioners appointed in relation to the members of the group shall also be included. This list should also state, if necessary, the courts and competent authorities involved in the insolvency proceedings of the members of the group. The list is necessary in order to ensure more effective communication between the court and the insolvency practitioners appointed to different group members. The inclusion of the list ensures that the court with the jurisdiction does not have to use effort on investigating the relevant parties. Thus, by demanding said list, the communication between relevant parties of the group

194. These prerequisites are discussed in chapter 4.6, hence they shall not be discussed in this context.

coordination proceedings is made easier.[195] However, it should be noted that the list shall be done in with care, as the court has to be able to rely that the list is accurate.

Fourth, an outline of the estimated costs of the proposed coordination and the estimation of the share of those costs to be paid by each members of the group shall also accompany the request. It is not easy to make these kinds of estimations; especially in first commenced group coordination proceedings as there are no guidelines on how the costs should be determined. Large part of the costs consists of the remuneration of the coordinator and the remuneration practices may vary a great deal depending on the provisions adopted by the Member States. Costs of the group coordination proceedings are determined in accordance with the national law of the Member State in which group coordination proceedings have been opened.[196]

It is stated in the recitals of the Recast Regulation, that the insolvency practitioner should obtain the necessary authorisation before making the request to open the group coordination proceedings, if the law applicable to the insolvency so requires.[197] In this context, it may be presumed that the law applicable to insolvency means the law applicable to the insolvency proceedings in respect of which the insolvency practitioner has been appointed to. Thus, depending on the rules of the respective national insolvency law, the insolvency practitioner should obtain permission, for example, from creditors or from the national court.[198] In my opinion, the national laws of Member States should be amended so that it is clear whether or not the insolvency practitioner must obtain such permission. This is needed in order to promote the goal of achieving transparency and predictability. The national rules have a great part in promoting the above-mentioned insolvency goals, as they supplement the rules stated in the group coordination proceedings. Thus, the national rules should clearly state if the insolvency practitioner needs a

195. Communication and ensuring exchange of relevant information is a vital part of the insolvency goal of ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information.

196. Recital 58 of the Recast Regulation.

197. Recital 55 of the Recast Regulation.

198. Recital 55 of the Recast Regulation.

 permission to request the opening of group coordination proceedings and who shall give the permission.

4.5 WHO MAY ACT AS A COORDINATOR?

The Recast Regulation establishes a few requirements to the proposed coordinator. According to the Article 71 of the Recast Regulation, the coordinator must be eligible under the law of a Member State to act as an insolvency practitioner.

The national rules on insolvency practitioners vary as in some countries it is possible that only a natural person acts as an insolvency practitioner. For example in Finnish restructuring proceedings, the administrator shall be an adult, known to be honest, not bankrupt and with full legal competency. The administrator shall have the ability, skills and experience needed for the position. In Finnish bankruptcy proceedings, one may be appointed as an estate administrator, if he or she consents to the appointment, has the ability, skills and experience required for the duty, and is also otherwise suitable for the duty.

Furthermore, the coordinator shall have no conflict of interest in respect of group members, their creditors and the insolvency practitioners appointed in respect of any of the group members. This provision is problematic because the rules regarding conflicts of interests, as the rules concerning the eligibility of the insolvency practitioners, may vary in Member States. For example, according to chapter 8 section 5(1) of the Finnish Bankruptcy Act, The administrator shall not have a relationship with the debtor or the creditor that would compromise his or her independence of the debtor or his or her impartiality towards the creditors, or of his or her ability to perform the task in an appropriate manner. In Finnish legal literature, it has been stated that the person proposed as an estate administrator in bankruptcy cannot act as a member of the board of the debtor or the creditor company. The estate administrator

cannot have pending or past assignments from the debtor or strong connections to the creditors. For example, a conflict of interest exists in situations where a person has represented one creditor in a dispute where a debtor or another creditor is the adverse party.[199] Nevertheless, it has been proposed that it would be wise to consider including provisions on conflicts of interests in the legislation.[200] The tasks and rights of the coordinator shall be discussed later in this thesis.

In addition, the coordinator cannot be one of the insolvency practitioners appointed to the insolvency proceedings of the members of the group. In my opinion, one of the largest defects of the Recast Regulation is that the coordinator shall be someone other than an insolvency practitioner appointed to the insolvency proceedings of a group member. Appointing an outsider as the coordinator increases expenses and slows down the group coordination proceedings, thus participating in the group coordination proceedings does not necessarily help to maximise the value of assets of the insolvency estate. Tens of main proceedings and secondary proceedings may be included in the group coordination proceedings as well as proceedings of different nature, i.e. bankruptcy and restructuring proceedings, as well as interim proceedings. The coordinator has not, as on outsider, any insight on how the group was operated before it faced financial difficulties and also has more work in investigating the state of the group once the insolvency proceedings were opened. Hence, it may take a lot of effort and time for the coordinator to determine how the coordination plan should be drafted. However, it can be argued that the appointment of an outsider reflects the theory of legal separateness as each group member is treated as a separate entity, thus no insolvency practitioner appointed shall be in a higher position than the other insolvency practitioners. Furthermore, the fact that the coordinator is an outsider helps to promote impartiality in the group coordination proceedings, as it is less likely that an outside coordinator has conflicts of interests with the other relevant parties of the group coordination proceedings and the insolvency proceedings included in group coordination.

199. Könkkölä – Linna 2013, p. 659.
200. UNCITRAL Legislative Guide 2010, p. 107.

72 Despite the above-mentioned positives of the coordinator being an outsider, it would be more beneficial if the coordinator is one of the insolvency practitioners involved, as she or he would not have to start from the very beginning and would have knowledge on the group members and the course of different opened insolvency proceedings. Determining whether or not the coordinator shall be an outsider requires balancing of different perspectives and objectives. In my opinion, appointing one of the insolvency practitioners as the coordinator would not interfere with the theory of legal separateness, as the coordinator is more of an enabler of communication rather than an actual insolvency practitioner defined by the Recast Regulation. The coordinator has no saying on realisation of the assets but rather provides guidelines on how the respective insolvency practitioners should communicate with each other. Furthermore, the coordinator creates a framework on how the included insolvency proceedings may be directed towards a common goal. In addition, nowadays the same insolvency practitioner may be appointed to insolvency proceedings opened in respect of different group members according to national legislation.[201] To sum up, in my opinion there are more pros than cons with appointing one of the insolvency practitioners as the coordinator and the relevant principles and goals are not interfered with even if the coordinator is one of the respective insolvency practitioners.

