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# PROTOCOLS AND OTHER VOLUNTARY COMMITMENTS WITHIN EUROPEAN TRANSNATIONAL INSOLVENCY REGULATION, EIR 848/2015

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“Transnational Protocols:  
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## Introduction.

In response to cross-border insolvencies, conflicts of law and jurisdiction may arise and they cannot be resolved in a strictly Territorial approach. In fact, in an era of globalized and interconnected economies, an insolvency proceeding on a narrow national basis, which coexists with at least one other local proceeding may lead to unexpected outcomes. Actually, under Territorialism, each Country seizes the debtor's assets which are located within its borders and conducts a separate bankruptcy proceeding to divide those assets among local creditors according to local law, while no proceeding affects each other. This causes a sharp fragmentation of the active and passive masses, and produces disappointing effects both on the level of creditors' recovery, and on the front of an increase of costs as well.

On the other hand, a cross-border bankruptcy resulting in only one proceeding, having worldwide jurisdiction, embracing all creditors, and including all the assets and liabilities in pool, according to a single *lex concursus*, is unlikely to be realized, because it requires both a general sharing of the substantive law, especially in matters of priority claim rules; and a threat to individual countries'

sovereignty and a general agreement in placing the COMI as well.

From these comments, a compromise solution (so-called "modified Universalism") moves; this vision and its applications are overwhelmingly accepted among Scholars, both at the domestic level and on the international scene<sup>1</sup>. The result of such a widespread opinion is to be found in the main sources of hard law and soft law: the European Insolvency Regulation (EIR recast) 848/2015 and UNCITRAL Model Law on Cross-border Insolvency (1997) and its Guide to Enactment and Interpretation, 2003<sup>2</sup>: in both cases a Modified Universalism approach can be noticed.

## EIR 848/2015

The Union framework, according to EIR 848/2015, in force since June 2017, binds all the Member States, excluding Denmark<sup>3</sup> and excluding, of course, crises and insolvencies involving systems outside the Union.

In this regulatory framework the coexistence of a main proceeding with one (or more) non-main proceeding may occur<sup>4</sup>. The main proceeding is universal in itself and starts out in the place of the debtor's COMI, therefore it is then subject to the

<sup>1</sup> See *Crisi transfrontaliera d'impresa: orizzonti internazionali ed europei*, by Leandro, Meo & Nuzzo, Bari, 2018; Andersen, The cross-border insolvency paradigm: a defense of the modified universal approach considering the Japanese experiment, *University of Pennsylvania Journal of Economic Law*, 2000, vol. 21, p.679 ("one advantage of [...] modified universalism is that it retains some of the efficiencies of pure universalism while incorporating the flexibility and discretion of the [...] territorial approaches described above."); Bork & Mangano, *European Cross-border Insolvency Law*, Oxford, 2016, pp. 27 ss.; A.B. Dawson, *Modularity in Cross-border Insolvency*, 93, *Chi-Kent Law Rev.* 677 (2018); Leath Bartled, *Cross-Border Bankruptcy and the Cooperative solution*, 9 *Int'l L. & Mgmt. Rev.* 27 2012-2013, p. 29; P. De Cesari e G. Montella, *Il nuovo diritto europeo della crisi d'impresa*, Torino, 2017, pp. 91; Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy* 98 *Mich. L. Rev.*, 2216 (2000); Wessels, *A Global Approach to Cross-Border Insolvency Cases in a Globalizing World*, *The Dovenschmidt Quartely* 2013, Issue I; Id., *A Glimpse te the future: Cross-border Judicial Cooperation in Insolvency cases in the European Union*, 2015, *INSOL, International Insolvency Review*, DOI: 10.1002/iir.1234; Westbrook, *Global Insolvency Proceedings for a Global Market: The Universalist System and the choice of a Central Court*, 96 *Tex L. Rev.* 1473 ( 2018); Vattermoli, *Gruppi multinazionali insolventi*, in *Riv. dir. comm.*, 2013, 594.

<sup>2</sup> *Uncitral, United Nations Commission on International Trade Law, "Model Law on Cross-Border Insolvency", and Guide to Enactment and Interpretation.* [www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e-pdf](http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e-pdf).

<sup>3</sup> U.K. position is unclear, at the present moment, because of Brexit impact on cross-border Restructuring.

<sup>4</sup> Insolvency proceedings are listed in EIR Annex A, for the purposes of the Regulation.

relevant *lex concursus*; the second can be opened in any Member State where the debtor has an establishment<sup>5</sup>. Without prejudice to any judgment opening insolvency proceedings handed down by a court of a Member State shall be recognised in all other Member States, pursuant to art. 19 EIR<sup>6</sup>.

