

# Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR

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**Article 31 EIR** Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

**Duty to cooperate and communicate information**

- Paragraph 1: duty of liquidators in main and secondary proceedings to communicate
- Paragraph 2: duty of liquidators in main and secondary proceedings to cooperate
- Paragraph 3: dominance of the main proceedings

*(‘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.’)*



## Double void

1. The EIR only specifically deals with cooperation between liquidators appointed in main and secondary insolvency proceedings concerning a single debtor.

The EIR does not contain a specific duty for courts to cooperate with each other.

2. The EIR does not contain specific provisions for dealing with insolvent group companies.



## Filling the void – previous initiatives include:

- European Communication and Cooperation Guidelines for Cross-border Insolvency ('CoCo Guidelines') developed under the aegis of the academic wing of INSOL Europe by Professors B. Wessels and M. Virgós (2007).
- Protocols
- Detailed proposals to amend the EIR, for example the proposals of INSOL Europe (2012), Tollenaar (2010) and Van Galen (2003)



## Initiatives outside the specific context of the EU include:

- UNCITRAL Model Law on Cross-Border Insolvency (1997)
- Principles of Cooperation among the NAFTA countries, and the Guidelines applicable to Court-to-Court Communications by the American Law Institute (ALI) (adopted in 2000)
- UNCITRAL Legislative Guide on Insolvency Law: Part three 'Treatment of Enterprise Groups in Insolvency' (2010)



## Initiatives outside the specific context of the EU include:

- Global Principles for Cooperation in International Insolvency Cases (2012); project initiated by the ALI and the International Insolvency Institute (III), and drawn up by Professors I.F. Fletcher and B. Wessels
- Draft Guidelines for Coordination of Multinational Enterprise Group Insolvency (2012) by the III's Committee on International Jurisdiction and Coordination



## Two forms of cooperation

- Cooperation and communication between liquidators and/or courts involved in main and secondary proceedings concerning a single debtor
- Cooperation and communication between liquidators and/or courts involved in insolvency proceedings of different group companies that belong to the same group.



## Proposed Article 2(i)

(European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings; COM(2012) 744 final)

*‘(i) “group of companies” means a number of companies consisting of parent and subsidiary companies;’*





## Proposed Article 2(j)

(European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings; COM(2012) 744 final)

- ‘(j) “parent company” means a company which*
- (i) has a majority of the shareholders’ or members’ voting rights in another company (a “subsidiary company”); or*
  - (ii) is a shareholder or member of the subsidiary company and has the right to*
    - (aa) appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary; or*
    - (bb) 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.’*



## Proposed Article 42a(1)

(European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings; COM(2012) 744 final)

*‘1. Where insolvency proceedings relate to two or more members of a group of companies, a liquidator appointed in proceedings concerning a member of the group shall cooperate with any liquidator appointed in proceedings concerning another member of the same group to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interests. That cooperation may take the form of agreements or protocols.’*



## Proposed Article 42b(1)

(European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings; COM(2012) 744 final)

*'1. Where insolvency proceedings relate to two or more members of a group of companies, a court before which a request to open proceedings concerning a member of the group is pending or which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings and is not incompatible with the rules applicable to them. For this purpose, courts may, where appropriate, appoint a person or body acting on its instructions.'*



## Proposed duty to cooperate – liquidators (article 42a(2))

Liquidators shall – in the exercise of the cooperation:

- immediately communicate any information to each other which may be relevant to the other proceedings, provided appropriate arrangements are made to protect confidential information,
- explore the possibilities for restructuring the group and, where these exist, coordinate with respect to the proposal and negotiation of a coordinated restructuring plan, and
- coordinate the administration and supervision of the affairs of the group members subject to insolvency proceedings.

Liquidators may agree to grant additional powers to one of them, if the rules applicable to each of the proceedings permit such an agreement.



## Powers of the liquidators (proposed Article 42d)

(1)

(European Commission, Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings; COM(2012) 744 final)

A liquidator appointed in insolvency proceedings of a group member shall have the right to – in short:

- be heard and to participate in any proceeding opened with regard to another group member of the same group,
- request a stay of the proceedings opened with respect to any other group member of the same group,



## Powers of the liquidators (proposed Article 42d)

(2)

(European Commission, Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings; COM(2012) 744 final)

- propose a rescue plan or comparable measure for all or some group members of the same group that are subject to insolvency proceedings, and to introduce the plan into any of the proceedings opened in accordance with the law applicable to such proceedings,
- request any additional procedural measures under the law applicable to the insolvency proceedings which may be necessary to promote rescue.



## Conclusion

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