4.6 PREREQUISITES OF OPENING GROUP COORDINATION PROCEEDINGS

As the next step, the court shall determine whether or not the group coordination proceedings may be opened and notify the relevant parties of the opening of the group coordination proceedings. The court seised of a request to open group coordination proceedings shall give notice as soon as possible of the request for the opening of group coordination proceedings and of the proposed coordinator to the insolvency practi-

201. Finnish Bankruptcy Act is a good example of a national law that provides rules on appointing the same coordinator for insolvency proceedings of different group members.

tioners stated in the request for opening the group coordination proceedings. The notice shall be given if the court is satisfied that the three conditions stated in Article 63(1) of the Recast Regulation are fulfilled:

1. the opening of group coordination proceedings needs to be appropriate to facilitate the effective administration of the insol vency proceedings relating to the different group members;
2. no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclu sion of that member in the group coordination proceedings; and
3. the proposed coordinator shall fulfil the requirements laid down in Article 71.

First, the notice will be given if the court decides that the opening of the group coordination proceedings is appropriate to facilitate the effective administration of the insolvency proceedings of the different members of the group. The assessment of whether or not the coordination can be held as "appropriate" requires knowledge on how the group of companies is structured and operated before insolvency as well as knowledge on the commenced insolvency proceedings and their nature, as the rules concerning group coordination proceedings do not make distinction between main and secondary proceedings or different kinds of proceedings. This means that some of the relevant proceedings may be restructuring proceedings and others bankruptcy proceedings.[202] It is for the court seised to determine if the different kinds of proceedings may be even coordinated. This kind of investigation may take a great deal of time and resources, unless the court communicates with the relevant insolvency practitioners. For these purposes, the Recast Regulation states that the court seised shall give the insolvency practitioners involved the opportunity to be heard.

However, it is problematic what circumstances and facts the court must take into consideration when determining if the group coordination proceedings are appropriate to facilitate the effective administration

202. This has been discussed above in chapter 4.2, thus it shall not be discussed again in this context.

74 of the insolvency proceedings relating to the different group members. Hence, the goal of achieving timely, efficient and impartial resolution of insolvency is not promoted the best way possible where this prerequisite is concerned as the access to group coordination proceedings is not based on clear criteria. So when are the group coordination proceedings an appropriate solution? First of all, the group coordination proceedings should not be opened if there is already enough cooperation between all relevant parties. This might be the case when insolvency proceedings have been commenced in respect of a few closely linked group members and the insolvency practitioners have established a functioning way to coordinate the insolvency proceedings. In these kinds of situations, group coordination proceedings would not add any value to the coordination of insolvency proceedings, but only increase costs and delay the resolution of insolvency, thus the goal of maximising the value of assets would not be achieved in a best way possible.

Hence, group coordination proceedings are probably most beneficial in cases where a larger group of companies is concerned and multiple insolvency proceedings have been opened in respect of different group members. In these cases a framework for the coordination is not easily established and it could be more effective to use the framework already provided by the Recast Regulation. In addition, the group coordination proceedings should be commenced in situations where the insolvency practitioners are not accustomed to communicating with one another or, for some reasons, do not want to communicate. However, in situations where the insolvency practitioners do not want to communicate it is unlikely that the group coordination proceedings are opened, or at least the insolvency practitioners shall opt-out from the group coordination. This leads to the fact that it would be wise if the court would ensure before opening the group coordination proceedings, that most of the insolvency practitioners are on board and willing to participate. The coordination is more likely to succeed where all the relevant insolvency proceedings are included in the group coordination.

Second, the notice is given if the court is satisfied that 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 such proceedings. As well is determining that the group coordination proceedings will facilitate the coordination of the separate insolvency proceedings, determining whether or not a creditor is likely to be financially disadvantaged takes a lot of time and resources. However, the provisions states that the group coordination proceedings cannot be commenced only if it is *likely* that a creditor is financially disadvantaged. Thus the court shall weigh the pros and cons of opening the group coordination proceedings from the point of view of the creditors.

It has been stated that especially because of said provision the group coordination proceedings shall not be available for group members very often.[203] One cannot lightly agree with this assessment. Because the aim of the group coordination proceedings is to facilitate the coordination of insolvency proceedings opened in respect of different group members, creditors are not likely to be disadvantaged. The task of the coordinator is to facilitate the communication between the relevant parties. Furthermore, the group coordination proceedings cannot include any proposals on joint administration or substantive consolidation, thus the separate legal nature of the group members is respected. Hence, in my view it is unlikely that the group coordination proceedings would put a creditor to a financially disadvantageous position.[204] It should be noted that the court is not obliged to hear creditors on this matter. The Recast Regulation merely states, that when considering if the group coordination proceedings should be opened or not, the court seised must give an opportunity to be heard to the insolvency practitioners involved.

Third, the proposed coordinator must fulfil the requirements stated in Article 71 of the Recast Regulation. These requirements have been discussed above, thus they will not be discussed here. In addition, the

203. Windsor – Hodgson 2015.

204. It is clear that the court should take into consideration of the interests of the creditors, but should it also consider some common interest of the group? In my opinion it is not possible for the court to consider some kind of a group-interest. As stated above in chapter 2.2 of this thesis, group-interest is a very vague concept at best and from a legal point of view, the interest of a separate group member comes first.

76 notice given by court shall list the elements stated in points (a) to (d) of the above-mentioned Article 61(3) of the Recast Regulation. Thus, the notice must include the proposal for the coordinator, an outline of the proposed group coordination, a list of the insolvency practitioners appointed in relation to the members of the group and 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. The notice must be sent registered letter, attested by an acknowledgement of receipt. The notice has an important task of providing information for all relevant insolvency practitioners.[205] The insolvency practitioners need enough information on the group coordination as they have an opportunity to opt-out from the proceedings, as well as in some situations to opt-in.

