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Date, 31 January 2017

ABSTRACT

The thesis approaches from a private international law perspective the multinational enterprise, i.e. a group of companies located in different States but subject to the direction and coordination of a single parent company. Such a vast and multifaceted topic is investigated with a focus on the jurisdictional aspects. In particular, the author pleads in favour of a unitary appraisal of groups: it is, in fact, submitted that, when several proceedings are brought against different companies forming part of the same group, the need to take into due account the reality of groups should lead to a consolidation of the group's litigation before one single forum. In this regard, two areas of law are extremely relevant in the business practice and represent the latest developments in EU private international law: competition and insolvency. The analysis of the functioning of jurisdictional rules in these fields reveals that, depending on the level of the group's integration and the degree of autonomy enjoyed by the group companies, the traditional pluralist view has to be definitively overcome in favor of a unitary approach, which might lead to the centralization of proceedings. This outcome is not only beneficial for the pursuit of the objectives of European judicial cooperation in civil matters and in terms of economic efficiency, but it is also specific to the characteristics of groups of companies: the attribution of procedural relevance to the affiliations among companies, indeed, proves to be necessary to reflect the decision-making functioning of the group in a way that guarantees the sound administration of justice.

TABLE OF CONTENTS

CHAPTER 3

THE CROSS-BORDER INSOLVENCY OF GROUPS OF COMPANIES

List of Abbreviations

AEDIPr.	Anuario español de derecho internacional privado
AG	Die Aktiengesellschaft
AIDA	Annali italiani del diritto d'autore, della cultura e dello spettacolo
Am. Bankr. Inst. J.	American Bankruptcy Institute Journal
Am. Bankr. L. J.	American Bankruptcy Law Journal
Anglo-Am. L. Rev.	Anglo-American Law Review
Ann. Rev. Insolv. L.	Annual Review of Insolvency Law
Ann. Survey Int. Comp. L.	Annual Survey of International and Comparative Law
Annales	Annales d'études internationales
Antitrust L. J.	Antitrust Law Journal
BB	Betriebs-Berater
BeckRS	Beck online Rechtsprechung
Boston College L. Rev.	Boston College Law Review
Brooklyn J. Corp. Fin. Comm. L.	Brooklyn Journal of Corporate Financial and Commercial Law
Brooklyn J. Int. L.	Brooklyn Journal of International Law
Bucerius L. J.	Bucerius Law Journal
Buffalo L. Rev.	Buffalo Law Review
Bull. Joly Entr. diff.	Bulletin Joly Entreprises en difficulté
Bull. Joly sociétés	Bulletin Joly Sociétés
Bus. L. Int.	Business Law International
Cahiers dr. eur.	Cahiers de droit européen
California L. Rev.	California Law Review
Cambr. J. Econ.	Cambridge Journal of Economics
Cambr. L. J.	Cambridge Law Journal
Can. Bus. L. J.	Canadian Business Law Journal
Cardozo J. Int. Comp. L	Cardozo Journal of International and Comparative Law
Chicago J. Int. L.	Chicago Journal of International Law
Clunet	Journal du droit international
CMLRev.	Common Market Law Review
Columbia Bus. L. Rev.	Columbia Business Law Review
Columbia J. Eur. L.	Columbia Journal of European Law
Columbia J. Trans. L.	Columbia Journal of Transnational Law
Com. L. J.	Commercial Law Journal
Comm. comm. electr.	Communication Commerce électronique
Comp. L. Rev.	Competition Law Review
Comp. Law.	The Company Lawyer
Conc. mercato	Concorrenza e mercato
Conn. L. Rev.	Connecticut Law Review
Contr. impr	Contratto e impresa
Contr. impr. Europa	Contratto e impresa/Europa
Cornell L. Rev.	Cornell Law Review
Corr. giur.	Corriere giuridico
CPI Antitrust Chron.	Competition Policy International – Antitrust Chronicle
Cuad. der. com.	Cuadernos de derecho y comercio
Cuad. der. trans.	Cuadernos de derecho transnacional
Current Leg. Probl.	Current Legal Problems

Dalloz	Recueil Dalloz
Danno resp.	Danno e responsabilità
DB	Der Betrieb
Denver J. Int. L. Pol.	Denver Journal of International Law and Policy
Digesto disc. priv.	Digesto – Discipline privatistiche
Dir. comm. int.	Diritto del commercio internazionale
Dir. fall.	Diritto fallimentare e delle società commerciali
Dir. Un. eur.	Il diritto dell'Unione europea
DZWIR	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht
Edinburgh L. Rev.	Edinburgh Law Review
Electronic J. Comp. L.	Electronic Journal of Comparative Law
Emory Bankr. Dev. J.	Emory Bankruptcy Developments Journal
Enc. Dir.	Enciclopedia del diritto
Erasmus L. Rev.	Erasmus Law Review
Eur. Antitrust Rev.	European Antitrust Review
Eur. Bus. L. Rev.	European Business Law Review
Eur. Bus. Org. Rev.	European Business Organization Law Review
Eur. Comp. Fin. L. Rev.	European Company and Financial Law Review
Eur. Comp. J.	European Competition Journal
Eur. Comp. L. Rev.	European Competition Law Review
Eur. L. Forum	The European Legal Forum
Eur. L. Reper.	European Law Reporter
Eur. L. Rev.	European Law Review
Eur. Rev. Priv. L.	European Review of Private Law
Europa dir. priv.	Europa e diritto privato
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWiR	Entscheidungen zum Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
Fall.	Il Fallimento
Fordham Int. L. J.	Fordham International Law Journal
Fordham J. Corp. Fin. L.	Fordham Journal of Corporate & Financial Law
Foro it.	Il Foro italiano
Gaz. Palais	Gazette du Palais
Geo. Wash. Int. L. Rev.	George Washington International Law Review .
Georg. L. J.	Georgetown Law Journal
Georgia J. Int. Comp. L.	Georgia Journal of International and Comparative Law
Georgia L. Rev.	Georgia Law Review
German L. J.	German Law Journal
Giur. comm.	Giurisprudenza commerciale
Giur. merito	Giurisprudenza di merito
Global Antitrust Rev.	Global Antitrust Review
Global Comp. Litig. Rev.	Global Competition Litigation Review
GmbHR	GmbH-Rundschau
GPR	Zeitschrift für das Privatrecht der Europäischen Union
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
Harv. Int. Law J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Hastings Int. Comp. L. Rev.	Hastings International and Comparative Law Review
IIC	International Review of Intellectual Property and Competition Law
IILR	International Insolvency Law Review
ILSA J. Int. Comp. L.	ILSA Journal of International & Comparative Law

Insolv. Int.	Insolvency Intelligence
Int. Comp. Comm. L. Rev	International Company and Commercial Law Review
Int. Comp. L. Quart.	International and Comparative Law Quarterly
Int. Enc. Comp. L.	International Encyclopedia of Comparative Law
Int. Insolv. Rev.	International Insolvency Review
Int. J. Soc. L.	International Journal of the Sociology of Law
Int'l Lis	Int'l Lis. Rivista di diritto processuale internazionale e arbitrato internazionale
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
J. Antitrust Enf.	Journal of Antitrust Enforcement
J. Bank. Fin.	Journal of Banking and Finance
J. Comp. Bus. Cap. Market L.	Journal of Comparative Business and Capital Market Law
J. Comp. L. Econ.	Journal of Competition Law & Economics
J. Corp. L. Studies	Journal of Corporate Law Studies
J. Corp. L.	Journal of Corporation Law
J. Eur. Comp. L. Pract.	Journal of European Competition Law & Practice
J. Int. Bank. L. Reg.	Journal of International Banking Law & Regulation
J. Leg. Stud.	Journal of Legal Studies
J. Priv. Int. L.	Journal of Private International Law
J. World Inv. Trade	Journal of World Investment & Trade
JZ	Juristenzeitung
Konzern	Der Konzern
KSzW	Kölner Schrift zum Wirtschaftsrecht
KTS	Zeitschrift für Insolvenzrecht
L. Pol. Int. Bus.	Law and Policy of International Business
L. Quart. Rev	Law Quarterly Review
Leg. Stud.	Legal Studies
Ley Un. Eur.	La Ley Unión Europea
Lloyd's Mar. Comm. L. Quart.	Lloyd's Maritime and Commercial Law Quarterly
LMK	Kommentierte BGH-Rechtsprechung Lindenmaier-Möhring
LSEU	Lund Student EU Law Review
Maastricht J.	Maastricht Journal of European and Comparative Law
Merc. Conc. Reg.	Mercato Concorrenza e Regole
Mich. L. Rev.	Michigan Law Review
Modern L. Rev	Modern Law Review
N.J.	Nederlandse jurisprudentie
N.Y.U. J. Int. L. Pol.	New York University Journal of International Law and Politics
NIPR	Nederlands Internationaal Privaatrecht
NJW	Neue Juristische Wochenschrift
Nuove leggi civ. comm.	Nuove leggi civili e commentate
Nw. J. Int. L. Bus.	Northwestern Journal of International Law & Business
NZI	Neue Zeitschrift für Insolvenz- und Sanierungsrecht
NZKart	Neue Zeitschrift für Kartellrecht
Oxford J. Leg. Stud.	Oxford Journal of Legal Studies
Pet. Aff.	Les Petites Affiches
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Recueil des cours	Recueil des Cours de l'Académie de La Haye
Resp. civ. prev.	Responsabilità civile e previdenza
Rev. belge dr. comm.	Revue belge de droit commercial

Rev. dr. int. dr. comp.	Revue de droit international et de droit comparé
Rev. dr. int. privé	Revue de droit international privé
Rev. dr. Un. eur.	Revue de droit de l'Union européenne
Rev. Lamy dr. aff.	Revue Lamy Droit des Affaires
Rev. Lamy dr. conc.	Revue Lamy Droit de la Concurrence
Rev. prat. sociétés	Revue pratique de sociétés civiles et commerciales
Rev. proc. coll.	Revue des procédures collectives
Rev. sociétés	Revue des sociétés
Revue belge dr. comm.	Revue belge de droit commercial
Revue critique	Revue critique de droit international privé
Riv. dir. civ.	Rivista di diritto civile
Riv. dir. comm.	Rivista del diritto commerciale e del diritto generale delle obbligazioni
Riv. dir. impr.	Rivista di diritto dell'impresa
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. dir. int.	Rivista di diritto internazionale
Riv. dir. proc.	Rivista di diritto processuale
Riv. dir. soc.	Rivista di diritto societario
Riv. int. sc. econ. comm.	Rivista internazionale di scienze economiche e commerciali
Riv. soc.	Rivista delle società
Riv. trim. dir. proc. civ.	Rivista trimestrale di diritto e procedura civile
RIW	Recht der internationalen Wirtschaft
RTD Com.	Revue trimestrielle de droit commercial
RTD Eur.	Revue trimestrielle de droit européen
Sem. Jur.	La Semaine Juridique - Edition Générale
Sem. Jur.-Entr. Aff.	La Semaine Juridique - Entreprise et Affaires
Sidney L. Rev.	Sidney Law Review
Società	Le Società. Rivista di diritto e pratica commerciale societaria e fiscale
Stanford J. Int. L.	Stanford Journal of International Law
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
Texas Int. L. J.	Texas International Law Journal
Texas L. Rev	Texas Law Review
Trav. fr. dr. int. priv.	Travaux du comité français de droit international privé
Tulane J. Int. Comp. L.	Tulane Journal of International and Comparative Law
Tulsa J. Comp. Int. L.	Tulsa Journal of Comparative and International Law
UMKC L. Rev.	UMKC Law Review
Univ. Chicago L. Rev.	The University of Chicago Law Review
Univ. Pa. L. Rev.	University of Pennsylvania Law Review
Va. J. Int. L.	Virginia Journal of International Law
WM	Zeitschrift für Wirtschafts- und Bankrecht
World Comp.	World Competition
WRP	Wettbewerb in Recht und Praxis
WuW	Wirtschaft und Wettbewerb
Yale L. J.	Yale Law Journal
Yb. Antitrust Reg. Stud.	Yearbook of Antitrust and regulatory Studies
Yb. Priv. Int. L.	Yearbook of Private International Law
ZEuP	Zeitschrift für Europäisches Privatrecht
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht

ZIK	Zeitschrift für Insolvenzrecht und Kreditschutz
ZInsO	Zeitschrift für das gesamte Insolvenzrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZRP	Zeitschrift für Rechtspolitik
ZSchwR	Zeitschrift für Schweizerisches Recht
ZVglRWiss.	Zeitschrift für Vergleichende Rechtswissenschaft
ZWeR	Zeitschrift für Wettbewerbsrecht
ZZP	Zeitschrift für Zivilprozess
ZZP Int.	Zeitschrift für Zivilprozess International

Analysis of the Scope of the Work

The thesis approaches from a private international law perspective the multinational enterprise, i.e. a group of companies located in different States but subject to the direction and coordination of a single parent company. Such a vast and multifaceted topic is investigated with a focus on the jurisdictional aspects, while conflict of laws issues are only marginally addressed.

The starting point of the analysis is the dichotomy between economic unity and legal plurality (para. 1.2), which is one of the main features of the multinational enterprise, consisting of a single economic entity but of a plurality of legal entities. This kind of legal pluralism, based upon the proliferation of companies in every country in which the enterprise acts, is stressed in transnational groups, where different companies are subject to different national laws. The result is that, in the international scenario, the unity of the group is extremely difficult to reach from a legal point of view.

Given the complexity of the issue, an introduction to the reality of corporate groups is necessary. Indeed, as group relations exist in a wide variety of forms, it is useful to put down a typology of groups of companies, in order to understand the complex nature of the conflicting relationships arising within and outside the group. This turns out to be critical because legal forms do not necessarily coincide with the business organization of the firm, thus leading to possible mismatches between control and legal structures. Different structures may also involve various degrees of financial and decision-making autonomy (in particular, the attention is focused on the distinction between hierarchical and heterarchical groups: para. 1.3). The interim conclusion is that “group of companies” is an umbrella concept that covers different forms of economic organization and corporate combinations, which may be generally defined as two or more legal entities linked together by some control or ownership. In particular, despite the absence of consistent definitions in domestic legal systems, with different tests applying to different fields, an investigation of the latter makes it evident that the definition of a group has been mainly construed on the basis of the concept of control, considered as the key connection between group members (para. 1.4).

Once clarified what constitutes a group of companies, the attention is shifted to the different approaches adopted by the Member States in order to regulate groups of companies. In particular, one may distinguish at least two different regulatory models: the first one, which is followed by the majority of EU jurisdictions, relies on the idea that traditional contract and

company law prove overall to be sufficient to regulate the phenomena occurring in the context of groups of companies, so that the protection of the subsidiary's interests may be entrusted to common company law provisions applying to separate companies, only complemented by *gruppenspecifisch* provisions; the second one, instead, is based on the idea that groups require specific rules derogating and integrating company law, in particular concerning the group management and the protection of subsidiary's interests (para. 1.5). In this respect, as is known, Germany was the first European country to introduce in 1965 a formal regulation on the law of groups, a systematically ordered body of rules governing the relationships between affiliated enterprises. These rules were aimed at establishing a legal framework for the constitution and the functioning of a group, at the same time safeguarding the interests of the dependent companies (on the distinction between contractual and factual groups, see para. 1.5.2.).

Moreover, it is also interesting to investigate which has been the impact of EU Law on the regulation and treatment of groups. As is known, a draft proposal of Ninth Company Law Directive dealing with corporate groups was released by the Commission, but ultimately abandoned owing to strong opposition from a number of Member States (para. 1.6.1). However, the widespread skepticism that accompanied the previous attempts to regulate corporate groups was overcome in the late 1990s by the proposal prepared by the *Forum Europaeum on Group Law*, a group of leading company law professors and practitioners from all over Europe. This proposal resulted in a great echo which relaunched the debate on groups. The two Action Plans on Company Law of the Commission released in 2003 and 2012 expressly called for the adoption of specific provisions in the area of groups, in particular concerning the recognition of the concept of group interest (see para. 1.6.2).

From the foregoing analysis, it results that the traditional principles of company law are in a tense relationship with the reality of the business organization, where companies do not act independently but are often part of larger economic groups. It is then questionable whether the desire to translate the economic reality of groups into legal terms might lead to the determination of a single national legislation required to govern its organization and functioning. Indeed, if from one side the essence of the group can be identified in the implementation of control through the exercise of a single management strategy by the parent company, from the other side, national legal systems do not confer legal personality to the group, which therefore is not a subject of law in itself.

To this day, the private international law debate on groups has been two-fold: from one side, it focused on the possibility to attribute a single nationality to the group as a whole, thus subjecting all the group members to the same applicable law, which is basically that of the parent company (para. 1.7.1); from the other side, it dealt with the law applicable to internal relationships between the parent and the subsidiary companies within the group (para. 1.7.2). In the legal doctrine, it has been proposed the adoption of a unitary approach aimed at subjecting all the group companies to the same national law, namely the law of the seat of the parent company. This approach, however, has been the object of relevant criticism. Thus, the inability to grasp the realities of interdependence between affiliated companies in multinational corporate groups makes it very difficult and uncertain the determination of a conflict of law rule designed to submit the group as a whole to a single national law. In this sense, in the literature, it is possible to acknowledge the existence of a bilateral conflict of laws rule according to which, insofar as the interests of the dependent company (including minority shareholder and creditors) are affected, the company statute of the subsidiary applies.

The interim conclusion is that a “pluralist approach”, entailing a distributive application of the laws governing the various subsidiaries, is preferable both under an economic and a legal point view: in fact, the possibility to transcend national boundaries is considered as a factor of optimization of the group because it allows the establishment of subsidiaries in countries where legal and fiscal conditions are more favorable. In contrast, with regard to the issue of jurisdiction, the thesis pleads in favour of a unitary appraisal of groups: it is, in fact, submitted that, when several proceedings are brought against different companies forming part of the same group, the need to take into due account the reality of groups of companies should lead to a consolidation of the group’s litigation before one single forum. In particular, two areas of law are extremely relevant in the business practice and represent the latest developments in EU private international law: insolvency and competition.

The second chapter focuses on groups of companies from the perspective of EU competition law, to verify whether they have to be treated like all other market participants or instead it is appropriate to assess their behavior taking into account the economic relations between companies of the same group. The enforcement of competition law is aimed at terminating the ongoing infringements and preventing future violations through deterrence, in view of the side objective of restoring the *status quo ante* through the compensation to the victims (par. 2.1). These objectives may only be achieved with a combination of public and private enforcement.

The latter may be defined as litigation in which private parties act as claimant or counterclaimant against undertakings that have allegedly in breach of antitrust rules, in particular, requesting damages or injunctions. The evolution of EU law has been tremendous in the last fifteen years since the CJEU's decision in *Courage*, where the Court affirmed that any private party can directly rely on the breach of EU competition law provisions to seek compensation for loss caused to him by a contract or by conduct liable to restrict or distort competition (para. 2.2.2.1). In this regard, the Commission decided to cope with the situation of total underdevelopment of private enforcement and started a legislative initiative on damages actions for breach of competition law. This led to the adoption of Directive 2014/104/EU on certain rules governing damages actions, which is aimed at removing practical obstacles to compensation for all victims of infringements of EU antitrust law and fine-tuning the interplay between private actions and public enforcement by the Commission and national competition authorities (para. 2.2.2.2).

The importance of economic affiliation has been soon acknowledged by the CJEU and the European Commission, which – albeit not in a coherent way – started in the seventies with the development of the so-called single economic entity doctrine (para. 2.3.1). According to this concept, which is based on the assumption that a company subject to the parent's management policy cannot determine its own conduct independently on the market, the anti-competitive agreements concluded between companies belonging to the same group are exempted from the application of EU competition law. Accordingly, whenever the subsidiaries do not enjoy real autonomy in determining their course of action in the market but carry out the instructions issued by the parent company, the latter may be held responsible for the infringements committed by the subsidiary. In particular, the key criterion of the actual exercise of decisive influence of the parent company over its subsidiaries' conduct is presumed whenever «the parent company holds all or almost all of the capital in a subsidiary», so that the parent company may be held liable for its subsidiary's infringement, unless it demonstrates the complete autonomy of such subsidiary (para. 2.3.2). The burden of proof for a rebuttal of the presumption lies with the parent company, which, irrespective of any personal direct or indirect involvement in the infringement, can avoid being held jointly and severally liable only by disproving the exercise of decisive influence on its part. The use of the single economic entity doctrine is not unanimously shared in cases where there is no evidence of the parent's actual involvement or knowledge and has been widely conceived as unconvincing and being in breach of fundamental

principles, such as legal certainty, *in dubio pro reo* (presumption of innocence) and the rights of the defence (para. 2.3.3). The problem lies in particular with the allegedly irrefutable nature of the presumption of parental liability and the very narrow room left for its actual rebuttal. Such criticism, however reasonable, did not find any follow-up in the CJEU's case law, except for the limited aspect concerning the insufficient degree of legal reasoning provided by the Commission in the evaluation of the evidence submitted in order to rebut the presumption and avoid responsibility.

The presumption of decisive influence does not automatically extend to parental liability for private damages claims so that, in order to establish the civil liability of the parent company, it is also necessary to prove the parent's own wrongdoing, i.e. its direct and personal involvement in the infringement (para. 2.3.4). Nonetheless, the single economic entity doctrine produces significant consequence on the side of private enforcement and has been widely referred to in the case law as a justification for the centralization of private damages claims filed against different companies belonging to the same groups. The relevant instrument governing the determination of jurisdiction for competition claims is the Brussels I regime, recently recast by Regulation 1215/2012 (para. 2.4). In this regard, EU jurisdictional rules are thoroughly analyzed, in the attempt of evaluating to what extent antitrust litigation may be concentrated in one forum.

The first relevant criterion for the attribution of jurisdiction is the domicile of the defendant (Article 4), irrespective of its nationality and regardless of any specific connection between the claim and the forum (para. 2.5). This criterion has not met any particular difficulties in the practical application of the Regulation. However, it results to be effective only when there is a single infringer so that there is a single case concerning the EU-wide infringing activities of the defendant. In contrast, it is less suitable in a multi-defendant context, as it seems impossible to establish jurisdiction against the subsidiary in the forum where the parent company is domiciled. Much more interesting is the analysis of the special ground of jurisdiction provided for extra-contractual obligations by Article 7(2) of Brussels I-*bis* Regulation (on the issue of characterization of competition claims as tortious, see para. 2.6.1) which grants jurisdiction to the courts of the «place where the harmful event occurred». This concept has been interpreted by CJEU as referring both to the place where the damage occurred (place of damage) and to the place of the event giving rise to it (place of acting), whenever they are located in different Member States. The option between these two places is given to the claimant and is based on

the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred.

The CJEU had recently the possibility in *CDC Hydrogen Peroxide* to determine where the place of damage and the place of acting have to be located with regard to competition claims (para. 2.6.2). Concerning the first place, the prevailing literature shares the view that in EU competition law claims it should be identified in the place where the market is affected by the anticompetitive conduct. This interpretation would assure a sound administration of justice, in particular concerning the foreseeability of competent courts both by plaintiffs and defendants, and would follow the same market-oriented approach prescribed by Article 6 of the Rome II Regulation. In contrast, the Court neglected the collective dimension of the market and focused on the individual dimension of antitrust infringements, holding that for loss consisting of additional costs incurred because of artificially higher prices, the *locus damni* is located, for each alleged victim, at that victim's registered office (para. 2.6.2.1). Concerning the second place, instead, the CJEU followed one of the solutions already highlighted in the literature and held that the place of the causal event can be identified as the place of the conclusion of the cartel. This criterion does not apply in cases of complex cartels consisting of collusive agreements concluded during various meetings and discussions in various places in the EU. Accordingly, in such cases, jurisdiction may be attributed to the court where a particular agreement was concluded, which was the sole causal event giving rise to the loss allegedly inflicted to the victim (para. 2.6.2.2).

In both cases, the CJEU's analysis is evaluated critically and confronted with the earlier CJEU's case law, thus showing the unconvincing reasoning and drawbacks of possible application in the practice. However, with this decision the CJEU makes a significant step forward as to the possibility of bundling claims against different group members: it is, in fact, allowed both at the place of the event giving rise to the damage, in so far as all claims are causally linked to the same cartel agreement, and at the place of damage where the victim's registered office is located. The second solution would certainly be more advantageous for the claimant but does not offer any margin of discretion as to where starting the proceedings, for instance in jurisdictions where private enforcement is more effective. In this regard, the most important provision is definitely Article 8(1) of the Brussels I-*bis* Regulation, according to which, in the case of multiple defendants, the plaintiff can bring a claim in the courts for the place where any one of the defendants is domiciled, provided the claims be closely connected.

Antitrust litigation involving groups of companies is a typical multi-defendant situation in which Article 8 may find application, especially in the case of horizontal cartels (para. 2.7.1). The evolution of the CJEU's case law concerning the interpretation of this provision has been significant in the last years, with a loosening of the strict interpretation initially provided as to the requirements of connectedness and the risk of irreconcilable judgments (in particular, the twin notion of the same situation of law and fact: see para. 2.7.2). The applicability of Article 8 was further extended in *CDC Hydrogen Peroxide*, where the Court held that, in competition disputes, the above-mentioned requirements are satisfied when there is a Commission's decision establishing that certain companies participated in a cartel agreement constituting a single infringement of EU competition law and holding them liable for the loss resulting from their tortious actions, so that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled.

The victim-friendly reasoning of the Court is hardly reconcilable with its previous case law. However, it is in line with a significant number of national decision already dealing with the application of *forum connexitatis* in competition claims and facilitates in a very pragmatic way centralization of proceedings, by allowing victims to shop for the more convenient forum and establishing jurisdiction before the courts of the domicile of any cartelist (para. 2.7.3). Albeit referring exclusively to follow-on competition claims, the decision offers the possibility to evaluate how the foreseeability criterion at the ground of CJEU's interpretation might be interpreted in cases of defendants not addressed by the infringement decision. The question is whether non-addressed companies may be used as an anchor defendant to attract litigation before one court, which is not necessarily closely connected with the dispute overall considered. In this regard, the analysis of the English case law allows determining the problems raised by overly liberal interpretations, which are capable of multiplying the courts possibly competent exponentially at the expenses of proximity and the foreseeability. The leading case in this context is *Roche Products Ltd. & Ors v Provimi Ltd*, which relied heavily on the single economic entity doctrine in order to establish a non-addressed subsidiary – with which the claimant had no direct relationship – as anchor defendant: the underlying rationale of the decision is the idea of "implementation" of the cartel, according to which all the companies that implemented in the cartel, entered into by the parent company, on a given market by applying cartel prices are considered as joint tortfeasors and are held jointly liable for the entire damage suffered, so that the conscious participation in the cartel is transferred from the parent company

to the single economic entity considered as a whole. Such a downward attribution of responsibility was harshly criticized in the literature but was never expressly reversed in the following decisions apart from *obiter* (para. 2.7.4). However, the analysis of this case law makes it evident the need to introduce some corrections capable of reducing the risk of abuses and tactical procedural practices which are contrary to the fundamental principles underlying the Brussels I regime, such as legal certainty and foreseeability of competent courts. In this regard, some amendments to the Regulation are proposed. What is particularly interesting for the antitrust litigation involving groups of companies is the so-called "spider-in-the-web doctrine" developed by Dutch courts in the context of IP infringements, according to which, in case a number of defendants belonging to a group of companies that markets identical products in different national markets and acts on the basis of a joint business plan, the court of the domicile of the head office of that group, in charge of the business operations and from which the business plan originated, should have jurisdiction also against all other members of the group (para. 2.7.5).

Similar problems are raised with regard to the administration of insolvency proceedings involving multinational enterprise groups consisting of legal entities registered in different countries. In this regard, one may see that the vast majority of cross-border cases filed in Europe and in the US involves corporate groups. However, an analysis of national legislations reveals a generalized lack of specific provisions, even in those countries that contributed the most to the last forty-year debate on groups, such as Germany. There is instead a widely accepted principle according to which, in respect of the principle of legal personality, each legal entity is subject to its own insolvency proceeding and the decision to open the proceedings is determined separately and independently for each entity (para. 3.1). This approach has its benefits in terms of legal certainty, but it overlooks the wider picture of the group and it is not feasible for the group's reorganization or the sale of the group business as a going concern. In contrast, it is necessary to have a proper regime for the treatment of insolvency of international groups of companies, which might follow some fundamental objectives. In particular, what seems to be extremely relevant is the maximization of enterprise value, clarity and predictability, equality of distribution and procedural fairness. In a group context, these objectives may be reached only by giving relevance to the interconnection between affiliated companies and treating the group as a whole in a comprehensive way.

The analysis starts necessarily from the basic models that are generally referred to when one is confronted with international insolvency problems. In particular, a comparison between universalism and territorialism allows identifying the main problems raised by a cross-border context (para. 3.2). The conclusion that universalism is the prevailing approach in the literature is mitigated by the fact that, albeit being in line with the economic realities of international insolvencies, it does not fully correspond to the legal reality of a world of self-contained legal systems and is widely considered unachievable in the practice in its purest form. That is why the most relevant pieces of legislation in the field – such as the European Insolvency Regulation or the UNCITRAL Model Law – adopted a middle ground approach, which is modified universalism.

These models also reflect various approaches as to group insolvencies, which are differently considered by legal literature and national case law, thus creating a multifaceted background in which pros and cons have to be assessed depending on the level of integration of the group (para. 3.3). The most radical solution is substantive consolidation, according to which, in disregard of the separate identity of individual companies, the assets and the liabilities of the group members should be considered as constituting a single consolidated estate, for the benefits of all creditors of the group (para. 3.3.1). This approach is followed in the US and in some Member States, but it is generally regarded as too extreme because it threatens the very essence of a legal entity and affects profoundly creditors' rights. The second solution is procedural consolidation, which requires the opening of insolvency proceedings against all the insolvent group companies before a single bankruptcy court, usually where the parent company is located (para. 3.3.2). This solution is widely considered as the most beneficial one in terms of economic efficiency, especially for strongly integrated groups, because it avoids unnecessary costs and delays and maximizes the enterprise's value for the benefit of creditors. For this reason, it gained immediate success for the application of the European Insolvency Regulation. The last solution is procedural coordination and refers to varying degrees of coordination with respect to the conduct of multiple insolvency proceedings commenced with respect to different group members before multiple jurisdictions (para. 3.3.3). In this regard, there are different mechanisms in which such coordination may take place in practice, including the possibility of appointing a single administrator in the individual proceedings opened in different States.

Against this background, when the European institutions finally succeeded in adopting a binding instrument – Regulation (EC) No. 1346/2000 (see para. 3.4.1. for the historical

development) – that contained a coherent system of legal rules to govern transnational insolvency proceedings, no specific rules dealing with the insolvency of a multinational enterprise group were provided (para. 3.4.2). Such omission was basically due to the fact the EIR necessarily reflects the thinking of a period where groups of companies were not so common in the business practice and the economic and the legal environment has changed radically since then, both concerning the mobility of companies and the objectives of insolvency proceedings. This entails that the jurisdictional criterion of COMI (centre of main interests) applies on an entity-by-entity basis, with the opening of several main proceedings against the different group companies, before the court where the respective COMI is located.

In this regard, it must be stressed that COMI plays a fundamental role in the functioning of the Regulation, because it works at the same time as a criterion of applicability of the Regulation, as a jurisdictional criterion for determining whether a national court is competent to open main insolvency proceedings, and as a connecting factor for determining which law applies to the proceeding opened. Nonetheless, such a concept is not properly defined in the text of the Regulation, but only limited guidance is provided in Recital (13), according to which it «should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties». The CJEU made it clear that is an autonomous concept and must be interpreted in a uniform way, independently of national legislations. Such indication, however, did not avoid that national courts have interpreted the COMI concept in the most diverse ways and have considered different elements for its localization. The omission of a proper definition was not helpful in bringing clarity as to the localization of COMI within the context of group insolvencies. That is why during the recasting process of the EIR the introduction of a regime for group insolvencies was one of the most debated topics (see para. 3.4.3 on the objectives and the main novelties of the New Regulation).

The failure of the Regulation to provide for a clear definition of COMI effectively invited domestic courts to fill in the gaps through the adoption of a centralized approach, which is based on the assumption that the COMI of all companies belonging to the same group is located in the country in which the group's headquarters are located (*head-office functions*). This place is, in fact, considered as the control and managing centre of the group and ensures the coordinated restructuring of the business through a global sale or reorganization (*mind-of-management approach*). A series of decisions in the UK opened the way for such broad interpretation (see in particular the leading case *Daisytek*: para. 3.5.1.1), on the ground of a series of elements

which were meant to show that the principal executive, strategic and administrative decisions in relation to the financial and economic activity of the subsidiaries were taken from the headquarters of the parent company. After the initial criticism by other countries, where the subsidiaries were located and where proceedings opened at the parent's headquarters had to be automatically recognized under the Regulation, this practice also passed the English Channel and reached continental Europe, where courts, particularly in France and Germany, got fully into the spirit of the "head office functions" approach and started to adopt it when the seat of the parent company was located within their territory.

The main of shortcomings of such centralized approach is that that it leaves in the background the condition that the COMI should be ascertainable by third parties, and it may thus affect the expectations of creditors on the law applicable to the insolvency and the destiny of their claims (para. 3.5.1.2). In particular, two main issues have been considered: the first one is that the COMI can hardly be ascertained by third parties without investigating the internal structure of the group; the second one, instead, relates to the fact that creditors' interests are so various and differently weighed that the possibility to have predictable outcomes is substantially reduced.

The development of this pragmatic approach at the national level, with the resulting drawbacks, increased the interest and the need for an intervention of the CJEU. The first occasion was the case *Eurofood* and concerned the insolvency of the group Parmalat. One of the questions referred to the Court related to the location of COMI of the Irish wholly-owned subsidiary *Eurofood IFSC Ltd*, whose main activity was the provision of financing facilities for companies in the Parmalat group. On that occasion, the Court adopted a separate entity approach so that each debtor, irrespective of whether it belongs to a group of companies, constitutes a distinct legal entity and is subject to separate and autonomous insolvency proceedings. The presumption in favor of the registered office may only be rebutted «if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect». This led to the conclusion that «where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation».

The *Eurofood* decision has been widely interpreted as a signal of rejection of the broad interpretation that underlies the head office approach. However, from a careful reading of the decision, it seems that the formalistic approach of the Court did not condemn *per se* the pragmatic approach adopted by national courts, but only excluded that control by a parent company is *per se* relevant and required that factors in addition to the mere exercise of management power over a subsidiary must take into account the "objective and foreseeable by third parties" test in order to rebut the presumption. As a result, a well-balanced procedural consolidation is still a viable solution for strongly integrated group after *Eurofood*, under the condition the place from where the head office functions of the subsidiary are carried out is ascertainable by the creditors. In the aftermath, national courts adopted different approaches, thus raising doubts as to the success of the CJEU in bringing clarity. However, the latter intervened again with the decision in *Interedil*, in which it adopted a pragmatic approach in the sense of «[attaching] greater importance to the place in which the company has its *central administration* as the criterion for jurisdiction». Under the interpretation here advocated, the CJEU acknowledged the head office approach and allowed – in some circumstances – the opening of insolvency proceedings over a subsidiary in the Member State where the parent company has its registered office.

However, the centralization of proceedings in relation to companies belonging to strongly integrated groups may be jeopardized by the opening of local proceedings in the States where the subsidiaries have their registered offices. This is, in fact, used as a tool to protect local creditors and to limit the effects of procedural consolidation and the shortcomings illustrated above (para. 3.5.3). In this sense, the recently approved practice of synthetic secondary – where local creditors are promised that they will not fare worse than if a secondary proceeding had been opened – may prove to be very useful in order to avoid an unnecessary split of the group's estate resulting in the opening of proceedings in different Member States.

Against this background, the New Regulation 2015/848 intervened significantly with a new chapter dedicated to the insolvency of groups of companies (for the definition of group under the Regulation, see para. 3.6.1; see also para. 3.7 for the lack of consideration of groups partially located in third States). The New Regulation falls short of considering the above-illustrated option of the procedural consolidation, which has gained significant success in the first decade of application of the Regulation (see however the reference in Recital (53)), and in fact does not provide for any group COMI or group insolvency plan. However, it intervenes under two

different aspects: from one side, it maintains the atomistic approach previously applicable to insolvency proceedings and provides rules on cooperation and communication between the courts and insolvency representatives in relation to the different members of the same group, in a way parallel to what was proposed for the main and secondary proceedings (para. 3.6.2); from the other side, it introduces a new "group coordination proceedings", to be managed by a single coordinator, which should further facilitate the group restructuring, even though the participation of various administrators is not binding and rests on a voluntary basis (para. 3.6.3). This new proceeding would sit alongside the separate insolvency proceedings opened in respect of individual companies within the group and would allow the coordinator to propose a group coordination plan with a comprehensive set of measures to be adopted within the single proceedings opened against different group members.

The first appraisals of this new proceeding have been critical. In particular, it seems that the introduction of such group coordination proceeding will not make a significant difference in the practice of group insolvencies. However, it is a first response to all the proposals advanced in the literature, which advocated the introduction of a comprehensive regime for the insolvency of groups of companies capable of considering the economic links between affiliated companies. As a first intervention, it must be welcomed and will certainly represent a set of rules on which the European legislator may build upon for next discussions and future amendments to the Regulation (para. 3.6.4).

CHAPTER I
THE REALITY OF GROUPS OF COMPANIES IN THE CONTEMPORARY WORLD

1.1. Legal and Economic Considerations Underlying the Constitution of a Group of Companies

From the perspective of corporate law, companies are traditionally referred to as stand-alone entities, with their assets and liabilities and their economic interests to pursue[1]. It is generally assumed that (*i*) each company has a distinct legal personality, with separate rights, duties, and liabilities, regardless of ownership; (*ii*) the shareholders of each company have limited liability, regardless of who they are, so that they will be liable only for the amount they have intentionally put at risk in the enterprise; (*iii*) the creditors of each company have claims only against that company; and (*iv*) a director of a company must act in the latter's only interests[2]. This approach relies on two closely related fundamental principles: the separate legal personality of each company[3] and the limited liability of corporate shareholders[4].

The traditional approach, however, does not fit well with the economic reality and with the fact that, in the current economy, the conduct of business is increasingly taking place on a global scale. Indeed, both domestically and internationally, companies operate frequently in groups

[1] FERRAN, CHAN HO, *Principles of Corporate Finance Law*, Oxford, OUP, 2014, 26. It is possible to identify five basic characteristics of corporate forms: i) full legal personality; ii) limited liability for owners and managers; iii) shared ownership by investors of capital; iv) delegated management under a board structure; v) transferable shares: HANSMANN, KRAAKMAN, *The End of History for Corporate Law*, in *Georg. L. J.*, 2001, 439-440; and EASTERBROOK, FISCHEL, *The Economic Structure of Corporate Law*, Cambridge, Harvard Univ. Press, 1991, 11.

[2] Consultation document, Company Law Review Steering Group: *Modern Company Law for a Competitive Economy: Completing the Structure*, November 2000, Chapter 10: Company Law and Groups, 178.

[3] The doctrine of corporate personality was firmly upheld by the British House of Lords in the landmark UK company law decision *Salomon v Salomon & Co Ltd* [1896] UKHL 1. Albeit not referring to corporate groups, it is generally held that corporate group structures could not have evolved in UK without such a strong proposition of the principle of separate legal personality: see AUSTIN, *Corporate Groups*, in GRANTHAM, RICKETT (eds.), *Corporate Personality in the 20th Century*, Oxford, Hart Publishing, 1998, 71.

[4] ANTUNES, *Liability of Corporate Groups. Autonomy and Control in Parent-Subsidiary Relationships in U.S., German and EEC Law: An International and Comparative Perspective*, Deventer, Kluwer, 1994, 122 *et seq.*; BLUMBERG, *Limited Liability and Corporate Groups*, in *J. Corp. L.*, 1986, 573 *et seq*. For a recent review of the debate on the application of limited liability in tort claims, see MUCHLINSKI, *Limited liability and multinational enterprises: a case for reform?*, in *Cambr. J. Econ.*, 2010, 915 *et seq.*

structures, with multi-layered enterprises organized in the form of a parent company and dozens or hundreds of subsidiaries[5]. In this respect, limited liability grants protection not only to individual investors in a corporate enterprise but also to each of the corporations in which the enterprise is fragmented[6]. The principle, in fact, originated in a world without corporate groups as a rule for allocation of business risks and costs and was later applied mechanically to subsidiary corporations, with no due regard being given to the primary differences between individual and corporate shareholders[7].

Groups of companies are not a recent phenomenon since, in the modern era, their roots go back to the second half of the nineteenth century when it became possible for a company to be a shareholder in another company. Concerning the United States, for instance, this process is understood to have started in New Jersey in 1889, when its corporation laws were amended to authorize intercorporate stock ownership, *i.e.* to recognize the authority of a company to own shares of another company[8]. This resulted in a turning-point change in corporate structures because before that date purchasing stock of another corporation was considered an improper expansion of the business purpose. Other States followed this evolution and corporations began to conduct their business through other companies and to acquire other corporations as a method of business expansion, leading to complex group structures and today's fragmentation existing among parent and subsidiary companies within the same enterprise[9]. In the UK, conversely, a company was able to purchase shares in another company only if provided in the memorandum of association of the purchasing company. This is why the relevance of corporate groups started to be acknowledged by the judiciary only since the 1920s[10].

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[5] DORRESTEIJN, MONTEIRO, TEICHMANN, WERLAUFF, *European Corporate Law*[2], Alphen aan den Rijn, Wolters Kluwer, 2009, 281; ANTUNES, *The Liability of Polycorporate Enterprises*, in *Conn. L. Rev.*, 1997, 203; HADDEN, *Inside Corporate Groups*, in *Int. J. Soc. L.*, 1984, 271. It is also worth mentioning a study realized by the US Bureau of Economic Analysis, *U.S. Multinational Companies. Operations of U.S. Parents and Their Foreign Affiliates in 2011*, November 2012, revealing that at least 75% of total US trade can be linked to firms organized as multinational groups.

[6] ANKER-SØRENSEN, *Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches*, LSN Research Paper Series No. 14-06, 2014, 3-7. This is a settled issue in the case law of many Member States: for Italy, see recently Italian Court of Cassation., 21 April 2011, n. 9260, in *Fall.*, 2011, 1163; 18 November, 2010, n. 23344, in *Fall.*, 2011, 565; 14 October 2010, n. 21250, in *Vita not.*, 2013, 33.

[7] See ANTUNES, *Liability of Corporate Groups*, cit., 124 *et seq.*, for further references.

[8] BLUMBERG, *The Multinational Challenge to Corporation Law. The Search for a new Corporate Personality*, New York, OUP, 1993, 56 *et seq.* On the nineteenth century debate on the *power of incorporate* stockholding, see TONELLO, *L'abuso della responsabilità limitata nelle società di capitali*, Padova, Cedam, 1999, 67 *et seq.*

[9] LUTTER, *Lo sviluppo del diritto dei gruppi in Europa*, in *Riv. soc.*, 1981, 655.

[10] See HADDEN, *Regulating Corporate Groups: An International Perspective*, in MCCAHERY, PICCIOTTO, SCOTT (eds.), *Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation*, Oxford, OUP, 1993, 343 *et seq.*

Despite the relatively scarce attention for a long time devoted to the nature of groups of companies within corporate law[11], and the fact that much of the legislation only addresses single companies, one could easily witness the presence of groups who carry out their activities through several companies located in different States and subject to the direction and coordination of the parent company[12]. In particular, the term «multinational enterprise»[13] is commonly referred to enterprises comprising two or more companies linked in such a way that they can be regarded as related entities operating in a transnational setting. Such enterprises have complex corporate structures that include a number of subsidiaries based widely around the globe[14] and often their economic power equals and sometimes exceeds that of some national economies[15]. In practice, however, multinational enterprises generally assume the structure of corporate groups[16], which has indeed become the prevailing form of large-sized companies

[11] With some outstanding exceptions: see MUCHLINSKI, *Multinational Enterprises and The Law*, Oxford: Oxford University Press, 2007; DINE, *The Governance of Corporate Groups*, Cambridge, Cambridge University Press, 2000; BLUMBERG, *The Multinational Challenge to Corporation Law*, cit.

[12] See GALGANO, SBISÀ, *Direzione e coordinamento di società*[2], Bologna, Zanichelli, 2014, 13 *et seq.*; BLUMBERG, STRASSER, GEORGAKOPOULOS, GOUVIN, *Blumberg on Corporate Groups*[2], Aspen Publishers, 2005, I-3 (hereinafter, *Blumberg on Corporate Groups*).

[13] This concept has been used for the first time by David E. Lilienthal at a lecture delivered in 1960 at Carnegie Mellon University, which then led to the following publication: see *The Multinational Corporations: a review of some problems and opportunities for business management in a period of world-wide economic change*, New York, Development and Resources Corporation, 1960. The Organisation for Economic Cooperation and Development (OECD) prefers to use the term «multinational» instead of «transnational»: see OECD, *Benchmark Definition of Foreign Direct Investment*[4], Paris, 2008; OECD *Handbook on Economic Globalisation Indicators*, 2005, p. 74 ff. On this issue, see also ABI-SAAB, *The International Law of Multinational Corporations: A Critique of American Legal Doctrines*, in *Annales*, 1971, 97, stressing that the term multinational is obviously a misnomer. According to RIGAUX, *Transnational Corporations*, in BEDJAOUI (ed.), *International Law: Achievements and Prospects*, Dordrecht-Paris, Martinus Nijhoff-Unesco, 1991, 121, the term transnational more correctly refers to a form of autonomy which corporations with establishments scattered over the territories of several States have been able to acquire in their relations with each one of them. More generally, see ALESSI, *La disciplina dei gruppi multinazionali nel sistema societario italiano*, Milano, Giuffrè, 1988, 3 *et seq.*; SACERDOTI, *L'impresa multinazionale come gruppo internazionale di società*, in *Giur. comm.*, 1988, 62; DUNNING, *Multinational Enterprises and the Global Economy*, Boston, Addison-Wesley, 1993, 3 *et seq.*

[14] LÜBKING, *Ein einheitliches Konzernrecht für Europa*, Baden-Baden, Nomos, 2000, 17. BLUMBERG, *The Multinational Challenge to Corporation Law*, cit., 139, observes that multinational groups have complex structures, with three or more tiers of subsidiary companies, under common control and central direction or coordination of the ultimate parent company. Along the same lines, see GALGANO, SBISÀ, *Direzione e coordinamento di società*, cit., 13 *et seq.*; GALGANO, *I gruppi nella riforma delle società di capitali*, in *Contr. impr.*, 2002, 1015.

[15]See also UNCTAD, *World Investment Report 2002*, 90, http://unctad.org/en/Docs/wir2002_en.pdf, holding that the size of the biggest multinational in 2000, *ExxonMobil* was equal (45th place of the ranking) to the size of the economies of Chile or Pakistan in terms of value added. This economic power, of course, also resulted in significant political influence: see for instance CAVANAGH, MANDER, *Alternatives to Economic Globalization: A Better World is Possible*, California: Berrett-Koehler, 2002.

[16] LUTTER, *Organzuständigkeiten im Konzern*, in LUTTER, ULMER (Hrsg.), *Festschrift für Walter Stimpel zum 68. Geburtstag am 29. November 1985*, Berlin, de Gruyter, 1985, 826: «Die Organisationsform des multinationalen Unternehmens ist der Konzern». See also SANTA MARIA, *Diritto commerciale europeo*[3], Milano, Giuffrè, 2008, 457; EROGLU, *Multinational Enterprises and Tort Liabilities*, Cheltenham, Edward Elgar, 2008, 70 *et seq.*;

organizing and conducting their business activity through a network of individual subsidiaries in several States inside and outside Europe[17].

In this regard, it must be noted that groups may choose between two main corporate structures to expand their business activities and to establish a worldwide presence: a subsidiary or a branch[18]. Differences between these two legal forms are well known and regard their legal independence, corporate liability, the directness and intensity of control exerted through the parent company, and regulatory scrutiny imposed by supervising authorities[19]. Contrary to a branch, which does not have legal personality and does not own any particular stock[20], a subsidiary is a legally independent entity which, despite being subject to the direction of the controlling company, is separately capitalized and has its board of directors[21].

However, operating abroad using a branch is not an adequate alternative because it raises almost the same legal problems (for instance tax issues and the application of different legal systems) without offering the same advantages[22]. Indeed, the reasons to create groups structures through subsidiaries are several and relate mainly to tax savings and risk diversification[23].

MAZZONI, *Osservazioni in tema di gruppo transnazionale insolvente*, in *Riv. dir. soc.*, 2007, 2; ACCONCI, *Il collegamento tra Stato e società in materia di investimenti stranieri*, Padova, Cedam, 45; MERCIAI, *Les entreprises multinationales en droit international*, Bruxelles, Bruylant, 1993, 37; SACERDOTI, *L'impresa multinazionale come gruppo internazionale di società*, cit., 66-71; BEHRENS, *Der Durchgriff über die Grenze*, in *RabelsZ*, 1982, 308.

[17] Report of the Reflection Group on the Future of EU Company Law, Brussels, 5 April 2011, 59, http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf. In this sense, see also SCHMITTHOFF, *Introduction*, in SCHMITTHOFF, WOOLDRIDGE (eds.), *Groups of companies*, London, Sweet & Maxwell, 1991: «in modern business life, particularly on the transnational level, the single public limited company has virtually ceased to exist and one encounters only group of companies».

[18] ALESSI, *La disciplina dei gruppi multinazionali nel sistema societario italiano*, cit., 5. With regard to the banking sector, see FIECHTER, ÖTKER-ROBE, ILYINA, HSU, SANTOS, SURTI, *Subsidiaries or Branches: Does One Size Fit All?*, International Monetary Fund, SDN/11/04, 7 March 2011; CERUTTI, DELL'ARICCIA, MARTÍNEZ PERÍA, *How banks go abroad: Branches or subsidiaries?*, in *J. Bank. Fin.*, 2007, 1669 *et seq.*

[19] See HAUSMANN, BECHTOLD, *Corporate Governance of Groups in an Era of Regulatory Nationalism: A Focused Analysis of Financial Services Regulation*, in *Eur. Comp. Fin. L. Rev.*, 2015, 343 *et seq.*

[20] An autonomous definition of branch has been outlined by the CJEU in Case C 33/78, *Somafer SA* [1978] *ECR* 2183, para. 12: «a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension». In this respect, a recent study reveals that, despite the very liberal case law of the Court of Justice on the right of establishment of companies, branching remains costly or impractical in many cases: BECHT, ENRIQUES, KOROM, Centros *and the Cost of Branching*, in *J. Corp. L. Studies*, 2009, 171 *et seq.*

[21] MENJUCQ, *Droit international et européen des sociétés*[3], Montchrestien, Paris, 2011, para. 454.

[22] TEICHMANN, *The downside of being a Letterbox Company*, in *Eur. Comp. L.*, 2012, 180; RINGE, *Corporate Mobility in the European Union – a Flash in the Pan?*, in *Eur. Comp. Fin. L. Rev.*, 2013, 230.

[23] See VERHOEVEN, *Die Konzerninsolvenz*, Köln, Carl Heymanns, 2011, 31-36 (individuating three main categories: organizational, financial, legal); SCHÖN, *Perspektiven der Konzernbesteuerung*, in *ZHR*, 2007, 409 *et seq.*; AUSTIN, *Corporate Groups*, cit., 73-74; BERETTA, *Il controllo dei gruppi aziendali*, Milano, Egea, 1990, 10 *et seq.*; IMMENGA, *Company Systems and Affiliation*, in *Int. Enc. Comp. L.*, 1985, vol. XIII, Ch. 7, 4-6 (also

Integrated groups may also serve to reduce transaction costs as the subsidiary may be used as a supplier of goods or provider of services, thus allowing an internalization of the group activities.

In this regard, various reasons are well summarized in a consultation document by the UK Company Law Review Steering Group:

> «The most obvious company law consideration favoring the use of subsidiaries is the scope to readjust the level of limited liability afforded to the group as a whole. For example, by holding valuable assets, such as group freehold properties, in a non-trading subsidiary and placing higher risk activities in a subsidiary with few assets, a parent reduces risk. However, there is a much wider variety of reasons why businesses choose a group structure, e.g. tax, ability to buy and sell businesses, a managerial organization of segmented or geographically dispersed businesses, a balance of power in collaborative enterprises, or local regulatory or cultural considerations»[24].

More generally, the factors shaping the formation and operation of groups range from legal and economic factors to societal, cultural, institutional and other norms. It may involve *i*) reducing commercial risk, or maximising potential financial return, by diversifying an enterprise's activities into various types of businesses; *ii*) preserving intangible commercial property of existing companies by acquiring the companies themselves to expand an enterprise or increase market power; *iii*) attracting capital without forfeiting overall control; *iv*) lowering the risk of legal liability by confining high liability risks, including environmental and consumer responsibility, to particular group companies; *v*) providing better security for debt or project financing; *vi*) simplifying the process of partial sale of an enterprise; *vii*) complying with various regulatory requirements requires by domestic law; *viii*) benefitting from fiscal advantages, stemming from offsetting profits and losses of one part of a business against another in tax returns[25].

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focusing on the advantages of external growth and the possibility to acquire control with a relatively small investment of capital). For a discussion of the legal factor influencing the growth of multinational enterprises, see MUCHLINSKI, *Multinational Enterprises and The Law*, cit., 33 *et seq.*

[24] *Modern Company Law for a Competitive Economy: Completing the Structure*, cit., 177.

[25] PRENTICE, *A Survey of the Law Relating to Corporate Groups in the United Kingdom*, in WYMEERSCH (ed.), *Groups of Companies in the EEC. A Survey Report to the European Commission on the Law Relating to Corporate Groups in Various Member States*, Berlin-New York, de Gruyter, 1993, 281; UNCITRAL, *Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency*, New York, 2012, 11-14; HARRIS, HARGOVAN, *Corporate Groups: The Intersection between Corporate and Tax Law*, in *Sidney L. Rev.*, 2010, 725-

1.2. The Group Enigma of the Dichotomy between Unity and Plurality

A uniform notion of multinational enterprise is still an unsolved problem for the international law scholarship, which in the attempt of shaping a definition draw attention on various elements such as the decision-making process, the governance structure, economic strategies[26]. The most important and widely recognized feature is undoubtedly the dichotomy existing between unity (of economic entity) and plurality (of legal entities)[27]. This is the very first question that comes up when one is confronted with issues relating to groups of companies[28].

After more than forty-five years since the seminal article of Professor Vagts, who wrote in 1970 that «the present legal framework has no comfortable, tidy receptacle for [a multinational enterprise]»[29], the question remains substantially the same as to whether a multinational enterprise is simply an aggregation of corporations organized under the laws of various States or, conversely, may be in some circumstances treated as having distinct legal characteristics[30].

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726. See also Companies and Securities Advisory Committee, *Corporate Groups Final Report*, May 2000, 3-4, at www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2000/$file/corporate_groups,_may_2000.pdf.

[26] The definition of «multinational enterprises» raises relevant problems and is subject to modification depending on the peculiar aspects taken into account: see FRANCIONI, *Imprese multinationali, protezione diplomatica e responsabilità internazionale*, Milano, Giuffre, 1979, 13. For definitions, see para. 20 of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*: «The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively»; point I.3 of the *OECD Guidelines for Multinational Enterprises*, 2011: «They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another»; *Institut de Droit International*, Oslo 1977 Resolution: «Enterprises which consist of a decision-making centre located in one country and of operating centres, with or without legal personality, situated in one or more other countries should, in law, be considered as multinational enterprises».

[27] WALLACE, *The Multinational Enterprise and Legal Control. Host State Sovereignity in an Era of Economic Globalisation*, The Hague, Martinus Nijhoff, 2002, 101 *et seq*, («a kind of "unity in diversity"», at 156); GRISOLI, *Prefazione*, in GRISOLI (a cura di), *Le imprese multinazionali e l'Europa*, Padova, Cedam, 1978, xxvii; ACCONCI, *Il collegamento tra Stato e società in materia di investimenti stranieri*, cit., fn. 33 at 21 and 45-47. See also EMMERICH, HABERSACK, *Konzernrecht: ein Studienbuch*[10], München, C.H. Beck, 2013, §4 paras. 6-10; BÄLZ, *Einheit und Vielheit im Konzern*, in *Festschrift für Ludwig Raiser*, Tübingen, Mohr Siebeck, 1974, 287; RAISER, *Die Konzernbildung als Gegenstand rechts- und wirtschaftswissenschaftlicher Untersuchung*, in RAISER, SAUERMANN, SCHNEIDER (Hrsg.), *Das Verhältnis der Wirtschaftswissenschaft zur Rechtswissenschaft, Soziologie und Statistik*, Duncker und Humblot, 1964, 51 *et seq.*

[28] SCHILLING, *Entwicklungstendenzen im Konzernrecht*, in *ZHR*, 1976, 530. GALGANO, *I gruppi di società*, Torino, Utet Giuridica, 2001, 8, affirms that this issue evokes religion-related mysteries like the Christian Trinity. By the same Author, see also *Qual è l'oggetto della società holding?*, in *Contr. impr.*, 1986, 327.

[29] VAGTS, *The Multinational Enterprise. A New Challenge for Transnational Law*, in *Harv. L. Rev.*, 1970, 740.

[30] Almost literally, see LOWENFELD, *International Litigation and the Quest for Reasonableness. Essays in Private International Law*, Oxford, Clarendon, 1999, 83 *et seq.*

From an economic perspective, a group of companies consists of a single economic or functional entity that operates to develop the interests of the group as a whole rather than those of its individual members. This economic unity is the result of corporate control and is crystallized in the existence of a unified management exercised as by the parent over its subsidiaries, to ensure the coordination of their business policies and activities through a common business strategy[31]. Albeit being a requirement for the constitution of a group, the concept of unitary management is not defined by national legislators and so its definition has been left to the judiciary and legal scholarship[32]. In this respect, it will be further illustrated that such economic unity would not be possible without corporate control and especially without the special corporate devices allowing for the exercise of such power of control.

On the other side, from a legal point of view, the various group companies are separate entities, each one independent from the other and only responsible for its debts. This is a manifest consequence of the principle of corporate autonomy illustrated in the previous paragraph. Indeed, the thesis according to which the groups may be qualified as a legal entity itself has never found a place in any legal order[33]. Treating the economic unity of the group also as a legal unity, by attributing legal personality to the group, would be nonsense and would represent a denial of all the considerations justifying the constitution of a group of companies. Also in the practice of large enterprises, unitary groups consisting of highly centralized enterprises represent an exception and cannot be taken as a model of entrepreneurial organization. Moreover, the legal systems in which business activities take place through

[31] MUCHLINSKI, *Multinational Enterprises and the Law*, Oxford–New York, 2007, 56 *et seq.* According to BUTTÀ, *Una metodologia per l'approccio economico-aziendale allo studio dei gruppi di imprese*, in PAVONE LA ROSA (a cura di), *I gruppi di società: ricerche per uno studio critico*, Bologna, Mulino, 1982, 61, from an economic point of view, a groups is constituted when «più imprese giuridicamente autonome sono dirette unitariamente per un fine comune ed in modo duraturo dal medesimo soggetto economico, che le controlla direttamente o indirettamente». In this regard, see aalso DAEMS, *The holding company and corporate control*, Leiden-Boston, Springer, 1978, 21 *et seq.* FERRI, *Concetto di controllo e di gruppo*, in *Disciplina giuridica del gruppo di imprese: esperienze e proposte. Atti del convegno di studi svoltosi a Bellagio nei giorni 19-20 giugno 1981*, Milano, Giuffrè, 1982, 72: «comune è la mente direttiva, comune è la fonte finanziaria, unitaria ed unitariamente concepita è l'azione economica e unitario e globale è l'interesse che per loto mezzo si realizza».

[32] See § 18 AktG or Art. 2497 *et seq.* of the Italian Civil Code. Literature is significant on this issue: among many see TOMBARI, *Diritto dei gruppi di imprese*, Milano, Giuffrè, 2011, 23 *et seq.*, and all the authors therein mentioned. However, the approach generally adopted as to the notion of unified management is negative and indirect, as it focuses on the powers that the parent company may exercise within the limits provided by the law of the subsidiary: see HOMMELHOFF, *Die Konzernleitungspflicht*, Köln: Carl Heymanns, 1982, 109 *et seq.*, 418 *et seq.* and 497 *et seq.*

[33] JAEGER, *Le società del gruppo tra unificazione e autonomia*, in BALZARINI, CARCANO, MUCCIARELLI (a cura di), *I Gruppi di società. Atti del Convegno internazionale di studi: Venezia, 16-17-18 novembre 1995*, Milano, Giuffrè, 1996, 1425 *et seq.*

various subsidiaries are different and scattered around the world. In this context, one may see that a profound contradiction emerges between the transnational dimension of corporate groups and the national character of the legal environment within which individual group companies operate[34].

Starting from the assumption of this dichotomy, one may see that groups of companies take different organizational structures resulting in various patterns of allocations of decision-making and governance powers, with no possibility of *a priori* generalization[35]. This results in different degrees of centralization of the group: in particular, it has been noted that the contrast between the legal structure of the group and the means used to conduct the business activity is only potential, because the balance between autonomy and control varies widely from group to group – «being integration a gradable characteristic»[36] – on the basis of a series of factors, such as the economic organization of the group.

1.3. Legal Forms of Multinational Groups: Equity-Based vs. Contract-Based Groups

The understanding of corporate groups changes significantly depending on the different legal orders taken into account. While in many jurisdictions, companies are separate legal entities, but their governance and capital structures may be highly integrated, as in the UK, Germany, and the US; in others, control is held by family structure or a group of related investors, so that there is considerable control exercised between legally separated entities, as with some enterprise business groups in India or Canada[37]. Of course, these differences also result in different economic concepts of the group[38].

Given such complexity, a summary of the main forms of corporate groups in the contemporary world is necessary. Indeed, as group relations exist in a wide variety of forms, it is useful to put down a typology of groups of companies to understand the complex nature of

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[34] Among many see BENEDETTELLI, *«Mercato» comunitario delle regole e riforma del diritto societario italiano*, in *Riv. soc.*, 2003, 716 *et seq.*; ID., *La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato*, in *Riv. soc.*, 1997, 85 *et seq.* For further references see para. 7.

[35] ANTUNES, *Liability of Corporate Groups*, cit., 160-161 and 206-208.

[36] With regard to banking groups, see PENNISI, *Attività di direzione e poteri della capogruppo nei gruppi bancari*, Torino, Giappichelli, 1997, 74 and 80.

[37] SARRA, *Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies*, in *Int. Insolv. Rev.*, 2008, 75 *et seq.* See also HOPT, *Groups of Companies. A Comparative Study on the Economics, Law and Regulation of Corporate Groups*, ECGI Law Working Paper N. 286/2015, 2.

[38] In this respect see KIRCHNER, *Ökonomische Überlungen zum Konzernrecht*, in *ZGR*, 1985, 214 *et seq.*

the conflicting relationship arising within and outside the group[39]. This is of particular importance because legal forms do not necessarily coincide with the business organization of the firm, thus leading to possible mismatches between control and legal structures[40].

In Part III of the UNCITRAL Legislative Guide on Insolvency Law dedicated to the treatment of enterprise groups, it is written that:

> «group structures may be simple or highly complex, involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub-subsidiaries, sub-holding companies, service companies, dormant companies, cross-directorships, equity ownership and so forth. They may also involve other types of entity, such as special purpose entities (SPE), joint ventures, offshore trusts, income trusts and partnerships»[41].

Of course, different structures may also involve various degrees of financial and decision-making autonomy, which in turn is determined by reference to some elements, such as the economic organization of the group, the way the group manages its marketing and the public image of the group[42]. However, despite the degree of centralized control, certain patterns of multinational enterprises may be identified around some factors. In this regard, the OECD offered the following conclusions concerning the influences on the *locus* of decision taking:

> «a foreign subsidiary may be seen as having relatively little autonomy if it belongs to a large multinational group established in many foreign countries; if it manufactures fairly standardised products; if the activities of the members are largely integrated, with important interflows of products between them (this holds true especially for the investment and finance function); if it has been created to serve a market larger than the country in which it is established; or if the parent company holds a large portion of the equity. On the other hand, a subsidiary may be seen as more autonomous if it was acquired to serve mainly the local market; if it belongs to a small group; if it has interchange of products with the rest of the group and is operating in an

[39] WYMEERSCH, *Do We Need a Law on Groups of Companies*, in HOPT, WYMEERSCH (eds.), *Capital Markets and Company Law*, 2003, Oxford, OUP, 573.

[40] This is the starting point of the analysis by MUCHLINSKI, *Multinational Enterprises and The Law*, cit., 45

[41] UNCITRAL, *Legislative Guide on Insolvency Law, Part Three*, cit., 6-7.

[42] *Ivi*, 10.

> activity slightly different from that of other members (the opposite holds true for the marketing function); if an important part of its common shares is held by local investors; and if the whole concern pursues a growth strategy»[43].

The traditional distinction is made between vertical and horizontal structures. The former are characterized by successive layers of parent and controlled subsidiaries which operate in upstream and downstream stages in the production or distribution process, so that the parent company directly controls – by ownership or by exercising purchasing power – the subsidiary, through the control of which may also indirectly control other subsidiaries. In contrast, the latter are characterized by many siblings operating at the same level in an industrial or trading process, and, albeit generally associated with the control of a single industry, may also conduct business in diverse ranges of unrelated fields. However, in order to understand business choices upon which organizational structure are based the focus is generally put on the degree of group integration, and therefore on the distinction between hierarchical and heterarchical groups[44].

1.3.1. Equity-Based Hierarchical Groups

The first form is perhaps the most widely used and consists of a closely controlled group operating abroad through companies linked by shares held by the parent company and its intermediate holding companies. These groups are said to be equity-based because of stock ownership links between its components and are characterized by the exercise of control on the management and operations of the various entities[45]. This allows establishing a hierarchical form of ownership, where the parent company owns the subsidiary wholly or holds the majority of its shares and accordingly controls it by influencing its business affairs. However, situations are usually not clear as groups may evolve into an intricate network of sub-holding companies with multi-tier group structures.

As will be seen in paragraph 4, the ability to control the subsidiary may derive from a variety of situations, sometimes being also sufficient the holding of a small percentage of shares but

[43] OECD, *Structure et organisation des entreprises multinationales*, Paris, 1987, 35.

[44] This classification, recently used by Mevorach and Muchlinski, may already be found in TINDALL, *Multinational Enterprises*, Dobbs Ferry, Oceana, 1975, ch 4; and WALLACE, *Legal Control of the Multinational Enterprise: national regulatory techniques and the prospects for international controls*, The Hague, Martinus Nijhoff, 1983, 13 *et seq.*

[45] MEVORACH, *Insolvency within Multinational Enterprise Groups*, Oxford, OUP, 2009, 16.

with concentrated rights, especially when the ownership of the remaining shares is dispersed. There are indeed some devices and mechanisms potentially allowing the destruction of corporations' closed nature and its autonomy. In this regard, among the different types of inter-corporate control individuated by Prof. Antunes in his seminal work on the liability of corporate group, one may see what he calls mechanisms of a financial nature and organizational nature[46]. The first one refers to devices allowing the concentration of voting rights – such as preference shares, treasury shares, controlling shares, and proxies – and enabling corporations to acquire other corporations' control, even with a minority interest, either directly or indirectly. The second one, instead, refers to rules which may be found at the level of the constitution of the company, in particular in the derogations provided to the one share-one vote rule in the articles of association, or in the nature of the rules governing its functioning, with the majority principle playing an important role for appropriation of corporate power and intercorporate control.

However, group structure and parent-subsidiary relationship are highly influenced by the different legal environment in which the firm has grown, also depending on regional and geographical influences[47]. In this sense, there are sensible differences between the pyramidal groups with closely held parent-subsidiary relationships typical of US and UK multinational enterprises, from one side, and groups characterized by small intra-group cross-shareholdings coupled with strongly coordinated managements like the Japanese *keiretsu*, from the other side[48].

1.3.2. Decentralized and Heterarchical Groups: Entities Linked by Contract

Groups of companies exist also beyond the hierarchical structure just illustrated and based upon the control and strategic influence on the subsidiary's activities. It is in fact held that groups may prefer to operate in more decentralized structures, through different degrees of

[46] ANTUNES, *Liability of Corporate Groups*, cit., 116 *et seq.*

[47] See MUCHLINSKI, *Multinational Enterprises and The Law*, cit., 56 *et seq.*, who also make the examples of "European Transnational Mergers", a corporate structure which represent a border between groups heads by one parent and joint ventures between independent companies. For factors influencing the choice, see SCHMITTHOF, *The Multinational Enterprise in the United Kingdom*, in HAHLO, GRAHAM SMITH, WRIGHT (eds.), *Nationalism and the Multinational Enterprise: Legal, Economic and Managerial Aspects*, Sijthoff, Oceana, 1973, 32-33.

[48] On this Japanese group structure, among many, see MCGUIRE, S. DOW, *Japanese keiretsu: Past, present, future*, in *Asia Pacific Journal of Management*, 2009, 333 *et seq.*; CALANDER, *Strategic Capitalism: Private Business and Public Purpose in Japanese Industrial Finance*, Princeton, Princeton University Press, 2003; RAMSEYER, *Cross-shareholding in the Japanese Keiretsu*, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series, Paper 244, 1998.

business coordination. In this group structure, companies tend to be less controlled and more autonomous, thus resulting in an overcoming of the traditional parent-subsidiary relationships[49]. This may also lead to contractual forms of multinational groups, where ownership is of no relevance and entities are connected only via contractual relationships. It is a fact that enterprises cooperate in the market through a variety of ties affecting their original economic independence and self-determination, such as supply contracts and credit and loan contracts, which may enable a company to exert a factual control or a decisive influence over another or to be so linked to coordinate their operations[50].

In other words, the relationship of control may derive from the conclusion of contracts which creates a degree of business integration within the legal forms used by multinational enterprises[51]. In particular, these contractual linkages are based on distribution and production agreements[52].

1.4. The Notion of Group of Companies and the Concept of Control

Groups of companies cover different forms of economic organization which may be defined as two or more legal entities linked together by some control or ownership[53]. Indeed, from the preceding, it emerges that "corporate group" is an umbrella concept that covers a large number of different corporate forms using different corporate combinations, including both equity and non-equity-based groups. Therefore, it is necessary to understand what constitutes a group of companies from a legal point of view and so to figure out by which criteria two or more legally independent companies may be considered as entities belonging to a group for the purpose of the application of some legal provisions[54].

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[49] MEVORACH, *Insolvency within Multinational Enterprise Groups*, cit., 20.

[50] ANTUNES, *Liability of Corporate Groups*, cit., 120. The list is long and includes also other agreements, such as technology transfer contracts, franchising, etc.

[51] In this regard, Teubner speaks of "network organisations": see TEUBNER, *The Many-Headed Hydra: Networks as Higher-Order Collective Actors*, in MCCAHERY, PICCIOTTO, SCOTT (eds.), *Corporate Control and Accountability*, cit., 41 *et seq.*; ID., Unitas Multiplex: *Corporate Governance in Group Enterprises*, in SUGARMAN, TEUBNER (eds.), *Regulating Corporate Groups in Europe*, Baden-Baden, Nomos, 1990, 67 *et seq.*

[52] MUCHLINSKI, *Multinational Enterprises and The Law*, cit., 52 *et seq.*

[53] Interestingly, a commonly shared definition is missing also in the economic literature: ALTOMONTE, RUNGI, *Business Groups as Hierarchies of Firms Determinants of Vertical Integration and Performance*, ECB Working Paper Series No 1554, 2013, 9 *et seq.*

[54] For a general overview of the issue from a EU perspective, see FORUM EUROPAEUM SUL DIRITTO DEI GRUPPI DI SOCIETÀ, *Un diritto dei gruppi di società per l'Europa*, in *Riv. soc.*, 2001, 362 *et seq.*; A. ADINOLFI, *The Legal Notion of the Group Enterprise: The EC Approach*, in SUGARMAN, TEUBNER (eds.), *Regulating Corporate Groups*

The definition of groups may present some problems because national legislations generally lack a coherent body of rules directly governing group relationships. This is also reflected in the absence of consistent definitions of groups in domestic legal systems. Indeed, it is more likely to have specific provisions in legislations on taxation, corporate, accounting, competition, mergers and other issues, with different tests applying to the different fields[55]. The evident consequence is that, despite some common elements, the concepts used may be narrower or broader depending on the purpose of the legislation in the specific area covered[56]. In other words, the lack of uniformity in the definitional criteria makes it not automatic that links between companies which are sufficient to constitute a group in a determined field deploy the same effects also in other areas[57].

In a comparative perspective, the definition of a group has been mainly construed on the basis of the concept of control[58], considered as the key connection between group members, with other concepts such as "unified management" being used by some Member States but offering less legal certainty[59]. It is also worth stressing that also the *Forum Europaeum* proposal that will be illustrated in the following paragraphs relates to mere control and disregards unified management as irrelevant[60].

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in Europe, cit., 495; WOOLDRIDGE, *The Definition of a Group of Companies in European Law*, in *J. Bus. L.*, 1982, 272-280. In the sense that the reference to a notion of group is useless and inappropriate, see OPPETIT, SAYAG, *Méthodologie d'un droit des groupes de sociétés*, in *Rev. sociétés*, 1973, 577.

[55] UNCITRAL, *Legislative Guide on Insolvency Law*, New York, 2005, 14. Using the words of GAUTHIER, *Les dirigeants et les groupes de sociétés*, Paris, Litec, 2000, 9: «la notion de groupe de sociétés est un prisme qui reflète une image différente selon la facette du droit qui est observée».

[56] On the relationship between the notions of control used in different fields, see LAMANDINI, *Il «controllo». Nozioni e «tipo» nella legislazione economica*, Milano, Giuffrè, 1995, 51 *et seq.*; NOTARI, *La nozione di controllo nella disciplina antitrust*, Milano, Giuffrè, 1996; RONDINONE, *I gruppi di imprese fra diritto comune e diritto speciale*, Milano, Giuffrè, 1999, 96 *et seq.* and 475 *et seq.*

[57] ANTUNES, *Liability of Corporate Groups*, cit., 148; SACERDOTI, *L'impresa multinazionale come gruppo internazionale di società*, cit., 68. With regard to the French legal order, see PARIENTE, *Evolution of the Concept of "Corporate Group" in France*, in *Eur. Comp. Fin. L. Rev.*, 2007, 320.

[58] The importance of corporate control is undisputed: defined «vital link» by BLUMBERG, *The Law of Corporate Groups*, II, 14; and «substantial link» by WALLACE, *Legal Control of the Multinational Enterprise*, cit., 15.

[59] MAGNUS, *Les groupes de sociétés et la protection des intérêts catégoriels. Aspects juridiques*, Bruxelles, Larcier, 2011, 32 *et seq.*; BLAUROCK, *Bemerkungen zu einem europäischen Recht der Unternehmensgruppe*, in BERGER *et al.*, *Festschrift für Otto Sandrock zum 70. Geburtstag*, Heidelberg, R & W, 2000, 81-82. In support of this last criterion, see ROSSI, *Il fenomeno dei gruppi ed il diritto societario: un nodo da risolvere*, in BALZARINI, CARCANO, MUCCIARELLI (a cura di), *I Gruppi di società*, cit., 24 *et seq.*; BEER, *La place de la notion de contrôle en droit des sociétés*, in *Mélanges en l'honneur de Daniel Bastian*, Librairies tech., 1974, 1 *et seq.* For a recent summary of the discussion in the Italian legal doctrine before the 2003 Company Law reform concerning whether control is necessary and sufficient to constitute a group, see RONDINONE, *Società (gruppi di)*, in *Digesto disc. priv., Sez. comm.*, Aggiornamento V, Torino, Utet Giuridica, 2009, 604-607.

[60] *Corporate Group Law for Europe*, Forum Europaeum Corporate Group Law, in *Eur. Bus. Org. Rev.*, 2000, 165 *et seq.* In this sense, see also CONAC, *The Chapter on Groups of Companies of the European Model Company Act (EMCA)*, in *Eur. Comp. Fin. L. Rev.*, 2016, 306.

In the field of corporate law, the term control may be used in two senses: as a power of supervisions over corporate behavior, thus referring to the control exercised by shareholders and auditors over the management or the financial status of the corporation; or, differently, as a power of domination, in particular over the governance and the direction of corporate affairs. The second meaning is the one that matters in this analysis: despite the extreme heterogeneity of such phenomenon, the focus must be put on the strategic position within the corporate organization and in particular within the decision-making system. In this sense, the control criterion usually refers to the majority of the shareholders' or members' voting rights in another undertaking allowing for dominant influence on the board appointment process and current business operation[61]. Other elements may be added and are actually taken into account not only in national legislations but also in European pieces of legislation directly or indirectly addressing groups of companies: for instance, in the most important piece of EU Law concerning groups of companies – *i.e.* the Consolidated Account Directive, whose latest version is Directive 2013/34/EU of 26 June 2013[62] – these other criteria are taken into account in order to ascertain the existence of the determined degree of connection among enterprises: (b) the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking, being at the same time a shareholder in or member of that undertaking; (c) the right to exercise a dominant influence over an undertaking (of which it is a shareholder or member), pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association; (d) under specific circumstances, (*i*) the majority of the members of the administrative, management or supervisory bodies of the subsidiary have been appointed solely as a result of the exercise of its voting rights or (*ii*) the control alone of a majority of shareholders' or members' voting rights in that undertaking[63].

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[61] GRUNDMANN, *European Company Law: Organization, Finance and Capital Markets*[2], Cambridge, Intersentia, 2011, 768.

[62] OJ L 182, 29.6.2013, 19-76. NIESSEN, *The Seventh Directive on consolidated accounts and company law harmonization in the European Community*, in GRAY, COENENBERG, GORDON (eds.), *International Group Accounting*[2], London-New York, Routledge, 1993, 7: «The most fascinating topic of the Seventh Directive, and also the most controversial, is certainly the definition of a group. Surprisingly, this term is not even used in the Directive. Instead you will find a cumbersome definition of the phenomenon».

[63] On such definition see SØGAARD, *Introduction of a Group Definition in the New Accounting Directive: The Impact on Future Accounting Regulation*, in *Eur. Comp. L.*, 2014, 232 *et seq.* The concept of control of the new directive has to be understood with reference to the former International Accounting Standard 27 [2008] OJ L 320/156, as amended by Commission Regulation (EU) 2015/2441 of 18 December 2015 amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Accounting Standard 27 [2015] OJ L 336/49.

The core element of control is the potential situation of exercising a decisive influence, characterized by the ability to manage the business of the companies belonging to the group, without the necessity of active and actual exercise of these management powers[64]. What matters is not the legal form of the relationship, but its substance. This concept is also paramount in national legislations, as a comparative survey easily shows[65]: this is indeed the case of Belgium[66], UK[67], France[68], Italy[69], and Spain[70]. However, there are countries adopting a more analytical approach to the definitional issue of groups of companies, with reference both to economic criteria or strictly legal ones: the first case relates to Germany and the definition of *Konzern* contained in § 18 of Aktiengesetz (German Stock Corporation Act, hereinafter AktG), which is mainly based on the economic unity of the group and focuses on its unitary direction[71]; an example of the second case, instead, is provided in the Portuguese *Código das Sociedades Comerciais*, whose Article 482 identifies four legal types of inter-company affiliation and,

[64] See STORCK, *Définition légale du contrôle d'une société en droit français*, in *Rev. sociétés*, 1986, 394-395, in the sense that control is «une forme d'exercice direct, indirect, virtuel ou effectif du pouvoir majoritaire sur la tête d'une seule et même personne».

[65] In this regard, in a comparative perspective, see ANDENAS, WOOLDRIDGE, *European Comparative Company Law*, Cambridge, Cambridge University Press, 2012, 470 *et seq.*; IMMENGA, *Company Systems and Affiliation*, cit., 36-41; VAN OMMESLAGHE, *Les groupes de sociétés*, in *Rev. prat. sociétés*, 1965, n. 5280, 226 *et seq.*

[66] Art. 6 of *Code des sociétés*. See FYON, MAGNUS, *Les traitement des groupes par le Code des sociétés*, in DE CORDT, ANDRE-DUMONT (eds.), *Droit des sociétés – Millésime 2011*, Bruxelles, Larcier, 2011, 361 *et seq.*

[67] See §§ 1159 and 1162 of the UK Companies Act 2006. This definition seems to cover most conventional holding company/subsidiary relationships. However, the Supreme Court unanimously agreed that the effect of a parent company granting security over shares in a subsidiary where legal title to the shares is transferred to the security holder, is that it is no longer a subsidiary of the parent for the purposes of the Companies Act 1985: see *Farstad Supply A/S v Enviroco Ltd* [2011] UKSC 16. In the literature, see PRENTICE, *The Law of Corporate Groups in Great Britain*, in BALZARINI, CARCANO, MUCCIARELLI (a cura di), *I Gruppi di società*, cit., 279-283; ID., *Groups of Companies: The English Experience*, in HOPT (ed.), *Groups of Companies in European Laws. Legal and Economic Analyses on Multinational Enterprises*, vol. II, Berlin-New York, de Gruyter, 1982, 99-100.

[68] Article L 233-3 of the *Code de commerce*. See DESJARDINS, CARLE, DELOGU BONAN, *Report from France*, in *Eur. Comp. L.*, 2007, 230 *et seq.* With regard to the notions used before the 1985 reform, see the criticism by PARIENTE, *Les groupes de sociétés et la loi de 1966*, in *Rev. sociétés*, 1996, 469.

[69] See notably G.F. CAMPOBASSO, *Diritto commerciale, 2. Diritto delle società*[9], Milano, Utet Giuridica, 2015, 286-289; FASCIANI, *Groups of Companies: The Italian Approach*, in *Eur. Comp. Fin. L. Rev.*, 2007, 195 *et seq.* and the authors mentioned at fn. 56. The static dimension of "control" has to be distinguished from the "attivita di direzione e coordinamento": LA ROSA, *Nuovi profili della disciplina dei gruppi societari*, in *Riv. soc.*, 2003, 773.

[70] A group definition is contained in Art. 42 of the Código Mercantil, as amended by Law 16/2007 of 4 July by deleting the concept of "unity of decision" and building the definition upon the concept of "control": see BARONA, CONCHA, *Report from Spain*, in *Eur. Comp. L.*, 2007, 238 *et seq.* Before the reform, see GIRGADO, *Legislative Situation of Corporate Groups in Spanish Law*, in *Eur. Comp. Fin. L. Rev.*, 2006, 365 *et seq.* However, a recent proposal presented in 2013 to reform the Código Mercantil opted for a broad notion of groups, based on the existence of "poder de dirección unitario", which is only presumed *iuris tantum* in case of control: see Arts. 291-1 to 291-3 at http://nuevocodigomercantil.es/pdf/Propuesta_codigo_mercantil.pdf

[71] This is the third criterion used by the German Group Law, after the rules concerning "verbundene Unternehmenn" (§ 16 AktG) and "Abhängige Unternehmen" (§ 17 AktG). See DESOUTTER, *La responsabilité civile de la société mère vis-à-vis de sa filiale*, Frankfurt am Main: Peter Lang, 2012, 167 *et seq.* By the same token see Art. 24b, Book II of the Dutch *Burgerlijk Wetboek* (Civil Code).

concerning the notion of groups, provides for different types of specific mechanisms which can give rise to it[72].

In sum, national divergences make it evident that it would be advantageous to adopt a functional test, broadly intended, which focuses on the capacity to control or to coordinate the business. That would certainly enhance legal certainty and predictability, at the same time allowing to take into account the dynamic nature of groups of companies and to facilitate the solutions to group-associated problems.

1.5. Forms and Structures of Groups in National Laws: The Example of Germany

Groups of companies are the centre of very specific and particular juridical problems, the background of which is that group structures create multiple limited liabilities for the shareholders of the parent company[73]. Typical company law-related issues raised by group structures include protection of minority shareholders and external creditors, intragroup transactions, conflicts of interest, disclosure of group relations and annual accounts[74].

However, one may see that there are at least two different approaches to groups of companies at the national level[75]. Under a first school of thought, followed by most national legal orders, traditional contract and company laws prove overall to be sufficient to regulate the phenomena occurring in the context of groups of companies.[76] This occurs for instance concerning the standards for the liability of directors and controlling shareholders for decisions that affect

[72] They are contract of subordination, contract of horizontal group, total domination. For an in-depth analysis, see ANTUNES, *The Law of Corporate Groups in Portugal*, ILF Working Paper n. 84, 2008, 26-32.

[73] GUYON, *Examen critique des projets européens en matière de groupes de sociétés (le point du vue français)*, in HOPT (ed.), *Groups of Companies in European Laws*, cit., 155. This is easily proved by the hundreds of articles published on this subject: see for instance WYMEERSCH, KRUITHOF, *The Law of Groups of Companies: An International Bibliography*, Antwerpen, Kluwer, 1991.

[74] DORRESTEIJN, MONTEIRO, TEICHMANN, WERLAUFF, *European Corporate Law*, cit., 284. LUTTER, *The Laws of Groups of Companies in Europe: a Challenge for Jurisprudence*, Daventer, Kluwer, 1983, 9: «A group of companies gives rise to the same questions as any single company, without being a company itself: a group of companies is founded, it must be financed, it must be managed and supervised, it has to resolve internal conflicts of interests between its members, it has to render account and it finally has to be dissolved».

[75] These two approaches are described, in general terms, by RONDINONE, *Società (gruppi di)*, cit., 594-595. In the European Model Company Act (EMCA), Chapter 16, Groups of Companies, four major approaches are identified: comprehensive regulation (Germany), partial regulation (Italy), a case law recognition of the interest of the group (France) and lack of treatment (United Kingdom). VAN OMMESLAGHE, in *Colloque international sur le droit international privé des groupes des sociétés*, Genève, Georg, 1973, 58: «il n'y a pas de pays qui ignore le Konzernrecht, il y a seulement des pays qui ne l'ont pas spécialement règlementé».

[76] HOPT, *Legal Elements and Policy Decisions in Regulating Groups of Companies*, in SCHMITTHOFF, WOOLDRIDGE (eds.), *Groups of companies*, cit., 85.

minority shareholders or creditors. Accordingly, the protection of the subsidiary is entrusted to the common company law provisions applying to separate companies but complemented by *gruppenspecifisch* provisions or interpretations by the judiciary[77]. This is, for instance, the case of the UK, where there is no group law and agency problems of minority shareholders and creditors are solved using the same tools provided for independent companies[78].

According to a different regulatory model, whose prototype is represented by the German law on groups[79], the latter require specific rules derogating and integrating common company law provisions under two main regulatory profiles: *a*) the legitimization of the pursuit of the group interest at the expense of the individual subsidiaries and the facilitation of the group management; *b*) the strengthening of protection of subsidiaries' interests, in particular of their shareholders and creditors[80]. The emphasis of this paragraph will be in the second model because it helps to have a better understanding of the legal issues raised by groups of companies.

1.5.1. Objectives and Scope of Application of German *Konzernrecht*

The German model of *Konzernrecht* and is based on the underlying idea that conflicts of interests can only be neutralized by means of special provisions governing group relations. As

[77] GRUNDMANN, *European Company Law*, cit., 757-758; URBAIN-PARLEANI, *Regards croisés français et allemands sur le droit applicable aux groups des sociétés*, in MENJUCQ, FAGES (dir.), *Actualité et évolutions comparées du droit allemand et français des sociétés*, Paris, Dalloz, 2010, 92. Concerning Italy, for instance, groups of companies were almost ignored by the legislator in 1942, when the current Civil Code was enacted. Before the 2003 Company Law reform which introduced a new liability regime of the holding company as its directors towards the subsidiary's shareholders and creditors, only few special laws addressed groups of companies, such as Law No. 95/1979 (now Decree No. 270/1999) (extraordinary administration of large insolvent companies); Law No. 416/81 (Publishing industry); Law No. 223/90 (Television broadcasting activities); Law No. 20/91 (Insurance firms); Legislative Decree No. 385/93 (Consolidated Banking Law); Legislative Decree No. 58/98 (Consolidated Finance Act). In France, after the 1966 reform of Company Law, there was a lively debate on the opportunity to introduce a set of rules addressing groups of companies and a proposal «sur les groups de sociétés et la protection des actionnaires, du personnel et des tiers» (known as "proposition de loi Cousté") was brought forward in 1970: see Law Proposals No 1055 of 9 April 1970 and No 52 of 12 April 1973. However, it has never been adopted: see HOUIN, *Les groupes de sociétés en droit français*, in HOPT (ed.), *Groups of Companies in European* Laws, cit., 56-57.