Furthermore, any creditor may lodge its claim in any insolvency proceeding, regardless of the place of its seat or residence (art. 45 EIR) and *par condicio* principle is confirmed, pursuant to art. 23, paragraph 2, EIR: " In order to ensure the equal treatment of creditors, a creditor which has, in the course of insolvency proceedings, obtained a dividend on its claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend". Moreover, according to art. 49 EIR, the Insolvency Practitioner appointed in non-main proceedings is supposed to transfer any assets remaining to the insolvency practitioner in the main insolvency proceeding, which enforces a global overview of the proceedings in EU area.

Nevertheless, in order to further tone down the universal approach set out in the EIR, it is not entirely excluded that only local proceedings, so-called independent territorial proceedings, may be filed for, regarding the same debtor ( art. 3, n. 4, EIR).

It should be noted that the cross-border debtor, who is likely to undergo a main and a non

main proceeding at the same time, is in itself a single debtor, i.e. a debtor who is not (necessarily) part of a group of companies. In this case, in fact, the EIR provides for a coordination between local proceedings, according to a multiple enterprises approach which in turn precludes an universal settling. Therefore, a sort of procedural consolidation between parallel procedures is suggested, according to the model of the so-called "Cooperative Territoriality"<sup>7</sup>.

## Protocols and Voluntary commitments

The EIR, while provides for a binding regulation by drawing the framework of procedural interrelationships, at the same time allows areas of contractual freedom and self-regulation. It does so on at least three times.

Firstly, art. 36 EIR enables the Insolvency Practitioner in the main proceeding to give an unilateral undertaking in order to avoid the opening of secondary insolvency proceedings<sup>8</sup>: in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, the IP will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. In other words, by means of the undertaking, the IP will act "as if" he leads a non main proceeding,

<sup>5</sup> 'Establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets (art. 2.10; art. 2, EU Reg 1346/2000).

<sup>6</sup> It's not possible to analyse the very basic definitions for COMI of the debtor, and then of dependence, and thus of the local creditor, as well as of the local asset ( art. 2, n. 9), EIR). But it is clear that any uncertainty on these general notions is at stake in the overall stability and effectiveness of the application of the entire regulatory framework of the EIR itself.

<sup>7</sup> That's the same solution adopted in Italian regulatory framework, according to Codice della Crisi 2019, artt. 284 ss.

<sup>8</sup> That's based on the assumption, declared *expressis verbis* in Whereas 41 EIR: "Secondary insolvency proceedings may also hamper the efficient administration of the insolvency estate"; while "Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings to the other Member States where the assets are located. For that reason, the insolvency practitioner in the main insolvency proceedings may request the

also called Virtual Territoriality<sup>9</sup>, formerly known in Common Law Countries<sup>10</sup>, even if, for the most part, they were experienced in cases of insolvency of multinational groups.

The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to wind up such assets and then has to be approved by the majority of the known local creditors<sup>11</sup>. Nevertheless, it doesn't turn into a proper bilateral agreement: it's worth minding the various linguistic options that can be found in the different translations of the Regulation, where the undertaking is, in the formulation in Italian, "un impegno unilaterale"; in French: "engagement"; in Spanish: "contraer un compromiso unilateral"; in Deutch: *Zusicherung*<sup>12</sup>.

Secondly, Protocols are supposed to coordinate proceedings and improve cooperation both

in vertical relationship, between main proceeding and non-main proceeding regarding a single debtor and in horizontal relationship between proceeding involving different group companies.

The EIR recast (Whereas n. 41), enhances Cooperation and communication between Insolvency Practitioners (art. 41 Reg.), Cooperation and communication between Courts (art. 42 Reg.) and Cooperation and communication between Insolvency Practitioners and Courts (art. 43 Reg. ). The same is also stated in relation to proceedings involving several group companies (Articles 56-57-58 EIR).

Actually, in both cases it's said that cooperation may be implemented even approving agreements or protocols. See Whereas 49: "In light of such cooperation, insolvency practitioners and courts should be able to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings

opening of secondary insolvency proceedings" (Whereas 40). Actually, in order to avoid a non-main proceeding, the EIR also provides for the possibility that the court temporarily stays the opening of secondary insolvency proceedings, "when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings, in order to preserve the efficiency of the stay granted in the main insolvency proceedings. The court should be able to grant the temporary stay if it is satisfied that suitable measures are in place to protect the general interest of local creditors. In such a case, all creditors that could be affected by the outcome of the negotiations on a restructuring plan should be informed of the negotiations and be allowed to participate in them" (Whereas n. 45).