205. As stated above in chapter 2.4, insolvency law should contain incentives for gathering and dispensing information.

5 Possibility to Opt-out and Opt-in

5.1 OBJECTIONS BY INSOLVENCY

PRACTITIONERS

The insolvency practitioners have a possibility to opt-out from the group coordination proceedings before the proceedings are opened. According to Article 64 of the Recast Regulation, an insolvency practitioner appointed in respect of any group member may object to:

1. the inclusion within group coordination proceedings of the insolvency proceedings in respect of which it has been appointed; or
2. the person proposed as a coordinator.

Thus, the objection may concern either the person proposed as the coordinator or the inclusion within the group proceedings. The insolvency practitioner may object only the inclusion of the insolvency proceedings in respect of which said insolvency practitioner has been appointed. Hence, the insolvency practitioners do not have to possibility to object the inclusion of insolvency proceedings of other group members. These objections must be lodged with the competent court referred to in Article 63 within 30 days of receipt of notice of the request for the opening of group coordination proceedings by the insolvency practitioner. However, before making the objection regarding the participation, the insolvency practitioner shall obtain any approval which may be required under the law of the Member State of the opening of proceedings for which he or she has been appointed. As stated above, in these cases it is likely that the national legislation of Member States requires that an approval is obtained from a court or the creditors.

This possibility to opt-out reflects the voluntary nature of the group

coordination proceedings. It is stated that the insolvency practitioners need to have a possibility to make an informed decision, before deciding on the participation to the group coordination proceedings. This presumes that the insolvency practitioners should be informed of the essential elements of the coordination at an early stage.[206] However, the window for the opt-out is quite short, as it has to be done in 30 days from receiving the notice. As there is no standard form in which the notice has to be made, the insolvency practitioners have to pay attention to the documents sent in relation to the respective insolvency proceedings. Especially when large insolvency estates are concerned, the amount of documents and paperwork can be excessive and it may be difficult to ensure that the opt-out is done in time, especially in situations where the insolvency practitioners is not familiar with how the group coordination proceedings actually function. Furthermore, once the above-mentioned 30 days has lapsed, there are no second chances for opting out. If the insolvency practitioner has failed to inform that the insolvency proceedings in respect of which he or she has been appointed are not included in the group coordination proceedings, the insolvency proceedings are included in the group coordination. The Recast Regulation interprets silence as a sign of consent.

The voluntary nature of the group coordination proceedings and the opt-out possibility of insolvency practitioners pose certain problems. As stated above, the maximisation of value is one of the key objectives in cross-border group insolvency. If a vital subsidiary or even the parent company opts out from the group coordination proceedings, there is no maximisation of value, as the coordination does not reach every jurisdiction.[207] It has been stated that economic reality demands at least some kind of coordination of the insolvency proceedings concerning members of group of companies.[208] However, the possibility to opt-out reflects the fact that separate legal nature of group members should be respected when group coordination proceedings are concerned, be-

206. Recital 56 of the Recast Regulation. This also reflects the insolvency goals, as it is required that the relevant parties exchange information with each other.
207. Sarra 2009, p. 551.
208. Sarra 2009, p. 551.

cause the power to choose whether or not the insolvency proceedings are included in the group coordination is essentially given to the entity[209] which, under national law, gives the approval on whether or not said insolvency proceedings are included or not. As stated above, the other insolvency practitioners cannot object the inclusion of other insolvency proceedings, thus for example the creditors in insolvency proceedings commenced in respect of a group member do not have a saying on if the insolvency proceedings of another group member are included in the group coordination. Hence, the group members and the insolvency proceedings opened in respect of these group members are treated strictly as legally separate.

According to the Article 64(2) of the Recast Regulation, the objection may be made by using the standard form established in accordance with the Article 88 of the Recast Regulation. This means that the Commission shall adopt implementing acts establishing and, where necessary, amending the forms referred to in Article 64(2). Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).[210] It is peculiar that in this instance the Recast Regulation states that the objection must be done by using a standard form, as this is necessary also in other situations in the group coordination proceedings. For example, there could be a standard form for the request or for the notice given by the court. The rules concerning communication between relevant parties should be uniform but for some reason, it was decided that the objection is the only document in group coordination proceedings that should be done by using a standard form. In other instances, it is usually left for the national law to determine the formalities of the documents.

If the insolvency practitioner objects to the inclusion of the insolvency proceedings in respect of which he or she has been appointed to

209. This is usually the creditors or the court of the insolvency proceedings.

210. Article 89(2) of the Recast Regulation states, that Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply: where the advisory procedure applies, the committee shall deliver its opinion, if necessary by taking a vote. If the committee takes a vote, the opinion shall be delivered by a simple majority of its component members. The Commission shall decide on the draft implementing act to be adopted, taking the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered.

the group coordination proceedings, those proceedings are not included in the group coordination proceedings. Furthermore, there will be no costs to this member. In addition, the powers of the court or of the co-ordinator have no effect as regards those insolvency proceedings. When the insolvency practitioner objects only to the proposed coordinator, it is possible that the court refrains from appointing that coordinator. If this is the case, the court invites the objecting insolvency practitioner to submit a new request for opening the group coordination proceedings. This request must follow the conditions laid down in Article 61(3) of the Recast Regulation. As stated above, these conditions establish that:

1. the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members;
2. 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 such proceedings; and
3. the proposed coordinator fulfils the requirements laid down in Article 71. [211]

5.2 SUBSEQUENT OPT-IN BY INSOLVENCY PRACTITIONERS

However, there is a possibility that the insolvency proceedings are included in the group coordination proceedings after opening of the group coordination proceedings. After the court has decided to open the group coordination proceedings, any insolvency practitioner may request the inclusion of the proceedings in respect of which it has been appointed. This must be done in accordance with the national law. First, the inclusion is possible if there has been an objection to the inclusion of the insolvency proceedings within the group coordination proceedings. Second, the inclusion is possible also in situations where insolvency proceedings regarding a group member have been opened after the

211. These conditions or prerequisites are discussed above in chapter 4.6 of this thesis.

court has opened group coordination proceedings. In other words, even though the insolvency practitioner has used the possibility to opt-out, after opening of the group coordination proceedings it is still possible that said proceedings are included if the insolvency practitioner requests it.