[78] See PRENTICE, *Groups of companies: The English Experience*, cit., 99 *et seq.* and more recently GOWER, DAVIES, *Principles of Modern Company Law*[9], London, Sweet & Maxwell, 2012, 687 *et seq*. For instance, concerning protection of creditors, a major role is played by the insolvency law-concept of "wrongful trading" (Sec. 214 of the UK Insolvency Act 1986): see HANNIGAN, *Company Law*[4], Oxford, OUP, 2016, 354-360.

[79] The essence of German approach is well described by a famous dictum of WIEDEMANN, *Die Unternehmensgruppe im Privatrecht*, Tübingen, Mohr Siebeck, 1988, 9: «Im Konzern ist alles anders» and «jede Rechtsregel ist auf ihre Anpassungsnotwendigkeit an den Tatbestand der Unternhmensgruppe zu prüfen».

[80] On the objectives of group law, see HOPT, *Groups of Companies. A Comparative Study on the Economics, Law and Regulation of Corporate Groups*, cit., 3. In paragraph 6, it will be illustrated that the protection of minority shareholders and creditors has been the core of group law discussion at the EU level.

is known, Germany is generally understood as the European country having introduced the first and most sophisticated regulation on the law of groups, a systematically ordered body of rules governing the relationships between enterprises affiliated with the group[81]. It is embodied in the Book III of the 1965 AktG[82], which, in the attempt of establishing a legal framework to determine what constitutes a group and how it may function, contains rules aimed at safeguarding the interests of the dependent companies and in particular those of their minority shareholders and external creditors[83]. The latter are in fact the first persons possibly affected by the existence of conflicts within the group, considering the risks run by the dependent company not to be managed in its best interest[84].

The German legislator concentrated upon this set of problems from the classical perspective of corporate law and following a typical protective and abuse-oriented approach. It is for that reasons that it is said that the point of view of German *Konzernrecht* is «from below to above»[85],

[81] That is why Germany is also known as "das Konzernland". DEARBORN, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, in *California L. Rev.*, 2009, 215 refers to Germany as the "Standard-Setter". As remembered by HOPT, *Europäisches Konzernrecht*, in *EuZW*, 1999, 577 *et seq.*, this approach at a later time influenced other Member States: Portugal (1986): ANTUNES, *The Law of Corporate Groups in Portugal*, cit.; GAUSE, *Europaisches Konzernrecht im Vergleich*, Berlin: Berlin-Verl. Spitz, 2000, 88 *et seq.*; PINTO RIBEIRO, *Die verbundenen Gesellschaften im neuen portugiesischen Handelsgesellschaftsgesetzbuch*, in MESTMÄCKER, BEHRENS, *Das Gesellschaftsrecht der Konzerne im internationalen Vergleich*, Baden-Baden: Nomos-Verl.-Ges., 1991, 203 *et seq.*; Hungary (1988): BAUMANN, *Das Konzernrecht Ungarns nach dem Inkrafttreten des Gesetzes Nr. IV aus dem Jahr 2006, über die Wirtschaftsgesellschaften*, Frankfurt am Main-Berlin-Bern-Wien: Peter Lang, 2011; SÁNDOR, SÁRKÖZY, *Regulatory Approaches to groups of companies in Hungary*, in *Eur. Bus. Org. Rev.*, 20014, 263; Croatia (1993): OBRADOVIC, *Haftungsrisiken für (ausländische) Muttergesellschaften in Konzernstrukturen nach kroatischem Recht*, in WINNER (hrsg.), *Haftungsrisiken für die Konzernmutter in Mittel- und Osteuropa*, Baden-Baden: Nomos, 2013, 127 *et seq.*; PETROVIĆ, *The Legal Regulation of Company Groups in Croatia*, in *Eur. Bus. Org. Rev.*, 2001, 281; Slovenia (1993): BRUS, *Das slowenische Konzernrecht in seiner Herkunft aus dem deutschen Recht der verbundenen Unternehmen*, Berlin: Berlin-Verl. Spitz, 1999; Albania (2008): WINNER, *Haftungsrisiken für Gesellschafter albanischer Gesellschaften*, in WINNER (hrsg.), *Haftungsrisiken für die Konzernmutter in Mittel- und Osteuropa*, cit., 9 *et seq.*; Czech Republic (1991-2012): HAŠKOVCOVÁ, *Report from the Czech Republic*, in *Eur. Comp. L.*, 2013, 93. For other comparative references, see ANKER-SØRENSEN, *Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches*, cit., 10 *et seq.*

[82] For an overview of the historical evolution in Germany, see EMMERICH, HABERSACK, *Konzernrecht: ein Studienbuch*, cit., §1 para 5 *et seq.*; WOOLDRIDGE, *Connected Undertakings and Groups of Undertakings under German Law*, in *Anglo-Am. L. Rev.*, 1995, 57-61

[83] See HOMMELHOFF, *Protection of Minority Shareholders, Investors and Creditors in Corporate Groups: the Strengths and Weaknesses of German Corporate Group* Law, in *Eur. Bus. Org. Rev.*, 2001, 62.

[84] Generally, in corporate law, three main agency problems are recognized: conflicts between managers and shareholders, conflicts among shareholders, and conflicts between the shareholders as a group and other stakeholders, in particular the creditors of the company: see ARMOUR, HANSMANN, KRAAKMAN, *Agency Problems and Legal Strategies*, in KRAAKMAN *et al.* (eds.), *The Anatomy of Corporate Law, A Comparative and Functional Approach*[2], Oxford, OUP, 2009, 35 *et seq.* With regard to groups of companies, see BIN, *Il conflitto di interesse nei gruppi di società*, in *Contr. impr.*, 1993, 880 *et seq.*; BONELLI, *Conflitto di interessi nei gruppi di società»*, in *Giur. comm.*, 1992, 219 *et seq.*; SCHIANO DI PEPE, *Il gruppo di imprese*, Milano, Giuffrè, 1990, 87 *et seq.*

[85] WIEDEMANN, *The German Experience with the Law of Affiliated Enterprises*, in HOPT (ed.), *Groups of Companies in European Laws*, cit., 22, highlights how this perspective «is fundamental for understanding the law

as it concentrates on the interests of the controlled companies and does not pay sufficient attention to the dominating companies[86]. However, it is held that it also deals with more structural aspects that, for instance, provide the controlling shareholders with management powers far beyond what is generally possible under the ordinary AktG provisions[87].

The relevant statute only governs one sector of affiliated enterprises, *i.e.* stock corporations (*Aktiengesellschaft*) and associations limited by shares (*Kommanditgesellschaft auf Aktien*), and does not regulate other forms of business associations, such as limited liability companies (*Gesellschaft mit beschränkter Haftung*, GmbH)[88]. Accordingly, it ignores the most prevalent type of corporate groups in Germany, namely GmbH groups[89]. The German judiciary intervened in this regard in the late 1970s and developed a separate legal doctrine applicable to the so-called "qualified de facto concern" (*qualifizierter faktischer Konzern*) which usually involves a GmbH subsidiary in place of the controlled AG[90], but as will be seen, this case law

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on affiliated enterprises and the interpretation of the legislative provisions and influences even the interpretation of individual sections of the Stock Corporation Law». The opposite «from above to below» approach (defined by Antunes as "Top-Down") views the corporate group under the lens of the group's unitary direction and business activities and finds place in other legal orders, such as the United States: see BAUTZ BONANNO, *The Protection of Minority Shareholders in a* Konzern *Under German and United States Law*, in *Harv. Int. L. J.*, 1977, 163 *et seq.*; EISENBERG, *Megasubsidiaries: The Effect of Corporate Structure on Corporate Control*, in *Harv. L. Rev.*, 1971, 1577 *et seq.* In this last sense, see also the recent approach adopted in Commission's Action Plan 2012 and the last EMCA's version: see CONAC, *The Chapter on Groups of Companies of the European Model Company Act (EMCA)*, cit., 301 *et seq.*; TOMBARI, *La tutela dei soci nel gruppo di società*, in *La riforma del diritto societario dieci anni dopo: per i quarant'anni di Giurisprudenza commerciale*, Milano, Giuffrè, 2015, 238-240 and 243-244.

[86] This is the traditional view according to EMMERICH, *AktG § 15 Verbundene Unternehmen*, in EMMERICH, HABERSACK, *Aktien- und GmbH-Konzernrecht*[8], C.H. Beck, München, 2016, para. 6 *et seq.*; ALTMEPPEN, *Die historische Grundlagen des Konzernrecht*, in BAYER, HABERSACK (Hrsg.), *Aktienrecht im Wandel*, Vol. 2, Tübingen, Mohr Siebeck, 2007, 1027 *et seq.*; ANTUNES, *The Law of Corporate Groups in Portugal*, cit., 6-8.

[87] This is stressed by SCHEUCH, Konzernrecht*: An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues*, in *Eur. Comp. L.*, 2016, 191.

[88] This is justified by the fact that public companies are best suited for external growth and their shares can be marketed broadly to a dispersed ownership. In a different context, in this sense see PAVONE LA ROSA, *Osservazioni sulla proposta di nona direttiva sui gruppi di società*, in *Giur. comm.*, 1986, 833 *et seq.*

[89] On the group affinity of GmbH and on their use as subsidiaries, see WICKE, *GmbHG*[3], München, C.H. Beck, 2016, Anh. § 13, para. 1; LIEBSCHER, *§ 13 Anhang Die GmbH als Konzernbaustein (GmbH-Konzernrecht)*, in *Münchener Kommentar zum GmbHG*[2], vol. 1, München, C.H. Beck, 2015, para. 5 *et seq.*; FLEISCHER, *Einleitung*, in *Münchener Kommentar zum GmbHG*[2], cit., paras. 47 and 142; ZÖLLNER, BEURSKENS, *Schlussanhang Die GmbH im Unternehmensverbund (GmbH-Konzernrecht)*, in BAUMBACH, HUECK, *GmbHG*[20], München, C.H. Beck, 2013, para. 2; HOMMELHOFF, *Förder- und Schutzrecht für den faktischen GmbH-Konzern*, in *ZGR*, 2012, 535; ID., *Gesellschaftsformen als Organisationselemente im Konzernaufbau*, in MESTMÄCKER, BEHRENS (Hrsg.), *Das Gesellschaftsrecht der Konzerne im internationalen Vergleich*, Baden Baden, Nomos, 1991, 126 *et seq.*; EMMERICH, *Anhang § 13: GmbH-Konzernrecht*, in SCHOLZ (Hrsg.), *Kommentar zum GmbH-Gesetz*[11], vol. 1, Köln, Otto Schmidt, 2012, para. 1. Two reform proposals were presented in 1971 and 1973 with the aim to reform the regulation of limited liability companies and to introduce provisions on affiliated enterprises, but they were later abandoned and the part on dependent company was set aside from the 1980 reform of GmbH.

[90] BGH, 5 February 1979, II ZR 210/76, *Gervais*, in *NJW*, 1980, 231; 16 September 1985, II ZR 275/84, *Autokran*, in *NJW*, 1986, 188; 20 February 1989, II ZR 167/88, *Tiefbau*, in *NJW*, 1989, 1800; 23 September 1991, II ZR 135/90, *Video*, in *NJW*, 1991, 3142.

was ultimately revised with few decisions that marked a significant step back for German Law on corporate groups[91].

The regulation of groups of companies consists of a considerable number of AktG provisions. However, two major blocks may be identified: this first one, §§ 15 to 22, is contained in the part of AktG dedicated to *Allgemeine Vorschriften* and provides for a general definition of different forms of enterprise affiliation, which are formulated in broad terms and therefore apply to all companies regardless of their legal form. In this regard, the central concepts are those of dependency and group dependency. According to § 15, associated or connected enterprises are defined as legally separate enterprises that with respect to each other are subsidiary and parent enterprise (§ 16, when an enterprise holds directly or indirectly the majority of the shares or is entitled to the majority of voting rights in another enterprise), controlled or controlling enterprises (§ 17, when an enterprise can exert, directly or indirectly, a controlling influence over another) [92], members of a group (§ 18, when a controlling enterprise and one or more controlled enterprises are subject to the common direction of the former)[93], enterprises with cross-shareholdings (§ 19, when each enterprise holds more than one-fourth of the shares of the other), or parties to an enterprise agreement (§§ 291-292). The second block, instead, contains the substantive regulation of groups of companies and provides for the first body of codified law adopted in this field in Europe.

1.5.2. Group Structures in the German *Aktiengesetz*: Contractual vs *de facto* Groups

Under the German *Konzernrecht* of 1965, there is a paramount distinction between contractual and factual groups[94]. For both categories, a set of harmonized principles on

[91] See *infra* para. 5.2.3.

[92] The concept of dependence (*Abhangigkeit*), as defined in § 17, is fundamental. Indeed, the most influential legal image of groups is that of "dependant company", which has been first developed by KRONSTEIN, *Die abhängige juristische Person*, München, Schweitzer, 1931, and more recently recalled by TEUBNER, Unitas Multiplex: *Corporate Governance in Group Enterprises*, cit., 85-92. The second paragraph of § 17 provides a rebuttable presumption of control where majority shareholding exists. Beyond this hypothesis, the influence must be conveyed at least partly by means of company law, basically shares in the company, and not only by purely economic dependancies that are not secured by company law and are solely based on external relationship such as licensing or credit agreements: see BGH, 26 March 1984, II ZR 171/83, in *NJW*, 1984, 1893.

[93] This is generally considered as the most important category of affiliated enterprises: see WIRTH, ARNOLD, MORSHÄUSER, *Corporate Law in Germany*[2], München, C.H. Beck, 2010, 210.

[94] MAGNUS, *La réglementation globale des groupes de sociétés en droit comparé et son impact pour les multinationales – Aperçu général*, in BRÜLS (dir.), *Les multinationales. Statut et règlementations*, Bruxelles, Larcier, 2013, 87 *et seq.*; IMMENGA, *The Law of Groups in the Federal Republic of Germany*, in WYMEERSCH

corporate governance and liability applies, based on the assumption that the basic decisions and conduct of management are oriented towards a common corporate group purpose and that liability is linked to the source of decision-making power in the group.

In particular, in contractual groups, the conclusion of a special contract with the subsidiary legitimises the unified management and the power of direction of the parent company, which is expressly attributed a legal right to instruct the subsidiary and a conduct its business affairs according to the group interest rather than its own, but having at the same time the duty to cover all annual losses of the subsidiary[95]. On the contrary, in *de facto* groups, the parent company is not given any legal right of instruction and it may use its influence only in the best interest of the subsidiary, being otherwise obliged to compensate every damage suffered by the latter in consequence of detrimental or disadvantageous measures adopted because of such influence[96].

Such distinction was intended to encourage the use of contractual groups, which should have become the model type for groups of companies in Germany[97]. Indeed, the legalization of the power of control and direction of the parent company over its affiliate company and the possibility to induce the subsidiary to act against its own interests were meant as one of the main regulatory objectives of such regulation and accordingly as an incentive to the conclusion of control agreements. However, notwithstanding the fiscal advantages associated with contracts of domination, this did not occur, as contractual groups are far from being common in practice[98]. Using the metaphor of Professor Hopt, «the great majority of parent companies have chosen "cohabitation without marriage certificate"»[99].

As noted by several authors, in a system based on the contractual principle the success of the regulation of group law is necessarily influenced by the existence of an adequate regulation of *de facto* relationships, which should accordingly prevent parent companies from exercising

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(ed.), *Groups of Companies in the EEC*, cit., 98 *et seq.* PETIT-PIERRE SAUVAIN, *Droit des sociétés et groupes de sociétés*, Genève, Georg, 1971, 121, argues whether such distinction is not purely formal.

[95] Examples of such agreements are management control contracts, business transfer contracts, or profit pools: see generally VON BREVERN, *Allgemeine Grundsätze für Unternehmensverträge*, Köln, Selbstverlag, 1971; MERCADAL, JANIN, *Les contracts de cooperation interentreprises*, Paris, Lefebvre, 1974; ENGLISH, *Les groupes d'entreprises à structure contractuelle*, Thèse Angers, 1980.

[96] In other words, the autonomy of the subsidiary is preserved in accordance with the classical canons of company law. See EMMERICH, HABERSACK, *Konzernrecht: ein Studienbuch*, cit., 461 *et seq.*

[97] SARGENT, *Beyond the Legal Entity Doctrine: Parent-Subsidiary Relations Under the West German Konzernrecht*, in *Can. Bus. L. J.*, 1985, 347 and 351–352.

[98] In this regard, see SCHÖN, *Abschied vom Vertragskonzern?*, in *ZHR*, 2004, 631–635.

[99] HOPT, *Legal Elements and Policy Decisions in Regulating Groups of Companies*, cit., 95. By the same Author, see also *Le Droit des Groupes de Sociétés – Expériences Allemandes, Perspectives Européennes*, in *Rev. sociétés*, 1987, 381.

a power of direction similar to that allowed in contractual groups[100]. Therefore, the inefficiencies of the compensation system provided for *de facto* groups are one of the reasons for the «failure» of the figure of contractual groups[101].

1.5.2.1. Contractual Groups

A group is defined contractual when an enterprise contract is concluded between the controlling and other dependent enterprises. These corporate contracts are mainly due to the tax advantages generating from this form of business[102]. The most relevant enterprise contracts are the control and transfer-of-profits contracts and presuppose that shareholders' meetings of both companies have agreed to their conclusions. § 291 AktG recites as follows: «An agreement in which a stock corporation or partnership limited by shares submits the direction of the company to another enterprise (control agreement) or undertakes to transfer its entire profits to another enterprise (profit transfer agreements) shall constitute enterprise agreements»[103]. Such an enterprise agreement grants to one company (the parent company) the right to direct the other company (the controlled company), even where this is detrimental to the controlled company, provided that these directions be consistent with the interests of the parent company or the corporate group as a whole[104]. In return for giving the parent company this power to direct the

[100] ANTUNES, *Liability of Corporate Groups*, cit., 330-331.

[101] Along this line, see IMMENGA, *Abhängige Unternehmen und Konzerne im europäischen Gemeinschaftsrecht*, in *RabelsZ*, 1984, 58.

[102] EMMERICH, *AktG § 291 Beherrschungsvertrag. Gewinnabführungsvertrag*, in EMMERICH, HABERSACK, *Aktien- und GmbH-Konzernrecht*, cit., paras. 5-6. Indeed, a company linked by contract agreement is organizationally integrated from a tax standpoint: SONNENSCHEIN, *Organschaft und Konzerngesellschaftsrecht*, Baden-Baden, Nomos, 1976, 124.

[103] The original text: «Unternehmensverträge sind Verträge, durch die eine Aktiengesellschaft oder Kommanditgesellschaft auf Aktien die Leitung ihrer Gesellschaft einem anderen Unternehmen unterstellt (*Beherrschungsvertrag*) oder sich verpflichtet, ihren ganzen Gewinn an ein anderes Unternehmen abzuführen (*Gewinnabführungsvertrag*)». For a list of other enterprise agreements, see § 292 AktG.

[104] The main weakness of such contracts is that they are not freely negotiated, since in most cases there are no arm's-length transactions and the dependent company has already become dependent before the conclusion of the contract. Indeed, the dominating enterprise can determine whether, at what time, and under which conditions an enterprise agreement is concluded, choosing a weak phase in the economic situation of the dependent company: see WIEDEMANN, *The German Experience with the Law of Affiliated Enterprises* cit., 33 et seq.; DORALT, *Zur Entwicklung eines österreichischen Konzernrechts*, in LUTTER (Hrsg.), *Konzernrecht im Ausland*, Berlin, de Gruyter, 1994, 203; IMMENGA, *Abhängige Unternehmen und Konzerne im europäischen Gemeinschaftsrecht*, cit., 57 et seq.; BÖHLHOFF, BUDDE, *Company Groups – The EEC Proposal For A Ninth Directive in the Light of the Legal Situation in the Federal Republic of Germany*, in *J. Comp. Bus. Cap. Market L.*, 1984, 169. Accordingly, ANTUNES, *Liability of Corporate Groups*, cit., 332, says that «a contract exists here in form, but not in substance». Moreover, since these contracts usually represents the final stage of long process of integration, protection would be more efficient at the initial moments of group formation: see SURA, *Fremdeinfluss und Abhängigkeit im*

controlled company for the benefit of the entire group, minority shareholders and creditors are ensured an enhanced protection.

It only becomes effective upon consent of the shareholders' meeting (at least a majority of three-fourths of the share capital) of both companies concerned[105] and requires the drafting of a report explaining and justifying legally and economically the conclusion of the enterprise agreements and its detailed provisions[106] and of an audit report containing recommendations as to whether the proposed compensation or settlement are adequate[107]. Moreover, registration in the commercial register of the company's domicile[108].

The main consequence of such contracts is that the parent company may give binding instructions and directives – also disadvantageous to the interests of the controlled company but consistent with the interests of the parent or the group as a whole – to the subsidiary's directors concerning its management (*Weisungsrecht*)[109]. Even though the management board of the controlled company is not entitled to refuse to follow the parent company's instructions, the latter company may not give instructions that do not serve the controlling enterprise's or group's interests, or that threaten the existence itself of the controlled company[110]. In this regard, for instance, § 309 requires that, in issuing instructions, legal representatives shall employ the care of a diligent and conscientious manager[111].

In return of such powers, the controlling enterprise has to compensate for any annual net loss of the controlled company occurring during the term of the agreement[112], so that, as far as the

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Aktienrecht: eine Neuorientierung zu den Grundlagen des Rechts der Verbundenen Unternehmen, Konstanz, Universitätsverlag Konstanz, 1980, 44.

[105] § 293 AktG. According to SCHEUCH, Konzernrecht*: An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues*, cit., 193, the consent of three-quarter majority of the (future) controlled company is usually a mere formality, because the controlling enterprise regularly holds this majority and is not barred from voting.

[106] § 293a AktG.

[107] § 293e AktG.

[108] § 294 AktG.

[109] § 308 AktG.

[110] HIRTE, *Kapitalgesellschaftsrecht*[8], Köln, RWS, 2016, para. 8.10; EMMERICH, *AktG § 308 Leitungsmacht*, in EMMERICH, HABERSACK, *Aktien- und GmbH-Konzernrecht*, cit., paras. 60-64.

[111] In case of violation of their duties, they are jointly and severally liable to the company for any resulting damage, also bearing the burden of proof. In addition to any person liable pursuant to § 309, the members of the management board and the supervisory board of the company shall be jointly and severally liable if they have acted in violation of their duties (§ 310).

[112] Under § 303 AktG, if the control agreement is cancelled or terminated, the controlling enterprise shall provide security to the creditors of the company whose claims arose prior to the cancellation or termination. This follow-up liability is limited to claims that become due within five years after the termination: BGH, 7 October 2014, II ZR 361/13, in *ZIP*, 2014, 2282. Concerning the energy sector, see KLOTZ, *Konzernhaftung: Entwurf eines Nachhaftungsgesetzes für Energiekonzerne*, in *Konzern*, 2016, 1.

parent is solvable, the subsidiary may not go bankrupt[113]. This protection for creditors, in particular, allows transferring the economic risks of the subsidiary automatically to the parent company, regardless of the legal or factual origin of the debts at stake[114]. Furthermore, minority shareholders are entitled to an adequate compensation for the damage suffered, in addition to the opportunity to withdraw from the company in return for a grant of the controlling enterprise's shares or for a cash indemnity[115].

Within the framework of contractual groups, it is possible to include also the so-called integration (*Eingliederung*). Under § 319 *et seq.* AktG, in fact, three-fourths of the shareholders voting at a meeting of a holding company, which owns at least 95% of the shares of a subsidiary[116], may approve the complete integration of the subsidiary, which accordingly becomes a wholly-owned subsidiary through the holding company compulsorily acquiring the subsidiary's minority shareholdings in exchange for an adequate settlement[117]. This facilitates the group management since the absence of minority shareholders provides more flexibility and reduces the costs of information as well as the risk of legal complaints. Moreover, the principal company has unlimited power to issue instructions and directions to the management board of the integrated company, such as those of disposing of its assets, forgoing corporate opportunities or otherwise acting in a manner that is detrimental to its interests as a separate legal entity[118]. In return, the principal company shall be liable to the creditors of the integrated company as joint and several debtors for its obligations that have been incurred before such date and shall also be liable for all obligations incurred after the integration[119].

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[113] Such an indirect and global protection for the subsidiary's creditors is provided by § 302 AktG. REICH-GRAEFE, *Changing Paradigms: The Liability of Corporate Groups in Germany*, in *Conn. L. Rev.*, 2005, 790, highlights how, from an accounting perspective, the balance sheet of a contractual group subsidiary can never show any losses, since they are automatically offset with a compensation claim against the parent company.

[114] BGH, 11 November 1991, II ZR 287/90, in *NJW*, 1992, 505.

[115] §§ 304 and 305 AktG. The adequacy of such compensation or indemnity can be subject to judicial review at the request of each shareholder according to the procedure outlined in § 306. Procedural weaknesses are stressed by HOMMELHOFF, *Protection of Minority Shareholders, Investors and Creditors in Corporate Groups*, cit., 65-66; and WIEDEMANN, *The German Experience with the Law of Affiliated Enterprises* cit., 34-35.

[116] § 320 AktG.

[117] § 320b AktG. What makes this integration attractive from a business standpoint is that this is the only possible way to squeeze out certain shareholders: MARTENS, *Die rechtliche Behandlung von Options- und Wandlungsrechten anlässlich der Eingliederung der verpflichteten Gesellschaft*, in *AG*, 1992, 209 *et seq.*

[118] § 323 AktG. ANDENAS, WOOLDRIDGE, *European Comparative Company Law*, cit., 457, stress that «from an economic point of view, an integrated company functions as a branch of the parent company», considering that the power to give instructions «is not limited by the requirement applicable to contractual groups that the instructions must further the interests of the group or a member thereof».

[119] § 322 AktG provides for a kind of statutory piercing of the corporate veil, which differently from § 302 AktG represents a direct and automatic protection for creditors. In this regard, § 321 provides that creditors of the

1.5.2.2. *De Facto* Groups

Contractual groups were meant by the German legislator as a significant incentive for the parent company to enter into enterprise agreements. However, contrary to the expectations, this kind of groups turned out to be rare in the business practice[120]. That is why regulation of *de facto* groups contained in §§ 311-318 AktG is widely considered as the most important and problematic provisions of German group law[121].

When control is exerted, either directly or indirectly, in the absence of any formal arrangement, in a way that ensures a systematic involvement of the parent in the affairs of the controlled company, a *de facto* group is constituted[122]. In this respect, as it is evident from the commercial practice, there is a huge risk of conflicts of interests, which of course may result in a parent company operating in its interest and to the detriment of its subsidiary. Therefore, considering that the acquisition of majority shareholding does not affect the legal independence of the subsidiary, the safeguards already existing in company law still play a role and need to be adapted to the peculiar context of groups of companies.

The main difference from contractual groups is that in this case the parent company has not accepted the same legal commitments concerning liabilities and therefore it cannot use its dominant influence to cause the subsidiary to enter into disadvantageous transactions, unless the controlling enterprise compensates, by the end of the fiscal year, the subsidiary for any

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integrated company whose claims arose prior to the registration of the integration in the commercial register shall be provided with security insofar as they are not able to demand satisfaction.

[120] EMMERICH, HABERSACK, *Konzernrecht: ein Studienbuch*, cit., §11 para. 6; HOMMELHOFF, *Protection of Minority Shareholders, Investors and Creditors in Corporate Groups*, cit., 66.

[121] WIMMER-LEONHARDT, *Konzernhaftungsrecht: die Haftung der Konzernmuttergesellschaft für die Tochtergesellschaften im deutschen und englischen Recht*, Tübingen, Mohr Siebeck, 2004, 64 *et seq*. These provisions have been long considered scarcely feasible and ill-drafted: see ANTUNES, *Liability of Corporate Groups*, cit., 341 *et seq.*; WOOLDRIDGE, *Aspects of the Regulation of Groups of Companies in European Laws*, in DRURY, XUEREB (eds.), *European Company Laws. A Comparative Approach*, Aldershot, Dartmouth, 1991, 119; HOFSTETTER, *Parent Responsibility for Subsidiary Corporations: Evaluating European Trends*, in *Int. Comp. L. Quart.*, 1990, 582. However, today the perception is quite different and the effects of Arts. 311 *et seq.* are mostly considered positively: ALTMEPPEN, *Vorbemerkung zu AktG § 311*, in *Münchener Kommentar zum Aktiengesetz*[4], München, C.H. Beck, 2015, para. 28.

[122] § 17 AktG translates the notion of controls in terms of dominant influence ("*beherrschender Einfluss*"), which is only a presumption for ascertaining the existence of a group under § 18 AktG. Under the latter section, control itself is not sufficient for the existence of a group, being also necessary that the dependant company be subject to the uniform management (*einheitliche Leitung*) of the dominant company. However, a definition of this concept is very controversial: EMMERICH, *AktG § 18 Konzern und Konzernunternehmen*, in EMMERICH, HABERSACK, *Aktien- und GmbH-Konzernrecht*, cit., para. 8 *et seq.* Criticism on the criteria to be taken into account for the outline of the notion of *de facto* groups by OPPETIT, SAYAG, *Méthodologie d'un droit des groupes de sociétés*, cit., 586-590.

consequential financial detriment (*Nachteilsausgleich*)[123]. However, this does not exclude that the management board of the controlled company may decide to follow the (non-legally binding) instructions from the controlling enterprise, after having reviewed them and accepted the risk of compensating the resulting disadvantages[124].

In case the parent causes the controlled company to enter into a disadvantageous transaction and does not compensate the financial loss or grants the controlled company an entitlement serving as compensation, it shall be considered liable, together with its representatives that actually induced the adverse measures, for any resulting damage to such controlled company and to the shareholders in case they incurred in further loss as a result of the damage to the company[125]. However, since the burden of proof concerning which prejudicial act was occasioned by the dominant company and the quantification of the detriment lies on the plaintiff, in many cases, such system of compensation is tough to implement because of the constant influence exercised on the board of management of the dependent company[126].

From the perspective of the future plaintiff, this last task is somehow facilitated by the annual report on (*Abhängigkeitsbericht*) on the company's relations with affiliated enterprises, which the directors of the controlled company must prepare, subject to audit by external auditors and examination by the supervisory board. Such report shall specify all transactions entered into during the previous fiscal year with the controlling enterprise or any enterprise affiliated with such controlling enterprise or at the instruction or in the interest of any such enterprise and all

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[123] § 311 AktG. The statute, however, fails to specify what constitutes compensable harm (*ausgleichspflichtige Nachteile*) and what qualifies as an offsetting benefit (*ausgleichsfihige Vorteile*). In this regard, REICH-GRAEFE, *Changing Paradigms: The Liability of Corporate Groups in Germany*, cit., 791, affirms that «liability in de facto groups is thus a case-by-case, interference-by-interference analysis of intragroup liability». However, it results from the case law that the notion of "disadvantage" is construed to encompass any decrease of or specific risk to the corporation's financial situation or earning position that occurs as a result of the controlled corporation's influence: see BGH, 19 May 2011, I ZB 57/10, in *NJW*, 2011, 3161, para. para 37; 1 December 2008, II ZR 102/07, in *NJW*, 2009, 850, para. 8; 1 March 2003, II ZR 312/97, in *NJW*, 1999, 1706.

[124] SCHEUCH, Konzernrecht*: An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues*, cit., 196.

[125] See respectively § 317 and §§ 309(4)(1)(2) together with 317(5). A derivative action can also be brought by its creditors, but only if the controlled company is in default: §§ 309(4)(3) together with 317(5). As stressed by REICH-GRAEFE, *Changing Paradigms: The Liability of Corporate Groups in Germany* cit., 791, it is a three-prong liability structure: uniform management, detrimental interference, causation nexus.

[126] STROHN, *Die Verfassung der Aktiengesellschaft im faktischen Konzern*, Köln, Carl Heymann, 1977, 65. Moreover, considering the high enforcement costs and risks, these suits against the parent company based on compensation liability very rarely turns out to be successful: SCHIESSL, *The Liability of Corporations and Shareholders for the Capitalization and Obligations of Subsidiaries under German Law*, in *Nw. J. Int. L. Bus.*, 1986, 501. Skepticism about German compensation rules also by HERTIG, KANDA, *Related Party Transactions*, in KRAAKMAN *et al.* (eds.), *The Anatomy of Corporate Law*, cit., 177.

other acts which the controlled company has undertaken or refrained from undertaking at the instruction or in the interest of any such enterprise[127].

Concerning *de facto* groups, as mentioned above, the Bundesgerichtshof developed in a series of decisions a new doctrine of the so-called *qualifizierter faktischer Konzern*, characterized by a parent company exercising a permanent (*dauernd*) and extensive (*umfassend*) power of control over the business affairs of the subsidiary[128]. Being § 311 AktG not suitable for such cases of disrespect of the subsidiary's autonomy and interests, German courts derived a cause of action analogous to §§ 302 and 303 AktG and available both to the dependent company and to its creditors, so reversing the principle of limited liability enshrined in § 13(2) GmbHG and extending the liability concepts provided in the AktG as to contractual groups far beyond their actual scope[129]. Indeed, according to this case law, a dependent limited company has a right to the covering of its losses against the dominant company in case of qualified control of the parent over the subsidiary management, unless the established losses of

[127] § 312 AktG. The literature was overwhelmingly skeptical about this report: see GÖTZ, *Der Abhängigkeitsbericht der 100%igen Tochtergesellschaft*, in *Die Aktiengesellschaft*, 2000, 499-450; and less recently KOPPENSTEINER, *Faktischer Konzern und Konzentration*, in *ZGR*, 1973, 11 *et seq*,; WÜRDINGER, *Betrachtungen zum faktischen Konzern*, in *DB*, 1973, 48. In particular, it is evidenced that the report is is not made directly available to minority shareholders and creditors due to confidential nature of the information therein contained, so that they only have indirect knowledge from the comments of the supervisory board and the auditor's findings at the shareholders' meeting: WOOLDRIDGE, *Connected Undertakings and Groups of Undertakings under German Law*, cit., 89; SARGENT, *Beyond the Legal Entity Doctrine: Parent-Subsidiary Relations Under the West German Konzernrecht*, cit., 350-351. Doubts about the compatibility with the numerouse disclosure duties provided for listed companies, as well as the requirements laid down in IAS 24 and the German accounting law reform, in addition to future EU's stance on related party transaction, are raised by HABERSACK, *AktG § 312 Bericht des Vorstands über Beziehungen zu verbundenen Unternehmen*, in EMMERICH, HABERSACK, *Aktien- und GmbH-Konzernrecht*, cit., para. 3.Proposal for amendments by ALTMEPPEN, *AktG § 312 Bericht des Vorstands über Beziehungen zu verbundenen Unternehmen*, in *Münchener Kommentar zum Aktiengesetz*[4], cit., paras. 20-21; and HOMMELHOFF, *Protection of Minority Shareholders, Investors and Creditors in Corporate Groups*, cit., 78.

[128] See *supra* fn. 90. That is the difference with a simple *de facto* group (*einfacher faktischer Konzern*), because in the latter dependent company supposedly maintains – to a certain extent – their autonomy, so that the influence of the parent company does not extend to strategic direction and management of the subsidiary. However, the BGH did not provide any answer to the crucial question concerning the threshold of control beyond which a *de facto* groups stops to be "simple" and becomes "qualified", so that the inquiry into the existence of a qualified control proves the source of great difficulties and make necessary a case-by-case analysis: see critically ANTUNES, *Liability of Corporate Groups*, cit., 442 and 449 *et seq*.; ASSMANN, *Der faktische GmbH-Konzern*, in LUTTER *et al.* (hrsg.), *Festschrift 100 Jahre GmbH-Gesetzt*, 1992, 680.

[129] The *Autokran* decision inferred this result from an application by analogy of provisions concerning intragroup liability of contractual groups: §§ 303(1), 322(2), and 322(3) AktG. Put it differently, the underlying rationale of this interpretation is that a permanent and extensive intervention by the parent company upon the management of the dependent company justifies the application of rules relating to contractual groups, because the intervention is of such intensity that in principle would have required the conclusion of a domination contract. See ALTING, *Piercing the Corporate Veil in American and German Law-Liability of Individuals and Entities: A Comparative View*, in *Tulsa J. Comp. Int. L.*, 1995, 241-249; WOOLDRIDGE, *The Situation of Dependent GmbH in a* de facto *Group in German Law*, in *J. Bus. Law*, 1996, 632-33, 636; SCHIESSL, *The Liability of Corporations and Shareholders for the Capitalization and Obligations of Subsidiaries under German Law*, cit., 503 *et seq.*

the dependent company proceeded from circumstances which have nothing to do with the exercise of the power of direction by the dominating one or the management of the dependent company exercised in the overall group interest has not been the cause of the former's losses[130].

However, after sixteen years of application and following the fierce criticism shown by legal scholars[131], such ambitious interpretation received a significant and unexpected setback in 2001 with the decision in the case *Bremer Vulkan*, where the BGH held that the system offered by AktG should no longer be applied by analogy to GmbH subsidiaries according to the qualified *de facto* group doctrine[132] and that protection is limited to rule governing the maintenance of the mandatory and safeguarding the company's legal and factual existence (*Bestandsschutz*)[133]. A new liability concept was outlined, that is the personal responsibility of majority or sole shareholder for causing the company's insolvency (*Existenzvernichtungshaftung*)[134]. In particular, three conditions are required, of which two are positive and one is negative[135]. Concerning the first two conditions, the shareholders must deprive the company of its assets and without full consideration and such deprivation must prejudice the company's ability to meet its debts[136]. Concerning the third (negative) condition, actually the most problematic one, unlimited liability is incurred only if the loss cannot be fully compensated according to §§ 30

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[130] BGH *Tiefbau*, cit.

[131] Among manjy, see SCHMIDT, *Gesellschafterhaftung und Konzernhaftung bei der GmbH*, in *NJW*, 2001, 3580-3582; ALTMEPPEN, *Grundlegend Neues zum «qualifiziert faktischen» Konzern und zum Gläubigerschutz in der Einmann-GmbH*, in *ZIP*, 1837 et seq.

[132] BGH, 17 September 2001, II ZR 178/99, *Bremer Vulkan*, BGHZ 149, 10. Further refined by BGH, 25 February 2002, II ZR 196/00, *Bremer Vulkan II*, BGHZ 150, 61; BGH, 24 June 2002, II ZR 300/00, *KBV*, in *NJW*, 2002, 3024. First signs of retrenchment were already shown with BGH, 29 March 1993, II ZR 265/91, *TBB*, in *NJW*, 1993, 1200, where the BGH restricted a cause of action similar to §§ 302 and 303 AktG against the controlling shareholder of a company and held that the exercise of a permanent and extensive influence could not serve as a presumption that insufficient attention was paid to the affairs of the dependent company. In this regard, see ZUMBANSEN, *Liability Within Corporate Groups (Bremer Vulkan) - Federal Court of Justice Attempts the Overhaul*, in *German L. J.*, 2002, n. 1, at www.germanlawjournal.com/index.php?pageID=11&artID=124

[133] In particular in case the parent company's interference puts in jeopardy the existence itself of the subsidiary and results in an abuse of the corporate form of the GmbH: see BGH *KBV* cited. See REICH-GRAEFE, *Changing Paradigms: The Liability of Corporate Groups in Germany*, cit., 799-802.

[134] This concept was clarified in BGH, 13 December 2004, II ZR 206/02, *Autohändler*, in *ZIP*, 2005, 117; and 13 December 2004, II ZR 256/02, *Unterschlagung*, in *ZIP*, 2005, 250. In a comparative perspective, see KROH, *Der existenzvernichtende Eingriff: eine vergleichende Untersuchung zum deutschen, englischen, französischen und niederländischen Recht*, Tübingen, Mohr Siebeck, 2012. For a conflict of laws analysis, see WELLER, *Europäische Rechtsformwahlfreiheit und Gesellschafterhaftung*, Köln, Carl Heymanns, 2004, 223 *et seq.*

[135] SHILLIG, *The development of a new concept of creditor protection for German GmbHs*, in *Comp. Law.*, 2006, 349-350.

[136] See ULMER, *Von 'TBB' zu 'Bremer Vulkan'--Revolution oder Evolution?*, in *ZIP*, 2001, 2021 *et seq.*; LUTTER, BANERJEA, *Die Haftung wegen Existenzvernichtung*, in *ZGR*, 2003, 413 *et seq.*; WIEDEMANN, *Reflexionen zur Durchgriffshaftung*, in *ZGR*, 2003, 292; WACKERBARTH, *Existenzvernichtungshaftung 2005: Unternehmerische Entscheidungen auf dem Prüfstand?*, in *ZIP*, 2005, 882.

and 31 GmbHG or, respectively if the shareholder is unable to demonstrate that the company would not have become insolvent if he had acted lawfully[137].

One last point was still unclear after this series of decisions concerning the legal basis of such judge-made cause of action[138]. This issue was addressed by BGH with the decision *Trihotel* in 2007[139], where the court reshaped the contours of such liability by shifting from a *Durchgriffshaftung* (misuse of the legal form), enforceable directly by the creditors of the company, to a case of *Innenhaftung* (internal liability) based on § 826 BGB, to be invoked only by the company which suffered the damage when a person, in an immoral manner which is contrary to public policy, intentionally inflicts damage on another person[140].

1.6. Groups of Companies in the EU: An Internal Market Perspective

The importance of groups of companies in the internal market has not to be explained, considering that for a long time it was the only organization corporate form in which companies could be combined across borders[141]. In this respect, one may see that EU Law has already regulated many aspects of groups of companies, such as those related to consolidated accounts[142], transparency of major shareholdings[143], prudential supervision on a consolidated basis[144], merger controls[145], takeovers[146], and so forth[147]. Additionally, the CJEU has often ruled

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[137] ULMER, *Haftung von GmbH-Gesellschaftern*, in *JZ*, 2002, 1051.

[138] See DESOUTTER, *La responsabilité civile de la société mère vis-à-vis de sa filiale*, cit., 76-77.

[139] BGH, 16 July 2007, II ZR 3/04 *Trihotel*, in *NJW*, 2007, 2689. On which see, among many, HABERSACK, *Trihotel – Das Ende der Debatte? Überlegungen zur Haftung für schädigende Einflussnahme im Aktien- und GmbH-Recht*, in *ZGR*, 2008, 533; SESTER, *Änderung des Haftungskonzepts der Existenzvernichtungshaftung – TRIHOTEL*, in *RIW*, 2007, 787; WELLER, *Die Neuausrichtung der Existenzvernichtungshaftung durch den BGH und ihre Implikationen für die Praxis*, in *ZIP*, 2007, 1681.

[140] In this regard, see LUTTER, HOMMELHOFF, *GmbH-Gesetz*[19], Köln, Otto Schmidt, 2016, § 13 para. 29 *et seq.*; HABERSACK, *Anh. § 318 Abhängige GmbH und „faktischer" GmbH-Konzernk*, in EMMERICH, HABERSACK, *Aktien- und GmbH-Konzernrecht*, cit., paras. 33-48; WICKE, *GmbHG*, cit., Anh. § 13, para. 5 *et seq.*; WIEDEMANN, *Aufstieg und Krise des GmbH-Konzernrechts*, in *GmbHR*, 2011, 1011 *et seq.*

[141] GRUNDMANN, *European Company Law*, cit., 759 and 761.

[142] Directive 2013/34/EU. See *supra* para. 4.

[143] Directive 2013/50/EU of 22 October 2013 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, on the prospectus to be published when securities are offered to the public or admitted to trading [2013] OJ L 294/13.

[144] Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176/338.

[145] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

[146] Directive 2004/25/EC of 21 April 2004 on takeover bids [2004] OJ L 142/12.

[147] See THOLEN, *Europäisches Konzernrecht*, Berlin, Duncker & Humblot, 2014, 156 *et seq.*; and HOPT, *Konzernrecht: die europäische Perspektive*, in *ZHR*, 2007, 199.

on cases involving groups of companies, showing that the Court uses both the enterprise approach and the entity approach, depending on the area of law at stake[148].

The discussions on the necessity of a legal initiative on groups often neglect the fundamental role played in this field by EU primary law and in particular by the right of establishment. Indeed, it is doubtless that every means of establishment, subsidiaries included, falls within the scope of Article 54 TFUE and so that the creation of cross-border groups of companies is protected by EU Law[149]. In different rulings, the CJEU held that primary law «leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State» and that this freedom cannot be limited by discriminatory provisions of the host State[150].

However, one may see that still nowadays a coherent and global set of rules concerning specifically the functioning of groups of companies is inexistent at the EU level. The German model illustrated above was, of course, the reference point for some initiatives embarked upon by the EU institutions and stakeholders. Unfortunately, such initiatives remained a dead letter and did not result in any piece of European legislation because of the fierce opposition of some Member States and their unwillingness to renounce their legal culture and traditions[151].

1.6.1. The Draft Proposal for a Ninth Directive on Groups of Companies

During the 1970s and beginning of 1980s, the European Commission initiated a significant initiative to regulate groups of companies through the provision of a tailored set of rules for this

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[148] ENGSIG SØRENSEN, *Groups of Companies in the Case Law of the Court of Justice of the European Union*, in *Eur. Bus. L. Rev.*, 2016, 393, observes that the use of the enterprise approach still represents an exception and is used only when EU Law aims at regulating market behaviour.

[149] In this regard see the CJEU's judgment of 20 June 2013 in the case *Impacto Azul*, C-186/12, which concerned the compatibility of Art. 49 TFEU with a national legislation precluding the application of the principle of the joint and several liability of parent companies vis-à-vis the creditors of their subsidiaries to parent companies having their seat in the territory of another Member State: see TEICHMANN, *Konzernrecht und Niederlassungsfreiheit*, in *ZGR*, 2014, 45; RAMMELOO, *The Judgment in CJEU C-186/12* (Impacto Azul)*: Company Law, Parental Liability and Article 49 TfUE - A Plea for a "Soft Law" Oriented EU Law Approach on Company Groups*, in *Eur. Comp. L.*, 2014, 20; MONTANARO, Impacto Azul*: la Corte afferma la compatibilità della normativa portoghese in materia di gruppi di società con l'articolo 49 TFUE*, in *Dir. comm. int.*, 2013, 1129 *et seq.* Concerning the meaning of 'subsidiaries' under Art. 49 TFEU, see e.g. Case C-251/98 *Baars* [2000] *ECR* I-2787, para. 22; Case C-208/00 *Uberseeing* [2002] *ECR* I-9919, para. 77; and Case C-360/06 *Bauer Verlag* [2008] *ECR* I-7333, para. 27.

[150] CJEU Case 270/83, *Commission v French Republic* [1986] *ECR* 273, para. 22. Later confirmed by CJEU C-253/03, *CLT-UFA SA* [2006] *ECR* I-1831, para. 14; Case C-231/05, *Oy AA* [2007] *ECR* I-6373, para. 40; Joined Cases C-439/07 and C-499/07, *KBC Bank* [2009] *ECR* I-4409, para. 77.

[151] LUTTER, *Guest Editorial: First steps for a European law on corporate groups*, in *CMLRev.*, 1999, 2; HOMMELHOFF, *Konzernrecht für den Europäischen Binnenmarkt*, in *ZGR*, 1992, 134-139; XUEREB, *Il gruppo di società nel diritto inglese*, in *Contr. impr.*, 1986, 955.

kind of economic organizations. There was, in fact, an extensive debate on a Draft Proposal of Ninth Directive on the Conduct of Groups, which was highly influenced by the German *Konzernrecht* model[152]. In this respect two drafts were released: a first one in 1974/1975, which proposed an organic model of group law, according to which the parent company may only choose between abstaining completely from exercising influence on the subsidiary or entering into a group agreement[153]; and a second one in 1984, which was closer to the German legislation[154]. The main objective of the Draft Proposal was to enable the parent company to operate in the interests of the group as a whole, by assuring protection to the minorities and charging the group as a whole with liability for the debts of all group companies[155]. Such a legal framework was considered to be lacking in the legal system of most Member States.

The regime was complicated and much criticized, also because the draft only concerned public companies, thus excluding a large portion of groups whose subsidiaries were constituted in the form of private companies[156]. In particular, it followed two different trails: from one side, it contained rules on the formal recognition of the group as a unit of business organization, providing a legal framework in which it can pursue its objectives without conflicts between the

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[152] On this draft proposal, see GLEICHMANN, *The Law of Corporate Groups in the European Community*, in SUGARMAN, TEUBNER (eds.), *Regulating Corporate Groups* cit., 446 *et seq.*; BÖHLOFF, BUDDE, *Company Groups* cit., 163 et seq.; GUYON, *Examen critique des projets européens en matière de groupes de sociétés*, cit., 155 *et seq.*; GAMBINO, *I gruppi in Italia alla luce del progetto di IX direttiva*, in *Giur. comm.*, 1987, 5 *et seq.*; PAVONE LA ROSA, *Osservazioni sulla proposta di nona direttiva sui gruppi di società*, cit., 831 *et seq.*; EMBID IRUJO, *Los grupos de sociedades en la Comunidad Económica Europea (El proyecto de Novena Directiva)*, in *Cuad. der. com.*, 1989, n. 5, 359; CALVOSA, *La tutela dei creditori nella proposta di IX direttiva Cee*, in *Foro it.*, 1988, 463; REGOLI, *La tutela delle minoranze nei gruppi secondo la proposta di IX direttiva Cee*, in *Foro it.*, 1988, 517; IMMENGA, *L'harmonisation du droit des groups des sociétés. La proposition d'une directive de la Commission de la CEE*, in *Giur. comm.*, 1986, 846 *et seq.* ; LUTTER, *Lo sviluppo del diritto dei gruppi in Europa*, cit., 654; JAEGER, *I gruppi tra diritto interno e prospettive comunitarie*, in *Riv. soc.*, 1981, 916; MINERVINI, *I gruppi di società nella Comunità economica europea. Problemi di diritto societario*, in *Riv. int. sc. econ. comm.*, 1974, 1130 *et seq.*

[153] Preliminary Draft of a Directive based on Article 54 (3) (g) of the ECC Treaty on Harmonisation of the Law of Groups of Companies, Doc. No. XI/328/74 and Doc. No. XI/593/75, later Doc. No. XI/215/77. These drafts were based on 1970 Working Report of Professor Würdinger, Doc. No. 15.524/XIV/70-D and addendum Doc. No. XI/394/73-F. For a critical review of the EU approach of that time, see VANETTI, *La disciplina dei gruppi di società*, in GRISOLI (a cura di), *Le imprese multinazionali e l'Europa*, cit., 233 *et seq.*; RODIERE, *Réflexions sur les avant-projets d'une directive de la commission des communautés européennes concernant les groupes de sociétés*, in *Dalloz*, 1977, 136 *et seq.*; DEROM, *The EEC Approach to Groups of Companies*, in *Va. J. Int. L.*, 1975, 565 *et seq.*; VAN OMMESLAGHE, *Les groupes de sociétés et le droit européen de sociétés*, in *Les groupes de sociétés*, Faculté de droit de l'Université de Liège, 1973, 235 *et seq*. Harsh criticism by SCHNEEBAUM, *The Company Law Harmonization Program of the European Community*, in *L. Pol. Int. Bus.*, 1982, 317.

[154] Doc. n. III/1639/84, whose text may be found in *Riv. soc.*, 1986, 1071; and *ZGR*, 1985, 446.

[155] These were the main issues addressed: *i*) the necessity for a legal framework for groups; *ii*) the concept of dependency among companies; *iii*) the reporting and auditing requirements for inter-company relations; *iv*) the protection of dependent enterprise and the obligations of the parent; *v*) the form of enterprise agreements establishing the legal basis of groups. In this terms, see BÖHLOFF, BUDDE, *Company Groups* cit., 174.

[156] See the above mentioned German case law that extended AktG provisions to GmbH companies.

different interests of its legally independent parts; from the other side, it strengthened the safeguards already existing under company law in situations where one company is *de facto* under the influence of another[157]. Evidently enough, the distinction based on whether domination is exercised as a result of enterprises agreements or *de facto* arrangements is taken directly from the rules introduced in Germany in 1968.

The Draft Directive never reached the stage of Commission's proposal and was eventually abandoned due to lack of support. The EU approach was perceived as too rigid and dogmatic, not particularly effective, too close to the German law on groups and in certain points even extending far beyond, which could have put companies established in the EU at a disadvantage compared to the non-EU competitors[158]. The majority of Member States, in fact, does not recognize the necessity of harmonized rules on groups of companies and consider that protection of minority shareholders and creditors may be attained through the mechanisms and safeguards provided by normal company law legislations with only minor amendments[159].

1.6.2. From the *Forum Europaeum on Group Law* to the Commission's Actions Plans

The interest in having a European set of rules on corporate groups was maintained until the mid-1980s and decreased significantly in the early 1990s[160]. No significant steps forwards were

[157] GLEICHMANN, *The Law of Corporate Groups* cit., 447 ff.

[158] TRÖGER, *Corporate Groups – A German's European Perspective*, Safe Working Paper No. 66, 2014, 11. Using the words of LUTTER, *Lo sviluppo del diritto dei gruppi in* Europa, cit., 663 *et seq.*, «questo progetto di soluzione (…) è sostanzialmente accettato dai circoli interessati tedeschi, è rifiutato dagli inglesi e dagli olandesi, è considerate inutile in Francia e , a quanto pare, anche in Italia». WERLAUFF, *One Stop Group Law Shop?*, in *Eur. Comp. L.*, 2012, 4, defines the German provisions on *Beherrschungsverträge* as too complicated and inefficient to serve as a model. (unworkable in practice). HOPT, *Legal Elements and Policy Decisions in Regulating Groups of Companies*, cit., 95, the provisions of two regimes for contractual and *de facto* groups, without giving sufficient incentives for enterprises to choose the contractual solution, is one the reasons for political failure of the draft. For a critical account of the effectiveness of the German group law, see also SCHEUCH, Konzernrecht*: An Overview of the German Regulation of Corporate Groups*, cit., 191 *et seq.*; WYMEERSCH, *Do We Need a Law on Groups of Companies*, cit., 588; HOPT, *Quelques réflexions sur l'actualité et les évolutions compares du droit allemande et du droit français des sociétés*, in *Rev. sociétés*, 2009, 318; WOOLDRIDGE, *Connected Undertakings and Groups of Undertakings under German Law*, cit., 102-103; GROßFELD, *Aktiengesellschaft, Unternehmenskonzentration Und Kleinaktionär*, Tübingen, Mohr Siebeck, 1968, 218-9.

[159] See RODIERE, *Réflexions sur les avant-projets d'une directive de la commission des communautés européennes concernant les groupes de sociétés*, cit., 136; KEUTGEN, *Vers un droit européen de groupes de sociétés*, in *Rev. dr. int. dr. comp.*, 1972, 121; GLEICHMANN, *Überlegungen zur Gestaltung eines Konzernrechts in den Europäischen Gemeinschaften*, in SANDERS, ZONDERLAND (Hrsg.), *Quo Vadis, ius societatum? Festschrift Sanders*, Deventer, Martinus Nijhoff, 1972, 49; SINAY, *Vers un droit des groupes de sociétés: l'initiative allemande et le Marche Commun*, in *Gaz. Palais*, 1967, 70; LUTTER, *II gruppo di imprese (Konzern) nel diritto tedesco e nel futuro del diritto europeo*, in *Riv. soc.*, 1974, 1.

[160] See EMBID IRUJO, *Searching for a Law of Groups in Europe*, in *RabelsZ*, 2005, 726.

made until the end of the last century when the Regulation on the Statute of *Societas Europea* was finally adopted[161]. Indeed, the relevance of such Regulation is self-evident, since different formation procedures of SE may be used to create the patterns of cross-border groups of companies and may prove attractive for certain operations as part of a European group[162].

The widespread skepticism that accompanied the previous attempts to regulate corporate groups, together with the idea that the *sedes materiae* for such a regulation was at the national level[163], was somehow overcome by the interesting proposal for a group law which was prepared in the late 1990s by the *Forum Europaeum on Group Law*, a group of leading company law professors and practitioners from all over Europe[164]. The final report renounced to suggest a complete regulatory treatment but proposed several remedies that, being mainly aimed at protecting minority shareholders and creditors and at facilitating group integration, could have contributed to a better solution of group problems[165].

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[161] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [2001] OJ L 294/1, which entered into force in 2004, some thirty years after the first Commission proposal. For an historical overview starting from the first 1975 proposal, see LUTTER, *Einleitung*, in LUTTER, HOMMELHOFF, TEICHMANN (Hrsg.), *SE Kommentar*[2], Köln, Otto Schmidt, 2015, para. 7 *et seq.*

[162] MENJUCQ, FAGES, VUIDARD, *The European Company under French Law: Main Features*, in *Eur. Bus. Org. Rev.*, 2008, 137 *et seq.*; SCHWARZ, *SE-VO*, München, C.H. Beck, 2006, 72-100; TEICHMANN, *The European Company – A Challenge to Academics, Legislatures and Practitioners*, in *German L. J.*, 2003, 312; More generally on this issue, see HOMMELHOFF, LÄCHLER, *SE-Konzernrecht*, in LUTTER, HOMMELHOFF, TEICHMANN (Hrsg.), *SE Kommentar*[2], cit., 1409-1426; MAUL, *§ 8 Abschnitt. Konzernrecht*, in VAN HULLE, MAUL, DRINHAUSEN, *Handbuch zur Europäischen Gesellschaft (SE)*, München, C.H. Beck, 2007, 267-281; LÄCHLER, *Das Konzernrecht der Europäischen Gesellschaft (SE)*, Baden Baden, Nomos, 2007, 25 *et seq.* However, expect small references (e.g. Arts. 31, 61 and 62), there are not rules concerning specifically groups of companies, thereby referring to national group laws: THOLEN, *Europäisches Konzernrecht*, cit., 167.

[163] WYMEERSCH, *Harmoniser le droit des groupes de sociétés en Europe?*, in *Festschrift fur Ulrich Everling*, Baden-Baden, Nomos, 1995, 1699 *et seq.* Interesting also the words by OPPETIT, SAYAG, *Méthodologie d'un droit des groupes de sociétés*, cit., 590: «un droit des groupes doit renoncer à toute réglementation obligatoire et se borner à proposer aux sociétés qui y seraient intéressées un régime facultatif».

[164] FORUM EUROPAEUM, *Konzernrecht für Europa*, in *ZGR*, 1998, 672 *et seq.* For the English version, see *Eur. Bus. Org. Rev.*, 2000, 166 et seq. The text has also been published in French (*Rev. sociétés*, 1999, 43 *et seq.* and 285 *et seq.*), Italian (*Riv. soc.*, 2001, 341 *et seq.*), and Spanish (*Rev. der. mercantil*, 1999, 445 *et seq.*). For discussions of the proposal see HOMMELHOFF, *Corporate Group Law for Europe - the Principles and Proposals of the Forum Europaeum*, in NEVILLE, ENGSIG SØRENSEN (eds.), *The Internalisation of Companies and Company Laws*, Copenhagen, DJ0F Publishing, 2001, 11 *et seq.*; WINDBICHLER, *"Corporate Group Law for Europe": Comments on the Forum Europaeum's Principles and Proposals for European Corporate Group Law*, in *Eur. Bus. Org. Rev.*, 2000, 265 *et seq.*; HOPT, *Common Principles of Corporate Governance in Europe?*, in MARKESINIS (ed.), *The Coming Together of the Common Law and the Civil Law*, Oxford, Hart Publishing, 2000, 105 *et seq.*; MANÓVIL, *Forum europaeum sobre derecho de grupos: algunas de sus propuestas vistas desde la perspectiva latinoamericana*, in BASEDOW *et al.* (Hrsg.), *Aufbruch nach Europa. 75 Jahre Max-Planck-Institut für Privatrecht*, Tübingen, Mohr Siebeck, 2001, 215 *et seq.*; HOPT, *Europäisches Konzernrecht, Zu den Vorschlägen und Thesen des Forum Europaeum Konzernrecht*, in BAUMS, HOPT, HORN, *Corporations, Capital Markets and Business in the Law, Liber amicorum Richard M. Buxbaum*, London, Den Haag, 2000, 299 *et seq.*

[165] THOLEN, *Europäisches Konzernrecht*, cit., 202 *et seq.*

In particular, one of the most relevant proposals concerned the adoption of the so-called *Rozenblum* standard[166], a French judge-made doctrine on abuse of corporate assets (*abus de biens sociaux*) within groups that allows the parent company to make economically detrimental proposals to the subsidiary and to implement this proposal[167]. This sort of group defence, however, allows the directors of a subsidiary to take into account the interests of the group when making a decision that prejudices the subsidiary, provided that some conditions be fulfilled: i) the group must be characterized by capital links between the companies; ii) there must a strong, effective business integration among group companies; iii) the financial support from one company to another company must have an economic *quid pro quo* and may not break the balance of mutual commitments between the concerned companies; iv) the support from the company must not exceed its possibilities, thus creating the risk of bankruptcy for the company.

This formula, despite the limited number of cases going to court in France and the scarce rate of successful actions[168], was considered to be helpful in solving the difficult relationship between the majority in the parent company and the minority in the subsidiary[169].

As a result of the echo caused by the *Forum Europaeum*'s proposal, the High-Level Group of Company Law Expert, acting on an explicit mandate of the Commission, adopted a similar approach and endorsed the adoption of legislative actions having an impact on corporate

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[166] French Court of Cassation, 4 February 1985, in *Receuil Dalloz* 1985, 478; 13 February 1989, in *Rev. Sociétés*, 1989, 692, 4 September 1996, in *Rev. sociétés*, 1997, 365. Recently, this approach has been adopted by the Supreme Courts of Estonia and Spain: see, respectively, Juhatuse liikme hoolsuskohustus Riigikohtu tsiviilkolleegiumi (Civil Chamber), 24 November 2015, case n. 3-2-1-129-15, and Tribunal Supremo, Sala de lo Civil Sede, 11 December 2015, case n. 695/2015. This doctrine is considered by WERLAUFF, *Group and Community – the European Court's Development of an Independent Community Law Concept of the Group and its Significance for National Company Law*, in *Eur. Comp. L.*, 2007, 201, as «the germ for establishment of a common European group law». A similar approach was also recommended by the French think tank *Club des Juristes* in their Report *Towards Recognition of the Group Interest in the Europen Union?*, June 2015, at http://www.leclubdesjuristes.com. In contrast, see the reservations presented by BLAUROCK, *Bemerkungen zu einem europäischen Recht der Unternehmensgruppe*, cit., 85 *et seq.*

[167] Similar to the Rozenblum test is the Italian "teoria dei vantaggi compensativi" provided by Art. 2497 of the Italian Civil Code, on which see, among many, VENTORUZZO, *Responsabilità da direzione e coordinamento e vantaggi compensativi futuri*, in *Riv. soc.*, 2016, 363; GIOVANNINI, *La responsabilità per attività di direzione e coordinamento nei gruppi di società*, Milano, Giuffrè, 2007, 152 *et seq.*; RONDINONE, *Società (gruppi di)*, cit., 638 *et seq.*; SBISÀ, *Responsabilità della capogruppo e vantaggi compensativi*, in *Contr. impr.*, 2003, 591 *et seq.*; MONTALENTI, *Conflitto di interesse nei gruppi di società e teoria dei vantaggi compensativi*, in *Giur. comm.*, 1995, I, 710. In English, see CARIELLO, *The 'Compensation' of Damages with Advantages Deriving from Management and Co-ordination Activity (Direzione e Coordinamento) of the Parent Company (Article 2497, Paragraph 1, Italian Civil Code)*, in *Eur. Comp. Fin. L. Rev.*, 2006, 331-340.

[168] An in-depth analysis is provided by BOURSIER, *Le fait justificatif de groupe de sociétés dans l'abus de biens sociaux: entre efficacité et clandestinité*, in *Rev. sociétés*, 2005, 273 *et seq.* (75 rejecting and only 9 successful cases). More recently, MAGNUS, *Les groupes de sociétés et la protection des intérêts catégoriels*, cit., 55 *et seq.*

[169] In these terms LUTTER, *Guest Editorial: First steps for a European law on corporate groups* cit., 3.

groups[170]. These measures are reflected in the Commission's 2003 Action Plan, which, although deciding against the introduction of a comprehensive regulation of groups of companies, reminded that:

> «The High Level Group of Company Law Experts pointed out that groups of companies, which today are frequent in most, if not all, Member States, are to be seen as a legitimate way of doing business, but that they may present specific risks for shareholders and creditors in various ways. The Commission, following the Group's recommendation, takes the view that *there is no need to revive the draft Ninth Directive on group relations*, since the enactment of an autonomous body of law specifically dealing with groups does not appear necessary, but that particular problems should be addressed through specific provisions in three areas»[171].

Although the Action Plan explicitly calls for the adoption of uniform instruments, at the end only some of the proposed regulatory strategies were promulgated, such as the mandatory bid rule in the Takeover Directive[172] or the disclosure duties provided in the Transparency Directive[173]. Actually, there was another initiative that was indirectly related to groups as it was aimed at making the management of cross-border groups easier: the 2008 Proposal on the Statute for a European Private Company (SPE)[174]. However, it was affected by the general

[170] In September 2001, the European Commission set up a Group of High Level Company Law Experts with the objective of initiating a discussion on the need for the modernization of company law in Europe. To this end, the Group was given a dual mandate: *i*) to address the concerns expressed the year before by the European Parliament during the negotiation of the proposed take-over bids Directive ("13th Company Law Directive"); and *ii*) to provide the Commission with recommendations for a modern regulatory European company law framework. In particular, the Final Report (also known as the "Winter Report") proposed some recommendations addressing specific problems such as the management of the group (rule allowing group policy, squeeze-out), transparency of groups, protections of creditors (wrongful trading) and of minority shareholders (sell-out rights): see WINTER *et al.*, *Report on a Modern Regulatory Framework for Company Law in Europe*, 4 November 2000, 17-18 and 94-100, http://ec.europa.eu/internal_market/company/docs/modern /report_en.pdf.

[171] COM/2003/0284 final, «Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward», par. 3.3 (italics added).

[172] Art. 5 of Directive 2004/25/EC of 21 April 2004 on takeover bids [2004] OJ L 142/12.

[173] Arts. 9-15 of Directive 2004/109/EC of 5 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L 390/38.

[174] Proposal for a Council Regulation on the statute for a European private company, COM(2008) 396. One of the aspects raised in favour of the EPC was the setting-up of subsidiaries and the creation of standardized group structures: see DRURY, *Why Do We Need the European Private Company (Societas Privata Europea)?*, in HIRTE, TEICHMANN (eds.), *The European Private Company – Societas Privata Europaea (SPE)*, Berlin, De Gruyter, 2013.

difficulties of the European process of harmonization of company law[175] and was eventually withdrawn[176].

Because of the non-intervention, the uncertainties relating to the legal regime of groups of companies and in particular of subsidiaries established in different Member States remained untouched. In fact, the non-acknowledgement of the fact that a company belongs to a group has a significant impact on the establishment of a coherent group strategy and for its implementation on the different levels of the group hierarchy[177]. That is what moved the Reflection Group on the Future of Company Law in 2011 to return to the same issues after nearly ten years and again investigate on the need for EU-level intervention in the area of groups of companies[178]. Notably, three issues were discussed: *i*) the recognition of the "interest of the group" by the EU legislation[179]; *ii*) the simplified single member company template; *iii*) the transparency of group structures and relations[180].

These proposals have been to a great extent embraced by the Commission in the Action Plan on Company Law 2012[181]**.** The public consultation has indeed shown that the public is in favor of well-targeted EU initiatives on groups of companies[182]. In particular two items have been

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See in particular TEICHMANN, *Die* Societas Privata Europaea *(SPE) als ausländische Tochtergesellschaft*, in *RIW*, 2010, 120 *et seq.*, for specific issues affecting groups of companies.

[175] Three reasons may be identified: *i*) diverging views among member States about the goal of European Company Law; *ii*) strong tendency among Member States to protect their legal traditions; and *iii*) current lack of trust between Member States: see CONAC, *Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level*, in *Eur. Comp. Fin. L. Rev.*, 2013, 198. Moreover, the legal basis used for the adoption of the Regulation (Art. 352 TFEU), required unanimity in the Council, which eventually could not be met.

[176] *Withdrawal of Obsolete Commission Proposals* [2014] OJ C 153/6.

[177] In this sense, see TEICHMANN, *Towards a European Framework for Cross-Border Group Management*, in *Eur. Comp. L.*, 2016, 152.

[178] Available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf. The need for a certain degree of harmonization was not unanimously shared within the working group: see for instance the position of KNAPP, *Groups of companies and the current European Company Law*, 17 May 2011, 3, http://ec.europa.eu/internal_market/company/docs/modern/conference201105/knapp_en.pdf.

[179] See CONAC, *Director's Duties in Groups of Companies* cit., 194 *et seq.*

[180] CHIAPPETTA, TOMBARI, *Perspectives on Group Corporate Governance and European Company Law*, in *Eur. Comp. Fin. L. Rev.*, 2013, 261 *et seq.*

[181] Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM(2012) 740 final, par. 4.6. On which see MARCHETTI, *Il nuovo* Action Plan *europeo in materia societaria e di* corporate governance, in *Riv. soc.*, 2013, 225 *et seq.*; HOPT, *Europäisches Gesellschaftsrecht im Lichte des Aktionsplans der Europäischen Kommission vom Dezember 2012*, in *ZGR*, 2013, 165 *et seq.*; HOMMELHOFF, *Ein Neustart im europäischen Konzernrecht*, in *KSzW*, 2014, 63; EKKENGA, *Neue Pläne der Europaïschen Kommission für ein Europaïsches Konzernrecht: Erste Eindrücke*, in *AG*, 2013, 181.

[182] KALLS, *Ein Schritt zu einem europäischen Konzernrecht*, in *EuZW*, 2013, 361-362. The summary of responses to the public consultation is available at http://ec.europa.eu/internal_market/consultations/docs/2012/ companylaw /feedback_statement_en.pdf, Question 19. In particular, the majority rightly agreed that there should be no comprehensive European law of corporate groups in the manner of the German stock company law.

identified on the basis of the reflection group report and other material submitted to the Commission before or during the consultation: from one side, simplified communication of a group's structure to investors and, from the other side, an EU-wide move towards recognition of the concept of 'group interest'. However, the idea of a comprehensive legal EU framework covering groups of companies was met with caution, leading the Commission to affirm that it would have intervened with an initiative to improve both the information available on groups and recognition of the group interest[183].

In this regard, an important step forward has been made in 2012 in the specialized context of bank recovery and resolution with the proposal for a Directive establishing a framework for the recovery and resolution of credit institutions and investment firms[184]. The rules aim at balancing the interest of achieving, where necessary, an efficient resolution for the group as a whole with the protection of financial stability in both the Member States where the group operates and the Union[185]. It is worth noting that, as is evident from the Impact Assessment, one of the options taken into account was the introduction of the notion of "group interest" for credit institutions in the company law legislation of the EU. However, in the words of the Commission, this approach would have undermined the traditional approach as to the separate legal personality. Therefore, it was at last set aside, inasmuch disproportionate with the benefits of a clear asset transferability framework for crisis situations[186].

Another interesting proposal has been later brought forward for a Directive on single-member private limited liability companies (*Societas Unius Personae* - SUP)[187], which addresses some of the obstacles usually faced by small and medium-sized enterprises (SMEs) and facilitate cross-border activities of companies[188]. This is not a European form of company,

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[183] For further details, see TOMBARI, *Il "diritto dei gruppi": primi bilanci e prospettive per il legislatore comunitario*, in *Riv. dir. comm.*, 2015, 77 *et seq.*; MÜLBERT, *Auf dem Weg zu einem europäischem Konzernrecht?*, in *ZHR*, 2015, 652 *et seq.*; HOPT, *Europäisches Gesellschaftsrecht im Lichte des Aktionsplans der Europäischen Kommission vom Dezember 2012*, cit., 209-212.

[184] Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms, COM (2012) 280.

[185] In particular, this framework establishes special rules for cross-border groups covering preparation and prevention (Arts. 7, 8, 11, 12 and 15), early intervention (Art. 25) and the resolution phase (Arts. 80 to 83). Moreover, it provides for rules concerning the transfer of assets between entities affiliated to a group in times of financial distress (Arts. 16 to 22).

[186] European Commission, Impact Assessment Accompanying Proposal for a directive establishing a framework for the recovery and resolution of credit institutions and investment firms, SWD(2012) 166 final, 22.

[187] Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, (COM)2014 212 final, 9th April 2014.

[188] MALBERTI, *La proposta di direttiva sulla* Societas Unius Personae*: una nuova strategia per l'armonizzazione del diritto societario europeo?*, in *Riv. soc.*, 2014, 848 *et seq.*; TEICHMANN, *Corporate Groups*

like the *Societas Europea*, but it is designed for the Member States to provide in their legal systems for a national company law form that would follow the same rules in all Member States and would have an EU-wide abbreviation, thereby diminishing set-up and operational costs[189].

In particular, considering the costs and the difficulties incurred by SMEs to be active across borders and invest abroad, the goal of the SUP proposal is not only to facilitate the establishment of subsidiaries in other Member States but also to facilitate the cross-border functioning of SME groups[190]. In this last sense, the proposal was partly interpreted as aimed at filling the lack of a legal framework helping to organize efficiently and to manage cross-border groups[191]. In fact, the SUP could be an attractive model for groups of companies, as the directive would allow the single-member to give binding instructions to the management body[192], except where they are contrary to the articles of association and the applicable national law; in other words, in the absence of any harmonization, the contours of this right are left to national legislation[193].

Such right to give instructions would evidently help the parent company to control its subsidiary and its management, and that is why it was well received in Germany[194]. In this regard, although one may affirm that this provision could lead to the recognition of an "interest

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within the Legal Framework if the European Union: The Group-Related Aspects of the SUP Proposal and the EU Freedom of Establishment, in *Eur. Comp. Fin. L. Rev.*, 2015, 202.

[189] TEICHMANN, FROHLICH, *Societas Unius Personae (SUP) – Facilitating Cross-Border Establishment*, in *Maastricht J.*, 2014, 541.

[190] JUNG, *Societas Unius Personae (SUP) – The New Corporate Element in Company Groups*, in *Eur. Bus. L. Rev.*, 2015, 652-653; CONAC, *The Societas Unius Personae (SUP): A "Passport" for Job Creation and Growth*, in *Eur. Comp. Fin. L. Rev.*; 2015, 139 *et seq.*

[191] Contrary to the traditional approach based on the protective function of Group Law, this proposal is an example of how the recent discussions on groups shifted the focus towards the so-called "enabling function of group law" (Ermöglichungsfunktion), which is aimed at facilitating the management of the group in the cross-border scenario. See TOMBARI, *La tutela dei soci nel gruppo di società*, cit., 237; WELLER, BAUER, *Europäisches Konzernrecht: vom Gläubigerschutz zur Konzernleitungsbefugnis via Societas Unius Personae*, in *ZEuP*, 2015, 6; TEICHMANN, *Europäisches Konzernrecht: Vom Schutzrecht zum Enabling Law*, in *AG*, 2013, 184; HOMMELHOFF, *Förder- und Schutzrecht für den faktischen GmbH-Konzern*, cit., 537-538.

[192] See Art. 23 of the proposal. For an in depth analysis of the suitability of the SUP within group structures see JUNG, *Societas Unius Personae (SUP) – The New Corporate Element in Company Groups*, cit., 660; HOMMELHOFF, *Die Societas Unius Personae: als Konzernbaustein momentan noch unbrauchbar*, in *GmbHR*, 2014, 1065 *et seq.*; TEICHMANN, *Europäische Harmonisierung des GmbH-Rechts*, in *NJW*, 2014, 3564, defines this provision as «eine willkommene europaweit verlässliche Klarstellung».

[193] Such restriction deserves approval only insofar those limits are meant to be outside company law: SCHMIDT, *Der Vorschlag für eine Societas Unius Personae (SUP) – super oder suboptimal?*, in *GmbHR*, 2014, R130.

[194] See for instance HOMMELHOFF, *Ein Neustart im europäischen Konzernrecht*, cit., 67 *et seq.*; ID., *Die Societas Unius Personae: als Konzernbaustein momentan noch unbrauchbar*, cit., 1070-1071. More generally, this is considered as a necessary element of a future European group regulation, by the recent initiatives of both the EMCA and the *Forum Europaeum*: see CONAC, *The Chapter on Groups of Companies of the European Model Company Act (EMCA)*, cit., 309-311; FORUM EUROPAEUM ON COMPANY GROUPS, *Proposal to Facilitate the Management of Cross-Border company Groups in Europe*, in *Eur. Comp. Fin. L. Rev.*, 2015, 303.

of the group" at European level[195], this is not exactly the case because in those Member States that do not recognize the interest of the group (e.g. Germany), the manager of the subsidiary would not be allowed to enter into a transaction with the parent company which would be detrimental to the subsidiary[196]. Regrettably, many provisions of the proposal have been watered down by the Member States to reach a compromise in the Council, thereby establishing only a low level of harmonization. In May 2015 Member States agreed on a general approach that significantly amended the provisions put forward by the Commission[197], and ultimately, under the Latvian Presidency, Article 23 was definitely removed from the directive's text, thereby referring the issue back to the national law[198].

1.7. The Conflict of Laws Dimension of Groups of Companies

The previous paragraphs have shown clearly that, when addressing groups of companies, traditional principles of company law have been in a tense relationship with the reality of the business organization, where companies do not act independently but are often part of larger economic groups. This gap is still existing when one is confronted with cross-border groups: while their creation has been partially regulated by EU Law, in conjunction with the remaining provisions at the national level, on the contrary, comparable rules on the group management lack[199], with different national provisions applying to the individual group companies[200].

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[195] See Paris Ile-de-France Chamber of commerce, *Proposition de directive relative aux sociétés unipersonnelles à responsabilité limitée*, 5 June 2014, 10.

[196] In the sense that the proposed Directive does not recognize an overriding interest of the group, see TRÖGER, *Corporate Groups – A German's European Perspective*, cit., 38.

[197] On 14 November 2014 the Italian presidency presented a compromise text, that already significantly amended the original proposal, but which did not reach an agreement in the Council: see Council, document No ST 14648 2014 INIT, 14th November 2014. On this text see KINDLER, *Die Einpersonen-Kapitalgesellschaft als Konzernbaustein – Bemerkungen zum Kompromissvorschlag der italienischen Ratspräsidentschaft für eine Societas Unius Personae (SUP)*, in *ZHR*, 2015, 330.

[198] BERTOLACELLI, *La* Societas Unius Personae (SUP)*: Verso un nuovo modello societario unipersonale europeo?*, in *Nuove leggi civ. comm.*, 2016, fn. 162 at 646; TEICHMANN, FRÖHLICH, *How to make a Molehill out of a Mountain: The Single-Member Company (SUP) proposal after Negotiations in the Council*, Working Paper 11/2015, 21-22.

[199] The deficits and inefficiencies of the national and European legal frameworks are partially compensated by private rulemaking and by a shift to centralized forms of organization, with private actors creating their own regulatory structures (privately set standards and informal structures). See PAPADAPOULOS, *The challenge of transnational private governance: Evaluating authorization, representation, and accountability*, LIEPP Working Paper, February 2013, n. 8; KIRCHNER, *Evolution of Law: Interplay between Private and Public Rule-Making – A New Institutional Economics-Analysis*, in *Erasmus L. Rev.*, 2011, 161.

[200] Among many, see RENNER, *Kollisionsrecht und Konzernwirklichkeit in der transnationalen Unternehmensgruppe*, in *ZGR*, 2014, 453.

This remark brings us back to what is considered the main feature of corporate groups, i.e. the tension between economic unity and legal plurality[201]. The latter, in particular, is stressed in transnational groups, where different companies are in principle subject to various national laws. In the presence of groups of companies, in fact, the plurality of connecting factors enhances fragmentation, with each issue (company law, insolvency law, labor law, etc.) being governed by its own – different – applicable law, pursuant to its own conflict of law provisions. Therefore, the unity of the group is extremely difficult to reach from a legal point of view[202].

In particular, to this day the PIL debate on groups has been two-fold: from one side, it focused on the possibility to attribute a single nationality to the group as a whole, thus subjecting all the group members to the same applicable law, which is basically that of the parent company; from the other side, it dealt with the law applicable to internal relationships between the parent and the subsidiary companies within the group[203].

1.7.1. The Nationality of Companies Belonging to a Group and *Lex Societatis*

As a result of the above-mentioned contrast between the economic unit and the legal plurality, it is questionable whether the desire to translate the economic reality of groups into legal terms might lead to the determination of a single national legislation required to govern the group's organization and functioning[204]. In this regard, one may see that, although the essence of the group can be identified in the implementation of control through the exercise of a single management strategy by the parent company, national legal systems do not confer legal personality to the group[205]. Accordingly, as the group is not a subject of law and has no capacity

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[201] See *supra*, par. 2.

[202] SACERDOTI, *Stati e imprese multinazionali*, in PICONE, SACERDOTI (a cura di), *Diritto internazionale dell'economia. Raccolta sistematica dei principali atti normativi internazionali ed interni con testi introduttivi e note*, Milano, F. Angeli, 1982, 707.

[203] See the seminal article by LABORDE, *Droit international privé et groupes internationaux de sociétés: une mise à l'épreuve réciproque*, in *Les activités et les biens de l'entreprise. Mélanges offerts à J. Derruppé*, Paris, Litec, 1991, 49.

[204] This can be referred to as the economic nationality of groups: BEGUIN, *La nationalité juridique des sociétés commerciales devrait correspondre à leur nationalité économique*, in *Le droit privé français à la fin du XXè siècle. Etudes offertes à Pierre Catala*, Paris, Litec, 2001, 859 *et seq*. In the negative, see ALESSI, *La disciplina dei gruppi multinazionali nel sistema societario italiano*, cit., 70-71; SANDROCK, *Die Multinationalen Korporationen im Internationalen Privatrecht*, in WILDHABER, GROSSFELD, SANDROCK, BIRK (Hrsg.), *Internationalrechtliche Probleme multinationaler Korporationen*, Heidelberg-Karlsruhe, C.F. Muller, 1978, 178-179.

[205] On the lack of legal personality, among many, see MAGNUS, *La réglementation globale des groupes de sociétés en droit comparé et son impact pour les multinationales*, cit., 80-81 ; DESOUTTER, *La responsabilité civile de la société mère vis-à-vis de sa filiale*, cit., 46-48. Especially in Germany, at the beginning of the last century,

to stipulate contracts, it cannot have a nationality. The only solution to achieve such unity is then to attribute the same nationality to all the companies belonging to the same group[206].

At the outset, it must be stressed that nationality of companies and *lex societatis* are strictly related terms but they address different issues: the first one concerns the treatment of foreigners and is the traditional link used by international law rules for diplomatic protections, while the second relates to the law applicable to the constitution and the functioning of legal persons[207]. However, in private international law, these two concepts are difficult to distinguish and are often confused[208]. Notably, the nationality of companies has been retained as a connecting factor for the determination of the *lex societatis*, especially in civil law jurisdictions like the French one, with all the difficulties relating to the interpretation of a concept composed of jurisdical elements, which require some connection between the company and the State[209].

Irrespective of this distinction, which would require much more attention to be examined *funditus*, two contrasting conflict of law theories are generally retained for the purposes of the *lex societatis*, the choice between one and another depending on different legislative policies: the incorporation theory (*Gründungsorttheorie*) and the real seat theory (*théorie du siège reel* or *Sitztheorie*)[210]. According to the incorporation theory, the rules applicable to a company are

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some authors supported the attribution of legal personality to groups: see, for instance, the *Einheitstheorie* by HAUSSMANN, *Die Tochtergesellschaft – Eine rechtliche Studie zur modernen Konzernbildung u. zum Effektenkapitalismus*, Berlin, Liebmann, 1923, 26 *et seq.* In France, for a critique of those proposals presenting the group as a single entity, see CONTIN, HOVASSE, *L'autonomie patrimoniale des sociétés – Réflexions sur les finalités d'une organisation juridique des groupes*, in *Dalloz*, 1971, chron. 197.

[206] LABORDE, *Droit international privé et groupes internationaux de sociétés*, cit., 53. The debate in the literature concerning the appropriateness of the concept of nationality with regard to corporations has been vast and dates back to the first half of the last century. In particular, in France, see TRAVERS, *La nationalité des sociétés commerciales*, in *Recueil des cours*, 1930, vol. 33, 10 *et seq.*; NIBOYET, *Existe-t-il vraiment une nationalité des sociétés?*, in *Rev. dr. int. privé*, 1927, 402 *et seq.* (who prefers speaking of "*allégeance politique*"); PEPY, *La nationalité des sociétés*, Paris, Sirey, 1920, 7 *et seq.* In contrast, in Germany and England the concepts of "nationality" and "Staatsangehörigkeit" do not play any role for the determination of the applicable law. In the Italian literature, this juxtaposition between nationality and *lex societatis* has been criticized, among many, by LUZZATTO, AZZOLINI, *Società (nazionalità e legge regolatrice)*, in *Digesto disc. priv., Sez. comm.*, vol. XIV, Torino, Utet Giuridica, 1997, 140, and less recently by CAPOTORTI, *Considerazioni sui conflitti di leggi in materia di società*, in *Riv. dir. int. priv. proc.*, 1965, 623 *et seq.* In France, see MENJUCQ, *Droit international et européen des sociétés*[3], cit., 37-42.

[207] KESSEDJIAN, *Droit du commerce international*, Paris, PUF, 2013, 106.

[208] BALLARINO, *Le società estere*, in RESCIGNO (a cura di), *Trattato di diritto privato*[2], vol. 17, t. 3, Torino, Utet Giuridica, 2010, 268-270.

[209] GUILLAME, Lex societatis: *principes de rattachement des sociétés et correctifs institués au bénéfice des tiers en droit international privé suisse*, Schultness, Zurich, 2001, 79 *et seq.*

[210] For a general overview of both theories, including how they have been adopted within different countries, see PASCHALIDIS, *Freedom of Establishment and Private International Law for Corporations*, Oxford, OUP, 2012, 3-11; RAMMELOO, *Corporations in Private International Law*, Oxford, OUP, 2001, 95 *et seq.*; GUILLAME, Lex societatis: *principes de rattachement des sociétés et correctifs institués au bénéfice des tiers en droit international privé suisse*, cit., 113 *et seq.* In particular, one may see that the Netherlands, England, Liechtenstein and Hungary

determined by the State in which the company has been duly incorporated and remains registered, so that the company's managers are free to choose which legal system applies to the company's relationship. This straightforward definition is based on a subjective proper law test, which stresses the role of party autonomy, legal certainty, and predictability and allows avoiding all the difficult material criteria such as where the main business is done or where the administrative decisions are taken. The opposing real seat theory, in contrast, was developed to avoid the evasion of domestic rules and refers to a material connection between the company and a State, thus referring to the central administration or the centre of gravity of the company. In this way, only the system of law that is predominantly interested in the company's organization and functioning finds application, thus avoiding possible forms of abuses[211].

These two theories, however, have been developed with regard to individual companies, outside the context of company affiliations and groupings. It is in fact widely accepted that multinational enterprises have profoundly modified the classical approach to the nationality of companies and *lex societatis*, because the traditional connecting factors used with regards to separate companies uneasily fit the context of groups[212]. In the legal doctrine, some authors proposed the adoption of a unitary approach aimed at subjecting all the group companies to the same national law, namely the law of the seat of the parent company[213], which has been referred

adhere to the incorporation theory, while Austria, Belgium, Germany, France, Greece, Luxembourg, Poland, Portugal, Slovenia and Spain represent the real seat theory. As far as Italy is concerned, the situation is more complicated, because Art. 25 of the Italian PIL Statute introduces a two-tiered conflict rule: in fact, the general reference to the place of incorporation encounters a limit in cases where the head-office is in Italy as well as if the principal operation of the bodies is situated in Italy. This limit ("norma di conflitto unilaterale introversa") is interpreted in the literature as meaning that, in such cases, the entity has to comply with domestic company law, which applies in addition to law of the incorporation place but without affecting the validity requirements of the entity itself: among many, see LUZZATTO, AZZOLINI, *Società (nazionalità e legge regolatrice)*, cit., 149-150; BENEDETTELLI, *La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato*, in *Riv. soc.*, 1997, 88; SANTA MARIA, *Spunti di riflessione sulla nuova norma di diritto internazionale private in materia di società e altri enti*, in Collisio Legum. *Studi di diritto internazionale private per Gerardo Broggini*, Milano, Giuffrè, 1997, 473. More recently, see MOSCONI, CAMPIGLIO, *Diritto internazionale privato e processuale – Vol. 2: Statuto personale e diritti reali*, Torino, Utet Giuridica, 2016, 62-64.