<sup>9</sup> About Syntetic proceeding, or *Virtual Proceeding* see Moss-Fletcher-Isaacs, *The EU Regulation on Insolvency Proceedings*, Oxford, 2016, 59 e 66; Dammann-Kohmann, *Le nouvel attelage entre procédures principale et secondaire(s), Le nouveau règlement insolvabilité: quelles évolutions?*, by Jault-Seséke & Robine, Paris, 2015, 106; Laukermann, *Instruments to avoid or postpone secondary proceedings*, Introductory paper for the kick-off conference of the EU project "Implementation of the New Insolvency Regulation", Vienna, 17/18 april 2015, JUST/2013/JCIV/AG/4679; Mooney, *Harmonizing Choice-of-Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests*, in *Brooklyn Journ. Corp. Fin. & Comm. Law*, 2014, 121 e segg.; Westbrook, *A Global Solution to Multinational Default*, 98, MICH. L. REV, 2300

<sup>10</sup> See Collins & Aikman Europe, SA, the High Court of England and Wales, Chancery Division, [2006], EWCH 1343 (Ch)- www.bailii.org

<sup>11</sup> According to art. 2, 11, EIR, 'local creditor' means a creditor whose claims against a debtor arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the centre of the debtor's main interests is located

<sup>12</sup> Cfr. Bork & Mangano, *op. cit.*, p. 248; Dammann-Kohmann, *op. cit.*, 103; Eidenmüller, *A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond*, in *Maastricht Journ. Eur. & Comp. Law*, 2013, 147; Mucciarelli, *Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo?*, in *Eur. Com. Fin. Law Rev.*, 2016, p. 26; Wessels, *Contracting out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation*, in *Brooklyn Journ. Corp. Fin. & Comm. Law*, 2014, 236 e segg.

in different Member States concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings. Such agreements and protocols may vary in form, in that they may be written or oral, and in scope, in that they may range from generic to specific, and may be entered into by different parties. Simple generic agreements may emphasise the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements may establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved, where the national law so requires. They may reflect an agreement between the parties to take, or to refrain from taking, certain steps or actions<sup>13</sup>

The so-called cross-border insolvency protocol is a mostly Anglo-American concept which has not been specifically developed by any legislators but by the insolvency practice itself. Its origin lays in the Maxwell insolvency in 1991. A protocol generally aims to solve problems that arise during multiple insolvency cases concerning the same debtor in different jurisdictions. Typically it aims to improve the communication and cooperation between insolvency practitioners and courts, the insolvency practitioners themselves and the courts themselves. The usage of protocols has been steadily increasing despite some attempts to deal with the conflict of law problems. Many theoretical deeper analysis would be needed, focusing on forms and views of protocols, on their legal status, on their contractual rather than bin-

ding attitude, and on their enforceability.

Finally, EU Regulation encourages other voluntary commitments, provided that Group coordination proceedings may be applied for (art. 61 EIR) in case of several local proceedings of group companies. Such a “super-coordination” proceeding is supposed to improve the effects of the procedural coordination, without prejudice, at the level of substantive law, the full force of each single local law. It can be requested by any appointed IP before any Court having jurisdiction over the insolvency proceedings of a member of the group and any other IP may lodge for objections ( ). Later, if at least two-thirds of all IPs 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 ( art. 66 EIR) and shall appoint a coordinator, even deciding on the outline of his coordination function.

## Final notations

Overall, such an effort at deregulation has to be welcome, because it serves efficiency and thus effective solutions are more likely to fit each specific case. Furthermore, it is also relevant on a systematic level, especially in the eyes of Civil Law Scholars, who witness a steady institutionalization of negotiation best practises.

It’s worth noticing that the negative consequences that are intended to be avoided in this

13 Commission Implementing Regulation 12th June 2017, (EU) 2017/1105, Annex III, provides for the standard notice form to be used for the lodgement of objections in group coordination proceedings.

14 Whereas 10, EIR: “The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs (...).”

15 See EU Commission Directive Proposal 22 November 2016 ( COM/2016/0723 (final) focusing on early warning, on the one hand, and second chance, on the other hand.

way may depend on unequal regulations of domestic substantive law, especially, in terms of credit claims order, priority rules, automatic stay, and regarding disharmonies between the managing, the timing, the effects and the purposes that single local proceeding can show.