The coordinator decides whether or not the insolvency proceedings of the group member will be included in the group coordination proceedings without prejudice to Article 69(4) of the Recast Regulation. Before making this decision, the coordinator must consult the insolvency practitioners involved. The insolvency proceedings can be included if the coordinator is satisfied that the criteria established in points (a) and (b) of Article 63(1) are met. This means, that the inclusion of said insolvency proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members. Furthermore, the coordinator shall also insure that 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 such proceedings. When assessing if the criteria are met, the coordinator shall also consider the stage that the group coordination proceedings has reached at the time of the request. In my view the insolvency proceedings should not be included in the group coordination, if the group coordination is in its final stages or if the already included insolvency proceedings are in a very different stage than the insolvency proceedings that would be included through the opt-in possibility. Group coordination proceedings are most beneficial in situation where the different insolvency proceedings are commenced at the same time, or at least conducted on a similar pace. The efficiency is lost when the insolvency proceedings are on different stages.[212]

The coordinator must 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 the insolvency practitioner whose request has been rejected may challenge the decision with the procedure set out under the law of the Member State in which the group coordination proceedings have been opened. In my

212. Koulu has stated that this applies to the coordinated cooperation, see Koulu 2013, p. 327.

opinion, it is peculiar that in this instance the coordinator makes the decision whether or not the insolvency proceedings are included in the group coordination proceedings, as it is usual in the system of the group coordination that the competent court makes the relevant decisions. As stated above, when making the decision concerning the opt-in, the coordinator shall assess whether or not the criteria set out in points (a) and (b) of Article 63(1) are met. Suddenly the powers of a court are given to the coordinator, as the criteria set in Article 63(1) are assessed by the court where the opening of group coordination proceedings is concerned. Furthermore, it seems that Article 69 is not very well thought out, as the request to include insolvency proceedings can be accepted even if the above-mentioned conditions are not met. The coordinator can accept the inclusion if all insolvency practitioners involved agree, subject to the conditions in their national law. If the group coordination proceedings cannot be opened if said criteria are not met, why should individual insolvency proceedings be included if the inclusion is not appropriate to facilitate the effective administration or a creditor is likely to be financially disadvantaged?

The fact that the coordinator makes the decision is even more problematic in the light of the Article 69(4) of the Recast Regulation which states that any participating insolvency practitioner or any insolvency practitioner whose request for inclusion in the group coordination proceedings has been rejected may challenge the decision made by the coordinator in accordance with the procedure set out under the law of the Member State in which the group coordination proceedings have been opened. Thus there is no court decision which the insolvency practitioners could challenge, only the decision of the coordinator. The Article 69 of the Recast Regulation should have been formulated so that the competent court makes the final decision on whether or not the insolvency proceedings are included based on the opt-in request. The Article could have stated that the coordinator can recommend the inclusion of said proceedings and that the competent court should make the decision based on the coordinator's recommendation.

6 Tasks of the Coordinator and the Coordination Plan

After the period stated in Article 64(2) has elapsed, i.e. 30 days of receipt of notice of the request for the opening of group coordination proceedings by the insolvency practitioner, the court can open the group coordination proceedings if it is satisfied that the conditions of Article 63(1) are met. This being the case, the court appoints a coordinator, decides on the outline of the coordination and decides on the estimation of costs and share to be paid by the group members. The decision to open the group coordination proceedings must be brought to the notice of the participating insolvency practitioners and of the coordinator. Thus, the non-participating insolvency practitioners do not need to be informed.

The insolvency practitioner has a large role in ensuring that the insolvency law is implemented in an effective and efficient way, because the insolvency practitioner carries the responsibility of the administration of the insolvency estate.[213] In addition, in group coordinator proceedings it is vital that the insolvency practitioners communicate with the coordinator, the court and with each other. However, in my opinion the coordinator carries the responsibility of successfully coordinating the insolvency proceedings included in the group coordination proceedings.

The tasks and rights of the coordinator are stated in the Article 72 of the Recast Regulation. According to said Article, the coordinator shall:

1. identify and outline recommendations for the coordinated conduct of the insolvency proceedings;
2. 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.

213. UNCITRAL Legislative Guide 2010, p. 103.

84 As stated above, the coordinator identifies and outlines recommendations for the coordinated conduct of the insolvency proceedings. Before being able to make recommendation for the coordination, the coordinator should investigate what kinds of proceedings are included in the group coordination. As stated above, this can be a hard task for an outside coordinator, as tens of insolvency proceedings may be included in the group coordination. Successful coordination requires that different stages of the respective insolvency proceedings are taken into account and that the coordinator is acquainted with the insolvency proceedings included. Insolvency proceedings may have very different aims and goals. To provide an example, the Finnish Bankruptcy is a form of insolvency proceedings covering all the liabilities of the debtor. The assets of the debtor are used in payment of the claims in bankruptcy. Thus, the aim is to maximise the value of assets so that the creditors get a largest distribution possible and not to rehabilitate the debtor's business. On the other hand, the aim of the Finnish Restructuring proceedings is to rehabilitate a distressed debtor's viable business, to ensure its continued viability and to achieve debt arrangements. As may be seen, the aims of said insolvency proceedings are very different. Group coordination proceedings should lead to coordinated conduct of different kind of proceedings, thus the special characteristics and aims should be taken into consideration when planning the appropriate way to coordinate the insolvency proceedings. Luckily, the coordinator does not have to start from nothing when considering the recommendation, as the court which opened the group coordination proceedings has already decided on the outlines of the group coordination.