[211] As recently remarked by KINDLER, *L'amministrazione centrale come criterio di collegamento del diritto internazionale privato delle società*, in *Riv. dir. int. priv. proc.*, 2015, 902, according to an opinion widely shared, the CJEU's case law on the right of establishment (*Centros*, *Überseering* and *Inspire Art*) urged the real seat countries to modify their conflict of law provisions in order that the company's functioning be regulated by the law of the country where it is incorporated. Concerning Germany, see BEHRENS, *From "Real Seat" to "Legal Seat": Germany's Private International Company Law Revolution*, in HAY *et al.* (eds.), *Resolving International Conflicts.* Liber Amicorum Tibor Vàrady, Budapest-New York, CEU Press, 2009, 45 *et seq.* More generally, on the impact of EU Law on national systems, see BENEDETTELLI, *Profili di diritto internazionale private ed europeo delle società*, in *Riv. dir. soc.*, 2015, 48 *et seq.*

[212] See, in particular, HANNOUN, *Le droit et les groupes de sociétés*, Paris, LGDJ, 1991, 261.

[213] See MENJUCQ, BEGUIN, *Droit du commerce international*[2], Paris, LexisNexis, 2011, 288; LABORDE, *Droit international privé et groupes internationaux de sociétés*, cit., 53.

to in a recent study as the *lex concilii societatium*[214]. In order to have a unique solution to the problems of groups of companies, different proposals have been brought forward, of which two deserve particular attention.

The first is the application of the criterion of control as connecting factor for the determination of the *lex societatis*. This test was developed by French courts during the First World War in order to unveil possible foreign interests behind national corporations, by taking into account the nationality of majority shareholders and directors or the place where the business activities were actually performed[215]. In other words, the notion of control was not used to determine the applicable law, but for the treatment of enemy aliens in time of war. After the Second World War[216], this criterion became almost unused, especially because it is particularly difficult to handle: indeed, it does not consider that there is often a discrepancy between the formal and the actual allocation of powers within the group and that a change in the controlling position would also influence the applicable law[217]. Moreover, concerning groups of companies, one should look not only at the nationality of the parent company, but should also lift the corporate veil and look at the parent's shareholders, its directors, and creditors, thus increasing uncertainties[218]. This criterion has been lately abandoned in the national case law[219] and met the fierce criticism by the International Court of Justice in the well-known cases *Barcelona Traction* and *Electronica Sicula*[220].

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[214] BODE, *Le groupe international de sociétés. Le système de conflit de lois en droit comparé français et allemand*, Bern, Peter Lang, 2010, 173 *et seq.*

[215] MENJUCQ, BEGUIN, *Droit du commerce international*, cit., 191. The authors remind that this criterion is used for the application of discriminatory measures and is aimed at denying the enjoyment of rights.

[216] On the interpretation of the control test in the French case law between the two World Wars, see MAYER, HEUZÉ, *Droit international privé*[10], Paris, Montchrestien, 2010, 768-770; LOUSSOUARN, BONNET, VAREILLES-SOMMIÈRES, *Droit international privé*[8], Paris, Dalloz, 2004, 931-934; BATIFFOL, LAGARDE, *Traité de droit international privé*[8], Paris, LGDJ, 1993, 339-341. See also LOUSSOUARN, *La condition des personne morales en droit international privé*, in *Recueil de cours*, vol. 96, 1959, 460-471. With regard to England and Italy, see BALLARINO, *Le società per azioni nella disciplina internazionalprivatistica*, in COLOMBO, PORTALE (dir.), *Trattato delle società*, vol. 9, Torino, Utet, 1994, 25-31.

[217] BOUDERHEM, *La nationalité des sociétés en droit français*, Université de Bourgogne, thèse 2012, 328-329.

[218] SYNVET, *L'organisation juridique du groupe international de sociétés. Conflits de loi en matière de sociétés et défaut d'autonomie économique de la personne morale*, thèse Rennes, 1979, 75 *et seq.*

[219] For a recent case, see French Court of Cassation, 10 March 2010, n. 09-82453, in *Rev. sociétés*, 2011, 114.

[220] ICJ, 5 February 1970, *Barcelona Traction, Light and Power Company, Limited*, in *I.C.J. Reports*, 1970, 3; and 20 July 1989, *Electronica Sicula S.p.A.*, in *I.C.J. Reports*, 1989, 15. In particular, the ICJ held that only the company's national State can submit a claim if an interest of the company as such has been prejudiced and if its shareholders' interests have been only indirectly prejudiced, thus excluding the applicability of the control test. In contrast, it is considered as a satisfactory solution by FRANCIONI, *Imprese multinazionali, protezione diplomatica e responsabilità internazionale*, cit., 112-113; and SACERDOTI, *Barcelona Traction Revisited: Foreign-Owned and Controlled Companies in International Law*, in DINSTEIN (ed.), *International law at a time of perplexity. Essays in honour of Shabtai Rosenne*, Dordrecht, Kluwer, 1989, 699 *et seq.* Recently, in the sense that a formal approach

The second proposal attributes relevance to the centre of decision, *i.e.* the place where all the relevant economic initiatives concerning the group are taken[221]. This criterion aims at replacing the real seat and the control approaches and would have the advantage to make a distinction depending on the different degree of autonomy that subsidiaries enjoy within the same group[222]. However, since in most situations the subsidiary would not benefit any longer of the law of the State where it has its seat, but it is subject to the law of the company from which it received instructions, one may doubt that there is a significant difference with the test control above illustrated[223]. Moreover, one has to consider that geometry of groups is rather evolutive so that management centres of the groups are not necessarily located in the same place[224].

1.7.2. The Law Applicable to the Internal Relations within the Group

The interim conclusion is that a pluralist approach seems preferable both under an economic and a legal point view. In fact, the possibility to transcend national boundaries is considered as a factor of optimization of the group, because it allows the establishment of subsidiaries in countries where legal and fiscal conditions are more favorable[225]. Besides, one has to take into account the lack of harmonization of group law among the Member States. It is in fact very likely that the law of the parent company does not provide for a legislation of groups of companies or does not sufficiently protects the interests of the subsidiary, thus raising serious concerns as to *law shopping* practices[226]. Accordingly, a distributive application of as many

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is not any more appropriate due to the development of corporate groups, see ACCONCI, *Determining the Internationally Relevant Link between a State and a Corporate Investor. Recent Trends concerning the Application of the "Genuine Link" Test*, in *J. World Inv. Trade*, 2004, 139 *et seq.*

[221] GOLDMAN, *La nationalité des sociétés dans la communauté économique européenne*, in *Trav. fr. dr. int. priv.*, 1966-1969, 245 ; ID., *Cours de droit du commerce international*, Paris, Les cours de droit, 1970-1971, 98. He speaks of "centre nerveux" and "lieu d'où part l'impulsion de l'activité sociale". In this regard, see also FATOUROS, *Problèmes et méthodes d'une réglementation des entreprises multinationales*, in *Clunet*, 1974, 495.

[222] LABORDE, *Droit international privé et groupes internationaux de sociétés*, cit., 54.

[223] MENJUCQ, *Droit international et européen des sociétés*[3], cit., 24-28 ; BODE, *Le groupe international de sociétés*, cit., 177; CASSONI, *Problemi relativi al fenomeno del gruppo sotto il profilo della legge regolatrice e della legge sostanziale italiana*, in *Riv. soc.*, 1985, 867; SYNVET, *L'organisation juridique du groupe international de sociétés*, cit., 84-85.

[224] MENJUCQ, BEGUIN, *Droit du commerce international*, cit., 289.

[225] YOUBO, *La* lex societatis *en droit international des affaires*, Université de Bordeaux, thèse 2015, 288-290 ; HANNOUN, *Le droit et les groupes de sociétés*, cit., 236; SYNVET, *L'organisation juridique du groupe international de sociétés*, cit., 3.

[226] BODE, *Le groupe international de sociétés*, cit., 178-182 and 193-196. Other difficulties are mentioned by MAGNUS, *La réglementation globale des groupes de sociétés en droit comparé et son impact pour les*

leges societatis as are the group members involved in a particular situation seems more suitable[227]. Indeed, once ascertained that the nationality of a subsidiary does not depend on its parent company, one may conclude that each company falls within the competence of its own applicable law.

In this regard, it must be stressed that even those system having a regulation on groups of companies lack specific conflict of law provision addressing the protection of shareholders and creditors, as well as infra-group transaction[228]. The silence on this matter raises a question as to the applicability of national legislations to the liability of foreign parent companies controlling domestic subsidiaries. As the latter are concerned, in the literature the existence of a conflict rule is undisputed, which provides that, for the group relationship, insofar as the interests of the dependent company (including minority shareholder and creditors) are affected, the company statute of the subsidiary applies[229], regardless of whether the legal system where the subsidiary

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multinationales, cit., 82-85: i) the inexistence of a uniform interpretation of the concept of parent company; ii) the mentioned absence of legal personality of the group; iii) the inaptitude of national laws to regulate all the companies belonging to the group.

[227] KESSEDJIAN, *Droit du commerce international*, cit., 119.

[228] PORTALE, *La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato*, in *Europa dir. priv.*, 2005, 140 (with regard o the German AktG and the Italian reform of 2003).

[229] HABERSACK, *AktG § 311 Schranken des Einflusses*, in EMMERICH, HABERSACK, *Aktien- und GmbH-Konzernrecht*, cit., para. 21; RENNER, *Kollisionsrecht und Konzernwirklichkeit in der transnationalen Unternehmensgruppe*, cit., 460-463; TEICHMANN, *Konzernrecht und Niederlassungsfreiheit*, cit., 71-72; DRINHAUSEN, *§ 44 Internationales Konzernrecht*, in LEIBLE, REICHERT (Hrsg.), *Münchener Handbuch des Gesellschaftsrechts* , vol. 6, München, C.H. Beck, 2013, para. 7; MAGNUS, *La réglementation globale des groupes de sociétés en droit comparé et son impact pour les multinationales – Aperçu général*, cit., 70-71; FRIGESSI DI RATTALMA, *La legge regolatrice della responsabilità da direzione e coordinamento nei gruppi multinazionali di società*, in BARIATTI, VENTURINI (a cura di), *Nuovi strumenti del diritto internazionale privato*. Liber Fausto Pocar, Milano, Giuffrè, 2009, 362; PORTALE, *La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato*, cit., 141-142; WIMMER-LEONHARDT, *Konzernhaftungsrecht: die Haftung der Konzernmuttergesellschaft für die Tochtergesellschaften im deutschen und englischen Recht*, cit., 664 *et seq.*; JAFFERALI, *L'application du droit belge aux sociétés de droit étranger. Une esquisse des contours de la* lex societatis, in *Rev. belge dr. comm.*, 2004, 785-786; CARBONE, *La riforma societaria tra conflitti di leggi e principi di diritto comunitario*, in *Dir. comm. int.*, 2003, 97-98; BENEDETTELLI, *«Mercato» comunitario delle regole e riforma del diritto societario italiano*, cit., 718-719 (possible limitations of responsibility provided in the *lex societatis* of the parent should also be taken into account); MUNARI, *Riforma del diritto societario italiano, diritto internazionale privato e diritto comunitario; prime riflessioni*, in *Riv. dir. int. priv. proc.*, 2003, 44-45; BEHRENS, *Konzernsachverhalte im internationalen Recht*, in *SZIER*, 2002, 92-93; MALATESTA, *In tema di legge regolatrice della responsabilità dell'unico azionista*, in *Riv. dir. int. priv. proc.*, 2000, 945 *et seq.*; BAIERLIPP, *Die Haftung* der *Muttergesellschaft eines multinationalen Konzerns für die Verbindlichkeiten ihrer ausländischen Tochtergesellschaft*, Hamburg, Kovač, 2002, 115-116; GROßFELD, *Internationales Gesellschaftsrecht*, in STAUDINGER, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*[14], 1998, Berlin, de Gruyter, para. 557; LUZZATTO, AZZOLINI, *Società (nazionalita e legge regolatrice)*, cit., 152; BEHRENS, *Internationales gesellschaftsrecht und Fremdenrecht*, in ID. (Hrsg.), *Die Gesellschaft mit beschränkter Haftung im internationalen und europäischen Recht*[2], Berlin, de Gruyter, 1997, 27; EINSELE, *Kollisionsrechtliche Behandlung des Rechts verbundener Unternehmen*, in *ZGR*, 1996, 41; ZIMMER, *Internationales Gesellschaftsrecht*, Heidelberg, R & W, 1996, 366-377; BALLARINO, *Le società per azioni nella disciplina internazionalprivatistica*, cit., 205; SCHÜCKING, *Kapitalersetzende Gesellschafterdarlehen im Internationalen*

is established provides or not a legislation on groups of companies[230]. This law also governs the legal obligations and liability of the controlling company, as well as the preliminary issue of whether a dependency or group event is present[231]. In other words, the *lex societatis* of the subsidiary and the conditions therein contained concerning the constitution of the group (e.g. whether a contract of domination is permitted) extends its scope of application towards any parent company, being irrelevant whether the latter is domestic or foreign[232]. This is also confirmed by Recital (15) of the SE-Regulation, which reads as follows:

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*Privatrecht***,** in *ZIP*, 1994, 1160; SCHMIDT, *Der Haftungsdurchgriff und seine Umkehrung im internationalen Privatrecht*, Tübingen, Mohr Siebeck, 1993, 182; EBENROTH, WILKEN, *Entwicklungstendenzen im deutschen Internationalen Gesellschaftsrecht - Teil 3*, in *JZ*, 1991, 1116; SANTA MARIA, *Società (dir. internaz. priv e proc.)*, in *Enc. Dir.*, vol. XLII, 1990, 899-890; SACERDOTI, *Questions de responsabilité envers les tiers dans les groupes multinationaux de sociétés*, in *Riv. soc.*, 1985, 985; CASSONI, *Problemi relativi al fenomeno del gruppo sotto il profilo della legge regolatrice e della legge sostanziale italiana*, cit., 863 *et seq.*; NEUMAYER, *Betrachtungen zum internationalen Konzernrecht*, in *ZVglRWiss*, 1984, 130 *et seq.*; ANGELICI, *Profili transnazionali della responsabilità degli amministratori nella crisi dei gruppi di società*, in *Riv. dir. civ.*, 1982, 35; SYNVET, *L'organisation juridique du groupe international de sociétés*, cit., 319-320; WIEDEMANN, *Internationales Gesellschaftsrecht*, in LÜDERITZ, SCHRÖDER (Hrsg.), *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts: Bewahrung oder Wende? Festschrift für Gerhard Kegel*, Frankfurt am Main, Metzner, 1977, 203; COESTER-WALTJEN, *German Conflict Rules and the Multinational Enterprise*, in *Georgia J. Int. Comp. L.*, 1976, 224-225; REHBINDER, *Das auf multinationale Unternehmen anwendbare Recht*, in *Deutsche zivil- und kollisionsrechtliche Beitrage zum IX. Internationalen Kongress für Rechtsvergleichung in Teheran 1974*, Tübingen, 1974, 124; BEITZKE, *Zur Entwicklung des internationalen Konzernrechts*, in *ZHR*, 1974, 533; IMMENGA, KLOCKE, *Konzernkollisionsrecht - Eine Problemskizze auf der Grundlage des deutschen Rechts der Unternehmensverbindungen*, in *ZSchwR*, 1973, 27; KOPPENSTEINER, *La protection des créanciers de sociétés membres du groupe*, in *Colloque international sur le droit international privé des groupes des sociétés*, cit., 79 *et seq.*; ID., *Internationale Unternehmen im deutschen Gesellschaftsrecht*, Frankfurt am Main, Athenäum, 1971, 97 *et seq.*; SINAY, *Vers un droit des groupes de sociétés*, cit., 70.

[230] BODE, *Le groupe international de sociétés*, cit., 433; LABORDE, *Droit international privé et groupes internationaux de sociétés*, cit., 55. This last consideration raises a concern as to whether the *lex societatis* of the subsidiary is actually well suited for the protection of the interests of minority shareholders and creditors. In this regard, GOLDMAN, *La protections des actionnaires minoritaires des sociétés filiales*, in *Colloque international sur le droit international privé des groupes des sociétés*, cit., 23 *et seq.*, proposed a different solution, according to which the law of the parent company should apply whenever it provides for a better protection of minority shareholders than the law of the subsidiary. Similarly, KLOCKE, *Deutsches Konzernkollisionsrecht und seine Substitionsprobleme*, Baden-Baden, Nomos, 1974, 62 *et seq.*, proposed to establish a system ("ergebnisbestimmte Anknüpfung"), inspired by American doctrine, in which bilateral conflict of law provision are oriented to the interests and the objectives of substantive group laws ("materiellrechtlich gefärbter, allseitiger Kollisionsnormen"). Criticism by CASSONI, *Problemi relativi al fenomeno del gruppo sotto il profilo della legge regolatrice e della legge sostanziale italiana*, cit., 866-869.

[231] LIEBSCHER, *GmbH-Konzernrecht. Die GmbH als Konzernbaustein*, München, C.H. Beck, 2006, 362; PORTALE, *La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato*, cit., 141-142.

[232] It is in fact conceived as a bilateral conflict of law rule ("allseitige Kollisionsnorm"). Among many, see BEHRENS, *Konzernsachverhalte im internationalen Recht*, cit., 89-91. This is the traditional concept of conflict of law rule developed by Savigny, according to whom applicable law has to be determined in the abstract by identifying the natural "seat" of a situation or relationship, as it happens with individuals, having due regard to the spatial localisation of the various elements of the case: see PICONE, *Les méthodes de coordination entre ordres juridiques en droit international privé*, in *Recueil des cours*, 1999, vol. 276, 35 *et seq.*; PATOCCHI, *Règles de rattachement localisatrices et règles de rattachmenet à caractère substantiel*, Genève, George, 1985, 201 *et seq.* A different interpretation was defended by LUCHTERHANDT, *Deutsches Konzernrecht bei grenzüberschreitenden Konzernverbindungen*, Stuttgart, Enke, 1971, 70 *et seq.*, under the name of "wirtschaftsrechtliche

> «Under the rules and general principles of private international law, where one undertaking controls another governed by a different legal system, its ensuing rights and obligations as regards the protection of minority shareholders and third parties are governed by the law governing the controlled undertaking, without prejudice to the obligations imposed on the controlling undertaking by its own law, for example the requirement to prepare consolidated accounts»[233].

This rule, however, is differently justified in the literature[234]. According to a convincing opinion, the solution to this question is not peculiar to corporate groups but has to be searched in the existing principles of international company law[235]. Indeed, since the parent company is a shareholder of the subsidiary, it goes without saying that the corporate legal relationship between the two companies is subject to the law of the subsidiary[236]. Moreover, from a substantive point of view, the protective approach of group law concerning subsidiary's creditors and shareholders is taken into account as giving relevance to the fact protective tools provided at the national level have to find application whenever the subsidiary is established within the territory of that State. In other words, the focus is on the fact the interests of the

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Sonderanknüpfung", according to which the traditional conflictual method under the company law qualification should be replaced by unilateral approach focused on the economic law nature of group law, similar to legislations aimed at protecting the market economy such as antitrust and unfair competition law.

[233] For further explanation, see LÄCHLER, *Das Konzernrecht der Europäischen Gesellschaft (SE)*, cit., 99-101. Reference to this recital may be found in TOMBARI, *Diritto dei gruppi di imprese*, cit., 86; BODE, *Le groupe international de sociétés*, cit., 337; FRIGESSI DI RATTALMA, *La legge regolatrice della responsabilità da direzione e coordinamento nei gruppi multinazionali di società*, cit., 365; CARBONE, *Lex mercatus e lex societatis tra pincipi di diritto internazionale privato e disciplina dei mercati finanziari*, in *Riv. dir. int. priv. proc.*, 2007, 46; BALLARINO, *Problemi di diritto internazionale private dopo la riforma*, in ABBADESSA, PORTALE (dir.), *Il nuovo diritto delle societa.* Liber amicorum *G. F. Campobasso*, vol. 1, Torino, Utet Giuridica, 2006, 171; MUNARI, *Riforma del diritto societario italiano, diritto internazionale privato e diritto comunitario: prime riflessioni*, cit., 49; CAFARI PANICO, *Il Regolamento della società europea e le fusioni transfrontaliere*, in DRAETTA, POCAR (a cura di), *La società europea. Problemi di diritto societario comunitario*, Milano, Egea, 2002, 40; MALATESTA, *Prime osservazioni sul regolamento CE n. 2157/2001 sulla società europea*, in *Riv. dir. int. priv. proc.*, 2002, 616.

[234] For an in-depth review of the different theses, see KINDLER, *Internationales Handels- und Gesellschaftsrecht*, in *Münchener Komm. zum BGB*[6], München, C.H. Beck, 2015, para. 688 *et seq.*

[235] SERVATIUS, *Internationales Gesellschaftsrecht*, in HENSSLER, STROHN, *Gesellschaftsrecht*[3], München, C.H. Beck, 2016, para. 406; ALTMEPPEN, *Anh § 13 Konzernrecht der GmbH*, in ROTH, ALTMEPPEN, *GmbHG*[8], München, C.H. Beck, 2015, para. 174; LIEBSCHER, *GmbH-Konzernrecht. Die GmbH als Konzernbaustein*, cit., 361-362; GROßFELD, *Internationales Gesellschaftsrecht,* cit., para. 556; MANN, in *Colloque international sur le droit international privé de sociétés*, cit., 41-42.

[236] BODE, *Le groupe international de sociétés*, cit., 294-295 and 419; LUZZATTO, AZZOLINI, *Società (nazionalita e legge regolatrice)*, cit., 152; ZIMMER, *Internationales Gesellschaftsrecht*, cit., 373-374; EBENROTH, *Konzernbildungs- und Konzernleitungskontrolle*, Konstanz, Universitätsverlag Konstanz, 1987, para. 381 *et seq.*; EINSELE, *Kollisionsrechtliche Behandlung des Rechts verbundener Unternehmen*, cit., 44; MANN, *Bemerkungen zum Internationalen Privatrecht der Aktiengesellschaft und des Konzerns*, in *Wirtschaftsfragen der Gegenwart: Festschrift für Hans Carl Barz zum 65. Geburtstag*, Berlin, de Gruyter, 1974, 219.

persons legally related to the controlled company are to be protected from actions taken by an independent entrepreneurial activity of the controlling company, which pursues simultaneously corporate interests in other companies[237].

Of course, this does not eliminate any relevance of the parent company's personal statute. Indeed, the latter still applies concerning the internal decision-making process and allocation of powers, including relations with shareholders and creditors, or asset protection of the parent, i.e. those provisions that deals with problems of the parent company and are intended to protect the dominant company and its shareholders and creditors[238]. An example in German *Konzernrecht* is provided by § 71d AktG, which regulates the acquisition of own shares through third parties[239] or the application of the so-called *Theorie der Konzernverfassung von oben*[240]. According to this last theory, developed by the BGH in *Holzmüller*[241] and then clarified in *Gelatine*[242], the parent's minority shareholders need protection when the management of the parent wants to take material measures which alter the structure of the corporation, and thus significantly affect the rights and interests of the shareholders, without the consent of the shareholders meeting[243].

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[237] FRIGESSI DI RATTALMA, *La legge regolatrice della responsabilità da direzione e coordinamento nei gruppi multinazionali di società*, cit., 363; GROßFELD, *Internationales Gesellschaftsrecht*, cit., para. 563; WIEDEMANN, *Internationales Gesellschaftsrecht*, cit., 203 *et seq.*; ANGELICI, *Profili transnazionali della responsabilità degli amministratori nella crisi dei gruppi di società*, cit., 43. Slighly differently, Koppensteiner comes to the conclusion that the standards of the company law legislation apply in international situations only when the *ratio legis* concerns the conditions of the German partner of the corporate connection: see KOPPENSTEINER, *Internationale Unternehmen im deutschen Gesellschaftsrecht*, cit., 104-105.

[238] DRINHAUSEN, *§ 44 Internationales Konzernrecht*, cit., para. 9; TOMBARI, *Diritto dei gruppi di imprese*, cit., 86-87; PORTALE, *La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato*, cit., 141. BEHRENS, *Konzernsachverhalte im internationalen Recht*, cit., 93-94 (decisions on the divestment of assets in the dependent company); COESTER-WALTJEN, *German Conflict Rules and the Multinational Enterprise*, cit., 224 (provisions dealing with whether a controlled corporation can acquire shares in the controlling company); GROßFELD, *Internationales Gesellschaftsrecht*, cit., paras. 557-559; EINSELE, *Kollisionsrechtliche Behandlung des Rechts verbundener Unternehmen*, cit., 49-50; ZIMMER, *Internationales Gesellschaftsrecht*, cit., 410; EBENROTH, *Konzernbildungs- und Konzernleitungskontrolle*, cit., 68-69 and 84 *et seq.*

[239] EMMERICH, *AktG § 291 Beherrschungsvertrag. Gewinnabführungsvertrag*, cit., 34; LIEBSCHER, *§ 13 Anhang Die GmbH als Konzernbaustein (GmbH-Konzernrecht)*, cit., para. 1233.

[240] KINDLER, *Internationales Handels- und Gesellschaftsrecht*, cit., paras. 681 and 714; BALLARINO, *Le società per azioni nella disciplina internazionalprivatistica*, cit., 207; GROßFELD, *Internationales Gesellschaftsrecht*, cit., para. 559.

[241] BGH, V ZR 50/81, in *ZIP*, 1982, 496.

[242] BGH, II ZR 155/02, in *ZIP*, 2004, 993; and II ZR 154/02, in *ZIP*, 2004, 1001.

[243] See LÖBBE, *Corporate Groups: Competences of the Shareholders' Meeting and Minority Protection – the German Federal Court of Justice's recent* Gelatine *and* Macrotron *Cases Redefine the* Holzmüller *Doctrine*, in *German L. J.*, 2004, 1057. For a review of the evolution, see also HABERSACK, *Vorbemerkung zu AktG § 311: Konzernbildungskontrolle*, in EMMERICH, HABERSACK, *Aktien- und GmbH-Konzernrecht*, cit., paras. 33-55.

CHAPTER II
GROUPS OF COMPANIES AND ANTITRUST LITIGATION

2.1. EU Competition Law and its Application between National and EU Law

The most important provisions of EU competition law are set out in Articles 101 and 102 TFEU (*ex* Articles 81 and 82 EC Treaty) and are considered by the CJEU as essential for the accomplishment of the tasks entrusted to the EU and in particular for the functioning of the internal market[244]. They are the two pillars of EU competition law, whose objective is «to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources (…) since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers»[245].

Article 101 TFUE prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition. The type of coordination of behaviours or collusion between undertakings falling within the scope of Article 101 is that where at least one undertaking *vis-à-vis* another one undertakes to adopt a particular conduct on the market or that as a result of contacts between them uncertainty as to their conduct on the market is eliminated or at least substantially reduced[246]. However, certain forms of cooperation are excluded from this prohibition whenever they have overall beneficial

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[244] CJEU Case C-126/97, *Eco Swiss* [1999] *ECR* I-3055, para. 36.

[245] *Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty* [2004] OJ C 101/97, 27 April 2004, para. 13.

[246] See Joined Cases T-25/95 and others, *Cimenteries CBR* [2000] *ECR* II-491, paras. 1849 and 1852; and Joined Cases T-202/98 and others, *British Sugar* [2001] *ECR* II-2035, paras. 58-60. Art. 101 does not contain any example as to the form of possible infringements. In general, on may list two sorts of anti-competitive behavior: a vertical cartel, between undertakings that do not operate at the same level of the supply chain, and horizontal cartel, a typical example of infringement, which takes place when several undertakings supplying a particular product or service coordinate their market behaviour. See ZIMMER, *AEUV Art. 101 Abs. 1*, in IMMENGA, MESTMÄCKER, *EU-Wettbewerbsrecht*[5], München, C.H. Beck, 2012, para. 230 *et seq*. In this regard, as summarized by WHISH, BAILEY, *Competition Law*[7], Oxford, OUP, 2012, 121-125, horizontal cartels are generaly aimed at fixing prices, exchanging information that reduces uncertainties about future behaviour, sharing market, limiting output and sales, entering into collective exclusive dealings; while vertical cartels often consist of imposing fixed or minimum resale prices and imposing export bans.

effects in critical areas, such as research and development, and restriction of competition is necessary to achieve that objective[247]. On the contrary, Article 102 TFUE covers the unilateral anti-competitive behavior of undertakings that abuse of their dominant position within the internal market or a substantial part thereof, in so far as the trade between the Member States is affected[248]. Holding a dominant position is not prohibited in itself, what Article 102 does not allow is the abuse of such position. Despite the absence of a provision similar to Article 101(3) TFEU, the CJEU clarified that there is space to argue that an infringing conduct was objectively necessary and that it produces substantial efficiencies outweighing the anti-competitive effects on consumers[249].

In general, the enforcement of competition law aims at achieving three main objectives: (*i*) the termination of ongoing infringements and clarification of the content of prohibitions; (*ii*) the deterrence and prevention of future violations; and (*iii*) the restoration of the *status quo ante* and the compensation to the victims[250]. To achieve these goals, a combination of public and private enforcement is envisaged[251]. On the one hand, there is public enforcement, which is carried out by public authorities – such as specialized national competition authorities (NCAs), national courts, and the European Commission – and represents the key driver of antitrust enforcement in the EU. It has, in fact, a fundamental role in ensuring effective deterrence by detecting infringements of the competition rules in Articles 101 and 102 TFUE and in imposing administrative sanctions or other structural remedies[252]. On the other hand, private enforcement

[247] Art. 101, para. 3, TFUE.

[248] Art. 102 TFEU provides a list of various forbidden abuses, which include imposing unfair prices or trading conditions and applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage

[249] CJEU Case C-311/84, *Centre belge d'études de marché* [1985] *ECR* 3261, para. 26; Case C-95/04 P, *British Airways plc* [2007] *ECR* I-2331, paras. 69 and 86.

[250] WILS, *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, in *World Comp.*, 2009, 5-12. On the suitability of current competition law remedies to achieve those goals, see HJELMENG, *Competition Law Remedies: Striving for Coherence of Finding New Ways*, in *CMLRev.*, 2013, 1007. For a different classification, instead, see HARDING, JOSHUA, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency*, Oxford, OUP, 2003, 229 *et seq.*

[251] In the sense that they are both necessary for the effectiveness of competition enforcement, among many, see DENOZZA, TOFFOLETTI, *Le funzioni delle azioni private nel libro bianco*, in NASCIMBENE, ROSSI DAL POZZO (a cura di), *Il* private enforcement *delle norme sulla concorrenza*, Milano, Giuffrè, 2009, 101-122 (in the light of "optimal" deterrence); WALLER, *Towards a Constructive Public-Private Partnership to Enforce Competition Law*, in *World Comp.*, 2006, 367, and NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza*, Torino, Giappichelli, 2006, 43. Very interestingly, HÜSCHELRATH, PEYER, *Public and Private Enforcement of Competition Law: A differentiated Approach*, in *World Comp.*, 2013, 585, propose a differentiated approach in which private and public enforcement are combined depending on the type of anti-competitive conduct.

[252] OECD, *Relationship Between Public And Private Antitrust Enforcement - European Union*, DAF/COMP/WP3/WD(2015)2, 15 June 2015.

may be defined as litigation in which private parties act as claimants or counterclaimants against undertakings that have allegedly acted in breach of antitrust rules[253]. In particular, a distinction is commonly made between situations in which antitrust rules are invoked as a "shield", for instance in contractual disputes, in order to avoid performance of obligations resulting from an agreement relied on by its contract partner who claims specific execution of the contract or alleges its breach by the defendant and claims damages[254]; and situations in which they are used as a "sword", in damages claims and injunctions[255], which are unquestionably more significantly linked to the private enforcement functions[256].

Private actions in this second sense can be follow-on, when brought following a finding of infringement ascertained through public enforcement, or stand-alone, which are entirely independent of public enforcement[257]. In the absence of specific TFEU provisions, the right of action for damages or injunctions has been established by the CJEU since 2001 and has then found an indirect source in Regulation 1/2003[258], which, albeit not referring expressly to private actions, empowers national courts to apply Articles 101 and 102 TFUE, thus contributing significantly to create the conditions under which antitrust rules may be invoked in private

[253] KOMNINOS, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*, Oxford-Portland, Hart, 2008, 2. The author also mentions a broad definition, according to which private enforcement includes all actions taken by private parties in order to enforce the EU competition law policy, including situations in which enforcement is sought through initiatives of private parties requesting the Commission or national authorities to take action against antitrust violations. This has been defined by JACOBS, DEISENHOFER, *Procedural Aspects of the Effective Enforcement of EC Competition Rules: A Community Perspective*, in EHLERMANN, ATANASIU (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford-Portland, Hart, 2003, 189, as «privately triggered public enforcement».

[254] Under Art. 101(2) TFUE, «any agreements (…) prohibited pursuant to this article shall be automatically void». More generally, in Case 127/73, *BRT* [1973] *ECR* 51, para. 16, the CJEU stated that the direct effect of Arts. 101 and 102 can lead to the voidness sanction. In this regard, see PEYER, *Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence*, in *J. Comp. L. Econ.*, 2012, 349-50.

[255] Although private enforcement is generally associated with damages actions, victims may be interested in different and quicker remedies aimed at ordering the perpetrator to cease from certain behaviour or to undertake certain actions: see PEYER, *Injunctive Relief and Private Antitrust Enforcement*, CCP Working Paper 11-7, 2011; HJELMENG, C*ompetition law remedies: striving for coherence or finding new ways?*, cit., 1011; CAUFFMAN, *Injunctions at the Request of Third Parties in EU Competition Law*, in *Maastricht J.*, 2010, 58.

[256] In this sense see BASEDOW, *Die Durchsetzung des Kartellrechts im Zivilverfahren*, in BAUDENBACHER (Hrsg.), *Neueste Entwicklungen im europaisches und internationalen Kartellrecht*, Basle-Geneva-Munich, 2006, 354 *et seq.*; WILS, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, in *World Comp.*, 2003, 474-475; JACOBS, DEISENHOFER, *Procedural Aspects of the Private Enforcement of EC Competition Rules: A Community Perspective*, cit., 187 *et seq.*

[257] Stand-alone actions are relatively rare and only few have been successfully pursued to trial. In the absence of a pre-existing infringement decision, alleged competition infringements have more frequently been pleaded as a defence to claims on other grounds (e.g., IP infringements), including in applications for summary judgment.

[258] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

cases[259]. The latter Regulation entered into force on 1 May 2004 and was accompanied by the "Modernisation Package" with notices and guidelines specifying the duties of cooperation between the Commission, NCAs, and national courts. Accordingly, it resulted in more public and private enforcement[260].

2.2. The Development of Private Actions until the Recent Directive 2014/104/EU

The starting point of this analysis is the tremendous evolution of private enforcement until the recent Damages Directive, which represents an evident sign of the EU legislator's will to enhance private actions and to engage individuals as relevant actors for the enforcement of competition law. Indeed, the Commission considers private antitrust litigation crucial for a more efficient antitrust enforcement. This will be the necessary background to verify whether EU private international law provides for procedural tools allowing consolidation before one and the same venue of the claims filed against different companies belonging to the same group.

2.2.1. From Public to Private Antitrust Enforcement: Advantages and Objectives

The enforcement of EU competition law has been primarily entrusted to specific authorities, vested with special powers and enabled to use special procedures to investigate an infringement. This choice was justified by the need of undertaking complex economic assessment and market-monitoring activities and by the reluctance – and sometimes the impossibility – of national courts to order investigative measures and to collect all available evidence[261]. Given this background, Regulation 1/2003 represented a landmark reform, which comprehensively overhauled the procedures for the application of Articles 101 and 102 TFEU and introduced an enforcement system based on the direct application of the EU competition rules in their

[259] Two provisions are particularly relevant for private enforcement: Art. 15 on cooperation with national courts and Art. 16 on the uniform application of EU Competition Law and on the effects of Commission's decisions: see VAN GERVEN, *Private enforcement of EC competition rules in the ECJ* – Courage v. Crehan *and the way ahead*, in BASEDOW (ed.), *Private enforcement of EC competition law*, Alphen aan den Rijn, Kluwer, 2007, 23-26.

[260] KOMNINOS, *Public and Private Enforcement in Europe: Complement? Overlap?*, in *Comp. L. Rev.*, 2006, 7. However, it was an «insufficient tool to promote private actions in Europe»: BRKAN, *Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms?*, in *World Comp.*, 2005, 481.

[261] GERADIN, LAYNE-FARRAR, PETIT, *EU Competition Law and Economics*, Oxford, OUP, 2012, 322.

entirety[262]. In particular, to enable the Commission to focus its activities on the most serious infringements in cases with an EU interest[263], it empowered NCAs and national courts to apply all aspects of the EU competition rules and introduced close forms of cooperation with the Commission[264].

Even though public enforcement has been historically more important than private enforcement within the EU[265], nowadays they are considered as complementing each other[266], mainly because of the insufficiency of public scrutiny of anticompetitive conduct in serving an optimal deterrence function[267]. Indeed, beyond the fines to be paid to public authorities, private enforcement can lead to a direct recovery of damages and allows to further develop a "culture of competition" amongst market participants[268] and to raise awareness of the competition rules, at the same time serving the restorative-compensatory objective, where the role of public enforcement is necessarily minimal[269].

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[262] Until May 2004, the enforcement of EU competition law was based on Regulation 17/62, which centralized enforcement in the hands of Commission and empowered the latter to grant exemptions under the old Art. 81(3) EC Treaty. National courts and NCAs had no competence once the firm had notified the agreement to the Commission and stricter national laws could not apply after the exemption was granted. On the Commission's desire of centralization, see FORRESTER, *The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security*, in EHLERMANN, ATANASIU (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford-Portland, Hart, 2001, 75 *et seq.* For a general overview of the evolution, see COMMISSION, *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, COM(2014) 453.

[263] In this regard, see VENIT, *Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty*, in *CMLRev.*, 2003, 552-568. As "guardian of the Treaties", the Commission is in charge to investigate and eliminate infringements of Arts. 101 and 102 TFEU, acting bot on its initiative or upon a complaint. The CJEU speaks of "supervisory" tasks and powers: see Joined Cases C-189/02 P and others, *Dansk Rørindustri A/S* [2005] *ECR* I-5425, paras. 170 and 175.

[264] The contribution of NCAs to the development of competition policy is justified in all cases in which they have a comparative advantage because of their familiarity with local markets and they are better placed to regulate national markets than the Commission: TEMPLE LANG, *Decentralised Application of Community Competition Law*, in *World Comp.*, 1999, 3. On the core principles of case allocation, see *Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities*, 15435/02 ADD 1, 210 December 2002, para. 15.

[265] See LANDE, DAVIS¸ *An Evaluation of Private Antitrust Enforcement: 29 Case Studies*, interim report, 8 November 2006, www.antitrustinstitute.org/recent2/550b.pdf . The prevalence of public enforcement was highly influenced by the economic thoughts of the Friburg School, according to which antitrust law is aimed at protecting the public interest and such protection should be entrusted to an administrative authority with quasi-jurisdictional powers: among many, see CSERES, *Competition Law and Consumer Protection*, The Hague, Kluwer, 2005, 83.

[266] See DE SANTIS, *Processo civile*, antitrust litigation *e* consumer protection, in *Riv. dir. proc.*, 2016, 1495; LIBERTINI, *Il ruolo necessariamente complementare di "private" e "public enforcement"*, in MAUGERI, ZOPPINI (a cura di), *Funzioni del diritto privato e tecniche di regolazione del mercato*, Bologna, Mulino, 2009, 171.

[267] In the law and economics literature, see already BECKER, STIGLER, *Law enforcement, Malfeasance and Compensation of Enforcers*, in *J. Leg. Stud.*, 1974, 1 *et seq.*

[268] JONES, SUFRIN, *EU Competition Law. Text, Cases, and Materials*[4], Oxford, OUP, 2011, 1090.

[269] As reminded by KOMNINOS, *Public and private enforcement in Europe: Complement? Overlap?*, cit., 9, it is worth noting that certain regimes provide for a role for public authorities also in private actions, e.g. *parens patriae* suits in US. In the US, the case law is oriented in affirming that the public enforcement remedy of treble

In general, there are three main categories of advantages in increasing private antitrust enforcement: victim's compensation, deterrent effect, efficiency and economic benefits. Concerning the first aspect, it is quite evident that the enforcement powers of the Commission do not entail the possibility to award damaged or other compensation for the loss suffered by the victims of the infringement[270]. The only way a victim of anti-competitive behaviors may make up for their losses is to litigate before civil courts. As to the second aspect, also the CJEU has emphasised the role of private enforcement as a deterrence tool, holding that «the existence of such a right [to damages] strengthens the working of the [EU] competition rules and discourages agreements or practices (…) which are able to restrict or distort competition» and «actions for damages before the national courts can make a *significant contribution* to the maintenance of effective competition in the [Union]»[271]. Of course, this objective is more efficiently reached by competition authorities, which have more powerful investigative and sanctioning tools than private claimants do. However, by pursuing the primary compensatory goal, private enforcement generates a substantial additional deterrent effect because companies are more likely to avoid infringements rules when they risk having to pay damages[272].

Furthermore, scholars have highlighted the benefits regarding competitiveness, growth, and jobs due to more competitive markets, which reduce allocative inefficiency by leading to a

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damages aims both at deterrence and compensation: among many, *Atl. Richfield Co. v. USA Petroleum*, 495 U.S. 328, 360 n.20 (1990); *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989). See also LANDE, *Introduction: Benefits of Private Enforcement*, in FOER, STUTZ (eds.), *Private Enforcement of Antitrust Law in the United States*, Cheltenham, Elgar, 2012, 1-13. For criticism, see PROSPERETTI, *Il Libro bianco della Commissione europea: qualche osservazione da un punto di vista economico*, in NASCIMBENE, ROSSI DAL POZZO (a cura di), *Il* private enforcement *delle norme sulla concorrenza*, cit., 59 *et seq.*

[270] Concerning cartels, for instance, there are at least five groups of subjects potentially exposed to damages: direct purchasers; customers who did not purchase from cartel members but from fringe firms outside the cartel; indirect purchasers who pay inflated prices for products that contain the cartelised input; purchaser who do not purchase at all or purchase a less-preferred alternative outside the cartel; suppliers to the cartel who sell products containing the cartelised input. However, due to standing limitations or difficulties as to proof of causation, only some of these groups are actually capable to claim for adequate compensation. See RENDA *et al.*, *Making Antitrust Damages Actions More Effective in the EU: welfare impact and potential scenarios*, Final Report, 21 December 2007, Contract DG COMP/2006/A3/012, 412-414.

[271] CJEU Case C-453/99, *Courage Ltd*, para. 27; Joined Cases C-295/04 and others, *Manfredi* [2006] I-6619, para. 91. In this regard, see the detailed analysis by NEBBIA, *Damages actions for the infringement of EC competition law: compensation or deterrence?*, in *Eur. L. Rev.*, 2008, 23 *et seq.*

[272] In these terms, see TADDEI ELMI, *Il risarcimento dei danni antitrust tra compensazione e deterrenza – Il modello americano e la proposta di direttiva UE del 2013*, in *Conc. mercato*, 2014, 183; and VAN DEN BERGH, CAMESASCA, *European Competition Law and Economics: a comparative perspective*[2], London, Sweet & Maxwell, 2006, 332. Indeed, recent EU initiatives show that deterrent effect is pursued only indirectly while damages actions have a merely compensatory function in the light of the principle of "corrective justice". Interestingly enough, in the US the compensatory objective is secondary if compared to deterrence and it is pursued only indirectly: see BUXBAUM, *Private enforcement of competition law in the United States – of Optimal Deterrence and Social Costs*, in BASEDOW (ed.), *Private enforcement of EC competition law*, cit., 44.

greater output, lower prices, and better quality[273]. The engagement of firms and consumers in the enforcement of competition significantly contribute to the development of a competitive economy, which is a fundamental element of the Lisbon strategy[274].

2.2.2 The Development of EU Competition Law Concerning the Right to Damages

As anticipated, TFUE does not provide for a right to damages for loss suffered because of an antitrust infringement. This is a major difference with US antitrust law[275] and resulted in considerable uncertainties because the only remedy provided in the Treaty was the nullity of any infringing contract and the Commission has not the power to award damages[276]. Although Articles 101 and 102 TFEU were interpreted already in 1974 as being directly applicable in relations between individuals[277], it was only in 2001 that the CJEU delivered a judgment dealing with the question of whether Member States are under an obligation, as a matter of EU Law, to provide a remedy for damages to compensate antitrust damages[278]. Before that date, in fact, many authors embraced the traditional view according to which the existence of such right was a pure question of national law[279]. For instance, the UK House of Lords held that such cases were actionable within English law under the tort of breach of statutory duty[280], while in

[273] RENDA *et al.*, *Making Antitrust Damages Actions More Effective in the EU*, cit., 10.

[274] COMMISSION, *Report on Competition Policy 2005*, Luxembourg, 2007, para. 31. According to KOMNINOS, *EC Private Antitrust Enforcement*, cit., 10, «where citizens pursue their Community rights in the national courts, (…) they also indirectly act in the Community interest and become the principal "guardians" of the legal integrity of Community law».

[275] In the US the vast majority of antitrust litigation is initiated by private plaintiffs based on Sec. 4 of the Clayton Act 1914. In this regard, see JONES, *Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US*, in BERGSTROM, IACOVIDES, STRAND (eds.), *EU Competition Law and the Emerging Harmonization of Private Enforcement*, Oxford-Portland, Hart, 2016, 15; GINSBURG, *Comparing Antitrust Enforcement in the United States and Europe*, in *J. Comp. L. Econ.*, 2005, 427.

[276] WAELBROECK, *Private Enforcement: Current Situation and Methods of Improvement*, in LIANOS, KOKKORIS (eds.), *The Reform of EC Competition Law: New Challenges*, Aalphen ann den Rijn, Kluwer, 2010, 19. Nevertheless, the Commission may encourage a defendant to compensate its victims in return for a reduction in its fine: *Pre-Insulated Pipe Cartel* [1999] OJ L24/1, para. 172; *Nintendo* [2003] OJ L255/33, paras. 440-441.

[277] Case 127/73, *BRT*, para. 16. At a later time, see also Case C-282/95 P, *Guérin Autmobiles* [1997] *ECR* I-1503, para. 39; Case C-344/98, *Masterfoods Ltd* [2000] *ECR* I-11369, para. 47.

[278] For a recent overview, see MEESSEN, *Der Anspruch auf Schadensersatz bei Verstössen gegen EU-Kartellrecht*, Tübingen, Mohr Siebeck, 2011, 20 *et seq.*

[279] DUNNE, *Antitrust and the Making of European Tort Law*, in *Oxford J. Leg. Stud.*, 2016, 378; KOMNINOS, *New Prospects for Private Enforcement of EC Competition Law: Courage v Crehan and the Community Right to Damages*, in *CMLRev*, 2002, 455–57. In this regard, see also TOFFOLETTO, *Il risarcimento del danno nel sistema delle sanzioni per la violazione della normativa antitrust*, Milano, Giuffrè, 1996, 113-118.

[280] *Garden Cottage Foods Ltd. Respondents v Milk Marketing Board Appellants* [1984] AC 130, para. 141. See also *An Bord Bainne Co-operative Ltd v Milk Marketing Board* [1984] 1 CMLR 519; *Bourgoin SA v Minister of Agriculture Fisheries and Food* [1985] 1 CMLR 518; *Society of Lloyd's v. Clemenston* [1995] CMLR 693.

Germany reference was made to § 823(2) BGB, whereby the violation of a legislative provision would give rise to a tort action provided that the norm is intended to protect individual interests[281].

2.2.2.1. The Fundamental Role Played by the CJEU's Jurisprudence

The debated question of whether such an obligation is based on national or EU Law was addressed by the CJEU in the landmark decision in *Courage*[282]. The case was referred to the CJEU by the English Court of Appeal and concerned two pub leases under which Mr. Chrean agreed to purchase fixed minimum quantities of various beers for resale at the leased premises, exclusively from the same brewery. After the surrendment of both leases, he was asked to pay the deliveries of all the beers sold. In response, he defended himself by contending that the lease was in breach of Article 101 and counterclaimed for damages. However, under English Law, this claim was barred, because a party cannot rely on its illegal actions to ask for damages. The question as to the compatibility of such bar with EU law was then referred to the CJEU.

On that occasion, the CJEU stressed the fundamental role played by Article 101 TFEU and held that any private party can directly rely on the breach of EU competition law provisions to seek compensation for loss caused to him by a contract or by conduct liable to restrict or distort competition[283]. EU competition law directly confers upon individuals an autonomous right to claim damages, which results from (*i*) the horizontal direct effect of EU competition rules[284] and (*ii*) the full effectiveness of those provisions[285].

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[281] Among many, see K. SCHMIDT, in IMMENGA, MESTMÄCKER, *EG-Wettbewerbsrecht, Kommentar*, Vol. I, München, C.H. Beck, 1997, 319-323.

[282] CJEU Case C-453/99, *Courage*. Among many, see ANDREANGELI, Courage Ltd v Crehan *and the enforcement of Article 81 EC before the national courts*, in *Eur. Comp. L. Rev.*, 2004, 758; CUMMING, Courage Ltd v. Crehan, in *Eur. Comp. L. Rev.*, 2002, 199; COLANGELO, *Intese* obtorto collo *e risarcibilità del danno: le improbabili acrobazie dell'antitrust comunitario*, in *Corr. giur.*, 2002, 454; MONTI, *Anticompetitive agreements: the innnocent party's right to damages*, in *Eur. L. Rev.*, 2002, 282; DI MAJO, *Il risarcimento da inadempimento del contratto*, in *Europa dir. priv*, 2002, 791; RODGER, *The Interface Between Competition Law and Private Law: Article 81, Illegality and Unjustified Enrichment*, in *Edinburgh L. Rev.*, 2002, 217; ROSSI, *"Take Courage"! La Corte di giustizia apre nuove frontiere per la risarcibilità del danno da illeciti antitrust*, in *Foro it.*, 2002, IV, 90.

[283] To understand the relevance of this statement, it suffices it to remind that in 2002 the Italian Court of Cassation denied the possibility for a consumer to invoke national antitrust rules to claim damages: see decision of 9 December 2002 n. 17475, in *Danno resp.*, 2003, 390.

[284] Arts. 101 and 102 TFEU produce indeed direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard: Case C-453/99, *Courage Ltd*, paras. 23-24; Joined Cases C-295/04 and others, *Manfredi*, paras. 39 and 58-59.

[285] Case C-453/99, *Courage Ltd*, para. 26; Joined Cases C-295/04 and others, *Manfredi*, para. 60.

In other words, it is not for the domestic legal system of each Member State to grant such a remedy but only, in the absence of EU rules governing the matter, «to prescribe the detailed rules governing the exercise of that right, provided that the principles of equivalence and effectiveness are observed»[286]. It means that national rules must safeguard the rights guaranteed by the Treaty in a manner not less favorable than those governing similar domestic actions, and so as not to render practically impossible or excessively difficult the exercise of rights conferred by EU law. This is a classical articulation of the principle of national procedural autonomy, which highlights the role of domestic courts in ensuring the legal protection of private parties when rights derived from EU Law are infringed[287]. Therefore, the CJEU made evident that it is for the domestic legal system of each Member State to designate the courts that are competent to rule on those cases and to establish the procedural rules applicable to the proceedings in question[288]. Member States are free to decide, within the limits set by EU Law, the bodies charged with fulfilling EU obligations and their structure and organization, including the means at their disposal and the rules applicable[289].

This landmark decision was subsequently expanded and refined in the later case law. In the case *Manfredi*, the CJEU confirmed *Courage*[290] and the fact that the application of the right to damages takes places within the strictures of national procedural autonomy, but emphasized the importance of the effectiveness principle in demarcating the requirements of EU law[291]. However, albeit solving some debated procedural issues, this case law revealed a major problem of EU private enforcement, that was the leeway left to national courts to apply their domestic non-harmonised procedural rules, thus leading to differing levels of protection in the EU.

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[286] Joined Cases C-295/04 and others, *Manfredi*, para. 64. KOMNINOS, *EC Private Antitrust Enforcement*, cit., 174 *et seq.*, holds that the Court marked a distinction between the "existence" of the right in damages and its "constitutive conditions", governed by EU law, and its "exercise and executive conditions", governed by national law. See REICH, *Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights*, in *CMLRev.*, 2007, 705 *et seq.*; VAN GERVEN, *Of Rights, Remedies and Procedures*, *CMLRev.*, 2000, 501 *et seq*. However, it must be bore in mind that the application of these principles is far from simple: PRECHAL, SHELKOPLYAS, *National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond*, in *Eur. Rev. Priv. L.*, 2004, 590.

[287] Although the expression "principle of procedural autonomy" was used for the first time in C-201/02, *Wells* [2004] *ECR* I-723, para. 65, this principle dates back to the seventies with the decisions Case 33/76, *Rewe-Zentralfinanz eG* [1976] *ECR* 1989, and Case 45/76, *Comet BV* [1976] *ECR* 2043. It had no express basis in the Treaties and was based on the principle of sincere cooperation enshrined in the current version of Art. 4(3) TEU.

[288] In this regard, the term "procedural" is intended in a very broad sense, so that it covers the organisation of judicial remedies and those on the jurisdiction of national courts: see the opinion of AG Jacobs in Joined Cases C-430/93 and C/431/93, *Van Schijndel*, para. 14.

[289] CJEU C-389/08, *Base* [2010] *ECR* I-9073, para. 26.

[290] See paras. 31 and 59-63.

[291] CJEU Joined Cases C-295/04 and others, *Manfredi*, para. 62.

2.2.2.2. From the Ashurst Report to the Recent EU Damages Directive

As said, the CJEU confirmed this line of case law in several decisions in a way that was instrumental in the development of private enforcement in EU[292]. Indeed, it provided an impetus for the Commission to adopt a more pro-active stance on the question of private enforcement in Europe and make the remedial right become a reality across the EU. After the decision in *Courage*, the Commission ordered an external study to analyze and identify the obstacle to successful damages actions in the Member States in the case of infringement of EU competition rules. The findings of that study were published in 2004 and described a situation of «astonishing diversity and total underdevelopment» of private competition litigation in the Member States[293], with only sixty cases leading to a judgment on damages, twenty-eight of which resulted in an award[294]. In the aftermath, the Commission published a Green Paper in 2005[295] and a White Paper in 2008[296], both on Damage Actions for Breach of the EC Antitrust Rules, in which it proposed measures to encourage private enforcement[297].

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[292] CJEU C-421/05, *City Motors Group NV* [2007] *ECR* I-653, para. 33; C-360/09, *Pfleiderer AG* [2001] *ECR* I-5161, par. 28; C-199/11, *Otis NV* [2012] EU:C:2012:684, paras. 40-43; C-536/11, *Donau Chemie AG* [2013] EU:C:2013:366, paras. 21-27; C-557/12, *Kone AG* [2014] EU:C:2014:1317, paras. 20-24.

[293] WAELBROECK, SLATER, EVEN-SHOSHAN, *Study on the conditions of claim for damages in case in case of infringement of EC competition rules. Comparative Report* (Ashurst Report), 31 August 2004, 1.

[294] This number, of course, does not take into account all those cases which have been settled out of court on the basis of confidentiality. In this regard, see RODGER, *Private Enforcement of Competition Law, the Hidden Story: Competition Law Litigation Settlements 2000-2005*, in *Eur. Comp. L. Rev.*, 2005, 96.

[295] COMMISSION, *Green Paper on Damages Actions for Breach of EC Antitrust Rules*, COM(2005) 672. See EILMANSBERGER, *The Green Paper on Damages Actions for Breach of the EC antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement through Legislative Action*, in *CMLRev.*, 2007, 431; PHEASANT, *Damages Actions for Breach of the EC Antitrust Rules: the European Commission's Green Paper*, in *Eur. Comp. L. Rev.*, 2006, 365; DI GIAMBATTISTA, *Damages actions for breach of EC Treaty antitrust rules: a critical assessment of the European Commission's Green Paper*, in *Dir. Un. eur.*, 2006, 729.

[296] COMMISSION, *White Paper on Damages Actions for Breach of EC Antitrust Rules*, COM(2008) 165 final. See BUTTAZZI, *Il libro bianco 2008 della Commissione europea: un passo Avanti per le azioni di risarcimento antitrust?*, in *Riv. trim. dir. proc. civ.*, 2009, 1073; BECKER, BESSOT, DE SMITER, *The White Paper on damages actions for breach of the EC antitrust rules*, in RAFFAELLI (ed.), *VI Antitrust between EC Law and National Law*, Bruxelles-Milano, Bruylant-Giuffrè, 2009, 513; BULST, *Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law*, in *Bucerius L. J.*, 2008, 81; KOMNINOS, *The EU White Paper for Damages Actions: A First Appraisal*, in *Concurrences*, 2008, 84; CAMILLI, CAPRILE, PARDOLESI, RENDA, *Il libro bianco sul danno antitrust: l'anno che verrà*, in *Merc. Conc. Reg.*, 2008, 229; COLANGELO, *Le evoluzioni del* private enforcement*: da* Courage *al Libro Bianco*, in *Europa dir. priv.*, 2008, 655.

[297] It is interesting to note that, although the main line remained unchanged, there are notable divergences between the white paper and the green paper, for instance concerning the purpose of damages actions: see WILS, *Ten years of Regulation 1/2003: a retrospective*, in *J. Eur. Comp. L. Pract.*, 2013, 297-298; CAUFFMAN, *The interaction of leniency programmes and actions for damages*, in *Comp. L. Rev.*, 2011, 182-3.

The content of these Papers was the subject of vivid debate for what has later become binding law in the form of a directive. Indeed, immediately after the Commission started a legislative initiative on actions for damages for breaches of competition law, not only to effective damage actions before national courts but also with the objective of clarifying the interrelation of such private actions with public enforcement, in order to preserve the central role of public enforcement in the EU. This ten-years effort successfully ended on 26 November 2014 with the enactment of the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions[298].

The Directive declares three principal objective: first, to ensure that anyone who has suffered harm caused by an infringement of competition law can effectively exercise the right to full compensation[299]; second, to increase legal certainty and to reduce the differences between the Member States as to the national rules governing damages actions, by promoting a minimum level of harmonisation in order to achieve equivalent protection of injured parties in the EU[300]; and third, to regulate the coordination of the enforcement of antitrust legislation by competition authorities and national courts in a coherent manner[301]. The significant differences among the Member States concerning the degree of victims' protection lead to distortions of competition and hamper the proper functioning of the internal market. To remedy this situation, the Directive establishes a set of principles, both substantive and procedural, which are aimed at ensuring an equivalent protection throughout the European Union. However, despite the mentioned goals and the statements of the former EU Commissioner[302], this new disciplines

[298] [2014] OJ L 349/1. On the new directive, see BERGSTROM, IACOVIDES, STRAND (eds.), *EU Competition Law and the Emerging Harmonization of Private Enforcement*, cit.; MUNARI, CELLERINO (a cura di), *L'impatto della nuova direttiva 104/2014 sul Private Antitrust Enforcement*, Roma, Aracne, 2016; IANNUCCELLI, *La responsabilità delle imprese nel diritto della concorrenza dell'Unione europea e la direttiva 2014/104*, Milano, Giuffrè, 2015. See also AA.VV., *La transposition de la directive 2014/104/UE relative aux actions en dommage et intérêts pour violation du droit des pratiques anticoncurrentielles*, in *Concurrences*, n. 2-2015, 11 *et seq.*; VILLA, *La Direttiva europea sul risarcimento del danno antitrust: riflessioni in vista dell'attuazione*, in *Corr. giur.*, 2015, 301; MALAGOLI, *Il risarcimento del danno da pratiche anticoncorrenziali alla luce della Direttiva 2014/104/UE del 26 novembre 2014*, in *Contr. impr. Eur.*, 2015, 391; VINCRE *La Direttiva 2014/104/UE sulla domanda di risarcimento del danno per violazione delle norme antitrust nel processo civile*, in *Riv. dir. proc.*, 2015, 1153; BÖNI, *Europäische Richtlinie zur privaten Kartellrechtsdurchsetzung: Maß aller Dinge für Privatgeschädigte?*, in *EWS*, 2014, 324; MARINO, *Alcune novità nel* private enforcement *del diritto della concorrenza*, in *Contr. impr. Eur.*, 2014, 96; CALISTI, HAASBEEK, KUBIK, *The Directive on antitrust damages actions: towards a stronger competition culture in Europe, founded on the combined power of public and private enforcement of the EU competition rules*, in *NZKart*, 2014, 466. For the status of implementation of the directive at the national level, see ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html

[299] Art. 3 and Recital (13) of Directive 2014/104.

[300] Recital (9) of the Directive.

[301] See Art. 1, para. 2, of the Directive.

[302] ALMUNIA, *Developments in EU Competition Policy*, Athens, 10 April 2014, Speech/14/312.

seems unfit to avoid *forum shopping* practices, because it fails to create a truly level playing field and to erase differences in domestic civil procedures albeit being the result of compromise and having reduced its original scope[303]. Accordingly, claimants can still benefit from certain jurisdictions which provide victims with more powerful and effective tools[304]. This reference is clearly meant to the UK[305], which is recognized as being one of the most attractive places where to litigate antitrust claims, alongside with Germany and the Netherlands[306].

2.3. The Relevance of Groups of Companies in EU Competition Law: The Single Economic Entity Doctrine

2.3.1. The Notion of Undertaking to the Test of Group Affiliations

As is evident from the wording of the prohibitions of Articles 101 and 102 TFEU, the concept of undertaking is fundamental to understand whether EU competition law rules apply to the conduct of an entity. It is a crucial term if one considers that only agreements and

[303] In particular, the Directive does not contain rules on the following aspects: the financing of the claims, the presumption of fault, the calculation of damages, the EU-wide binding effect of national competition authorities, the availability of interim injunctions in stand-alone actions, and of course a collective redress mechanism. In general, the first commentators are disappointed because the Directive fails to create incentives for individuals to claims damages and ultimately will not lead to a better protection: PEYER, *Compensation and the Damages Directive*, in *Eur. Comp. J.*, 2016, 87 *et seq.*; and TRULI, *Will Its Provisions Serve Its Goals? Directive 2014/104/EU on Certain Rules Governing Actions for Damages for Competition Law Infringements*, in *J. Eur. Comp. L. Pract.*, 2016, 311-312. In this regard, see also the criticism within the Council expressed by the Polish, Slovenian and German delegations: COUNCIL, document n. 14680/14 ADD 1, 3 November 2014.

[304] WURMNEST, *Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie*, in *NZKart*, 2017, 2 *et seq.*; BURROWS, ALLEN, *The Likely Impact of the EU Damages Directive*, in *Competition Litigation 2016*, London, Global Legal Group, 2016, par. 8.2; MIGANI, *Directive 2014/104/EU: In Search of a Balance between the Protection of Leniency Corporate Statements and an Effective Private Competition Law Enforcement*, in *Global Antitrust Rev.*, 2014, 105-7; VINCRE *La Direttiva 2014/104/UE sulla domanda di risarcimento del danno per violazione delle norme antitrust nel processo civile*, cit., 1154-5. On the contrary, KWAN, *The Damages Directive: end of England's eminence?*, in *Eur. Comp. L. Rev.*, 455, is of the view that the Directive, albeit leaving many areas untouched, will diminish England's appeal as a forum for damages actions.

[305] RYNGAERT, *Foreign-to-Foreign Claims: the US Supreme Court's Decision v the English High Court's Decision in the Vitamins Case*, in *Eur. Comp. L. Rev.*, 2004, 615, puts the focus on disclosure and exemplary damages. See also the procedural differences highlighted by BRKAN, *Procedural aspects of private enforcement of EC antitrust law: heading towards new reforms?*, cit., 479 *et seq.*

[306] These three countries, in addition to Austria and Finland, are considered by SUDEROW, *Acciones derivadas de ilicitos antitrust: el foro especial de la obligacion extracontractual despues de la sentencia CDC Hydrogen Peroxyde*, in *Cuad. der. trans.*, 2016, vol. 8, n. 2, 310; STADLER, *Schadensersatzklagen im Kartellrecht – Forum shopping welcome!*, in *JZ*, 2015, 1144-1148; MERCER, *Applicable Law in Cross Border EU Competition Law Actions- Forum Shopping, Mandatory Rules and Public Policy*, in DANOV, BECKER, BEAUMONT (eds.), *Cross-border EU Competition Law Actions*, *Oxford*, Hart, 2013, 329; SCHREIBER, *Praxisbericht Durchsetzung von kartellrechtlichen Schadensersatzansprüche*, in *KSzW*, 2011, 40; KRAUSKOPF, TKACIKOVA, *Competition Law Violations and Private Enforcement: Forum Shopping Strategies*, in *Global Comp. Litig. Rev.*, 2011, 26.

concerted practices between *undertakings* or *associations of undertakings* fall within the scope of Article 101[307], while similarly only abuses by dominant *undertakings* are caught by Article 102[308]. Despite its centrality, however, this term is not defined by the Treaty and has been left to the CJEU's case law for elucidation[309].

As a starting point, the Court held that the concept of undertaking encompasses every entity that, regardless of its legal status and the way in which it is financed[310], engaged in an economic activity consisting in offering goods or services in a given market[311]. On the contrary, it does not apply to an activity that – by its nature, its aim and the rules to which is subject – does not belong to the sphere of economic activity or is connected with the exercise of the powers of a public authority[312]. Moreover, it has long been accepted that the concept of undertaking is not necessarily identical with the notion of corporate legal personality in national company or fiscal law[313]. Indeed, it denoted an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal[314]: in other words, it is a concept that involves human and physical components joined in the pursuit of a «single economic entity»[315].

From the above, it is quite evident the difficulty to have a clear understanding of the concept of undertaking and its boundaries for the applicability of competition rules, especially if one considers that an undertaking may range from a single individual to two or more companies

[307] These two expressions are interpreted distinctly and expansively «to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves»: see Case C-8/08, *T-Mobile Netherlands BV* [2009] *ECR* I-4529, para. 23.

[308] See JONES, *The Boundaries of an Undertaking in EU Competition Law*, in *Eur. Comp. J.*, 2012, 301.

[309] Case T-99/04, *AC-Treuhand* [2008] *ECR* II-1501, para. 144. AG Bot in Case C-216/09 P, *ArcelorMittal*, para. 175: «The concept of undertaking in competition law is an autonomous concept of European Union law».

[310] CJEU Joined Cases C-189/02 P and others, *Dansk Rorindustri* [2005] *ECR* I-5425, para. 112; Case C-222/04, *Cassa di risparmio di Firenze* [2006] *ECR* I-289, para. 107; Case C-205/03 P, *FENIN* [2006] *ECR* I-6295, para. 25; CJEU Case C-41/90, *Höfner and Elser* [1991] *ECR* I-1979, para. 21; and CFI Case T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali* [2000] *ECR* II-1807, para. 36.

[311] CJEU Case C-180/98, *Pavlov* [2000] *ECR* I-6451, para. 75.

[312] CJEU Case C-309/99, *Wouter* [2002] *ECR* I-1577, para. 57.

[313] *Pre-insulated Pipe Cartel* [1999] OJ L24/1, para. 154. However, for enforcement purposes, infringement decision may only be addressed to entities with legal personality: Joined Cases T-122/07 and others, *Siemens/VA Tech* [2011] para. 122; Joined Cases C-204/00 and others, *Aalborg Portland* [2005] *ECR* I-123, para. 60; Joined Cases C-322/07 P and others, *Papierfabrik August Koehler AG* [2009] *ECR* I-7191, para. 39.

[314] CJEU Case 170/83, *Hydrotherm Gerätebau GmbH* [1984] *ECR* 2999, para. 11; Case C-97/08 P, *Akzo Nobel* [2009] *ECR* I-8237, para. 55.

[315] For a general review, see ODUDU, BAILEY, *The Single Economic Entity Doctrine in EU Competition Law*, in *CMLRev.*, 2014, 1721.

within a corporate group[316]. In this regard, Article 101 does not apply to agreements between legal persons that form a single economic entity: collectively they comprise a single undertaking, and so there is no agreement between companies. The examples are several and include agreements between a principal and an agent, or between a contractor and subcontractor; however, the most obvious situation concerns agreements concluded between a parent company and its subsidiary within the context of a corporate group[317].

The basic rule is that agreements entered into by firms within the same group, albeit legally enforceable, do not fall within the scope of Article 101 if the relationship between them is so close that they «consist of a unitary organization of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis, and can contribute to the commission of an infringement»[318]. Accordingly, these agreements are considered as the internal allocation of functions within a group rather than a restrictive agreement between independent undertakings[319]. This proposition dates back to the 1970s[320] and was further developed in the *Viho Europe* judgment of 1995, where the Court upheld the decision of the Commission concerning the concerted practices among Parker Pen UK and its European subsidiaries: the parent company was found to control the sales, advertising, and marketing policy of its subsidiaries which had no real autonomy to determine their course of action and thus formed a "single economic entity" with them. In particular, the Court held that «the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them»[321]. Hence,

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[316] WILS, *The undertaking as subject of E.C. competition law and the imputation of infringement to natural or legal persons*, in *Eur. L. Rev.*, 2000, 99.

[317] WHISH, BAILEY, *Competition Law*, cit., p. 92.

[318] Case T-11/89, *Shell International Chemical Company* [1992] *ECR* II-757, para. 311; Case T-112/05, *Akzo Nobel NV* [2007] *ECR* II-5049, paras. 57-58. Conseil concurrence, avis n° 03-D-01, 14 January 2003, para. 123.

[319] CJEU Joined Cases 56 and 58/64, *Consten and Grundig* [1966] *ECR* 299; Case 15/74, *Centrafarm BV* [1974] *ECR* 1147, para. 41.

[320] Case 22/71, *Béguelin Import v GL Import-Export* [1971] *ECR* 949, para. 8; CJEU Case 48/69, *Imperial Chemical Industries* [1972] *ECR* 619, paras. 133-4; Case 15/74 *Centrafarm* [1974] *ECR* 1147, para. 41; Case 16/74 *Centrafarm v Winthrop* [1974] *ECR* 1183, para. 32; Case 30/87, *Bodson* [1988] *ECR* 2479, para. 19; Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] *ECR* 803, para. 35. See also the Commission decision in *Re Christiani and Nielsen NV* [1969] OJ L165/12; *Re Kodak* [1970] OJ L 147/24 and the *Report on Competition Policy*, 1999, 167.

[321] Case T-102/92, *Viho Europe BV* [1995] *ECR* II-17, upheld the CJEU in Case C-73/95 P [1996] *ECR* I-5457. See the same concept also in Case T-203/01, *Michelin* [2003] *ECR* II-4071, para. 290; Joined Cases T-122/07 and others, *Siemens AG Osterreich* [2011] *ECR* II-793, para. 122. For a similar position in the US law, see *Copperweld Corpn v. Independence Tube Corpn* 467 U.S. 752 (1984); *American Needle, Inc v National Football League et al* 560 U.S. 183 (2010) and VAN CLEYNENBREUGEL, *Single entity tests in U.S. antitrust and EU competition law*, 2011, http://papers.ssrn.com. In France, see Autorité de la concurrence, n° 11-D-02, 26 January 2011, para. 615 and, more generally, Conseil de la concurrence, *Rapport annuel 2006*, Paris, 2007, 87 *et seq.*

the conclusion is that free competition is not possible between entities forming part of the same economic unit[322].

This represents the so-called defensive approach which was originally developed to shield intra-groups activities and to avoid interferences with EU competition law. Indeed, the economic unit doctrine was first outlined as a guarantee for companies organized in a group to be free to pursue a unitary commercial strategy without being hindered by EU law[323]. However, the full potential of Article 101 TFEU is deployed when this doctrine is used to impose liability and responsibility for an infringement of competition rules committed by a subsidiary to its parent company, *i.e.* to pierce the parent's corporate veil[324]. This is an entirely different question and concerns the possibility of imputing the conduct of the subsidiary to the parent that forms part of the same undertaking[325]. In this regard, it will be seen that the use of the single economic entity doctrine is not unanimously shared and has been widely conceived as unconvincing and being in breach of fundamental principles, such as legal certainty, *in dubio pro reo* (presumption of innocence) and the rights of the defence, including the principle of equality of arms [326].

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[322] CJEU Case 170/83, *Hydrotherm Gerätebau* GmbH, para. 11. According to the *Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* [2011] OJ C 11/2, para. 11, this happens not only «when a company exercises decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking», but also between «sister companies, that is to say, companies over which decisive influence is exercised by the same parent company». See also ODUDU, BAILEY, *The Single Economic Entity Doctrine in EU Competition Law*, cit., 1731-1733 and 1740.

[323] In this sense, see CORTESE, *Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability*, in CORTESE (ed.), *EU Competition Law. Between Public and Private Enforcement*, Alphen aan den Rijn, Kluwer, 2014, 73.

[324] Parent companies may face significant consequences if they are held liable for the infringements of their subsidiaries: (i) the maximum fining cap of 10 % of worldwide turnover applies to the aggregate sales of the group constituting the undertaking (T-112/05, *Akzo Nobel* [2007] *ECR* II-5049, para. 90); (ii) any previous cartel infringement of any companies belonging to the undertaking may be taken into account concerning recidivism (Case T-161/05, *Hoechst GmbH* [2009] *ECR* II-3555, para. 145-147; but with limits in C-508/11 P, *Eni SpA* [2013] EU:C:2013:289, par. 129). These consequences are welcomed by KERSTING, *Die Rechtsprechung des EuGH zur Bußgeldhaftung in der wirtschaftlichen Einheit*, in *WuW*, 2014, 1156; and GHEZZI, MAGGIOLINO, *L'imputazione delle sanzioni antitrust nei gruppi di imprese, tra "responsabilità personale" e finalità dissuasive*, in *Riv. soc.*, 2014, 1082.

[325] See Case 48/69, *Imperial Chemical Industries*, paras. 11 and 131-140; and Case 6/72, *Europemballage and Continental Can* [1973] *ECR* 215.

[326] In particular, see TEMPLE LANG, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-Owned Subsidiary Be Resolved, in Fordham Int. L. J.*, 2014, 1481; JOSHUA, BOTTEMAN, ATLEE, *'You Can't Beat the Percentage'- The Parental Liability Presumption in EU Cartel Enforcement' in Global Competition Review*, in *Eur. Antitrust Rev.*, 2012, 3; THOMAS, *Guilty of a Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law*, in *J. Eur. Comp. L. Pract.*, 2012, 11; ID., *Die wirtschaftliche Einheit im EU-Kartellbußgeldrecht*, in *KSzW*, 2011, 11 *et seq.*; SCORDAMAGLIA, *Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling Effective Enforcement and Adequate Protection of Procedural Guaranties*, in *Comp. L. Rev.*, 2010, 5; HOFSTETTER, LUDESCHER, *Fines against Parent Companies in EU Antitrust Law: Setting Incentives for*

2.3.2. The Presumption of Liability for Wholly-Owned Subsidiaries and the Criteria for its Rebuttal

The CJEU's line of case law premised on the assumption that the parent company can exercise a decisive influence over the conduct of its subsidiary. In some circumstances, however, there is a rebuttable presumption that the parent company does, in fact, exercise such influence[327]. The offensive dimension of the single economic entity doctrine finds its roots in the CJEU's decision of 1983 relating to the case *AEG-Telefunken*[328], which was the first instance where the CJEU expressly ascribed the anti-competitive conduct of a wholly owned subsidiary to the parent company. This automatic approach is conceived by the CJEU as exceptional and concerning only wholly owned subsidiary[329], while a different rule is provided for all other cases of control within a group of companies, where a proof is required of the parent's involvement in the subsidiary's activities[330]. In other words, what the CJEU seemed to have outlined is a semi-automatic system of attribution of responsibility to the parent company, in which the presumption mentioned above exempts the Commission from the duty to give additional evidence of decisive control and its exercise[331].

'Best Practice Compliance', in *World Comp.*, 2010, 55; BRONCKERS, VALLERY, *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in *World Comp.*, 2011, 535. For a different opinion, see KOKOTT, DITTERT, *Die Verantwortlichkeit von Muttergesellschaften für Kartellvergehen ihrer Tochtergesellschaften im Lichte der Rechtsprechung der Unionsgerichte*, in *WuW*, 2012, 675-676; KERSTING, *Wettbewerbsrechtliche Haftung im Konzern*, in *Konzern*, 2011, 451-452.

[327] See LEUPOLD, *Effective enforcement of EU competition law gone too far? Recent case law om the presumption of parental liability*, in *Eur. Comp. L. Rev.*, 2013, 573-576, for the interpretation of the individual elements constituting the test of the exercise of decisive influence. On the role of presumptions in competition law, see BAILEY, *Presumptions in EU competition law*, in *Eur. Comp. L. Rev.*, 2010, 20; BRUZZONE, BOCCACCIO, *Impact-based assessment and use of legal presumptions in EC competition law: The search for the proper mix*, in *World Comp.*, 2009, 465.

[328] CJEU Case 107/82, *AEG-Telefunken AG* [1983] *ECR* 3151.

[329] This presumption is also applicable with respect to second or further tier subsidiaries so that the ultimate parent is deemed to have exercised decisive influence also over the lowest tier and is directly liable even for their conduct: see Case C-90/09 P, *General Quımica SA* [2011] *ECR* I-1, para. 88; C-508/11 P, *Eni SpA*, para. 48.

[330] According to the CJEU, responsibility can also be attributed to the company that do not hold all or the majority of its shares or, in cases of joint ventures, to the companies that hold the joint control (Case C-172/12 P, *El du Pont de Nemours*, EU:C:2013:601; and Case C-179/12 P, *Dow Chemical Company*, EU:C:2013:605). As referred by DE SANCTIS, *L'imputabilità delle responsabilità delle violazioni* antitrust *e i gruppi di società*, in PACE (ed.), *Dizionario sistematico del diritto della concorrenza*, Napoli, Jovene, 2013, 212, also a sister company may be held responsible when, albeit not having shares in the capital stock of the infringer, still has a decisive influence on its conduct by virtue of the economic and legal links between them: see Case T-43/02, *Jungbuzlauer AG* [2006] *ECR* II-3435, paras. 122-130.

[331] However, it is important to stress that the Commission is not bound to rely on such presumption and may decide to establish that a parent actually exercises decisive influence over its subsidiary by means of other evidence

After a period of hesitation[332], EU Courts have revived the *AEG-Telefunken* special rule, holding that in case of wholly owned subsidiaries, the Commission is entitled to assume that the parent company exerts a decisive influence on the conduct of its subsidiary in the absence of any actual evidence of the parent's involvement in the subsidiary's activities[333]. The most important decision of this revived approach is *Akzo Nobel* of 2009[334], which concerned a cartel between the main European producers of choline chloride (better known as vitamin B4), an additive mainly used in the animal feed industry as a feed additive. After a 6-year investigation, the Commission found that the arrangements concluded at global and European levels constituted a single and continuous infringement of Article 101 TFEU. As regards the *Akzo Nobel* group, the Commission decided to address the contested decision jointly and severally to all the appellants belonging to the same group, through the application of two cumulative requirements (so-called *Akzo* test): first, the parent company must have the power to control the

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or by a combination of such evidence and that presumption (so-called "dual basis" approach): see Joined Cases C-628/10 P and C-14/11 P, *Alliance One International*, EU:C:2012:479, para. 49.

[332] Probably due to the disagreement among practitioners on the exact interpretation of the Case C‑286/98 P, *Stora Kopparbergs Bergslags* [2000] *ECR* I‑9925, para. 28-29, which is mainly interpreted as requiring additional elements other than share capital: see LA ROCCA, *The controversial issue of the parent-company for the violation of EC completion rules by subsidiary*, in *Eur. Comp. L. Rev.*, 2011, 69-72; MONTESA, GIVAJA, *When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios*, in *World Comp.*, 2006, 561-562. Between the late 1990s and the early 2000s, CJEU started to require direct or indirect evidence on the parent's involvement. In particular, beside the fact that the parent detains 100 % of the subsidiary's shares, the Court referred to other evidentiary elements, such as the fact that the parent did not dispute it had exercised influence over the subsidiary's commercial policy and that during the administrative procedure the parent expressly assumed the role of the sole representative of the group: see CJEU Joined Cases C-189/02 P and others, *Dansk Rorindustri*, para. 118-120; Case-196/99, *Siderurgica Aristrain Madrid SL* [2003] *ECR* I-1105, paras. 97–101; Case T-309/94, *Koninklijke KNP BT* [1998] *ECR* II-1007, para. 48. This interpretation seems also to be prevailing in France, where, despite the formal recognition of the presumption referred above, the then *Conseil de la concurrence* considered different elements to establish the existence of control: see in particular Conseil concurrence, n. 11-D-02, 26 January 2011, para. 601; and n° 07-D-12, 28 March 2007, para. 8.

[333] T-325/01, *DaimlerChrysler* [2005] *ECR* II-3319, para. 218; T-314/01, *Cooperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA* [2006] *ECR* II-3085, para. 136. On the evolution of the case law, see RIESENKAMPFF, KRAUTHAUSEN, *Liability of Parent Companies for Antitrust Violation of their Subsidiaries*, in *Eur. Comp. L. Rev.*, 2010, 38. However, it is worth stressing that even after 2005, the CFI held that other indicia more than the extent of shareholding must be shown, at least in the form of evidence of instructions given by the parent company to its subsidiary to participate in the cartel: see Joined Cases T-109/02 and others, *Bolloré* [2007] *ECR* II-947, para. 132. This decision, however, has been then reformed by the CJEU: Case C-322/07 P and other, *Papierfabrik August Koehler AG* [2009] *ECR* I-7191.

[334] Case C-98/08 P, *Akzo Nobel* [2009] *ECR* I-8237. On this decision, among many, see the commentaries by REINSTADLER, REINALTER, *Imputabilità della responsabilità per la violazione dell'art. 101, comma 1, t.f.u.e. ad una società capogruppo per il comportamento illecito della propria controllata: una presunzione davvero confutabile?*, in *Riv. dir. soc.*, 2012, 523; CHAMPAUD, DANET, *Groupe de sociétés. Responsabilité de la société mère pour les infractions aux règles de concurrence commises par ses filiales*, in *RTD Com.*, 2010, 144; BURNLEY, *Group Liability for Antitrust Infringements: Responsibility and Accountability*, in *World Comp.*, 2010, 595; FREUND, *Verteidigungsrechte im kartellrechtlichen Bußgeldverfahren*, in *EuZW*, 2009, 839; GALANTE, *Arrêt "Akzo Nobel NV c/ Commission"*, in *Rev. dr. Un. eur.*, 2009, 559.

subsidiary, *i.e.* the potential ability to exercise a decisive influence over its conduct; second, the parent actually (*in concreto*) exerts such power[335]. Concerning this second requirement, the Commission may rely on the presumption for wholly-owned subsidiaries:

> «In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary, and that they therefore constitute a single undertaking within the meaning of Article 81 EC. It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent. (…) That being so, it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary, unless the parent company proves that the subsidiary (…) acts autonomously on the market»[336].

The burden of proof for a rebuttal of the presumption lies with the parent companies, which can avoid being held jointly and severally liable for their subsidiaries conduct only by disproving the exercise of decisive influence on their part[337]. In particular, irrespective of any

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[335] GHEZZI, MAGGIOLINO, *L'imputazione delle sanzioni antitrust nei gruppi di imprese*, cit., 1066 and 1084 *et seq.* Indeed, as stressed in Case C-179/12 P, *Dow Chemical Company* [2013] EU:C:2013:605, para. 55: «the Commission cannot merely find that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary, but must also check whether that influence was actually exercised». This test, however, is not new and is taken from CJEU Case 107/82, *AEG-Telefunken AG*, para. 50.

[336] Paras. 60 and 62. Then confirmed in Case C-216/09 P, *ArcelorMittal* [2011] *ECR* I-2239, paras. 97–99; Case C-520/09 P, *Arkema SA* [2011] *ECR* I-8901, paras. 38-41; Case C-521/09 P, *Elf Aquitaine SA* [2011] *ECR* I-8947, paras. 56-57 and 63. This principle has been then acknowledged by national authorities and courts: in Italy, for instance, see TAR Lazio, 9 January 2013, n. 125; AGCM I723, decision n. 23931, 28 September 2012, paras. 92-100; and AGCM I740, decision n. 23794, 2 August 2012, paras. 193-199.

[337] One may argue to what extent does the parent actually benefit from the rebuttal of the presumption, considered that in such cases only the wholly-owned subsidiary will be fined for the infringement. However, if the parent succeeds, it may request to re-calculate the fine and to obtain a significantly lower punishment: see Art. 32 of Regulation 1/2003 and *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* [2006] OJ C 210, 2-5.

personal direct or indirect involvement in the infringement[338], the parent has to produce «sufficient evidence» to establish that its subsidiary was independent, and the subsidiary's conduct can therefore not be imputable to the parent company[339]. According to the Commission, «it must be shown either that under the particular circumstances of the case the parent company was not in a position to exert a decisive influence on its wholly-owned subsidiary's commercial policy, or that the subsidiary nonetheless determined autonomously its commercial policy»[340].

Generally, abstention from exercising control is irrelevant for relieving someone of responsibility for an anti-competitive act, also when the parent is not aware of its subsidiaries' conducts or its involvement is only indirect[341]. The possible justifications are several but have been mostly rejected by the Commission and EU courts, which set a very high standard[342]. Also the implementation of a strict compliance program[343] or the flagrant non-compliance of parent's

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[338] Case C-98/08 P, *Akzo Nobel*, para. 59; C-520/09 P, *Arkema*, para. 37; C-508/11 P, *Eni SpA*, para. 46; T-24/05, *Alliance*, para. 127. Recently, the GC held that «it is not because of a parent-subsidiary relationship in which the parent company instigates the infringement, nor a fortiori because of the parent company's involvement in the infringement, but because they constitute a single undertaking for the purposes of Article 81 EC that the Commission is able to address a decision imposing fines to the parent company»: Joined Cases T-144/07 and others, *ThyssenKrupp elevators and escalators* [2011] *ECR* II-5129, para. 107. See ODUDU, BAILEY, *The Single Economic Entity Doctrine in EU Competition Law*, cit., 1747-1748.

[339] See Case 286/98 P, *Stora*, para. 29; Case C-98/08 P, *Akzo Nobel*, para. 61; Case C-90/09 P, *General Quimica SA*, para. 40; Case C-216/09 P, *ArcelorMittal*, para. 98; Joined Cases C-628/10 P and C-14/11 P, *Alliance One International*, cit., para. 47. T-168/05 *Arkema*, para. 82: «the parties concerned are not required to adduce direct and irrefutable evidence of the independence of the subsidiary's conduct on the market but only to submit evidence capable of demonstrating that independence». T-146/09, *Parker ITR* [2013] EU:T:2013:258, para. 184: «a body of precise and consistent evidence showing that the subsidiary acted independently, despite the parent company's 100% shareholding in it».

[340] Commission Decision, COMP/E-1/38.823, *PO/ Elevators and Escalators*, para. 605.

[341] WAHL, *Parent Company Liability – A Question of Facts or Presumption?*, 19th St.Gallen International Competition Law Forum ICF, 2012, 7, http://papers.ssrn.com.

[342] For a review, see GHEZZI, MAGGIOLINO, *L'imputazione delle sanzioni antitrust nei gruppi di imprese*, cit., 1104-1107; LEUPOLD, *Effective enforcement of EU competition law gone too far?*, cit., 571-572; BURNLEY, *Group Liability for Antitrust Infringements: Responsibility and Accountability*, cit., 603-5; JOSHUA, BOTTEMAN, ATLEE, *'You Can't Beat the Percentage'- The Parental Liability Presumption in EU Cartel Enforcement' in Global Competition Review*, cit., 7; MICKONYTE, *Joint Liability of Parent Companies in EU Competition Law*, in *LSEU*, vol. 1, 44-49; ISLENTYEVA, *Like father like son – The parental liability under the EU Competition law today*, in *Global Antitrust Rev.*, 2011, 105-106. Among the very few cases in which the presumption was successfully rebutted, see Commission Decision, COMP/E-1/38 240, *Industrial tubes*, para. 479; Case COMP/C.38.238/B.2, *Raw Tobacco Spain*, para. 251; Case COMP/36.571/D-1, *Austrian banks – 'Lombard Club'*, para. 376; Case COMP/E-1/37.512, *Vitamins*, para. 642. Some form of guidance was provided by the Commission in Case COMP/38.456, *Bitumen NL*, para. 200, according to which the subsidiary has to rebut the presumption by proving its autonomy in respect of the most important strategic decisions a company can face, so that general assertions of commercial autonomy unsupported by convincing evidence regarding are not sufficient.