Drafting of the actual coordination plan is the most important task of the coordinator. In particular, the plan may contain proposals for;

1. the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;
2. the settlement of intra-group disputes as regards intra-group

transactions and avoidance actions;

3. agreements between the insolvency practitioners of the insolvent group members.[214]

At first glance it seems that the coordinator has a great freedom of choice in determining which measures could be proposed in the group coordination plan. However, according to the Article 72(3) of the Recast Regulation, the group coordination plan cannot include recommendations as to any consolidation of proceedings or insolvency estates. This Article reflects very clearly that the Recast Regulation does not depart from the theory of legal separateness and the theory is followed very strictly. Hence, for example the above-mentioned proposals cannot include appointment of the same coordinator to different insolvency proceedings or any pooling of assets or liabilities.

As stated above in chapter 3.3 of this thesis, substantive consolidation means that the assets and liabilities of two or more group members are treated as if they were part of the same insolvency estate.[215] When bankruptcy proceedings or liquidation is concerned, the assets are pooled in order to meet the creditors' claims.[216] Substantive consolidation is usually discussed in the context of bankruptcy proceedings, but it has been suggested in UNCITRAL Legislative Guide, Part 3 that substantive consolidation may also be used in restructuring proceedings. It has been stated that substantive consolidation should be allowed especially in situations, where the assets or liabilities of group members are so intermingled that "the ownership of assets and responsibility for liabilities cannot be identified with sufficient confidence without disproportionate expense or delay".[217] However, substantive consolidation

214. On cross-border insolvency agreements, see for example UNCITRAL Practice Guide 2009. As the length of this thesis is limited, intra-group disputes or agreements between insolvency practitioners are not discussed, as investigating the problems relating to these topics would demand their own chapters.

215. UNCITRAL Legislative Guide 2010, p. 2. See also Sarra 2009, p. 566.

216. Sarra 2009, p. 566.

217. Briefing Note 2011, p. 12. It is also stated that "it is not generally desirable for courts to have wider discretion to order the consolidation of insolvency estates without the consent of the parties: this should normally be achieved through the mechanisms in the relevant domestic law provisions."

is used more rarely than procedural consolidation, as it is based on the theory of unification and it does not take into consideration the separate legal nature of group members.[218]

When solutions to the problem of group insolvency were investigated, substantive consolidation was not even an option.[219] This may be because of political reasons, as substantive consolidation is used more in U.S. than in Europe, thus it is an alien solution when insolvency laws of different Member States are concerned. For example in Finland, the concept of substantive consolidation would interfere with the long tradition of theory of legal separateness used in insolvency laws. Thus, it is probably easier from the Member States' point of view to prohibit the coordinator from using substantive consolidation.

The prohibition of procedural consolidation is a trickier question, because the Recast regulation does not define what procedural consolidation means. Procedural consolidation is often referred to as joint administration or procedural coordination[220]. As stated in chapter 3.3, joint administration was chosen in this thesis to describe coordination of insolvency proceedings in terms of coordinating the administration. In U.S., this was earlier referred to as procedural consolidation, but the term is not used anymore in this context, as there is no consolidation involved: the separate legal nature of group members is respected and no pooling of assets or liabilities is involved. Thus, the term procedural consolidation was found misleading. Furthermore, procedural coordination or consolidation is not a legal definition, as it refers to different ways of coordinating multiple insolvency proceedings.[221]

Procedural coordination may include, for example:

> *"facilitating sharing of information to obtain a comprehensive evaluation of the situation of the various debtors; combining of court hearings and creditors' meetings, including by means of joint creditors' meetings; preparation of combined lists of creditors and*

218. Sarra 2009, p. 566.
219. Eidenmüller 2013, p. 20.
220. It is very usual, that the term "procedural coordination" is used in this context. However, to avoid confusion, procedural consolidation is used in this thesis.
221. Briefing Note 2011, p. 11.

other parties in interest for the provision of notices and coordination of the provision of notices; establishment of joint deadlines; agreement on a joint claims procedure and coordinated realization and sale of the debtors' businesses and assets; coordination of avoidance proceedings; and the holding of combined or simultaneous meetings of creditors or creditors' committees."[222]

Hence, in procedural consolidation, the insolvency proceedings opened in respect of different group members are unified in order to lower the costs and achieve efficient and effective insolvency proceedings.[223] It has been argued that there is no conflict where theory of legal separateness and procedural consolidation are concerned, because unifying of the insolvency proceedings is done only for administrative purposes. Assets and liabilities are not pooled and the different group members remain as separate entities and none of the basic principles of theory of legal separateness are broken.[224] Furthermore, including procedural consolidation to the group coordination plan would likely enhance the potential to achieve to above-discussed insolvency goals. In particular, using procedural consolidation would help maximizing the value of assets of the debtor, and reduces the costs of the insolvency proceedings.[225]

Nevertheless, procedural consolidation or procedural coordination, whatever term one chooses to describe it with, is a very multi-layered concept. As the Recast Regulation prohibits of including any consolidation of insolvency proceedings in the group coordination plan, I assume that both joint administration and substantive consolidation examined in chapter 3.3 are prohibited. This is a very strict outlook on group insolvency, as there are insolvency cases in Europe that have benefitted from joint administration.[226] Hence, it is peculiar that the Recast Regulation prohibits also procedural consolidation.

To sum up, the Recast Regulation took a very conservative approach

222. Briefing Note 2011, p. 11.
223. Mevorach 2013, p. 374.
224. Mevorach 2013, p. 376.
225. Mevorach 2010, p. 377.
226. See for example a short description of the case Collins & Aikman in chapter 3.2.

88 on how the groups of companies are treated. However, it should be noted that the prohibition of consolidation does not mean that the Member States cannot include provisions on consolidation into their national insolvency laws. It is stated in the recital of the Recast Regulation, that the Recast Regulation should not prevent Member States from establishing national rules which would supplement the rules on cooperation, communication and coordination with regard to the insolvency of members of groups of companies set out in the Recast Regulation. However, the scope of application of those national rules shall be limited to the national jurisdiction and their application cannot impair the efficiency of the rules laid down by the Recast Regulation.[227]

In addition to the coordination plan and determining recommendations for the coordinated conduct, the Article 72(2) of the Recast Regulation gives the coordinator an option to perform other tasks. First, the coordinator may be heard and participate, in particular by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group. This might be important in order to obtain information of the different insolvency proceedings and the participation may facilitate the designing of the group coordination plan. However, it needs to be considered if the participation really adds value to the group coordination. It is questionable if the coordinator has to actually participate or be heard in the different insolvency proceedings, as the Article 72(2) of the Recast Regulation also states that the coordinator may 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 proceeding. Furthermore, as the coordinator hopefully conveys information to the insolvency practitioners due to the course of the group coordination, it is probably not necessary to participate, for example, to creditors' meetings.

Second, the coordinator may mediate any dispute arising between two or more insolvency practitioners. In this context the fact that the coordinator is an outsider may be an asset, because the coordinator

227. Recital 61 of the Recast Regulation.

does not have, at least in principle, a closer relationship to any of the included insolvency proceedings. If the mediation is successful, it may lower the costs of the insolvency proceedings and speed the proceedings. This task reflects the coordinators task as the enabler of communication, as it is crucial for the success of the group coordination that the insolvency practitioners are in good terms and are able to communicate with each other.

Third, the coordinator may present and explain the group coordination plan to the persons or bodies that he or she is to report under his or her national law. As can be seen, this task is not mandatory, but it could ensure that the Member States have information on the group coordination proceedings if the coordinator presents the group coordination plan to the supervisory entities of respective Member States. For example in Finland, it might be beneficial if the coordinator reports to Bankruptcy Ombudsman. However, the purpose of this task is only to convey information, as the Recast Regulation does not give any supervisory powers to the supervisory entities of the Member States. It is for the court which opened the group coordination proceedings to supervise the coordinator, as the Article 75 of the Recast Regulation states that the court shall revoke the appointment of the coordinator of its own motion or at the request of the insolvency practitioner of a participating group member where:

1. the coordinator acts to the detriment of the creditors of a participating group member; or
2. the coordinator fails to comply with his or her obligations.

Finally and fifth, the coordinator may 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. Such a request shall be made to the court

90 that opened the proceedings for which a stay is requested.

It should be noted that according to Article 72(4) of the Recast Regulation, the rights and tasks of the coordinator do not extend to any member of the group not participating in the group coordination proceedings. Furthermore, it is not obligatory for the insolvency practitioners to follow the recommendations and the coordination plan of the coordinator. As stated in Article 70 of the Recast Regulation, insolvency practitioners shall "consider" the recommendations of the coordinator and the content of the group coordination plan when conducting their insolvency proceedings. If the insolvency practitioner does not follow the recommendation or the group coordination plan, it must explain this to the persons or bodies that it has to report under its national law. Insolvency practitioners must also explain to the coordinator why the recommendations or group coordination plan is not followed.

It has been stated that this provision entails the possibility to opt-out in the middle of the proceedings[228], but this provision does not state the same kind of opting-out possibility as the one discussed above, as the insolvency proceedings are still a part of the group coordination proceedings. Even if the insolvency practitioner does not follow the recommendations or the coordination plan of the coordinator, the insolvency practitioners still has to report to relevant bodies or persons under its national law, as stated above. However, in practice the insolvency practitioner can merely inform the coordinator and other relevant bodies or persons that the group coordination plan shall not be followed and then remain passive for the rest of the group coordination. Although, the insolvency practitioner must opt-out from the costs of the group coordination proceedings separately.

In addition, the coordinator must perform his or her duties impartially and with due care. The Recast Regulation does not provide any definitions as to what impartially and due care means nor does it refer to national law. However, the Recast Regulation does not provide provisions on the liability of the coordinator. It cannot be assumed that the coordinator is not liable for the damages or loss caused to the relevant

228. Windsor – Hodgson 2015.

parties. Thus, the Member States may, as stated in the recitals of the Recast Regulation, establish national rules which supplement the rules on coordination with regard to the insolvency of members of groups of companies. However, the scope of application of those national rules shall be limited to the national jurisdiction and their application cannot impair the efficiency of the rules laid down by the Recast Regulation.[229]

The Recast Regulation also establishes rules on what languages the coordinator shall use in the course of the proceedings. The coordinator shall communicate with the insolvency practitioner of a participating group member in the language agreed with the insolvency practitioner or, in the absence of an agreement, in the official language or one of the official languages of the institutions of the Union, and of the court which opened the proceedings in respect of that group member. As for the communication with the courts, the coordinator shall communicate with a court in the official language applicable to that court. From the point of view of achieving efficient proceedings and keeping the costs in a moderate level, the coordinator should strive for concluding an agreement on the language used with the insolvency practitioners, as it would be the most advantageous that the same language is used in communication with all of the insolvency practitioners.

229. Recital 61 of the Recast Regulation.

7 Costs of the Group Coordination Proceedings

The rules concerning group coordination proceedings mention the costs of the proceedings in multiple instances. At the very beginning, before the group coordination proceedings are opened, the requesting insolvency practitioner shall provide 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 alongside with the request to open the group coordination proceedings. When the court decides to open the proceedings, it shall also decide on the estimation of costs and the share to be paid by the group members. Especially the first times where the group coordination is used, the estimation of costs can be hard to make. No one knows when the costs may be considered as moderate and if the estimation has been too low, it may pose problems to the coordinator and the coordination of the insolvency proceedings.

Hence, the Recast Regulation offers a possibility for the coordinator to exceed the estimation confirmed by the court. Where the coordinator considers that the fulfilment of his or her tasks requires a significant increase in the costs compared to the cost estimate referred to in point (d) of Article 61(3), and in any case, where the costs exceed 10 % of the estimated costs, the coordinator shall:

1. inform without delay the participating insolvency practitioners; and
2. seek the prior approval of the court opening group coordination proceedings.

Thus, the coordinator must monitor the costs of the group coordination and when it seems that the costs shall increase at least 10 % from the estimation mentioned above, it must seek the approval of the court. I believe that in the first cases where the group coordination is used to

coordinate the insolvency proceedings of group members, the coordinators are going to resort to said Article. This is only natural, as the insolvency practitioner that requested the group coordination is not in a very good position to estimate the costs of the group coordination, as said insolvency practitioner only suggests outlines of the coordination and not the actual measures to be taken in the course of the group coordination. Thus, the coordinator can better assess the costs of the group coordination.