[343] See Commision Decision COMP/39.396, *Calcium carbide and magnesium based reagents for the steel and gas industries*, para. 325; Commission Decision, COMP/E-1/38.823, *PO/Elevators and Escalators*, paras. 631, 687 *et seq.* and 753 *et seq.*; and COMP/F/38.645, *Methacrylates*, para. 386. Very surprisingly, the GC not only argued that the existence of such policies does not indicate the independence of the subsidiaries on the market, but interpreted it as an indication that the subsidiaries do not operate on an independent basis: see T-141/07 and other, *General Technic-Otis Sàrl* [2011] *ECR* II-4977, paras. 85-87. Harsh criticism by MOBLEY, MOURKAS, MURRAY,

instructions and guidelines[344] were not considered sufficient to rebut the presumption. Among these reasons generally invoked, one of the most convincing is certainly the defence raised when the parent acts as a non-operational holding company[345], which «serves merely to invest capital in companies whose commercial operations it then leaves to those companies, withdrawing capital as soon as it considers that an investment in other companies, possibly not belonging to [the same] group, would provide a better return»[346]. In such case, in fact, there is not a single economic entity pursuing the same commercial policy.

This test has been invoked on different occasions, but only rarely with success: after the case *Raw Tobacco Spain*, where the parent company was found to have a purely financial interest in its wholly-owned subsidiary[347], the General Court stressed in different cases that the existence of a non-operational holding company, which rarely intervenes in the management of its subsidiaries, is not sufficient to rule out the possibility that it exercises decisive influence over the conduct of those subsidiaries by coordinating, inter alia, financial investments within the group[348]. Recently, it held that «the reference (…) to a 'pure financial investor' must, therefore, be understood as referring to the case of an investor who holds shares in a company to make a profit, but who refrains from any involvement in its management and in its control»[349].

Parent liability for joint venture parents: the Courts' "El du Pont" and "Dow Chemical" judgments in conflict with optimal compliance incentives, in *Eur. Comp. L. Rev.*, 2014, 505-508; KERSTING, *Die Rechtsprechung des EuGH zur Bußgeldhaftung in der wirtschaftlichen Einheit*, cit., 1165-1166; HOFSTETTER, LUDESCHER, *Fines against Parent Companies in EU Antitrust Law*, cit., 61 and 70-71. In this direction, see OFFICE OF FAIR TRADING, *OFT Guidance as to the appropriate amount of a penalty*, September 2012, para. 2.15 and fn. 26; and AUTORITE DE LA CONCURRENCE, *Document-cadre du 10 février 2012 sur les programmes de conformité aux règles de concurrence*, paras, 29-31.

[344] Case T-146/09, *Parker ITR*, paras. 191-195; Case C-501/11 P, *Schindler Holding Ltd* [2013] EU:C:2013:522, para. 113. On these decisions see AMATO, LIBERATORE, DELLA NEGRA, *La responsabilità della capogruppo per le violazioni del diritto* antitrust *europeo commesse dalle controllate: presunzione relative o, di fatto, assoluta?*, in *Contr. impr. Eur.*, 2014, 334.

[345] See also BURNLEY, *Group Liability for Antitrust Infringements: Responsibility and Accountability*, cit., 606; MICKONYTE, *Joint Liability of Parent Companies in EU Competition Law*, cit., 49.

[346] The quotation is taken from Commission Decision, COMP/E-1/37.773, *MCAA*, para. 240.

[347] Comission, COMP/C.38.238/B.2, *Raw Tobacco Spain*, paras. 376 and 383. However, despite the factual similarity, the Commission departed from it in the subsequent decision COMP/38.281, *Italian Raw Tobacco*.

[348] Case T-360/09, *E.ON Ruhrgas* [2011] EU:T:2012:332, para. 283; Case T-38/07, *Shell Petroleum* [2011] *ECR* II-4383, para. 70; T-190/06, *Total SA and Elf Aquitaine SA* [2011] II-5513, para. 68; T-168/05, *Arkema*, para. 76. In Case T-69/04, *Schunk* [2008] *ECR* II-2567, para. 62, the CFI stated that «Although that definition of Schunk GmbH's corporate object supports its statement that it is only a financial holding company which does not exercise any industrial or commercial activity, the expression 'strategic management of industrial participations' is broad enough to encompass and permit, in practice, the management and running of its subsidiaries». In C-289/11 P, *Legris Industries SA* [2012] EU:C:2012:270, paras 45–55, the CJEU rejected as inadmissible Legris' claim that the GC made the presumption *de facto* irrebuttable by rejecting its argument that, since it was a financial holding company it could not have exercised decisive influence over its subsidiary.

[349] T-392/09, *1. garantovaná a.s.* [2012] EU:T:2012:674, para. 52.

However, such a claim is not successful because often a financial institution can and does engage in defining the strategy of its portfolio companies, and today the capitalistic image of a pure rent seeker, without any engagement with the business, is very rare[350].

2.3.3. The CJEU's Response to the Alleged Violation of Fundamental Rights

The presumption above illustrated represent a clear exception to the traditional concepts of separate legal personality and limited liability, which are at the heart of national legislations addressing groups of companies. In fact, the parent company may be held liable even if there is no evidence of its actual involvement or knowledge[351]. Although it is undisputed that, if the parent is somehow involved in the infringement, responsibility should necessarily be also on its part[352], the situation is different when the violation is perpetrated only by the subsidiary. In such a case, as seen above, the parent may no rebut the presumption by simply providing evidence that it did not participate in the infringement or did not breach competition rules[353]. Consequently, one may raise a legitimate doubt, whether the presumption is rebuttable as such, irrespective of evidence may be submitted by the parties.

The problem lies with the rebuttable nature of the presumption of parental liability. In particular, considering the difficulties above summarized and the lack of success in rebutting the presumption of liability, the legal doctrine has raised the point that it is not rebuttable and that it genuinely represents a *probatio diabolica*[354]. Indeed, not only did the CJEU not define what would qualify as sufficient evidence, but the courts gradually broadened the notion of «exercise of decisive influence»[355], thus diminishing the chances of a successful invocation of

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[350] ISLENTYEVA, *Like father like son – The parental liability under the EU Competition law today*, cit., 104.

[351] HUGHES, *Competition Law Enforcement and Corporate Group Liability – Adjusting the veil*, in *Eur. Comp. L. Rev.*, 2014, 68; JOSHUA, BOTTEMAN, ATLEE, *"You can't beat the percentage" – The Parental Liability Presumption in EU Cartel Enforcement*, cit., 4; PIJNACKER HORDIJK, EVANS, *The AKZO Case: Up a Corporate Tree for Parental Liability for Competition Law Infringements*, in *J. Eur. Comp. L. Pract.*, 2010, 129.

[352] This point is stressed by PACE, *The Parent-subsidiary Relationship in EU Antitrust Law and the* AEG Telefunken *Presumption: Between the Effectiveness of Competition Law and the Protection of Fundamental Rights*, in *Yb. Antitrust Reg. Stud.*, 2014, 197.

[353] THOMAS, *Guilty of Fault that one has not Committed*, cit., 20.

[354] For instance, the Italian Competition Authorty (AGCM) considered this presumption as preluding to a form of strict responsibility: see AGCM, decision n. 23770, 25 July 2012, para. 249. In this sense, also VOET VAN VORMIZEELE, *Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen*, in *WuW*, 2010, 1012-1013.

[355] While, in general, an actual exercise is required (Cases T-141/07, and others, *General Technic-Otis*, para. 58), in a recent case the General Court held that the notion of "exercise" of decisive influence also includes the attempt to exercise influence, i.e. when the intervention in the subsidiary's management is not successful,

presumption's rebuttal. In particular, one may see that this concept has undergone a significant modification and shifted the focus from the subsidiary's commercial policy[356] to «all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list»[357]. Moreover, the extent of the autonomy of a subsidiary has been broadened considerably, through the gradual abandonment of the concept of autonomy regarding market conduct in favor of a far more extensive concept, not anymore tied to market conduct[358].

In particular, two pleas concerning a breach of fundamental rights have been raised. The first one concern the principle of personal responsibility and focuses on the fact that, if the parent's involvement is irrelevant and one legal entity may be punished for other legal entities' conduct solely on the merits of being members of the same corporate group, then the principle of personal responsibility loses its relevance. The CJEU tried to reconcile the parental liability doctrine with this principle, by affirming that the point of reference is the economic entity and not the individual legal entities[359], but the reasoning was not convincing[360]. Indeed, the system

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regardless the parent's real intentions: Case T-146/09, *Parker ITR Srl and Parker-Hannifin Corp.* [2013] EU:T:2013:258, paras. 187-193. In this regard, see LEUPOLD, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, cit., 2013, 570.

[356] Since CJEU Case 48/69, *Imperial Chemical Industries*, paras. 130-140, where the Court focused on the control of selling prices on the market; and Case 107/82, *AEG-Telefunken AG*, paras. 49-52. See in particular the list in T-76/08, *EI du Pont de Nemours and Company* [2012] EU:T:2012:46, para. 62: «corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters».

[357] Case C-98/08 P, *Akzo Nobel*, paras. 58 and 74; Case C-90/09 P, *General Quımica*, para. 37; Case C-520/09 P, *Arkema SA*, para. 38; Case-628/10 P, *Alliance One International*, para. 43; T-146/09, *Parker ITR*, para. 178. This shift is well described by MICKONYTE, *Joint Liability of Parent Companies in EU Competition Law*, cit., 35-36; and JOSHUA, BOTTEMAN, ATLEE, *'You Can't Beat the Percentage'- The Parental Liability Presumption in EU Cartel Enforcement*, cit., 5-6, according to whom «the absence of autonomy that was traditionally the touchstone for a finding of decisive influence is now almost irrelevant in comparison with the organisational and economic links between the companies of the group».

[358] See T-72/06, *Groupe Gascogne SA* [2011] *ECR* II-400, para. 74 ; and C-508/11 P, *Eni SpA*, para. 64.

[359] Case C-508/11 P, *Eni SpA*, para. 82; Joined Cases C-C-628/10 P and C-14/11 P, *Alliance One International*, para. 42; Case T-347/06, *Nynas Petroleum AB* [2012] EU:T:2012:480, para. 40; Case C-98/08 P, *Akzo Nobel*, para. 77. In this regard, see the interesting decision of the Dutch Trade and Industry Appeals Tribunal, 18 November 2010, *Beheersmaatschappij A B.V. te B*, NL:CBB:2010:BO5197, paras. 3.2.4.4–3.2.4.7, according to which the presumption of innocence no longer comes into play once the infringement is proved.

[360] BRONCKERS, VALLERY, *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, cit., 549; GHEZZI, MAGGIOLINO, *L'imputazione delle sanzioni antitrust nei gruppi di imprese*, cit., 1083. According to WINCKLER, *Parent's Liability: New case extending the presumption of liability of a parent company for the conduct of its wholly owned subsidiary*, in *J. Eur. Comp. L. Pract.*, 2011, 233, the Court pays lip service to the principle of personal liability, but confirms that under EU Competition Law one can be held liable without being guilty. Indeed, in Case C-501/11 P, *Schindler Holding Ltd*, paras. 101, the Court admitted «whilst this principle is of particular importance especially as regards liability in the sphere of civil law, it cannot be relevant for defining the perpetrator of an infringement of competition law, which is concerned with the actual conduct of undertakings».

of collective guilt established by the Commission and EU courts seems to deprive single legal persons of the protection afforded by this principle[361].

The second point, instead, concerns the violation of the presumption of innocence[362]. This issue has been raised before the CJEU in different instances, but always unsuccessfully. In the case *Elf Aquitaine*, for instance, the parent appealed the GC's decision by arguing that the GC had made the presumption irrebuttable, since any attempt to demonstrate the independence of the subsidiary's conduct on the market would run counter to the very function which the Court finds holding companies to have, and because of the amalgamation of powers within the prosecuting authority. The CJEU, in line with Advocate General Mengozzi[363], rejected the applicant's arguments according to which the presumption was irrefutable. In particular, the Court held that «the mere fact that an entity does not, in a given case, produce evidence capable of rebutting the presumption of actual exercise of decisive influence does not mean that that presumption cannot be rebutted in any circumstances»[364]. The CJEU also recalled the ECtHR jurisprudence and affirmed that Article 6 ECHR does not preclude presumptions of fact or law, but requires them to be confined within *reasonable limits*, depending on the importance of what is at stake and maintaining the rights of the defense[365].

In other words, the Court is satisfied that the presumption is proportionate to the legitimate aim pursued because it is always – in principle – possible to adduce evidence to the contrary

[361] In this sense, very critically, THOMAS, *Guilty of a Fault that one has not Committed*, cit., 15-16, who mentions a judgment of the German Constitutional Court of 1966, which found the parental liability regime as being in breach of the principle of personal responsibility. See also VON HÜLSEN, KASTEN, *Passivlegitimation von Konzernen im Kartell-Schadensersatzprozess? – Gedanken zur Umsetzung der Richtlinie 2014/104/EU*, in *NZKart*, 2015, 303. Concerning a recent ministerial legislative proposal in Germany for the strengthening of liability, see BRETTEL, THOMAS, *Der Vorschlag enier bußgeldrechtlichen „Konzernhaftung" nach § 81 Abs. 3a RefE 9. GWB-Novelle*, in *WuW*, 2016, 336.

[362] Joined Cases T-144/07 and others, *ThyssenKrupp*, para. 112: «the principle of the presumption of innocence, as it results in particular from Article 6(2) of the ECHR, is one of the fundamental rights which (…) are recognised in the legal order of the European Union» and «applies in particular to procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines».

[363] See para. 62 of his conclusions.

[364] Case C-521/09 P, *Elf Aquitaine SA*, para. 66. This is especially so when «the entities against which the presumption operates are those best placed to seek that evidence within their own sphere of activity» (para. 70). Similarly, see C-440/11 P, *Stichting Administratiekantoor Portielje* [2013] EU:C:2013:514, para. 71; C-289/11 P, *Legris Industries SA*, para. 53; and C-508/11 P, *Eni SpA*, para. 68, where the Court, albeit declaring admissible Eni's complaints relating to an alleged infringement of Article 47 of the Charter and Article 6 of the ECHR, did not discuss them anymore in the decision.

[365] Joined Cases T-144/07 and others, *ThyssenKrupp*, para. 114. The decision recalled is *Salabiaku v. France*, 7 October 1988, Series A no. 141-A, para. 28. See also the conclusions of AG Bot in *ArcelorMittal Luxembourg SA*, paras. 211-213, where he says that, in order to keep the presumption within reasonable limits, it should be corroborated by other element of fact proving that the parent exercised decisive influence over its subsidiary.

and the rights of the defense are safeguarded[366]. Accordingly, it concluded that the presumption is compatible with Article 47 of the Charter of Fundamental Rights and Article 6 ECHR[367].

However, albeit preserving the potential to rebut the presumption, in recent decisions both the Court of Justice and the General Court annulled the Commission decisions based on the insufficient degree of legal reasoning provided by the Commission because the latter failed its obligation to state reasons for its decision under Article 296 TFEU, so that the addressees were unable to understand the grounds for their imputability. It means that the Commission has to motivate adequately why the evidence submitted is insufficient or unconvincing and cannot simply reject parties' allegations by negating their relevance, without substantiation[368]. Nevertheless, the overall situation concerning the rather irrebuttable nature of the presumption does not change and leaves almost untouched the doubts concerning the real possibility that such a simple presumption can be effectively rebutted[369].

2.3.4. The Relevance of the Single Economic Entity Doctrine for Private Actions

The previous paragraph has illustrated how the single economic entity doctrine has been outlined and enforced by the Commission and EU courts concerning groups of companies. This approach represents a clear exception to the principles applied to groups at the national level and has been the subject of harsh criticism by practitioners. At this point, it is important to understand which are the consequences of such a far-reaching approach within the context of private enforcement of EU competition law, in particular concerning the civil liability of parent

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[366] Case C-90/09 P, *General Quımica*, para. 52; Case C-521/09 P, *Elf Aquitaine SA*, para. 59; Joined Cases T-144/07 and others, *ThyssenKrupp*, para. 116; C-199/11, *Otis NV*, paras. 75-76; C-508/11 P, *Eni SpA*, para. 68. On this last decision, see critically NEHL, *Kartellrecht: Konzernhaftung – ENI SpA/Kommission*, in *EuZW*, 2013, 554-555, affirming that the CJEU replies with a somewhat vague and circular argument.

[367] Case C-238/12 P, *FLSmidth & Co* [2014] EU:C:2014:284, para. 25; Case C-501/11 P, *Schindler Holding*, paras. 107-110; Case C-440/11 P, *Stichting Administratiekantoor Portielje*, paras. 71-72, on which STANEVICIUS, Portielje*: Bar Remains High for Rebutting Parental Liability Presumption*, in *J. Eur. Comp. L. Pract.*, 2014, 24.

[368] Case C-521/09 P, *Elf Aquitaine*, paras. 161-167; and, in the same sense Case T-185/06, *Air liquide* [2011] *ECR* II-2809, para. 69; Case T-234/07, *Koninklijke Grolsch* [2011] *ECR* II-6169, para. 89. See also SVETLICINII, SAD, *Parental Liability for the Antitrust Infringements of Subsidiaries: A Rebuttable Presumption or* Probatio Diabolica, in *Eur. L. Repor.*, 2011, 288.

[369] Among many, see LEUPOLD, *Effective enforcement of EU competition law gone too far? Recent case law om the presumption of parental liability*, cit., 578; THOMAS, *Guilty of a Fault that one has not Committed*, cit., 17-21; PIJNACKER HORDIJK, EVANS, *The AKZO Case: Up a Corporate Tree for Parental Liability for Competition Law Infringements*, cit., 128; WINCKLER, *Parent's Liability: New case extending the presumption of liability of a parent company for the conduct of its wholly owned subsidiary*, cit., 233; HOFSTETTER, LUDESCHER, *Fines against Parent Companies in EU Antitrust Law*, cit., 60; BRONCKERS, VALLERY, *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, cit., 555.

companies and the determination of jurisdiction for damages actions relating to infringements committed in the framework of a group of companies. Put it differently, the question is how the term "undertaking" might be employed by private litigants. The focus will be on cartels and on firms acting concertedly because claims based on abuse of dominant position are generally brought against individual competitors or suppliers.

First of all, it must be stressed what the CJEU held in *Courage* and *Manfredi* concerning the substantive and procedural conditions governing damages actions. In fact, the Court stressed that, in the absence of uniform EU rules, it is necessary to resort to national rules, provided that they are not less favorable than those governing similar domestic actions and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law[370]. The same principles apply also after the adoption of Directive 2014/104/EU, which, regardless of one article dealing with joint and several liability[371], does not say anything about the possibility that a parent company might incur civil liability for the infringements committed by a wholly owned subsidiary and does not provide any obligation for Member States to introduce an accessory liability of the parent company for its subsidiaries' actions [372]. Accordingly, such an issue is still regulated by national laws[373].

From a first analysis of the national case law, in particular in Germany and in the Netherlands, it seems possible to point out a general rejection of an automatic transposition of the single economic entity (*rectius*: the presumption of decisive influence) in private law, due to the relevance attributed to the principles of separate legal personality and limited liability[374].

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[370] See *supra*, para. 2.2.2.1.

[371] Art. 11 of Directive 2014/104/EU.

[372] In this sense, see in-depth analysis by KLOTZ, *Wirtschaftliche Einheit und Konzernhaftung im Kartellzivilrecht*, Köln, Carl Heymanns, 2016, 109 *et seq.* See also KÖNEN, *Die Passivlegitimation des Kartellschadensersatzes nach der 9. GWB-Novelle*, in *NZKart*, 2017, 15; THOMAS, LEGNER, *Die wirtschaftliche Einheit im Kartellzivilrecht*, in *NZKart*, 2016, 155 *et seq.*; VON HÜLSEN, KASTEN, *Passivlegitimation von Konzernen im Kartell-Schadensersatzprozess? – Gedanken zur Umsetzung der Richtlinie 2014/104/EU*, cit., 296. According to a different interpretation, some authors share the view that the EU case law and the Directive require to implement the parent liability principles in national systems: see WEITBRECHT, *Die Umsetzung der EU-Schadensersatzrichtlinie*, in *WuW*, 2015, 964; LETTL, *Kartellschadensersatz nach der Richtlinie 2014/104/EU und deutsches Kartellrecht*, in *WRP*, 2015, 538; MAKATSCH, MIR, *Die neue EU-Richtlinie zu Kartellschadensersatzklagen – Angst vor der eigenen „Courage"?*, in *EuZW*, 2015, 8; KERSTING, *Die neue Richtlinie zur privaten Rechtsdurchsetzung im Kartellrecht*, in *WuW*, 2014, 565; VOLLRATH, *Das Maßnahmenpaket der Kommission zum wettbewerbsrechtlichen Schadenersatzrecht*, in *NZKart*, 2013, 438.

[373] This is also the conclusion reached by VAN LEUKEN, *Parental Liability for Cartel Infringements Committed by Wholly Owned Subsidiaries*, in *Eur. Rev. Priv. L.*, 2016, 521-522.

[374] See, respectively, BGH, 23 June 2009, KZR 21/08, in *WRP*, 2009, 1402 (*obiter*); LG Düsseldorf, 8 September 2016, 37 O 27/11 Kart, in *NZKart*, 2016, 490; LG Berlin, 6 August 2013, 16 O 193/11 Kart, in *BeckRS*, 2013, 22659; and District Court of Midden-Nederland, 20 July 2016, *East West Debt v United Technologies Corporation et al.*, NL:RBMNE:2016:4284. In the literature, in this sense, see KUIJPERS *et al.*, *Actions for*

According to this approach, in order to establish the liability of the parent company, it is necessary to prove the latter's own unlawful conduct, that is its personal and direct involvement in the infringement, because the mere exercise of control and decisive influence over the subsidiary is not sufficient to give rise to a liability for damages[375]. This conclusion cannot be put into question by the obligation to ensure the full effectiveness of EU competition law: indeed, the lack of automatic imputation of liability to the parent company does not make it practically impossible or excessively difficult for the victim to enforce his rights, only because he cannot rely on the parent's assets to seek full compensation[376]. However, although the solution just illustrated is perfectly reasonable and compatible with EU law, it cannot be forgotten that the answer to the question concerning the extent of parental liability in private law depends – in the absence of harmonization – on the different national systems involved. Other countries, such as Austria, are in fact more open in this regard and largely admit the possibility to extend civil liability to parent companies and more generally to all the group companies that are aware of the essential circumstances of the infringement[377].

From the perspective of private international law, the issue of the relevance of the single economic entity is less problematic. Indeed, as will be illustrated in the following paragraphs concerning the application of the so-called *forum connexitatis*, not only is jurisdiction of the forum of the subsidiary's domicile generally extended to the parent company, but it also

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Damages in the Netherlands, the United Kingdom, and Germany, in *J. Eur. Comp. L Pract.*, 1-2017, 54; KLOTZ, *Wirtschaftliche Einheit und Konzernhaftung im Kartellzivilrecht*, cit., 71-72; JANKA, *Parent Company Liability in German and EU Competition Law: Two Worlds Apart?*, in *J. Eur. Comp. L. Pract.*, 2016, 617-618; VAN LEUKEN, *Parental Liability for Cartel Infringements Committed by Wholly Owned Subsidiaries*, cit., 524-526 (stressing that cartel fines and damages actions have different objectives); KORTMANN, *The Draft Directive on Antitrust Damages Actions and its Likely Effects on National Law*, in HARTKAMP *et al.* (eds.), *The Influence of EU Law on National Private Law*, Deventer, Kluwer, 2014, 681-682.

[375] This conclusion seems to be supported by the opinion of AG Bot in C-327/07 P, para. 126: «if [the Commission's] decision results in the undertakings in question incurring civil liability, it is only because they have been found to have participated in the collective conduct that has been collectively penalised and correctly defined». See also the opinion of AG Kokott in Case C-501/11 P, paras. 65-66: « the principle of separation is a common principle in the company law of the Member States, whose practical importance should not be underestimated, above all in matters of *civil liability* in connection with trading companies, such as companies with limited liability or joint stock companies. In assessing an undertaking's *responsibility under antitrust law*, however, the crucial factor cannot be whether there is a '*corporate veil*' between the parent company and the subsidiary. What is important is economic reality, since competition law is guided not by technicalities, but by the actual conduct of undertakings on the market».

[376] LG Berlin, 6 August 2013, 16 O 193/11 Kart.

[377] OGH, 2 August 2012, 4 Ob 46/12, in *WuW*, 2013, 313; 14 February 2012, 5 Ob 39/11p, in *WuW*, 2012, 1251. For a positive appraisal, see KRIECHBAUMER, BAMBERGER, *Private Enforcement – Die Rechtslage in Österreich*, in *WuW*, 2014, 690.

accepted that the latter, when addressed in the Commission's decision, can be used as anchor defendants to establish jurisdiction against the other alleged members of the cartel, subsidiaries included, even if it did not directly participate in the infringement[378]. On the contrary, problems arise when the CJEU's case law on parental liability is used to justify the use of subsidiaries as anchor defendants, even though they were not aware of the existence of the cartel, for the sole reason that they part of the undertaking fined by the Commission.

2.4. The Determination of Jurisdiction for Competition Claims: Introductory Remarks

Considering the increasing number of cases involving cross-border situations and therefore transnational litigation among parties coming from different Member States, the role of private international law in the enforcement of competition law has been significant over the last years. The Directive on antitrust damages actions does not cover the issue of determination of jurisdiction[379], neither are there specific rules at the EU level governing jurisdictional matters for competition claims[380]. The relevant instrument establishing the heads of jurisdiction that national courts must apply regarding defendants domiciled in a Member State is the well-known Brussels I Regime, which has been recently recast by Regulation 1215/2012[381]. The latter, albeit not dealing specifically with competition law claims, provides for a general regime concerning jurisdiction and recognition and enforcement of decisions in civil and commercial matters. It builds on the previous Regulation, by renumbering all articles and introducing some novelties, in particular concerning the *lis pendens* regime and the recognition of judgments[382]. However,

[378] See *infra*, para. 2.7.4.

[379] IDOT, *La dimension internationale des actions en réparation. Choisir sa loi et son juge: Quelles possibilités?*, in *Concurrences*, n. 3-2014, 43.

[380] See DANOV, *Jurisdiction in Cross-Border EU Competition Law Cases: Some Specific Issues Requiring Specific Solutions*, in DANOV, BECKER, BEAUMONT (eds.), *Cross-border EU Competition Law Actions*, cit., 167.

[381] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

[382] On the novelties of the new Regulation, see MALATESTA (a cura di), *La riforma del regolamento Bruxelles I*, Milano, Giuffrè, 2016; FERRARI, RAGNO (eds.), *Cross-border Litigation in Europe: the Brussels I Recast Regulation as a* panacea*?*, Padova, Cedam, 2015; GUINCHARD (dir.), *Le nouveau règlement Bruxelles I*-bis, Bruxelles, Bruylant, 2013. See also the following commentaries: CARBONE, TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, Torino, Giappichelli, 2016; DICKINSON, LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, OUP, 2015; SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, Padova, Cedam, 2015; MAGNUS, MANKOWSKI (eds.), *ECPIL - Brussels Ibis Regulation*, Köln, Otto Schmidt, 2016; GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*[5], Issy-les-Moulineux, LGDJ, 2015; RAUSCHER (Hrsg.), *Europäisches Zivilprozess-und Kollisionsrecht: Brüssel Ia-VO*, Köln, Otto Schmidt, 2015.

it maintains its general territorial scope of application only to defendants domiciled in a Member State[383].

The substantive scope of the Regulation is defined by its Article 1, which is split into different parts: the first sentence contains a positive definition of the matters covered by the Regulation («civil and commercial matters whatever the nature of the court or tribunal»), while excluding other areas, such as administrative matters and States' liability[384]; the second sentence, instead, provides for a negative list of the fields not covered. These concepts, as well as the general notion of «civil and commercial matters», have to be interpreted autonomously, without any recourse to national laws or international conventions[385].

Accordingly, it is settled both in the national case law[386] and in the literature[387] that competition cases fall within the notion of civil and commercial matters for the purpose of the Brussels I regime. This interpretation is not affected by the fact that private enforcement actions

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[383] As is known, the initial proposal of the Commission provided that persons not domiciled in any of the Member States could be sued in the courts of a Members State only by virtue of the rules of the Regulation. In other words, the Regulation was intended to apply to any dispute in which the issue of jurisdiction arises, irrespective of where the defendant is domiciled. See LUZZATTO, *On the proposed Application of Jurisdictional Criteria of Brussels I Regulation to non-Domiciled Defendants*, in POCAR, VIARENGO, VILLATA (eds.), *Recasting Brussels I*, Padova, Cedam, 2012, 111 *et seq.*; WEBER, *Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation*, in *RabelsZ*, 2011, 619 *et seq.*

[384] These areas relate to acts and omission when public authorities act in the execution of public powers. The additional reference to "*acta iure imperii*" represents a codification of the CJEU's case law concerning issues of State immunity: see Case C-292/05, *Lechouritou* [2007] *ECR* I-1519.

[385] CJEU Case 29/76, *LTU* [1976] *ECR* 1541, para. 3; Case 133/78, *Gourdain* [1979] *ECR* 733, para. 3; Case 814/79, *Rüffer* [1980] *ECR* 3807, para. 7; and Case C-172/91, *Sonntag* [1993] *ECR* I-1963, para. 18; Case C-271/00, *Gemeente Steenbergen* [2002] *ECR* I-10489, para. 28 See HAUSMANN, *The Scope of Application of the Brussels I Regulation*, in POCAR, VIARENGO, VILLATA (eds.), *Recasting Brussels I*, cit., 3 *et seq.*

[386] In England, for instance, see *Toshiba Carrier UK Ltd & Ors v KME Yorkshire Ltd & Ors* [2011] EWHC 2665 (Ch); *Sandisk Corporation v Koninklijke Philips Electronics NV & Ors* [2007] EWHC 332 (Ch). With regard to the Lugano Convention, see also LG Dortmund, 1 April 2004, 13 O 55/02 Kart, in *IPRax* 2005, 542. See also Trib. Milano, 8 May 2009, in *Riv. dir. int. priv. proc.*, 2011, 405.

[387] Among many, see MONICO, *Il* private antitrust enforcement *nello spazio giudiziario europeo*, in *Riv. dir. int.*, 2016, 1153-1155; FRATEA, *Il* private enforcement *del diritto della concorrenza dell'Unione europea*, Napoli, ESI, 2015, 111-112; MUNARI, *Issues on Jurisdiction and Applicable Law in Private Antitrust Enforcement Cases*, in QUEIROLO, HEIDERHOFF (eds.), *Party Autonomy in European Private (and) International Law*, Roma, Aracne, 2015, 148; DANOV, *EU Competition Law Enforcement: Is Brussels I Suited to Dealing with All the Challenges*, in *Int. Comp. L. Quart.*, 2012, 27; WURMNEST, *Internationale Zuständigkeit und anwendbares Recht bei grenzüberschreitenden Kartelldelikten*, in *EuZW*, 2012, 933; TZAKAS, *Die Haftung für Kartellrechtsverstöße im internationalen Rechtsverkehr*, Baden-Baden, Nomos, 2011, 93; SUDEROW, *Cuestiones de jurisdicción internacional en torno a la aplicación privada del derecho antitrues:* forum shopping *y "demandas torpedo"*, in *Cuad. der. trans.*, 2010, vol. 2, n. 2, 320; BARIATTI, *Violazione di norme antitrust e diritto internazionale privato: il giudice italiano e i cartelli*, in *Riv. dir. int. priv. proc.*, 2008, 354; NOURISSAT, *Livre vert sur les actions en dommages-intérêts: questions de droit judiciaire privé européen*, in *Rev. Lamy dr. conc.*, 2006, 46; RADICATI DI BROZOLO, *Antitrust Claims: Why Exclude Them from the Hague Jurisdiction and Judgments Convention ?*, in *Eur. Comp. L. Rev.*, 2004, 783; LENAERTS, GERARD, *Decentralisation of EC Competition Law Enforcement: Judges in the Frontline*, in *World Comp.*, 2004, 326; WITHERS, *Jurisdiction and Applicable Law in Antitrust Tort Claims*, in *J. Bus. L.*, 2002, 259.

pursue also public law objectives, such as the safeguard of the free market and protection of consumers[388]. Moreover, the CJEU affirmed that an action seeking legal redress for damage resulting from alleged infringements of European Union competition law is covered by the concept of 'civil and commercial matters' and falls within the scope of that regulation[389].

Having that clarified, it is important to understand how jurisdictional criteria of the Regulation are currently interpreted and how this interpretation may be relevant to realize the consolidation of claims filed against different companies belonging to the same group of companies. Recently, the CJEU had for the first time the opportunity to give a preliminary ruling on the application of Brussels I Regulation in competition law cases. The starting point of the case was a decision of the Commission[390], which found that several companies participated in a single and continuous infringement of the prohibition of cartel agreements under EU competition law, consisting in in exchanging valuable and confidential market and/or company-relevant information, limiting and/or controlling production, allocating markets and customers and fixing and monitoring prices as part of multilateral and bilateral meetings in the market of hydrogen peroxide and sodium perborate. These agreements were adapted and modified at regular intervals but were mainly concluded in a series of meetings that took place in various Member States, including Belgium, France, and Belgium. Some of the companies involved were held jointly and severally liable and ordered to pay significant damages[391]. In response to the Commission's decision, some of the cartel victims domiciled in thirteen different countries and operating in the industrial pulp and paper processing industry assigned their damages claims to *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, a Belgian SPV company established for the purpose of pursuing claims for damages of undertakings affected by a cartel[392]. CDC brought a claim for damages on 16 March 2009 before the Regional Court

[388] KOMNINOS, *EC Private Antitrust Enforcement*, cit., 250.

[389] Case C-302/13, *flyLAL-Lithuanian Airlines AS* [2014] EU:C:2014:2319, para. 38. The case dealt with a claim for compensation following the abuse of dominant position of Air Baltic company on the market for flights from or to Vilnius Airport (Lithuania) and an anti-competitive agreement between the co-defendants, in relation to which the applicant in the main proceedings applied for provisional and protective measures. In the Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA* [2015] EU:C:2015:335, the issue concerning the scope of application of Brussels I Regulation is taken for granted.

[390] Commission Decision 2006/903/EC of 3 May 2006, Case COMP/F/C.38.620 — *Hydrogen Peroxide and perborate* [2006] OJ L 353/54.

[391] A summary of the fines imposed and the actions against them brought before the General Court of the European Union and the Court are set out in Press Release No 154/13 of 5 December 2013, which can be found at http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/cp130154fr.pdf.

[392] Interestingly enough, OLG Dortmund, 18 February 2015, VI-U Kart 3/14, in *NZKart*, 2015, 201, denied the standing to sue of corporation like CDC on the assumption that in the event of losing, the plaintiff would not have

of Dortmund, in whose district one of the defendants had its registered office, against six chemical undertakings that were fined by the Commission and were domiciled in different Member States, on the ground that the assigning companies had purchased considerable amount of hydrogen peroxide during the relevant time of the cartel[393].

2.5. The Forum of the Defendant's Domicile: Is a Group-Tailored Interpretation Possible?

The first relevant criterion for the attribution of jurisdiction is the domicile of the defendant, who may be both the alleged person who infringed competition law and, less frequently, in negative declaratory actions, the alleged victim of the antitrust infringement[394]. This criterion has a twofold function: it establishes the general territorial criterion for application of the Regulation concerning jurisdiction, and it provides for the general rule for jurisdiction. This is the fundamental jurisdiction rule of the Regulation, which, albeit being renumbered, has remained untouched since Brussels Convention 1968[395], thus confirming the hostility of the Regulation towards the attribution of jurisdiction to the courts of the claimant's domicile[396].

In particular, Article 4 establishes jurisdiction in favor of the courts of the State where the defendant is domiciled (*actor sequitur forum rei*), irrespective of its nationality and regardless any specific connection between the claim and the forum. This allows having a highly predictable general head of jurisdiction[397], which can be derogated only in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. In particular, the defendant can be sued before the courts of another

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the funds required to reimburse the legal costs of the defendants in accordance with § 91 of the Code of Civil Procedure. Differently, see Amsterdam Court of Appeal, 21 July 2015, *Kemira v CDC*, NL:GHAMS:2015:3006; Amsterdam Court of Appeal, 7 January 2014, case 200.122.098/01; and District Court of Helsinki, provisional order of 4 July 2013. On the assignment of antitrust claims, see SCHREIBER, SMITH, *The Case for Bundling Antitrust Damage Claims by Assignment*, in *Concurrences*, 3-2014, 23; SCHREIBER, SEEGERS, *The EU Directive on Antitrust Damage Actions and the Role of Bundling Claims by Assignment*, in *CPI Antitrust Chron.*, February 2015, 3.

393 The order for reference to the CJEU may be consulted in *WuW*, 2013, 872.

394 ASHTON, VOLLRATH, *Choice of court and applicable law in tortious actions for breach of Community competition law*, in *ZWeR*, 2006, 6.

395 Jenard Report on the Brussels Convention [1979] OJ C 59, 18.

396 See Case C-412/98, *Group Josi Reinsurance Company SA* [2000] *ECR* I-5925, para. 50; Case C-220/88 *Dumez France* [1990] *ECR* I-49, para. 16; Case C-89/91 *ShearsonLehman Hutton* [1993] *ECR* I-139, para. 17. However, in some very specific circumstances, the CJEU adopted a more opened approach and provided the claimant with such possibility: see HEINZE, *Der Deliktsgerichtsstand als Klägergerichtsstand? – Zum Einfluss materiellrechtlicher Wertungen auf die Auslegung des Art. 7 Nr. 2 EuGVO*, in BÜSCHER, ERDMANN, FUCHS, JÄNICH, LOSCHELDER, MCGUIRE (Hrsg.), *Rechtsdurchsetzung – Rechtsverwirklichung durch materielles Recht und Verfahrensrecht – Festschrift für Hans-Jürgen Ahrens zum 70. Geburtstag*, Köln, Carl Heymanns, 2016, 521.

397 Recital (15).

Member State only by virtue of the heads of jurisdiction set out in Sections 2 to 7 of the Regulation, which constitutes an additional option for the plaintiff, alongside the forum of defendant's domicile. As a corollary, with regard to EU-domiciled defendants, national courts may not derive jurisdiction from their domestic legislation, often providing for so-called exorbitant rules[398].

The use of domicile as the principal criterion for establishing jurisdiction has not met with any particular difficulties in the practical application of the Brussels I Regulation. The CJEU has however interpreted its scope *ratione personae* very broadly, not limiting it to pure intra-EU disputes. In *Group Josi*, indeed, the CJEU admitted that the then Brussels Convention also applied where the plaintiff is domiciled in a third country or, in the case of the exclusive grounds of Article 24, regardless of the location of the domicile of the parties in the territory of a Member State[399]. At a later time, in the case *Owusu*, the Court made a step further and ruled that the Brussels Convention, and in particular its Article 2, applies even if the plaintiff and the defendant are domiciled in the same Member State and the case does not have a link with any other Member State, but only with a third State[400]. This approach is justified because the goal of the Regulation is to remove any obstacles to the smooth functioning of the internal market and this may be pursued only with the full unification of the rules on conflicts of jurisdiction[401]. In this sense, in the Lugano Opinion, the Court stated that the jurisdictional system has a «uniform and coherent» nature and apply indirectly also to cases where the defendant is domiciled outside the EU, through a reference to the legislation of the Member State before whose court the matter is brought[402].

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[398] See Art. 5. On the functioning of exorbitant rules, see BONOMI, *The opportunity and the modalities of the introduction of erga omnes EC rules on jurisdiction*, in MALATESTA, POCAR, BARIATTI (eds.), *The External Dimension of EC Private International Law*, Padova, Cedam, 2008, 149; FERNANDEZ ARROYO, *Exorbitant and Exclusive Grounds of Jurisdiction in European Private International Law: Will they Ever Survive?*, in *Festschrift für Erik Jayme*, Vol. 1, München, Sellier, 2004, 169.

[399] Case C-412/98, *Group Josi Reinsurance Company SA*, para. 46.

[400] Case C-281/02, *Andrew Owusu* [2005] *ECR* I-1383, para. 26. In this regard, see DE VAREILLES-SOMMIÈRES, *The Mandatory Nature of Article 2 of the Brussels Convention and Derogation from the Rule It Lays Down*, in DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Oxford-Portland, Hart, 2007, 101 *et seq.* For a similar interpretation concerning the European Insolvency Regulation, see CJEU Case C-328/13, *Schmid* [2014] EU:C:2014:2197, para. 19 *et seq.*

[401] Case C-281/02, *Andrew Owusu*, para. 34.

[402] CJEU Opinion 1/03 [2006] *ECR* I-1145, para. 148. In this regard, see POCAR, *Explanatory Report on the Lugano Convention* [2009] OJ C319/1, para. 37. In fact, as is clear after the CJEU's Opinion, obstacles to the functioning of the internal market may also arise in relation to cases connected with third States, thus establishing a link between the situation concerned and the proper functioning of the internal market: see FRANZINA, *Le condizioni di applicabilità del regolamento (CE) n. 44/2001 alla luce del parere 1/03 della Corte di giustizia*, in *Riv. dir. int.*, 2006, 962-963.

The domicile of a legal person must be defined autonomously to make the uniform rules more transparent and avoid conflicts of jurisdiction. Usually, Article 4 points to one forum, which is determined according to the internal law of the Member State whose courts are seized[403]. However, in cases concerning companies or other legal persons, the Regulation identifies three alternative criteria[404]: the statutory seat, the central administration, or the principal place of business[405]. This means that under the Regulation there are competing jurisdictions, and the choice of the forum is left to the plaintiff, thus opening the door to a certain degree of *forum shopping*[406].

In general, this domicile criterion results to be effective when there is a single infringer so that there is a single case before a single court dealing with the EU-wide infringing activities of the defendant[407]. Indeed, it has the advantage of avoiding the need to go into the merits of the case at the jurisdictional stage of proceedings[408]. In contrast, it may appear less suitable in a multi-defendant context, or when it pinpoints to a place that is not closely located with the infringing activity. Of the three criteria referred above, only the central administration may play a role in litigation involving groups of companies[409]. In fact, in the case law, one may find interesting attempts to locate the central administration of a subsidiary company in the jurisdiction of the parent company, on the ground that the latter exerted a powerful influence

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[403] See Art. 62.

[404] In contract, in the light of the CJEU's case lase on the freedom of establishment, HESS, *Die allgemeinen Gerichtsstände der Brüssel I-Verordnung*, in *Facetten des Verfahrensrechts. Liber amicorum Walter F. Lindacher*, Köln, Heymann, 2007, 60-62, advocates a restrictive interpretation based on a hierarchization of the connecting factors laid down in Art. 63, thus attributing a primary role to the statutory seat.

[405] For a recent review of the relevant connecting factors used by European conflict of law and procedural law, see WEDEMANN, *Die Verortnung juristischer Personen im europäischen IPR and IZPR*, in VON HEIN, RÜHL (Hrsg.), *Kohärenz im internationalen Privat- und Verfahrensrecht der Europäischen Union*, Tübingen, Mohr Siebeck, 2016, 182.

[406] See Pocar Report, para. 28. According to BENEDETELLI, *Brussels I, Rome I and Issues of Company Law*, in MEEUSEN, PERTEGÁS, STRAETMANS (eds.), *Enforcement of International Contracts in the European Union*, Antwerp, Intersentia, 2004, 239, in order to reduce the risks of forum shopping, this article should be interpreted in exactly the same way in each Member State by applying the same material law, that is: (i) the *lex societatis* under which the relevant entity is incorporated, be it the forum law or the law of another State; (ii) the law chosen by the shareholder, partners or corporate bodies where the laws of more than one State may apply; or (iii) the law of a Member State other than the State of incorporation, when there is a mandatory requirement of such State that the relevant law intends to fulfil. In contrast, these problems do not arise with regard to the *Societas Europea*, because under Art. 7 of Regulation 2157/2001 the registered office and the head office must be located in the same place: CAFARI PANICO, *Il Regolamento della società europea e le fusioni transfrontaliere*, cit., 44-45.

[407] In this sense, with regard to IP infringements, see TORREMANS, *Jurisdiction for cross-border intellectual property infringement cases in Europe*, in *CMLRev.*, 2016, 1629.

[408] KAMMIN, *Reforming Private Antitrust Enforcement in Europe: Between Harmonisation and Regulatory Competition*, Berlin, Duncker & Humblot, 2014, 99.

[409] In favour of this connecting factor, see KINDLER, *L'amministrazione centrale come criterio di collegamento del diritto internazionale privato delle società*, in *Riv. dir. int. priv. proc.*, 2015, 897.

over the former. However, in a recent case concerning an action started by some mine workers who contracted silicosis in South Africa due to the negligence of the parent company, this argument was rejected by the English High Court[410].

2.6. Special Grounds of Jurisdiction and Competition Claims: New Possibilities for Bundling Proceedings

2.6.1. The Characterization of Competition Claims: Contract vs Tort

When one has to determine which court is entitled to hear an antitrust claim under the special grounds of jurisdiction of the Brussels I regime, a problem of characterization arises at the outset[411]. The purpose of characterization is to question the nature of the claim to determine the corresponding legal category and ultimately identify an appropriate connecting factor[412]. In this respect, the qualification of claims based on Articles 101 and 102 TFEU either as tort or as contract may lead to the application of different connecting factors and thus to different competent courts for actions originating from the same anti-competitive behavior[413].

The traditional distinction between contract and tort finds its roots in national legislations

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[410] *Vava & Ors v Anglo American South Africa Ltd* [2013] EWHC 2131 (QB), and then *Young v Anglo American South Africa Ltd & Ors* [2014] EWCA Civ 1130. In particular, at paras. 23 and 71 of the first decision, central administration is defined as the place where the company take decisions that are essential for the company's operations. See ADESINA OKOLI, AASA*: Locating the Central Administration of a Subsidiary Company Which Is Part of a Group of Companies under Article 60 of Brussels I Regulation*, in *Eur. Comp. L.*, 2015, 13; TANSLEY, *South African Silicosis Litigation in London. A Case Study*, in BOOM, WAGNER (eds.), *Mass Torts in Europe. Cases and Reflection*, De Gruyter, 2014, 105.

[411] See NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II, La tutela della concorrenza innanzi al giudice civile*, Torino, Giappichelli, 2012, 77; DANOV, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, Oxford, Hart, 2011, 19. On the problems raised by characterization in EU PIL, see BARIATTI, *Qualificazione e interpretazione nel diritto internazionale privato comunitario: prime riflessioni*, in *Riv. dir. int. priv. proc.*, 2006, 361 *et seq.*; M. AUDIT, *L'interprétation autonome du droit international privé communautaire*, in *Clunet*, 2004, 789 *et seq.*; and CARBONE, *Base giuridica e criteri interpretativi delle norme comunitarie nello spazio giudiziario europeo*, in *Contr. impr. Eur.*, 2003, 183 *et seq*. More generally, see BARATTA, *Qualificazioni*, in BARATTA (a cura di), *Dizionari del diritto privato. Diritto internazionale privato*, Milano, Giuffrè, 2011, 315 *et seq.* and the authors therein mentioned.

[412] POILLOT-PERUZZETTO, LAWNICKA, *Relevance of the Distinction between the Contractual and Non-Contractual Spheres (Jurisdiction and Applicable Law)*, in BASEDOW, FRANCQ, IDOT (eds.), *International Antitrust Litigation*, cit., 131.

[413] CRESPI REGHIZZI, *«Contratto» e «illecito»: la qualificazione delle obbligazioni nel diritto internazionale privato dell'Unione europea*, in *Riv. dir. int. priv. proc.*, 2012, 318-320. In the sense that this distinction «is far from being academic; rather it has a huge practical significance, being decisive for the forum», see KAMMIN, *Reforming Private Antitrust Enforcement in Europe*, cit., 106-107.

and acquired soon relevance immediately after the entry into force of the Brussels Convention of 1968. Indeed, Article 7 Brussels I-*bis* provides for two different special heads of jurisdiction depending on whether the claim concerns matters «relating to a contract» – Article 7(1) – or «relating to tort, delict or quasi-delict» – Article 7(2)[414]. As is known, these expressions have been given an autonomous meaning, having regard to the objectives and general schemes of such acts and without reference to any national law, *i.e.* irrespective of the result of characterization of the same legal issue under domestic legal orders[415]. However, striking a line of demarcation between contract and tort is not an easy task. Despite the lack of a general definition, some useful indications may be extrapolated by the CJEU's case law.

2.6.1.1. The Principles Established by the CJEU and the Recent *Brogsitter* Test

The concept of contractual matters covers only situations in which there is an obligation "freely" or "voluntarily" assumed by one party towards another [416]. This notion, despite the case-by-case approach adopted by the CJEU, is based on the fact that a contractual engagement cannot emerge without the will of the parties and has to be interpreted broadly. In particular, the provision does not necessarily require the conclusion of a contract, being on the contrary essential the existence of an obligation[417]; indeed, it covers relationships of widely differing kinds, both from the viewpoint of their social importance and from that of

[414] As reminded by Recital 16, Art. 7 provides alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice, which should in turn ensure legal certainty and foreseeability of competent courts: see CARBONE, TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., 85-86; and SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, cit., 131-132. It is important to stress that Art. 4 and Arts. 7(1)(a) and (2) of the Recast Regulation reflects the same system of Regulation No 44/2001 and of Brussels Convention, so that continuity in the interpretation of the three instruments should be ensured (Recital 34). Concerning the relation between Brussels Convention and Regulation 44/2001, see CJEU Case C-533/07, *Falco Privatstiftung* [2009] *ECR* I-3327, paras. 48-56; Case C-189/08 *Zuid-Chemie* [2009] *ECR* I-6917, para. 19.

[415] Among many, see CJEU Case 34/82, *Martin Peters* [1983] *ECR* 987, paras. 9-10; Case 9/87, *Arcado* [1988] *ECR* 1539, paras. 10-11; Case 189/87, *Kalfelis* [1988] *ECR* 5565, paras. 16-17; Case C-26/91, *Handte* [1992] *ECR* I-3967, para. 10; Case C-89/91, *ShearsonLehman Hutton* [1993] *ECR* I-139, para. 13; Case C-27/02, *Engler* [2005] *ECR* I-481, para. 33; Case C-265/02, *Frahuil* [2004] *ECR* I-1543, para. 22; Case C-372/07, *Hassett and Doherty* [2008] *ECR* I-7403, para. 17; Case C-167/08, *Draka NK Cables* [2009] *ECR* I-3477, para. 19; Case C-189/08 *Zuid-Chemie*, para. 17; Case C-147/12 *ÖFAB* [2013] EU:C:2013:490, para. 27. See LEHMANN, *Jurisdiction for Contractual Matters*, in DICKINSON, LEIN (eds.), *The Brussels I Regulation Recast*, cit., 143.

[416] See CJEU Case C-26/91, *Handte*, para. 15; Case C-51/97, *Réunion européenne* [1998] *ECR* I-6511, paras. 17 and 19; Case C-334/00, *Tacconi* [2002] *ECR* I-7357, para. 22; Case C-27/02 *Engler*, paras. 45 and 50-51.

[417] Case C-334/00 *Tacconi*, para. 22; and more recently Case C-419/11 *Česká spořitelna* [2013] EU:C:2013:165, paras. 46-47.

the obligations entered into[418], and applies to a wide range of actions: it must be borne in mind that Article 7(1) covers not only actions seeking a declaration that the contract is void, but also the consequential compensatory or restitution reliefs claimed by one of the parties to the contract against their co-contractor[419].

The relationship between contractual and non-contractual matters has been defined in terms of mutual exclusivity, which gives precedence to the contractual characterisation[420]. Indeed, the category "tort, delict or quasi-delict" is constructed as a residual category, which covers all claims that seek to establish the liability of a defendant and that cannot be characterized as contractual[421]. Accordingly, the contractual analysis takes priority over the non-contractual, so that it is necessary first to decide whether the matter relates to a contract under Article 7(1); if it does not, it falls within Article 7(2)[422].

In this context, it may also be useful to look at the respective interpretation provided in the Rome I and Rome II Regulations, concerning the law applicable to contractual and non-contractual obligations[423]. The connection with Article 7 is evidently showed by Recital (7)

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[418] CJEU Case C-266/85, *Shevanai* [1987] *ECR* 251, para. 6.

[419] Among many, see GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, cit., 209-213; MANKOWSKI, *Art. 7*, in MAGNUS, MANKOWSKI (eds.), *ECPIL - Brussels Ibis Regulation*, cit., 171-176; KAMMIN, *Reforming Private Antitrust Enforcement in Europe*, cit., 107-110; VILA COSTA, *How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach*, in BASEDOW, FRANCQ, IDOT (eds.), *International Antitrust Litigation*, cit., 24; FRANZINA, *La giurisdizione in materia contrattuale*, Padova, Cedam, 2006, 263 and 276; SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, cit., 135-137; DE CRISTOFARO, *Il foro delle obbligazioni. Profili di competenza e giurisdizione*, Torino, Giappichelli, 1999, 430; RADICATI DI BROZOLO, *La ripetizione dell'indebito nel diritto internazionale privato e processuale*, in Collisio legum. *Scritti di diritto internazionale privato per Gerardo Broggini*, Milano, Giuffrè, 1997, 421. In this regard, see recently CJEU Case C-366/13, *Profit Investment SIM SpA* [2016] EU:C:2016:282, paras. 54-57.

[420] LEHMANN, *Jurisdiction for Contractual Matters*, cit., 157; WAGNER, *Art. 5 EuGVVO*, in STEIN, JONAS, *ZPO*[22], Vol. 10, Tübingen, Mohr Siebeck, 2011, para. 123.

[421] See Case 189/87, *Kalfelis*, para. 18; Case C-261/90 *Reichert and Kockler* [1992] *ECR* I-2149, para. 16; Case C-51/97, *Réunion européenne*, para. 22; Case-96/00, *Rudolf Gabriel* [2002] *ECR* I-6367, para. 33; Case C-334/00 *Tacconi*, para. 21; Case C-147/12, *ÖFAB*, para. 32; Case C-519/12, *OTP Bank Nyilvánosan Működő Részvénytársaság*, EU:C:2013:674, para. 26. According to AG Geelhoed, in his opinion in Case C-334/00 *Tacconi*, para. 71, "in matters of liability under civil law the [Regulation] provides for a closed scheme: whatever the case, either Art. 5(1) or Art. 5(3) applies. The provisions can never apply simultaneously". On the contrary, AG Jacobs, in his opinion delivered in case C-27/02, *Engler*, para. 54 *et seq.*, does not believe that «such a simple binary classification is correct», particularly because «there are clearly categories of actions for liability which fall within neither Art. 5(1) nor Art. 5(3)». This second view is shared by MANKOWSKI, *Art. 7*, cit., 269; MARONGIU BUONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Milano, Giuffrè, 2013, 17; FAWCETT, CARRUTHERS, *Ceshire, North & Fawcett. Private International Law*[14], Oxford OUP, 2008, 248. In this regard see also the Italian Court of Cassation, 23 July 2004 n. 13905, in *Riv dir. int. priv. proc.*, 2005, 440.

[422] In this sense, see VILA COSTA, *How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach*, cit., 22.

[423] On the relationship among these instruments, see CRAWFORD, CARRUTHERS, *Connection and coherence between and among European instruments in the private international law of obligations*, in *Int. Comp. L. Quart.*,

of the two Rome Regulations. Indeed, although a comparison may serve only as a mere guideline because the classificatory standards and the respective definitions therein contained do not have necessarily an identical meaning[424], it is usually held that jurisdictional rules should follow as closely as possible the same solutions adopted for the purpose of applicable law[425].

From these premises, it follows that the qualification of damages actions based on an anti-competitive behavior is not necessarily an easy task. In particular, it is debated whether the distinction between contractual and non-contractual builds on the nature of the relation between the parties, *i.e.* the existence or not of a contract, or whether damages claims have to be always considered as based on tort, irrespective of the source of this restriction.

From the decision in *Tacconi*, albeit much debated in the literature for its implications[426], it seems possible to extrapolate a general standard, according to which the line of demarcation between contractual and tortious issues is drawn depending upon the source of the legal obligation at stake: if it is voluntarily undertaken by the debtor, it is contractual, while if otherwise imposed by the law, it is tortious[427]. Indeed, in that case. the CJEU

2014, 1; HAFTEL, *Entre «Rome II» et «Bruxelles I»: l'interprétation communautaire uniforme du règlement «Rome I»*, in *Clunet*, 2009, 761; AZZI, *Bruxelles I, Rome I, Rome II: regard sur la qualification en droit international privé communautaire*, in *Dalloz*, 2009, 1621; LEIN, *The New Rome I/Rome II/Brussels I Synergy*, in *Yb. Priv. Int. L.*, 2008, 177; TANG, *The Interrelationship of European Jurisdiction and Choice of Law in Contract*, in *J. Priv. Int. L.*, 2008, 35. See also C-585/08 and C-144/09, *Peter Pammer* [2010] *ECR* I-12527, paras. 43, 74 ad 84.

[424] In this sense, see Case C-45/13, *Andreas Kainz*, EU:C:2014:7, para. 20. In support, see SCHACK, *Kohärenz im europäischen Internationalen Deliktsrecht*, in VON HEIN, RÜHL (Hrsg.), *Kohärenz im internationalen Privat- und Verfahrensrecht der Europäischen Union*, cit., 279 (but arguing for a better alignment between Brussels I and Rome II Regulations, especially concerning characterization of claims as contractual or non-contractual).

[425] See BRIGGS, *Civil Jurisdiction and Judgments*[6], London, Informa, 2015, 244-245; MANKOWSKI, *Art. 7*, cit., 166; GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, cit., 209. See also WÜRDINGER, *Das Prinzip der Einheit der Schuldrechtsverordnungen im Europäischen Internationalen Privat- und Verfahrensrecht*, in *RabelsZ*, 2011, 102 (arguing against relativity of the respective legal terms and for a consistent interpretation beyond the limits of each Regulation).

[426] See *ex multis* BERTOLI, *Criteri di giurisdizione e legge applicabile in tema di responsabilità* precontrattuale *alla luce della sentenza* Fonderie Meccaniche Tacconi, in *Riv. dir. int. priv. proc.*, 2003, 109; FRANZINA, *La responsabilità precontrattuale nello spazio giudiziario europeo*, in *Riv. dir. int.*, 2003, 714; MOURA VICENTE, *Precontractual Liability in Private International Law: A Portuguese Perspective*, in *RabelsZ*, 2003, 699. See also D'ALESSANDRO, *La* culpa in contrahendo *nella prospettiva del Regolamento CE n. 44 del 2001 e del Regolamento CE n. 864 del 2007 (Roma II). Rapporti con la tecnica processuale degli «elementi a doppia rilevanza»*, in *Riv. dir. civ.*, 2009, 279.

[427] In this sense, for instance, see CRESPI REGHIZZI, *«Contratto» e «illecito»: la qualificazione delle obbligazioni nel diritto internazionale privato dell'Unione europea*, cit., 335; BARATTA, *La natura della* culpa in contrahendo *secondo la sentenza* Tacconi, in *Int'l Lis*, 2004, 136. For the opposite view, according to which pre-contractual duties to inform or to disclose information should be classified as contractual, in particular when they may generate a claims to rescind a contract eventually concluded, see MANKOWSKI, *Art. 7*, cit., 182-185; ID., *Die Qualifikation der* culpa in contrahendo *– Nagelprobe für den Vertragsbegriff des europäischen IZPR und IPR*, in *IPRax*, 2003, 131; BRIGGS, *Civil Jurisdiction and Judgments*, cit., 216-217 and 245-247; GOTTWALD, *EuGVVO Art.* 5, in *Münchener Kommentar zur ZPO*[4], München, C.H. Beck, 2013, para. 11; FRANZINA, *La responsabilità*

excluded from the scope of application of the then Article 5(1) an action for damages on the basis that a defendant had acted in bad faith in failing to conclude a contract with the counterparty in negotiations[428]. In particular, the Court held that there was not any obligation freely assumed between the parties because «the obligation to make good the damage allegedly caused by the unjustified breaking off of negotiations *could derive only from breach of rules of law*, in particular, the rule which requires the parties to act in good faith in negotiations with a view to the formation of a contract»[429].

The CJEU offered new insights on this issue in the recent decision *Brogsitter*, which confirmed the principle of autonomous interpretation and clarified that national court must take the *purpose of the contract* into account[430]. Moreover, it held that a claim must be considered contractual if an interpretation of the agreement is «indispensable» to establishing the lawful or unlawful nature of the conduct complained of and to deciding on the action. Therefore, the Court concluded that it is up to national courts to determine whether the legal basis of the damages action «can reasonably be regarded» as a breach of the rights and obligations set out in the contract which binds the parties to the main proceedings[431]. If this test is met, the claim falls within Article 7(1), if not it falls under Article 7(2).

In other words, the mere fact that a contractual agreement exists does not suffice to allow

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precontrattuale, cit., 718-721 and 734; ID., *La giurisdizione in materia contrattuale*, cit., 236-243 and 246; PERTEGÁS, *The Notion of Contractual Obligation in Brussels I and Rome I*, in MEEUSEN, PERTEGÁS, STRAETMANS (eds.), *Enforcement of International Contracts in the European Union*, cit., 186-187. Before Tacconi, see MARI, *Il diritto processuale civile della convenzione di Bruxelles. I, Il sistema della competenza*, Padova, Cedam, 1999, 193-195. Recently, obiter, see also BGH, 16 October 2015, V ZR 120/14, in *RIW*, 2016, 229, para. 11, on which see critically SCHÄRTL, *Auf dem Weg zu einer gespaltenen internationalen Entscheidungszuständigkeit für eine Haftung aus culpa in contrahendo?*, in *LMK*, 2016, 377693.

[428] Case C-334/00, *Tacconi*, para. 27.

[429] *Ibid.*, paras. 23-25 (emphasis added). Based on this dictum, the CJEU Case C-519/12, *OTP Bank Nyilvánosan Működő Részvénytársaság*, cit., paras. 24-26, included within Art. 7(2) an action «dans lequel la législation nationale impose à une personne de répondre des dettes d'une société qu'elle contrôle, faute pour cette personne d'avoir satisfait aux obligations de déclaration consécutives à la prise de contrôle de cette société». More recently, in Case C-196/15, *Granarolo SpA* [2015] EU:C:2015:851, the Court applied *Brogsitter* in an action for damages for the abrupt termination of an established business relationship for the supply of goods over several years to a retailer without a framework contract, nor an exclusivity agreement.

[430] Case C-548/12, *Marc Brogsitter* [2014] EU:C:2014:148, para. 24.

[431] *Ibid.*, para. 26. This seems to entail a *prima facie* control of the substance of the dispute, already at the stage of determining jurisdiction: SUJECKI, *EuGVVO: Gerichtliche Zuständigkeit für Klagen aus deliktsrechtlichen Ansprüchen zwischen Vertragspartnern*, in *EuZW*, 2014, 385. On the contrary, DICKINSON, *Towards an Agreement on The Concept of 'Contract' in EU Private International Law?*, in *Lloyd's Mar. Comm. L. Quart.*, 2014, 471, suggests to avoid this investigation of the substance, by restraining the examination of the legal basis of the matter only to the claim as formulated by the claimant, irrespective of the defence submissions.

tort-based claims to enter the forum for contractual claims[432]. The CJEU has established a rule of indispensability, according to which not only the conduct must be considered as a breach of contract, but it is also necessary an interpretation of the contract to establish the (un)lawful nature of such conduct complained[433].

2.6.1.2. The (Prevailing) Tortious Nature of Competition Claims

As a result of the above, damages actions for breach of competition rules seem to fall within the scope of Article 7(2). In particular, they should be characterized as tortious even where such claims have been brought by a contracting party after the contract has been invalidated. This is the view largely prevailing in the literature[434] and also endorsed by the Commission in its Green Paper on damages actions[435]. Moreover, there is also a considerable national case law[436]. This interpretation is also convincing under the *Brogsitter* test illustrated above: indeed, if one looks at the traditional and most common cartel infringement, *i.e.* inflated prices, it seems unnecessary to interpret or to look at the

[432] In this regard, concerning prospectus liability, see the analysis by LEHMANN, *Prospectus Liability and Private International Law – Assessing the Landscape after the CJEU* Kolassa *Ruling*, in *J. Priv. Int. L.*, 2016, 318 *et seq.* It is also worth stressing that, in the case that led to the CJEU's decision in *Brogsitter*, the claim was carachterised as tortious for the purpose of German law (§ 823 BGB).

[433] DORNIS, *Von Kalfelis zu Brogsitter – Künftig enge Grenzen der Annexkompetenz im europäischen Vertrags- und Deliktsgerichtsstand*, in *GPR*, 2014, 353. On the difficulties to identify properly the content of a contractual obligation, see HAFTEL, *Absorption du délictuel par le contractuel, application du Règlement (CE) n° 44/2001 à une action en responsabilité délictuelle*, in *Revue critique*, 2014, 863.

[434] See SUDEROW, *Acciones derivadas de ilicitos antitrust*, cit., 313-314; FRATEA, *Il* private enforcement *del diritto della concorrenza dell'Unione europea*, cit., 128-129; GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, cit., 271; NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II*, cit., 79-81 and 94-95; TZAKAS, *Die Haftung für Kartellrechtsverstöße im internationalen Rechtsverkehr*, cit., 105; MAIER, *Marktortanknüpfung im internationalen Kartelldeliktsrecht*, Frankfurt am Main, Peter Lang, 2011, 58-61 and 124-126; FAWCETT, TORREMANS, *Intellectual Property and Private International Law*[2], Oxford, OUP, 2011, 501-505; DANOV, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, cit., 19-20 and 88-90 (including actions to prevent possible future breaches of EU competition law); BARIATTI, *Violazione di norme antitrust e diritto Internazionale privato: il giudice italiano e i cartelli*, cit., 354; BALLARINO, *L'art. 6 del Regolamento Roma II e il diritto antitrust comunitario: conflitto di leggi e principio territorialistico*, in *Riv. dir. int.*, 2008, 65; HELLNER, *Unfair Competition and Acts Restricting Free Competition A Commentary on Article 6 of the Rome II Regulation*, in *Yb. Priv. Int. L.*, 2007, 49; NEGRI, *Il "cartello delle vitamine" e la giurisdizione per connessione nelle azioni risarcitorie antitrust*, in *Int'l Lis*, 2007, fn. 55 at 152; FITCHEN, *Allocating Jurisdiction in Private Competition Law Claims within the EU*, in *Maastricht J.*, 2006, 381; WITHERS, *Jurisdiction and Applicable Law in Antitrust Tort Claims*, cit., 253; KESSEDJIAN, *Competition*, in MCLACHLAN, NYGH (eds.), *Transnational Tort Litigation: Jurisdictional Principles*, Oxford, Clarendon Press, 1996, 172.

[435] See para. 2.8 of the Green Paper. In contrast, no indication about jurisdiction is provided in the White Paper.

[436] For instance, in the UK, the case law is settled in this sense: *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130; *Provimi Ltd v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm); *Sandisk Corporation v Koninklijke Philips Electronics NV & Ors* [2007] EWHC 332 (Ch); *Cooper Tire & Rubber Co & Ors v Shell Chemicals UK Ltd & Ors* [2009] EWHC 2609 (Comm).

provisions of the contract possibly concluded among the parties.

According to a different view, however, the precedence of the contractual characterisation should be preserved. In particular, a distinction should be drawn up depending on whether the parties in dispute have a contractual relationship or not, so that in the former case, the claim should be regarded as contractual for jurisdictional purposes[437], notwithstanding that neither duties of fair conduct nor the liability for breach of such duties are voluntarily assumed by traders, but are imposed on them by the law[438]. In particular, this could be the case for infringements related to abuses of dominant position and abuses of economic dependence, both resulting in unfair contracts[439].

2.6.2. Article 7(2) of Brussels I-*bis* Regulation: from *Mines de Potasse* to *CDC Hydrogen Peroxide*

Once identified that, for jurisdictional purposes, competition damages claims fall within Article 7(2) of the Brussels I-*bis* Regulation, it is important to determine the courts to which this provision attributes jurisdiction. The criterion adopted by the Article 7(2) is the place where the harmful event occurred or may occur, which covers both international and territorial jurisdiction[440]. The topography of Article 7(2) was shaped by the landmark decision *Mines de Potasse* concerning the cross-border pollution case of the river Rhine, in which for the first time the CJEU interpreted the expression of «place where the harmful event occurred» as referring both to the place where the damage occurred (place of damage) and to the place of the event

[437] KAMMIN, *Reforming Private Antitrust Enforcement in Europe*, cit., 118-122; VILA COSTA, *How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach*, cit., 23-24 (stating that the contractual characterisation should be preserved, in particular with regard to those distribution in which liability is exclusively or mainly attributed to the supplier). More catiously, see ORÓ MARTÍNEZ, *Litigación internacional y acciones de indemnización por infracción del derecho de la competencia de la UE: aspectos de competencia judicial*, in FONT I RIBAS, VILÀ COSTA (dir.), *La indemnización por infracción de normas comunitarias de la competencia*, Madrid, Marcial Pons, 2012, 117.

[438] Concerning unfair commercial practices, see VITELLINO, *Consumer protection against unfair practices in cross-border food trade*, in RICCI, LUPONE, SANTINI (eds.), *The right to safe food towards a global governance*, Torino, Giappichelli, 2013, 432-433. In a diferent context, concerning responsibility for misleading information, see FRANZINA, *L'elusiva proiezione geografica del danno meramente patrimoniale: la responsabilità da informazioni inesatte tra* forum commissi delicti *e* forum destinatae solutionis, in *Int'l Lis*, 2004, 122-125.

[439] In this sense, from a private law perspective, see DI GIÒ, *Contract and Restitution Law and the Private Enforcement of EC Competition Law*, in *World Comp.*, 2009, 199. This is also the conclusion reached by the Italian Court of Cassation, 35 November 2011 n. 24906, in *Riv. dir. int. priv. proc.*, 2012, 931.

[440] WAGNER, *Art. 5 EuGVVO*, cit., para. 109; and GOTTWALD, *EuGVVO Art. 5*, cit., para. 59.

giving rise to it (place of acting), whenever they are located in different Member States[441]. The option between these two places is given to the claimant and is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, in particular relating to the sound administration of justice and the efficacious conduct of proceedings[442]. These courts are in fact the most appropriate for deciding the case on the grounds of the proximity to the dispute and ease of taking evidence[443], which in turn recalls the principles of legal certainty and predictability of competent courts[444].

The wording of Article 7(2) is a general rule that applies to all torts and all different types of damage. Although in the literature it was suggested to consider the specificities of some torts[445], such as the financial ones[446], the interpretive system based on the principle of ubiquity has always remained the same, albeit adapted depending on the peculiarities of the case. It is also worth stressing that Article 7(2) does not have any special protective purpose for the victim and has not been interpreted as to favor one party over the other[447]. The negative answer stems

[441] Case 21/76, *Mines de potasse d'Alsace* [1976] *ECR* 1735, paras. 24-25. Last confirmed in Case C-12/15, *Universal Music* [2016] EU:C:2016:44, para. 28.

[442] See Case 21/76, *Mines de potasse d'Alsace*, para. 11; Case C-220/88, *Dumez France*, para. 17; Case C-68/93, *Shevill* [1995] *ECR* I-415, para. 19; Case C-364/93, *Marinari* [1995] *ECR* I-2719, para. 10; C-168/02, *Kronhofer* [2004] *ECR* I-6009; para. 15; C-189/08, *Zuid-Chemie BV*, para. 24; Case C-133/11 *Folien Fischer*, EU:C:2012:664, para. 37; Case C-228/11, *Melzer* [2013] EU:C:2013:305, para. 26.

[443] Case C-167/00 *Henkel*, para. 46. On the principle of proximity, see the seminal work by LAGARDE, *Le principe de proximité dans le droit international privé contemporain*, in *Recueil des cours*, 1986, vol. 196, 25 *et seq.*, espec. 127 *et seq.* More recently, with reference to tort claims, see FALLON, *Le principe de proximité dans le droit de l'Union européenne*, in *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de P. Lagarde*, Paris, Dalloz, 2005, 241 *et seq.*; and USUNIER, *La régulation de la compétence juridictionnelle en droit international privé*, Paris, Economica, 2008, 170 *et seq.*

[444] See MARI, *Il diritto processuale civile della convenzione di Bruxelles*, cit., 389-390; GARDELLA, *Diffamazione a mezzo stampa e convenzione di Bruxelles del 27 settembre 1968*, in *Riv. dir. int. priv. proc.*, 1995, 665-666; KERAMEUS, *La compétence internationale en matière délictuelle dans la Convention de Bruxelles*, in *Trav. fr. dr. int. pr.*, 1991-1992, 265; GOTHOT, HOLLEAUX, *La convention de Bruxelles du 27 septembre 1968, compétence judiciaire et effets des jugements dans la CEE*, Paris, Jupiter, 1985, 50.

[445] See, in particular, BOUREL, *Du rattachement de quelques délits spéciaux en droit international privé*, in *Recueil des cours*, 1989, vol. 214, *passim*; USUNIER, *La régulation de la compétence juridictionnelle en droit international privé*, cit., 199; MUIR WATT, *De la localisation d'un préjudice patrimonial subi à l'occasion de placements financier à l'étranger*, in *Revue critique*, 2005, 334.

[446] For instance, BARIATTI, *Riflessioni sull'applicazione extraterritoriale delle norme relative ai servizi finanziari: dal caso* Morrison *al* Dodd-Franck Act *e oltre*, in *Dir. comm. int.*, 2012, 437. Concerning applicable law issues, see also CORNELOUP, *Roma II y el derecho de los mercados financieros: el ejemplo de los daños causados por la violación de las obligaciones de información*, in *AEDIPr.*, 2011, 78-81; LEHMANN, *Proposition d'une règle spéciale dans le Règlement Rome II pour les délits financiers*, in *Revue critique*, 2012, 506-510.

[447] LUPOI, *Conflitti transnazionali di giurisdizioni. Tomo I.* Policies, *metodi, criteri di collegamento*, Milano, Giuffrè, 2002, 507. This issue has been particularly investigated with regard to investors and financial torts: for instance, according to GARGANTINI, *Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General's Opinion in* Kolassa v. Barclays, in *Riv. dir. int. priv. proc.*, 2014, 1103-1104, investor protection calls for the application of consumers' provisions to all types of prospectus liability cases.

directly from the CJEU's case law, which is based on purely procedural reasons and denied any intention to reserve a privilege to the victims as regards the determination of jurisdiction[448]. This paved the way to the recognition of negative declaratory claims brought by tortfeasors as falling within Article 7(2)[449]. Accordingly, although in some specific cases – such as on-line violation of personality rights – the CJEU interpreted this provision as attributing jurisdiction to the court where the centre of interests of the victim is located (*forum actoris*)[450], this solution cannot be adopted as a general rule aimed at giving relevance to the domicile of the victim as the place where the damage is suffered[451].

2.6.2.1. The Specificity of Competition Claims: The Place of Damage

According to the settled case-law of the Court, the place where the "primary" and "immediate" damage occurred is the place where the alleged damage actually manifests itself and the wrongful conduct produces directly its harmful effects on the victim[452]. Only the direct consequence of the harmful event matters, while the damage suffered by indirect victims or the adverse consequences of an event which already caused damage arising elsewhere are jurisdictionally irrelevant[453]. In a way parallel to the conflict of law dimension, it means that

[448] CJEU Case C-133/11, *Folien Fischer*, para. 46; confirmed in Case C-45/13, *Andreas Kainz*, paras. 30-31. Along the same line, see the opinion of AG Léger in *Kronhofer*, para. 34. However, according to POCAR, *Le lieu du fait illicite dans les conflits de lois et de juridictions*, in *Trav. fr. dr. int. priv.*, 1985-1986, 78, despite the CJEU's decision in *Mines de Potasse* was based on neutral grounds, the interpretation of the Court also responds to the intention to promote the position of the victims. On the contrary, it does not come at surprise that a protective purpose may be found in the Rome II Regulation: see FRANZINA, *Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali ("Roma II")*, in *Nuove leggi civ. comm.*, 2008, fn. 43 at 980.

[449] Case C-133/11 *Folien Fischer*, paras. 51-54. The reasons are well explained by MANKOWSKI, *Art. 7*, cit., 263-267; and CARBONE, TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., 133-138. In the Italian case law, the Court of Cassation recently endorsed this approach in its order of 10 June 2013 n. 14508, in *Riv. dir. int. priv. proc.*, 2014, 413. For an application of this approach in competition claims, see District Court of Amsterdam, 22 July 2015, *KLM et al. v Deutsche Bahn et al.*, NL:RBAMS:2015:4408.

[450] Joined Cases C-509/09 and C-161/10, *eDate Advertising* [2011] *ECR* I-10269, para. 52.

[451] In this sense, C-523/10, *Wintersteiger AG* [2012] EU:C:2012:220, paras. 24-25. See also LEIN, *Jurisdiction in Matters Relating to Tort, Delict, or Quasi-Delict (Art. 7(2))*, in DICKINSON, LEIN (eds.), *The Brussels I Regulation Recast*, cit., 172; and M.E. ANCEL, *Un an de droit international privé du commerce électronique*, in *Comm. comm. electr.*, January 2012, chron. 1. For further references, see *infra* par. 5.3.1.

[452] Case C-189/08, *Zuid-Chemie*, para. 27. See MANKOWSKI, *Art. 7*, cit., 305 for further references.

[453] See, respectively, Case C-220/88, *Dumez France*, para. 20; and Case C-364/93, *Marinari*, para. 14. In Italy, for instance, the case law is settled in the sense that the further consequences are only relevant for the determination of the amount of compensation, but not for the purpose of determining jurisdiction: Italian Court of Cassation, 28 April 2015 n. 8571; order 5 July 2011 n. 14654, in *Riv. dir. int. priv. proc.*, 2012, 432; 22 November 2010 n. 23593, *ivi*, 2011, 1055; 21 June 2006 n. 14287, *ivi*, 2007, 414; order 5 May 2006 n. 10312, *ivi*, 2006, 1076. In this regard, see GARDELLA, *Giurisdizione in materia di illecito: un passo avanti nella localizzazione del danno*

also for jurisdictional purposes that of damage is a juridical concept, in which a specific element of the chain of events – which the entire harmful situation consists of – is identified: in other words, damage is represented by the breach of a right or an interest protected by the law, which is the result of a wrongful conduct but does not correspond necessarily with its consequences[454].

Needless to say, the determination of the place where the damage occured may vary significantly according to the nature of the right allegedly infringed and of the harm caused. In this sense, one may note that anti-competitive agreements may have basically two effects: an artificial inflation of prices in the market and the restriction of the ability of non-parties to the agreement to compete[455]. Therefore, damages resulting from antitrust infringement are generally considered as economic or financial ones, consisting of an increased price paid or in the loss of profits and opportunities arising from a restriction to compete[456]. However, the relevance of the individual financial loss should be counterbalanced by the collective character of the interests protected by antitrust rules. As proposed by one scholar, a two-tier method should be adopted: beside the specific harm, suffered by the victim of the infringement, there is, in fact, a generic harm, which consists of the harm to the market and the infliction of the anti-competitive behavior to the victim of the infringement from a market perspective[457]. Indeed, the primary interested protected by antitrust law are the functioning of the market and free competition.

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patrimoniale, in *Int'l Lis*, 2004, 128; and SARAVALLE, *Evento dannoso e sue conseguenze patrimoniali: giurisprudenza italiana e comunitaria a confronto*, in *Foro it.*, 1996, IV, 347.

[454] Concerning the Rome II Regulation, in this sense, see MALATESTA, *Il nuovo diritto internazionale privato in materia di obbligazioni non contrattuali: il regolamento (CE) "Roma II" entra in vigore*, in *Danno resp.*, 2008, 1210; HOHLOCH, *Place of Injury, Habitual Residence, Closer Connections and Substantive Scope – the Basic Principles*, in *Yb. Priv. Int. L.*, 2007, 7; FRANZINA, *Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali*, cit., 983-984; DE LIMA PINHEIRO, *Choice of Law on Non-Contractual Obligations between Comunitarization and Globalization. A First Assessment of EC Regulation Rome II*, in *Riv. dir. int. priv. proc.*, 2008, 17; CALVO CARAVACA, CARRASCOSA GONZÁLEZ, *Las obligaciones extracontractuales en derecho internacional privado. El Reglamento Roma II*, Granada, Comares, 2008, 22-23; GARCIMARTÍN, *The Rome II Regulation: On the way towards a European Private International Law Code*, in *Eur. L. Forum*, 2007, I-84.

[455] In this sense, WITHERS, *Jurisdiction and Applicable Law in Antitrust Tort Claims*, cit., 255.

[456] WAGNER, *Art. 5 EuGVVO*, cit., para. 166; DANOV, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, cit., 94; KOMNINOS, *EC Private Antitrust Enforcement*, cit., 210; MÄSCH, *Vitamine für Kartellopfer – Forum shopping im europäischen Kartelldeliktsrecht*, in *IPRax*, 2005, 515; BULST, *Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht*, in *EWS*, 2004, 406; WITHERS, *Jurisdiction and Applicable Law in Antitrust Tort Claims*, cit., 255.

[457] VILA COSTA, *How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach*, cit., 27. Using the words of KESSEDJIAN, *Competition*, cit., 185: «The starting point is to recognize that for a competition action to exist, there must be a market. Competition cannot be understood without a market where the parties are in competition with one another, where thay are present in one way or another, either directly through actuve business or indirectly through their products and services, where their interests may clash with one another».

In this last sense, the prevailing literature shares the view that the *locus damni* in EU competition law claims should be identified in the place where the market is affected by the anticompetitive conduct, which, in the case of cartel infringements, generally coincides with the place where the goods are offered or have been purchased at an inflated price, or depending on the nature of the infringement, with the market from which the claimant was excluded[458]. For jurisdictional purposes, infringements of competition law have to be considered as market torts, where the event is represented not by the economic loss sustained by individual victims but by the prejudice to the market's free competition[459]. This interpretation emphasizes the predominant macroeconomic objective of protecting competition on the market and ensuring an efficient and competitive marketplace.

This interpretation would be in line with the CJUE's jurisprudence and would assure a sound administration of justice, in particular concerning the foreseeability of competent courts both by plaintiffs and defendants as they are economically active in the relevant market[460]. Especially in a follow-on action, where the market is already defined in the infringement decision. Moreover, it would follow the same market-oriented approach prescribed by Article 6 of the Rome II Regulation, which is based on the so-called effects doctrine[461].

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[458] SUDEROW, *Acciones derivadas de ilicitos antitrust*, cit., 326; W.H. ROTH, *Der europäische Deliktsgerichtsstand in Kartellstreitigkeiten*, in MELLER-HANNICH *et al.* (Hrsg.), *Rechtslage – Rechtserkenntnis – Rechtsdurchsetzung: Festschrift für Eberhard Schilken zum 70. Geburtstag*, C.H. Beck, München, 2015, 437; KAMMIN, *Reforming Private Antitrust Enforcement in Europe*, cit.,148; ASHTON, HENRY, *Competition Damages Actions in the EU. Law and Practice*, Cheltenham, Elgar, 2013, 179; MANKOWSKI, *Der europäische Gerichtsstand des Tatortes aus Art. 5 Nr. 3 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, in *WuW*, 2012, 804-807; NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II*, cit., 106; WURMNEST, *Internationale Zuständigkeit und anwendbares Recht bei grenzüberschreitenden Kartelldelikten*, cit., 935; MAIER, *Marktortanknüpfung im internationalen Kartelldeliktsrecht*, cit., l52-156 (identifying advantages in terms of proximity of evidence, legal certainty, and avoiding multiplication of competente courts); TZAKAS, *Die Haftung für Kartellrechtsverstöße im internationalen Rechtsverkehr*, cit., 118-119; DANOV, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, cit., 97; LINDACHER, *Einstweiliger Rechtsschutz in Wettbewerbssachen unter der Geltungsbereich von Brüssel I*, in STÜRNER, MATSUMOTO, LÜKE, DEGUCHI (Hrsg.), *Festschrift für Dieter Leipold zum 70. Geburtstag*, Tübingen, Mohr Siebeck, 2009, 255; BARIATTI, *Violazione di norme antitrust e diritto Internazionale privato: il giudice italiano e i cartelli*, cit., 355; MORITZ BECKER, *Kartelldeliktsrecht: § 826 BGB als "Zuständigkeitshebel" im Anwendungsbereich der EuGVVO?*, in *EWS*, 2008, 230; ASHTON, VOLLRATH, *Choice of court and applicable law in tortious actions for breach of Community competition law*, cit., 8; VON HEIN, *Deliktischer Kapitalanlegerschutz im europäischen Zustandigleitsrecht*, in *IPRax*, 2005, 22.

[459] In this sense, MANKOWSKI, *Der europäische Gerichtsstand des Tatortes aus Art. 5 Nr. 3 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, cit., 804.

[460] See, in particular, HONORATI, *The Law Applicable to Unfair Competition*, in MALATESTA (ed.), *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe*, Padova, Cedam, 2006, 148.

[461] Concerning this aspect in the Rome II Regulation, among many, see PINEAU, *Conflict of Laws Comes to the Rescue of Competition Law: The New Rome Rome II Regulation*, in *J. Priv. Int. L.*, 2009, 321; and ACKERMANN, *Antitrust Damages Actions under the Rome II Regulation*, in BULTERMAN, HANCHER, MCDONNELL, SEVENSTER (eds.), *Views of European Law from the Mountain:* Liber Amicorum *for Piet Jan Slot*, Alphen aan den Rijn,

In *CDC Hydrogen Peroxide*, however, the Court neglected the collective dimension of the market and focused on the individual dimension of antitrust infringements[462]. In particular, it held that for loss consisting of additional costs incurred because of artificially higher prices, the *locus damni* is located, for each alleged victim, at that victim's registered office[463]. This place does not necessarily coincide with the domicile of the defendant under Article 63 of the Brussels I-*bis* Regulation, which, as seen above, provide for two other criteria in addition to the statutory seat[464]. This court, however, has jurisdiction to hear an action brought either against any one of the participants in the cartel or against several of them for the whole of the loss inflicted upon that undertaking, regardless of the forum State in which the damage is suffered[465]. This entails that the Court, without any further explanation and any reference to its earlier case law, abandoned the *Shevill* doctrine which introduced the mosaic principle (*Mosaikbetrachtung*)[466], according to which jurisdiction at the place of damage is restricted to the harm caused in the State of the court seized[467]. The CJEU's embracement of the *forum actoris* is justified by the fact that jurisdiction at the victim's domicile guarantees the efficacious conduct of potential

Kluwer, 2009, 113. However, according to MUNARI, *Issues on Jurisdiction and Applicable Law in Private Antitrust Enforcement Cases*, cit., 154, the place where the effects are produced does not necessarily correspond to the place where the damages have actually occurred: there is not necessarily a coincidence between market defined under competition law (implementation test) and affected market (effects doctrine).

[462] On the juxtaposition of "Individualschutz" and "Marktfunktionsschutz", see MARTINY, *Die Anknüpfung an den Markt*, in *Festschrift für Ulrich Drobnig zum 70. Geburtstag*, Tübingen, Mohr Siebeck, 1998, 392.

[463] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 52. In this sense see also the already mentioned decision LG Dortmund, 1 April 2004, 13 O 55/02 Kart (but delivered before CJEU's decisions in *DFDS* and *Kronhofer*). In this direction, for financial torts, already MUIR WATT, *De la localisation d'un préjudice patrimonial subi à l'occasion de placements financier à l'étranger*, cit., 333. According to FRANZINA, *L'elusiva proiezione geografica del danno meramente patrimoniale*, cit., 123, «chi volesse localizzare l'evento in un luogo diverso dal domicilio del danneggiato si vedrebbe costretto a dare rilievo, il piú delle volte, ad elementi della fattispecie litigiosa scarsamente significativi o difficilmente prevedibili».

[464] See *supra* para. 5.1

[465] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 54.

[466] This mosaic principle has been developed by the CJEU in Case C-68/93, *Shevill*, paras. 32-33; and then further developed in Joined Cases C-509/09 and C-161/10, *eDate Advertising*, paras. 42-43; Case C-523/10, *Wintersteiger*, para. 26; Case C-170/12, *Peter Pinckney* [2013] EU:C:2013:635, para. 45

[467] MONICO, *Il* private antitrust enforcement *nello spazio giudiziario europeo*, cit., 1164. This is quite surprising, if one considers that according to the prevailing opinion the mosaic principle is a structural element of Art. 7(2), which is not german to any specific tort but a matter of general costruction: MANKOWSKI, *Art. 7*, cit., 278-279. With regard to cartel claims, see WELLER, *Die internationale Deliktszuständigkeit für kartellprivatrechtliche Schadenersatzklagen*, in NIETSCH, WELLER (Hrsg.), Private Enforcement*: Brennpunkte kartellprivatrechtlicher Schadensersatzklagen*, Baden-Baden, Nomos, 2014, 55; KAMMIN, *Reforming Private Antitrust Enforcement in Europe*, cit., 144. Doubts on the compatibility of *Shevill* with Art. 6 of Rome II Regulation are raised by BARIATTI, *Violazione di norme antitrust e diritto Internazionale privato: il giudice italiano e i cartelli*, cit., 358-359. Albeit the lack of reasoning, one may note that the context here is different from multi-state defamation, because the CJEU's interpretation of the place of damage pinpoints only one place, which is the victim's seat, thus eliminating the need to limit jurisdiction to the harms caused within the State whose courts are seized.

proceedings, given that the assessment of an antitrust claim for damages for loss allegedly inflicted upon a specific undertaking essentially depends on factors specifically relating to the situation of that undertaking[468]. This leads to the conclusion that those courts are in the best position to adjudicate antitrust claims for damages[469].

This plaintiff-friendly decision is certainly a good news for cartel victims but does not convince for a number of reasons. The Court decided not to take into account the connecting factor that, as illustrated above, is widely recognized for cross-border competition claims, *i.e.* the affected market where the cartel produces its harmful effects, thus renouncing to adopt a coherent approach with the Rome II Regulation concerning the determination of the law applicable[470]. The solution adopted resembles the decision in *eDate* concerning on-line violations of personality rights, where the CJEU interpreted the old Article 5(3) as giving jurisdiction to the courts of the victim's centre of interests[471]. However, the context of antitrust claims is rather different because it involves pure economic losses. That is why it is extremely surprising that the Court did not even mention its earlier decisions addressing specifically this kind of damages, with whom the current decision is not easily reconcilable[472]. Indeed, the CJEU always considered the *forum actoris* as inappropriate for the localization of damage[473] and maintained the irrelevance of the place where the applicant is domiciled and where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State[474].

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[468] W.H. ROTH, *Internationale Zuständigkeit bei Kartelldeliktslagen*, in *IPRax*, 2016, 326, stresses the relevance of this criterion for negative declaratoy actions in terms of less complexity and more foreseeability.

[469] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 53. This statement is criticised by WURMNEST, *Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie*, cit., 5.

[470] STADLER, *Schadensersatzklagen im Kartellrecht – Forum shopping welcome!*, cit., 1140; HARMS, SANNER, SCHMIDT, *EuGVVO: Gerichtsstand bei Kartellschadensersatzklagen*, cit., 590 (but considering the CJEU's interpretation as «einigermaßen nachvollziehbar»). As stressed by ORÓ MARTÍNEZ, *Reglamento Bruselas I y acciones indemnizatorias derivadas de un cártel: cuestiones de competencia judicial internacional*, in *Ley Un. Eur.*, 2015, n. 30, 7, there is not automatic coincidence between the victim's registered office and the market affected by competition restriction.

[471] In this sense, critically, NEGRI, *Una pronuncia a tutto campo sui criteri di allocazione della competenza giurisdizionale nel* private antitrust enforcement *transfrontaliero: il caso esemplare delle azioni risarcitorie c.d.* follow-on *rispetto a decisioni sanzionatorie di cartelli pan-europei*, in *Int'l Lis*, 2016, 83.

[472] MÄSCH, *Blondes Have More Fun (or Have They?)*, in *WuW*, 2016, 289 (provokatorily asking whether the CJEU was aware of its earlier case law); STADLER, *Schadensersatzklagen im Kartellrecht – Forum shopping welcome!*, cit., 1140. Only Kolassa is mentioned, but in a different context. In this regard, see also NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II*, cit., 104-106.

[473] KERAMEUS, *La compétence internationale* cit., 258, speaks suggestively of «*horror fori actoris*».

[474] C-168/02, *Kronhofer*, para. 21. In this regard, see BARIATTI, *Riflessioni sull'applicazione extraterritoriale delle norme relative ai servizi finanziari*, cit., 436-437; LEHMANN, *Where Does Economic Loss Occur?*, in *J. Priv. Int. L.*, 2011, 537-541 and 548; WAGNER, GEISS, *Der Gerichtsstand der unerlaubten Handlung nach der EuGVVO*

This has not been put into question by the recent decision in *Kolassa*, where the attribution of jurisdiction to the courts of the claimant's domicile, insofar the damage materialises directly in his bank account held with a bank established within the area of competence of that court[475], was justified by the specific context of prospectus liability which gave rise to the decision[476]. Accordingly, a departure from this acquired principle, albeit limited to antitrust claims, would have deserved a sound justification in the decision as to its grounds to fill the gap of uncertainty[477].

Furthermore, the reasoning of the Court does not support its conclusions on the appropriateness of the *forum actoris*[478]. In particular, it seems debatable that evidence to be collected to decide on causation and damages is located at the registered seat of the victim. Of course, some evidence may be found there, but it is undeniable that, as the disclosure rules provided in the recent Antitrust Damages Directive reveal, the relevant evidence lies in the hands of the defendant party who infringed competition rules[479].

2.6.2.2. The Specificity of Competition Claims: The Place of Acting

The second limb of *Mines de Potasse* provides jurisdiction at the place where «the event giving rise to the damage occurred», which is the place «at the origin of that damage»[480],

bei Kapitalanlagedelikten, in *NJW*, 2009, 3483; and BLOBEL, *European Tort Jurisdiction and Pure Economic Loss*, in *Eur. L. Forum*, 2004, 189. In the national case law, see French Court of Cassation, 7 January 2014, n. 11-24.157; and 12 July 2011, n. 10-24.006.

[475] C-375/13, *Kolassa* [2015] EU:C:2015:37, para. 55. This passage raised great uncertainties as to its real meaning: HAENTJENS, VERHEIJ, *Finding Nemo: Locating Financial Losses after* Kolassa/Barclays Bank *and* Profit, in *J. Int. Bank. L. Reg.*, 2016, 358 *et seq.* Earlier, considering the centre of the victim's financial interests as not relevant in itself, see WAGNER, *Art. 5 EuGVVO*, cit., paras. 158 and 160; MANKOWSKI, *Art. 7*, cit., 306; and BACH, *Art. 4*, in HUBER (ed.), *Rome II Regulation. Pocket Commentary*, Munich, Sellier, 2011, 72 and 76-79. Critical also KINDLER, *Aktuelle Hauptfragen des Europäischen Zivilprozessrechts*, in *ZVglRWiss*, 2006, 247.

[476] STEINRÖTTER, *Der notorische Problemfall der grenzüberschreitenden Prospekthaftung*, in *RIW*, 2015, 414. This interpretation has been recently confirmed by Case C-12/15, *Universal Music*, paras. 34-38. In this sense, see VAN BOCHOVE, *Purely economic loss in conflict of laws: the case of tortius interference with contract*, in *NIPR*, 2016, 456 *et seq.*

[477] In the sense that the CJEU's jurisprudence on Art. 7(2) of the Brussels I-*bis* Regulation is becoming increasingly confusing: MANKOWSKI, *Arbeitnehmerbegriff i.S.d. EuGVVO - Abgrenzung der Gerichtsstände aus Arbeitsvertrag, vertraglichem Erfüllungsort und Delikt*, in *RIW*, 2015, 823.

[478] In this sense, W.H. ROTH, *Internationale Zuständigkeit bei Kartelldeliktslagen*, cit., 325 (who raises similar doubts at 322 concerning the relevance of the place of conclusion of the anti-competitive agreement as to the gathering of evidence); HEINZE, *Der Deliktsgerichtsstand als Klägergerichtsstand? – Zum Einfluss materiellrechtlicher Wertungen auf die Auslegung des Art. 7 Nr. 2 EuGVO*, cit., 527 *et seq.*

[479] WURMNEST, *International jurisdiction in competition damages cases under the Brussels I Regulation:* CDC Hydrogen Peroxide, in *CMLRev.*, 2016, 243.

[480] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 25.

provided that there be a causal connection between the damage and the event in question[481]. Although the attention is generally focused on the *locus damni*, the role of the place of acting cannot be underestimated. In particular, in a multi-defendant context like the one involving different members of the same group of companies, it will be highlighted that the recent CJEU's interpretation in *CDC Cartel Damages Claims* opens a new possibility for bundling proceedings before the place of acting.

In general, one may see that the determination of such place for the purpose of jurisdiction is not easy when the event is fragmented and localized in different Member States and is the result of an uninterrupted chain of causal events. In other words, the question is which of the antecedent parts of the story is to be seen as the event giving rise to the damage. This criterion, of course, has to be interpreted in an autonomous and uniform way, considering that national systems construct torts in differing ways and attribute relevance to different elements.

In this sense, from the CJEU's case law, it seems possible to extrapolate a general principle, according to which it is necessary to look at the beginning of the process which led to the damage, *i.e.* the first element of the chain of causation[482]. In a case of libel by a newspaper article, the place of the event giving rise to the damages was identified where the publisher of the newspaper is established, «since that is the place where the harmful event originated and from which the libel was issued and put into circulation»[483]. In fact, it was the production of the newspaper with its defamatory material, rather than the distribution or sale, which gave rise to the damage[484]. The CJEU adopted the same approach with the regard to a claim for

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[481] *Ibid*., para. 16.

[482] BRIGGS, *Civil Jurisdiction and Judgments*, cit., 263-266; LEIN, *Jurisdiction in Matters Relating to Tort, Delict, or Quasi-Delict (Art. 7(2))*, cit., 162-165; MARI, *Il diritto processuale civile della convenzione di Bruxelles*, cit., 396-398; LUPOI, *Conflitti transnazionali di giurisdizioni. Tomo I*, cit., 519-524. Doubts are raised by SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, cit., 166, when this place is not significantly linked with the dispute. This place, however, often coincides with the defendant's domicile: see NUYTS, *Suing at the place of infringement: the application of article 5(3) of Regulation 44/2001 to IP matters and internet disputed*, in NUYTS (ed.), *International Litigation in Intellectual Property and Information Technology*, Austin, Wolter Kluwers, 2008, 118-121.

[483] Case C-68/93, *Shevill*, para. 24. For a critical appraisal of the decision, among many, see LAGARDE, *Compétence juridictionnelle en matière de délit commis par un organe de presse diffusé dans plusieurs Etats*, in *Revue critique*, 1996, 487. It is worth also mentioning the position of GAUDEMET-TALLON, *ivi*, 1983, 676, according to whom the place of acting had to be split up in two harmful events: one primary (the publication), the other secondary (the diffusion).

[484] This principle, by analogy, has been applied also to negligent misstatements: the place where the misstatement originates, rather than where it is received and relied upon: *Domicrest Ltd v. Swiss Bank Corporation* [1998] EWHC 2001 (QB); *Alfred Dunhill Ltd. v. Diffusion Internationale de Maroquinerie de Prestige SARL* [2001] EWHC 2002 (QB); *London Helicopters Ltd v. Heliportugal LDA-INAC* [2006] EWHC 108 (QB); *Newsat Holdings Ltd & Ors v. Zani* [2006] EWHC 342 (Comm). On the issue, see FAWCETT, CARRUTHERS, *Ceshire, North & Fawcett. Private International Law*, cit., 254-255; STONE, *EU Private International Law*[3], Cheltenham, Elgar,

compensation for the damage caused by an industrial action[485], an infringement of a national mark through the use of a keyword identical to that trademark on a search engine operating under a country-specific top-level domain of another Member State[486], a claim founded on liability for defective products[487].

When one is confronted with damages competition claims, different places may come into play along a chain of actions. In particular, following the CJEU's case law on the extraterritoriality of EU competition law[488], two elements are taken into account: the formation of the agreement and the implementation thereof[489]. Accordingly, the first place is represented by the entering into an agreement to collude which results in the imposition of charges for goods or services at artificially inflated prices[490]. This proposition is in line with what the CJEU

2014, 103. For an application by analogy concerning rating agencies' liability, see NISI, *La giurisdizione in materia di responsabilità delle agenzie di rating alla luce del regolamento Bruxelles I*, in *Riv. dir. int. priv. proc.*, 2013, 401-403.

[485] Case C-18/02, *DFDS Torline A/S* [2004] *ECR* I-1417, para. 41: it is where the notice of unlawful industrial action was given and received.

[486] Case C-523/10, *Wintersteiger*, para. 34; and C-441/13, *Pez Hejduk*, EU:C:2015:28, para. 24: it is the activation by the advertiser of the technical process displaying the advertisement, which it created for its own commercial communications, and not the display of the advertisement itself.

[487] Case C-45/13, *Andreas Kainz*, para. 26: it is place of manufacture, rather than of acquisition by the victim.

[488] Joined Cases 89/85 and others, *Ashlstrom Osakeyhtio* [1988] *ECR* 5193, para. 16. More recently, see T-91/11, *InnoLux Corp*, EU:T:2014:92, then confirmed by C-231 P, EU:C:2015:451. On the extraterritoriality of EU Competition Law, see PICONE, *L'applicazione extraterritoriale delle regole sulla concorrenza e il diritto internazionale*, in *Il fenomeno delle concentrazioni di imprese nel diritto interno e internazionale*, Padova, Cedam, 1989, 81, and more recently DE PASQUALE, *L'applicazione extraterritoriale dei divieti* antitrust, in PACE (ed.), *Dizionario sistematico del diritto della concorrenza*, cit., 144; and MUNARI, *Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza*, in PALCHETTI (a cura di), *L'incidenza del diritto non scritto sul diritto internazionale ed europeo*, Napoli, ESI, 2016, 311.

[489] In this regard, see BASEDOW, *International Cartels and the Place of Acting under Article 5(3) of the Brussels I Regulation*, in BASEDOW, FRANCQ, IDOT (eds.), *International Antitrust Litigation*, cit., 33-35; ID., *Jurisdiction and Choice of Law in the Private Enforcement of EC Competition Law*, in BASEDOW (ed.), *Private enforcement of EC competition law*, cit., 250; VILA COSTA, *How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach*, cit., 28; SCHREIBER, *Praxisbericht Private Durchsetzung von kartellrechtlichen Schadenersatzansprüchen*, cit., 39; and MANKOWSKI, *Der europäische Gerichtsstand des Tatortes aus Art. 5 Nr. 3 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, cit., 800–803. It is worth saying that Basedow and Mankowski considers a third place as possibly relevant, *i.e.* the seat of the defendant, but ultimately rejects it as it would lead always to the forum of the defendant's domicile already available under Art. 4. Similarly, KAMMIN, *Reforming Private Antitrust Enforcement in Europe*, cit., 147; NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II*, cit., 102. This place is instead positively considered by MAIER, *Marktortanknüpfung im internationalen Kartelldeliktsrecht*, cit., 138-141; MÄSCH, *Vitamine für Kartellopfer*, cit., 515; BULST, *Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht*, cit., 405. In the sense that this interpretation would undermine the *effet utile* of Art. 7(2), see WAGNER, *Art. 5 EuGVVO*, cit., para. 146; FRANZINA, *L'elusiva proiezione geografica del danno meramente patrimoniale*, cit., 124.

[490] BASEDOW, *Der Handlungsort im internationalen Kartellrecht – Ein juristisches Chameleon auf dem Weg vom Völkerrecht zum internationalen Prozessrecht*, in *Wettbewerbspolitik und Kartellrecht in der Marktwirtschaft. 50 Jahre FIW: 1960 bis 2010*, Carl Heymanns, Köln, 2010, 136. On this criterion, see the critical appraisal of MÄSCH, *Blondes Have More Fun (or Have They?)*, cit., 288, according to whom the formation of a cartel agreement is only a preparatory act for the subsequent restriction of competition, which does not take place until the cartel is implemented.

decided in *Shevill* and with the general principle illustrated above, according to which the event giving rise to the damages is the place of origination[491]. However, although it is undeniable that relevant activities take place where agreements are concluded, one must consider that the latter are by their nature secret and may involve a series of worldwide or EU-wide meetings in different States through extended periods of time. As a result, this place proves to be not easy to identify and may have little connection with the substance of the claim, thus leading lead to an excessive expansion of competent courts[492].

Alternatively, it has been suggested to consider the place where the agreement is implemented, because it would lead to a strong connection between jurisdiction and the relevant market[493]. Indeed, the place of the agreement's implementation is precisely where the cartel members determine the conditions for the actual restriction of competition[494]. It would also serve the purpose of Article 7(2), providing for proximity and facilitating the efficacious conduct of proceedings and the taking of evidence. However, problems persist if one considers that EU-wide cartels are usually implemented in several national markets, so that the place of acting would be located in different Member States, thus opening the door to *forum shopping*[495].

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[491] MONICO, *Il* private antitrust enforcement *nello spazio giudiziario europeo*, cit., 1162; DANOV, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, cit., 92; WITHERS, *Jurisdiction and Applicable Law in Antitrust Tort Claims*, cit., 261. This approach has been followed by the English High Court in *Sandisk Corporation v Koninklijke Philips Electronics NV & Ors* [2007] EWHC 332 (Ch), para. 22.

[492] SUDEROW, *Acciones derivadas de ilicitos antitrust*, cit., 320; HARMS, SANNER, SCHMIDT, *EuGVVO: Gerichtsstand bei Kartellschadensersatzklagen*, in *EuZW*, 2015, 589; W.H. ROTH, *Der europäische Deliktsgerichtsstand in Kartellstreitigkeiten*, cit., 432-433 (according to whom courts at the place where a cartel agreement was formed should not have jurisdiction if the cartel lacks a strong organizational structure ensuring the connection between the court and the dispute); NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II*, cit., 100.

[493] WELLER, *Die internationale Deliktszuständigkeit für kartellprivatrechtliche Schadenersatzklagen*, cit., 57-58; KAMMIN, *Reforming Private Antitrust Enforcement in Europe*, cit., 146; ASHTON, HENRY, *Competition Damages Actions in the EU. Law and Practice*, cit., 178; DANOV, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, cit., 94; MORITZ BECKER, *Kartelldeliktsrecht: § 826 BGB als "Zuständigkeitshebel" im Anwendungsbereich der EuGVVO?*, cit., 229; WITHERS, *Jurisdiction and Applicable Law in Antitrust Tort Claims*, cit., 261. Similarly, concerning NCAs' competence, see *Commission Notice on cooperation within the Network of Competition Authorities* [2004] OJ 101/43, para. 8. In this sense, see also BARIATTI, *Problemi di giurisdizione e di diritto internazionale privato nell'azione antitrust*, in PACE (ed.), *Dizionario sistematico del diritto della concorrenza*, cit., 269. Doubts expressed by FITCHEN, *Allocating Jurisdiction in Private Competition Law Claims within the EU*, cit., 394-395, on the automatic extension to private claims of the significant relevance attributed by the Commission and the CJEU to the implementation of cartels within the context of public enforcement.

[494] BASEDOW, *International Cartels and the Place of Acting under Article 5(3) of the Brussels I Regulation*, cit., 34; MANKOWSKI, *Der europäische Gerichtsstand des Tatortes aus Art. 5 Nr. 3 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, cit., 802.

[495] In this regard, see the critical remarks by MAIER, *Marktortanknüpfung im internationalen Kartelldeliktsrecht*, cit., 131-137. Moreover, it has been observed that this criterion could not operate for violations by object, where the implementation of the agreement is not required for there to be a violation of Art. 101 TFUE: VILA COSTA, *How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition*

The CJEU intervened in this debate with its decision in *CDC Hydrogen Peroxide* and held that the place of a causal event of loss consisting of additional costs that a buyer had to pay because a cartel has distorted market prices can be identified as the place of the conclusion of the cartel[496]. Thus, every victim may bring a claim before the courts of this place for the entire damage suffered. The Court acknowledged the difficulties mentioned above concerning the possibility to identify a single place in case of complex cartels consisting of some collusive agreements concluded during various meetings and discussions which took place in various places in the European Union[497]. Accordingly, in such cases, the courts of the places where the meetings took place do not have jurisdiction to adjudicate damages claims[498]. However, when among several agreements that amounted to the unlawful cartel, one, in particular, is identified that was the sole causal event giving rise to the loss allegedly inflicted, the courts in whose jurisdiction that particular agreement was concluded have jurisdiction on the loss thereby

Law: a Coherent Approach, cit., 28; ASHTON, VOLLRATH, *Choice of court and applicable law in tortious actions for breach of Community competition law*, cit., 8.

[496] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 44. It is worth stressing that the Court rejected the proposal of AG Jääskinen, paras. 47-48, according to whom Art. 7(2) cannot be properly applied in cases of a horizontal cartel, which has existed for a long time and has restricted competition throughout Union territory and whose structure is highly complex, since it has given rise to a series of agreements and collusive practices. In particular, in such cases the place of acting could theoretically refer to any place in which the unlawful cartel agreement was entered into by its members, a place which it could be difficult, if not impossible, to pinpoint in view of the secret nature of the cartel, unless the various places where the registered offices of the companies concerned are situated are taken into account. Similarly, see *Cooper Tire & Rubber Co & Ors v Shell Chemicals UK Ltd & Ors* [2009] EWHC 2609 (Comm), para. 65, recently confirmed in *Bord NA Mona Horticulture Ltd & Anor v British Polythene Industries Plc & Ors* [2012] EWHC 3346 (Comm), para. 86, and *Deutsche Bahn AG & Ors v Morgan Advanced Materials Plc & Ors* [2013] CAT 18. In the literature, the application of the place of acting in complex cartels is put into question by BASEDOW, *Der Handlungsort im internationalen Kartellrecht*, cit., 140. More generally, see also LUPOI, *Conflitti transnazionali di giurisdizioni. Tomo I*, cit., 525-526.

[497] In this regard, see the victim-friendly appraisal by MANKOWSKI, *Art. 7*, cit., 301, in the sense that it would not be unfair to consider each meeting as a place of relevant activity, because the cartelists may freely choose where to meet. In any case, MEHRBREY, JAEGER, *EuGH-Entscheidung klärt internationale Zuständigkeit von nationalen Zivilge richten in Kartellschadensersatzfällen*, in *Eur. L. Repor.*, 2015, 150; GEISS, DANIEL, *Cartel Damage Claims (CDC) Hydrogen Peroxide Sa v Akzo Noble NV and Others: A summary and critique of the European Court of Justice of May 21, 2015*, in *Eur. Comp. L. Rev.*, 2015, 432-433; and HARMS, SANNER, SCHMIDT, *EuGVVO: Gerichtsstand bei Kartellschadensersatzklagen*, cit., 592, share the view that the place of acting as interpreted by the CJEU is hardly likely to play a role in the practice. In this regard, they also consider that in complex cartel cases even the Commission fails to identify a specific specific organizational meeting and that the non-confidential versions of the Commission's decisions are often not sufficiently detailed to substantiate individual organizational meetings.

[498] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 45. The difficulties for determing jurisdiction using the criterion adopted by the CJEU in cas of complex cartels are stressed by WURMNEST, *Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie*, cit., 4; and W-H. ROTH, *Internationale Zuständigkeit bei Kartelldeliktslagen*, cit., 323-324. The authors also share the view that the relevance of the place of implementation of the cartel should not be rejected in principle.

inflicted[499]. In other words, each victim may rely on the place where there was a subsequent agreement to bring a claim limited to damages which can be specifically attributed to that individual agreement[500]. This means that if the global agreement is fragmented in various single agreements, the claimant should bring as many damages actions as are the places in which the single agreements have been concluded, similarly to what happen with the mosaic principle relating to the place of damage[501]. Moreover, considering that the claimant often does not know which damage results from which concrete individual agreement, one has to consider the difficulties relating to the proof of the causal link between the single agreement and the damage and to the fact that Commission or NCAs' decisions usually do not contain useful information for this purpose[502].

However, in circumstances such as those in the main proceedings, there is no reason for preventing several perpetrators from being sued together before the same court[503]. The CJEU gives way to its previous decision in *Melzer,* concerning scenarios in which a principal actor is sued in the place in which another co-tortfeasor has acted, without any explanation about the rationale of this differentiation[504]. The Court accepts the idea that, in the context of antitrust damages claims, this concentration may be justified by the fact that all economic operators were present at the anticompetitive agreements, and thus there is a uniform place of acting for all cartel members[505]. Although it is self-evident that such concentration will depend on the actual

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[499] *Ibid*., para. 46. For an example, see WURMNEST, *International jurisdiction in competition damages cases under the Brussels I Regulation:* CDC Hydrogen Peroxide, cit., 241.

[500] Criticism by MÄSCH, *Blondes Have More Fun (or Have They?)*, cit., 288; and doubts on its real impact by WURMNEST, *Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie*, cit., 4; and GEELHAND, GARTAGANI, CDC v Akzo Nobel and Other*: Clarifications on the Jurisdiction Rules in Cartel Damages Claims*, in *J. Eur. Comp. L. Pract.*, 2015, 715.

[501] FRATEA, *Cross-border damage antitrust claims and rules on jurisdiction: a real plaintiff's paradise?*, Papers di diritto europeo, 1/2016, 14. Critically, in this sense, MEHRBREY, JAEGER, *EuGH-Entscheidung klärt internationale Zuständigkeit von nationalen Zivilgerichten in Kartellschadensersatzfällen*, cit., 151.

[502] In this sense, WIEGANDT, *Kommentar zu EuGH vom 21.05.2015 - Rs. C-352/13*, in *EWS*, 2015, 159; and HARMS, SANNER, SCHMIDT, *EuGVVO: Gerichtsstand bei Kartellschadensersatzklagen*, cit., 592 (stressing that the non-confidential versions of the Commission's decisions are often not sufficiently detailed to substantiate individual organizational meetings).

[503] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 49.

[504] Case C-228/11, *Melzer*, paras. 29 and 36; Case C-387/12, *Hi Hotel HCF SARL* [2014] EU:C:2014:215, paras. 30-31; Case C-360/12, *Coty Germany* [2014] EU:C:2014:1318, paras. 49-51. Critically against *Melzer*, see VON HEIN, *Der Gerichtsstand der unerlaubten Handlung bei arbeitsteiliger Tatbegehnng iin enropäischen Zivilprozessrecht*, in *IPRax*, 2013, 505 *et seq.* The inconsistency evidenced in the text is also stressed by MANKOWSKI, *Art.* 7, cit., 288-292, who welcomes this development by providing an in-depth critical appraisal of the previous CJEU's case law. In this sense, see also MÜLLER, *Der zuständigkeitsrechtliche Handlungsort des Delikts bei mehreren Beteiligten in der EuGVVO*, in *EuZW*, 2013, 130.

[505] NEGRI, *Una pronuncia a tutto campo sui criteri di allocazione della competenza giurisdizionale nel* private antitrust enforcement *transfrontaliero*, cit., 82.

feasibility to identify and then to invoke the place of acting, which may prove to be very hard in the practice, this represents a very interesting solution to address competition litigation involving groups of companies[506]. Indeed, the overcoming of *Melzer*'s limitations as to the relevance of co-tortfeasors' actions in breach of competition laws seems to indicate that victims may start a damages action before the place of acting against any member of the group which participated in the infringement, regardless of whether this group member had any relationship with the claimant and, more importantly, of whether his participation to the anti-competitive behaviour took place in the national market whose court has been seized. Of course, at the moment, this can be only a prevision, which will require time in the practice for a confirmation.

2.7. Jurisdiction and the Peculiarity of Groups of Companies: The *Forum Connexitatis*

2.7.1. Multi-Defendant Antitrust Litigation within the Context of a Group of Companies

As said above, the objective of this study is to verify whether jurisdictional rules, albeit originally neutral to groups of companies, may be adapted as to concentrate the litigation involving different companies of the same undertaking or single economic entity. When dealing with competition claims, the literature is generally oriented in considering that Articles 4 and 7(2) of the Brussels I-*bis* Regulation are not capable of addressing efficiently jurisdictional issues with regard to the possibility to consolidate claims[507]. Against this background, the recent CJEU's judgement makes a significant step forward: bundling of claims is in fact allowed both at the place of the event giving rise to the damage, in so far as all claims are causally linked to the same cartel agreement, and at the place of damage where the victim's registered office is located[508].

Considering the difficulties relating to the determination of the place where the cartel was concluded, the second solution seems to be more advantageous for the claimant.

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[506] GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, cit., 294, hightlighs that, as the place of acting often coincides with the domicile of one of the defendants, the joining of proceedings would always be possible based on Art. 4 and 8(1) of the Brussels I-*bis* Regulation.

[507] PATO, *Collective redress for cartel damage claims in the European Union after* CDC v Akzo Nobel NV and others, in *Yb. Priv. Int. L.*, 2015/2016, 503-505; BASEDOW, HEINZE, *Kartellrechtliche Schadensersatzklagen im europaischen Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVVO)*, in BECHTOLD, JICKELI, ROHE (Hrsg.), *Recht, Ordnung und Wettbewerb: Festschrift zum 70. Geburtstag von Wernhard Möschel*, Baden-Baden, Nomos, 2011, 63-64.

[508] The abandonment of the mosaic principles allows overtaking the limit evidenced in this regard by HESS, *Kartellrechtliche Kollecktivklagen in der Europaischen Union – Aktuelle Perspektiven*, in *WuW*, 2010, 499.

However, albeit offering the benefit of litigating in a familiar forum, this solution does not leave any margin of discretion to the claimant as to where to start the proceedings. For instance, if one thinks of a horizontal cartel, where there are by definition more than one company responsible for the damages stemming from the infringement, the victims are incentivized to attract before one favorable court defendants from different countries, including other companies within the same undertaking as the seller which participated in the infringement but were not directly involved in the sale to the claimant[509].

To this end, an important role is played by Article 8(1) of the Brussels I-*bis* Regulation, according to which, in the case of multiple defendants[510], the plaintiff can bring a claim in the courts for the place where any one of the defendants is domiciled[511], provided the claims be closely connected[512]. This enables a number of defendants from different member states to be sued in one action in a Member State provided that one of them ("anchor defendant") is

[509] See, e.g. BÖRGER, *Internationale Zuständigkeit für kartellprivatrechtliche Schadenersatzklagen nach Art. 6 Nr. 1 EuGVO*, in NIETSCH, WELLER (Hrsg.), Private Enforcement*: Brennpunkte kartellprivatrechtlicher Schadensersatzklagen*, cit., 61 *et seq.*; KAMMIN, *Reforming Private Antitrust Enforcement in Europe*, cit., 125-126; WILDERSPIN, *Jurisdiction Issues: Brussels I Regulation Articles 6(1), 23, 27 and 28 in Antitrust Litigation*, in BASEDOW, FRANCQ, IDOT (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Oxford-Portland, Hart, 2012, 42 (defining at 52 Art. 8 as one of the most important provisions of the Regulation); NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II*, cit., 115-116.

[510] The provision does not apply in case of multiple plaintiffs: MANN, *Zum Verhältnis von Zuständigkeits-bestimmungsverfahren und gemeinsamen Beklagtengerichtsstand nach Art. 6 Nr. 1 EuGVVO*, in *ZZP*, 2014, 233; GEIMER, *Forum Condefensoris*, in BAETGE, VON HEIN, VON HINDEN (Hrsg.), *Die richtige Ordnung: Festschrift für Jan Kropholler zum 70 Geburtstag*, Tübingen, Mohr Siebeck, 2008, 784-785.

[511] As stressed by M.E. ANCEL, *Derived Special Jurisdiction (Art. 8)*, in DICKINSON, LEIN (eds.), *The Brussels I Regulation Recast*, cit., 186, the scope of application *ratione personae* of Art. 8(1) is unchanged in the Recast Regulation, so that both the defendant sued and the anchor defendant must be domiciled in a Member State, and the anchor defendant must be sued before the court of its domiciled under Art. 4, the other grounds of jurisdiction being irrelevant for the purpose of Art. 8. Moreover, Art. 8 is not intended to apply to a co-defendant domiciled outside the EU: see Case C-645/11, *Land Berlin* [2013] EU:C:2013:228, para. 55. In such cases, national PIL of the forum seized on the basis of Art. 4 will apply: concerning Italy, for instance, as a result of the reference contained in the Art. 3(2) Law No. 218/1995 to the Brussels Convention of 1968, the jurisdictional criterion of Art. 8 also applies to lawsuits involving defendants domiciled in a third State: see DI BLASE, *Art. 3, II*, in BARIATTI (a cura di), *Legge 31 maggio 1995, n. 218. Riforma del sistema italiano di diritto internazionale privato, Commentario*, in *Nuove leggi civ. comm.*, 1996, 912 and 916-917: D'ALESSANDRO, *La connessione tra controversie transnazionali. Profili sistematici*, Torino, Giappichelli, 2009, fn. 29 at 41 and 237. On the contrary, in favour of the application of Art. 8 by analogy, see OLG Stuttgart, 31 July 2012, in *NJW*, 2013, 83; and in the literature KROPHOLLER, VON HEIN, *Europäisches Zivilprozessrecht*[9], Frankfurt am Main, R&W, 2011, 254; GOTTWALD, *EuGVVO Art. 6*, in *Münchener Kommentar zur ZPO*[4], cit., para. 4; GEIMER, *Art. 6 EuGVVO*, in GEIMER, SCHUTZE, *Europäisches Zivilverfahrensrecht: EuZVR*[3], München, C.H. Beck, 2010, para. 7. *Contra*, BRANDES, *Der gemeinsame Gerichtsstand. Die Zuständigkeit im europäischen Mehrparteienprozeß nach Art. 6 Nr. 1 EuGVÜ/LÜ*, Frankfurt am Main, Peter Lang, 1998, 91-95.

[512] A comparable mechanism is also known in the US, where it is based on specific jurisdiction over one of the defendants based on the defendant's acts, not its domicile: the conspiracy doctrine. See BUXBAUM, MICHAELS, *Jurisdiction and Choice of Law in International Antitrust Law – A US Perspective*, in BASEDOW, FRANCQ, IDOT (eds.), *International Antitrust Litigation*, cit., 229-230.

domiciled there[513]. This rule, in particular, proved to be very often triggered in the field of multi-jurisdictional intellectual property and in cases involving the conduct of groups of companies[514].

The applicability of Article 8 to competition claims results implicitly from Article 6(3)(b) of the Rome II Regulation on the law applicable to non-contractual obligations, which contains a conflict of law rule relating to acts restricting free competition, in particular when the claimant sues more than one defendant before one and the same court[515]. Accordingly, considering that the majority of claims are brought as follow-on damages actions, following an NCA's or a Commission's decision finding a breach of Article 101 TFEU, cartel victims may want to file a claim against all or some of the addressees of the infringement decision, so would seek to find an anchor defendant domiciled in the country most favorable to him[516], bring the claim on the basis of Article 4(1), and then attract the remaining cartel participant under Article 8(1)[517]. In particular, it will be evidenced that problems arise when "parent liability" principle and the notion of "undertaking" are used to start the proceeding in a certain Member State against a

[513] The domicile of the anchor defendant is a necessary condition: see KROPHOLLER, VON HEIN, *Europäisches Zivilprozessrecht*[9], cit., 259 and, recently, BGH, 24 February 2015, VI ZR 279/14, in *NJW*, 2015, 2429. In this regard, see the decision mentioned by BARIATTI, *Problemi di giurisdizione e di diritto internazionale privato nell'azione antitrust*, cit., 270 and KORTMANN, SWAAK, *Private Antitrust Enforcement – Status Quo in the Netherlands*, in *EuZW*, 2012, 771-772, which applied Art. 8 even though all defendants were domiciled outside the Member States of the seized court (Arnhem District Court, 26 October 2011, *Tennet v ABB*, NL:RBARN:2011:BU3546).

[514] See MUIR WATT, *Art. 8*, in MAGNUS, MANKOWSKI (eds.), *ECPIL - Brussels Ibis Regulation*, cit., 372. For its attractiveness for competition claims, among many, see KOUTSOUKOU, PAVLOVA, *Der Gerichtsstand der Streitgenossenschaft bei Schadensersatzklagen wegen Verletzung des EU-Kartellrechts*, in *WuW*, 2014, 153; MANKOWSKI, *Der europäische Gerichtsstand der Streitgenossenschaft aus Art. 6 Nr. 1 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, in *WuW*, 2012, 947; DANOV, *Jurisdiction and judgments in relation to EU competition law claims*, cit., 51-54 and 102-104.

[515] On the conditions to apply this provision, see FITCHEN, *The Applicable Law in Cross-Border Competition Law Actions and Article 6(3) of Regulation 864/2007*, in DANOV, BECKER, BEAUMONT (eds.), *Cross-border EU Competition Law Actions*, cit., 297; MAIER, *Marktortanknüpfung im internationalen Kartelldeliktsrecht*, cit., 397-405; MANKOWSKI, *Das neue Internationale Kartellrecht des Art. 6 Abs. 3 der Rom II-Verordnung*, in *RIW*, 2008, 177. However, Art. 8 is not the only rule qualifying for the applicability of Art. 6(3)(b) of the Rome II Regulation: see DICKINSON, *The Rome II Regulation*, Oxford, OUP, 2008, 424.

[516] On the claimant's choice among different legal orders, see MÄSCH, *Vitamine für Kartellopfer*, cit., 510-511. However, the author recognizes these strategic considerations by the claimant as legitime and perfectly allowed in the context of Art. 6 (esp. at 513).

[517] In this regard, one has to consider the relevance of the principle of joint and several liability of the participants for a common infringement of EU competition law, which appear to be generally accepted both in national legal system and in the new directive 2014/104 (Art. 11). Accordingly, undertakings that infringed competition law through a joint behaviour are jointly and severally liable for the harm caused, so that they are all bound to fully compensate the injured parties. No doubts co-debtors are exposed to Art. 8: French Court of Cassation, 28 September 2011, n. 10-14.355. However, WELLER, *Kartellprivatrechliche Klagen im Europäischen Prozessrecht: "Private Enforcement" und die Brüssel I-VO*, in *ZvglWiss*., 2013, 99, stresses that the actual form of liability – *Mithaftung* or *Teilschuld* – should not play any role for the determination of jurisdiction.

domiciled subsidiary, which was not necessarily involved in the infringement, in order to join proceedings against another subsidiary, the one that directly sold goods to the victim, and its parent company.

2.7.2. The Interpretation of Article 8(1) Resulting from CJEU's Case Law

As anticipated, Article 8 of Brussels I-*bis* Regulation contemplates connection as a derived special title conferring jurisdiction and allowing the joining before a single court of closely connected claims over which several different courts, belonging to different countries, would have otherwise jurisdiction. The rationale of this provision is reflected in the text of Article 8(1) and builds on the CJEU's landmark decision in *Kalfelis*, where the Court decided that two claims may be considered related for the purpose of Article 8 when they are so closely connected «that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings»[518]. The purpose of this test is to facilitate the sound administration of justice, to minimize the possibility of concurrent proceedings and thus to avoid irreconcilable outcomes if cases are decided separately[519], the preceding without undermining the principle of legal certainty and avoiding the multiplication of heads of jurisdiction. However, it raised difficulties in the practice, considering the definition of connectedness and the comparison with other mechanisms provided by the Regulation.

The first issue concerns the relationship between the condition of close connection and the risk that the rule might be used solely to oust the jurisdiction of the natural forum for a claim, thus depriving other courts possibly competent of their jurisdiction over connected claims[520]. This concern is expressly dealt with in Article 8(2)[521], but Article 8(1) remains silent, and the

[518] Case C-189/87, *Kalfelis*, para. 13. This requirement has been interpreted strictly by the Midden-Nederland District Court, 27 November 2013, *East West Debt v United Technologies Corporation c.s.*, NL:RBMNE:2013:5978, para. 2.7, in the sense that connection should be established between the anchor claim and each of the claims to be attracted.

[519] Case C-145/10, *Eva-Maria Painer* [2011] ECR I-12533, para. 77; Case C-616/10, *Solvay SA* [2012] EU:C:2012:445, para. 19. See TANG, *Multiple defendants in the European Jurisdiction Regulation*, in *Eur. L. Rev.*, 2009, 81-84.

[520] On the idea of a general prohibition of abuse in EU civil procedure, see KLÖPFER, *Missbrauch im europäischen Zivilverfahrensrecht*, Tübingen, Mohr Siebeck, 2016; LOPES PEGNA, *Collegamenti fittizi o fraudolenti di competenza giurisdizionale nello spazio giudiziario europeo*, in *Riv. dir. int.*, 2015, 397; THOLE, *Missbrauchskontrolle im Europäischen Zivilverfahrensrecht*, in *ZZP*, 2009, 423.

[521] Case C-77/04, *GIE Réunion européenne e a.* [2005] *ECR* I-4509, paras. 29 and 33. See also the French Court of Cassation, 19 juin 2007, pourvois n° 04-14.862, 04-16.154, 04-16.979. In the sense that the same limitation should apply with regard to Art. 8(1), see KROPHOLLER, VON HEIN, *Europäisches Zivilprozessrecht*, cit.,

interpretation by the CJEU has been the subject of an inconsistent case law[522]. Building on the Jenard Report, the Court initially excluded the possibility to make a claim against several defendants with the sole object of ousting the jurisdiction of the courts of the State where one of the defendants is domiciled[523]. However, in a subsequent case, the Court made up its mind[524] and ruled that, after a close connection is established, there is not any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled[525]. Indeed, the Court was satisfied that the requirement of close connection provided sufficient protection for the defendant sued before a court different than that of its domicile[526]. After two decisions seemingly reaffirming the need to avoid the risk of abuse[527], the Court recently intervened on this issue in a case where the action against the sole co-defendant (anchor) domiciled in the same Member State as the court seized was withdrawn following a settlement with that undertaking[528]. The Court tried to differentiate among the different cases previously decided

260; MARI, *Il diritto processuale civile della convenzione di Bruxelles*, cit., 462-463; DI BLASE, *Connessione e litispendenza nella Convenzione di Bruxelles*, Padova, Cedam, 1993, 26. See also OGH, 2 February 2005, 9 Ob 95/04t, in *Eur. L. Forum*, 2005, II-108; Italian Court of Cassation, 3 April 2000 n. 86, in *Riv. dir. int. priv. proc.*, 2001, 398; 8 August 1989 n. 3657, *ivi*, 1990, 685.

[522] LEIBLE, *Art. 8*, in RAUSCHER (Hrsg.), *Europäisches Zivilprozess-und Kollisionsrecht*, cit., 388.

[523] CJEU Case *Kalfelis*, paras. 8-9; Case C-51/97, *Réunion européenne*, para. 47; Case C-539/03, *Roche Nederland* [2006] ECR I-6535, para. 21. In favour of such a control of abuse, GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, cit., 326; BERTOLI, *Profili evolutivi della connessione attributiva internazionale*, in D'ELIA, TIBERI, VIVIANI SCHLEIN (a cura di), *Scritti in memoria di Alessandra Concaro*, Milano, Giuffrè, 2012, 40-42; BUREAU, MUIR WATT, *Droit international privé*[2], Paris, PUF, 2010, t. I, n. 215; TANG, *Multiple defendants in the European Jurisdiction Regulation*, cit., 94-95.

[524] ALTHAMMER, *Die Auslegung der Europäischen Streitgenossenzu ständigkeit durch den EuGH - Quelle nationaler Fehlinterpretation?*, in *IPRax*, 2008, 231, speaks of «diametralem Gegensatz».

[525] Case C-98/06, *Freeport plc* [2007] I-8319, para. 54. In this sense see also French Court of Cassation, 26 February 2013, n° 11-27.139; Italian Court of Cassation, 27 October 2008 n. 25875, in *Riv. dir. int. priv. proc.*, 2009, 169. According to *Sibir Energy Ltd v Tchigirinski & Ors* [2012] EWHC 1844 (Comm), para. 27, this was already implicit in *Kalfelis* and *Reisch Montage*. On the consequences to be drawn from the ambiguous wording of the Court, see WÜRDINGER, *Einheitlicher Gerichtsstand nach Art. 6 Nr. 1 EuGVVO für Klagen gegen mehrere Beklagte, die auf unterschiedlichen Rechtsgrundlagen beruhen*, in *RIW*, 2008, 71-72; SCOTT, *'Réunion' Revised?* Freeport v Arnoldsson, in *Lloyd's Mar. Comm. L. Quart.*, 2008, 113.

[526] CARBONE, TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., 164; BRIGGS, *Civil Jurisdiction and Judgments*, cit., 287; BUCHER, *Art. 6 CL*, in BUCHER (ed.), *Loi sur le droit international privé. Convention de Lugano*, Bâle, Helbing Lichtenhahn, 2011, 1863; KROPHOLLER, VON HEIN, *Europäisches Zivilprozessrecht*, cit., 260; GOTTWALD, *EuGVVO Art. 6*, cit., para. 14; WÜRDINGER, *Anmerkung zu EuGH, Urteil vom 24.5.2007 – C-98/06*, in *ZZP Int.*, 2007, 225. Using the words of PATAUT, in *Revue critique*, 2007, 847, «la condition de connexité et la condition de non-détournement de for ne sont en réalité que deux façons de dire la même chose».

[527] Case C-145/10, *Eva-Maria Painer*, cit., para. 78; Case C-616/10, *Solvay SA*, cit., para. 22. Recently, see also OGH, 15 January 2013, 4 Ob 221/12x, in *GRUR Int.*, 2013, 569.

[528] In this regard, see LUND, *Der Gerichtsstand der Streitgenossenschaft im europäischen Zivilprozessrecht*, cit., 129-132; D'ALESSANDRO, *La connessione tra controversie transnazionali*, cit., 289-290. On the relevance of

and ultimately held that the court seized of the case can find that the rule of jurisdiction laid down in that provision has potentially been circumvented only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision's applicability[529].

The second issue concerns the notion of irreconcilable judgments. Indeed, the Regulation provides two other mechanism involving variable degrees of connectedness[530]: beyond Article 8, which is a preventive remedy playing at the jurisdictional level, there are Article 30, which allows the joining of related action already pending before different courts in different States on the base of bare connectedness, and Article 45(1)(d), which deals with conflicting judgments at the stage of recognition and enforcement of decisions. With the decision in *Kalfelis*, between the broad expression of Article 30 and the narrower approach of Article 45[531], the Court preferred the former one, according to which a sufficient connection exists when there is a risk that, if decided separately, two claims could give rise to contradictory decisions, even if they can be executed separately and their legal consequences are not mutually exclusive[532]. Notwithstanding, according to some authors the differences between the two provisions justify different conditions of connectedness for their respective application, so that the close connection in the field of related claims should be understood more narrowly than in the field of related actions[533].

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settlement in competition litigation, see RODGER, *Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the UK 2000–2005*, cit., 96.

[529] Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, para. 29. On abuse, see also *Sibir Energy Ltd v Tchigirinski & Ors* [2012] EWHC 1844 (Comm), para. 31: «The court must be able to refuse an application which otherwise meets the requirements of 6(1) if there is clear evidence of collusion or abuse».

[530] MUIR WATT, *Art. 8*, cit., 376, speaks of «variable geometry of connectedness».

[531] For the purpose of Art. 45, the Court held in Case 145/86, *Horst Ludwig Martin Hofmann* [1988] ECR 645, para. 22, that it should be examined whether they entail legal consequences that are mutually exclusive.

[532] C-406/92, *Tatry* [1994] ECR I-5439, para. 52, with regard to Art. 22 of the Brussels Convention, which equates to Art. 30 of the Brussels I-*bis* Regulation. Same notion as Art. 30: GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, cit., 322; BRIGGS, *Civil Jurisdiction and Judgments*, cit., 283-284; WILDERSPIN, *Jurisdiction Issues: Brussels I Regulation Articles 6(1), 23, 27 and 28 in Antitrust Litigation*, cit., 48-49; TANG, *Multiple defendants in the European Jurisdiction Regulation*, cit., 90-93; KROPHOLLER, VON HEIN, *Europäisches Zivilprozessrecht*, cit., 255; D'ALESSANDRO, *La connessione tra controversie transnazionali*, cit., 46-49; RÖSLER, *The Court of Jurisdiction for Joint Parties in International Patent Disputed*, in *IIC*, 2007, 383-384; MERCER, LAYTON, *European Civil Practice*[2], London, Sweet & Maxwell, 2004, 507; MARI, *Il diritto processuale civile della convenzione di Bruxelles*, cit., 462-466; DI BLASE, *Connessione per identità di* petitum *tra cause promosse nei confronti di più convenuti*, in *Riv. dir. int. priv. proc.*, 2002, 91; EAD., *Connessione e litispendenza nella convenzione di Bruxelles*, cit., 39 *et seq.* For a comparative overview of the different notions of connectedness used at the national level, see PISANESCHI, *La connessione internazionale: struttura e funzione*, Milano, Giuffrè, 2006, 122-141.

[533] See the in-depth analysis by BIAGIONI, *La connessione attributiva di giurisdizione nel regolamento CE n. 44/2001*, Padova, Cedam, 2011, 157-158 and 162-166 (stressing the non-unitary nature of this mechanism and

However, the precise meaning of the notion of «irreconcilable judgments» for the applicability of Article 8 has been left open. With reference to violations of intellectual property rights, in a case concerning parallel breaches of IP rights (national portions of a European patent) committed in different Member States by different companies belonging to the same group, the CJEU adopted a very narrow interpretation based on the principle of territoriality and held that «in order that decisions may be regarded as contradictory it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the *same situation of law and fact*»[534]. According to the Court, neither requirement was met in the case at stake[535]: concerning the situation of fact, the defendants were different, each one operating in a different State, and the infringements they were accused of, committed in different States, were not the same[536]; concerning the situation of law, one must take into account the peculiarities of European patents, inasmuch as any infringement action must be examined in the light of the relevant national law in force in each of the States for which it was granted, so that proceedings brought before different courts in different States, in respect of acts allegedly committed in their territory, are necessarily governed by different laws[537].

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recognizing that the notion of «irreconcilable judgement» in Art. 8 is more similar to that of Art. 30 than the narrow one of Art. 45). See also CARBONE, TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, cit., 158; LEIBLE, *Art. 8*, cit., 383; SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, cit., 185; M.E. ANCEL, *Derived Special Jurisdiction (Art. 8)*, cit., 188; MARONGIU BUONAIUTI, *Litispendenza e connessione internazionale. Strumenti di coordinamento tra giurisdizioni statali in materia civile*, Napoli, Jovene, 2008, 366-377; DE CRISTOFARO, *Giurisdizione per connessione e foro del litisconsorzio passivo*, in *Resp. civ. prev.*, 2000, 1354.

[534] Case C-539/03, *Roche Nederland*, para. 26 (italics added). Similarly, already SCHURIG, *Der Konvexitätsgerichtsstand nach Art. 6 Nr. 1 EuGVVO und die Verschleifung von örtlicher und internationaler Zuständigkeit im europäischen Zivilverfahrensrecht*, in *Festschrift für Hans-Joachim Musielak zum 70. Geburtstag*, München, Beck, 2004, 506 *et seq.*; and FAWCETT, *Multi-Party Litigation in Private International Law*, in *Int. Comp. L. Quart.*, 1995, 751.

[535] At the national level, for a positive answer, see the interesting pro-holder Belgian case law referred to by PERTEGÁS, *Cross-border enforcement of patent rights*, Oxford, OUP, 2002, fn. 37 at 91. In Germany see LG Düsseldorf, 16 January 1996, 4 O 5/95, in *Unalex*, DE-319, LG Mannheim, 8 February 2002, 7 O 235/01. In the UK see *Coin Controls Ltd v Suzo International (UK) Ltd* [1997] FSR 660. For other decisions, see RÖSLER, *The Court of Jurisdiction for Joint Parties in International Patent Disputed*, cit., 388-390 and 393.

[536] Case C-539/03, *Roche Nederland*, para. 27. Conversely, the Court recognized the existence of the same factual situation in a "spider in the web" scenario, «where defendant companies, which belong to the same group, have acted in an identical or similar manner in accordance with a common policy elaborated by one of them» (para. 34). This doctrine was first outlined by the Court of Appeal of the Hague, 23 April 1998, *Expendable Grafts v Boston Scientific* [1999] FSR 352, on which see NORRGÅRD, *A Spider without a Web? Multiple Defendants in IP Litigation*, in LEIBLE, OHLY (eds.), *Intellectual Property and Private International Law*, Tübingen, Mohr Siebeck, 2009, 211.

[537] Case C-539/03, *Roche Nederland*, paras. 30-31. In this regard, see also *Sandisk Corporation v Koninklijke Philips Electronics NV & Ors* [2007] EWHC 332 (Ch), para. 39. By analogy, for competition claims, see MANKOWSKI, *Der europäische Gerichtsstand der Streitgenossenschaft aus Art. 6 Nr. 1 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, cit., 949-950; BASEDOW, HEINZE, *Kartellrechtliche Schadensersatzklagen im europaischen Gerichtsstand der Streitgenossenschaft*, cit., 76.

This decision was highly criticized because it rules out the application of Article 8 in a situation where parallel territorial IP rights are involved, on the ground that it would lead to the unfulfillment of the irreconcilability requirement whenever claims against several defendants, albeit having an identical object and based on a parallel set of facts, are governed by different laws[538]. Moreover, the underlying idea of the decision, according to which irreconcilable judgments cannot exist where different laws apply to the actions and inconsistencies can only be attributed to the differences between applicable laws, is evidently flawed[539].

This led the Court, in a series of judgments, to mitigate the consequence of such a strict interpretation and to attenuate the two requirements of the same factual and legal situation[540]. First, the CJEU ruled in *Freeport* that the fact that claims brought against a number of defendants have different legal bases does not *per se* preclude the application of Article 8[541]. Indeed, it is only one relevant factor among others to be taken into account by national courts in assessing whether there is a connection between different claims, being in any case not indispensable[542]. At a later time, in a case relating to a violation of a copyright, the Court reinforced this principle and held that a difference in legal basis between the actions does not

[538] Among many, see FAWCETT, TORREMANS, *Intellectual Property and Private International Law*, cit., 611-613; AZZI, *Les conflits de procédures*, in NOURISSAT, TREPPOZ (dir.), *Droit international privé et propriété intellectuelle: nouveau cadre, nouvelles stratégies*, Rueil-Malmaison, Lamy, 2010, 214; GONZALEZ BEILFUSS, *Is There Any Web for the Spider? Jurisdiction over Co-defendants after* Roche Nederland, in NUYTS (ed.), *International Litigation in Intellectual Property and Information Technology*, Austin, Wolter Kluwers, 2008, 84-87; DE MIGUEL ASENSIO, *Cross-Border Adjudication of Intellectual Property Rights and Competition between Jurisdictions*, in *AIDA*, 2007, 128-129; SCHLOSSER, *Auslegung des Zusammenhangs im Sinne von Art. 6 Nr. 1 EuGVVO*, in *JZ*, 2007, 305; ADOLPHSEN, *Renationalisierung von Patentstreitigkeiten in Europa*, in *IPRax*, 2007, 19-21; KUR, *A Farewell to Cross-Border Injunctions? The ECJ Decisions* GAT v Luk *and* Roche Nederland v Primus and Goldenberg, in *IIC*, 2006, 849 ; WILDERSPIN, *La compétence juridictionnelle en matière de litiges concernant la violation des droits de propriété intellectuelle*, in *Revue critique*, 2006, 791. Among the proposals for amendment presented as a response to the CJEU's judgment in *Roche Nederland*, see HEINZE, *Article 2:206: Multiple defendants*, in EUROPEAN MAX PLANCK GROUP ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, *Conflict of laws in intellectual property: the CLIP principles and commentary*, Oxford, OUP, 2013, 103.

[539] KUR, *A Farewell to Cross-Border Injunctions ?*, cit., 850; and GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, cit., 323, define respectively this argument as «manifestly deficient» and «très contestable». See also AG Trstenjak in Case C-145/10, *Eva-Maria Painer*, para. 78.

[540] See the critical overview by TORREMANS, *La propriété intellectuelle met l'article 6(1) du règlement Bruxelles I à l'épreuve*, in *Mélanges en l'honneur du professeur André Lucas*, Paris, LexisNexis, 2014, 751.

[541] Earlier, differently, C-51/97, *Réunion européenne*, and, at the national level, French Cassation, 4 July 2006, in *Revue critique*, 2007, 622; OGH, 29 June 2004, 5Ob188/03p, in *Unalex* AT-65; BGH, 23 October, 2001, in *NJW-RR*, 2002, 1149. For a critical appraisal, see HONORATI, *Concorso di responsabilità contrattuale ed extracontrattuale e giurisdizione ai sensi della convenzione di Bruxelles del 1968*, in *Riv. dir. int. priv. proc.*, 1994, 281. See also *Andrew Weir Shipping Ltd v Wartsila UK Ltd* [2004] EWHC 1284 (Comm), para. 69.

[542] Case C-98/06, *Freeport plc*, paras. 38-46, then reaffirmed in Case C-145/10, *Eva-Maria Painer*, paras. 76 and 80; and Case C-645/11, *Land Berlin*, para. 44. According to COESTER-WALTJEN, *Konnexitat und Rechtsmissbrauch zu. Art. 6 Nr. 1 EuGVVO*, in BAETGE, VON HEIN, VON HINDEN (Hrsg.), *Die richtige Ordnung: Festschrift für Jan Kropholler zum 70 Geburtstag*, cit., 751, the Court has removed «ein vermeintliches und aus materiellrechtlicher Sicht nicht verständliches Hindernis».

have a preclusive effect, in particular when the national laws on which the actions against the various defendants are based are substantially identical[543]. This entails that the more national laws are harmonized, the more likely is to invoke successfully Article 8[544].

Although the strict approach in *Roche* has consistently been reaffirmed by the CJEU, also in the recent case *Solvay*[545], it is worth stressing that the Court ultimately confirmed the newly loosened interpretation in *Land Berlin*, in the sense that what matters is that all the claims are directed at the same interest, namely, in the case at stake, the repayment of the erroneously transferred surplus amount[546]. However, the principle of legal certainty imposes to take into account that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled[547]. The assessment of national courts in this regard must then include whether the defendants did or did not act independently[548]. In particular, this last requirement, albeit vaguely defined by the CJEU and not formulated as a decisive criterion[549], represents a significant development of the *Roche* approach and may play a major role when one is confronted with action committed by different companies belonging to the same group[550].

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[543] Case C-145/10, *Eva-Maria Painer*, para. 82. The contradiction with *Roche Nederland* is evidenced by AZZI, *La Cour de justice et le droit international privé ou l'art de dire parfois tout et son contraire*, in *Mélanges en l'honneur du professeur Bernard Audit: les relations privées internationales*, Paris, LGDJ, 2013, 50-51.

[544] TORREMANS, *La propriété intellectuelle met l'article 6(1) du règlement Bruxelles I à l'épreuve*, cit., 757; HEINZE, *Article 2:206: Multiple defendants*, cit., 111; KUR, *A Farewell to Cross-Border Injunctions?*, cit., 850. According to BASEDOW, HEINZE, *Kartellrechtliche Schadensersatzklagen im europaischen Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVVO)*, cit., 76, the level of harmonizaion of EU Competition Law allows to distinguish between patent litigation and antitrust litigation.

[545] Case C-616/10, *Solvay SA*. As the *Roche* decision has never been expressly overruled, it is still valid law concerning infringement of parallel IP rights: see TREPPOZ, *Compétence internationale en matière de contrefaçon de brevet européen*, in *Revue critique*, 2013, 472; and LUND, *Verschwommene Konturen: Das Luxemburger Porträt der Konvexität des Art. 6 Nr. 1 EuGVVO*, in *RIW*, 2012, 379.

[546] Case C-645/11, *Land Berlin*, para. 47. Similarly, *FKI Engineering Ltd & Anor v De Wind Holdings Ltd & Anor* [2008] EWCA Civ 316, para. 16: claims «inextricably linked».

[547] Case C-145/10, *Eva-Maria Painer*, para. 81. With the words of TORREMANS, *Jurisdiction for cross-border intellectual property infringement cases in Europe*, cit., 1641, «This last aspect is almost a *conditio sine qua non* for the discretional application of Article 8(1)».

[548] In other words, as stressed by HEINZE, *Article 2:206: Multiple defendants*, cit., 109, Art. 8 does not apply in case of unconcerted parallel conducts, *i.e.* when the action of the anchor defendant and the co-defendant occur independently and without knowledge of one another. This aspect of foreseeability is also stressed by AG Trstenjak in Case C-145/10, *Eva-Maria Painer*, paras. 87-90 and 95-98; and *Gard Marine and Energy Ltd & Ors v Glacier Reinsurance AG* [2010] EWCA Civ 1052, para. 35.

[549] See, e.g. KOUTSOUKOU, PAVLOVA, *Der Gerichtsstand der Streitgenossenschaft bei Schadensersatzklagen wegen Verletzung des EU-Kartellrechts*, cit., 155.

[550] LUND, *Verschwommene Konturen: Das Luxemburger Porträt der Konvexität des Art. 6*, cit., 379.

2.7.3. The Application of Article 8(1) Concerning Competition Claims in the Recent CJEU's Decision in *CDC Hydrogen Peroxide*: Moving Forward Forgetting the Past

As seen above, the CJEU recently had the opportunity to deliver a decision concerning the application of Brussels I Regulation to competition law claims, thereby contributing to clarify important questions on jurisdiction that before this judgment were solved in different ways by national courts[551]. In particular, the first preliminary question submitted to the CJEU was whether Article 8(1) applies to a damages action brought jointly against undertakings having participated in different places and at different times in a single and continuous infringement, as previously found by a Commission decision, of the prohibition of anti-competitive practices provided for in EU law[552]. In fact, in the main proceeding, the case was started in Germany, where one of the chemical undertakings fined by the Commission was domiciled, and then the claims against other defendants were joined based on Article 8 of Brussels I-*bis* Regulation.

The Court recalled its previous judgment illustrated above, in particular concerning the condition that, for judgments to be regarded as irreconcilable, the divergence in the outcome of the dispute must arise in the context of the same situation of fact and law[553]. Accordingly, the Court had to analyze whether the connectedness between the different damages actions brought by the claimant was close enough to justify hearing and determining them together to avoid the risk of irreconcilable judgments. In competition disputes, these requirements are satisfied when there is a Commission's decision establishing that certain companies participated in a cartel agreement constituting a single infringement of EU competition law and holding them liable for the loss resulting from their tortious actions, so that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled[554].

Although the defendants in the main proceedings participated in the implementation of the cartel in different places and at different times, the cartel agreement amounted to a single and continuous infringement of Article 101 TFEU[555]. The Court did not elaborate in detail the

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[551] For a description of the case, see *supra* para. 2.4.

[552] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 15.

[553] *Ibid.*, para. 20. BASEDOW, HEINZE, *Kartellrechtliche Schadensersatzklagen im europaischen Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVVO)*, cit., 71-73, try to argue in favour of the irrelevance of the *Roche* requirements in competition claims, but conclude that such submission is not actually feasible.

[554] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 23-24.

[555] *Ibid.*, para 21. For a broad interpretation of the same factual situation requirement concerning groups of companies, see OGH, 14 February 2012, 5 Ob 39/11p, and the comments by KOUTSOUKOU, PAVLOVA, *Der*

requirement of the same factual situation and seems to have been convinced by the mere participation of all the defendants in the same unlawful cartel, as ascertained by the Commission[556]. Neither did the Court focus on the second requirement, concerning the same legal situation: the Court, in fact, limited itself in affirming that liability of co-cartelists is governed by national law, which, by virtue of the private international law rules of the court seized, provides the requirements for holding those participating in an unlawful cartel liable in tort[557]. Nonetheless, even without considering that the right to damages and the unlawfulness of the anti-competitive conduct stem directly from EU Law, the Court reached the conclusion that such a diversity is not an obstacle to meet the "same legal situation" requirement[558].

On the contrary, the pre-directive great variety of national laws determining the conditions for holding the participants of the unlawful cartel liable in tort is a manifestation of the risk of irreconcilable judgement if separate actions against several undertakings domiciled in different States were brought in parallel before the courts of different Member States by the same party allegedly adversely affected by the cartel agreement[559]. In particular, the Court stressed that the differences in national liability regimes do not prevent the application of Article 8, insofar as the defendants could foresee that they might be sued in the Member State where at least one of them is domiciled. This last condition was fulfilled in the case at stake because all the

Gerichtsstand der Streitgenossenschaft bei Schadensersatzklagen wegen Verletzung des EU-Kartellrechts, cit., 157-158.

[556] This results also from the opinion of AG Jääskinen, para. 65, who make reference to the Commission decision when affirming that the single and continuous infringement had been committed by the companies sued by CDC and that the conduct in which the other co-participants had engaged could be attributed to every participant as a co-offender, irrespective of their own individual contribution, so that every author of the infringement is liable for damages for the tortious conduct of the co-authors.

[557] Indeed, as already highlighted *supra* at para. 3.1, according to CJEU's decisions *Courage* and *Manfredi* national rules have only to comply with the EU principles of equivalence and effectiveness.

[558] In the national case law, see Rotterdam District Court 17 July 2013, *Stichting Elevator Cartel Claim v Kone c.s.*, NL:RBROT:2013:5504, para. 5.21. Stressing the relevance of the entry into force of the Rome II Regulation, see BASEDOW, HEINZE, *Kartellrechtliche Schadensersatzklagen im europaischen Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVVO)*, cit., 83; BÖRGER, *Internationale Zuständigkeit für kartellprivatrechtliche Schadenersatzklagen nach Art. 6 Nr. 1 EuGVO*, cit., 63 and 69-70. MANKOWSKI, *Der europäische Gerichtsstand der Streitgenossenschaft aus Art. 6 Nr. 1 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, cit., 949, seems to be contrary, if *Roche* is applied strictly.

[559] Case C-352/13, *Cartel Damage Claims (CDC)*, paras. 22 and 25. According to AG Jääskinen, paras. 69 and 71, in case of joint liability of multiple perpetrators, proceedings in different Member States would create the risk of irreconcilable judgments. In the context of follow-on claims, it is not sufficient to affirm that the key issue concerning the existence of the infringement has been bindingly ascertained by the Commission in order to avoid the risk of irreconcilable judgements: NEGRI, *Il cartello della gomma giunge alla Court of Appeal (ancora sul foro del litisconsorzio passivo)*, in *Int'l Lis*, 2011, 22; WAGNER, *Art. 6 EuGVVO*, in STEIN, JONAS, *ZPO*, cit., para. 37.

defendants were addressees of the Commission decision and so could expect to be sued before the courts of a Member State in which another addressee is domiciled[560].

The first impression resulting from the reading of the decision is that the Court deals with the requirements of "same factual and legal situation" at the same time, treating them together and thus losing their specificity[561]. This appears to be scatterbrained and makes the Courts' reasoning not convincing[562]. More precisely, the analysis of the CJEU – both in fact and in law – is entirely built upon a legal construction, which is the binding ascertainment by the Commission of a single and continuous infringement of EU competition law[563], and does not take into account that the infringement is only one element of the damages claim. Indeed, other elements, such as causality and *an* and *quantum* of damages, are not covered by the Commission decision, although their determination lies at the heart of a damages claim[564].

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[560] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 24. See also AG Jääskinen, para. 67. The same conclusion had been reached by the District Court of The Hague, 1 May 2013, *CDC Project 14 SA v Shell Petroleum NV & Ors*, NL:RBDHA:2013:CA1870, para. 4.19, and Midden-Nederland District Court, 27 November 2013, NL:RBMNE:2013:5978, where the foreseeability requirement was considered to be met on the ground that all defendants were addressee of the Commission decision concerning the *Paraffin Wax* cartel, some as direct participants in the cartel, others as parent companies which, albeit non participating directly in the infringement, were fined by the Commission because they directed the policy of the subsidiaries under the single economic entity jurisprudence. See also Limburg District Court, 25 February 2015, *Deutsche Bahn AG et al. v Nedri Spanstaal BV et al.*, NL:RBLIM:2015:1791 (stressing that not only the anchor defendant participated directly in the cartel but also that several cartel meetings were held in the Netherlands).

[561] STADLER, *Schadensersatzklagen im Kartellrecht – Forum shopping welcome!*, cit., 1141; EAD., *Art. 8 EuGVVO nF*, in MUSIELAK, VOIT, *ZPO Kommentar*[13], München, Franz Vahlen, 2016, para. 3. Indeed, as stressed by HESS, *Europäisches Zivilprozessrecht*, Heidelberg, C.F. Müller, 2010, § 6 para. 85, both criteria must be met cumulatively. For a detailed analysis of these requirements, concerning defendants addressed by the Commission, see LUND, *Der Gerichtsstand der Streitgenossenschaft im europäischen Zivilprozessrecht*, cit., 241-268.

[562] Critically, see HARMS, SANNER, SCHMIDT, *EuGVVO: Gerichtsstand bei Kartellschadensersatzklagen*, cit., 586; and VON HEIN, *EuGH: Zuständigkeitskonzentration für Klagen wegen Kartellschaden gegen mehrere Kartellbeteiligte aus verschiedenen EU-Staaten*, in *LMK*, 2015, 373398. On the contrary, HAVU, *Private Claims Based on EU Competition Law. Jurisdictional Issues and Effective Enforcement*, in *Maastricht J.*, 2015, 886 speaks of «welcome development».

[563] MÄSCH, *Blondes Have More Fun (or Have They?)*, cit., 286. In this regard, it is important to stress the criticism arisen against the ascertainment by the Commission of "single and continuous infringements", due to the fact that this concept has been strechted too far: RILEY, *Revisiting the Single and Continuous Infringement of Article 101: The Significance of* ANIC *in a New Era of Cartel Detection and Analysis*, in *World Comp.*, 2014, 293; BAILEY, *Single, Overall Agreement in EU Competition Law*, in *CMLRev.*, 2010, 473; SEIFERT *The Single Complex and Continuous Infringement – "Effect or Utilitarianism?"*, in *Eur. Comp. L. Rev.*, 2009, 546; JOSHUA, *Single Continuous Infringement of Article 81 EC: Has the Commission Stretched the Concept Beyond the Limit of its Logic?*, in *Eur. Comp. J.*, 2009, 451. For a strict interpretation of the factual requirement, see Rotterdam District Court, 17 July 2013, NL:RBROT:2013:5504, stressing that differences existed relating to the conduct of each of the national cartels ascertained by the Commission, in particular concerning i) the manner in which competition was eliminated; ii) the periods and the duration of agreements; iii) specific products and services constituting the relevant market. In the sense that the *Roche* judgment indicates a strict interpretation, see BÖRGER, *Internationale Zuständigkeit für kartellprivatrechtliche Schadenersatzklagen nach Art. 6 Nr. 1 EuGVO*, cit., 68-69.

[564] In the sense that the reference to the Commission's decision does not solve all problems, see MANKOWSKI, *Der europäische Gerichtsstand der Streitgenossenschaft aus Art. 6 Nr. 1 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, cit., 949; BASEDOW, HEINZE, *Kartellrechtliche Schadensersatzklagen im europaischen*

Then the Court moves from the assumption that the courts of different Member States could assess the claims according to different legal systems. This is only mentioned about the risk of irreconcilable judgment, while there is not any further explanation concerning the requirement of the same legal situation, which is fully disregarded by the CJEU. Instead, the relevance attributed to the foreseeability requirement ends up with a clear fade-out of the same legal situation requirement, whose importance seems to be replaced by the common or at least concerted practice by the defendants. This is by far the most interesting part of the decision, in particular concerning the upgrade of foreseeability requirement in the assessment of the "close connection" if compared with the previous decision in *Painer*. Indeed, in *CDC Hydrogen Peroxide* the Court does not limit itself in reminding the relevance of this criterion, but goes forward in providing when this criterion is met when it comes to competition claim, *i.e.* in the case of a binding decision of the Commission finding there to have been a single infringement of EU law and holding each participant liable for the loss resulting from the tortious actions of those participating in the infringement[565].

However, also in this case there could be problems relating to the principle of legal certainty; indeed, as correctly stated by some authors, cartel members should be able to foresee that they might be sued in any Member States where one of them is domiciled at the time of the conclusion and implementation of the unlawful cartel agreement and not, as the CJEU suggests, at the time the Commission ascertains the anti-competitive conduct and fines the infringers[566]. *In concreto*, foreseeability alone does not represent a viable solution and may result acceptable only for follow-on actions, but it does not exonerate the CJEU from providing manageable criteria for related claims, where the risk of conflicting decisions is not completely excluded as a prerequisite[567].

Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVVO), cit., 73-74. Moreover, as stressed by HARMS, SANNER, SCHMIDT, *EuGVVO: Gerichtsstand bei Kartellschadensersatzklagen*, cit., 586, if the focus must be only on the Commission decision, actually there would be no risk of irreconcilable judgements, because national courts would be bound by the Commission factual ascertainment. In this regard, see also BÖRGER, *Internationale Zuständigkeit für kartellprivatrechtliche Schadenersatzklagen nach Art. 6 Nr. 1 EuGVO*, cit., 66 and 73.

[565] Case C-352/13, *Cartel Damage Claims (CDC)*, para. 24.

[566] WURMNEST, *International jurisdiction in competition damages cases under the Brussels I Regulation:* CDC Hydrogen Peroxide, cit., 236.

[567] STADLER, *Schadensersatzklagen im Kartellrecht – Forum shopping welcome!*, cit., 1142. Critically, see also MÄSCH, *Blondes Have More Fun (or Have They?)*, cit., 287. This point is developed by MANKOWSKI, *Der europäische Gerichtsstand der Streitgenossenschaft aus Art. 6 Nr. 1 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, cit., 949, according to whom an actual subjective knowledge (of the extension of the cartel, the market affected and the companies involved) is not required, but a mere foreseeability is sufficient, to be intended as a «Möglichkeit zu subjektiver Kenntnisnahme».

From the above, it appears that the reasoning of the decision is hardly justifiable and reconcilable with the CJEU's case law, but probably this was the only way to conclude that in such cases the two twin requirements of *Roche* were met. However, considering the evolution of the CJEU's jurisprudence illustrated in the previous paragraph (from *Roche* to *Painer*)[568] and a significant number of national decisions already dealing with the application of *forum connexitatis* in competition claims[569], the victim-friendly interpretation of the Court does not surprise and turns out to be very pragmatic[570]. The centralization realized by Article 8, in fact, allows alleged victims to shop for the best forum, by establishing jurisdiction before the courts of any cartelist's domicile[571], and to request the application of the *lex fori* against all defendants under Article 6(3)(b) of Rome II Regulation[572].

2.7.4. The Liberal Interpretation of Article 8(1) before National Courts

As is evident from the preceding, a very common scenario in competition law is that the infringement is not committed by one or more independent companies, but by groups of companies operating in different Member States. In this case, beyond cases like *CDC Hydrogen Peroxide* where the damage claim is brought against one of the companies directly fined by the Commission, it may happen that an alleged victim brings the action against a company that is not addressed by the decision but belongs to the same group which was held liable.

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[568] The sense of this evolution is well illustrated by WELLER, *Kartellprivatrechliche Klagen im Europäischen Prozessrecht: "Private Enforcement" und die Brüssel I-VO*, cit., 94-97, according to whom the requirement of the same legal situation would not be met following the strict interpretation in Roche, but the question would be different under the CJEU's reasoning in *Painer*.

[569] See in particular the prior Dutch case law: BOSCH *et al.*, *Netherlands*, in KNABLE GOTTS (ed.), *The Private Competition Enforcement Review*[9], London, Law Business Research, 2016, 259-261; and KUIJPERS *et al.*, *Actions for Damages in the Netherlands, the United Kingdom, and Germany*, in *J. Eur. Comp. L Pract.*, 2-2015, 2-3.

[570] WURMNEST, *International jurisdiction in competition damages cases under the Brussels I Regulation*, cit., 234; MEHRBREY, JAEGER, *EuGH-Entscheidung klärt internationale Zuständigkeit von nationalen Zivilgerichten in Kartellschadensersatzfällen*, cit., 149; GEISS, DANIEL, *Cartel Damage Claims (CDC) Hydrogen Peroxide Sa v Akzo Noble NV and Others*, cit., 435. It also confirms

[571] STADLER, *Schadensersatzklagen im Kartellrecht – Forum shopping welcome!*, cit., 1144. Similarly, MEHRBREY, JAEGER, *EuGH-Entscheidung klärt internationale Zuständigkeit von nationalen Zivilgerichten in Kartellschadensersatzfällen*, cit., 149; and WELLER, *Kartellprivatrechliche Klagen im Europäischen Prozessrecht: "Private Enforcement" und die Brüssel I-VO*, cit., 101.

[572] WELLER, WÄSCHLE, *Kommentar zu EuGH vom 21.05.2015 - Rs. C-352/13*, in *RIW*, 2015, 605; MANKOWSKI, *Das neue Internationale Kartellrecht des Art. 6 Abs. 3 der Rom II-Verordnung*, cit., 190-192. Under a strict interpretation, only the application of *lex fori* would allow to meet the same legal situation requirement: see SCHOLZ, RIXEN, *Die neue europäische Kollisionsnorm für außervertragliche Schuldverhältnisse aus wettbewerbsbeschränkendem Verhalten*, in *EuZW*, 2008, 332.

The CJEU did not say anything about the application of the foreseeability criterion concerning stand-alone actions[573]. However, it seems that Article 8(1) may apply also in cases of defendants not addressed by the infringement decision, provided that the foreseeability threshold is met[574]. A question, then, arises as to whether non-addressed companies may be used as an anchor defendant to attract litigation before one and the same court, which is not necessarily closely connected with the dispute overall considered. This issue is a manifestation of a more general concern relating to the fact that Article 8(1) does not designate the "most appropriate" forum, nor does it require a specific procedural link between the claims, such as that the anchor claim must be more important or more central than the others[575]. The lack of such indication has consequences also for competition claims, as it aggravates the risk of abuses and opens the doors to *forum shopping*[576].

The leading case in this context is *Roche Products Ltd. & Ors v Provimi Ltd*[577], which arose out of the Commission's 2001 decision in the *Vitamins* cartel[578]. There were two sets of proceedings, against companies in the Roche and Aventis groups[579], each one consisting of two actions: the first one was brought by an English company (Provimi UK), while the second by

[573] NEGRI, *Una pronuncia a tutto campo sui criteri di allocazione della competenza giurisdizionale nel* private antitrust enforcement *transfrontaliero*, cit., 80. On the relevance of the Commission's decision, see W.H. ROTH, *Internationale Zuständigkeit bei Kartelldeliktslagen*, cit., 322.

[574] Along this line, see WIEGANDT, *Kommentar zu EuGH vom 21.05.2015*, cit., 159.

[575] Among many, see MUIR WATT, *Art. 8*, cit., 383; BRIGGS, *Civil Jurisdiction and Judgments*, cit., 279; LUND, *Der Gerichtsstand der Streitgenossenschaft im europäischen Zivilprozessrecht*, cit., 132-133; MANKOWSKI, *Der europäische Gerichtsstand der Streitgenossenschaft aus Art. 6 Nr. 1 EuGVVO bei Schadensersatzklagen bei Kartelldelikten*, cit., 947; TANG, *Multiple defendants in the European Jurisdiction Regulation*, cit., 92-93.

[576] In order to avoid or diminuish risk of abuses, national courts added similar requirements for the claim againt the anchor defendant. French courts, for instance, require the defendant not to be fictive: French Court of Cassation, 8 January 2002, in *Revue critique*, 2003, 127. See HUET, in *Juris-Classeur dr. int. privé*, 1988, fasc. 581-D, n. 59 («defendeur reel et sérieux, c'est-à-dire un défendeur personellement interessé au litige»). In Germany, see OLG Stuttgart, 31 July 2012, 5 U 150/11. English courts held that claimant has to establish a «real issue that the plaintiff may reasonably ask the court to try»: see *The Rewia* [1991] 2 Lloyd's Rep. 325. Similarly, requiring a "good arguable case", a "serious issue" as to the facts essential to establish jurisdiction: see *Brown & Ors v Innovatorone Plc & Ors* [2010] EWHC 2281 (Comm), paras. 24; *FKI Engineering and FKI plc v De Wind* [2007] EWHC 72 (Comm) para. 32; *ET Plus SA v Welter* [2005] EWHC 2112 (Comm), para. 59. See STONE, *EU Private International Law*, cit., 120-121; COESTER-WALTJEN, *Konnexitat und Rechtsmissbrauch*, cit., 757; FAWCETT, CARRUTHERS, *Ceshire, North & Fawcett. Private International Law*, cit., 373; MÄSCH, *Vitamine für Kartellopfer*, cit., 514; MERCER, LAYTON, *European Civil Practice*, cit., 508.

[577] [2003] EWHC 961. See BULST, *The Provimi Decision of the High Court: Beginnings of Private Antitrust Litigation in Europe*, in *Eur. Bus. Org. Rev.*, 2003, 623; MÄSCH, *Vitamine für Kartellopfer*, cit., 509; NEGRI, *Il "cartello delle vitamine" e la giurisdizione per connessione nelle azioni risarcitorie antitrust*, cit., 143.

[578] Commission Decision (EC) 2003/2, Case COMP/E-1/37.512 - *Vitamins* [2003] OJ L 6/1. For an overview of the complex investigations, see FIRST, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, in *Antitrust L. J.*, 2001, 711.

[579] For the sake of simplicity, considering that the two groups of proceedings raised the same or very similar legal questions, the focus will be on the actions brought against the Roche group.

two companies belonging to the Trouw group, Trouw UK and Trouw Germany. The three claimants, all direct purchasers of vitamins from companies within the undertakings which participated in the cartel, sued four companies of the Roche group, namely the English subsidiary of Roche Switzerland and two other subsidiaries incorporated in Germany and Switzerland, in addition to the Swiss parent company that was the only company to be addressed by the Commission decision[580]. Jurisdiction against Roche UK was based on Articles 2 and 5(3) of the old Brussels I Regulation, while 6(1) of the Brussels Regulation and Lugano Convention was invoked cumulatively against the other defendants.

In this highly complex context, applications were made to strike out the action brought by Trouw Germany against Roche UK, from which the claimant did not purchase any vitamins during the relevant period, on the basis that the claim had no prospect of success and was hopeless on the causation grounds, since Roche UK was not an addressee of the Commission decision. Moreover, according to the defendant, there was no allegation that it had knowledge (actual, implied or imputed) of the infringing agreement and that was aware or should have been conscious of the state of mind of the parent company[581]. A successful challenge of the jurisdiction against the UK-domiciled company would have in turn resulted in rejecting the application of the then Article 6(1) against the other co-defendants[582].

The High Court dismissed all the challenges and held that Trouw Germany had an arguable claim that the English defendant had breached a statutory duty not to infringe the then Article 81 EC Treaty, as it was part of the infringing undertaking and participated in the implementation of the cartel[583]. Moreover, although Roche UK's participation in the cartel did not cause any

[580] In this regard, it is worth stressing that the Commission's practice is not always to specify in the operative part all the legal entities which form the "undertaking" which has been found to infringe. Where, for example, there is a corporate group with numerous subsidiaries, all of whom form a single infringing undertaking, the Commission prefers specifying the ultimate parent company, rather than listing each and every subsidiary involved in the unlawful conduct. This argument was raised in *Emerson Electric Co v Mersen UK Portslade Ltd* [2011] CAT 4, para. 38. However, according to a strict interpretation, a Commission decision is legally binding in its entirety only upon those to whom it is addressed: see *Inntrepreneur Pub Company (CPC) & Ors v. Crehan* [2006] UKHL 38, para. 6.

[581] *Roche Products Ltd. & Ors v Provimi Ltd*, para. 24 (there was no concurrence of wills on the part of the subsidiary). On the contrary, according to the claimant (para. 23.6), Roche UK was part of the undertaking that was held to have infringed Art. 81 and was in fact participating in the infringement by implementing the infringing agreements. Then, it must have been committing a breach of statutory duty under English law, albeit as one of a number of tortfeasors, being it immaterial whether it sold vitamins to the claimant.

[582] The parties accepted there was a proper case for jurisdiction under Art. 6(1) concerning the actions brought by the English claimants, with whom the domiciled defendant had direct contractual relationships: WILDERSPIN, *Jurisdiction Issues: Brussels I Regulation Articles 6(1), 23, 27 and 28 in Antitrust Litigation*, cit., 46.

[583] *Roche Products Ltd. & Ors v Provimi Ltd*, paras. 30-36. Very interestingly, based on this submission, recently the CAT considered for the purpose of Art. 5(3) Brussels I Regulation purchases by the claimant from

loss to the claimant, without the cartel the latter might have been able to buy vitamins from another group at a lower price than the price fixed by the cartel itself[584]. This conclusion – reached irrespective of the fact that Roche UK was not addressed by the Commission decision and that there was no allegation by the claimant that the defendant knowingly implemented the cartel – was sufficient to establish the English subsidiary as an anchor defendant, thus allowing the other entities within the Roche group to be sued in England as co-defendants to the same claim. Indeed, the High Court held that there was "a good arguable case" that the connectedness test was met.

The underlying rationale of the *Provimi* decision is the idea of "implementation" of the cartel, according to which all the companies that implemented in the cartel, entered into by the parent company, on a given market by applying cartel prices are considered as joint tortfeasors and are held jointly liable for the entire damage suffered, so that the conscious participation in the cartel is transferred from the parent company to the single economic entity considered as a whole[585]. In other words, the Court considered that, by virtue of its membership in the undertaking, Roche UK had implicit knowledge of the infringement, without asking whether the latter could have been held responsible for the conduct of its parent company, and especially without ascertaining that the undertaking of which the defendant was part was in fact covered by the Commission decision[586]. In this way, the German claimant exploited the full potential of

undertakings of which the defendants were a part to be direct purchases: see *Deutsche Bahn AG & Ors v Morgan Advanced Materials Plc* & Ors [2013] CAT 18, para. 44(1).

[584] *Roche Products Ltd. & Ors v Provimi Ltd*, paras. 39-40. This interpretation actually stretches the notion of causation to its logical limit. Indeed, this same point was answered in the opposite by US Court of Appeal in *Empagran v. F. Hoffmann-LaRoche*, 417 F.3d 1267 (D.C. Cir. 2005), applying a more stringent test that a simple *but-for* test of causation. See CARRIER, *A Tort-Based Causation Framework For Antitrust Analysis*, in *Antitrust L. J.*, 2011, 401; TUCKER, *In The Wake of* Empagran *– Lights Out on Foreign Activity Falling Under Sherman Act Jurisdiction? Courts Carve Out A Prevailing Standard*, in *Fordham J. Corp. Fin. L.*, 2009, 807.

[585] NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II*, cit., 122. The author criticizes the reference by the Court to the *Wood Pulp* decision, which highlighted that an infringement consists of two elements: the formation of the agreement and the implementation thereof. Indeed, that decision was delivered in a different context, that of the extraterritorial application of EU Competition Law, and was aimed at understating whether the latter applied in cases where companies incorporated in non-EU States committed the infringement. In this regard, see also VAN LEUKEN, *Parental Liability for Cartel Infringements Committed by Wholly Owned Subsidiaries*, cit., 525-527 (stressing that the CJEU's decision in *Akzo*, as it is conventionally (wrongly) intended, implies that the anti-competitive conduct of the subsidiary should be attributed to all legal entities within the undertaking and not only to the parent company).

[586] An opposite interpretation, more careful to the CJEU's rationale of parental liability, may be found in District Court of Eastern Netherlands, 16 January 2013, *TenneT v ABB*, NL:RBONE:2013:BZ0403, para. 4.10; and French Court of Cassation, 15 November 2011, n. 10-21701. More generally, on what the English Court could have said, but did not, see BULST, *The Provimi Decision of the High Court: Beginnings of Private Antitrust Litigation in Europe*, cit., 636-639 (according to whom the question is not whether there is a breach, but who is

Article 6(1) and centered all the litigation before a court that had not any particular proximity with the damage thereby suffered, entirely located in another country[587].