The Recast Regulation states also rules concerning the remuneration of the coordinator. I presume that the remuneration is included in the cost estimation mentioned above, although the Recast Regulation does not mention whether or not it is included in the costs. However, it would seem appropriate that the requesting insolvency practitioner shall propose an estimation of the remuneration of the coordinator and that the opening court shall confirm this estimation. The final remuneration shall be confirmed when the tasks of the coordinator have been concluded. According to the Article 77 of the Recast Regulation, the remuneration for the coordinator shall be adequate, proportionate to the tasks fulfilled and reflect reasonable expenses. The Article is vague at best, as the criteria for the remuneration may be interpreted in multiple ways and the remuneration practices vary depending on the Member State in question. It is better that the decision on the remuneration can be made on a case-by-case basis, as the group coordination is always tailored to suit the insolvency proceedings of group members included. However, there needs to be a balance between the remuneration and the tasks performed during the group coordination proceedings, thus the remuneration should be kept in a moderate level. From a Finnish point of view, this may be problematic, as the remunerations in Finland are lower than for example the remunerations used in the UK.

According to the recitals of the Recast Regulation, the costs are determined in accordance with the national law of the Member State in which group coordination proceedings have been opened.[230] Thus, also

230. Recital 58 of the Recast Regulation.

94 the remuneration of the coordinator is decided according to the national rules of the opening court.

On having completed his or her tasks, the coordinator shall establish the final statement of costs and the share to be paid by each member, and submit this statement to each participating insolvency practitioner and to the court opening coordination proceedings. The insolvency practitioners may object the statement within 30 days of receipt of said statement. In my opinion, 30 days is a very short time to make the objection, especially when the Recast Regulation does not establish any specified form for the statement. In this case, it would be wise that the statement would be made on a standardised form. This would also ensure that the insolvency practitioners involved would surely recognise the document and notice the time limit of 30 days.

If no one objects, the costs and the share to be paid by each member shall be deemed to be agreed. The statement shall be submitted to the court opening coordination proceedings for confirmation. However, in the event of an objection, the court that opened the group coordination proceedings shall, upon the application of the coordinator or any participating insolvency practitioner, decide on the costs and the share to be paid by each member in accordance with the criteria mentioned above, and taking into account the estimation of costs referred to in Article 68(1)[231] and, where applicable, Article 72(6)[232]. Any participating insolvency practitioner may challenge the decision mentioned above in accordance with the procedure set out under the law of the Member State where group coordination proceedings have been opened.[233]

231. After the period referred to in Article 64(2) has elapsed, the court may open group coordination proceedings where it is satisfied that the conditions of Article 63(1) are met. In such a case, the court shall, among other things, decide on the estimation of costs and the share to be paid by the group members.

232. Where the coordinator considers that the fulfilment of his or her tasks requires a significant increase in the costs compared to the cost estimate referred to in point (d) of Article 61(3), and in any case, where the costs exceed 10 % of the estimated costs, the coordinator shall: 1. inform without delay the participating insolvency practitioners and 2. seek the prior approval of the court opening group coordination proceedings.

233. In this case it is apparent that the national laws should be amended in order to make the challenging timely and efficient.

This approach differs from the one adopted in, for example, Finnish bankruptcy proceedings. The Bankruptcy Act chapter 8 section 7 states that the particulars of the fee and compensation shall be set by the creditors, after having heard the estate administrator, without delay after the administrator has been appointed and, if necessary, also at a later stage. The fee and the compensation shall be paid during the discharge of the duty at reasonable intervals. The creditors may decide that a part of the fee be paid at the conclusion of the duty of the administrator. The creditors shall decide on the payment of the fee and compensation once the administrator has supplied an account of the measures on which the payment is to be based. Furthermore, the final settlement of accounts including account on the income and expenditures of the bankruptcy estate during the proceedings shall be approved by the creditors' meeting.

Hence, for example in Finnish bankruptcy proceedings, the creditors have the final saying on the costs of the proceedings and on the remuneration of the estate administrator. This approach cannot be chosen for the group coordination proceedings as coordination does not result in the creditors becoming creditors of the group as a whole, as any kind of consolidation is prohibited when group coordination is concerned. However, on this matter the Recast Regulation leaves room for the national law on the matter, as it is stated in the recitals of the Recast Regulation that:

"The insolvency practitioners involved should also have the possibility of controlling those costs from an early stage of the proceedings. Where the national law so requires, controlling costs from an early stage of proceedings could involve the insolvency practitioner seeking the approval of a court or creditors' committee."[234]

Thus, the creditor can be taken into consideration based on the national law, if the Member States choose to include such provision in the national insolvency laws. Although the acceptation got from the creditors can be held important, getting all the relevant creditor's committees to approve the costs and the remuneration can be very time-consuming. In my opinion, this is one of the few situations where the coordinator

234. Recital 58 of the Recast Regulation.

96 participating in the insolvency proceedings and to the creditor's meeting could be beneficial.[235] By attending the creditor's meeting, the coordinator could present why the costs of the group coordination are moderate and why the remuneration may be held as appropriate.

As can be seen from the recital referred to above, the insolvency practitioners should have the opportunity to control the costs of the group coordination. This is done by using the objection on costs discussed above. The rights of the insolvency practitioners could, however, go even further, as other option could be that the insolvency practitioners involved would accept the costs and remuneration of the coordinator. It can be argued that the insolvency practitioners know better the coordination conducted by the coordinator and the tasks which the coordinator has fulfilled. This leads to the fact that the respective insolvency practitioners would be in a better position to evaluate the costs, as the competent court in group coordination proceedings does not have a lot of powers. However, as stated above, it is for the court which opened the group coordination proceedings to supervise the coordinator, thus the court must also have knowledge of ow the group coordination has been conducted. To conclude, it is suitable that the opening court has the last saying on the costs of the group coordination, especially because of the fact that the costs are determined in accordance with the national law of the Member State in which group coordination proceedings have been opened.

235. As established above, Article 72(2) of the Recast Regulation states that the coordinator may be heard and participate, in particular by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group.