All these arguments, however, have to be balanced with the problems raised by the scope of application of Article 8(1) Brussels I and, more generally, with the overall objectives pursued by Brussels I Regulation[588]. Indeed, such interpretation would have the merit to concentrate the litigation, but sacrificing the proximity and the foreseeability of the competent court and multiplying the courts possibly competent exponentially[589]. More precisely, the use of the concept of "undertaking" by the High Court – *de facto* resulting into an imputation of knowledge – leads to the result the almost any Member State becomes a possible venue for an action brought against a large multinational group with a pan-European presence, thus opening the doors to an almost unlimited *forum shopping*[590]. As a result, this interpretation is hardly compatible with the requirement of foreseeability set out by the CJEU in the recent case *CDC Hydrogen Peroxide*[591].

However, criticism against the High Court's reasoning does not amount to a general rejection of the recourse to the single economic entity concerning private claims. This may, in fact, result to be very helpful to ensure the effectiveness of EU competition law, by bringing deep pocket claims against parent companies[592]. However, one thing is to attribute the behaviour of the

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responsible for it in private law); and NEGRI, *Il "cartello delle vitamine" e la giurisdizione per connessione nelle azioni risarcitorie antitrust,* cit., 147.

[587] FRATEA, *Il* private enforcement *del diritto della concorrenza dell'Unione europea*, cit., 132 and 144-145.

[588] FITCHEN, *Allocating Jurisdiction in Private Competition Law Claims within the EU*, cit., 395.

[589] See, e.g. IGARTUA ARREGUI, *The Commission's Green Paper on damages Claims: some thoughts on jurisdiction and applicable law*, in RAFFAELLI (ed.), *Antitrust between EC law and national law: VII Conference European Lawyers Union*, Bruxelles-Milano, Bruylant-Giuffrè, 2007, 364-365 and 368. Predictability and avoiding multiplication were actually at the base of the CJEU's decision in Case C-539/03, *Roche Nederland*, paras. 37-38; and Case C-98/06, *Freeport plc*, para. 36.

[590] ASHTON, HENRY, *Competition Damages Actions in the EU. Law and Practice*, cit., 183.

[591] In this sense WURMNEST, *International jurisdiction in competition damages cases under the Brussels I Regulation:* CDC Hydrogen Peroxide, cit., 238. See also BASEDOW, HEINZE, *Kartellrechtliche Schadensersatzklagen im europaischen Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVVO)*, cit., 79.

[592] KOUTSOUKOU, PAVLOVA, *Der Gerichtsstand der Streitgenossenschaft bei Schadensersatzklagen wegen Verletzung des EU-Kartellrechts*, cit., 159-160 (affirming that the CJEU's case law on parental liability works a minimum requirement for national systems and that such joint liability entails the risk or irreconcilable judgments and it is sufficient to meet the requirements of the same situation of fact and law). This upward attribution of responsibility, when applied to private claim, could be a viable solution to attract foreign parent company. In this regard, see LG Dortmund, 1 April 2004, 13 O 55/02 Kart, in *WuW*, 2004, 1182, where the parent company, addressed by the Commission, was sued to pay damages resulting from a contractual relation between the claimant and the German subsidiary (KÖHLER, *Kartellverbot und Schadensersatz*, in *GRUR*, 2004, 99 *et seq.*; BULST, *Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht*, cit., 403 *et seq.*). Similarly, it was accepted that parent companies, addressed by the Commission's decision, can be used as anchor defendants to establish the jurisdiction for the alleged members of the cartel, even if the parent company did not directly participate in the infringement of its subsidiaries: see Amsterdam District Court, 4 June 2014, *CDC*

subsidiary to the parent, as it happens in the context public enforcement proceedings, provided that both companies form a single economic unit; another thing is the factual scenario in *Provimi*, where the behaviour of the parent is attributed to the subsidiary, which is involved in the following litigation and is sued as the anchor defendant[593].

The so-called Provimi point was challenged unsuccessfully in *Cooper Tire & Rubber Company v Shell Chemicals UK Limited*[594], a case related to a follow-on action from the Commission's cartel decision in synthetic rubber[595]. The factual context was similar to Provimi, considered that none of the addressees of the Commission decision was English, with the only difference that in this case there was a relatively amount of sale by some of the claimants from the anchor defendant. The question of law was instead identical – *i.e.* whether a claimant has a claim against non-addressees who are subsidiaries of certain addressees of a Commission infringement decision – and led to the same result. Mr Justice Teare, in fact, confirmed *Provimi* and held that since the legal entity which makes the offending agreement has knowledge of it, the concept of an undertaking as a single economic entity implies that the undertaking has knowledge of the agreement, with no further need to allege and prove that knowledge on the subsidiaries which implemented it[596]. Accordingly, even though it was plain that the anchor defendants had been selected as a tactical device to establish jurisdiction in the UK, he concluded that the court had jurisdiction under Article 6(1) of the old Brussels I Regulation[597].

The issue, however, was reopened before the Court of Appeal, which refused to grant a strike-out application lodged by some of the defendants, because the pleadings were sufficiently

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Project 13 SA v Akzo Nobel NV et al., NL:RBAMS:2014:3190, para. 2.16 (also considering that the anchor defendant's name appeared on the co-defendant's invoice as its parent company), then confirmed by the Amsterdam Court of Appeal, 21 July 2015, NL:GHAMS:2015:3006, paras. 2.9-2.10, which is the first EU decision applying the CJEU's judgments in *CDC Hydrogen Peroxide*. More generally, on cases where the parent company of a firm addressed by the Commission is sued as anchor defendant, see LUND, *Der Gerichtsstand der Streitgenossenschaft im europäischen Zivilprozessrecht*, cit., 268-284.

[593] Using the words of ASHTON, HENRY, *Competition Damages Actions in the EU. Law and Practice*, cit., 184, «assuming influence on the part of the parent over the subsidiary is as very different matter from assuming influence on the part of the subsidiary over the parent».

[594] *Cooper Tire & Rubber Co & Ors v Shell Chemicals UK Ltd & Ors* [2009] EWHC 2609 (Comm). It is worth stressing that a parallel proceeding was started in Italy before the Tribunal of Milan by companies in the Eni Group for declaration that the cartel did not exist and that no anti-competitive behaviour was implemented in relation to the activities covered by the Commission's decision. This action was meant as an "Italian torpedo", aimed at delaying the matter in Italian courts in order to obtain a stay of subsequent damages actions brought in the UK by the cartel victims: see STELLA, *La prima pronuncia di un Tribunale italiano in un caso di cd.* follow-on antitrust litigation *e sul valore delle decisioni della Commission CE in materia*, in *Int'l Lis*, 2009, 149.

[595] Commission decision, COMP/F/38.638 – *Butadiene Rubber and Emulsion Styrene Butadiene Rubber* [2008] OJ C7/11.

[596] *Cooper Tire* (High Court), para. 50.

[597] *Ibid.*, para. 64.

broadly drafted to encompass the possibility that the English-domiciled subsidiaries had knowledge of, or were party to, the cartel[598]. The court considered that, since cartel agreements tend to be secret by their very nature, the strength of the claimant's argument as to the knowledge possessed by the English subsidiaries cannot be assessed until after disclosure of documents[599]. However, albeit being unnecessary to resort to the Provimi point, Lord Justice Longmore put it into question and revisited it. In particular, he held that:

> «As to the Provimi point, we can readily agree that, as Aikens J said, it is "arguable". We would, however, add that it is also arguable the other way. Although one can see that a parent company should be liable for what its subsidiary has done on the basis that a parent company is presumed to be able to exercise (and actually exercise) decisive influence over a subsidiary, it is by no means obvious even in an Article 81 context that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. Nor does the Provimi point sit comfortably with the apparent practice of the Commission, when it exercises its power to fine, to single out those who are primarily responsible or their parent companies rather than to impose a fine on all the entities of the relevant undertaking[600].

More recent attempts by UK defendants to challenge the downward attribution of responsibility from a parent to its subsidiary realized by the so-called Provimi point have been unsuccessful too, notably in the recent Court of Appeal judgment in *Toshiba Carrier*[601], which

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[598] *Cooper Tire & Rubber Company Europe Ltd & Ors v Dow Deutschland Inc & Ors* [2010] EWCA 864, paras. 38-43. In this regard, see NEGRI, *Il cartello della gomma giunge alla Court of Appeal (ancora sul foro del litisconsorzio passivo)*, cit., 19 (stressing that the Court of Appeal gets around the problem by reinterpreting the claimant's claim and reading it as it was affirming the conscious participation of the anchor defendant.

[599] *Cooper Tire* (Appeal), para. 43. Similarly, *KME Yorkshire Ltd v Toshiba Carrier UK Ltd* [2012] EWCA Civ 1190, para. 32; *Bord NA Mona Horticulture Ltd & Anor v British Polythene Industries Plc & Ors*, para. 30.

[600] *Cooper Tire* (Appeal), para. 45.

[601] Following the first-instance decision, where the Chancellor of the High Court concluded that the decisions of Aikens J in *Provimi* and Teare J in *Cooper Tire* were not plainly wrong, the Court of Appeal held that the Provimi point did not arise in that case because the claimants had made a stand-alone claim against the UK subsidiary alleging that it participated in, and implemented, the cartel arrangements with knowledge of the cartel agreement. However, he affirmed *obiter* that, save in the case where the parent company exercises a decisive influence over its subsidiary – or a non-parent member of the group over another member – there is no scope for imputation of knowledge, intent or unlawful conduct: see *KME Yorkshire Ltd v Toshiba Carrier UK Ltd*, para. 37. Very interestingly also the decision on the application for a permission to appeal delivered by Lord Justice Kitchin, who affirmed that even though, in some cases, it may be sufficient to allege that the UK-domiciled anchor defendants were parties or aware of the anti-competitive conduct, this is not necessarily so in all cases, so that if allegations are based on nothing more than mere speculation, it is at least arguable that the claim should not be

confirmed the doubts already raised by the Court of Appeal in *Cooper Tire*[602], and in the first-instance *Nokia* judgment[603]. This latter case, in particular, raised again issues concerning how much detail of the UK subsidiary's knowledge or implementation of the cartel must be pleaded to anchor the claim in the jurisdiction[604]. Mr. Justice Sales, however, confirmed the previous line of case law and found that the claim was sufficiently pleaded. Interestingly, he held that, as a matter of EU law, a damages claim can be brought against a member of a participating undertaking which implemented the cartel arrangements, albeit without knowledge of the cartel, whenever there is some significant element of influence or control by a member of the undertaking which does have knowledge of the cartel over the activities of the implementing member of the undertaking[605].

As a result of the decisions mentioned above, it is possible to state that Article 8(1) of the Brussels I-*bis* Regulation raises complex issues in competition law claims involving conducts realized by companies belonging to a group and that the evolution of the jurisprudence was not helpful in bringing more certainty[606]. Interestingly enough, the Competition Appeal Tribunal[607]

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allowed to proceed merely on the basis that something might turn up on disclosure (*Toshiba Carrier UK Ltd and others v KME Yorkshire Ltd and others* [2012] EWCA Civ 169, para. 30).

[602] Both decisions seem to accept as a principle that the claimants must prove the anchor defendant's knowledge of the cartel agreement: see FRATEA, *Il* private enforcement *del diritto della concorrenza dell'Unione europea*, cit., 139-140; and DANOV, *Jurisdiction in Cross-Border EU Competition Law Cases: Some Specific Issues Requiring Specific Solutions*, cit., 177. According to NEGRI, *Il cartello della gomma giunge alla Court of Appeal (ancora sul foro del litisconsorzio passivo)*, cit., 20, this should mark the end of the Provimi point.

[603] *Nokia Corporation v AU Optronics Corporation & Ors* [2012] EWHC 731 (Ch), following Commission decision of 8 December 2010, case COMP/39.309 – *Liquid Crystal Displays (LCD)*.

[604] In particular, the claimants submitted that the *Provimi* point did not take into account the CJEU Case C-196/99 P, *Siderurgica Aristrain Madrid SL* [2003] ECR I-11005, according to which the simple fact that the share capital of two separate commercial companies is held by the same legal person or the same family is insufficient, in itself, to establish that those two companies are an economic unit. This submission, rejected by the High Court, is instead followed by FRATEA, *Cross-border damage antitrust claims and rules on jurisdiction: a real plaintiff's paradise?*, cit., 19-23.

[605] *Nokia* Corporation, para. 82.

[606] For instance, in *Tesco Stores Ltd & Ors v Mastercard Incorporated & Ors* [2015] EWHC 1145 (Ch), para. 76, Mrs Justice Asplin affirmed *obiter* that responsibility for an infringement within a single economic entity is not based upon strict liability, *i.e.* the mere membership of the entity, but requires something more which may be decisive influence. In *DSG Retail Ltd & Ors v Mastercard Incorporated & Ors* [2015] EWHC 3673 (Ch), para. 66, Mr Justice Barling held that the issues raised in *Provimi* and *Cooper Tire* remain open questions.

[607] It should be noted that, at the time of the decision, as made clear by Section 47(10) of the Competition Act 1998, follow-on actions might be brought either before the civil court or before the Competition Appeal Tribunal (CAT). Claims in the CAT are brought under Section 47A of the Competition Act, which permits a person who has suffered loss or damage as a result of a competition law infringement to bring an action for damages or any other monetary claim. However, claims that combined standalone and follow-on elements lied outside the scope of the follow-on provisions and had to be raised before the High Court. In this regard, see RODGER, *Why not court? A study of follow-on actions in the UK*, in *J. Antitrust Enf.*, 2013, 104. Recently, the Consumer Rights Act 2015 removed a number of limitations on the jurisdiction of the CAT over competition claims: in particular, it extended CAT's jurisdiction also to stand-alone actions and to application for injunctions.

did not follow the High Court's liberal approach to jurisdiction in *Emerson Electric Co & Ors v Morgan Crucible Company plc & Ors*[608], which came to the conclusion that follow-on action can be brought before the CAT only against formal addressees of the infringement decision. In the case at stake, the anchor defendant was not specifically named neither in the recitals to nor in the operative part of the decision, which was addressed to the undertaking named as the parent company, and not to the whole group of companies collectively. Therefore, by virtue of the principle of legal certainty and without undermining the effectiveness of EU competition law, even if the subsidiary was regarded as part of the undertaking addressed as Carbone SA, that still does not identify Carbone GB as an infringing party so as to render it liable, as a separate entity, for the infringement of competition law[609]. However, it is important to stress that such rejection of downward attribution of liability is also due to the previous limitation of the CAT's jurisdiction only to follow-on claims, so that it can be expected to change after the recent extension of CAT's competence to hear stand-alone claims[610].

2.7.5. The Need to Avoid Abuses in the Application of Article 8(1): Proposals for Amendment

Article 6(1) of the old Brussels I Regulation did not receive particular attention during the recasting process of the Regulation. Only in the Green Paper, the Commission put forward an idea for a possible amendment concerning expressly only the context of IP infringements[611]. As emerges from the foregoing, this appears rather surprising: the liberal interpretation of Article 8 in complex competition cases – where the CJEU has not provided any guidance yet – makes it evident the need to introduce some corrections capable of reducing the risk of abuses and tactical procedural practices which are contrary to the fundamental principles underlying the Brussels I regime. Especially in the context of a group of companies with subsidiaries in different Member States, the mere requirement of a serious or arguable claim against the anchor defendant does not impede national courts to apply Article 8 irrespective of principles of legal

[608] *Emerson Electric Co and others v Morgan Crucible Company PLC* [2011] CAT 4, then confirmed by the Court of Appeal in *Emerson Electric Co & Ors v Mersen UK Portslade Ltd & Anor* [2012] EWCA Civ 1559.

[609] *Emerson Electric* (CAT), para. 51; and *Emerson Electric* (Appeal), para. 82. In this regard, see ASHTON, HENRY, *Competition Damages Actions in the EU. Law and Practice*, cit., 98-99.

[610] SCOTT, SIMPSON, FLETT, *England & Wales*, in KNABLE GOTTS (ed.), *The Private Competition Enforcement Review*, cit., 141.

[611] WILDERSPIN, *Jurisdiction Issues: Brussels I Regulation Articles 6(1), 23, 27 and 28*, cit., 52.

certainty and foreseeability promoted by the CJEU, thus opening the doors to improper *forum shopping*[612]. The claimant is, in fact, interested only in bringing spurious claims aimed at establishing jurisdiction against the anchor defendant to attract foreign defendants, irrespective of how the anchor claim will be decided on the merits[613]. Neither seems the attribution of a greater judicial discretion an effective solution to prevent actions being brought outside the natural forum, with the sole object of ousting the jurisdiction of the State where one of those defendants is domiciled[614].

Against this background, in order facilitate the joining of connected claims but without sacrificing proximity and avoiding an uncontrolled multiplication of possible competent courts, a first correction could be the introduction of a requirement according to which the claim against the anchor defendant should not be manifestly inadmissible or unfounded[615]. In *Reisch Montage* the CJEU held that the fact that the initial claim against the anchor defendant was inadmissible under the procedural rules of the seized court did not preclude the joining of the claims brought before that court in respect of non-domiciled defendants[616]. The CJEU's concern was that national laws should not frustrate the purposes of the uniform jurisdictional rules[617]. However, such conclusion does not seem to be in line with the rationale of other provisions of the Regulation, whose applicability largely depend on national law[618], and with the margin left to domestic law in the CJEU's earlier case law[619]. Moreover, it has been harshly criticized

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[612] In this sense NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II*, cit., 126.

[613] D'ALESSANDRO, *La connessione tra controversie transnazionali*, cit., 72-73. See the opionion of AG Colomer in Case C-103/05, *Reisch Montage*, para. 44.

[614] See *supra*, para. 6.1, for the evolution of the CJEU's case on the matter.

[615] See, e.g. KAMMIN, *Reforming Private Antitrust Enforcement in Europe*, cit., 126-127; WILDERSPIN, *Jurisdiction Issues: Brussels I Regulation Articles 6(1), 23, 27 and 28 in Antitrust Litigation*, cit., 53; BASEDOW, HEINZE, *Kartellrechtliche Schadensersatzklagen im europaischen Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVVO)*, cit., 81. The CLIP Principles, at Art. 2:206, adds also another possibility, that is when the the contribution of the defendant who is habitually resident in the State where the court is located is insubstantial in relation to the dispute in its entirety: see HEINZE, *Article 2:206: Multiple defendants*, cit., 114-115. In this last sense, also GALLI, *La Corte giustizia restring drasticamente lo spazio per le azioni* cross-border *in materia di brevetti*, in *Int'l Lis*, 2006, 147.

[616] Case C-103/05, *Reisch Montage*, paras. 27-31. Similarly, the French Court of Cassation, 19 December 2007, 06-18.811 in *Clunet*, 2008, 531.

[617] BIAGIONI, *La connessione attributiva di giurisdizione nel regolamento CE n. 44/2001*, cit., 160. Interestingly, OGH, 28 September 2006, 4 Ob 122/06d, in *RZ*, 2007, 73, held that connectedness should be evaluated according to the substantive laws applicable (*leges causarum*) to the respective claims.

[618] MUIR WATT, *Art. 8*, cit., 380 and 391, provides the example of the jurisdictional rules on insurance contracts and of Art. 8(4), which subordinates the derived jurisdiction of the competent court under Art. 24(1) over immovable property to the condition that the action in contract may be combined, under national law, with an action concerning rights in rem against the same defendant.

[619] Indeed, as a general rule, resort to national law is possible only when expressly envisaged and, in any case, subject to the principle of effectiveness, under which a court cannot apply conditions laid down by national law

because, according to the prevailing literature, in such cases the CJEU's hostility for the application of *lex fori* appears to be contrary to the underlying rationale of the rule on multiple defendants, which is to avoid the risk of irreconcilable judgements: if there is no possibility of a judgment against the anchor defendant, consequently there is no risk of irreconcilable judgments[620]. As Advocate General Colomer put it, where one of the claims is ruled inadmissible at the outset, there are not a number of defendants in the true sense and, therefore, the prerequisite for the choice of jurisdiction is not satisfied[621].

These reasons sound rather compelling toward the recognition of this requirement for the applicability of Article 8[622]. Besides, also the likelihood of success of the anchor claim may come into play to avoid overly tactical maneuvers by the claimant. In particular, although it is widely recognized the applicability of Article 8 should not be denied only because the anchor claim failed as to its merit[623], a different situation occurs when the claim is manifestly unfounded from the beginning[624]. In this regard, the High Court distinguished *Reisch Montage* and held *obiter* that when the claim against the anchor defendant is unsustainable because

insofar as they restrain the application of uniform rules: CJEU Case C-365/88, *Kongress Agentur Hagen GmbH* [1990] ECR I-845, para. 20. In this regard, see BIAGIONI, *La connessione attributiva di giurisdizione nel regolamento CE n. 44/2001*, cit., 186-188.

620 Among many, see BRIGGS, *Civil Jurisdiction and Judgments*, cit., 280; M.E. ANCEL, *Derived Special Jurisdiction (Art. 8)*, cit., 190; GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe*, cit., 325-326; TANG, *Multiple defendants in the European Jurisdiction Regulation*, cit., 93; ALTHAMMER, *Die Auslegung der Europäischen Streitgenossenzuständigkeit durch den EuGH*, cit., 232; ID., *Die Anforferungen an die „Ankerklage" am foum connexitatis (Art. 6 Nr. 1 EuGVVO)*, in *IPRax*, 2006, 558; H. ROTH, *Das Konnexitätserfordernis im Meherparteiengerichtsstand des Art. 6 Nr. 1 EuGVO*, in BAETGE, VON HEIN, VON HINDEN (Hrsg.), *Die richtige Ordnung: Festschrift für Jan Kropholler zum 70 Geburtstag*, cit., 889-890; PATAUT, in *Revue critique*, 2007, 175 (finding the sharp and abstract separation between national procedural rules and uniform rules non convincing). See also AG Mengozzi in Case C-98/06, *Freeport plc*, para. 70. In *Brown & Ors v Innovatorone Plc & Ors* [2010] EWHC 2281 (Comm), the High Court held that lacking a real dispute between the parties, there is not a sufficient connection with the rest of the litigation and no risk of irreconcilable judgments.

621 Opinion of AG Colomer in Case C-103/05, para. 42.

622 In favour a control af adminissibility, see THOLE, *Missbrauchskontrolle im Europäischen Zivilverfahrensrecht*, cit., 440; COESTER-WALTJEN, *Konnexitat und Rechtsmissbrauch - zu. Art. 6 Nr. 1 EuGVVO*, cit., 756; WÜRDINGER, *Anmerkung zu EuGH, Urteil vom 13.7.2006 – C-103/*05, in *ZZP Int.*, 2006, 188-189; BRANDES, *Der gemeinsame Gerichtsstand*, cit., 122-123.

623 STADLER, *Art. 8 EuGVVO nF*, cit., para. 5; LEIBLE, *Art. 8*, cit., 389; KROPHOLLER, VON HEIN, *Europäisches Zivilprozessrecht*, cit., 261; HESS, *Europäisches Zivilprozessrecht*, cit., § 6 para. 86.

624 In this sense, see WAGNER, *Art. 6 EuGVVO*, cit., para. 45; THOLE, *Missbrauchskontrolle im Europäischen Zivilverfahrensrecht*, cit., 442; COESTER-WALTJEN, *Konnexitat und Rechtsmissbrauch - zu. Art. 6 Nr. 1 EuGVVO*, cit., 757-758; ALTHAMMER, *Die Anforferungen an die „Ankerklage" am foum connexitatis (Art. 6 Nr. 1 EuGVVO)*, cit., 560; ID., *Die Auslegung der Europäischen Streitgenossenzu ständigkeit durch den EuGH - Quelle nationaler Fehlinterpretation?*, cit., 232-233; WÜRDINGER, *Anmerkung zu EuGH, Urteil vom 24.5.2007 – C-98/*06, cit., 227; BRANDES, *Der gemeinsame Gerichtsstand*, cit., 123. In this sense, see Swiss Federal Tribunal, 9 October 2007, 4A_155/2007, BGE 134 III 27.

substantively, as opposed to procedurally, it has no real prospect of success, the requirements of Article 8 would not be satisfied[625].

A second correction could be the limitation of Article 8 through the request of a qualified feature of the anchor defendant. In this regard, concerning infringements committed by companies belonging to a group acting in accordance with a coordinated policy, the Commission's Green Paper on the review of the Brussels I Regulation proposed to allow consolidation before the courts of the Member State where the defendant coordinating the activities or otherwise having the closest connection with the infringements[626]. This proposition builds upon the Heidelberg Report[627] and largely corresponds to the CLIP Principles to codify – with minor differences – the so-called spider in the web doctrine developed by Dutch courts[628]. It is in fact held that, in the case of a number of defendants forming part of a group of companies that markets identical products in different national markets and acts on the basis of a joint business plan, the court of the domicile of the head office of that group, in charge of the business operations and from which the business plan originated, should have jurisdiction also against all other members of the group on the basis of Article 8(1) Brussels I-*bis* Regulation[629]. This doctrine has met with widespread approval in the literature, not only concerning patent litigation but also concerning infringements of EU competition law[630]. Indeed, it would allow fostering legal certainty and foreseeability by requiring a connection between the defendants and forcing the plaintiff to sue at a place with a substantial relationship with the infringement plan[631]. However, this should not prevent cartel victims to ask for the joining of claims before

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[625] *Bord NA Mona Horticulture Ltd & Anor v British Polythene Industries Plc & Ors*, para. 83.

[626] Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, para. 4.

[627] HESS, PFEIFFER, SCHLOSSER, *Report on the Application of Regulation Brussels I intheMemberStates*, Study JLS/C4/2005/03, 2007, paras. 852-854, at http://ec.europa.eu/civiljustice/news/docs/study_application _brussels _1_en.pdf.

[628] See *supra* fn. 536.

[629] It is worth stressing that in *Roche* the CJEU seemed to have accepted that in a spider in the web scenario the factual situation is the same, so that Art. 8 could still be applied in cases of multi-state infringements. The non-obsolescence of the spider in the web doctrine is also shared by the decision of the Hague Court of Appeal, 23 August 2007, 05-913, *Bacardi v Mad Bat*, with regard to Community IP rights for trademarks, designs and plant variety rights. See KONO, JURČIS, *General Report*, in KONO (ed.), *Intellectual Property and Private International Law*, Oxford-Portland, Hart, 2012, 81; VAN ENGELEN, *Jurisdiction and Applicable Law in Matters of Intellectual Property*, in *Electronic J. Comp. L.*, 3/2010, 7-9; NORRGÅRD, *A Spider without a Web? Multiple Defendants in IP Litigation*, cit., 225-226.

[630] See, specifically, NEGRI, *Giurisdizione e amministrazione nella tutela della concorrenza. II*, cit., 151; AZZI, *Connexité entre contrefaçon et concurrence déloyale*, in *Revue critique*, 2013, 932.

[631] See, e.g. GONZALEZ BEILFUSS, *Is There Any Web for the Spider? Jurisdiction over Co-defendants after* Roche Nederland, cit., 85; DE MIGUEL ASENSIO, *Cross-Border Adjudication of Intellectual Property Rights and Competition between Jurisdictions*, cit., 126.

the court where the subsidiary with which the claimant had a direct contractual relationship is domiciled: this is advisable not only as a matter of proximity but also because, if the actions are concentrated before the domicile of the parent company, Article 8 would be inoperative where the parent is domiciled outside the territorial scope of Brussels I-*bis* Regulation[632].

A third possible correction could be to shape Article 8 of the Brussels I-*bis* Regulation in a way similar to Article 6(3)(b) Rome II Regulation, which allows the claimant to elect to apply the law of the court seized in the case of multiple defendants jointly sued before the court of a Member State whose market is directly and substantially affected by the restriction of competition. Accordingly, Article 8 could be amended so as to require that consolidation of connected claims could take place only before the courts of the Member State whose market has been directly and substantially affected by the alleged restriction of competition. In this way, a genuine link to the Member State where proceedings are brought would be required and *forum shopping* would be reduced[633].

Last, in the literature, it has been proposed to correct the liberal English case law illustrated above through the use of Article 7(5), according to which an EU-domiciled defendant may be sued out of its place of domicile as regards disputes arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated[634]. Although this concept is in principle neutral with regard to company law links[635], subsidiaries are usually considered to be outside the scope of Article 7(5), because they are a separate legal entity and lack the authority to act on behalf of the parent company[636]. However, in cases where the subsidiary lacks economic independence as to its

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[632] RÖSLER, *The Court of Jurisdiction for Joint Parties in International Patent Disputed*, cit., 397.

[633] ILLMER, *Art. 6*, in HUBER (ed.), *Rome II Regulation*, cit., 201; DICKINSON, *The Rome II Regulation*, cit., 425.

[634] See, in particular, DANOV, *Jurisdiction in Cross-Border EU Competition Law Cases: Some Specific Issues Requiring Specific Solutions*, cit., 181-183; FRATEA, *Il* private enforcement *del diritto della concorrenza dell'Unione europea*, cit., 157-159; DE LA MARE, *Subsidiaries as "branches" for undertakings: a new route to jurisdiction under Article 5(5) of the Brussels Regulation?*, 14 February 2013, Competition Bulletin. See also IDOT, *La dimension internationale des actions en réparation*, cit., 49.

[635] MANKOWSKI, *Art. 7*, cit., 354.

[636] WAGNER, *Art. 5 EuGVVO*, cit., para. 199; FAWCETT, CARRUTHERS, *Ceshire, North & Fawcett. Private International Law*, cit., 259 (identifying the following charachteristics: i) fixed permanent place of business; ii) subject to the direction and control of the parent; iii) a certain degree of autonomy and iv) act on behald of the parent and has the power to bind it); ALLWOOD, *Art. 5(5): Meaning of 'Branch, Agency or Other Establishment'*, in *Eur. L. Rev.*, 1988, 213. In this regard, see also the interpretation of Art. 97 CTMR: OLG Dussseldorf, 16 November 2015, I-20 U 68/15, referring to the CJEU Case C-617/15, *Hummel Holding A/S*. See P LEHMANN, *Is a legally distinct subsidiary an "establishment" under Article 97(1) of the Community Trade Mark Regulation?*, in *J. Int. Prop. L. Pract.*, 2016, 386-387. Recently, on 12 January 2017, AG Tanchev delivered his opinion and, after stressing the differences with Art. 7(5) of Brussels I-*bis* Regulation, held that «a legally distinct second-tier

commercial policy and forms part of the same undertaking as its parent company, it is held that the claimant may use Article 7(5) to sue the parent before the forum of the subsidiary, provided that the competition law claim has arisen out of the operation of that subsidiary[637]. Nevertheless, even if this wide interpretation were accepted, the claimant would be prevented to sue before the same court more companies belonging to the same group that participated in the cartel infringement[638]. Moreover, it seems that the use of Article 7(5) would be directed to situations that do no pose problems under Article 8(1), namely the attraction of the parent company before the court of the domicile of the subsidiary with which the claimant had a direct relationship.

subsidiary, with its seat in an EU Member State, of an undertaking that itself has no seat in the European Union is to be considered an 'establishment' of that undertaking within the meaning of Article 97(1) of Council Regulation (EC) No 207/2009 (…) if that legally distinct second-tier subsidiary is a centre of operations which, in the Member State where it is situated, has the appearance of permanency, such as an extension of the third State parent body».

[637] CJEU Case 218/86, *Schotte* [1986] ECR 4905. In some cases, indeed, the subsdiairy is operated like a dependent branch and may be considered as a prolonged arm of the parent company.

[638] Against the letter of the Regulation, this possibility is not precluded according to FRATEA, *Il* private enforcement *del diritto della concorrenza dell'Unione europea*, cit., 159.

CHAPTER 3
THE CROSS-BORDER INSOLVENCY OF GROUPS OF COMPANIES

3.1. The Insolvency of Groups of Companies: Objectives of an International Regime

The analysis of the first chapter provided the picture of a generalized lack of a coherent body of law addressing group scenarios, although companies have been mostly conducting their business through the corporate structure of cross-border groups. The situation is even more dramatic in insolvency law, because a proper legislation is lacking also in those countries that contributed the most to the last forty-year debate on groups, such as Germany[639]. National legislators have not been active in enacting provisions addressing the case of group insolvencies, *i.e.* insolvency scenarios in which more members of the same group go into insolvency proceedings[640], and the solutions rarely provided at the national level are so diverse that it is not an easy task to identify a generally accepted solution that could serve as a model[641].

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[639] MIOLA, *Attività di direzione e coordinamento e crisi di impresa nei gruppi di società*, in *Società, banche e crisi di impresa*. Liber amicorum *Pietro Abbadessa*, vol. III, Torino, Utet Giuridica, 2014**,** 2694. Only recently, in 2013, a governmental bill has been presented (*Gesetzentwurf eines Gesetzes zur Erleichterung der Bewältigung von Konzerninsolvenzen*), which, *inter alia*, (i) establishes the possibility of a single venue for group insolvencies and facilitates the appointment of the same person as insolvency receiver for all members of the group; (ii) creates an obligation to cooperate for insolvency courts and insolvency practitioners; (iii) introduces a "coordination proceeding" among insolvency practitioners of group members and the possibility to adopt a "coordination plan". Among many, see recently MADAUS, *Deutsches Konzerninsolvenzrecht*, in AHRENS, GEHRLEIN, RINGSTMEIER (Hrsg.), *Insolvenzrect. Kommentar*, Köln, Luchterhand, 2017, 2985. The text of the bill and the progress of the initiative can be checked at http://dipbt.bundestag.de/extrakt/ba/WP18/555/55535.html. On the contrary, France has already introduced in 2014 new provisions on group insolvencies at Art. L662-8 and R662-18 *et seq.* of the Code du Commerce, on which see VALLENS, *Les groups des sociétés en difficulté, une nouvelle donne*, in *RTD Com.*, 2014, 869; HENRY, *Les groups de sociétés et la réforme de 2014: l'ombre du droit européen*, in *BJE*, sept.-oct. 2014, 290. In Italy, a draft proposal on the revision of insolvency law has been recently presented by the Committee Rordorf, which provides for specific solutions to group insolvencies: see PANZANI, *La disciplina della crisi di gruppo tra proposte di riforma e modelli internazionali*, in *Fall.*, 2016, 1153.

[640] It is important to stress that the group may be considered insolvent or on the verge of insolvency even though individual group members are still solvent. The assumption that all legal entities need to be part of the proceedings, in fact, is not always valid: K. SCHMIDT, *Flexibilität und Praktikabilität im Konzerninsolvenzrecht – Die Zuständigkeitsfrage als Beispiel*, in *ZIP*, 2012, 1056 («Dann kann zwar von Insolvenzen „im" Konzern gesprochen werden, jedoch schwerlich von einer Insolvenz „des" Konzerns»); RASMUSSEN, *A New Approach to Transnational Insolvencies*, in *Mich. J. Int. L.*, 1997, 28-29. However, in the case of a comprehensive reorganization plan, addressing the assets of both solvent and insolvent group members, a solvent member may voluntarily join the plan: see UNCITRAL, *Working Group V (Insolvency Law)*, 35th Session, 17-21 November 2008 Vienna, A/CN.9/WG.V/WP.82/Add.3, paras. 54-55.

[641] OBERHAMMER, *Groups of companies*, in HESS, OBERHAMMER, PFEIFFER (eds.), *European Insolvency Regulation. The Heidelberg-Luxembourg-Vienna Report*, München, C.H. Beck, 2014, 155.

The basic premise widely accepted in insolvency law is that each legal entity is subject to its own insolvency proceeding and that the decision to open the proceedings is determined separately and independently for each entity[642]. Indeed, if the separate legal personality is respected under company law, there is no reason why the same principle should not apply with regard to insolvency law. This means that each company has its own creditors for whose benefit its assets are available and that pre-conditions of insolvency have to be assessed separately for each group member[643]. The preference of form over substance entails that there are as many proceedings as are the insolvent group members against which proceedings must be opened[644].

This principle has the advantage of avoiding the complexities raised by group insolvencies by overlooking affiliations among companies. However, it proves to be not feasible when the debtor's reorganization or the sale of the business as a going concern is at stake[645], because it threatens the possibility to maximize the asset value of the business[646]. An example that is often mentioned in the literature is one of the very first insolvency cases under the European Insolvency Regulation, the *KPNQwest* group[647]. The latter operated a glass fiber network, providing business customers telecommunication services throughout Europe. For these services, it had built a modern broadband network of glass fiber cables that was divided into

[642] This principle is generally referred to as «one company, one insolvency, one proceeding»: see PAULUS, *Group Insolvencies – Some Thoughts About New Approaches*, in *Texas Int. L. J.*, 2007, 821; HIRTE, *Towards a Framework for the Regulation of Corporate Groups' Insolvencies*, in *Eur. Comp. Fin. L. Rev.*, 2008, 214. It is only a manifestation of tension illustrated in the first chapter between economic unity and legal plurality: see EHRICKE, *Das abhängige Konzernunternehmen in der Insolvenz: Wege zur Vergrößerung der Haftungsmasse abhängiger Konzernunternehmen im Konkurs und Verfahrensfragen: eine rechtsvergleichende Analyse*, Tübingen, Mohr Siebeck, 1998, 458-459.

[643] GOODE, *Principles of Corporate Insolvency Law*[4], London, Sweet & Maxwell, 2011, 788. In Italy, for instance, it is considered undisputed that «l'accertamento dello stato di insolvenza deve essere effettuato con esclusivo riferimento alla situazione economica della società medesima, anche quando essa sia inserita in un gruppo (…), atteso che, nonostante tale collegamento o controllo, ciascuna di dette società conserva distinta la propria personalità giuridica»: *ex multis*, Court of Cassation, 16 July 1992, n. 8656, in *Dir. fall.*, 1993, II, 381. See QUEIROLO, *Le procedure di insolvenza nella disciplina comunitaria. Modelli di riferimento e diritto interno*, Torino, Giappichelli, 2007, 30-31; and more recently PANZANI, *Il gruppo di imprese nelle soluzioni giudiziali della crisi*, in *Società*, 2013, 1361-1363.

[644] PETER, *Insolvency of Groups of Companies, Substantive and Procedural Consolidation: When and How*, in PETER, JEANDIN, KILBORN (eds.), *The Challenges of Insolvency Law Reform in the 21st Century*, Zurich, Schulthess, 2006, 200-202. More precisely, under a strict approach, a concentration of competence in one court for all affiliated companies would be only be possible if and insofar as this place is the center of the autonomous economic activity of each individual insolvent group company.

[645] GARNER (ed.), *Black's Law Dictionary*[10], St. Paul, Thomson Reuters, 2014, 1785, defines this concept as «the value of a commercial enterprise's assets or of the enterprise itself as an active business with future earning power, as opposed to the liquidation values of the business or of its assets».

[646] Commission Staff Working Document, SWD (2012) 416 final of 12 December 2012, 15.

[647] UNCITRAL, *Working Group V (Insolvency Law)*, 31th Session, 11-15 December 2006, Vienna, A/CN.9/WG.V/WP.74/Add.2, para. 2, KPNQwest failed the very same day the EIR came into force, 31 May 2002.

six interconnected 'EuroRings'. In their turn, these rings were connected to Qwest's network in the United States. KPNQwest had at least two separate companies in nearly every jurisdiction, one of which owned the assets and provided the actual access to the network in the country concerned and to the pan-European Ring. When the parent company of the group became insolvent, many of its European subsidiaries entered into insolvency proceedings as well. As the trustees of the parent did not have any powers with respect to bankrupt subsidiaries in other Member States, it proved to be very difficult to coordinate the sale of the rings. As a result, the assets of the group's components were sold separately, sometimes at knockdown prices, thus resulting in a disadvantageous sale in terms of maximizing values[648].

This is a good example, in the negative, to understand which goals a legal regime should pursue for the treatment of insolvency of international groups of companies. In this regard, it is first necessary to refer to the objectives that apply to international insolvency law in general, as have been recently listed by UNCITRAL in its Legislative Guide[649]. The starting point is the awareness that a wide range of interests is to be accommodated when addressing the collective satisfaction of claims against the debtors and its assets. Every legal system has to strike a balance not only between the interests of the different stakeholders[650], but also between these interests and «the relevant social, political and other policy consideration that have an impact on the economic and legal goals of insolvency proceedings»[651]. Although countries follow

[648] VAN GALEN, *The European Insolvency Regulation and Groups of Companies*, 2003, 2, www.insol-europe.org.

[649] UNCITRAL, *Legislative Guide on Insolvency Law*, New York, 2005, 10-13: (i) provision of certainty in the market to promote economic stability and growth; (ii) maximization of value of assets; (iii) striking a balance between liquidation and reorganization; (iv) ensuring equitable treatment of similarly situated creditors; (v) provision for timely, efficient and impartial resolution of insolvency; (vi) preservation of insolvency estate to equitable distribution to creditors; (vii) ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; (viii) recognition of existing creditors rights and establishment of clear rules for ranking or priority claims. Similarly, see VATTERMOLI, Par condicio omnium creditorum, in *Riv. trim. dir. proc. civ.*, 2013, 155-156; and LOPUCKI, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, in *Cornell L. Rev.*, 1999, 702-703. WESSELS, MARKELL, KILBORN, *International Cooperation in Bankruptcy and Insolvency Matters*, New York, OUP, 2009, 13-17, identify three widely accepted broad principled of insolvency systems: maximization of asset value for all creditors, recognizing/preserving existing creditor rights and equitable treatment of similarly situated creditors. In this regard, JACKSON, *The Logic and Limits of Bankruptcy Law*, Washington, BeardBooks, 1986, 4, affirms that «bankruptcy law historically has done two things: allowed from some sort of a financial fresh start for individuals and provided creditors with a compulsory and collective forum to sort out their relative entitlements to a debtor's assets».

[650] In particular, their bargaining power, their vulnerability concerning their ability to respond to insolvency risks *ex ante* and their ability of bearing loss *ex post*. See WARREN, *Bankruptcy Policy*, in *Univ. Chicago L. Rev.*, 1987, 775 *et seq.*, recognizing that bankruptcy encompasses a number of competing and sometimes conflicting values in the distribution and affirming that «the central job of bankruptcy is to apportion the losses of the debtor's default, and that a variety of factors impinge on the difficult policy decision of where to let those losses fall».

[651] UNCITRAL, *Legislative Guide on Insolvency Law*, cit., 9.

different approaches and strike different balances in their legal regimes, there is a broad convergence on some key objectives for an effective and efficient administration of insolvency proceedings, also concerning the social and legal values on which insolvency law is based.

In particular, concerning groups of companies, the following elements are particularly relevant: maximization of enterprise value, clarity and predictability, equality of distribution and procedural fairness[652]. The first objective is generally the most important one, especially within the context of reorganization proceedings where the business is worth more as a going concern[653], and benefits in particular unsecured creditors, because the preservation of values permits them to recover a larger portion of the debt owing to them[654]. Maximizing the creditor's wealth entails a reduction of *ex ante* and *ex post* costs, respectively relating to the costs involved with the prospect of default and the costs that may occur after the enforcement of the debt[655]. Moreover, it is important to respect creditors' pre-insolvency entitlements and to provide for clear and predictable rules capable of minimizing transaction costs[656]. This is related to the need of meeting the pre-insolvency creditors' expectations and balancing their competing goals, by taking into account all relevant parties possibly affected[657]. In addition, a predictable venue will allow different creditors to reach the same conclusions as to where the proceeding will be opened, thus enhancing *ex ante* efficiency and reducing the risk of jurisdictional battles[658].

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[652] MEVORACH, *Insolvency within Multinational Enterprise Groups*, Oxford, OUP, 2009, 151 *et seq*. BUFFORD, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, in *Am. Bankr. L. J.*, 2012, 692-699, adds also protection of employment and respecting the separateness of individual legal entities.

[653] This is stressed also by IMF, *Orderly & Effective Insolvency Procedures. Key Issues*, 1999, at www.imf.org/external/pubs/ft/orderly/#genobj. The significant role of rescue and restructuring as a crucial means to give the debtor a second chance represents the new European approach on insolvency and business failure: see the communications of the Commission *Single Market Act II – Together for new growth*, COM(2012)573 final; *A new European approach to business failure and insolvency*, COM(2012)742 final; and *Reigniting the entrepreneurial spirit in Europe*, COM(2012)795 final. See also the recommendation C(2014) 1500 final adopted on 12 March 2014. On this new approach to insolvency, in a comparative perspective, see PANZANI, *L'insolvenza in Europa: sguardo d'insieme*, in *Fall.*, 2015, 1013 *et seq*.

[654] WORLD BANK, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, April 2001, 24: «Maximizing asset values is a crucial objective of the insolvency process (…), because more value means that creditors will receive higher distributions and reduce the burden of insolvency».

[655] MEVORACH, *Towards a consensus on the treatment of multinational enterprise groups in insolvency*, in *Cardozo J. Int. Comp. L.*, 2010, 371.

[656] WORLD BANK, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, cit., 25: «A predictable law promotes stability in commercial transactions, fosters lending and investment at lower risk premiums, and promotes consensual resolutions of disputes between a debtor and its creditors by establishing a backdrop against which parties can assess their relative rights».

[657] This point is stressed by WIED, *Achieving Universalism in MEG Insolvencies: An Analysis of Whether the German Stock Corporation Act of 1965 Could Help*, in *Texas. Int. L. J.*, 2015, 529-530.

[658] MEVORACH, *The "Home Country" of a Multinational Enterprise Group Facing Insolvency*, in *Int. Comp. L. Quart.*, 2008, 435.

The promotion of efficiency[659], in turn, allows the parties involved to plan their business activities in advantage and to calculate the risks related to the debtor's insolvency, in particular relating to the law that will govern their rights and how it will be applied. Predictability also reduces opportunities for improper forum shopping[660].

Another necessary element for a regime of group insolvencies is the principle of equitable distribution, which is based on the notion that in a collective proceeding, creditors with similar legal rights should be treated the same (*par condicio creditorum*)[661]. It plays a role also with regard to group insolvencies, albeit weakened, in the sense that creditor's expectations are to be treated equally with other creditors of all of the group entities. Such equality refers not only to substantive aspects, like those relating to the ranking of creditors, but also to procedural fairness as to the location of proceedings[662] and the participation of creditors in the insolvency proceedings[663]. Of course, in the case of international groups, this condition is not easy to satisfy and that is why procedural fairness plays an important role. In this context, every creditor and party in interest of every entity involved should have the right to be heard and participate. In particular, any discrimination should be avoided against foreign creditors[664].

At this point, it is necessary to stress that the promotion of the above-mentioned goals may require to give relevance to the interconnection between affiliated companies situated in different countries and to treat the group as a whole in a comprehensive way, even disregarding the legal separateness of separate legal entities belonging to the same group. As will be better

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[659] As recalled by RASMUSSEN, *A New Approach to Transnational Insolvencies*, cit., 4 and in particular fn. 21, the overall goal of bankruptcy law, at least in the corporate setting, should be efficiency.

[660] In this sense, POTTOW, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, in *Brooklyn J. Int. L.*, 2007, 785 *et seq.*

[661] This is defined by MOKAL, *Priority as Pathology: The* Pari Passu *Mith*, in *Cambr. L. J.*, 2001, 581, as «the foremost principle in the law of insolvency around the world». See also GIORGINI, *Méthodes conflictuelles et règles matérielles dans l'application des nouveaux instruments de reglement de la faillite internationale*, Paris, Dalloz, 2006, 391 *et seq.* The French Court of Cassation clearly stated that «le principe d'égalité des créanciers dans la masse… est à la fois d'ordre public interne et international»: decision of 4 February 1992, *Bull. civ.* I, n. 38, 28. In Italy see Court of Cassation, 19 December 1990, n. 12031, in *Foro it.*, 1991, I, 1482; and in Germany the leading case delivered by BGH, 11 July 1985, IX ZR 178/84, in *ZIP*, 1985, 944, on which see VANZETTI, *L'insolvenza transnazionale: Storia del problema*, Milano, Giuffrè, 2006, 132 *et seq.* Along these lines, see also NADELMANN, *Assumption of bankruptcy jurisdiction over non-residents*, in *Tulane L. Rev.*, 1966, 77.

[662] MEVORACH, *The "Home Country" of a Multinational Enterprise Group Facing Insolvency*, cit., 434.

[663] VATTERMOLI, Par condicio omnium creditorum, cit., 158-159.

[664] On the equality of arms, see AMERICAN LAW INSTITUTE, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases*, 2012, n. 5: «All judicial orders, decisions, and judgments issued in an international insolvency case are subject to the principle of equality of arms, so that there should be no substantial disadvantage to a party concerned. Accordingly: (i). Each party should have a full and fair opportunity to present evidence and legal arguments; (ii). Each party should have a full and fair opportunity to comment on the evidence and legal arguments presented by other parties».

highlighted in the following paragraphs, the opening of proceedings before the same court or the establishment of a high degree of coordination among proceedings may be very beneficial for the stakeholders involved in terms of efficiency and fairness. This chapter will be in fact devoted to the procedural issue concerning the determination of jurisdiction to open insolvency proceedings against different companies belonging to the same group. In contrast, it will not cover the substantive issues relating to the so-called domino effect, *i.e.* the risk that the insolvency of one group member may cause financial distress to other members or in the group as a whole, because of the group's integrated structure and a high degree of interdependence of its different parts[665]. Accordingly, it is held that there may be some advantage in judging the imminence of the insolvency by reference to the group situation as a whole or coordinating that consideration with respect to multiple members[666].

3.2. Different Regimes in International Insolvency: Universalism, Territorialism and Contractualism

The two dominant models for addressing international insolvency problems are universality and territoriality[667], whose principles have long been discussed in the previous century, as have their exact meaning and scope. Needless to say, the acceptance of one or the other model involves the solution of a problem that is preliminary with respect to every single potential private international law problem relating to cross-border insolvency[668].

Under the universality approach[669], there should be a single set of insolvency proceedings, presumably in the debtor's domicile, collecting administering and distributing the debtor's

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[665] UNCITRAL, *Legislative Guide on Insolvency Law. Part Three: Treatment of enterprise groups in insolvency*, New York, 2012, 20. See also SPECOVIUS, in FLÖTHER (Hrsg.), *Handbuch zum Konzerninsolvenzrecht*, München, C.H. Beck, 2015, Ch. 3, para. 124 *et seq.*; MIOLA, *Attività di direzione e coordinamento e crisi di impresa nei gruppi di società*, cit., 2725-2735; KÜBLER, *Konzern und Insolvenz – Zur Durchsetzung konzernmäßiger Sanierungsziele an den Beispiels- fällen AEG und Korf*, in *ZGR*, 1984, 560 *et seq.*; WELLENSIEK, *Risiken von Beteiligungen in (durch) Insolvenzverfahren der Muttergesellschaften*, in *ZIP*, 1984, 541 *et seq.*

[666] SIEMON, FRIND, *Groups of Companies in Insolvency: A German Perspective. Overcoming the Domino Effect in an (International) Group Insolvency*, in *Int. Insolv. Rev.*, 2013, 61 *et seq.*, propose to create group-tailored substantive rules aimed at preventing the insolvency of all group members.

[667] On the models of universalism and territorialism, for a clear and thorough review of the different positions, see FRANKEN, *Three Principles of Transnational Corporate Bankruptcy: A Review*, in *Eur. L. J.*, 2005, 232 *et seq.*

[668] In this sense, see already ENRIQUES, *Universalità e Territorialità del Fallimento nel Diritto Internazionale Privato*, in *Riv. dir. int.*, 1934, 148-150 and 551.

[669] A model of universalism finds its roots in the nineteenth century, starting from STORY, *Commentaries on the Conflict of Laws*, Boston, Hilliard Gray, 1834, 337 *et seq.*; VON SAVIGNY, *System des heutigen Römischen Rechts*, Vol. 8, Berlin, Veit, 1849, 282 *et seq.*; LOWELL, *Conflict of Laws as Applied to Assignments of Creditors*,

assets to creditors on a worldwide basis[670]. Universalism is based on the idea of "unity of bankruptcy", with a single forum applying a single legal regime to all aspects of a debtor's affairs[671]. However, albeit the single law-single court system being the ideal solution, it is important to stress that there is not a necessary coincidence between universalism and unity of proceedings: in fact, universalism is compatible with the existence of separate proceedings in different jurisdictions, which are opened with the sole objective of making the collection of assets more convenient for the benefit of the principle proceeding[672].

On the contrary, under a territorialist approach, each nation conducts its own insolvency proceeding with respect to the assets located within its jurisdiction and disregards any parallel proceedings in a foreign State[673]. The court uses local assets to satisfy local creditors, with the

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in *Harv. L. Rev.*, 1888, 264. In modern times, see BUFFORD, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, in *Am. Bankr. L. J.*, 2005, 135; DEVLING, *The Continuing Vitality of the Territorial Approach to Cross-Border Insolvency*, in *UMKC L. Rev.*, 2002, 445-452; WESTBROOK, *A Global Solution to Multinational Default*, in *Mich. L. Rev.*, 2000, 2283-2288; ID., *Universal Priorities*, in *Texas Int. L. J.*, 1998, 27; ANDERSON, *The Cross-Border Insolvency Paradigm: A Defense Of The Modified Universal Approach Considering The Japanese Experience*, in *U. Pa. J. Int. Econ. L.*, 2000, 679; SILVERMAN, *Advances In Cross-Border Insolvency Cooperation: The UNCITRAL Model Law On Cross-Border Insolvency*, in *ILSA J. Int. Comp. L.*, 2000, 265; PERKINS, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, in *N.Y.U. J. Int. L. Pol.*, 2000, 787; BUXBAUM, *Rethinking International Insolvency: The Neglected Role of Choice- of-Law Rules and Theory*, in *Stanford J. Int. L.*, 2000, 60; GUZMAN, *International Bankruptcy: In Defense of Universalism*, in *Mich. L. Rev.*, 2000, 2177; BEBCHUK, GUZMAN, *An Economic Analysis of Transnational Bankruptcies*, in *J. L. Econ.*, 1999, 775; BERENDS, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, in *Tulane J. Int. Comp. L.*, 1998, 309; DROBNIG, *Secured Credit in International Insolvency Proceedings*, in *Texas Int. L. J.*, 1998, 66; UNT, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, in *L. Pol. Int. Bus.*, 1997, 1037; KRAFT, ARANSON, *Transnational Bankruptcies: Section 304 and Beyond*, in *Columbia Bus. L. Rev.*, 1993, 349-351; WESTBROOK, *Choice of Avoidance Law in Global Insolvencies*, in *Brooklyn J. Int. L.*, 1991, 516; WESTBROOK, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, in *Am. Bankr. L. J.*, 1991, 461.

[670] See Lord Hoffman in the case *Re HIH Casualty and General Insurance Ltd: McGrath v Riddell* [2008] UKHL 21, para. 6, and in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26, para. 16. This principle has been followed in other common law countries: see, for instance, *Bank of Western Australia v Henderson* [2011] FMCA 840 (Australia); and *Re Founding Partners Global Fund Ltd* [2011] SC (Bda) 19 Com (Bermuda). In the US, see *In re Board of Directors of Multicanal S.A.*, 314 B.R. 486, 521 (Bankr. S.D.N.Y. 2004). Recently, also Singapore has adopted a universalist approach: see *Re Gulf Pacific Shipping Ltd (in creditors' voluntary liquidation) and others* [2016] SGHC 287; and *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108.

[671] Although the theory of universalism generally implies a coincidence between choice of forum and choice of law, it is important to stress that, even under a strict approach, it is possible that some aspects of the insolvency proceedings are governed by law other than the *lex concursus*: BERENDS, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, cit., 315-316, make an example concerning labor contracts.

[672] In this sense, MCCORMACK, *Universalism in Insolvency Proceedings and the Common Law*, in *Oxford J. Leg. Stud.*, 2012, 3.

[673] KIPLIS**,** *Beyond UNCITRAL: Alternatives to universality in transnational insolvency*, in *Denver J. Int. L. Pol.*, 2008, 155; LOPUCKI, *Universalism Unravels*, in *Am. Bankr. L. J.*, 2005, 143; ID., *The Case for Cooperative Territoriality in International Bankruptcy*, in *Mich. L. Rev.*, 2000, 2216; ID., *Cooperation in International Bankruptcy: A Post-Universalist Approach*, cit., 696 *et seq.*; TUNG, *Is International Bankrupty Possible?*, in *Mich. J. Int. L.*, 2001, 31; ID., *Fear of Commitment in International Bankruptcy*, in *Geo. Wash. Int. L. Rev.*, 2001, 555.

consequence that only the latter are entitled to prove in the proceedings, with no regard for proceedings or parties elsewhere[674]. Territoriality takes the pessimistic view that local creditors ultimately will not receive their fair share of the assets in a foreign insolvency.

According to the authors supporting universalism, the main advantages of this theory is that it allows (i) keeping the administrative costs down (e.g. relating to collection and distribution of assets) by reducing the number of proceedings; (ii) ensuring the equal treatment of creditors; (iii) promoting *ex ante* predictability by lowering the cost of credit and reducing informational, contracting and enforcement costs; (iv) facilitating the restructuring or the global sale of the business. However, universalism can only be efficiently realized if all States involved agree upon it[675]. In fact, if one State does not reciprocate this approach and adopts territorialism, jurisdictional conflicts will arise and will compromise the national interests of the universalist State[676]. Moreover, it only works if all States agree upon the standards used to determine which State exercise universal jurisdiction: indeed, the general agreement on the home-country standard as referring to the company's principal place of business does not exclude that such place may be determined according to different criteria depending on the State concerned[677]. To these deficiencies, one must add the typical territorialist objection concerning the fact the universalism does not take into account differences in fundamental national policies, such as tax and employment, providing with a different ranking of claims and priority, as well as it does force creditors to deal with foreign proceedings with all relating problems[678].

In general, national regimes embrace universalism, when domestic proceedings are to be given extraterritorial effects encompassing all the debtor's assets wherever located, while at the same time they do not recognize the universal reach of foreign proceedings, whose effects are halted at the national border in order to protect local creditors and policies[679]. The reality is that

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[674] QUEIROLO, *Le procedure di insolvenza nella disciplina comunitario*, cit., 15-16.

[675] WESTBROOK, *Theory and Pragmatism*, 467-468.

[676] MCCORMACK, *Universalism in Insolvency Proceedings and the Common Law*, cit., 4.

[677] FRANKEN, *Three Principles of Transnational Corporate Bankruptcy*, cit., 236. Doubts are raised also by LOPUCKI, *Universalism Unravels*, cit., 2226-2229; ID., *Cooperation in International Bankruptcy: A Post-Universalist Approach*, cit., 713-718.

[678] Indeed, «territorialist objections to universalism center on the treatment of small, local creditors» and on the courts' reluctance «to turn assets over to foreign jurisdictions when doing so would put local creditors at a disadvantage, ex post, relative to foreign creditors»: GUZMAN, *International Bankruptcy: In Defense of Universalism*, cit., 2180. The costs of disregarding national policies affect in particular the non-adjusting creditors, *i.e.* those creditors that cannot adjust their position *ex ante* to the risks associated with their debtor's insolvency.

[679] Despite the harmful effects on *ex ante* capital allocation and the distortion of investment decisions, it is proved that States, acting individually, have an incentive to adopt territorialist regimes and so a policy of favouritism towards local creditors: BEBCHUK, GUZMAN, *An economic analysis of transnational bankruptcies*, cit.

universalism is in line with the economic realities of international insolvencies but does not fully correspond to the legal reality of a world of self-contained legal systems[680]. Indeed, universalism in its purest form is widely considered unachievable in the practice[681]. In fact, the most important pieces of legislation addressing international insolvency retained a "middle ground approach", which is generally referred to as modified universalism[682].

Accordingly, there should be a single main case for an international business in its home country, governed for the most part by the laws of that country and encompassing all the assets of the debtor, regardless of where they are located, and all creditors, regardless of their nationality; at the same time, in order to protect the interests of local creditors[683], local proceedings may be opened in the State where the debtor has an establishment with purely territorial effects, confined to the assets situated within the borders of that State. Such secondary proceedings fit with creditors' expectations and may assist the main proceeding[684]. Modified universalism tries to pursue the advantages of universalism, towards the achievement of a global

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In the sense of the text above, see QUEIROLO, *Le procedure di insolvenza nella disciplina comunitaria*, cit., 21-22; FRANKEN, *Three Principles of Transnational Corporate Bankruptcy*, cit., 235 ; WAUTELET, *Reconnaissance et exécution des décisions en Europe: l'exemple de la faillite internationale*, in DE LAVAL, STORME (dir), *Le droit processuel et judiciaire européen*, Bruxelles, La Charte, 2003, 432 ("universalism à sens unique"); VOLKEN, *L'harmonisation du droit international privé de la faillite*, in *Recueil de cours*, Vol. 230, 1991, 375.

[680] This is the synthesis by MEVORACH, *Insolvency within Multinational Enterprise Groups*, cit., 67.

[681] TUNG, *Is International Bankrupty Possible?*, cit., 45, speaks of "intituive implausibility of universalism".

[682] Defined by QUEIROLO, *L'insolvenza transnazionale: il regolamento (Ce) 1346/2000 e la disciplina italiana*, in SCHIANO DI PEPE (a cura di), *Il diritto fallimentare riformato*, Padova, Cedam, 2008, 808, as «lo strumento che fornisce le migliori risposte alle istanze derivanti dall'insolvenza transfrontaliera». This is the approach embodied in the UNCITRAL Model Law on Cross-Border Insolvency, in the European Insolvency Regulation, in the NAFTA Principles. For a thorough analysis of the advantages of modified universalism, see ADAM, FINCKE, *Coordinating Cross-Border Bankruptcy: How territorialism Saves Universalism*, in *Columbia J. Eur. L.*, 2009, 43 *et seq.*; PAE**,** *The EU Regulation on Insolvency Proceedings: the Need for a Modified Universal Approach, in Hastings Int. Comp. L. Rev.*, 2004, 555 *et seq.*

[683] Case C-327/13, *Burgo Group SpA* [2014] EU:C:2014:2158, paras. 36; CJEU Case C-649/13, *Nortel Networks SA*, EU:C:2015:384, para. 36. On the notion of "local creditors" and "local interests", see POTTOW, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests*, in *Mich. L. Rev.*, 2006, 1899. More generally, on the functions of secondary proceedings, see FEHRENBACH, *Haupt- und Sekundärinsolvenzverfahren*, Tübingen, Mohr Siebeck, 2014, 301 *et seq.* Recital (22) of the New EIR also take into account the widely differing substantive law of the Member States as a justification of the limitation to the universal scope of the main proceeding.

[684] BUFFORD, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, cit., 111-113; WESTBROOK, *A Global Solution to Multinational Default*, cit., 2300-2301. On the contrary, the modified model advocated by LOPUCKI, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, cit., 696, is «a system of cooperative territoriality is optimal even though it potentially requires multiple filing and prosecution of claims, cooperation among courts and administrators with respect to particular reorganizations and liquidations, and international agreements to control fleeing assets». However, also cooperative territorialism realizes a fragmentation that is counter-productive for financial reorganization or efficient liquidations of the entire company and prevents a fair distribution of assets to creditors.

collective result, at the same time preserving the diversity of national laws[685]. This is why it is considered as the best solution for the short term, in view of the future transition to a regime of pure universalism in the long term[686].

For the sake of completeness, it is worth stressing that other approaches have been outlined beyond universalism and territorialist. The most relevant is contractualism, which is based on the idea that the debtor and its creditors should select the applicable insolvency regime by contract. This result may be achieved in several ways: according to the "debtor's choice" approach advocated by Rasmussen, each debtor should choose from a menu of several optional regimes and incorporate them into the article of association, thus specifying which national bankruptcy law would apply in the case of financial distress[687]. This choice may be then changed only if all the company's creditors agree on it. Accordingly, it allows applying a single law worldwide, with the peculiarity that it is determined by the parties[688]. However, this form of contractualism has been criticized in the literature because it does not take into account the multiparty nature of insolvency regimes and the divergences in the nature of claimants[689].

A constrained form of contractualism has been also presented, according to which the choice of the place where to incorporate a company would automatically imply the determination of the forum that will administer the insolvency and the law applicable[690]. Accordingly, the law of the incorporation country would govern not only company law issues, but also the

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[685] A will be seen concerning the EIR, also in this case the main problems lie in the identification of the debtor's home country that is competent for the opening of the main proceeding: MEVORACH, *Insolvency within Multinational Enterprise Groups*, cit., 70; QUEIROLO, *Le procedure di insolvenza nella disciplina comunitaria*, cit., 28 and 32; LOPUCKI, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, cit., 716-8.

[686] WESTBROOK, *A Global Solution to Multinational Default*, cit., 2302. In this regard, see also the interesting analysis by JANGER, *Universal Proceduralism*, in *Brooklyn J. Int. L.*, 2007, 819.

[687] RASMUSSEN, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, in *Texas L. Rev.*, 1992, 51; ID., *A New Approach to Transnational Insolvencies*, cit., 1; ID., *Resolving Transnational Insolvencies Through Private Ordering*, in *Mich. L. Rev.*, 2000, 2252. See also FRANKEN, *Three Principles of Transnational Corporate Bankruptcy*, cit., 242-247 (submitting that a free-choice regime could combine the advantage of *ex post* value maximization of debtor's assets with a comparatively higher degree of *ex ante* predictability); SCHWARTZ, *A Contract Theory Approach to Business Bankruptcy*, in *Yale L. J.*, 1998, 1807.

[688] On the contrary, despite the lack of clarity, it seems that contractualism does not necessarily entail a single court system. This point is noted by WESTBROOK, *A global solution to multinational default*, cit., 2303; and LOPUCKI, *Cooperation in International bankruptcy*, cit., 737.

[689] For instance, it is evident that non-adjusting and involuntary creditors, such as tort victims, would be unable to contract and negotiate with the debtor: see MEVORACH, *Insolvency within Multinational Enterprise Groups*, cit., 77-78.

[690] See EIDENMÜLLER, *Wettbewerb der Insolvenzechte?*, in *ZGR*, 2006, 480 *et seq.*; ID., *Free Choice in International company insolvency law in Europe*, in *Eur. Bus. Org. Rev.*, 2005, 438-440: «by incorporating in that jurisdiction, however, they would simultaneously 'choose' the competent bankruptcy court for any bankruptcy proceedings to come».

administration of insolvency proceedings, thus eliminating uncertainties as to the determination of the competent court and to manipulation of the home country[691].

3.3. The Treatment of Enterprise Groups: Consolidation vs Coordination

Group insolvencies are the litmus test of the efficiency of bankruptcy law, because here the economic unit and the legal independence of the respective group members develop their full tension[692]. A separate opening and execution of proceedings against the individual group companies could frustrate an overall recovery strategy, which is regularly connected to all participating actors with a higher benefit[693]. Conversely, the indiscriminate consolidation of various proceedings and the assets of the group members "in a single pot"[694] is not necessarily an appropriate solution, since otherwise the principle of legal personality would exist only on paper and would be overturned in a situation of emergency like insolvency. Therefore, it is undisputed that within these poles, a certain degree of coordination between insolvency proceedings opened against different group companies must be carried out. The lack of coordination fails to preserve the synergy existing among the group members[695].

For a more precise configuration of the issue, several models come into consideration, responding to different policy choices and accentuating the economic unit of the group with different grades of intensity[696]. However, all regulatory approaches assume that a group-tailored regime allows having a far higher realization than the sum of isolated realization of individual masses or the rescue operation of the individual group companies[697]. In particular, it is possible

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[691] In the thought of Eidemuller, this system would preserve the efficiency benefits of an unconstrained forum choice, but at the same time reducing its efficiency costs and improving the incentives for an efficient choice. The biggest deficiency, however, would concern the treatment of group insolvency: indeed,

[692] THOLE, *Der Konzern im insolvenzrechtlichen Sinne*, in FLÖTHER (Hrsg), *Handbuch zum Konzerninsolvenzrecht*, cit., para. 56.

[693] SARRA, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, in *Texas Int. L. J.*, 2009, 552-553: «Uncoordinated proceedings can harm the ability of otherwise business entities to devise new business plans that maximize value, lower return to creditors, retain employees, and increase economic activity».

[694] BRÜNKMANS, *Die Koordinierte Verfahrensbewältigung von Insolvenzverfahren gruppenangehöriger Schuldner nach dem Diskussionsentwurf zur Konzerninsolvenz*, in *Konzern*, 2013, 171 («in einen Topf»).

[695] RASMUSSEN, *The Problem of Corporate Groups, A Comment on Professor Ziegel*, in *Fordham J. Corp. Fin. L.*, 2002, 401.

[696] As stressed by MEVORACH, *Appropriate Treatment of Corporate Groups in Insolvency: A Universal View*, in *Eur. Bus. Org. Rev.*, 2007, 181, what really matters is to have a mechanism capable of imposing a link between affiliated companies, especially when the group components are highly interdependent.

[697] BRÜNKMANS, *Konzerninsolvenzrecht*, in *Münchener Kommentar zur Insolvenzordnung*[3], Vol. 3, München, C.H. Beck, 2014, para. 14.

to identify three main approaches that will be presented in descending order depending on the different level of integration of the insolvency proceedings to be opened against different group members: (i) substantive consolidation; (ii) procedural consolidation; (iii) procedural coordination[698]. Such a spectrum of standardized policies should be considered for the sake of legal certainty, in order to stabilize *ex ante* capital markets by minimizing uncertainties in the event of future insolvencies[699].

3.3.1. Substantive Consolidation

Substantive consolidation is the most radical solution in the sense of stressing the economic unity of the group[700]. This concept assumes that the assets of the individual group members subject to insolvency proceedings should be considered as constituting a single consolidated estate, for the benefits of all creditors of the group members[701]. In other words, the court is allowed to disregard the separate identity of each group member and consolidate their assets and liabilities, treating them as though held and incurred by a single entity[702].

The substantive consolidation is often resorted in the US court practice in cases of strongly integrated groups, characterized by companies that are economically and functionally closely

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[698] EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen: Verfahrenskonsolidierung im Kontext nationaler und internationaler Reformhaben*, in *ZIP*, 2013, Beilage zu Heft 22, 2; SARRA, *Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies*, in *Int. Insolv. Rev.*, 2008, 84-91.

[699] WOUTERS, RAYKIN, *Corporate Group Cross-Border Insolvencies Between The United States & European Union: Legal & Economic Developments*, in *Emory Bankr. & Dev. J.*, 2013, 408-410. SARRA, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, cit., 564, refers to the different approaches as a « a continuum of international cooperation, from communication to procedural coordination to substantive consolidation, including a mix of strategies where the proceedings involve a large number of related business entities with complex financing and governance arrangements».

[700] For a general review of substantive consolidation in bankruptcy, see VATTERMOLI, *Gruppi insolventi e «consolidamento» di patrimoni (*substantive consolidation*)*, in *Riv. dir. soc.*, 2010, 586; SARRA, *Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies*, cit., 91-102; WIDEN, *Corporate Form and Substantive Consolidation*, in *Geo. Wash. L. Rev*., 2007, 237.

[701] K. SCHMIDT, *Konzerninsolvenzrecht – Entwicklungsstand und Perspektiven*, in *KTS*, 2010, 13, speaks of «generalisierten Totaldurchgriff». As is clearly held in the UNCITRAL Guide on the treatment of group insolvencies, because of the nature of enterprise groups and the manner in which they operate, there may be a complex web of financial transactions between group members, and creditors may have dealt with different members or even with the group as a single economic entity rather than with members individually.

[702] «Substantive consolidation usually results in, inter alia, pooling the assets of, and claims against, the two entities; satisfying liabilities from the resulted common fund; eliminating inter-company claims; and combining the creditors of the two companies for the purposes of voting on reorganization plans»: *In re Augie/Restivo Banking Co* 850 F 2d 515, 518 (2nd Circ, 1988); *Genesis Health Ventures, Inc. v, Stapleton (In re. Genesis Health Ventures, Inc.)*, 402 F.3d 416, 423 (3d Cir. 2005). The result is comparable to a merger or a multiparty version of veil piercing: PETER, *Insolvency of Groups of Companies*, cit., 204.

interdependent and whose assets and liabilities are so intertwined that it is difficult to separate the different legal personalities[703]. In particular, attention is paid to the interests of the creditors, to their good faith in relying on the group as a whole and to possible hindrances or frauds committed to their detriment[704]. Also UNCITRAL support substantive consolidation in its recommendations, in the exceptional circumstances in which «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 with sufficient confidence without disproportionate expense or delay» or when «group members have been engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential in the interests of justice to rectify that scheme or activity»[705].

Within the European Union, only a limited number of countries applies substantive consolidation. Irish legislation specifically provides such mechanism in Section 141 of the Companies Act 1990, while the French legislator only recently codified in the Code de Commerce the case law concerning the so-called *confusion des patrimoines*[706]. In the

[703] See SKEEL, *Groups of Companies: Substantive Consolidation in the US*, in PETER, JEANDIN, KILBORN (eds.), *The Challenges of Insolvency Law Reform in the 21st Century*, cit., 229 *et seq*. Leading cases: *In re Augie/Restivo Baking Co.*, 860 E2d 515, 518 (2d Cir. 1988); *In re Bonham*, 229 E3d 750, 764 (9th Cir. 2000); *In re WorldCom, Inc*, 2003 Bankr LEXIS 1401, 102 ff (Bankr DNY 2003); *In re Auto-Train Corp. Inc.* 810 F-2d 270, 276 (C.D.Cir.1987); *In re Standard Brand Paint Co.* 154 B.R. 563, 569 (Bankr.C.D.Cal 1993). Although it is considered as an equitable remedy, which finds its roots in § 105(a) of the Bankruptcy Code, its statutory basis is still considered as questionable because has never been expressly embraced by the Supreme Court: see BAIRD, *Substantive Consolidation Today*, in *Boston College L. Rev.*, 2005, 15.

[704] It is in fact held that consolidation is not necessarily in all creditors' interest. See *Chemical Bank New York Trust Company v T W Kheel*, 369 F.2d 845, para. 10: «I cannot agree that a practice of handling the business of a group of corporations so as to impede or even prevent completely accurate ascertainment of their respective assets and liabilities in their subsequent bankruptcy justifies failure to make every reasonable endeavour to reach the best possible approximation in order to do justice to a creditor who had relied on the credit of one – especially to creditor who was ignorant of the loose manner in which corporate affairs were being conducted».

[705] See UNCITRAL, *Legislative Guide on Insolvency Law, Part Three*, cit., Recommendation n. 220.

[706] After a first codification of the case law in 1985 (Art. 7 de la loi n° 85-98 du 25 janvier 1985 relative au redressement et à la liquidation judiciaires des entreprises), this mechanism has been finally given a full legal basis only in 2005 in Art. L621-2 of the Code de commerce: «*la procédure ouverte peut être étendue à une ou plusieurs autres personnes en cas de confusion de leur patrimoine avec celui du débiteur ou de fictivité de la personne morale. A cette fin, le tribunal avant ouvert la procédure initiale reste compétent*». Among the most relevant cases, see the French Court of Cassation, 19 April 2005, *Metaleurop*, and 10 January 2006, n. 04-19.917, *Air Lib*, on which see GRELON, DESSUS-LARRIVE, *La confusion des patrimoines au sein d'un groupe*, in *Rev. sociétés*, 2006, 281. In the sense that the mechanism may be applied in the context of the EIR, see ROUSSEL GALLE, *Confusion des patrimoines et application du règlement n. 1346/2000*, in *Rev. sociétés*, 2010, 404 *et seq.*; BUREAU, *Du juge compétent pour étendre à une société étrangère une procédure collective ouverte en France*, in *Revue critique*, 2009, 766; ID., *La fin d'un ilôt de résistance. Le Règlement du Conseil relatif aux procédures d'insolvabilité*, in *Revue critique*, 2002, 635-636; MELIN, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité*, Bruxelles, Bruylant, 2008, 39; MENJUCQ, *Les groupes de sociétés*, in JAULT-SESEKE, ROBINE (dir.), *L'effet international de la faillite: une réalité?*, Paris, Dalloz, 2004, 165. However, in Case C-191/10, *Rastelli* [2011] *ECR* I-13209, para. 28, the CJEU held that the possibility to join another legal entity to insolvency

Netherlands, the admissibility of substantive consolidation is based on a ruling by the Dutch Supreme Court and codification in the Dutch legislation was proposed in the preliminary bill for an Insolvency Act in 2007[707]. Although the German literature appeared to be in favor of the introduction of a substantive consolidation for exceptional cases[708], the recent governmental bill advocates in the opposite sense, on the ground that it would call into question a fundamental dogma of German group law, that is the principle of separate legal personality, and would thus jeopardize the economic attractiveness of group corporate structures[709].

This insolvency-shaped form of lifting the corporate veil allows benefiting from the appointment of a single administrator and the application of a single law. Moreover, the reduction of the number of proceedings reduce costs and increase the turnout for creditors through value maximization. However, a consolidation of this kind is generally regarded as too extreme because it threatens the very essence of a legal entity and affects profoundly creditors' rights and recoveries[710]. That is why it is a remedy to be used only sparingly[711]. As a response to these drawbacks, middle solutions have been proposed: for instance, one could envisage a partial consolidation, with the exclusion of those group members that are not strongly integrated with the rest of the group, aimed at protecting the interests of specific creditors and respecting the equitable nature of this remedy[712].

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proceedings on the sole ground that their property has been intermixed, without considering where that entity's COMI is situated, would constitute a circumvention of the system established by the Regulation. The fact that this extension is only possible when both companies have their COMI in France was already stressed by DAMMANN, PODEUR, *Les groupes de sociétés face aux procedures d'insolvabilité*, in *Rev. Lamy dr. aff.*, 2007, 65 *et seq.*

[707] Hoge Raad, 25 September 1987, *Van Kempen/Zilfa en DWC*, in *N.J.*, 1988, 136. For an in-depth examination, see REUMERS, *Samengevoegde afwikkeling van faillissementen*, Deventer, Wolters Kluwer, 2008.

[708] HUMBECK, *Plädoyer für ein materielles Konzerninsolvenzrecht*, in *NZI*, 2013, 957; PAULUS, *Überlegungen zu einem modernen Konzerninsolvenzrecht*, in *ZIP*, 2005, 1953-1955; ID., *Wege zu einem Konzerninsolvenrecht*, in *ZGR* 2010, 277. See also VERHOEVEN, *Die Konzerninsolvenz*, Köln, Carl Heymanns, 2011, 238 *et seq.*

[709] BRÜNKMANS, *Konzerninsolvenzrecht*, cit., para. 17. Substantive consolidation is also excluded in Austria: see OGH, 22 November 2011, 8 Ob 104/11v, in *ZIK*, 2012, 24.

[710] In regards, HIRTE, *Towards a Framework for the Regulation of Corporate Groups' Insolvencies*, cit., 225-226, observes that it is possible to continue respecting creditors' differences with the advantage of having an individual procedure, by granting priority claims to those creditors proving they relied on separate entities.

[711] *In re Owens Corning*, 419 F.3d 195, 209 (3d Cir. 2005); *In re Augie/Restivo*, 860 F.2d at 518; *In re Bonham*, 229 F.3d at 767; *In re Flora Mir*, 432 F.2d at 1062-63. EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 3: «Es handelt sich um eine außergewöhnliche Maßnahme für außergewöhnliche Fälle». Accordingly, they conclude that substantive consolidation has to be rejected because it leads to massive economic disincentives. The cases of asset mixing and fraud are actually rare and can be covered with the general tools for the abuse of rights.

[712] UNCITRAL, *Legislative Guide on Insolvency Law. Part Thre*, cit., 70-71; MEVORACH, *Appropriate Treatment of Corporate Groups in Insolvency*, cit., 188 (but defining this solution as rare and impractical).

3.3.2. Procedural or Administrative Consolidation

The second approach is procedural consolidation. In this case, insolvency proceedings against all the insolvent companies belonging to the same group are conducted before a single bankruptcy court, usually in the district the parent company is located, i.e. the place from where the group business as a whole is controlled[713]. This may, in fact, be considered as the "nerve centre" of the group, from where subsidiaries are controlled and coordinated[714]. This consolidation allows one court presiding over all the proceedings, with the application of one single law and the appointment of the same individual as the insolvency representative of every member of the group[715], who can better take into account the overall group's structure[716].

The economic rationale underlying this approach is that a group often operates as a single functional entity and that a comprehensive approach can simplify a going-concern sale of the business or a global group-wide restructuring. It is, in fact, widely accepted that a centralization of the proceedings opened with regard to the different members of a group is beneficial in terms of economic efficiency, especially in case of integrated groups, in order to avoid unnecessary costs and delay and to maximize the enterprise value for the benefit of creditors and other interested parties, thereby protecting investors and preserving employment[717].

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[713] PAULUS, *Group Insolvencies – Some Thoughts About New Approaches*, cit., 827. *Black's Law Dictionary*[10], cit., 965: «The management of two or more bankruptcy estates, usually involving related debtors, under one docket for purposes of handling various administrative matters, (…) to conclude the cases more efficiently».

[714] In its purest form, this model implements a rule which establish the group court – in the case of hierarchically structured groups – at the forum of the group's mother. In many cases, however, there is a great deal of disputes as to whether this place is sufficiently relevant. It can also be unclear which company is at the top in complex structures – if there is such a top company at all. See EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 5; VALLENDER, DEYDA, *Brauchen wir einen Konzerninsolvenzgerichtsstand?*, in *NZI*, 2009, 828-829; MEVORACH, *The "Home Country" of a Multinational Enterprise Group Facing Insolvency*, cit., 428-429 and 433 *et seq.*

[715] PETER, *Insolvency of Groups of Companies*, cit., 207. The importance to have a single administrator is stressed by TOLLENAAR, *Proposal for Reform: Improving the ability to rescue multinational Enterprises under the European Regulation*, in *IILR*, 2011, 253-255, who extends this possibility also in cases where proceedings against different group members are opened in various States: «This is the most powerful way to centralise efforts to rescue the business as a whole and to co-ordinate all the proceedings of the various individual debtor companies, without causing the unintended side effects of the group COMI approach». See also REUMERS, *Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR*, in *Eur. Comp. Fin. L. Rev.*, 2013, 584-586.

[716] EHRICKE, *Das abhängige Konzernunternehmen in der Insolvenz*, cit., 465. Such a mechanism would certainly lead to the attribution of jurisdiction to a single court and to the application of its insolvency law, thus providing only the basic conditions for procedural coordination, but other aspects, such as the appointment of a single administrator and other coordination measures, would be left to to national law: VALLENDER, DEYDA, *Brauchen wir einen Konzerninsolvenzgerichtsstand?*, cit., 831.

[717] For a detailed analysis of the benefits of centralization, see WOLF, *Der europäische Gerichtsstand bei Konzerninsolvenenten*, Tübingen, Mohr Siebeck, 2012, 64-90. See also BUFFORD, *Coordination of Insolvency*

This is considered to be an appropriate tool to address the insolvency of integrated groups that are significantly linked to the home country forum and may benefit from a unified process. Moreover, it allows to overcome the main critiques raised against the overly intrusiveness of substantive consolidation[718]: indeed, in contrast to the preceding approach, in the procedural consolidation the separate entity principle is not formally called into question, because each proceeding is formally separated from the others and the assets of each group member are merely available for the satisfaction of creditors of the individual group member[719]. Consequently, the respect of the entity separateness allows transparency and certainty with regard to legal duties and obligations, and more clarity in entitlements to profits and residual assets, thus minimizing possible prejudices to creditors[720].

Some modern insolvency legislations expressly provide this mechanism[721]. This is a common practice in Canada[722] and in the US, where Rule 1015 of the Federal Rules of bankruptcy procedure expressly permits the consolidation of two petitions by or against affiliated debtors[723]. Similar provisions may be found also in some Member States, such as

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Cases for International Enterprise Groups, cit., 692 *et seq.*; MENJUCQ, *La question de l'application du règlement aux groups de sociétés*, in *Bull. Joly Entr. diff.*, 2012, n. 1, 56; VERHOEVEN, *Die Konzerninsolvenz*, cit., 193 *et seq.*; MEVORACH, *Towards a consensus on the treatment of multinational enterprise groups in insolvency*, cit., 370 *et seq.*; SARRA, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, cit., 549. According to MOSS, *Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, in *Brooklyn J. Int. L.*, 2007, 1008: «from a practical point of view, having separate main proceedings in each place where each subsidiary in a group is registered is wasteful, duplicative, expensive, and likely to impede a rescue, reconstruction, or beneficial realization of the business of the group».

[718] MEVORACH, *Appropriate Treatment of Corporate Groups in Insolvency*, cit., 189.

[719] VALLENDER, DEYDA, *Brauchen wir einen Konzerninsolvenzgerichtsstand?*, cit., 826; HIGHTOWER, *The Consolidation of the Consolidations in Bankruptcy*, in *Georgia L. Rev.*, 2003, 466 and 469-470; BERRY, *Consolidation in Bankruptcy*, in *Am. Bankr. L. J.*, 1976, 347: «Administrative consolidation eliminates duplicative paper work but preserves the separate entities. Substantive consolidation, on the other hand, merges the assets and liabilities of the different bankrupts and disregards any inter-entity claims»; TATELBAUM, *The Multi-Tiered Corporate Bankruptcy and Substantive Consolidation – Do Creditors Lose Rights and Protection?*, in *Com. L. J.*, 1984, 285. See also *Unsecured Creditors Comm. v. Leavitt Structural Tubing*, 55 B.R. 710, 711-12 (N.D. Ill. 1985), *affd*, 796 F.2d 477; *In re Coles*, 14 B.R. 5, 5-6 (Bankr. E.D. Pa. 1981). However, some authors affirm that the distinction between these two concepts is more apparent than real and that every consolidation, however characterized, is likely to have an impact upon the substantive rights of some of the parties involved: SELIGSON, MANDELL, *Multi-Debtor Petition: Consolidation of Debtors and Due Process*, in *Com. L. J.*, 1968, 346-347.

[720] SARRA, *Oversight and Financing of Cross-Border Enterprise Group Insolvency Proceedings*, cit., 571.

[721] UNCITRAL, *Working Group V*, A/CN.9/WG.V/WP.74/Add.2, cit., para. 12.

[722] ZIEGEL, *Corporate Groups and Cross-border Insolvencies: A Canada-Unites States Perspective*, in *Fordham J. Corp. Fin. L.*, 2002, 375-382: «procedural consolidation is almost *de rigueur* where a financially distressed group seeks to reorganize itself».

[723] BUFFORD, *United States International Insolvency Law: 2008-2009*, New York, OUP, 2009, 565-567. Interestingly, VAN GALEN, *International groups of insolvent companies in the European Community*, in *IILR*, 2012, 383-384, stresses that there are two important differences between the American and the European situation: (i) under US Chapter 11 the debtor remains in possession of the assets and no trustee is appointed, so that the

Spain, where consolidation can be realized either *ab initio* or *ex post* after the opening of the proceedings[724], or Italy, where the extraordinary proceedings for large insolvent companies can be procedurally extended to other company of the same group[725].

It is self-evident that the opening of parallel main proceedings against different group members before the venue of the parent company eliminates the need for coordination among proceedings, thus reducing significantly transactional costs and discrepancies and expediting proceedings[726]. It also creates the conditions for eliminating strategic conflicts in a group insolvency and implementing advantageous cross-group settlement solutions, especially in situations where different courts would pursue various winding-up strategies. However, the aim of minimizing transaction costs must be brought into line with the general criteria applicable to jurisdiction, in order to ensure as much as possible clarity and foreseeability[727].

A major concern raised by procedural consolidation is its compatibility with creditors' *ex ante* expectations as to their pre-insolvency rights and to what forum and law will preside the proceedings against the subsidiary with which they were dealing. In order to achieve reasonable solutions, it is necessary to consider the legitimate expectations of various groups of creditors involved with the international group, in particular focusing on the disadvantage they may incur because of the opening of insolvency proceedings in a foreign country[728]. A change in the

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management of all companies remains in place; (ii) the shift of location of insolvency proceedings does not correspond to a change in the applicable law, because bankruptcy law is federal law.

[724] SÁNCHEZ-CALERO, FUENTES NAHARRO, Gr*upos y concurso: las recomendaciones de UNCITRAL y el Derecho español*, in AA.VV., *Insolvency and Cross-border Groups. UNCITRAL Recommendations for a European Perspective?*, Quaderni di Ricerca Giuridica, February 2011, n. 69, 59-62; EMBID IRUJO, *Grupos de sociedades y Derecho concursal*, in *Estudios sobre la Ley concursal: libro homenaje a Manuel Olivencia*, vol. 2, Madrid, Marcial Pons, 2005, 1903; FERRÉ FALCÓN, *El grupo de sociedades y la declaración de concurso en la nueva normativa concursal*, ivi, 1946; SÁNCHEZ-CALERO, *Algunas cuestiones concursa les relativas a los grupos de sociedades*, in *An. der conc.*, 2005, 7 *et seq.*

[725] See Art. 80 *et seq.* of Legislative Decree 8 July 1999, n. 270, and Art. 3, par. 3-*bis*, of Law Decree 22 December 2003 n. 347. In the literature, among many, see DI MAJO, *I gruppi di imprese nel fallimento*, in GHIA, PICCININNI, SEVERINI (dir.), *Trattato delle procedure concorsuali. La dichiarazione di fallimento*, Vol. I, Milanofiori Assago, Utet Giuridica, 2010, 289 *et seq.*; PANZANI, *L'insolvenza dei gruppi di società*, in *Riv. dir. impr.*, 2009, 527 *et seq.*; SCOGNAMIGLIO, *Gruppi di imprese e procedure concorsuali*, in *Giur. comm.*, 2008, 1091 *et seq.*

[726] BUFFORD, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, cit., 709-10. In fact, the indirect bankruptcy costs appear lower than for introduction of an additional co-ordination process: THOLE, *Der Konzern im insolvenzrechtlichen Sinne*, cit., para. 71.

[727] This point will be further analysed with regard to the European Insolvency Regulation: see *infra* para. 3.5.1.

[728] MEVORACH, *The "Home Country" of a Multinational Enterprise Group Facing Insolvency*, cit., 434-435. However, BARIATTI, *L'applicazione del regolamento CE n. 1346/2000 nella giurisprudenza*, in *Riv dir. proc.*, 2005, 679, highlights that «il fatto che molto spesso le obbligazioni delle controllate siano garantite dalla controllante sembra fornire un'ulteriore giustificazione all'accentramento della procedura di insolvenza presso la sede di quest'ultima, perché i creditori garantiti avranno valutato, e in ipotesi accettato, il rischio di insolvenza anche con riferimento alla legislazione dello Stato della controllante».

location of an insolvency proceeding is capable of affecting significantly both the creditors' substantial rights, if one thinks of applicable law and the ranking of claims, and procedural rights, concerning the real ability to participate in a foreign proceeding[729]. In this last regard, there could be significant barriers for small trade suppliers and employee groups to participate in hearings in foreign jurisdictions and to voice concern about potential prejudice to their interests, thus making more difficult for the court to ensure fairness and reasonableness[730].

In addition, there may also be problems of lack of transparency and conflict of interest of the single representative, who should consider every parallel proceeding separately, in particular concerning the settlement of intra-group claims and attribution of assets. It is quite evident, in fact, that he would be virulently exposed to this risk when asserting claims for contestation against other members of the group, or when raising objections from equity compensation to affiliates or, finally, in the case of liability proceedings[731]. There are constellations of cases in which the supervisory role of the competent court is not sufficient to counterbalance the central role of the representative, so that the only solution could be to appoint a special insolvency administrator (*Sonderinsolvenzverwalter*), to whom certain powers should be assigned, for instance concerning agreements with other members of the group,[732].

3.3.3. Procedural Coordination

It is generally assumed that procedural consolidation cannot work as a one-size-fits-all rule, with universalism and territorialism playing both a role depending on the different group

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[729] VAN GALEN, *International groups of insolvent companies in the European Community*, cit., 384, speaks of "substantial redistributive effect".

[730] SARRA, *Oversight and Financing of Cross-Border Enterprise Group Insolvency Proceedings*, cit., 565. In this sense, GARAŠIĆ, *What is right and what is wrong in the ECJ's judgment on* Eurofood IFSC Ltd, in *Yb. Priv. Int. L.*, 2006, 91, affirms that «many (…) creditors with smaller claims and those with lower levels of education would most likely refrain from seeking their claims due to insufficient financial means, as well as inadequate knowledge of foreign languages, and legal codes».

[731] THOLE, *Der Konzern im insolvenzrechtlichen Sinne*, cit., paras. 72-73; EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 6; GRAEBER, *Der Konzerninsolvenzverwalter - Pragmatische Überlegungen zu Möglichkeiten eines Konzerninsolvenzverfahrens*, in *NZI*, 2007, 266; PAULUS, *Überlegungen zu einem modernen Konzerninsolvenzrecht*, cit., 1951-1952.

[732] ROTSTEGGE, *Konzerninsolvenz: Die verfahrensrechtliche Behandlung von verbundenen Unternehmen nach der Insolvenzordnung*, Baden-Baden, Nomos, 2007, 202-206; GRAEBER, *Der Konzerninsolvenzverwalter – Pragmatische Überlegungen zu Möglichkeiten eines Konzerninsolvenzverfahrens*, cit., 269-70 (affirming that the former representative is deprived of the power to examine and to approve the agreement, which power is transferred to the new special administrator, without further attribution of a separate right of actions or of management of the group's assets); EIDENMÜLLER, *Verfahrenskoordination bei Konzerninsolvenzen*, in *ZHR*, 2005, 540-541; K. SCHMIDT, *Konzerninsolvenzrecht – Entwicklungsstand und Perspektiven*, cit., 28.

structures and managerial patterns[733]. Indeed, while centralisation may match the economic reality of integrated groups, in the case of decentralised groups characterized by an independent management and enjoying a greater degree of autonomy, with no single centre of control or coordination, there is no clear evidence that the most appropriate forum for the insolvency proceedings is that in which the parent company is incorporated, so the interests of creditors are best served by the opening an insolvency proceeding in the state where the subsidiaries have their registered office and by strengthening cooperation duties[734].

Within this context, procedural coordination refers to varying degrees of coordination with respect to the conduct of multiple insolvency proceedings commenced with respect to different group members before multiple jurisdictions[735]. Like in the case of a procedural consolidation, there are separate insolvency proceedings for each group member, whose assets and liabilities remain separate and distinct, and the integrity of individual group members is preserved. However, in this case, proceedings are commenced concurrently in different States, where the different group members are located, with the positive outcome of keeping the interference with the twin notions of separate legal personality and limited liability to the minimum[736].

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[733] MEVORACH, *Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge*, in *Brooklyn J. Corp. Fin. Comm. L.*, 2014, 234-241. This is also true within the same group of companies, because some subsidiaries may enjoy more independence and autonomy than others: WAUTELET, *Some considerations on the Centre of Main Interests as jurisdictional test under the European Insolvency Regulation*, in AFFAKI (dir.), *Faillite internationale et conflit de juridiction. Regards croisés transatlantique*, Bruxelles, Bruylant, 2007, 98; DAMMANN, *L'application du règlement CE n° 1346-2000 après les arrêts Staubitz-Schreiber et Eurofood de la CJCE*, in *Dalloz*, 2006, 1752, para. 1. The lack of a universal solution for different kind of group structure is at the base of Karsten Schmidt's denial of the appropriateness to legislate on group insolvency: K. SCHMIDT, *Flexibilität und Praktikabilität im Konzerninsolvenzrecht – Die Zuständigkeitsfrage als Beispiel*, cit., 1058.

[734] Among many, see NIETZER, *Guidelines for coordination of Multinational Enterprise group insolvencies*, in *IILR*, 2012, 499; VALLENDER, DEYDA, *Brauchen wir einen Konzerninsolvenzgerichtsstand?*, cit., 826 and 831; FRANKEN, *Three Principles of Transnational Corporate Bankruptcy*, cit., 241; BUFFORD, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, in *Columbia J. Eur. L.*, 2006, 429; ID., *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, cit., 136-137. The distinction between different levels of group integration is also considered by EUROPEAN PARLIAMENT, Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Part. 3. A different opinion has been expressed by WOUTERS, RAYKIN, *Corporate Group Cross-Border Insolvencies Between The United States & European Union*, cit., 397-399, according to whom all types of groups may benefit from centralized proceedings.

[735] COOPER, *Insolvency proceedings in case of groups of companies: prospects of harmonisation at EU level*, PE 432.762, 2011, 11. UNCITRAL, *Legislative Guide on Insolvency Law, Part Three*, cit., 86, stresses the importance of cooperation also with regard to groups of companies, as a tool «to facilitate commercial predictability and increase certainty for trade and commerce, as well as fair and efficient administration of proceedings that protects the interests of the parties, maximizes the value of the assets of group members to preserve employment and minimizes costs». See, extensively, VATTERMOLI, *Gruppi multinazionali insolventi*, in *Riv. dir. comm.*, 2013, 585.

[736] THOLE, *Der Konzern im insolvenzrechtlichen Sinne*, cit., para. 68 (at the same time avoiding negative repercussions on the credit financing capacity of the group members); PAULUS, *Group Insolvencies – Some Thoughts About New Approaches*, cit., 827.

While the benefits of coordination are unanimously shared in general terms, there are different mechanisms in which such coordination may take place in practice[737]. The upper level of coordination is achieved with the appointment of identical administrators in the individual proceedings opened in different States[738]. This is known as the "principle of personal union", which is generally used in national group insolvencies and may be applied it two ways: first, by initially appointing an individual only as representative of the parent company, in which capacity he may decide how to proceed with regard to the subsidiaries and possibly, if proceedings against the subsidiaries are opened, he may urge the court to appoint him also as representatives of these companies; second, by appointing the same individual as representative of all insolvent group members from the outset[739]. The presence of a single administrator in all proceedings would evidently simplify coordination among proceedings and would make it easier the adoption of a common policy and reduce the need for decisions by the courts of the subsidiaries' proceedings[740]. However, this situation raises problems similar to those highlighted above concerning possible conflict of interest, especially when the group is financed through a cash pool[741]. In addition, one should also consider the serious difficulties in dealing with different laws and different legal cultures with respect to group insolvency and to the courts' reluctance to appoint foreign individuals[742].

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[737] EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 4.

[738] With regard to the German group insolvency bill, see BRÜNKMANS, *Die koordinierte Verfahrensbewältigung von Insolvenzverfahren gruppenangehöriger Schuldner nach dem Diskussionsentwurf zur Konzerninsolvenz*, cit., 174-175. Using the expression of EHRICKE, *Konzerninsolvenzrecht*, in *Kölner Schrift zur Insolvenzordnung*[3], Köln, Kap, 2009, 1055, this would allow to secure «eine Verfahrenskontrolle in *einer* Hand».

[739] ROTSTEGGE, *Konzerninsolvenz: Die verfahrensrechtliche Behandlung von verbundenen Unternehmen nach der Insolvenzordnung*, cit., 460.

[740] UNCITRAL, *Legislative Guide on Insolvency Law. Part Three*, cit., 106-107.

[741] DEYDA, *Der Konzern im europaischen internationalen Insolvenzrecht*, Köln, Nomos, 2008, 147.

[742] PAULUS, *Group Insolvencies – Some Thoughts About New Approaches*, cit., 827, stresses that a single administrator would avoid frictional losses due to cooperation of several administrators, but presenting the same concerns illustrated above as to loss of neutrality and possible conflict of interest. In these cases, as seen above, the law shall allow the appointment of a special examiner (*Sonderinsolvenzverwalter*): see BRÜNKMANS, *Konzerninsolvenzrecht*, cit., para. 68-69 (specifying that the competences of this special administrator should be limited to mere supervision and control with regard to mass displacements and the examination of the application for intra-group claims, similar to the administrators in individual insolvencies); GRAEBER, *InsO § 56 Bestellung des Insolvenzverwalters*, in *Münchener Kommentar zur Insolvenzordnung*[3], cit., Vol. 1, para. 47; EIDENMÜLLER, *Verfahrenskoordination bei Konzerninsolvenzen*, cit., 541. In this regard, one author the proposed to appoint the insolvency practitioner of the parent company as office holder in all the proceedings opened against group members, but at the same time retaining local representatives who will handle the day-today work. Given the risk that the group office holder may come across evident conflicts of interest, local representatives should be given a right to veto decisions, so that such decisions are submitted to the local courts for determination: see TOLLENAAR, *Dealing with the Insolvency of Multinational Groups under the European Insolvency Regulation*, in *Insolv. Int.*, 2010, 69 *et seq.*

An intermediate solution could be to ensure coordination via a leading jurisdiction, through the leadership of the forum where the whole group is to some extent coordinated in the ordinary course[743]. However, an additional layer of binding cooperation may run against the objectives of minimizing transactions costs and result in inefficiencies and procedural complexity, so that the cooperation gains are more difficult to balance with the additional costs[744].

The lower model is horizontal coordination lies on the assumption that a minimum form of coordination is fundamental to reorganization plans of whatever kind. For a cost-efficient and timely administration of proceedings, it is necessary to facilitate the spreading of information concerning the financial activities of the group members, the coordination of sale of assets, the identification of intra-group liabilities, and the establishment of joint deadlines,[745]. In particular, the possibility to have coordinated hearings and meetings could significantly promote the efficiency of parallel proceedings by bringing relevant stakeholders together to discuss and resolve relevant issues or potential conflicts[746].

A fundamental tool to create a framework for communication and cooperation in the context of group insolvency proceedings are cross-border protocols (ad-hoc contractualism)[747]. They are private agreements negotiated among the key parties to the proceedings, tailored to the specifics of the particular situation on a case-by-case basis and designed to address issues arising in cross-border cases. In particular, they aim at facilitating resolution of controversies through cooperation among the courts, the debtor, and other interested parties, working

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[743] VAN GALEN, *International groups of insolvent companies in the European Community*, cit., 382-383. The idea is that the liquidator of the ultimate parent company has, for example, the power to ask the court of the main proceedings of a subsidiary to stay the process of liquidation with respect to the subsidiary's assets or to propose a rescue plan with respect to the subsidiary.

[744] Critically, EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 6-7; FRIND, *Die Überregulierung der Konzerninsolvenz*, in *ZInsO*, 2013, 429; and ANDRES, MÖHLENLEAMP, *Konzerne in der Insolvenz - Chance auf Sanierung?*, in *BB*, 2013, 586-587.

[745] SARRA, *Oversight and Financing of Cross-Border Enterprise Group Insolvency Proceedings*, cit., 564; EAD., *Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies*, cit., 89-90.

[746] UNCITRAL, Note by the Secretariat, Working Group V (Insolvency Law), 10 February 2010, A/CN.9/WG.V/WP.92, Para. 23.

[747] On the fundamental role played by protocols, see ZUMBRO, *Cross-Border Insolvencies and International Protocols - An Imperfect But Effective Tool*, in *Bus. L. Int.*, 2010, 157; SEXTON, *Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law and the EU Insolvency Regulation*, in *Chicago J. Int. L.*, 2011, 811; TAYLOR, *The Use of Protocols in Cross Border Insolvency Cases*, in PANNEN (ed.), *European Insolvency Regulation*, Berlin, De Gruyter, 2007, 678; EIDENMÜLLER, *Der nationale und der internationale Insolvenzverwaltungsvertrag*, in *ZZP*, 2001, 3; PAULUS, *Protokolle – ein anderer Zugang zur Abwicklung grenzüberschreitender Insolvenz*, in *ZIP*, 1998, 977; FLASCHEN, SILVERMAN, *Cross-Border Insolvency Cooperation Protocols*, in *Texas Int. L. J.*, 1998, 587.

efficiently and increasing realizations for creditors in potentially competing jurisdictions, thus also effectively reducing the cost of litigation and enabling the parties to focus on the conduct of the insolvency proceedings[748].

The first – and one of the most successful – time protocols were used in modern times was in the 1991 case of *In re Maxwell Communications Corp.*[749], and nowadays are commonly employed by courts, especially in common law jurisdictions[750]. As to their content, even though protocols usually cover issues related to procedural coordination and court-to-court communication, more recently, conversely, they also seek in some cases to address substantive issues, such as the definition of the law applicable to avoidance actions, the applicable choice of law for certain classes of claims or classes of assets and, very interestingly, limited substantive consolidation for the purposes of settling intra-group liabilities[751].

An important role is also played by the best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines for communication and cooperation adopted by European and international organizations active in the area of insolvency law and the relevant guidelines prepared by UNCITRAL[752].

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[748] A similar definition is provided in UNCITRAL, *Practice Guide on Cross-Border Insolvency Cooperation*, New York, 2010, 4. According to ESPINIELLA, *Procedimientos de insolvencias y groupos multinacionales de sociedades*, Madrid, Thomson, 2006, 289 *et seq.*, the procedural cooperation between the different group members should be based upon what he calls "institutionalized" protocol, whose use should be mandatory for such cases.

[749] *In re Maxwell Communications Corporation plc*, 170 BR 802, 802 (Bankr. S.D.N.Y. 1994), on which see WESTBROOK, *The Lessons of Maxwell Communications*, in *Fordham L. Rev.*, 1996, 2531 *et seq.*; and FLASCHEN, SILVERMAN, *Cross-Border Insolvency Cooperation Protocols*, cit., 590–592. Recent US bankruptcy cases in which protocols have been employed include: *In re Smurfit-Stone Container Corporation*, Case No 09-10235 (Bankr. D Del 2009); *In re Nortel Networks Inc*, Case No 09-10138 (Bankr D Del 2009); *In re Lehman Brothers Holdings Inc*, Case No 08-13555 (Bankr SDNY 2008); *In re Quebecor World (USA) Inc*, Case No 08-10152 (Bankr SDNY 2008). In Europe, one of the most important protocols was the one concluded between the Commercial Court of Nanterre (France) and the Chancery Division of the High Court of Justice (London) to coordinate the main insolvency proceeding opened against *Sendo International Ltd* in England and the secondary proceeding opened against the same debtor in France (1 Jun 2006): the text of the protocol is available in PANNEN (ed.), *European Insolvency Regulation*, cit., 660 *et seq.*

[750] See WESSELS, MARKELL, KILBORN, *International Cooperation in Bankruptcy and Insolvency Matters*, cit., 176 *et seq.*, and all the cases therein referred to.

[751] A sample is provided by the Cross-Border Insolvency Concordat adopted by the Council of the International Bar Association Section on Business Law (Paris, 17 September 1995) and by the Council of the International Bar Association (Madrid, 31 May 1996). See also ZUMBRO, *Cross-Border Insolvencies and International Protocols -- An Imperfect But Effective Tool*, cit., 168-169; SEXTON, *Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups*, cit., 822. More generally, on the drafting and functioning of protocols, see ESPINIELLA, *Los protocolos concursales*, in *An. der. conc.*, 2007, 165 *et seq.*

[752] In this regard, see the INTERNATIONAL INSOLVENCY INSTITUTE, *Guidelines for Coordination of Multinational Enterprise Group Insolvencies*, Paris, 2012; UNIVERSITEIT LEIDEN, NOTTINGHAM TRENT UNIVERSITY, *EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Communication Guidelines*, 2014; AMERICAN LAW INSTITUTE, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases*.

3.4. The European Insolvency Regulation: Historical Remarks and the Road to the Recast Regulation 2015/848

3.4.1. The European Efforts towards a Unified Regime for Cross-Border Insolvency

As it is evident from the previous paragraphs, the phenomenon of cross-border insolvency is not recent[753] and the attempts to provide an international framework dealing with the effects of international insolvencies transcending national boundaries have been several since the second half of the eighteenth century[754]. In particular, in the 1980s and 1990s, some important multilateral initiatives reached the treaty table and resulted into concrete possible conventions.

For instance, the Council of Europe and the European Union have been very active in concluding texts seeking to regulate the phenomenon. The concerted efforts to address the problem of cross-border insolvency began in 1963 in the then European Economic Community with a draft that was produced seven years later in 1970 and renegotiated in 1973[755]. A final

[753] NADELMANN, *Bankruptcy Treaties*, in *Univ. Pa. L. Rev.*, 1944, 58, starts his article by remembering the insolvency of the Ammanati Bank of Pistoia in 1302, with the closure of its branch in Rome, and the panic created among its creditors in Spain, England, Portugal, Germany and France.

[754] The first attempt in modern times is generally indicated as the Congress of the *Association pour la réforme et la codification du droit des gens*, held in Antwerp in 1877, which resulted in a proposal draft for a convention based on the principles of unity of insolvency and its extraterritorial effects. Immediately after, in 1894, a project consisting of six articles was drafted by the *Institut de droit international*: for further references and other projects, see GIANNINI, *Il movimento internazionale per l'unificazione del diritto commerciale*, Roma, Il foro italiano, 1937, 46 *et seq.*; GIULIANO, *Il fallimento dei diritto processuale civile internazionale*, Padova, Cedam, 1943, 382 *et seq.*; VANZETTI, *L'insolvenza transnazionale storia del problema. In Germania, in Italia e nei progetti di convenzione internazionale*, Milano, Giuffrè, 2006, 381 *et seq.* In particular, the only multilateral convention entered into force is the Scandinavian Convention of 1933 between Denmark, Finland, Iceland, Norway, and Sweden, on which see PARMENT, *The Nordic Bankruptcy Convention – An Introduction*, 2004, www.iiiglobal.org; BOGDAN, *The Nordic Bankruptcy Convention*, in ZIEGEL (ed.), *Current Developments in International and Comparative Insolvency Law*, Oxford, Clarendon, 1994, 701 *et seq.*

[755] Avant-Projet de Convention relative à la faillite, aux concordats et aux procédures analogues, Doc. 3.327/1/XIV/70-F, with the accompanying Explanatory Report Noël-Lemontey Doc. 16/775/XIV 70-F. The English version may be found in LIPSTEIN (ed.), *Harmonisation of Private International Law by the E.E.C.*, London, Inst. of Adv. Legal Studies, 1978, Appendix C, 169 *et seq.* Among many, see HIRSCH, *Vers l'universalité de la faillite au sein du Marché commun*, in *Cahiers dr. eur.*, 1970, 50 *et seq.*; PASTOR RIDRUEJO, *La faillite en droit international privé*, in *Recueil des cours*, 1971, vol. 133, 141; GANSHOF, *L'élaboration d'un droit européen de la faillite dans le cadre de la CEE*, in *Cahiers dr. eur.*, 1971, 146 ; HUNTER, *Draft Bankruptcy Convention of the EEC*, in *Int. Comp. L. Quart.*, 1972, 682; VOULGARIS, *De la compétence judiciaire internationale en matière de faillite dans le cadre de la CEE*, in *Clunet*, 1974, 522; NOËL, *Lignes directrices du projet de convention C.E.E. relative à la faillite*, in *RTD Eur.*, 1975, 159 *et seq.* Insolvency matters were, in fact, excluded from the Brussels Convention 1968, on the ground that the nature of insolvency law and the lack of consensus on essential principles required a separate convention to achieve harmonization: on this exclusion, see the CJEU's leading case 133/78, *Henri Gourdain* [1979] *ECR* 733, para. 4, whose wording has been then recalled in Recital (4) of Regulation

version of the draft was made public in 1982[756], but met the fierce criticism of scholars due to the proposition to introduce uniform substantive provisions that would have significantly affected national insolvency laws[757]. This led to the abandonment of negotiations in 1985[758].

The idea of a European convention received new attention following the initiative of the Council of Europe, which led in 1990 to the adoption of the Istanbul Convention on certain international aspects of insolvency[759]. This new interests re-opened negotiations within the European Community and allowed the Member States to reach an agreement in 1995, with the adoption of the European Convention on insolvency proceedings[760]. This convention was particularly important because it was accompanied by an explanatory report drafted by Miguel Virgós and Etienne Schmit[761], which albeit its non-binding nature has been since then considered both by the judiciary and by academics as a fundamental source of interpretation of the subsequent Insolvency Regulation[762].

The text of the convention was open for signature between 23 November 1995 and 23 May 1996, but never entered into force because of the opposition of the UK, due to political controversies with the other Member States concerning the so-called "mad cow disease" and

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1346/2000. For recent cases, see Case C-157/13, *Nickel & Goeldner Spedition GmbH* [2014] EU:C:2014:2145, para. 23; Case C-213/10, *F-Tex* [2012] EU:C:2012:215, paras. 23 and 29.

[756] The text of the 1982 Draft Convention and the accompanying Report Lemontey in *EC Bull.* Suppl. 2/82.

[757] OMAR, *The Case for a European Convention in Insolvency*, in *Int. Comp. Comm. L. Rev.*, 1996, 163.

[758] See BURTON, *Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty*, in *Ann. Survey Int. Comp. L.*, 1999, 212, for the reasons of negotiation's failure.

[759] DANIELE, *La convenzione europea su alcuni aspetti internazionali del fallimento: prime riflessioni*, in *Riv. dir. int. priv. proc.*, 1994, 500; FLETCHER, *Harmonization of Jurisdictional and Recognitional Rules: The Istanbul Convention and the Draft EEC Convention*, in ZIEGEL (ed.), *Current Developments in International and Comparative Insolvency Law*, cit., 709; DORDI, *La convenzione europea su alcuni aspetti internazionali del fallimento: la consacrazione dell'universalità limitata degli effetti delle procedure concorsuali*, in *Dir. comm. int.*, 1993, 626; LUPONE, *L'insolvenza transnazionale: procedure concorsuali nello Stato e beni all'estero*, Padova, Cedam, 1995, 96; VALLENS, *La convention du Conseil de l'Europe sur certains aspects internationaux de la faillite*, in *Revue critique*, 1993, 137.

[760] Among many, see BALZ, *The European Union Convention on Insolvency Proceedings*, in *Am. Bankr. L. J.*, 1996, 485; FLETCHER, *The European Union Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind*, in *Brooklyn J. Int. L.*, 1997, 25; DORDI, *La convenzione dell'Unione europea sulle procedure di insolvenza*, in *Riv. dir. int. priv. proc.*, 1997, 333; KAYSER, *A Study of the European Convention on Insolvency Proceedings*, in *Int. Insolv. Rev.*, 1998, 95; LUPONE, *La convenzione comunitaria sulle procedure di insolvenza e la riforma del sistema italiano di diritto internazionale privato*, in *Contr. impr. Eur.*, 1999, 429.

[761] VIRGOS, SCHMIT, *Report on the Convention of Insolvency Proceedings* (COUNCIL, document n. 6500/1/96).

[762] WESSELS, *International Insolvency Law*[3], Deventer, Kluwer, 2012, para. 10489.6; VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, The Hague, Kluwer, 2004, 7. In the national case law, see *Stanford International Bank Ltd* [2010] EWCA Civ 137, para. 36: «Though never formally adopted it was and is regarded as an authoritative commentary on the Convention and the subsequent regulation derived from it»; and similarly *Syska & Anor v Vivendi Universal S.A. & Ors* [2009] EWCA Civ 677, para. 20; *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, para. 47. Although no reference may be found in the CJEU's case law, see AG Jacobs in Case C-341/04, *Eurofood IFSC Ltd*, para. 2

with Spain concerning sovereignty issues over the territory of Gibraltar[763]. In those same years, the efforts of UNCITRAL towards a transnational insolvency project successfully culminated in the adoption of a Model Law in 1997. The latter provides for a well-known framework of procedural mechanisms to facilitate the more efficient disposition of international insolvency cases in which an insolvent debtor has assets or debts in more than one State[764].

After the "communitarization" of private international law realized by the Treaty of Amsterdam[765], on the initiative of Germany and Finland the text of the convention was almost integrally taken and converted in the Regulation (EC) No. 1346/2000, i.e. a (then) Community law instrument that is binding directly applicable in all Member States. The Regulation was adopted on 29 may 2000 and came into force on 31 May 2002. Its objective was (i) to improve and secure the efficient and effective operation of cross-border insolvency proceedings so as to ensure the proper functioning of the internal market; (ii) to meet the need for cooperation of the measures to be taken regarding an insolvent debtor's assets; and (iii) to avoid incentives for forum shopping practices by the parties seeking to obtain a more favorable legal position[766].

To this end, the EIR introduced a coherent system of legal rules to govern transnational insolvency procedures involving companies or individuals and to permit coordinated measures to be taken concerning the assets of an insolvent debtor located in different EU countries. These rules relate to different aspects, such as determination of jurisdiction and applicable law, the

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[763] FLETCHER, *Insolvency in Private International Law*[2], Oxford, OUP, 2005, para. 7.1 *et seq.*; OMAR, *Genesis of the European Initiative in Insolvency Law*, in *Int. Insolv. Rev.*, 2003, 147 *et seq.*; WILDERSPIN, L*a Genèse du règlement 1346/2000 du 29 mai 2000 relatif aux procédures d'insolvabilité*, in *Pet. Aff.*, 2001, n. 231, 13 *et seq.*

[764] The UNCITRAL Model Law was adopted on 15 December 1997 by resolution No. 52/58 of the UN General Assembly. See *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, New York, 2014. As results from the UNCITRAL's website, legislation based on the Model Law has been already adopted in 41 States, including Australia (2008), US (2005), Canada (2005), South Africa (2000), Mexico (2000), Japan (2000). In the EU, Romania (2002), Poland (2003), UK (2006), Slovenia (2007), and Greece (2010). On the Model Law, among many, see HARMER, *UNCITRAL Model Law on Cross-border Insolvency*, in *Int. Insolv. Rev.*, 1997, 145; BERENDS, *The UNCITRAL Model Law on Cross Border Insolvency: a comprehensive review*, in *Tulane J. Int. Comp. L.*, 1998, 309; ISHAM, *UNCITRAL's Model Law on Cross-border Insolvency: a Workable Protection for Transnational Investment at last*, in *Brooklyn J. Int. Law*, 2001, 1177; GHIA, *Gli obiettivi della Guida legislativa sull'insolvenza dell'UNCITRAL*, in *Fall.*, 2005, 1229; HOLLANDER, GRAHAM, *UNCITRAL Model Law on Cross-Border Insolvency*, in PANNEN (ed.), *European Insolvency Regulation*, cit., 687; LOOK CHAN (ed.), *Cross-border insolvency. A commentary on the UNCITRAL model law*[2], London, Globe Law and Business, 2009.

[765] Among many, see POCAR, *La comunitarizzazione del diritto internazionale privato: una "European conflict of laws revolution*?", in *Riv. dir. int. priv. proc.*, 2000, 873; ID., *The "Communitarization" of Private International Law and its Impact on the External Relations of the European Union*, in MALATESTA, BARIATTI, POCAR (eds.), *The External Dimension of EC Private International Law in Family and Succession Matters*, Padova, Cedam, 2008, 3; BASEDOW, *The Communitarization of Private International Law*, in *RabelsZ*, 2009, 455; ID., *The Communitarization of the conflict of laws under the Treaty of Amsterdam*, in *CMLRev.*, 2000, 687; BOELE-WOELKI, VAN OOIK, *The Communitarization of Private International Law*, in *Yb. Priv. Int. L.*, 2002, 1.

[766] Recitals (2), (3), (4) and (8) of Regulation 1346/2000.

recognition of foreign insolvency proceedings and decisions, the relationship between proceedings opened in different Member States in relation to the same debtor, and the lodging of claims by foreign creditors.

3.4.2. The General Structure of the Regulation No. 1346/2000 Concerning Jurisdiction and the Lack of Provisions Addressing the Insolvency of Groups of Companies

The insolvency model adopted by the EIR is the modified universalism that has been illustrated above[767]. In fact, Article 3 enables main insolvency proceedings to be opened before the court where the debtor has its centre of main interests (COMI)[768]. This proceeding has a global scope and is designed to cover the debtor's worldwide assets and to be of interest to creditors, wherever they may be[769]. At the same time, the EIR permits the opening of secondary insolvency proceedings in another Member State where the debtor has an establishment. The effects of these secondary proceedings are limited to the assets located in that State[770]. Both main and secondary insolvency proceedings are subject to the law of the Member State in which they are opened, the so-called *lex fori concursus*. The latter determines a list of relevant aspects such as (i) the conditions for the opening, conduct, and closure of proceedings, or (ii) the definition of debtors and assets, the respective powers of the debtor and the liquidator and the effects of proceedings[771].

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[767] FEHRENBACH, *Haupt- und Sekundärinsolvenzverfahren*, cit., 16-21. With particular regard to the European Insolvency Regulation, see WESSELS, *International Insolvency Law*[3], cit., para. 10009 *et seq.*; QUEIROLO, *Le procedure di insolvenza nella disciplina comunitaria*, cit., 13 *et seq.*; VIRGOS, GARCIMARTIN, *The European Insolvency Regulation: Law and Practice*, cit., 11 *et seq.*; COQUELET, *L'effet international de la faillite: la solution du règlement communautaire relatif aux procédures d'insolvabilité*, in JAULT-SESEKE, ROBINE (dir.), *L'effet international de la faillite: une réalité?*, cit., 29. In this respect, it is noteworthy that single insolvency aspects have been dealt with according to different models: STARACE, *La disciplina comunitaria delle procedure di insolvenza: giurisdizione ed efficacia delle sentenza straniere*, in *Riv. dir., int.*, 2002, 307.

[768] BARIATTI, *L'applicazione del regolamento CE n. 1346/2000 nella giurisprudenza*, cit., 677 stresses that the companies submitted to the EIR are not identical to the companies qualified as "European" under Art. 54 TFEU.

[769] Recital (12).

[770] Art. 27 of Regulation 1346/2000.

[771] Art. 4 of Regulation 1346/2000. As is known, the Regulation provides for a number of exceptions, as Arts. 5-15 of the Regulation leave certain matters to be governed by laws other than the law of the debtor's COMI. For instance, Art. 8 embodies the traditional principle according to which questions of title to immovable property are governed exclusively by the *lex situs*, while Art. 6 preserves set-off rights if they are permitted by the law applicable to the insolvent debtor's claim. One of the provisions that raised more problems in the practice is Art. 13 on detrimental acts, which provides creditors for a defense whenever the relevant act is subject to the law of a Member State other that of the State of the opening of proceedings and that law does not allow any means of challenging that act in the relevant case: in the CJUE's case law, see C-310/14, *Nike European Operations Netherlands* [2015] EU:C:2015:690; C-557/13, *Hermann Lutz* [2015] EU:C:2015:227. In general, see DANIELE,

To ensure that the debtor's estate is administered effectively and that a minimum amount of coherence between parallel proceedings is ensured, the Regulation also imposes a duty to communicate and cooperate upon the administrators of both main and secondary proceedings[772], at the same time providing for a number of participation rights that are granted to administrators[773]. The liquidator in the main proceeding, for instance, can intervene in the secondary proceedings, *inter alia* proposing a restructuring plan or requesting the sale of assets to be suspended[774].

In this framework, a fundamental role is played by the location of the COMI, as it works simultaneously as a criterion of applicability of the Regulation, as a jurisdictional criterion for determining whether a national court is competent to open main insolvency proceedings, and as a connecting factor for determining which law applies to the proceeding opened[775]. Moreover, decisions opened by a court on the basis of COMI receives automatic recognition in all Member States with no further formalities from the date they become effective in the opening State[776]. In contrast, when the COMI is located outside the EU, the EIR does not apply, irrespective of whether the debtor has an establishment or other assets in the EU. In this latter case, national laws apply, thus creating a complicated dual regime[777].

Legge applicabile e diritto uniforme nel regolamento comunitario relativo alle procedure di *insolvenza*, in *Riv. dir. int. priv. proc.*, 2002, 35 *et seq.*

[772] Art. 31 of Regulation 1346/2000. In this regard, see VALLENDER, *Judicial cooperation within the EC Insolvency Regulation*, in *IILR*, 2011, 309; DIALTI, *Cooperazione tra curatori e corti in diritto internazionale fallimentare: un'analisi comparata*, in *Dir. fall.*, 2005, 1010 *et seq.*; EHRICKE, *Die Zusammenarbeit der Insolvenzverwalter bei grenzüberschreitenden Insolvenzen nach der EuInsVO*, in *WM*, 2005, 397 *et seq.* Concerning groups of companies, see BECKER, *Kooperationspflichten in der Konzerninsolvenz*, Köln, RWS, 2012, 141 *et seq.*; EIDENMÜLLER, *Verfahrenskoordination bei Konzerninsolvenzen*, cit., 528 *et seq.*

[773] Art. 32 of Regulation 1346/2000.

[774] Art. 33 of Regulation 1346/2000. In this regard, see FERRI**,** *Creditori e curatore della procedura principale nel Regolamento comunitario sulle procedure di insolvenza transnazionali*, in *Riv. dir. proc.*, 2004, 706 *et seq.*

[775] The COMI concept has been also adopted by the UNCITRAL Model Law 1997 and by the Principles of Cooperation among NAFTA Countries. BENEDETTELLI, *"Centre of Main Interests" of the Debtor under EU Regulation n. 1346/2000 and Insolvency of Cross-Border Groups: a Private International Law Perspective*, in AA.VV., *Insolvency and Cross-border Groups. UNCITRAL Recommendations for a European Perspective?*, cit., 124, stresses that the model of coordination adopted by the Regulation is the so-called "jurisdictional approach", which regulates legal relationships strictly connected with the forum by establishing the forum's jurisdiction and by applying in principle the *lex fori*, irrespective of any international element lining such relationship with one or more other States. On this method of coordination, see PICONE, *Les méthodes de coordination entre ordres juridiques en droit international privé*, in *Recueil des cours*, 1999, vol. 276, 143 *et seq.*; ID., *Il metodo dell'applicazione generalizzata della lex fori*, in ID., *La riforma italiana del diritto internazionale privato*, Padova, Cedam, 1998, 371 *et seq.*

[776] Art. 16 of Regulation 1346/2000.

[777] Among many, see PAULUS, *Europäische Insolvenzverordnung. Kommentar*[4], Frankfurt am Main, R&W, 2013, 156-157*;* MELIN, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité*, cit., 31-32; ISRAËL, *European Cross-Border Insolvency Regulation*, Antwerpen-Oxford, Intesentia, 2005, 252; BUREAU, *La fin d'un ilôt de résistance. Le Règlement du Conseil relatif aux procédures d'insolvabilité*, cit., 621;

Regrettably, the Regulation does not contain a proper definition of COMI, but provide only limited guidance in Recital (13), according to which it «should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties»[778]. This place must be characterized by a certain stability, in order to make sure that the risk of insolvency is manageable and calculable for the creditors, on the assumption that most of the assets and the majority of creditors are located in that State[779]. At the same time, for the sake of simplicity, Article 3 introduce a rebuttable presumption for legal persons in favor of a formal and easily ascertainable criterion, the statutory seat[780].

When the CJEU was asked to provide guidance on the interpretation of this concept, it held that «the concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation»[781]. Despite this indication, the interpretation of the two elements of «administration on a regular basis» and «ascertainability by third parties» has been at the heart of a vivid debate in the last ten years, with the delivery of conflicting decisions by national

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FUMAGALLI, *Il regolamento comunitario sulle procedure di insolvenza*, in *Riv. dir. proc.*, 2001, 686.

[778] Virgos-Schmit Report, cit., para. 75. According to VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, cit., 39, the function of the definition contained in the recital has the same value of definitions provided in Art. 2 of the Regulation, even though in general recital do not have a binding force. The unusual location would be due to the genetic reasons related to the process of drafting of the Regulation. In contrast, this argument was rejected in *Stojevic v Official Receiver* [2007] BPIR 141, paras. 31-33. In general, on the significance of recitals, see LEMAIRE, *Interrogations sur la portée juridique du préambule du règlement Rome I*, in *Dalloz*, 2008. 2157.

[779] KINDLER, *EuInsVO. Art. 3 Internationale Zuständigkeit*, in *Münchener Kommentar zur BGB*[6], Vol. 11, München, C.H. Beck, 2015, para. 14.

[780] The presumption was intended to avoid the difficulties arisen with regard to the Brussels Convention 1968 concerning the determination of the domicile of companies: PANNEN, *Art. 3. International Jurisdiction*, in ID. (ed.), *European Insolvency Regulation*, cit., para. 30. On the benefits of such presumptions, including efficiency effects and legal certainty, see MANKOWSKI, *Art. 3*, in MANKOWSKI, MÜLLER, SCHMIDT, *Europäische Insolvenzordnung 2015. Kommentar*, München, C.H. Beck, 2016, paras. 44-47. Actually, some authors proposed to eliminate the presumption and to replace COMI with the incorporation test: RINGE, *Forum shopping under the EU Insolvency Regulation*, in *Eur. Bus. Org. Rev.*, 2008, 614-615; EIDENMÜLLER, *Free Choice in International company insolvency law in Europe*, cit., 447. See also ARMOUR, *Who should make corporate law? EC legislation versus regulatory competition*, in *Current Leg. Probl.*, 2005, 369; and SKEEL, *European implication of bankruptcy venue shopping in the US*, in *Buffalo L. Rev.*, 2006, 439.

[781] Case C-341/04, *Eurofood IFSC Ltd* [2006] *ECR* I-3813, para. 31. An alternative solution has been proposed by BENEDETTELLI, *"Centre of Main Interests" of the Debtor under EU Regulation n. 1346/2000 and Insolvency of Cross-Border Groups*, cit., 130-131, according to whom the interests of the debtor should be identified by reference to the different subjects with whom the debtor has relationships, inasmuch as they are considered relevant for the regulation of insolvency by the relevant *lex concursus*. A similar interpretation, equally to be rejected, was adopted by Italian Court of Cassation, 29 May 2005 n. 10606, in *Giur. comm.*, 2005, 616. In this regard, see the criticism by LEANDRO, *La giurisdizione sulla procedura principale di insolvenza di società controllata e il regolamento (CE) n. 1346/2000*, in *Studi in onore di Vincenzo Starace*, Napoli, ESI, 2008, 1497.

courts and consideration of different elements by both the judiciary and the literature[782]. In this regard, the following paragraphs will illustrate how the evolution of the CJEU's case law has given particular importance to the central administration of the company, so that the attention has to be focused on the place where the head office functions are carried out[783].

Against this background, the Regulation is characterized by the lack of specific rules dealing with the insolvency of a multinational enterprise group, so that the COMI applies on an entity-by-entity basis[784]. In other words, several main proceedings should be opened against the different companies belonging to the same group[785]. The Regulation, in fact, focuses on each individual entity and does nothing to facilitate the coordinated group rescue or coordinated disposal of the assets of the group as a whole. Such omission was criticized in the literature[786]. However, one has to consider that cross-border insolvency was discussed in Europe for over forty years before the enactment of Regulation No 1346/2000, which necessarily reflects the thinking of a period where groups were not as developed and common as they are today[787]. In

[782] Two different approaches have been developed in the case law: the first one is that of mind-of-management, which pays attention to the place where head office functions are carried out and strategic decisions are taken; the second one, in contrast, refers to the daily business activity, assuming the COMI is situated where the company pursues it operational economic activity, provided that this place is easily perceived by the creditors. For a clear and detailed overview, see KINDLER, *EuInsVO. Art. 3 Internationale Zuständigkeit*, cit., para. 18-20; WESSELS, *International Insolvency Law*[3], cit., 480 *et seq.*; and PANNEN, *Art. 3. International Jurisdiction*, cit., 94-110. See also LATELLA, *The "COMI" concept in the Revision of the European Insolvency Regulation*, in *Eur. Comp. Fin. L. Rev.*, 2014, 479; and GIORGINI, *Il centro degli interessi principali del debitore insolvente in diritto comparato*, in *Giur. comm.*, 2013, 612.

[783] MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], Oxford, OUP, 2016, 309; GARCIMARTÍN, *The EU Insolvency Regulation Recast: Scope, Jurisdiction and Applicable Law*, in *ZEuP*, 2015, 705 («The underlying idea is to look for the "brain" of the debtor, not for its "muscle", i.e. to consider the actual centre of management and supervision of the interest of the debtor»). It is worth stressing that, since the beginning, the COMI concept was considered as having many common elements with the real seat approach: LAUTERFELD, "Centros*" and the EC Regulation on Insolvency Proceedings: The End of the "Real Seat" Approach towards Pseudo-foreign Companies in German International Company and Insolvency Law?*, in *Eur. Bus. L. Rev.*, 2001, 79 *et seq.*; and recently BARIATTI, CORNO, *Centro degli interessi principali*, in *Fallimentarista*, 7 September 2016, para. 2; RINGE, *Art. 3*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford, OUP, 2016, para. 3.20.

[784] Virgos-Schmit Report, cit., para. 76. This is actually quite surprising if one thinks that the vast majority of cross-border cases filed in Europe involves corporate groups: WOUTERS, RAYKIN, *Corporate Group Cross-Border Insolvencies Between The United States & European Union: Legal & Economic Developments*, cit., 399. A similar tendence is evidenced in the US by WESTBROOK, *An empirical study of the implementation in the United States of the Model Law on Cross Border Insolvency*, in *Am. Bankr. L. J.*, 2013, 267: «387 of 577 cases were (…) members of a corporate group based on their filings in the United States»

[785] VERHOEVEN, *Die Konzerninsolvenz*, cit., 153. See *supra* fn. 642-644 and the accompanying text.

[786] See, e.g. MCCORMACK, *Reconstructing European Insolvency Law – putting in place a new paradigm*, in *Leg. Stud.*, 2013, 131; HIRTE, *Towards a Framework for the Regulation of Corporate Groups' Insolvencies*, cit., 214; PAULUS, *Die ersten Jahre mit der Europäischen Insolvenzverordnung*, in *RabelsZ*, 2006, 459.

[787] WESSELS, *The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation*, in *Eur. Comp. L.*, 2009, 175. MAZZONI, *Cross-border insolvency of multinational groups of companies: proposals for a European approach in the light of the UNCITRAL approach*, in *Dir. comm. int.*, 2010,

addition, the economic and legal environment has changed radically since the conception of the Regulation, both concerning the mobility of companies and the objective of insolvency proceedings[788].

The absence of specific provisions in the original EIR addressing group insolvencies raised great uncertainties and created significant problems in the practice, especially because it often diminished the prospect of the successful restructuring of the group as a whole and reduced the value of the group's assets[789]. However, this does not mean that the EIR's legal regime did not have any impact on insolvency scenarios involving groups of companies. Indeed, different approached have been followed in the practice in order to achieve efficient solutions and fill the EIR's gap in the interest of the stakeholders involved[790]. Among the different solutions, the most relevant one concerns the group-oriented interpretation of the jurisdictional criterion of COMI, aimed at centralizing jurisdiction according to a head office functions[791].

3.4.3. The Recast Regulation 2015/848: A First Consideration of Groups of Companies

Article 46 of Regulation No. 1346/2000 provided the need for a systematic review and revision of the EIR and accordingly imposed a duty upon the Commission to present a draft on the application of the Regulation, possibly accompanied by a proposal for adaptation thereof,

755, stresses that there was a widespread feeling that «groups of companies and the problems of their insolvency in an international perspective were too complicated to be handled efficiently, not to say that they were thought to be totally intractable». According to WIMMER, *Konzerninsolvenzen im Rahmen der EulnsVO. Ausblick auf die Schaffung eines deutschen Konzerninsolvenzrechts*, in *DB*, 2013, 1344, if one takes a closer look at the situation at that time, there would have been a risk that the entire project would have failed to create appropriate rules for the groups. See also BALZ, *The European Union Convention on Insolvency Proceedings*, cit., 503.

[788] DAMMANN, *Mobility of companies and localization of assets – Arguments in favour of a dynamic and teleological interpretation of EC Regulation No 1346/2000 on insolvency proceedings*, in AFFAKI (dir.), *Faillite internationale et conflit de juridiction. Regards croisés transatlantique*, cit., 106-107.

[789] Commission Staff Working Document, SWD (2012) 416 final, cit., 15.

[790] See the different approached referred to in BORNEMANN, *Verfahren über Mitglieder einer Unternehmensgruppe – Konzerninsolvenzrecht*, in WIMMER, BORNEMANN, LIENAU, *Die Neufassung der EuInsVO*, Köln, Luchterhand, 2016, 178-181; LEANDRO, *La giurisdizione sulla procedura principale di insolvenza di società controllata e il regolamento (CE) n. 1346/2000*, cit., 1490-1492; WESSELS, *The Ongoing Struggle of Multinational Groups*, cit., 169 *et seq.*

[791] In the form of possible reform of the EIR, see BUFFORD, *Revision of the European Union Regulation on Insolvency Proceedings – Recommendations*, in *IILR*, 2012, 341 *et seq.*; TAYLOR, *Conference on Reform of the European Insolvency Regulation*, in *IILR* 2011, 242 *et seq.*; VALLENS, *Réviser le règlement communautaire CE 1346/2000 sur les procédures d'insolvabilité*, in *Rev. proc. coll.*, 2010, 25; MCCORMACK, *Reconstructing European Insolvency Law – putting in place a new paradigm*, cit., 126 *et seq.*; MOSS, *European Insolvency Regulation – Jurisdiction Issue*, in *IILR*, 2011, 237; PAULUS, MOSS, *The European Insolvency Regulation – The Case for Urgent Reform*, in *Int. Insolv.*, 2006, 1.

no later than 1 June 2012. The first steps in this direction have been taken by the European Parliament in a resolution of 15 November 2011, which requested the Commission to submit one or more proposals relating to an EU corporate insolvency framework[792]. In particular, the detailed recommendations were structured in four parts, of which one was dedicated to the revision of the EIR and another to the insolvency of a group of companies[793].

In December 2012 the Commission presented its proposal for amending Regulation 1346/2000[794], together with the impact assessment[795] and a report on the application of the Regulation[796], which was largely based on two studies commissioned in view of the future recasting process[797]. The Parliament responded in December 2013 with a report containing numerous amendments to the Commission's text and in February 2014 voted to adopt the amendments proposed by its Legal Affairs Committee[798]. After a process of inter-institutional negotiations, the European Parliament and the Council reached a political agreement in December 2014, which led to the final adoption of the Regulation on 20 May 2015 and then the publication in the Official Journal on 5 June 2015[799].

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[792] EUROPEAN PARLIAMENT, Resolution (2011/2006(INI)) of 15 November 2011, cit.

[793] See, in particular, parts 2 and 3 of the resolution.

[794] Proposal COM(2012) 744 final of 12 December 2012, on which see MCCORMACK, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, in *J. Priv. Int. L.*, 2014, 41; THOLE, *Die Reform der Europäischen Insolvenzverordnung – Zentrale Aspekte des Kommissionsvorschlags und offene Fragen*, in *ZEuP*, 2014, 39; MAZZONI, *La disciplina europea dell'insolvenza transfrontaliera. Problemi aperti e prospettive di riforma*, in *Società, banche e crisi d'impresa.* Liber amicorum *Pietro Abbadessa*, Torino, Utet Giuridica, 2014, 2653; KINDLER, *Hauptfragen der Reform des Europäischen Internationalen Insolvenzrechts*, in *KTS*, 2014, 25; WINKLER, FAZZINI, *La proposta di modifica del regolamento sulle procedure di insolvenza*, in *Dir. comm. int.*, 2013, 141; MOCK, *Das (geplante) neue europäische Insolvenzrecht nach dem Vorschlag der Kommission zur Reform der EuInsVO*, in *GPR*, 2013, 156; REUß, *Europäisches Insolvenzrecht 3.0 oder doch nur Version 1.1?*, in *EuZW*, 2013, 165; 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 J.*, 2013, 133; PRAGER, KELLER, *Der Vorschlag der Europäischen Kommission zur Reform der EuInsVO*, in *NZI*, 2013, 57; ROUSSEL GALLE, *La proposition de révision du règlement n°1346/2000 sur les procédures d'insolvabilité entre prudence et audace*, in S*em. Jur. – Entr. Aff.*, 2013, n. 12.

[795] Commission Staff Working Document, SWD (2012) 416 final, cit.

[796] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, COM(2012) 743 final.

[797] See in particular HESS, OBERHAMMER, PFEIFFER, *European Insolvency Law*, cit.

[798] See the legislative resolution P7_TA(2014) 0093.

[799] [2015] OJ L141/19, on which see the first commentaries by BORK, MANGANO, *European Cross-Border Insolvency Law*, Oxford, OUP, 2016; BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, cit.; MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit.; MANKOWSKI, MÜLLER, SCHMIDT, *Europäische Insolvenzordnung 2015. Kommentar*, cit.; WIMMER, BORNEMANN, LIENAU, *Die Neufassung der EuInsVO*, cit.; SAUTONIE-LAGUIONIE (dir.), *Le règlement (UE) n° 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité. Commentaire article par article*, Paris, Société de législation comparée, 2015. See also LEANDRO, *A First Critical Appraisal of the New European Insolvency Regulation*, in *Dir. Un. eur.*, 2016, 215; JAULT-SESEKE, ROBINE, *Le règlement 2015/848: le vin nouveau et le vieilles outres*, in

The New Insolvency Regulation – Regulation (EU) 2015/848 (hereinafter, the New EIR or EIR Recast) – replaces the original Regulation No. 1346/2000 currently in force and will apply to insolvency proceedings opened as of 26 June 2017[800], while proceedings opened before that date remain subject to Regulation No. 1346/2000. It introduces some new solutions that were in part developed by the CJEU in the first thirteen years of application of the original EIR[801].

In particular, the novelties of the EIR Recast concerns basically five aspects: (*a*) the extension of the EIR's scope to rescue and restructuring proceedings to be opened when there is only a likelihood of insolvency, as well as proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons[802]; (*b*) the strengthening of the current jurisdictional framework in terms of certainty, with a clarification of the concept of COMI aimed at preventing bad forum shopping and conflicting interpretations and with the codification of the *vis attractiva concursus*[803]; (*c*) the improvement of the coordination among

Revue critique, 2016, 21; MCCORMACK, *Something Old, Something New: Recasting the European Insolvency Regulation*, in *Modern L. Rev.*, 2016, 121; MUCCIARELLI, *Private international rules in the Insolvency Regulation Recast: a reform or a restatement of the status quo?*, in *Eur. Comp. Fin. L. Rev.*, 2016, 1; REINHART, *The European Insolvency Regulation 2015*, in *Yb. Priv. Int. L.*, 2015/2016, 291; BARIATTI, CORNO, *Il Regolamento (UE) 2015/848 del Parlamento Europeo e del Consiglio del 20 maggio 2015 relativo alle procedure di insolvenza (rifusione). Una prima lettura*, in *Fallimentarista*, 9 September 2015; GARCIMARTÍN, *The EU Insolvency Regulation Recast: Scope, Jurisdiction and Applicable Law*, cit., 694; KINDLER, SAKKA, *Die Neufassung der Europäischen Insolvenzverordnung*, in *EuZW*, 2015, 460; VALLENS, *Le règlement (UE) nº 2015/848 du 20 mai 2015: une avancée significative du droit européen de l'insolvabilité*, in *Rev. Lamy dr. aff.*, 2015, n. 5655; FLETCHER, *The European Insolvency Regulation recast: the main features of the new law*, in *Insolv. Int.*, 2015, n. 7, 97; PRAGER, KELLER, *Der Entwicklungsstand des Europäischen Insolvenzrechts*, in *WM*, 2015, 805; DAMMANN, MENJUCQ, ROUSSEL GALLE, *Le nouveau règlement européen sur les procedures d'insolvabilité*, in *Rev. proc. coll.*, 1/2015, étude 2.

[800] The following exception are provided: (i) Art. 86 (the description of national insolvency law and procedures to be provided by each member state (particularly the matters governed by the law of the main proceedings) which shall apply from 26 June 2016; (ii) Art. 24, para. 1, concerning the establishment of national insolvency registers, which shall apply from 26 June 2018; (iii) Art. 25, concerning the interconnection of national registers, which shall apply from 26 June 2019.

[801] The title of a recent article is explanatory in this sense: see CARBALLO PIÑEIRO, *Towards the reform of the European Insolvency Regulation: codification rather than modification*, in *NIPR*, 2014, 207.

[802] See Recital (10) of the New EIR, affirming that «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». In this regard, see the proceedings that are listed exhaustively in Annex A.

[803] The New EIR is based on the same basic scheme of the old Regulation and the concept of COMI is substantially construed in the same way. Some relevant differences are introduced in order to make fraudulent or abusive COMI-shifting more difficult. For instance, new Art. 3(1), second sentence, provides that the presumption in favour of the registered office does not apply if the company moved the latter to another Member State within three months of the request for the opening of insolvency proceedings. This system is supplemented by Art. 4, which recognizes the duty for the seized court to examine *ex officio* its jurisdiction, and Art. 5, which grants the debtor or his creditors the right to challenge the decision opening the insolvency proceeding. As to the *vis attractiva concursus*, Art. 6(1) codifies the CJEU's decision in Case C-339/07, *Deko Marty* [2009] *ECR* I-767.

insolvency proceedings opened in respect of the same debtor and a better balance between efficient insolvency administration and the protection of local creditors[804]; (*d*) the reinforcement of the publicity of the proceedings by requiring the establishment of national insolvency registers to be connected each other through the e-Justice portal[805]; (*e*) the treatment of multiple insolvency proceedings relating to groups of companies.

The changes implemented by the new Regulation are not as far-reaching and fundamental as were the expectations: not only the overall structure of the Regulation is not altered, but the improvements have been realized with the high price of doubling length and increasing complexity[806]. However, albeit with a rather soft and cautious approach, the New EIR intervenes significantly with regard to groups of companies and contains a new chapter specifically dealing with this issue[807]. The new provisions aim at ensuring the efficiency of the insolvency administration while respecting each group member's separate legal personality. In particular, as will be illustrated in the following paragraphs, insolvency practitioners and courts are obliged to cooperate and communicate with each other, in a way parallel to what is provided in the context of main and secondary proceedings.

The main innovation, however, concerns the possibility to request the opening of a "group coordination proceeding", to be managed by a single coordinator, which should further facilitate the group restructuring, even though the participation of various administrators is not binding and rests on a voluntary basis[808]. This new proceeding would sit alongside the separate

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[804] In particular, by making the opening of secondary proceedings conditional upon both the interests of local creditors and the objectives of the main proceedings, and accordingly, strengthening the main insolvency practitioner's role: in this regard, see LEANDRO, *Amending the European Insolvency Regulation to Strengthen Main Proceedings*, in *Riv. dir. int. priv. proc.*, 2014, 317 *et seq.* The Regulation acknowledges in Recital (41) that secondary proceedings may hamper the efficient administration of the insolvency estate, so that the it is necessary to give the practitioner of the main proceeding the right of requesting to postpone or refuse the opening of such proceeding (Arts. 36 and 38 of the New EIR).

[805] Arts. 24-25 of the New EIR. According to Recital (76), such register should improve the provision of information to relevant creditors and courts and prevent the opening of parallel insolvency proceedings.

[806] In this sense, MCCORMACK, *Something Old, Something New: Recasting the European Insolvency Regulation*, cit., 122. With regard to the Commission's proposal, see also MOSS, *A very decent proposal: The European Commission's proposal for reforming the EC Regulation on insolvency proceedings 1346/2000*, in *Insolv. Int.*, 2013, 55; and EIDENMÜLLER, *A New Framework for Business Restructuring in Europe*, cit., 150.

[807] See Art. 56 *et seq*. of the New EIR. However, the New EIR does not introduce specific rules on international jurisdiction addressing groups of companies: LIENAU, *Internationale Zuständigkeit*, in WIMMER, BORNEMANN, LIENAU, *Die Neufassung der EuInsVO*, cit., 82.

[808] Specifically, on the new group coordination proceeding, see REUMERS, *What is in a Name? Group Coordination or Consolidation Plan – What is Allowed Under the EIR Recast*, in *Int. Insolv. Rev.*, 2016, 225; D'AVOUT, *Le traitement des groupes de sociétés: entre formalisme et réalisme*, in FAULT-SESEKE, ROBINE (dir.), *Le nouveau règlement insolvabilité: quelle évolutions?*, Issy-les-Moulineaux, Joly, 2015, 129; MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, in *IILR*, 2015, 241; ID.,

insolvency proceedings opened in respect of individual companies within the group and would allow the coordinator to propose a group coordination plan with a comprehensive set of measures to be adopted within the single proceedings opened against different group members.

3.5. The Interpretation of COMI in the Context of Groups of Companies

3.5.1. The Broad Interpretation Developed by National Courts

3.5.1.1. The Development of the "Head-Office Functions" Test throughout Europe

As anticipated above, the lack of rules dealing with affiliated companies does not entail that the Regulation does not provide for «partial and indirect means for achieving centralisation of the insolvency processes (…) when all companies involved have their centre of main interests in the same state»[809]. The failure to provide a clear definition of COMI effectively invited domestic courts to fill in the gaps through the adoption of a centralized approach, referred to as procedural consolidation, which is based on the assumption the COMI of all companies belonging to the same group is located in the country in which the group's headquarters are located (*head-office functions*)[810]. This place is considered as the control and managing centre of the group and ensures the coordinated restructuring of the business through a global sale or reorganization (*mind-of-management approach*)[811].

Koordination ohne Koordinationsverfahren? – Reformvorschläge aus Berlin und Brüssels zu Konzerninsolvenzen, in *ZRP*, 2014, 192; THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, in *Int. Insolv. Rev.*, 2015, 214; VAN GALEN, *The Recast Insolvency Regulation and groups of companies*, in *ERA Forum*, 2015, 241; ESSER, *Reform of the EU Regulation: New Framework for Insolvent Company Groups: Part I*, in *Am. Bankr. Inst. J.*, March 2015, 38; ID., *Reform of the EU Regulation: New Framework for Insolvent Company Groups: Part II*, *ivi*, April 2015, 46.

[809] MEVORACH, *Centralising Insolvencies of Pan-European Corporate Groups: a Creditor's Dream or Nightmare?*, in *J. Bus. L.*, 2006, 469. See also FABRIES-LECEA, *Le règlement «insolvabilité». Apport à la construction de l'ordre juridique de l'Union européenne*, Bruxelles, Bruylant, 2012, 258 *et seq.*; DAMMANN, *Mobility of companies and localization of assets*, cit., 112. This approach, according to WESSELS, *The Ongoing Struggle of Multinational Groups*, cit., 171, does not flow from the interpretation of the text, the history and the system of the Regulation, and departs from the rationale laid down in the Virgos-Schmit Report.

[810] As reminded by MENJUCQ, *Les groupes de sociétés*, in JAULT-SESEKE, ROBINE (dir.), *Le droit européen des procédures d'insolvabilité à la croisée des chemins*, cit., 95-96, this is also the approach favoured by the European Parliament in its report of 15 November 2011 for integrated groups.

[811] For an overview of this case law, see WESSELS, *International Insolvency Law*[3], cit., 511 *et seq.*; MEVORACH, *Jurisdiction in insolvency – a study of European courts' decisions*, in *J. Priv. Int. L.*, 2010, 341 *et seq.*; MELIN, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité*, cit., 150 *et seq.*; RAIMON, *Le règlement communautaire 1346-2000 du 29 mai 2000 relatif aux procédures d'insolvabilité*, Paris, LGDJ, 2007,

One of the first relevant case to be decided within the context of a group of companies was *Enron Directo*, where the English High Court opened an administration proceeding against a Spanish subsidiary of the Enron group, at that time one of the largest in the world for energy and commodities, on the ground that the headquarters functions were carried out in England[812]. In particular, the Court concluded that the presumption under Article 3 of the EIR had to be rebutted because all of the principal executive, strategic and administrative decisions in relation to the financial and economic activity of the company were conducted in London, where the head office was based, in addition to the fact that a significant number of additional elements showed that high-level control was exercised from the Enron House in London[813].

Soon after, the High Court of Leeds decided a case in the insolvency of *Daisytek*, a US-based group with fifteen European subsidiaries controlled by a UK holding company and incorporated in various jurisdictions. The US parent company filed for reorganisation proceedings under Chapter 11 of the US Bankruptcy Code, while the winding-up of fourteen of the European subsidiaries was to be made pursuant to the English law, and, in fact, insolvency petitions were lodged in England in respect of the English companies and the subsidiaries operating in France and Germany. Accordingly, the English Court had to ascertain whether it had jurisdiction in respect of the foreign subsidiaries, *i.e.* whether their COMI was located in England. In light of the factual evidence presented, on 16 May 2003, Judge McGonigal opened parallel proceedings against the different group members[814].

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73 *et seq.*; VELLANI. *L'approccio giurisdizionale all'insolvenza transfrontaliera*, Milano, Giuffrè, 2006, 155 *et seq.*; PANNEN, RIEDEMANN, *Der Begriff des „centre of main interests" i.S. des Art. 3 I 1 EuInsVO im Spiegel aktueller Fälle aus der Rechtsprechung*, in *NZI*, 2004, 646. Interestingly, a functional test of COMI aimed at consolidating proceeding before the State where head office functions are carried out developed also in the US, under the name of "command and control" test, within recognition proceedings under Chapter 15 of the US Bankruptcy Code: see SARRA, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, cit., 558-561. Among the most relevant US decisions, see *Re SPhinX Ltd.*, Case No. 06-11760 (Bankr. S.D.N.Y. 2006), on which see MOSS, *Mystery of the SPhinX-COMI in the US*, in *Insolv. Int.*, 2007, 4.

[812] *Enron Directo Sociedad Limitada*, unreported, 4 July 2002. Although there is no judgment available for this case, a detailed analysis is provided by the lead counsel for the petitioner: MOSS, *Skeleton Argument on Behalf of the Petitioners, In the Matter of Enron Directo SL*, www.iiiglobal.org.

[813] In particular, the following indicators were taken into account: (i) the company's main creditors knew that the company was administered from London; (ii) employment contracts were negotiated in London; (iii) all targets, budgets and margins were set in London; (iv) all Spanish regulatory and compliance issues were dealt with in London; (v) the treasury was based in London; (vi) all customers and suppliers were subject to authorisation from London; and finally (vii) all executive level management was based in London. See KASTRINOU, *Cross-border insolvency and the effect of the EC Regulation on insolvency proceedings*, in *Int. Comp. Comm. L. Rev.*, 2012, 4.

[814] *Re Daisytek-ISA Ltd* [2003] B.C.C. 562 (Ch D). See WAUTELET, *Some considerations on the Centre of Main Interests as jurisdictional test*, cit., 77-80; BUFFORD, *International Insolvency Case Venue in The European Union*, cit., 453-464; BARBÉ, *Note sous Leeds High Court of Justice, 16 mai 2003*, in *Revue belge dr. comm.*, 2004, 813 *et seq.*; WESSELS, *International Jurisdiction to Open Insolvency Proceedings in Europe, In Particular Against (Groups of) Companies*, ILF Working Paper n. 17, 2003; PAULUS, *Zuständigkeitsfragen nach der Europäischen Insolvenzverordnung*, in *ZIP*, 2003, 1725.

In line with the Enron decision, the Court retained a pragmatic approach which became immediately the point of reference for the interpretation of COMI within the context of groups of companies, holding that the COMI of each company in the group was located in England and that the presumption under Article 3 of the EIR was displaced. In particular, the Court was influenced by the following elements: (i) the financial functions of the subsidiaries were performed by the headquarters, through a factoring agreement concluded with an English subsidiary of the Royal Bank of Scotland; (ii) the subsidiaries could not make purchase above a certain amount without approval of the parent; (iii) all senior employees of the subsidiaries were recruited after consultation with the parent; (iv) all information technology and support was being done by the headquarters; (v) all pan-European customers were serviced by the parent and the contracts were negotiated by and entered into by the parent; (vi) over 70 % of the purchases were negotiated and dealt with by the headquarters; (vii) the corporate entity and branding was run by the headquarters; (viii) the subsidiaries were required to carry out their business in accordance with the management strategy plan drawn up by the UK sub-holding[815]. Additionally, following the text of Recital (13) of the EIR, the Court put a special emphasis on the expectations of the most important group of potential creditors, identified in the group's financiers and trade suppliers[816].

The outcome of the *Daisytek* case was initially highly criticized in the German and French literature and raised a strong debate regarding the reasoning of the English Court[817]. Judicial reactions in both countries were similar and led to the declaration of the English proceedings as being contrary to the spirit of the Regulation, in particular concerning the public policy exception under Article 26 of the EIR[818], and to the opening of parallel main proceedings[819].

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[815] *Re Daisytek-ISA Ltd*, paras. 13 and 17, with regard, respectively, to the German and French subsidiaries.

[816] *Ibid.*, para. 16.

[817] See in particular PAULUS, *Zuständigkeitsfragen nach der Europäischen Insolvenzverordnung*, cit.; and WESSELS, *International Jurisdiction to Open Insolvency Proceedings in Europe*, cit.

[818] On this provision, see SERAGLINI, *L'ordre public et la faillite internationale: une première application dans le cadre de l'affaire Eurofood*, in AFFAKI (dir.), *Faillite internationale et conflit de jurisdiction*, cit., 171; MANKOWSKI, *Der ordre public im europäischen und im deutschen Internationalen Insolvenzrecht*, in *KTS*, 2011, 185. On the application of Art. 26 of the EIR by national courts see HESS, PFEIFFER, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law*, Study IP/C/JURI/IC/2010-076, 2011, 39-40, 119-34 and 162-4.

[819] The German management requested the opening of insolvency proceedings in Germany. The AG Dusseldorf initially assumed jurisdiction on 10 May 2003, unaware that English proceedings were opened. Once they became aware, the court issued a clarification order on 6 June 2003, in which it was raised a breach of the public policy exception under Art. 26 EIR due to the failure to hear the German managing director and a secondary insolvency proceeding was opened: AG Düsseldorf, 6 June 2003, S02 IN 126/03, in *ZIP*, 2003, 1363, on which see MANKOWSKI, in *EWiR*, 2003, 767 and 1239; SMID, in *DZWiR*, 2003, 397. In France the directors of the French

These reactions, however understandable, were hardly compatible with the recognition system of the Regulation, whose Article 16 establishes the principle of immediate and automatic recognition – without any further formality – of any judgement opening insolvency proceedings under the Regulation, thus rejecting the possibility of opening parallel main proceedings and solving positive conflicts of jurisdiction through a simple priority rule[820]. Accordingly, in both cases, the decisions were set aside in the respective jurisdictions and the English main proceedings were finally recognized in accordance with Article 16 of the EIR[821].

The *Daisytek* approach was reiterated by the English High Court in the case *Rover*, which concerned the insolvency of the well-known automotive group and proceeded along a similar line. Indeed, the elements taken into account for determining the English jurisdiction in relation to foreign sales company largely coincided with those mentioned above, *i.e.* the overall control exercised on the management of the subsidiaries, the absence of autonomy in the budget setting, the financial scrutiny and funding, and the absence of independent trading by the subsidiaries[822].

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subsidiary requested the opening of a *procédure de redressement judiciaire* before the Court of Pontoise, which denied recognition of the English proceedings on the ground that it amounted to a denial of the separate corporate personality of the French subsidiary: decision of 26 May 2003, in *Riv. dir. int. priv. proc.*, 2004, 780.

[820] The only exception provided by the Regulation is the violation of public policy and there is not any indication as to the control of indirect competence. This point was controversial during the first years of application of the Regulation (for a permissive interpretation, see e.g. MENJUCQ, *Les groupes de société*, in JAULT SESEKE, ROBINE (dir.), *L'effet International de la faillite, une réalité*?, cit., 170; DANIELE, *Il Regolamento n. 1346/2000 relativo alle procedure di insolvenza: spunti critici*, in *Dir. fall.*, 2004, 607; KHAIRALLAH, *Note sous CA Versailles, 4 septembre 2003*, in *Revue critique*, 2003, 667), but the CJEU clarified the matter in its decision in *Eurofood*, para. 42, by holding that «the principle of mutual trust requires that the courts of the other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction». See BARIATTI, *Recent Case-Law Concerning Jurisdiction and the Recognition of Judgements under the European Insolvency Regulation*, in *RabelsZ*, 2009, 641-642; JAULT-SESEKE, ROBINE, *L'interprétation du règlement n° 1346/2000 relaitf aux procedures d'insolvabilité, la fin des incertitudes?*, in *Revue critique*, 2006, 811, paras. 7-13; and EIDENMÜLLER, *Der Markt für internationale Konzerninsolvenzen: Zuständigkeitskonflikte unter der EuInsVO*, in *NJW* 2004, 3457. In the sense that this system favours a race to court, see DE CRISTOFARO, *Forum Shopping and Insolvency of Groups of Companies in the European Insolvency Regulation*, in STÜRNER, KAWANO (eds.), *Cross Border Insolvency, Intellectual Property Litigation, Arbitration and Ordre Public*, Tübingen, Mohr Siebeck, 2011, 44-45; LUPOI, *Conflitti di giurisdizioni e di decisioni nel regolamento sulle procedure di insolvenza: il caso "Eurofood" e non solo*, in *Riv. trim. dir. proc. civ*., 2005, 1403.

[821] AG Düsseldorf, 12 March 2004, S02 IN 126/03, in *ZIP*, 2004, 623; and afterwards OLG Düsseldorf, 9 July 2004, I-3 W 53/04, in *ZIP*, 2004, 1514. In France see the Court of Appeal of Versailles, 4 Semptember 2003, then confirmed by the French Court of Cassation, 27 June 2006, in *Revue critique*, 2006, 811. As stressed by QUEIROLO, *Le procedure di insolvenza nella disciplina comunitaria*, cit., 199; and BUFFORD, *International Insolvency Case Venue in The European Union*, cit., 461, the underlying rationale of these decisions is only the correct interpretation of the Regulation and does not entail any agreement with the reasoning of the English High Court.

[822] *MG Rover Group Ltd* [2005] EWHC 874 (Ch). The proceeding was immediately recognized in France: Tribunal of Nanterre, 19 May 2005, in *Dalloz*, 2005, 1787, confirmed by the Court of Appeal of Versailles, 15 December 2005, in *Dalloz*, 2006, 379. See DAMMANN, *L'affaire Rover: priorité donnée à la High Court of Justice de Birmingham*, in *Dalloz*, 2007, 1787; MENJUCQ, *Compétence de La High Court of Justice pour ouvrir une procédure d'insolvabilité à l'égard de la filiale française d'une société britannique*, in *Sem. Jur.*, 2005, II, 10116.

Another major case was decided in relation to the insolvency of *Collin & Aikmans*, a leading global supplier of automotive component systems that had its headquarters in the US and twenty-four subsidiaries in Europe[823]. When the US operations of the group entered into reorganization proceedings, the English High Court was requested to determine where the subsidiaries' COMI was located, *i.e.* whether the head office functions of the European subsidiaries were carried out in England or at the place of their respective seats. The evidence submitted convinced the Court that the main administrative functions relating to the European operations had been carried out – for each of the companies – from England including cash coordination, pooling bank accounts, human resources, IT, engineering and design and sales[824].

Surprisingly, following the shock created by the *Daisytek* saga, other Member States' courts got fully into the spirit of the "head office functions" approach and started to adopt it when the seat of the parent company was located within their territory[825]. The most relevant cases are *Hettlage* in Germany, concerning a subsidiary located in Austria[826], and *Emtec* in France, where parallel proceedings were opened against the German and the Belgian subsidiaries[827]. The English approach found then breeding ground also in Italy[828] and Hungary[829].

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[823] One is incorporated in Luxembourg, six in England, one in Spain, one in Austria, four in Germany, two in Sweden, three in Italy, one in Belgium, four in The Netherlands and one in the Czech Republic.

[824] *Collins & Aikman Europe SA* [2005] EWHC 1754 (Ch). WESSELS, *The Ongoing Struggle of Multinational Groups*, cit., 170-171, defined it as «the most stretched interpretation of COMI until now».

[825] See MOSS, *Group Insolvency – Choice of Forum and Law*, cit., 1012-1014; WAUTELET, *Some considerations on the Centre of Main Interests as jurisdictional test*, cit., 85.

[826] AG Munich, 4 May 2004, in *ZIP*, 2004, 962, on which see MANKOWSKI, *Zuständigkeit des Insolvenzgerichts am Sitz der Konzernmutter bei Leitung der Verwaltung der Schuldnerin - Hettlage*, in *NZI*, 2004, 450; PAULUS, in *EWiR*, 2004, 495; MOSS, *Daisytek followed in New German Case*, in *Insolv. Int.*, 2004, 141-142. Another example, outside the group context, is represented by AG Weilheim, 22 June 2005, IN 260/05, in *ZIP*, 2005, 1611.

[827] Tribunal of Nanterre, 15 february 2006, in *Dalloz*, 2006, 793, on which see MOSS, "*Building Europe" – the French case law on COMI*, in *Insolv. Int.*, 2007, n. 2, 20; GAILLOT**,** *The Interpretation by French Courts of the EU COMI Notion*, 2006, www.iiiglobal.org; MELIN, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité*, cit., 154-155. In particular, the following elements were considered: (i) the place of meetings of the board of directors; (ii) the law governing the main contracts; (iii) the location of the business relations with clients; (iv) the location where the group commercial policy is defined; (v) the location of banks (as creditors); (vi) the centralised management of the purchasing policy, of the staff, of the accounts.

[828] Tribunal of Roma, 14 August 2003, in *Riv. dir. int. priv. proc.*, 2004, 685, and 26 November 2003, in *Riv. dir. int. priv. proc*, 2004, 691 (*Cirio*): «centro strategico e direzionale delle scelte di impresa»; Tribunal of Parma, 4 February 2004, in *Riv. dir. int. priv. proc.*, 2004, 1062, and 20 February 2004, in *Riv. dir. int. priv. proc.*, 2004, 693 (*Parmalat*). On the Italian case law, see QUEIROLO, *Le procedure d'insolvenza nell'ordinamento comunitario*, cit., 199 *et seq.*; and BENEDETTELLI, *"Centro degli interessi principali" del debitore e* forum shopping *nella disciplina comunitaria delle procedure di insolvenza transfronaliera*, in *Riv. dir. int. priv. proc.*, 2004, 508 *et seq.*

[829] Municipal Court of Fejer, 14 June 2004, *Re Parmalat Slovakia*, on which see MOSS, *"Daisytek" effect reaches new Member States*, in *Insolv. Int.*, 2005, 31-32.

3.5.1.2. A Critical Appraisal in the Light of Creditors' Expectations

Despite the widespread application of this pragmatic approach, the doctrine immediately started to focus on the shortcomings of such a broadened interpretation of COMI in the group context. In particular, the major objection concerned the fact that it leaves in the background the condition that the COMI should be ascertainable by third parties, and it may thus affect the expectations of creditors on the law applicable to the insolvency and the destiny of their claims[830]. Indeed, the COMI can hardly be ascertained by third parties without investigating the internal structure of the group. *i.e.* the company's ties based on corporate and contract law and the managerial and operational structure of the group[831]. Moreover, with regard to a company belonging to an international group, it appears very difficult to make a *reduction ad unitatem* of the creditors' interests, which in most cases are so various and differently weighed that the possibility to have predictable outcomes is substantially reduced[832]. In this sense, one can understand other narrower interpretations that make reference to the outward advertising activity of the group[833] or the proposal to consider whether the duties of disclosure of the group affiliation under the relevant *lex societatis* have been correctly performed[834].

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[830] BARIATTI, *Il regolamento n. 1346/2000 davanti alla Corte di giustizia: il caso* Eurofood, in *Riv. dir. proc.*, 2007, 214; EAD., *L'applicazione del regolamento CE n. 1346/2000 nella giurisprudenza*, cit., 684.

[831] WESSELS, MARKELL, KILBORN, *International Cooperation in Bankruptcy and Insolvency Matters*, cit., 125; WAUTELET, *Some considerations on the Centre of Main Interests as jurisdictional test*, cit., 90; EIDENMÜLLER, *Abuse of Law in the Context of European Insolvency Law*, in *Eur. Bus. Org. Rev.*, 2009, 24.

[832] DE CRISTOFARO, *Forum Shopping and Insolvency of Groups of Companies in the European Insolvency Regulation*, cit., 54; WESSELS, *The Ongoing Struggle of Multinational Groups*, cit., 172 (distinguishing between large and small creditors, trade creditors and insiders). With regard to the decision of the High Court in *Daisytek*, this point is stressed by RAIMON, *Centre des intérêts principaux et coordination des procédures dans la jurisprudence européenne sur le règlement relatif aux procédures d'insolvabilité*, in *Clunet*, 2005, para. 43: «L'égalité des créanciers, la prévisibilité pour les tiers, la localisation du centre névralgique du débiteur, semblent mieux s'accommoder d'une approche reposant sur le plus grand nombre de créanciers que d'une démarche axée sur le quantum des créances».

[833] AG Mönchengladbach, 27 April 2004, 19 IN 54/04, in *NZI*, 2004, 383: «Entscheidend für die Beurteilung der Frage des Interessenmittelpunkts kann nur sein, wo die Schuldnerin ihre *werbende Tätigkeit* entfaltet hatte, nicht, von wo aus die Gesellschaft abgewickelt wird»; AG Hamburg, 1 December 2005, 67a IN 450/05, in *NZI*, 2006, 120. For a positive appraisal, see WESSELS, *International Insolvency Law*[3], cit., 524; MANKOWSKI, in *EWiR*, 2005, 638; PANNEN, RIEDEMANN, *Der Begriff des „centre of main interests" i.S. des Art. 3 I 1 EuInsVO*, cit., 651. According to KAMMEL, *Die Bestimmung der zuständigen Gerichte bei grenzüberschreitenden Konzerninsolvenzen*, in *NZI*, 2006, 336, this criterion has been privileged by the CJEU in *Eurofood*. For further references, see DEYDA, *Der Konzern im europaischen internationalen Insolvenzrecht*, cit., 82-86.

[834] This is the proposal presented by LEANDRO, *La giurisdizione sulla procedura principale di insolvenza di società controllata e il regolamento (CE) n. 1346/2000*, cit., 1503-1505, which actually seems hardly compatible with the CJEU's principle of autonomous interpretation of the COMI criterion.

In addition, two other shortcomings were identified with regard to the general functioning of the Regulation, in particular concerning applicable law issues. First, it was held that the delocalization of proceedings favoured the application of Articles 5 and 7 of the old EIR, according to which creditors who have rights *in rem* or benefit from a retention ot title clause over assets that are located within the territory of another Member State are not affected by insolvency proceedings and can realize their security interests. These two provisions would be particularly important in this context, because one may assume that the subsidiary will have most of its assets in the Stated of its registered office. Secondly, for the same reason, the realization of assets located in a State different from the one where the proceeding has been opened would require *exequatur* proceedings, thus increasing costs and making the activities of the insolvency practitioner more burdensome[835].

3.5.2. The CJEU's Contribution to the Interpretation of COMI

3.5.2.1. The *Eurofood* Decision: The Strengthening of Legal Certainty and Foreseeability

The interpretative issues raised by the pragmatic approach initially adopted by the English courts and then applied in the continent made an intervention of the CJEU much awaited. The first decision concerning a preliminary question related to COMI was delivered only in 2006 in the *Eurofood* saga. This case concerned the insolvency of the group *Parmalat*, whose headquarters were located in Italy and which had subsidiaries scattered around the world. A dispute arose between the High Court of Dublin and the Tribunal of Parma as to the location of the COMI of the Irish wholly-owned subsidiary *Eurofood IFSC Ltd*, whose main activity was the provision of financing facilities for companies in the Parmalat group, without employing any workforce and without having any offices or premises[836].

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[835] MENJUCQ, *EC-Regulation No 1346/2000 on Insolvency Proceedings and Groups of Companies*, in *Eur. Comp. Fin. L. Rev.*, 2008, 139-140; and FASQUELLE, *Les faillites des groups de sociétés dans l'Unione européenne: la difficile conciliation entre approaches économique et juridique*, in *Bull. Joly sociétés*, 2006, 151 *et seq*. Concerning the second aspect, it must be said for the enforceability of judgements handed down by the insolvency court Art. 32 of the New EIR now refers to Arts. 39-44 and 44-57 of the Brussels I-*bis* Regulation, which is characterized by the elimination of *exequatur* and established the principle of direct enforcement of foreign decisions: see MALATESTA, NISI, *Le novità in materia di riconoscimento ed esecuzione delle decisioni*, in MALATESTA (a cura di), *La riforma del regolamento Bruxelles I*, Milano, Giuffrè, 2016, 135 *et seq.*

[836] For the issues covered by this study it is not necessary to go much into depth of the whole story. Here is a summary: on 27 January 2004, the Bank of America NA applied to the High Court (Ireland) for compulsory winding up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator. On

In particular, the CJEU was asked about how much relative weight should be given as between, on the one hand, the fact that the subsidiary regularly administers its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the Member State where its registered office is situated and, on the other hand, the fact that the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary[837].

The CJEU did not follow the prevailing case law and adopted a "separate entity approach", so that each debtor, irrespective of whether it belongs to a group of companies, constitutes a distinct legal entity and is subject to separate and autonomous insolvency proceedings[838]. The definition contained in Recital (13) requires that, in order to ensure legal certainty and foreseeability concerning the determination of jurisdiction, the COMI must be identified by reference to criteria that are both objective and ascertainable by third parties[839]. Accordingly, the presumption in favor of the registered office may only be rebutted «if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to

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the same day the High Court appointed Mr Farrell as the provisional liquidator, with powers to take possession of all the company's assets, manage its affairs, open a bank account in its name, and instruct lawyers on its behalf. On 9 February 2004, the Italian Minister for Production Activities admitted Eurofoods to the extraordinary administration procedure and appointed Mr Bondi as the extraordinary administrator. On 20 February 2004, the District Court of Parma, taking the view that Eurofood's COMI was in Italy, held that it had international jurisdiction to determine whether Eurofood was in a state of insolvency. By 23 March 2004 the High Court decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted, namely 27 January 2004. Taking the view that the COMI was in Ireland, it made an order for winding up and appointed Mr Farrell as the liquidator. After the appeal of Mr Bondi, the Supreme Court considered it necessary, before ruling on the dispute, to stay the proceedings and to refer some questions to the CJEU for a preliminary ruling. For a complete overview, see CARRARA**,** *The Parmalat Case*, in *RabelsZ*, in 2006, 538.

[837] This is the synthesis made by the Court at para. 27.

[838] Case C-341/04, *Eurofood IFSC Ltd*, paras. 30. See REMERY, *L'application à une filiale du règlement communautaire relatif aux procédures d'insolvabilité*, in *Rev. sociétés*, 2006, 360; MOSS, *Asking the right question? Highs and lows of the ECJ Judgement in Eurofood*, in *Insolv. Int.*, 2006, 97; BACCAGLINI, *Il caso Eurofood: giurisdizione e litispendenza nell'insolvenza transfrontaliera*, in *Int'l Lis*, 2006, 123; BACHNER, *The Battle over Jurisdiction in EC Insolvency Law*, in *Eur. Comp. Fin. L. Rev.*, 2006, 310; GARASIC, *What is right and what Is wrong in the ECJ's Judgement on Eurofood IFSC LTD*, in *Yb. Priv. Int. L.*, 2006, 87; FREITAG, LEIBLE, *Justizkonflikte im Europäischen Internationalen Insolvenzrecht und (k)ein Ende?*, in *RIW*, 2006, 643; BARIATTI, *Il regolamento n. 1346/2000 davanti alla Corte di giustizia: il caso* Eurofood, cit., 203; BUFFORD, *Centre of Main Interest, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice*, in *Nw. J. Int. L. Bus.*, 2007, 351; DUURSMA-KEPPLINGER, *Aktuelle Entwicklungen zur internationalen Zuständigkeit für Hauptinsolvenzverfahren – Erkenntnisse aus Staubitz-Schreiber und Eurofood*, in *ZIP*, 2007, 896; WINKLER, *Le procedure concorsuali relative ad imprese multinazionali: la Corte di Giustizia si pronuncia sul caso Eurofood*, in *Int'l Lis*, 2007, 15; MUCCIARELLI, *Eurofood, ovvero: certezza del diritto formale e incoerenza dei principi*, in *Giur. comm.*, 2008, 1224.

[839] Case C-341/04, *Eurofood IFSC Ltd*, paras. 33.

reflect»[840]. This led to the conclusion that «where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation»[841]. The only example provided by the CJEU in which the presumption may be rebutted is that of a "letterbox company" not carrying out any business in the Member State where its registered office is situated[842].

The CJEU put a strong emphasis on Recital (13) and on the instrumentality of third parties' expectations for the determination of COMI, with the principles of legal certainty and foreseeability playing a key role in governing its interpretation. Although the Court did not make a step towards a further clarification of how these interests should be measured and identified[843], the *Eurofood* decision has been widely interpreted a signal of rejection of the broad interpretation of Article 3 of the EIR that underlies the head office approach[844].

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[840] *Ibid*., para. 34.

[841] *Ibid.*, para. 36.

[842] *Ibid*., para. 35. In this sense see already, AG Hamburg, 14 May 2003, 67g IN 358/02, in *ZIP*, 2003, 1008; Commercial Court of Brussels, 29 July 2003, in *Rev. int. dr. aff.*, 2003, 68; Commercial Court of Brussels, 2 October 2003, in *BeckRS*, 2010, 21373; Trib. Luxemburg, 15 April 2005, in *BeckRS*, 2010, 21627. The same description as the CJEU in *Eurofood* may be found in the US in *In re SPhinX, Ltd.*, 351 B.R. 118 (Bankr. S.D.N.Y. 2006); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 129 (Bankr. S.D.N.Y. 2007); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 53 (Bankr. S.D.N.Y. 2008); *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 136-137 (2d Cir. 2013). For recent cases, see BGH, 21 June 2012, IX ZB 287/11, in *NZI*, 2012, 725; BGH, 21 June 2007, IX ZB 51/06, in *NZI*, 2008, 121.