8 Conclusions

It is time to make the conclusions on the group coordination proceedings. The aim of this thesis was to answer to the research question "what are group coordination proceedings". To answer this question, group coordination proceedings were placed in the relevant theoretical framework, the rules were systemised by placing them under appropriate headlines and the rules concerning the group coordination proceedings were interpreted and analysed.

It seems that the definition of a group of companies is successful, as it leaves room for interpretation and does not define the element of control too precisely. Furthermore, as the insolvency proceedings included can be both main and secondary proceedings, also the establishment are, in a way, included in the definition of a group of companies. Thus, taking into account that the rules concerning the group coordination proceedings are meant to apply only to groups consisting of a parent undertaking and its subsidiaries, the definition appears to be wide enough to allow different kinds of group structures to be subject to the rules of the Recast Regulation.

As for the theory of legal separateness, the principles of said theory are followed to the letter when the Recast Regulation is concerned. The insolvency proceedings are kept totally separate and different insolvency practitioners are still appointed to the insolvency proceedings opened in respect of different group members. However, the prohibition of procedural consolidation or joint administration seems to be unnecessary, as the use of joint administration does not mean that the theory of legal separateness is abandoned. In joint administration, the assets and liabilities of different group members remain separate and there is no risk of intermingling of said assets. Using joint administration as a measure in the coordination plan would have its advantages, as it would make the coordination even more efficient and effective and reduce the costs of the coordination. Thus, the goal of maximising the value of assets would be promoted well if joint administration would be allowed

by the Recast Regulation. In addition, it is natural that substantive consolidation is not allowed because, at least from a Finnish point of view, it would add an alien dimension to the coordination. Nevertheless, it was probably a compromise that either forms of consolidation cannot be used in the group coordination plan.

The task of the coordinator seems to be merely to facilitate the communication between the relevant insolvency practitioners. However, one exception is provided by the Recast Regulation as when the possibility to opt-in is discussed, the rules give the coordinator similar powers that the court opening the group coordination proceedings has, as the coordinator may decide whether or not the insolvency proceedings are included in the group coordination proceedings based on the opt-in request. This is, in my opinion, a defect in the rules concerning the group coordination proceedings, as it would be more appropriate that the court assesses which insolvency proceedings may be included, especially considering the fact that any participating insolvency practitioner or any insolvency practitioner whose request for inclusion in the group coordination proceedings has been rejected may challenge the decision made by the coordinator in accordance with the procedure set out under the law of the Member State in which the group coordination proceedings have been opened. Hence, there is no court decision the insolvency practitioners could challenge, only the decision of the coordinator.

As stated above, the fact that the coordinator shall be an outsider and not one of the respective insolvency practitioners is one of the largest defects in the system of the group coordination proceedings. As an outsider, it takes a lot of effort and time from the coordinator to draft the coordination plan that would take into consideration the different features and stages of the included insolvency proceedings, thus the costs of the coordination shall rise merely because of the fact that the coordinator is an outsider. Furthermore, appointing one of the insolvency practitioners as the coordinator would not interfere with the theory of legal separateness, as the coordinator is more of an enabler of communication rather than an actual insolvency practitioner defined by the

Recast Regulation. As stated before, the coordinator has no saying on realisation of the assets but rather provides guidelines on how the respective insolvency practitioners should communicate with each other. In conclusion, it would be more beneficial if one of the insolvency practitioners could be appointed as the coordinator. On the other hand, it is more likely that conflicts of interests are avoided better by choosing an outsider to act as the coordinator.

Furthermore, the remuneration of the coordinator and the costs of the proceedings may pose problems as Member States have very different rules and practices on the matter. For example, in Finland the remunerations are in a moderate level compared to the value of assets to the insolvency estates. Thus, it would be difficult for a Finnish insolvency practitioner to understand the remuneration practices applied for example in the UK. In my opinion, there should be some kind of framework for the remuneration of the coordinator, as it seems problematic that the coordinators with the same tasks could get very different remuneration depending on the competent court and thus the national law of the respective Member State.

As for the group coordination proceedings as a whole, it seems that said proceedings are suitable only in large insolvency cases where to costs of the coordination can be taken care of. It seems unlikely that the group coordination proceedings would be used in cases concerning small groups of companies where there are not a lot assets in the insolvency estates. Furthermore, when small groups of companies are concerned, group coordination may be too heavy to be used as the insolvency practitioners hopefully communicate with each other without institutionally established framework of coordination. This means also that it is probably not necessary to open group coordination proceedings in cases where only a few insolvency proceedings need to be coordinated. As voluntary ways of coordination already exists and the new rules of the Recast Regulation actually establish that the insolvency practitioners are obligated to communicate with the insolvency practitioners as well as with the relevant courts, group coordination proceed-

ings do not add value to the coordination of insolvency proceedings in above-mentioned cases.[236]

Hence, the group coordination proceedings do not necessarily lead in all cases to efficient and effective coordination of insolvency proceedings meaning also that the relevant insolvency goals discussed above are not promoted in the best way possible. In a worst case scenario, the group coordination can add the costs of the insolvency proceedings and delay the conclusion of said proceedings. However, in some cases the group coordination proceedings can be an ideal solution. This is especially where the insolvency practitioners do not, for a reason or another, communicate with each other and an outside coordinator is needed to settle the disputes between the insolvency practitioners. In conclusion, the decision to open the group coordination proceedings must be always done based on the specific features and circumstances of each case at hand. This requires a lot of effort from all the relevant parties but if the end-result is that the coordination leads to efficient and effective resolution of insolvency and the coordination has helped for example to maximise the value of assets, the end-result is worth the effort. Realistically speaking, only time will tell if the group coordination proceedings shall be used and to what extent. However, it can be argued that the use of the group coordination shall be more of an exception than a rule, as the amount of cases where the need for this kind of institutional coordination is quite limited.

Lastly, the Recast Regulation establishes that no later than 27 June 2022, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the group coordination proceedings. The report shall be accompanied where necessary by a proposal for adaptation of this Regulation. Hopefully by this point group coordination has been used in the European Union and the defects of the group coordination proceedings have been detected in practice, at least to some extent.

236. On rules on cooperation and communication outside the group coordination proceedings, see Chapter V, Section 1 of the Recast Regulation.