[843] The decision has been criticised in so far as it does not define who should be considered as a third party: PAULUS, *Der EuGH und das modern Insolvenzrecht*, in *NZG*, 2006, 612; KNOF, MOCK, *Zur Anerkennung der Insolvenzeröffnung in einem anderen EU-Mitgliedstaat („Eurofood")*, in *ZIP*, 2006, 915. More generaly, this uncertainty has been also stressed by FEHRENBACH, *Die Rechtsprechung des EuGH zur Europäischen Insolvenzverordnung*, in *ZEuP*, 2013, 362. What is sure is that creditors fall within this notion: Case C-396/09, *Interedil* [2011] EU:C:2011:671, para. 49. In this regard, it is very interesting what the High Court held in *Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch), para. 22: «the investors are not the type of third parties that the ECJ in *Eurofood* (…) had in mind. The investors are insiders within the partnership, equivalent to the shareholders or contributories of the company, rather than persons doing business with the partnership».

[844] Among many, RINGE, *Art. 3*, cit., paras. 3.43 and 3.106-108; KINDLER, *EuInsVO. Art. 3 Internationale Zuständigkeit*, cit., para. 22; WENNER, SCHUSTER, *Internationale Zuständigkeit Art. 3 EuInsVO*, in WIMMER (Hrsg.), *FK-InsO*[8], Köln, Luchterhand, 2015, para. 16; DE CRISTOFARO, *Forum Shopping and Insolvency of Groups of Companies in the European Insolvency Regulation*, cit., 56; WELLER, *Die Verlegung des Center of Main Interest von Deutschland nach England*, in *ZGR*, 2008, 855; BARIATTI, *Il regolamento n. 1346/2000 davanti alla Corte di giustizia: il caso Eurofood*, cit., 215-216; PANNEN, *Art. 3. International Jurisdiction*, cit., 101; MANKOWSKI, *Klärung von Grundfragen des europäischen Internationalen Insolvenzrechts durch die Eurofood-Entscheidung?*, in *BB*, 2006, 1754; and MENJUCQ, *Notion autonome du centre des intérêts principaux d'une filiale étrangère d'un groupe*, in *Sem. Jur.*, 2006, n. 23, 1124. For a comparative analysis of national case law and literature, see J. SCHIMDT, *Eurofood – Eine Leitentscheidung und ihre Rezeption in Europa und den USA*, in *ZIP*, 2007, 405 *et seq.* With a suggestive expression, MOSS, *Group Insolvency - Forum - EC Regulation and Model Law Under the Influence of English Pragmatism Revisited*, in *Brooklyn J. Corp. Fin. Comm. L.*, 2014, 253, refers to this idea of rejection as «short-lived heretical school».

In the case at stake, it has been questioned that the Cour did not pay sufficient attention to the fact that the Irish subsidiary of the Parmalat group did not carry out any business in Ireland and was a mere instrument of the parent company as a tax-efficient vehicle for raising money and was incorporated in Ireland merely for tax reasons[845]. However, in an attempt of abstracting from the specific case under consideration, a careful reading of the decision invites not make generalizations: it seems, in fact, that the formalistic approach of the Court did not condemn *per se* the pragmatic approach adopted by national courts in the context of groups of companies, but only excluded that control by a parent company is *per se* relevant and required that factors in addition to the mere exercise of management power over a subsidiary must take into account the "objective and foreseeable by third parties" test in order to rebut the presumption[846]. In contrast, it is held that the internal management and controlling mechanisms, as well as external influences over a subsidiary, are not decisive for determining the COMI as far as they do not stand out from the outside. In this sense, one may see that in some circumstances (e.g. the *Emtec* case) the above-illustrated national decisions actually took into account criteria that met the standard set up by the CJEU[847].

Clearly, the role of the presumption in favor of the registered office is reinforced and cannot be considered only as one of the element to be taken into account[848], so that national courts must pay scrupulous attention with regard to the location of COMI. However, a well-balanced procedural consolidation is still a viable solution for strongly integrated group after *Eurofood,* under the condition the place from where the head office functions of the subsidiary are carried out is ascertainable by the creditors[849]. Moreover, it does not seem reasonable to conclude that

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[845] See WINKLER, *Le procedure concorsuali relative ad imprese multinazionali*, cit., 18-19; and BACCAGLINI, *Il caso Eurofood: giurisdizione e litispendenza nell'insolvenza transfrontaliera*, cit., 126. It is worth stressing that similar situations before Italian courts led to a different outcome, with the ascertainment of Italian jurisdiction in relation to companies having their registered offices in Luxembourg: see Tribunal of Isernia, 10 April 2009, in *Fall.*, 2010, 59, annotated by MONTELLA, *Il fallimento del COMI?*; and Court of Appeal of Rome, 3 July 2012, in *Fall.*, 2013, 444, annotated by MONTELLA, *Riconoscibilità ed abitualità del COMI*.

[846] DAMMANN, *Mobility of companies and localization of assets*, cit., 115. In this regard, a recent decision affirmed that the word "ascertainable" used by the CJEU must be intended as referring to something that is «reasonably or sufficiently ascertainable or ascertainable by a reasonably diligent creditor», so that the creditor cannot be expected to «[employ] private detectives to follow the debtor or otherwise investigate his whereabouts»: see *Irish Bank Resolution Corporation Ltd v Quinn* [2012] NICh 1, para. 28

[847] FABRIES-LECEA, *Le règlement «insolvabilité». Apport à la construction de l'ordre juridique de l'Union européenne*, cit., 264; JAULT-SESEKE, ROBINE, *L'interprétation du règlement n° 1346/2000 relaitf aux procedures d'insolvabilité, la fin des incertitudes?*, cit., para. 20.

[848] The English High Court held this in *Re Ci4net.com Inc* [2004] EWHC 1941 (Ch), para. 1.

[849] BRINKMANN, *Art. 3 EuInsVO*, in K. SCHMIDT, *Insolvenzordnung*[19], München, C.H. Beck, 2016, para. 13; PANNEN, *Aspekte der europäischen Konzerninsolvenz*, in *ZinsO*, 2014, 224, FEHRENBACH, *Haupt- und Sekundärinsolvenzverfahren*, cit., 33-34; MOSS, *Group Insolvency – Choice of Forum and Law*, cit., 1016-1017;

the presumption is not rebuttable for the sole fact that the company does actually carry out some activity in the State where its registered office is located[850]. Indeed, paragraph 36 of the *Eurofood* decision expressly provides for the possibility that additional factors might show that the COMI is located in another State despite the fact that the debtor has assets or carries out its activities in the State of the registered office[851]. As a consequence, the application of the Regulation to a group of companies should always be permitted, in so far as it complies with the principles of legal certainty and foreseeability. Put it differently, *Eurofood* is not a rejection of the head office approach, but a resolute slowdown.

3.5.2.2. The Aftermath of *Eurofood* and the Shift towards Central Administration

The interpretation of the *Eurofood* decision proposed above seems to be confirmed by the fact that the approach of national courts to COMI, concerning both independent companies and group members, did not change significantly afterwards, but presented in some circumstances evident signes of adjustments in light of the principles stressed by the CJEU. One of the very first cases to be decided after Eurofood was *Eurotunnel* in France. On 2 August 2006, the commercial court of Paris initiated main proceedings in respect of seventeen group companies located in different Member States[852]. The Court held that the location of COMI in France was supported by a number of factors ascertainable by third parties[853], in particular on the grounds

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DE VETTE, *Multinational enterprise groups in insolvency: how should the European Union act?*, in *Utrecht L. Rev.*, 2011, 219; VALLENDER, DEYDA, *Brauchen wir einen Konzerninsolvenzgerichtsstand?*, cit., 830-831; REMERY, *L'application à une filiale du règlement communautaire relatif aux procédures d'insolvabilité*, cit., para. 25; VALLENS, *Le règlement européen sur les procédures d'insolvabilité à l'épreuve des groupes de sociétés: l'arbitrage de la CJCE*, in *Sem. Jur.-Entr. Aff.*, 2006, 1220. This outcome is also possible according to BRÜNKMANS, *Die Koordinierung von Insolvenzverfahren konzernverbundener Unternehemen nach deutschem und europaischem Insolvenzrecht*, Berlin, Dunckler & Humblot, 2009, 343-356, for "Zentral-funktionale Konzerne".

[850] GARAŠIĆ, *What is right and what is wrong in the ECJ's judgment on* Eurofood IFSC Ltd, cit., 92.

[851] WELLER, *Die Verlegung des Center of Main Interest von Deutschland nach England*, cit., 857. In this sense, LEANDRO, *Trasferimento di sede e determinazione del COMI*, in *Riv. dir. soc.*, 2012, 81; ID., *La giurisdizione sulla procedura principale di insolvenza di società controllata e il regolamento (CE) n. 1346/2000*, cit., 1499, stresses that letterbox companies are mentioned by the CJEU only by way of example and do not represent the only situation in which rebuttal of the presumption is allowed.

[852] Commercial Court of Paris, 2 August 2006, in *Dalloz*, 2006, 2329, annotated by DAMMANN, PODEUR, *L'affaire Eurotunnel: première application du Règlement n° 1346/2000/CE à la procédure de sauvegarde*. Then confirmed by Commercial Court of Paris, 15 January 2007, in *Dalloz*, 2007, 313, and the appeal rejected by the Court of Appeal of Paris, 29 November 2007, n. 06/7316.

[853] In this sense, NABET, *La coordination des procédures d'insolvabilité et droit de la faillite International et communautaire*, Paris, Litec, 2009, 44. In particular, the following elements were considered: (i) the strategic and operational management of the various Eurotunnel entities is exercised by a joint committee which sits in Paris at

that the debt restructuring negotiations took place publicly in Paris, so that all creditors, even those not participating in the proceeding, could reasonably expect the opening of insolvency proceedings in relation to all the group companies in France[854].

There have been, of course, even after *Eurofood* very broadened interpretation of COMI which were more in line with *Daisytek* than with *Eurofood*[855]. For instance, in June 2008, the English High Court was seized for the insolvency of *Lennox Holding plc*, which also involved two Spanish subsidiaries. Considering the *Eurofood* decision, Lewison J. held that he should focus on «the head office functions of the two Spanish companies. It is (…) clear that the two Spanish companies do carry on business in the member state where their registered offices is situated and consequently the "mere fact" that its economic choices are or can be controlled by a parent company is not enough to rebut the presumption. That is not what is relied on in the present case. It is not control by a parent company that is relied on in the present case. It is control of the companies themselves by their boards of directors»[856]. Then, he concluded that «the financing of the company, its major decisions and the administration of the company itself is conducted in this country and through English suppliers, English directors and with English funding»[857].

Interestingly, one year later the same judge had to decide another case concerning, *inter alia*, the determination of COMI – under the UNCITRAL Model Law – of *Stanford International Bank Ltd*, a bank accused of a Ponzi scheme which was incorporated in Antigua and had its registered office there[858]. Lewison J. held that «simply to look at the place where head office functions are actually carried out, without considering whether the location of those functions

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the seat of Eurotunnel SA and on which sit a number of French nationals; (ii) the registered office of the two main French companies of the group, Eurotunnel SA and France Manche is in Paris; (iii) its financial management which is responsible for the accounting of the various entities is also located in France (56 employees out of 63); (iv) the main part of the activities, the employees and assets is equally located in France.

[854] DAMMANN, *Mobility of companies and localization of assets*, cit., 117. According to MCCORMACK, *Jurisdictional Competition and Forum Shopping in Insolvency Proceedings*, in *Cambr. L. J.*, 2009, 189, is hardly reconcilable with *Eurofood*.

[855] Concerning the Italian case law, see DE CESARI, *L'evoluzione della legislazione europea in tema di insolvenza*, in JORIO (a cura di), *Fallimento e concordato fallimentare*, Milanofiori, Utet Giuridica, 2016, 527-531; and MAZZONI, *La disciplina europea dell'insolvenza transfrontaliera. Problemi aperti e prospettive di riforma*, cit., 2665-2669. In addition, see Trib. Lucca, 12 February 2010, *Kartogroup*, annotated by MINUTOLI, *L'insolvenza transazionale nei gruppi di imprese: il punto in dottrina e in giurisprudenza*, in *Giur. merito*, 2010, 1570.

[856] *Lennox Holding Plc* [2009] B.C.C. 155, para. 9.

[857] *Ibid.*, para. 10.

[858] *Stanford International Bank Ltd (In Receivership), Re* [2009] EWHC 1441 (Ch), then confirmed by [2010] EWCA Civ 137.

is ascertainable by third parties, is the wrong test» and showed publicly his remorse for his previous decision, by stating that «the way in which the ECJ approached Recital (13) was not to apply the factual assumption underlying it but to apply its rationale. I accept this submission. To the extent that I considered and applied the head office functions test in Lennox Holdings (…) I now consider that I was wrong to do so. Pre-*Eurofood* decisions by English courts should no longer be followed in this respect»[859].

This decision has been considered as a new starting point in the development of the interpretation of COMI, as it shifted the discussion – at least in the UK – to the *Eurofood*'s elements of "ascertainability" and "third party"[860]. However, a new development in the CJEU's case law might have returned to a certain degree of pragmatic interpretations, adopting what one could call a head-office-oriented reading of *Eurofood*[861]. The case in question is *Interedil*, which was decided by the CJEU in October 2011[862]. Since the facts are rather confusing, one is well advised to focus only on the legal reasoning: the Court was, in fact, asked how the second sentence of Article 3(1) of the EIR must be interpreted for the purposes of determining the COMI.

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[859] *Ibid*. para. 61. On this spectacular change of opinion, see WESSELS, *COMI: past, present and future*, in *Insolv. Int.*, 2011, n. 2, 17 *et seq*. According to the author, this is the test applie: the test to apply is: (i) the relevant COMI is the COMI of Stanford International Bank; (ii) the Bank's registered office is in Antigua, it is presumed in the absence of proof to the contrary, that its COMI is in Antigua; (iii) the burden of rebutting this presumption lies on the American Receiver; (iv) the presumption will only be rebutted by factors that are objective; (v) but objective factors will not count unless they are also ascertainable by third parties; (vi) what is ascertainable by third parties is what is in the public domain, and what they would learn in the ordinary course of business with the company.

[860] RINGE, *Art. 3*, cit., para. 3.43, in the sense that with this decision the English courts finally accepted the interpretation made by *Eurofood*. The *Stanford* test was applied also in the already mentioned decision in *Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch)**.**

[861] MOSS, *Group Insolvency - Forum - EC Regulation and Model Law Under the Influence of English Pragmatism Revisited*, cit., 253.

[862] Case C-396/09, *Interedil* [2011] EU:C:2011:671. See MUCCIARELLI, *Da Monopoli a Londra, passando dal Lussemburgo: appunti sull'emigrazione delle società italiane*, in *Giur. comm.*, 2012, 583; MÉLIN, *Nouvelles précisions relatives aux notions de centre des intérêts principaux et d'établissement du débiteur*, in *Rev. Lamy dr. aff.*, 2012, n. 67, 18; PANZANI, *La nozione di COMI nella disciplina comunitaria dell'insolvenza transfrontaliera: i casi* Interedil *e* Rastelli, in *Int'l Lis*, 2012, 32; LEANDRO, *Trasferimento di sede e determinazione del COMI*, cit.; HONORATI, *Higher courts, lower courts and priliminary ruling: a lesson from Interedil*, in *Int'l Lis*, 2012, 134; JAULT-SESEKE, ROBINE, *Procédure d'insolvabilité: critères et date d'appréciation du centre des intérêts principaux du débiteur*, in *Revue critique*, 2012, 189; NISI, *Centro degli interessi principali e trasferimento della sede statutaria: la Corte di giustizia dell'Unione europea torna sul regolamento n. 1346/2000 in materia di insolvenza transfrontaliera*, in *Liuc Papers*, n. 246, 2012; MENJUCQ, *Centre des intérêts principaux: les apports de l'arrêt Interedil de la CJUE du 20 octobre 2011*, in *Rev. proc. coll.*, 2011, n. 6, étude 32; MOSS, *"Head office functions" test triumphs in ECJ:Interedil*, in *Insolv. Int.*, 2011, 126; ROUSSEL GALLE, *Centre d'intérêts principaux, transfert du siège social, notion d'établissement*, in *Rev. sociétés*, 2011, 726; VALLENS, *Transfert du siège statutaire et transfert du centre des intérêts principaux*, in *Dalloz*, 2011, 2915.

In this context, the Court stated that a debtor's COMI must be determined by «[attaching] greater importance to the place in which the company has its *central administration* as the criterion for jurisdiction»[863]. This is a significant novelty because the priority given to the central administration is intended to replace the *Eurofood*'s criterion of business activity, as the place in which the company is managed outwards in a manner ascertainable by third parties[864].

What is of particular interest for groups of companies is that, according to the Court, the presumption of Article 3 may be rebutted, where there are factors – both objective and ascertainable by third parties – which, assessed in a comprehensive manner, enable to establish that «the place in which a company's central administration is located is not the same as that of its registered office»[865]. On the contrary, where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, the presumption cannot be rebutted[866].

The CJEU confirms the policy considerations underlying the judicial cooperation in insolvency matters in the sense that COMI must be interpreted from a creditor perspective[867]. In fact, the principle of legal certainty and foreseeability maintain their key role in the ascertaining of COMI[868]. However, this does not seem perfectly coherent with the fact that the

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[863] Case C-396/09, *Interedil*, para. 48 (italics added). In this regard, see FEHRENBACH, *Haupt- und Sekundärinsolvenzverfahren*, cit., 81 *et seq.*; BRÜNKMANS, *Die Renaissance der Sitztheorie im europäischen Insolvenzrecht*, in *KSzW*, 2012, 319 *et seq.* MENJUCQ, *Centre des intérêts principaux: les apports de l'arrêt Interedil de la CJUE du 20 octobre* 2011, cit., par. 7, stresses that Recital (13) does not contain any implicit reference to the place of central adminsitration, because the administration of interests does not coincide with the notions of direction and control. Interestingly, the relevance of the place of central administration was expressly excluded by BENEDETTELLI, *"Centre of Main Interests" of the Debtor under EU Regulation n. 1346/2000 and Insolvency of Cross-Border Groups*, cit., 128, on the ground that such notion has been consistently used since the outset of the European integration in many different EU law instruments, so that there is no reason why in regulating the phenomenon of cross-border insolvencies the European legislator would have had to divert from them if it really intended to refer to the same concepts.

[864] In this sense, NISI, *Centro degli interessi principali e trasferimento della sede statutaria*, cit., 6.

[865] Case C-396/09, *Interedil*, para. 51.

The factors considered by the Court «include, in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, as far as those places are ascertainable by third parties » (para. 52). In this regard, it may also useful to look at the US case law, where the following criteria have been recently listed in *In re Fairfield Sentry Ltd*: the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.

[866] *Ibid.*, para. 50. This is welcomed by FABRIÈS-LECEA, *Le règlement «insolvabilité». Apport à la construction de l'ordre juridique de l'Union européenne*, cit., 272.

[867] RINGE, *Art. 3*, cit., para. 3.47.

[868] These principles have been expressly acknowledged in Recital (28) of the New EIR: see LIENAU, *Internationale Zuständigkeit*, cit., 83-85.

place of the company's decision-making centre is not always known by the generality of ordinary creditors, especially when there is a discrepancy between the place where the company' will is formed and that in which the will is manifested outside. In this regard, the Court gives some guidance for the interpretation of these two requirements, which are considered to be met when the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them»[869],

In summary, if compared with *Eurofood*, *Interedil* makes a significant step forward because the (only) example of letterbox companies is replaced by every situation in which there is a discrepancy between the registered office and the place where the head office functions of the debtor are exercised and strategic decisions are taken[870]. In other words, provided that it results from an overall assessment of all elements and is ascertainable by third parties, the CJEU acknowledges the head office approach and allows to open insolvency proceedings over a subsidiary in the Member State where the parent company has its registered office[871].

3.5.3. The Opening of Secondary Proceedings and the Practice of Synthetic Proceedings

The previous paragraphs have illustrated the advantages in economic terms resulting from the centralization of proceedings in relation to companies belonging to strongly integrated groups[872]. This practice, however, may potentially jeopardize the expectation of local creditors as to which law will apply to the proceeding in which they have to lodge their claims and so to avoid the negative effects deriving from the fact that the proceeding has been opened in a State

[869] Case C-396/09, *Interedil*, para. 49.

[870] MANGANO, *International Jurisdiction*, in BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., para. 3.22; OBERHAMMER, *Groups of companies*, cit., 165-166.

[871] In this sense, see MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.104. According to MAZZONI, *La disciplina europea dell'insolvenza transfrontaliera. Problemi aperti e prospettive di riforma*, cit., 2671, the Court adopted a reinforced variation of the head office approach. Expressly in the sense of the text above, see also the Report of the Commission, (2012)COM 743 final, cit., 15: «this means in practice that courts have to examine a complex bundle of factors, including whether the financing of a subsidiary is taken care of by the parent company, whether the parent company controlled the operational business (e.g. by approving purchases above a certain threshold) and the hiring of staff, whether certain functions (e.g. the management of the IT equipment or the visual/business identity) were centralised. Essentially, these conditions will only be fulfilled in the case of very integrated companies».

[872] See *supra* para. 3.2.

different from that in which the registered office of the subsidiary is located[873]. Indeed, significant differences exist among Member States as to the ranking of creditors: for instance, the advances by the parent company in favour of the subsidiary are subordinated to all other creditors under German and Italian Law, while in France and in the UK they are treated as unsecured claims; another example is the treatment of employees' claims, which enjoys a super-privilege in France, while in other countries there are quantitative limits (UK) or there is no privilege at all (Germany)[874].

To safeguard their expectations, local creditors may request the opening of local proceedings in the States where the subsidiaries have their registered offices. In the literature, it was highly debated whether the definition of establishment as a «place of operations where the debtor carries out a non-transitory economic activity with human means and goods» contained in Article 2(h) of the EIR[875] could apply to an entity with legal personality: more precisely, it was questioned whether a subsidiary could be classified as an establishment of its parent company[876]. The prevailing doctrine has been since the beginning contrary to this possibility, on the ground that treating a subsidiary as an establishment would contradict the literal wording of the reported definition and the intention of the EIR drafters, who consciously decided not to include groups of companies[877]. Moreover, it would prove unwelcome because it would imply

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[873] MENJUCQ, *EC-Regulation No 1346/2000 on Insolvency Proceedings and Groups of Companies*, cit., 141.

[874] For a comparative evaluation of different national rankings, see the recent work edited by FABER, VERMUNT, KILBORN, RICHTER, TIRADO, *Ranking and Priority of Creditors*, Oxford, OUP, 2016.

[875] The CJEU interpreted this definition in Case C-396/09, *Interedil*, para. 62, in the sense that «a minimum level of organisation and a degree of stability are required», so that «the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an 'establishment'». See also *Trustees of the Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27.

[876] This issue has been already dealt with in the second chapter, para. 7.5, with regard to Art. 7(5) of the Brussels I-*bis* Regulation. It is worth stressing that the majority of Member States did not agree to use in the EIR the same definition provided by the CJEU with regard to the Brussels Convention 1968, so they developed an independent concept to be used in insolvency matters: in this regard, see QUEIROLO, *Le procedure d'insolvenza nell'ordinamento comunitario*, cit., 206-210.

[877] Among many, see MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.50; WESSELS, *International Insolvency Law*[3], cit., 509-511; WOLF, *Der europäische Gerichtsstand bei Konzerninsolvenenten*, cit., 94-98; VERHOEVEN, *Die Konzerninsolvenz*, cit., 153; PANNEN, *Art. 3. International Jurisdiction*, cit., 64-65; BARIATTI, *L'applicazione del regolamento CE n. 1346/2000 nella giurisprudenza*, cit., 682; LEANDRO, *La giurisdizione sulla procedura principale di insolvenza di società controllata e il regolamento (CE) n. 1346/2000*, cit., 1495; VALLENDER, *Aufgaben und Befugnisse des deutschen Insolvenzrichters in Verfahren nach der EuInsVO*, in *KTS*, 2005, 303; BENEDETTELLI, "*Centro degli interessi principali" del debitore e* forum shopping, cit., 507; EHRICKE, *Die neue Europäische Insolvenzverordnung und grenzüberschreitende Konzerninsolvenzen*, in *EWS*, 2002, 105; BUREAU, *La fin d'un ilôt de résistance. Le Règlement du Conseil relatif aux procédures d'insolvabilité*, cit., 634; GOTTWALD, *Le insolvenze transfrontaliere: tendenze e soluzioni europee e mondiali*, in *Riv. trim. dir. proc. civ.*, 1999, 155. *Contra* PAULUS, *Europäische Insolvenzverordnung. Kommentar*[4], cit., 147 (with regard to «unselbsttändige Töchter»); SANTOSUOSSO, *L'insolvenza nei gruppi*

that insolvency of the parent extends unconditionally to the subsidiaries[878]. This interpretation has also found judicial confirmation[879].

A different question arises as to whether, when the COMI of the subsidiary is situated at the registered office of its parent company in a different Member State, a secondary proceeding may be opened against the assets of the subsidiary at its place of operations[880]. This approach, albeit not expected by the EU legislator[881], might be helpful as a tool to protect local creditors and to limit the effects of procedural consolidation and the shortcomings illustrated above[882]. Moreover, it may be used in order to reduce the risk of *forum shopping* and to correct excessively broadened interpretation of the COMI criterion by foreign courts[883].

This approach has been followed by some national courts[884] and has recently been confirmed in a recent decision by the CJEU, where the latter held that local interests would be denied the protection afforded by the Regulation if the possibility that an establishment may possess legal personality and be situated in the Member State where the company has its registered office

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transfrontalieri tra diritto comunitario e diritto interno, in *Dir. fall.*, 2003, 667-668; DE CRISTOFARO, *Nuovo coordinamento delle giurisdizioni in Europa*, in *Int'l Lis*, 2002, 89.

[878] WINKLER, *Le procedure concorsuali relative ad imprese multinazionali*, cit., 17-18; and BACCAGLINI, *Il caso Eurofood: giurisdizione e litispendenza nell'insolvenza transfrontaliera*, cit., fn. 13 at 125.

[879] *Telia AB v Hilcourt (Docklands) Ltd* [2002] EWHC 2377 (Ch), concerning the business premises in England of a Swedish debtor company's UK premises.

[880] In this regard, see the in-depth analysis by DEYDA, *Der Konzern im europaischen internationalen Insolvenzrecht*, cit., 183 *et seq.*

[881] In this sense MANKOWSKI, *Keine Erforderlichkeit des Einsatzes eigener Arbeitnehmer für Niederlassungsbegriff*, in *NZI*, 2007, 360 («einem zuvor kaum geahnten Aufschwung und zu einer unverhofften Prominenz»).

[882] MENJUCQ, *EC-Regulation No 1346/2000 on Insolvency Proceedings and Groups of Companies*, cit., 142-143; MELIN, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité*, cit., 164-166; DAMMANN, SÉNÉCHAL, *La procédure secondaire du règlement n° 1346/2000: mode d'emploi*, in *Rev. Lamy dr. aff.*, 2006, n. 9, para. 8; VELLANI, *L'approccio giurisdizionale all'insolvenza transfrontaliera*, cit., 162; FASQUELLE, *Les faillites des groups de sociétés dans l'Unione européenne*, cit., 151 *et seq.*

[883] This objective is at the base of Court of Appeal of Turin, 10 March 2009, *Illochroma Italia*, in *Fall.*, 2009, 1293, annotated by MONTELLA, *La procedura secondaria: un rimedio contro il forum shopping del debitore nel regolamento CE n. 1346/2000*. On this decision, then confirmed by the Italian Court of Cassation, 29 October 2015, n. 22093, in *Fall.*, 2016, 829, see also PASSALACQUA, BENINCASA, ALESSI, *Rapporti tra procedura principale e procedure secondarie nel regolamento (CE) 1346/2000*, in BONELLI (a cura di), *Crisi di imprese: casi e materiali*, Milano, Giuffrè, 2011, 328-333. In this sense, see also FABRIÈS-LECEA, *Le règlement «insolvabilité». Apport à la construction de l'ordre juridique de l'Union européenne*, cit., 275.

[884] In Germany, see AG Köln, 23 January 2004, 71 IN 1/04, in *NZI*, 2004, 151 (*Automold*); OLG Düsseldorf, 9 July 2004, I-3 W 53/04, in *RIW*, 2005, 150 (*Daisytek*). In Austria, see LG Innsbruck, 11 May 2004, 9 S 15/04m, in *ZIP*, 2004, 1721 (*Hettlage*); LG Klagenfurt, 2 July 2004, 41 S 75/04h, in *EWiR*, 2005, 217 (*Zenith*); LG Leoben, 1 August 2005, 17 S 56/05m (*Collins & Aikman*); LG Eisenstadt, 11 April 2006, 26 S 34/06m (*Emtec*). In this sense, see also the French *Circulaire de la DACS n° 2006-19 du 15 décembre 2006 relative au règlement n° 1346/2000 du 29 mai 2000 relatif aux procédures d'insolvabilité*, para. 1.2.2: «Lorsqu'une procédure principale a été ouverte hors du territoire français à l'égard d'une société dont le siège statutaire est en France, une procédure secondaire peut être ouverte en France pour le ou les établissements de cette société, dans les conditions prévues pour l'ouverture d'une procédure territoriale».

were ruled out[885]. Once clarified that, it is worth stressing that secondary proceedings are generally accused of jeopardizing the efficient administration of the insolvency estate and, in the case at stake, the benefits resulting from procedural consolidation[886]. The duplication of proceedings and the multiplication of appointments are in fact capable of disrupting the smooth process of restructuring or global sale of the business, in particular causing the main insolvency practitioner to lose centralized control over the foreign assets and activities, and giving rise to the coordination problems that consolidation is actually intended to avoid[887].

As a solution to avoid the opening of local proceedings in the State where the subsidiaries have their registered office, the remedy of "synthetic proceedings" has been developed by English Court to create *de facto* secondary proceedings but without undermining the effective administration of the estate[888]. In particular, local creditors are promised that they will not fare worse than if a secondary proceeding had been opened. In *Collins & Aikman*, for instance, the UK administrator met with committees of local creditors and dissuaded them from applying for the opening of secondary proceedings in return for assurances that local law priorities would have been respected[889]. This approach was successful and avoided the unnecessary and disruptive effects of secondary proceedings.

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[885] Case C-327/13, *Burgo Group SpA*, paras. 32 and 35. For a critical appraisal, see MANKOWSKI, *Antragsbefugnis für die Eröffnung eines Sekundärinsolvenzverfahrens*, in *NZI*, 2014, 968.

[886] BRINKMANN, *Grenzüberschreitende Sanierung und europäisches Insolvenzrecht*, in *KTS*, 2014, 389-394; MOSS, *Group Insolvency – Choice of Forum and Law*, cit., 1017-1018. SIEMON, FRIN, *Groups of Companies in Insolvency: A German Perspective. Overcoming the Domino Effect in an (International) Group Insolvency*, cit., 62-63; BARIATTI, *Recent Case-Law Concerning Jurisdiction and the Recognition of Judgements under the European Insolvency Regulation*, cit., 648. In the case *Rover*, the Court of Appeal of Versailles (15 December 2005, in *Dalloz*, 2006, 379) held that single proceedings permit continuation of activity and hence sale of vehicles over a longer period, and allow coordination of the sales operations throughout the territory of Europe. On the ground that secondary insolvency proceedings would multiply costs and formalities to no purpose, the Court declined to open secondary proceedings in France because it was unnecessary for the protection of local interests and the realization of assets. In general, on the problems created by the opening of secondary proceedings, see ARTS, *Main and Seconday Proceedings in the recast of the European Insolvency Regulation. The only good secondary proceeding is a synthetic secondary proceeding*, 2015, 12-15, www.iiiglobal.org.

[887] TOLLENAAR, *Dealing with the insolvency of multinational groups under the European Insolvency Regulation*, cit., 66-67. For a different interpretation, see BRÜNKMANS, *Die Koordinierung von Insolvenzverfahren konzernverbundener Unternehemen nach deutschem und europaischem Insolvenzrecht*, cit., 363-377.

[888] With the words of MOSS, *Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, cit., this represents «an obvious model for the way to harmonize the need for centralization and simplicity, on the one hand, and the respecting of local priorities, on the other». For a definition, see JANGER, *Virtual Territoriality*, in *Columbia J. Trans. L.*, 2010, 436-438; POTTOW, *A New Role for Secondary Proceedings in International Bankruptcies*, in *Texas Int. L. J.*, 2010, 584-586.

[889] *Collins & Aikman Europe SA* [2006] EWHC (Ch) 1343. For other examples, see *Nortel Networks* [2009] EWHC 206 (Ch); *Collins & Aikman Europe SA* [2006] EWHC 1343 (Ch); *Re MG Rover Beluxl SA/NV (In Administration)* [2006] EWHC 1296 (Ch).

Such remedy has been "europeanised"[890] by the New EIR and inserted in the new Article 36, which confers on the insolvency practitioner in main insolvency proceedings the possibility of giving an undertaking to local creditors, to be approved by a qualified majority of them, that they will be treated as if secondary insolvency proceedings had been opened[891]. In particular, such an undertaking must be given for the assets located in the Member State where potential secondary proceedings could be opened and must involve a commitment to comply with the distribution and priority rights under the law of the Member State where secondary proceedings could be opened.

3.6. Groups of Companies in the New Regulation 2015/848

From the previous paragraph, it emerges clearly that the CJEU failed in providing legal certainty and solving all interpretative issues concerning the correct determination of COMI. The Commission's proposal presented in December 2012 provided for the inclusion of two new recitals and a new chapter specially dedicated to business groups. Despite the different solutions suggested by the doctrine[892] and the different models illustrated above for a modern treatment of group insolvency[893], the Commission's approach was in the sense of maintaining the atomistic approach previously applicable to insolvency proceedings and to provide rules on cooperation and communication between the courts and insolvency representatives in relation to the different members of the same group[894], in a way parallel to what was proposed for the

[890] MCCORMACK, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, cit., 53.

[891] On Art. 36 of the New EIR, see MADAUS, *Die Zusicherung nach Art. 36 EuInsVO - Das Ende virtueller Sekundärinsolvenzverfahren?*, in *Festschrift für Klaus Pannen* [forthcoming]; MANKOWSKI, *Zusicherungen zur Vermeidung von Sekundärinsolvenzen unter Art. 36 EuInsVO – Synthetische Sekundärverfahren*, in *NZI*, 2015, 961; PLUTA, KELLER, *Das virtuelle Sekundärinsolvenzverfahren nach der reformierten Europäischen Insolvenzverordnung*, in GRAF-SCHLICKER, PRÜTTING, UHLENBRUCK (Hrsg.), *Festschrift für Heinz Vallender*, Köln, RWS, 2015, 437; ARTS, *Main and Secondary Proceedings in the recast of the European Insolvency Regulation*, cit.; 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 J. Corp. Fin. Com. L.*, 2014, 63.

[892] In addition to the authors mentioned in fn. 791, see MEVORACH, *INSOL Europe's Proposals on Groups of Companies (in Cross-Border Insolvency): A Critical Appraisal*, in *Int. Insolv. Rev.*, 2012, 183; BUFFORD, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, cit., 710-43; ASIMACOPOULOS, *The Future of the European Insolvency Regulation*, in *IILR*, 2011, 248; PAULUS, *Wege zu einem Konzerninsolvenrecht*, in *ZGR*, 2010, 270. See also the different approaches referred by authors in fn. 790, and by VAN GALEN, *International groups of insolvent companies in the European Community*, cit.; HIRTE, *Sechs Thesen zur Kodifikation der Konzerninsolvenz in der EuInsO*, in *ZInsO*, 2011, 1178; ID., *Towards a Framework for the Regulation of Corporate Groups' Insolvencies*, cit.

[893] See *supra* para. 3.

[894] Recital (52) of the New EIR.

main and secondary proceedings[895]. In other words, the Commission presented a horizontal model of coordination and cooperation between the proceedings opened in different Member States, similar to that already proposed the UNCITRAL Legislative Guide dedicated to groups of companies[896].

This solution was not considered satisfying and, in fact, met wide criticism in the literature: from one side, it was perceived as too cautious and not sufficiently far-reaching[897]; from the other side, there were concerns that it would have led to difficulties and frictions capable of delaying and reciprocally paralyzing insolvency proceedings[898]. Against this backdrop, Germany exercised successfully its influence both in the European Parliament[899] and in the

[895] The new EIR improves the coordination among insolvency proceedings opened against the same debtor: while the previous Art. 31 only applied to liquidators, the new Arts. 41 *et seq.* provide for specific rules on cooperation and communication between insolvency practitioner, between courts and between insolvency practitioners and courts. In this regard, see MASTRULLO, *La coopération entre les acteurs intervenant dans les procédures d'insolvabilité après la révision du règlement (CE) n° 1346/2000*, in *Rev. proc. coll.*, 2015, n. 1, dossier 7; REQUEJO ISIDRO, *La cooperación judicial en materia de insolvencia transfronteriza en la propuesta de reglamento del Parlamento europeo y del Consejo por el que se modifica el reglamento (ce) nº 1346/2000 sobre procedimientos de insolvencia*, in *AEDIPr.*, 2013, 217.

[896] UNCITRAL, *Legislative Guide on Insolvency Law, Part Three*, cit., 83 *et seq.* On the Uncitral's approach concerning groups of companies, see MEVORACH, *Is the Future Bright for Enterprise Groups in Insolvency? An Analysis of UNCITRAL's New Recommendations on the Domestic Aspects*, in OMAR (ed.), *International Insolvency Law. Reforms and Challenges*, Farnham, Ashgate, 2013, 363 *et seq.*; VATTERMOLI, *Gruppi multinazionali insolventi*, cit.; AA.VV., *Insolvency and Cross-border Groups. UNCITRAL Recommendations for a European Perspective?*, cit; HOLZER, *Die Empfehlungen der UNCITRAL zum nationalen und internationalen Konzerninsolvenzrecht*, in *ZIP*, 2011, 1894 *et seq.*, MAZZONI, *Cross-border insolvency of multinational groups of companies: proposals for a European approach in the light of the UNCITRAL approach*, cit.

[897] SCHMIDT, *Das Prinzip 'eine Person, ein Vermögen, eine Insolvenz' und seine Durchbrechungen vor dem Hintergrund der aktuellen Reformen im europäischen und deutschen Recht*, in *KTS*, 2015, 37-38; EIDENMÜLLER, *A New Framework for Business Restructuring in Europe*, cit., 148; MOCK, *Das (geplante) neue europäische Insolvenzrecht nach dem Vorschlag der Kommission zur Reform der EuInsVO*, cit., 165.

[898] See the position of the German delegation in COUNCIL, document n. 15675/13, 5-7: «the mere existence of a duty to cooperate will probably not ensure an agreement among the involved representatives. (…) In cases of substantial disagreement between the insolvency representatives, the availability of rights to participate in each other's proceedings can expose the coordination process to considerable difficulties and frictions (…) [stemming] not only from the general availability of the right to petition for a stay, but also from the right to propose a restructuring plan. (…) [With the further risk that] representatives use their participation rights in other proceedings as a strategic leverage to push through their particular interests and to undermine competing interests and concepts». See also KINDLER, *Hauptfragen der Reform des Europäischen Internationalen Insolvenzrechts*, cit., 43; REUMERS, *Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR*, cit., 586; MEVORACH, *Enterprise Groups in Insolvency: Recent International Developments*, in *Ann. Rev. Insolv. L.*, 2013, 285 *et seq.*; MCCORMACK, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, cit., 58. Using the metaphor of TOLLENAAR, *Dealing with the insolvency of multi-national groups under the European Insolvency Regulation*, cit., 70, having multiple captains on a ship is a bad governance model in any situation. In contrast, the Commission proposal deserved approval according to PANNEN, *Aspekte der europäischen Konzerninsolvenz*, cit., 229; DAMMANN, *Application du Règlement (CE) n. 1346/2000 modifié aux groups de sociétés*, in *Rev. proc. coll.*, 2013, n. 5, dossier 37; THOLE, SWIERCZOK, *Der Kommissionsvorschlag zur Reform der EuInsVO*, cit., 557.

[899] European Parliament, Committee on Legal Affairs (Lehne Report), A7-0481/2013, 48.

Council[900] for an alternative model: the opening of a "group coordination proceedings", to be managed by a single coordinator, which should further facilitate the group restructuring, even though the participation of various administrators is not binding and rests on a voluntary basis. This new proceeding would sit alongside the separate insolvency proceedings opened in respect of individual companies within the group and would allow the coordinator to propose a group coordination plan with a comprehensive set of measures to be adopted within the single proceedings opened against different group members. In particular, the plan may contain proposals for the settlement of intra-group disputes or, more ambitiously, to re-establish the economic performance and financial soundness of the group.

The final text of the New Regulation (EU) 2015/848 includes the amendments proposed by the European Parliament and provides for such a solution. In fact, this non-binding model of group coordination is considered as an effective tool to allow the coordinated restructuring of the group, further enhancing the coordination of insolvency proceedings opened against the companies forming part of it[901]. However, it is important to stress that the New EIR follows the Commission's proposal in retaining the classic entity-by-entity approach of the autonomy of each legal entity member of the group, already indicated by the CJEU in the landmark decision *Eurofood*, and falls short of considering the above-illustrated option of the procedural consolidation, which has gain significant success in first decade of application of the Regulation[902]. In fact, there is no group COMI or group insolvency plan, with the result that insolvency proceedings have still to be opened by the courts of the Member State within the

[900] COUNCIL, document n. 15675/13.

[901] See Recitals (54) to (62) of the New EIR.

[902] SCHMIDT, *Art. 56*, in MANKOWSKI, MÜLLER, SCHMIDT, *Europäische Insolvenzordnung 2015*, cit., para. 6; BORNEMANN, *Verfahren über Mitglieder einer Unternehmensgruppe – Konzerninsolvenzrecht*, cit., paras. 521. In favour of the introduction of procedural consolidation in the New EIR, MADAUS, *Koordination ohne Koordinationsverfahren? – Reformvorschläge aus Berlin und Brüssels zu Konzerninsolvenzen*, in *ZRP*, 2014, 195; EIDENMÜLLER, *A New Framework for Business Restructuring in Europe*, in *Maastricht J.*, 2013, 148-149; FAZZINI, WINKLER, *La proposta di modifica del regolamento sulle procedure di insolvenza*, cit., 164-165; EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 16-17; BRÜNKMANS, *Auf dem Weg zu einem europäischen Konzerninsolvenzrecht*, in *ZInsO*, 2013, 805; VERHOEVEN, *Ein Konzerninsolvenzrecht für Europa – Was lange währt, wird endlich gut?*, in *ZInsO*, 2012, 2376-2377. In contrast, the decision not to provide for procedural consolidation has been applauded by REINHART, *The European Insolvency Regulation 2015*, cit., 317; THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., 215 THOLE, *Das neue Konzerninsolvenzrecht in Deutschland und Europa*, in *KTS*, 2014, 353-354 and 373 (lack of transparency and higher risk of conflict of interests); KINDLER, *Hauptfragen der Reform des Europäischen Internationalen Insolvenzrecht*, cit., 38-39. *Contra*, see also VALLENDER, DEYDA, *Brauchen wir einen Konzerninsolvenzgerichtsstand?*, cit., 829-833. In this sense, see also the French and German delegations in COUNCIL, document n. 8108/13, par. 3.

territory of which each company's COMI is situated[903]. This practice is somehow legitimated and justified in Recital (53) in cases in which it is possible to identify a uniform COMI for the group as a whole[904]. In particular, the recital reads as follows:

> «The introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them».

In other words, albeit in absence of express provisions in the text of the Regulation, Recital (53) may be interpreted as legitimizing *ex post* the above-illustrated national case-law on procedural consolidation, thus recognizing the need – at least for highly integrated groups – for a comprehensive approach is to facilitate the reorganization[905]. However, the choice of policy of the EU legislator is disappointing, because a recital is by its own nature not binding, and in the case at stake does not offer further guidance as to the requirements under which a court may consolidate proceedings[906].

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[903] MANGANO, *Group Insolvencies*, in BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., 282 ("One group–many COMIs"). For a proposal to introduce the group-COMI, see BUFFORD, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, in *Am. Bankr. L. J.*, 2012, 685 *et seq.*

[904] On the role that Recital (53) may play, see MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.749; FRITZ, *Die Neufassung der Europäischen Insolvenzverordnung: Erleichterung bei der Restrukturierung in grenzüberschreitenden Fällen? (Teil 2)*, in *Der Betrieb*, 2015, 1946; MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, cit., 237; SCHMIDT, *Das Prinzip 'eine Person, ein Vermögen, eine Insolvenz' und seine Durchbrechungen*, cit., 43; MAZZONI, *La disciplina europea dell'insolvenza transfrontaliera*, cit., 2684-2685. A very interesting analysis of Recital (53) is proposed by D'AVOUT, *Le traitement des groupes de sociétés: entre formalisme et réalisme*, cit., 137, according to whom two interpretatios are possible: a broad one, in the line of the case law illustrated at para. 5.1; or a narrow one, so that consolidation is only possible when the group members have their registered office in the same Member State or they are letterbox companies that are entirely managed from another State. Given this alternative, the author prefers a narrow interpretation, considering that the European legislator avoided to introduce a form of procedural consolidation.

[905] It is worth stressing that the opening of proceedings in the Member State where the operational headquarters of the group are located, with the appointment of a single insolvency practitioner, was also the approach recommended by the European Parliament, Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Part. 3, «whenever the functional/ownership structure allows it».

[906] In this sense, see also MANGANO, *Group Insolvencies*, cit., para. 8.29.

Needless to say, the EU legislator also abstained from introducing mechanisms of substantive consolidation[907]. This decision has certainly to be welcomed for the practical problems that it would raise: in particular, as illustrated above, not only the general principle of separate liability, but also the creditors' *ex ante* expectations and risk assessments, with a massive relocation of assets[908].

3.6.1. The Puzzling Definition of a Group of Companies

The definition of the group of companies included in the final text of the Regulation is different from the more restrictive of the Commission's proposal, which relied on the stock report and the control, thus limiting the new rules for groups only to hierarchical structures resulting in subordinated groups[909]. This narrow solution was criticized because it seemed to overlook the fact that groups may take a multiplicity of forms, including more loosely connected networks of economic affiliations[910].

Accordingly, the New EIR adopted a different definition in Article 2, nos. 13 and 14, where 'group of companies' is defined as a parent undertaking and all its subsidiary undertakings,

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[907] For an indication of the opposition to consolidation, see Art. 72(3) of the New EIR

[908] DAMMANN, MENJUCQ, ROUSSEL GALLE, *Le nouveau règlement européen sur les procedures d'insolvabilité*, cit., para. 34; FRITZ, *Die Neufassung der Europäischen Insolvenzverordnung*, cit., 1945; THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., 215. In this sense, see also PRAGER, KELLER, *Der Vorschlag der Europäischen Kommission zur Reform der EuInsVO*, cit., 62; THOLE, SWIERCZOK, *Der Kommissionsvorschlag zur Reform der EuInsVO*, in *ZIP*, 2013, 556; BRÜNKMANS, *Auf dem Weg zu einem europäischen Konzerninsolvenzrecht*, cit., 798; OBERHAMMER, *Groups of companies*, cit., 157. On the contrary, substantive concolidation was proposed in Art. 46 *et seq.* of the *Revision of the European Insolvency Regulation – Proposals by INSOL Europe* (2012).

[909] See Art. 2(j) of the Commission's proposal: «"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».

[910] See, in particular, MCCORMACK, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, cit., 58; REUß, *Europäisches Insolvenzrecht 3.0 oder doch nur Version 1.1?*, cit., 168; REUMERS, *Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR*, cit., 576-577; EIDENMÜLLER, *A New Framework for Business Restructuring in Europe*, cit., 149; FAZZINI, WINKLER, *La proposta di modifica del regolamento sulle procedure di insolvenza*, cit., 163-164; MEVORACH, *INSOL Europe's Proposals on Groups of Companies (in Cross-Border Insolvency)*, cit., 188, according to whom the not only such a notion excludes networks of affiliates linked by means of intra-group holdings operating in coordination by meetings of the managements and through interlocking directorships, but also some hierarchical structures are not taken into account, such as sister companies controlled by an individual shareholder (or shareholders) and enterprises that are split organizationally and controlled via several sets of management.

with the further clarification that the term "parent undertaking" has to intended as «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 the Council shall be deemed to be a parent undertaking»[911]. Although if it is clear from the wording that the obligation to prepare consolidated accounts only works as a rebuttable presumption, it seems reasonable that whenever consolidated financial statements have been actually drawn up in compliance with the Directive, it is not necessary to examine the group structure[912]. At the same time, it follows from the Regulation that direct or indirect control may be assumed outside the requirements of the Accounting Directive.

This definition disregards the legal form of the companies involved[913] and, in line with the provisions of the UNCITRAL Legislative Guide, introduces a notion that is based on control and therefore seems to be broader than that presented by the Commission[914]. This change is certainly welcome, as it allows having a greater number of cases within the scope of the new provisions[915]. However, criticism has not disappeared and some authors are still convinced that also the new wording excludes from the scope of application of the Regulation horizontal structures (*Gleichordnungskonzern*)[916]. It has to be seen, in fact, whether the options left to the Member States under Article 22(7) of the EU Account Directive – referring to cases in which

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[911] This different definition was provided by the European Parliament in the Lehne Report, amendment 25. More generally, on the directive, see *supra* chapter 1, para. 4.

[912] EBLE, *Auf dem Weg zu einem europäischen Konzerninsolvenzrecht – Die "Unternehmensgruppe" in der EuInsVO 2017*, in *NZI*, 2016, 119. See also BRÜNKMANS, *Auf dem Weg zu einem europäischen Konzerninsolvenzrecht*, cit., 799; WIMMER, *Konzerninsolvenzen im Rahmen der EulnsVO*, cit., 1347; LEUTHEUSSER-SCHNARRENBERGER, *Dritte Stufe der Insolvenzrechtsreform – Entwurf eines Gesetzes zur Erleichterung der Bewältigung von Konzerninsolvenzen*, in *ZIP*, 2013, 100.

[913] ESSER, *Reform of the EU Regulation: New Framework for Insolvent Company Groups: Part I*, cit., 39.

[914] MANGANO, *Group Insolvencies*, cit., 279: «the definition provided is entity-based, restricted to companies, and control-based, while the control itself can be direct or indirect, and equity-, agreement-, or management-based». As an example of this last type of group, the authors makes the example of interlocking directorate systems which allow members of a corporate board of directors of a parent to serve at the same time as directors in the subsidiary company. As stressed by MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.751, the question of whether a group of companies exists is fact-sensitive and will depend on the evidence of the existence of control between the relevant entities.

[915] SCHMIDT, *Das Prinzip 'eine Person, ein Vermögen, eine Insolvenz' und seine Durchbrechungen*, cit., 36.

[916] In the sense that horizontally coordinated groups are not covered, see LIENAU, *Definitionen*, in WIMMER, BORNEMANN, LIENAU, *Die Neufassung der EuInsVO*, cit., para. 204; BORNEMANN, *Verfahren über Mitglieder einer Unternehmensgruppe – Konzerninsolvenzrecht*, cit., para. 542; THOLE, *EuInsVO 2015. Art. 2 Begriffsbestimmungen*, in *Münchener Kommentar zur Insolvenzordnung*[3], Vol. 4, München, C.H. Beck, 2016, para. 20 (defining the exclusion as "vertretbar"); ID., *Die Reform der Europäischen Insolvenzverordnung*, cit., 68; KINDLER, SAKKA, *Die Neufassung der Europäischen Insolvenzverordnung*, cit., 465; MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, cit., 237.

undertakings not subjects to control are managed on a unified basis or have a common administrative, managerial or supervisory body – are included in the definition of the Regulation[917]. Whatever interpretation will prevail, it is evident that there is a linguistic inconsistency between the Accounting Directive and the Regulation, which raise a question as to how the horizontal structures might be reconciled with the "control" requirement and the element of subordination therewith considered relevant by the Regulation[918].

In general, one may see that the approach of building on the well-established group concept of accounting law has the advantage of systematic consistency and coherence in EU law[919]. However, it has been criticized as bringing unnecessary complexity and raises doubts as to the automatic transposition in the field of insolvency law of a definition used for different objectives and addressing different issues[920]. As an example, one may reflect on the fact that the Directive does not require the actual exercise of dominant influence, which on the contrary is quite relevant when one is confronted with the insolvency of a group of companies. Accordingly, it will be interesting to see which practical relevance this definition will have and whether and to what extent the CJEU will resort to an independent interpretation of the definition provided in the New EIR[921].

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[917] This confusion is stressed by REUMERS, *What is in a Name? Group Coordination or Consolidation Plan – What is Allowed Under the EIR Recast*, cit., fn. 30 at 230 (asking in particular whether the expression «an undertaking that 'prepares consolidated financial statements in accordance with Directive 2013/34/EU'» should be interpreted as referring to an undertaking that «[has] to prepare consolidated accounts according to Directive 2013/34/EU»). In this regard, BRULARD, *Les groupes et les procédures de pré-insolvency: le signe d'un changement de nature du nouveau règlement insolvabilité?*, in *Rev. proc. coll.*, January 2015, dossier 4, para. 13, affirms that «le règlement s'appliquera aux groupes pour lesquels en vertu de la législation d'un État membre les obligations de la directive 2013/34 seront obligatoires». On the contrary, there are no doubts as to exclusion of cases in which Member States decided unilaterally to extend the scope of the directive, thus requiring undertakings not addressed by the directive to prepare consolidated financial statements.

[918] In this sense, see EBLE, *Auf dem Weg zu einem europäischen Konzerninsolvenzrecht – Die "Unternehmensgruppe" in der EuInsVO 2017*, cit., 120 (but considering horizontal groups as included).

[919] SCHMIDT, *Art. 2*, in MANKOWSKI, MÜLLER, SCHMIDT, *Europäische Insolvenzordnung 2015. Kommentar*, cit., 76-78; KINDLER, SAKKA, *Die Neufassung der Europäischen Insolvenzverordnung*, cit., 465; WIMMER, *Konzerninsolvenzen im Rahmen der EulnsVO*, cit., 1347. WEISS, *Bridge over Troubled Water: The Revised Insolvency Regulation*, in *Int. Insolv. Rev.*, 2015, 198-199, would have preferred a simple reference to the directive.

[920] The reference to the EU Account Directive is questionable according to THOLE, *EuInsVO 2015. Art. 2 Begriffsbestimmungen*, cit., para. 22; MOCK, *Das (geplante) neue europäische Insolvenzrecht nach dem Vorschlag der Kommission zur Reform der EuInsVO*, cit., 164; K. SCHMIDT, *Konzerninsolvenzrecht – Entwicklungsstand und Perspektiven*, cit., 12 *et seq.* (but concerning German legislation on domestic groups). In contrast, see the French and German delegations in COUNCIL, document n. 8108/13, par. 6.

[921] EBLE, *Auf dem Weg zu einem europäischen Konzerninsolvenzrecht – Die "Unternehmensgruppe" in der EuInsVO 2017*, cit., 121.

Another major shortcoming is represented by the limited scope of application of the Regulation[922], and by the fact that the new rules on groups of companies will only apply to parent companies and subsidiaries that have all their COMI in at least two Member States[923]. More precisely, once proceedings have been opened with regard to group members located in different States and the cross-border element of the group has been ascertained, the new rules apply also to the relationship between proceedings opened in the same State[924].

However, it is evident that group structures are not limited to the territory of the European Union and that an increasing number of insolvency cases involving groups is significantly connected with third states. Indeed, there is often an ultimate parent company in the US, and there may well be a European sub-group centered on the UK, with a main subsidiary used as a conduit for the business in Europe through establishments and subsidiaries in the other EU States[925]. More generally, a group of companies may well be partially located in third States, with some subsidiaries or the parent company itself having their seat outside the EU. In these last cases, complicated problems arise when the assets owned by separate companies or the activities conducted through different companies are displaced in different countries, some of

[922] Indeed, the EIR Recast maintains the classical EU-centric perspective and the idea of an EU regime deprived of any consideration for the rest of the world, thus reflecting the same philosophy of Euro-universalism of the old Regulation: MCCORMACK, *Something Old, Something New: Recasting the European Insolvency Regulation*, cit., 123; REINHART, *EuInsVO 2015. Art. 1 Anwendungsbereich*, in *Münchener Kommentar zur Insolvenzordnung*[3], Vol. 4, cit., para. 13; FABRIES-LECEA, *Chapitre préliminaire: considérants*, in SAUTONIE-LAGUIONIE (dir.), *Le règlement (UE) n° 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité*, cit., 23-30. More generally, on the relationship between the Regulation and the outer world, *i.e.* its applicability when the insolvency is significantly linked with third states and the relationship with national laws currently applicable when the debtor's centre of main interests (COMI) is located outside the EU, see JAULT-SESEKE, *Les relations avec les états tiers*, in JAULT-SESEKE, ROBINE (dir.), *Le droit européen des procédures d'insolvabilité à la croisée des chemins*, Paris, LGDJ, 2013, 103; OMAR, *The Extra-territorial Reach of the European Insolvency Regulation*, in *Int. Comp. Comm. L. Rev.*, 2007, 57; and BARBE, MARQUETTE, *Les procédures d'insolvabilité extracommunautaires. Articulation des dispositions du règlement (CE) n° 1346/2000 et du droit commun des États membres*, in *Clunet*, 2006, 511.

[923] Recital (62) of the New EIR. See THOLE, *EuInsVO 2015. Art. 2 Begriffsbestimmungen*, cit., para. 21; BRÜNKMANS, *Auf dem Weg zu einem europäischen Konzerninsolvenzrecht*, cit., 806-807. Indeed, also the INSOL Europe Proposal, cit., 92-95, gives relevance to the ultimate parent company in the EU, *i.e.* the top company that is both located in the EU and is subject to insolvency proceedings. In this respect, see critically MEVORACH, *INSOL Europe's Proposals on Groups of Companies (in Cross-Border Insolvency)*, cit., 189; and BUFFORD, *Coordination of Insolvency Cases for International Enterprise Groups: A Proposal*, cit., 705. With regard to group coordination proceeding, SCHMIDT, *Art. 61*, in MANKOWSKI, MÜLLER, SCHMIDT, *Europäische Insolvenzordnung 2015*, cit., para. 10, stresses that the EIR's provisions apply irrespective of whether proceedings have also been opened in relation to group members outside the EU, so that their application is limited to the EU-part of the group.

[924] BORNEMANN, *Verfahren über Mitglieder einer Unternehmensgruppe – Konzerninsolvenzrecht*, cit., para. 549; THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., 222-223; THOLE, *Das neue Konzerninsolvenzrecht in Deutschland und Europa*, cit., 372.

[925] GRUBER, in FLÖTHER (Hrsg.), *Handbuch zum Konzerninsolvenzrecht*, cit., Ch 8, para. 123; MOSS, *Group Insolvency – Choice of Forum and Law*, cit., 1009.

which are not in the EU[926]. Therefore, it is doubtful that the EU-centric perspective that also marks the New EIR is the best possible[927].

3.6.2. The Duties of Cooperation and Communication Provided between Insolvency Practitioners and Courts

As anticipated above, the EIR Recast has introduced cooperation and communication duties between insolvency practitioners, courts and insolvency practitioners, and courts involved in insolvency proceedings relating to two or more members of a group of companies[928]. These duties are mandated and follow exactly the same principles provided for cooperation and communication in the context of secondary proceedings, with the difference that in this case there is no dominance of some proceedings over the others[929]. In this respect, one may see that the Regulation adopts a rather contractualistic approach that developed in some countries, especially with a common law tradition, in the sense of promoting the role of party autonomy[930].

Under Article 56, an insolvency practitioner appointed in proceedings concerning a member of the group *shall* cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group to the extent that such cooperation is appropriate

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[926] OBERHAMMER, *Groups of companies*, cit., 154;

[927] EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 14: «Eine Regulierung des Gruppeninsolvenzrechts kann daher Fälle mit Berührung zu Drittstaaten nicht ignorieren». For a review of possible solutions to the treatment of groups of companies partially located in third States, see NISI, *The Recast of the Insolvency Regulation: A Third Country Perspective*, in *J. Priv. Int. L.*, 2017 [forthcoming]; ID., *La refundición del reglamento de insolvencia europeo y los grupos de empresas de terceros Estados*, in *AEDIPr.*, 2013, 245.

[928] This means that there are two level of cooperation: the first one at the group level, among parallel main proceedings; the second one, at the company level, between main and secondary proceedings: D'AVOUT, *Le traitement des groupes de sociétés: entre formalisme et réalisme*, cit., 139.

[929] As is stressed by REUMERS, *Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR*, cit., 584, there is no designated leading figure in charge to coordinate the liquidation or reorganization of the group business and no specific powers attributed to the insolvency representative appointed within the parent company's proceeding. See also BOURBOULOUX, LOSTE, *Vers une amelioration du traitement de l'insolvabilité des groupes*, in *Rev. proc. coll.*, 2015, n. 1, dossier 8, para. 18. This is interpreted by MANGANO, *Group Insolvencies*, cit., para. 8.36, as meaning that dominance of one procedure over the others is determined on a cases-by-case basis according to the need to ensure the efficient administration of insolvency proceedings relating to the different group members.

[930] RÉTORNAZ, *Cooperation in the New EU Regulation on insolvency proceedings: an unfinished transition from status to contract*, in *Yb. Priv. Int. L.*, 2015/2016, 319 *et seq.*; HENRY, *Le nouveau règlement «insolvabilité»: entre continuité et innovations*, in *Dalloz*, 2015, 979, para. 21; WINKLER, *The Reform of the European Insolvency Regulation: Is there any Space for Private Autonomy*, in BARIATTI, OMAR (eds.), *The Grand Project: Reform of the European Insolvency Regulation*, Nottingham, INSOL Europe, 2014, 119 *et seq.* This approach has been integrated also in some continental jurisdictions: see SENECHAL, *The implementation of judicial cooperation in the cross-border insolvency French cases – The EMDO and SENDO files: return of experience*, in *IILR*, 2015, 396.

to facilitate the effective administration of the proceedings. The provision expressly states that cooperation may take any form, including the conclusion of agreements or protocols. In particular, three different ways of cooperation are mentioned by way of example: (i) by communicating to each other any information relevant to the other proceedings, provided that appropriate arrangements are made to protect confidentiality; (ii) by coordinating the administration and supervision of the affairs of the group members, which are subject to insolvency proceedings; and (iii) by considering whether possibilities exist for restructuring the group members and, if so, coordinate with regard to the proposal and negotiation of a coordinated restructuring plan[931]. Concerning the last two situations, all or some of the insolvency practitioners may agree – under certain circumstances – to grant additional powers to an insolvency practitioner appointed in one of the proceedings where such an agreement is permitted by the rules applicable to each of the proceedings[932].

Similar duties are provided by Articles 57 and 58 as to between courts and between insolvency practitioners and courts. The first rule represents a quite important novelty if compared to the original Regulation and urges courts to communicate directly with each other, or request information or assistance directly from each other, provided that such communication respects the procedural rights of the parties and the confidentiality of information[933]. In particular, it is provided that cooperation may be implemented by any appropriate means, concerning for instance (a) coordination in the appointment of insolvency practitioners[934]; (b)

[931] This last obligation must be read together with Art. 60(1)(b), which allows an insolvency practitioner to request a stay of the realization of assets in foreign proceedings in order to facilitate the implementation of a restructuring plan. It is also interesting to note that the original Commission's proposal provided « liquidator which has the biggest interest in the successful restructuring of all companies concerned to officially submit his reorganisation plan in the proceedings concerning a group member, even if the liquidator in these proceedings is unwilling to cooperate or is opposed to the plan». This possibility was criticized by MCCORMACK, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, cit., 58, as opening up the possibility of procedural chaos with different restructuring plans being put forward by different insolvency practitioners.

[932] Art. 56, para. 2, of the New EIR. According to REUMERS, *What is in a Name? Group Coordination or Consolidation Plan – What is Allowed Under the EIR Recast*, cit., 236, this attribution may result in a form of procedural consolidation.

[933] In practice, however, it is likely that this duty will be invoked when an application is made by a party, such as the insolvency practitioner relating to another group member: MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.759. Art. 57 also allows courts, when appropriate, to appoint an independent person or body to act on its instructions, provided that this is not compatible with the rule applicable to them. In this sense, see also Art. 27(a) of the Model Law. As provided in the UNCITRAL, *Practice Guide on Cross-Border Insolvency Cooperation*, cit., 18, this person may have a variety of possible functions, including acting as a go-between for the courts involved, especially where issues of language are present; developing an insolvency agreement; and promoting consensual resolution of issues between the parties.

[934] See Recital (50) of the New EIR. On the pros and cons of having a single insolvency practitioner appointed in several proceedings opened in different States, see *supra* para. 3.2.

communication of information; (c) coordination of the administration and supervision of the assets and affairs of the group members[935]; (d) coordination of the conduct of hearings[936]; (e) coordination in the approval of protocols[937]. Furthermore, Article 58 requires an insolvency practitioner appointed in an insolvency proceeding of a group member to further cooperate and communicate with the court before which a request to open insolvency proceedings against another group member is pending or which has opened such proceedings.

The duties of cooperation just illustrated in their main features are typically consensual and not enforceable[938]. This means that if an insolvency representative or a foreign court does not comply with the duty to cooperate, there is not any specific remedy other than those consisting in supervision by national courts, including the replacement of the insolvency practitioner[939]. An alternative solution could be to request compensation for damages inflicted to creditors or third parties because of the lack of cooperation: however, the Regulation does not contain any provision in this respect[940], so that any damages action would be subject to the conditions required at the national level by the *lex fori concursus*[941]. Moreover, such duties are subject to significant limitations that, albeit to the interpreted strictly, in certain circumstance may

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[935] UNCITRAL, *Practice Guide on Cross-Border Insolvency Cooperation*, cit., 78.

[936] On the benefit of having coordinated hearings, see UNCITRAL, *Practice Guide on Cross-Border Insolvency Cooperation*, cit., 93-94.

[937] This article appears to have been inspired by Art. 27 of the Model Law: see UNCITRAL, *Legislative Guide on Insolvency Law, Part Three*, cit., Recommendation 241.

[938] The problem was already highlighted with regard to the original EIR by CZAJA, *Umsetzung der Kooperationsvorgaben durch die Europäische Insolvenzverordnung im deutschen Insolvenzverfahren*, Frankfurt am Main, Peter Lang, 2009, 223 *et seq.*; BECK, *Verwertungsfragen im Verhältnis von Haupt- und Sekundärverfahren nach der EuInsVO*, in *NZI*, 2006, 611; and DIALTI, *Cooperazione tra curatori e Corti in diritto internazionale fallimentare: un'analisi comparata*, cit., 1012-1013.

[939] RÉTORNAZ, *Cooperation in the New EU Regulation on insolvency proceedings*, cit., 352. For instance, with regard to the German bill, KÜBLER, *Inhalt und Grenzen der Kooperationspflichten der Insolvenzverwalter in der Konzerninsolvenz*, in GRAF-SCHLICKER, PRÜTTING, UHLENBRUCK (Hrsg.), *Festschrift für Heinz Vallender*, cit., 305; and BRÜNKMANS, *Konzerninsolvenzrecht*, cit., paras. 80-82, stress that, as an alternative to liability for damages (§ 60 InsO), § 58 InsO provides insolvency courts with the power to impose an administrative fine on the administrator if he does not fulfil his duties.

[940] With a similar purpose, see Art. 36(10) of the New EIR, under which insolvency practitioners shall be liable for any damage caused to local creditors as a result of their non-compliance with the obligations resulting from the undertaking given to avoide the opening of secondary proceedings. The undertaking given by the insolvency practitioner is binding, so that he may be requested to comply with the terms of the undertaking and be sued in case for any damage caused in case of non-compliance.

[941] KINDLER, *Hauptfragen der Reform des Europäischen Internationalen Insolvenzrecht*, cit., 43; THOLE, SWIERCZOK, *Der Kommissionsvorschlag zur Reform der EuInsVO*, cit., 557; WIMMER, *Konzerninsolvenzen im Rahmen der EulnsVO*, cit., 1345. MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, cit., 240, affirms that it is doubtful whether a non-cooperative behaviour might be linked to a specific damage to the estate or to creditors. In this last sense, see also THOLE, *Die Reform der Europäischen Insolvenzverordnung*, cit., 69 (but differentiating the case where there is a total refuse of cooperation); CZAJA, *Umsetzung der Kooperationsvorgaben durch die Europäische Insolvenzverordnung*, cit., 231.

significantly undermine the objectives of the Regulation as to the efficiency and the benefits of a coordinated approach[942]. In addition to the fact that the exchange of information must take place with means which might protect its confidentiality and that procedural rights of the parties are respected[943], three identical limitations are contained in the provisions above mentioned, so that the duty to cooperate only exists to the extent that: (i) it is appropriate to facilitate the effective administration of the proceedings involved[944]; (ii) it is compatible with rules applicable to the proceedings[945]; and (iii) it does not entail any conflict of interest (e.g. where there is a disputed claim between two insolvency estates)[946]. These limitations weaken considerably the obligation to cooperate if used as an excuse not to engage in any kind of cooperation. Accordingly, they have to be interpreted in a restrictive way in order to avoid further obstacles making cooperation and coordination impossible[947].

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[942] RÉTORNAZ, *Cooperation in the New EU Regulation on insolvency proceedings*, cit., 347 *et seq.* Concerning the German group bill, see KÜBLER, *Inhalt und Grenzen der Kooperationspflichten der Insolvenzverwalter in der Konzerninsolvenz*, cit., 301-305.

[943] This requirement may make it necessary to conclude appropriate confidentiality arrangements regarding the notification of information and, where appropriate, the enforcement and dispute settlement. Concerning cooperation among courts, Art. 57(2) adds another limitation concerning the safeguard of the procedural rights of the parties: in similar terms, see *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, cit., para. 217, holding that «communication should be done openly, in the presence of the parties involved (except in extreme circumstances), who should be given advance notice».

[944] It is important to stress that individual proceedings keep their independence, so that the actors involved may participate into disadvantageous solutions (e.g. continuation of a loss-making business operation to enable group-wide operations) only in so far as these advantages are compensated: BORNEMANN, *Verfahren über Mitglieder einer Unternehmensgruppe – Konzerninsolvenzrecht*, cit., para. 567.

[945] This reservation allows each Member State to retain control over whether, in what framework and to what extent insolvency practitioner and courts are obliged to communicate information and to cooperate in other ways. In this sense, as highlighted by BRULARD, *Les groupes et les procédures de pré-insolvency: le signe d'un changement de nature du nouveau règlement insolvabilité?*, cit., para. 19, one may note that the Regulation does not simply refer to national laws, but it also invites Member States to adopt implementation measures at the national levels. According to SCHMIDT, *Art. 56*, cit., para. 28, the reference to national applicable law includes not only the *leges fori concursus* of the individual proceeding, but also any regulations and guidelines of professional organizations to which the insolvency administrators involved belongs.

[946] MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.754. According to MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, cit., 240, also the expenses of cooperation efforts may play a role in this sense, resulting in a basis for a conflict of interests when the required amount for cooperation would cause extra costs at the expense of the insolvency estate. According to REINHART, *The European Insolvency Regulation 2015*, cit., 314 (ID., *EuInsVO 2015. Art. 56 Zusammenarbeit und Kommunikation der Verwalter*, in *Münchener Kommentar zur Insolvenzordnung*[3], Vol. 4, cit., para. 2), «the requirement that there should be no conflict of interests is in itself contradictory, as conflict of interests must necessarily arise in the process of coordination». In similar terms, see THOLE, *Die Reform der Europäischen Insolvenzverordnung*, cit., 69; BRÜNKMANS, *Auf dem Weg zu einem europäischen Konzerninsolvenzrecht*, cit., 800.

[947] VAN GALEN, *The Recast Insolvency Regulation and groups of companies*, cit., 250; ESSER, *Reform of the EU Regulation: New Framework for Insolvent Company Groups: Part I*, cit., 77. It is regrettable that the Regulation does not provide for any guidance on how to interpret this limitation, especially concerning conflict of interest, so that it is necessary to resort to national systems: MASTRULLO, *La coopération entre les acteurs intervenant dans les procédures d'insolvabilité après la révision du règlement (CE) n° 1346/2000*, cit., para. 9.

The New Regulation also outlines the powers of insolvency practitioners in proceedings against other members of a group of companies[948]. The insolvency practitioner has the right to be heard in any proceeding brought against any other member of the group[949] or the more invasive right to request a stay of any measure concerning the realization of the assets of any other member of the group[950]. Such a stay is admissible only if a proposed restructuring plan has been proposed[951] and has reasonable chances of success, and the stay would ensure proper implementation of the plan and be to the benefit of the creditors in the proceedings for which it is requested[952]. The EIR Recast does not establish further criteria or conditions for a restructuring plan in the group context[953] but emphasizes that such a plan is an alternative to group coordination proceedings, which cannot be pursued in parallel. In other words, once the group coordination proceeding has been opened, insolvency practitioners of the individual proceedings lose their right to request a stay with respect to another group company included in the group coordination proceeding[954].

The decision to request a stay lies in the full discretion of the insolvency practitioner and is not amenable to judicial review[955]. In contrast, if the above conditions are satisfied[956] and the

[948] Art. 60(1) of the EIR Recast.

[949] Clearly, this right is subject to the conditions and the modalities provided by the *lex fori concursus*. However, this right in no case extends to voting: BORNEMANN, *Verfahren über Mitglieder einer Unternehmensgruppe – Konzerninsolvenzrecht*, cit., para. 584; KINDLER, SAKKA, *Die Neufassung der Europäischen Insolvenzverordnung*, cit., 465.

[950] On the correct use of the term "stay", doubts are raised by WIMMER, *Konzerninsolvenzen im Rahmen der EulnsVO*, cit., 1346. From the wording of the provisions, it seems that the stay is not limited to actions of the local insolvency practitioner, but concerns also the actions of secured creditors, with the consequence that Art. 8 of the New EIR on third parties' rights in rem would be set aside: in this sense, VAN GALEN, *The Recast Insolvency Regulation and groups of companies*, cit., 251. SCHMIDT, *Art. 60*, in MANKOWSKI, MÜLLER, SCHMIDT, *Europäische Insolvenzordnung 2015. Kommentar*, cit., para. 8, makes the following examples: private sale, foreclosure, sequestration, sale of pledged property, confiscation of claims.

[951] It is not necessary that implementation of the plan has already begun. In this sense, see FRITZ, *Die Neufassung der Europäischen Insolvenzverordnung*, cit., 1947.

[952] Article 60 (1) (c) (i)–(iii) of the New EIR. Critical on these requirements, EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 16; THOLE, *Die Reform der Europäischen Insolvenzverordnung*, cit., 70-71; PRAGER, KELLER, *Der Vorschlag der Europäischen Kommission zur Reform der EuInsVO*, cit., 64.

[953] Critical in this sense MOCK, *Das (geplante) neue europäische Insolvenzrecht nach dem Vorschlag der Kommission zur Reform der EuInsVO*, cit., 165.

[954] This requirement is aimed at preserving the priority of the group coordination proceeding: SCHMIDT, *Art. 60*, cit., para. 15. To this end, it is worth stressing that a similar but more far-reaching power of influencing the insolvency proceedings relating to group members is attributed under Art. 72(2) of the New EIR to coordinator within the framework of the group coordination proceeding.

[955] WEISS, *Bridge over Troubled Water: The Revised Insolvency Regulation*, cit., 209.

[956] The *lex fori concursus* applies as to the measures to be adopted and to the burden of proof relating to the the existence of the requirements of Article 60(1)(b), according to KINDLER, SAKKA, *Die Neufassung der Europäischen Insolvenzverordnung*, cit., 465-466. Under a different view, an autonomous interpretation should prevail, so that it is sufficient to ascertain a great likelihood that the suspension will serve the creditor's interests,

insolvency practitioner appointed in the proceeding for which the stay is requested has been heard, the court addressed is obliged to grant the stay, with no possibility of discretionary evaluations[957]. In contrast, some discretion is provided as to the content and the duration of the stay: in fact, the measures related to the realization of the assets may be stayed in whole or in part, for any period not exceeding three months and extendable to a maximum of six months[958]. Moreover, the court ordering the stay may require the requesting insolvency practitioner to take any suitable measure available under national law aimed at balancing the effects of the stay and guaranteeing the interests of the creditors in the proceedings[959].

3.6.3. The New Group Coordination Proceeding: A Step Forward, but a Small One

3.6.3.1. The Conditions for the Opening of the Proceeding and Jurisdiction

Another major power that is granted by Article 60 to the insolvency representatives appointed in proceedings relating to group members is the possibility to apply for the opening of a group coordination proceeding. As anticipated above, this is one of the most relevant novelties of the Recast Regulation and aims at introducing a new framework for the coordination of proceedings opened against companies belonging to the same group, in order to facilitate the coordinated restructuring of the group[960].

Group coordination proceedings may be requested by any insolvency practitioner appointed in insolvency proceedings opened in relation to a member of a group of companies[961]. The

without any referent to national laws: PRAGER, KELLER, *Der Vorschlag der Europäischen Kommission zur Reform der EuInsVO*, cit., 64; THOLE, SWIERCZOK, *Der Kommissionsvorschlag zur Reform der EuInsVO*, cit., 557.

[957] MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.768; MANGANO, *Group Insolvencies*, cit., para. 8.40.

[958] Art. 60, para. 2, of the New EIR. For such extension, the Regulation requires that the court be satisfied that the conditions laid down in Art. 60(1)(b) (ii)-(iv) are still fulfilled. However, as noted by REUMERS, *Cooperation between Liquidators and Courts in Insolvency Proceedings of Related Companies under the Proposed Revised EIR*, cit., 589, the Regulation is silent as to how and when a stay may be terminated.

[959] In this way, the legislator applies a safeguard mechanism, which is already in place when the recovery is suspended in the secondary proceedings (see Art. 46 of the New EIR): REINHART, *EuInsVO 2015. Art. 60*, para. 10. But contrary to Art. 46, this must be a measure under national law.

[960] Recital (54) of the New EIR. Using the words of MEVORACH, *Enterprise Groups in Insolvency: Recent International Developments*, cit., this proceeding «reflects a push from mere cooperation between parallel proceedings to a more centralized approach», which «may indeed increase the likelihood of achieving a coordinated and more harmonized process to the insolvency of related companies».

[961] Under, Art. 61, para. 2, the application shall be made in accordance with the conditions provided by the law applicable to the proceedings in which the insolvency practitioner has been appointed. This means, as clarified by Recital (53), that it might be necessary for the requesting practitioner to obtain the necessary authorisation before

application must be detailed and contain: (a) a proposal as to the person to be nominated as the group coordinator[962], with the details of his or her eligibility and qualifications; (b) an outline of the proposed group coordination; (c) a list of the insolvency practitioners appointed and the courts involved in relation to the group members, possibly together with contact details; (d) an outline of the estimated costs of the proposed group coordination and the estimation of apportionment among the different participating companies. In particular, it is important to provide evidence of the fact that: (i) the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members; (ii) 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[963]; and (iii) the proposed coordinator fulfils the requirements laid down in Article 71[964].

The court competent to receive the request is anyone having jurisdiction over the insolvency proceedings of a member of the group[965]. The Regulation does not provide any further guidance, as to whether the seized court must be competent to open main proceedings, or whether, in contract, also jurisdiction for secondary and territorial proceedings is sufficient to trigger the group coordination procedure. However, the broad wording of the text seems to indicate that Article 61 covers all three types of insolvency proceedings[966].

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making the request. In contrast, the proceeding cannot be opened *ex officio* or by request of a creditor or a public authority: PRAGER, KELLER, *Der Entwicklungsstand des Europäischen Insolvenzrechts*, cit., 810.

[962] Under Art. 71, the coordinator shall be a person eligible under the law of a Member State to act as an insolvency practitioner. His independence is guaranteed by the fact that he shall not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members. This last condition may severely limit the number of qualified candidates for the role where a major multinational group is in point: BEWICK, *The EU Insolvency Regulation, Revisted*, in *Int. Insolv. Rev.*, 2016, 187. MCCORMACK, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, cit., 58, calls him "super-mediator".

[963] On this requirements, criticism by PANZANI, *La disciplina della crisi di gruppo tra proposte di riforma e modelli internazionali*, cit., 1156; and SCHMIDT, *Art. 63*, para. 9 (affirming that the proceeding must have a generally positive impact on the creditors, but that it is impossible to determine a common interest of the creditors in the context of group insolvencies). According to ESSER, *Reform of the EU Regulation: New Framework for Insolvent Company Groups: Part II*, cit., 120, it seems hard that the Court might make a prognosis of the financial position of each creditor of each group member with and without the coordination proceedings.

[964] Another requirement was proposed by the French delegation in COUNCIL, document n. 10688/14, 5, as to the fact that «the number of insolvency practitioners is sufficiently significant to ensure the success of the group proceedings», but it was finally rejected.

[965] The Regulation does not contain any time limit for the request of opening a group coordination proceeding. However, as highlighted by MANGANO, *Group Insolvencies*, cit., para. 8.58, indirect indications may be deduced from the fact that the application has to justify the soundness and the suitability of the coordination, so that it would be incompatible with a situation in which some proceedings have already accomplished their functions.

[966] SCHMIDT, *Art. 61*, cit., para. 25. In fact, in other articles this limitation is expressly provided (eg. Art. 11, para. 2, or Art. 36 *et seq.*). Moreover, in this sense see the British delegation in COUNCIL, document n. 10731/14,

Such a quite flexible criterion is a significant modification if compared with the original proposal of the European Parliament, according to which the application should have to be brought before the court that opened the proceeding against the company carrying out the most crucial functions of the group. The latter criterion met fierce criticism as to the practical problems that would have raised for the determination of such court[967]. This rule has been replaced by a system based on a priority rule, in which when 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 jurisdiction in favor of that court[968]. Any reference to the centre of gravity of the group, both geographical and economical, has been eliminated[969]. In any case, in order to avoid giving relevance to fortuitous or inappropriate places and to prevent abuses of the rule and possible races to the court[970], the priority rule applies without prejudice to the possibility for at least two-thirds of all insolvency practitioners involved[971],

3, arguing that «main proceedings [may] have little or no assets, being largely 'head office' functions, whereas the majority of assets [may] be located in the jurisdiction of secondary proceedings».

[967] COUNCIL, document n. 15675/2013, 9, defines crucial functions within the group as either the ability to take and enforce decisions of strategic importance within the group or as the economic significance within the group as measured in terms of turnover and assets. Moreover, where petitions for commencement of coordination proceedings are pending in more than one Member State hosting crucial functions, the proposal was to attribute jurisdiction to the Member State that hosts the most crucial functions or, in case no determination is possible as to the location of the most crucial functions, to the court first seised. Doubts were raised by MEVORACH, *Enterprise Groups in Insolvency: Recent International Developments*, cit.; and MCCORMACK, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, cit., 58-59.

[968] Art. 62 of the New EIR. In absence of specific indication, the determination of when a court is considered to be seised should be determined by the *lex fori*. However, a uniform interpretation is to be preferred, so that, in case there is a rush of requests for group coordination proceedings, the court first seised should be determined in the same way as under Art. 32 of the Brussels I-*bis* Regulation: MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.773; J. SCHMIDT, *Art. 62*, para. 7. Regrettably, neither the filing of a request for the opening of a group coordination proceeding nor the notice provided in Art. 63 is included in the mandatory information to be published in the isolvency registers under Art. 24, para. 2, of the New EIR.

[969] D'AVOUT, *Le traitement des groupes de sociétés: entre formalisme et réalisme*, cit., 135.

[970] The priority rule may, in fact, lead to a "race to the court" to ensure jurisdiction of a particular court: in this sense, BEWICK, *The EU Insolvency Regulation, Revisted*, cit., 187; FRITZ, *Die Neufassung der Europäischen Insolvenzverordnung*, cit., 1947; and THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., 216 and 224–225. This risk is not considered real by MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, cit., 244, due to the fact that the group coordination proceeding have only limited effects. More interestingly, he highlights that the information necessary to request the opening of coordination proceeding reveals that actually that such request «would be a strategic step rather than an ad-hoc measure», because it implies a specific coordination strategy that has to be developed in advance.

[971] The use of the word "all" seems to indicate that majority must be reached not only among the insolvency practitioners participating in the group coordination proceedings, but also including the practitioners that already objected the inclusion in the proceedings under Arts. 64-65: SCHIMDT, *Art. 66*, cit., para. 4. Moreover, one has to consider that reaching an agreement among two-thirds of the practitioners may be practically difficult and result in delays and value-destructive uncertainties: MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.775.

irrespective of the share of group assets they represent, to attribute exclusive jurisdiction to a different court, which is considered as the most appropriate for the opening of group coordination proceeding[972]. The choice of court is only possible until a group proceeding is officially opened and must be made in writing or evidenced in writing[973]. Accordingly, an entirely new proceeding would start, with all the requirements provided by Article 63 *et seq.* to be newly fulfilled. This opening to party autonomy is quite innovative and could have a significant impact, if one thinks of the fact that, in absence of special provisions, the group coordination procedure will be governed by the law of the court opening the proceedings and that the group coordinator will most likely be based in the Member State whose court opens the proceeding[974].

3.6.3.2. The Opening of the Proceeding and the Possible Objections to Be Raised

After a preliminary examination of the fulfillment of the conditions illustrated, the request for the opening of group coordination proceedings and the name of proposed coordinator are communicated as soon as possible to the insolvency practitioners appointed in proceedings relating to the other group members[975]. The latter are given the opportunity to be heard and, more importantly, the right under Article 64 to raise two types of objections within thirty days from the receipt of the notice: the first one concerns the inclusion of the proceeding for which they have been appointed within the group coordination proceeding and it is aimed at ensuring the voluntary nature of the coordination proceeding[976], while the second one concerns the person proposed as a coordinator[977].

In the first case, the proceeding is automatically and immediately excluded from the group coordination proceeding, with the consequence that the powers of the court opening the latter proceeding and of the coordinator appointed shall not produce any effect on the proceeding in

[972] Art. 66, para. 1, of the New EIR.

[973] The form requirement should be interpreted in the same was as in Art. 25 of the Brussels I-*bis* Regulation.

[974] THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., 224.

[975] Art. 63 of the New EIR.

[976] Recital (56) of the New EIR. Se also BOURBOULOUX, LOSTE, *Vers une amélioration du traitement de l'insolvabilité des groupes*, cit., para. 26. Under Art. 64, para. 3, an insolvency practitioner shall obtain any approval which may be required under the law of the State of the opening of proceedings for which it has been appointed

[977] Art. 64, para. 1, of the New EIR. A to the form of the objections, Art. 64, para. 2, second sentence, refers to the standard form established in accordinace with Art. 88.

question, and shall entail no costs for that group member[978]. In particular, the opt-out takes place without any element of discretion by the court seised and especially without the possibility for the actors involved to be heard about the consequences of the exclusion on the prospect of successful restructuring. In the second case, Article 67 provides that the court may refrain from appointing that person and invite the objecting insolvency practitioner to submit a new request[979]. From the wording of the two provisions, it is quite evident that the two objections are different in nature, because only the first one produce immediate and binding effects[980]. It is regrettable, however, that the Regulation does not impose any duty to explain the reasons for any of the two objections: in the first case, because the objections may be useful for the participating practitioners to correct possible mistakes and to evaluate better the actual benefits stemming from the group coordination proceeding; in the second case, because the opt-out does not have automatic effects, so that the court must be convinced that the objection is well founded[981].

After the objection period of thirty days has expired, the court seised shall evaluate whether the conditions for opening are still satisfied and, if so, opens the group coordination proceeding, by appointing the coordinator and deciding on the outline of the coordination, the estimation of costs and the share to be paid by the group members[982]. It is however questioned whether the

[978] Art. 65, para. 2, of the New EIR. This "opt-out" does not necessarily have to be the "final word": Art. 69 of the EIR Recast, in fact, establishes the possibility of a subsequent "opt-in" under certain conditions, both for group members in which the insolvency practitioner has previously made an objection as to the inclusion in the group coordination proceedings and for group members against which an insolvency proceeding has been opened at a later time. The subsequent opt-in is subject to the agreement of all insolvency practitioners and to the decisions of the coordinator, which may be challenged by any participating practitioners be it a positive or a negative decision. However, it is evident that the decision for a subsequent opt-in only makes sense if the coordinator considers that proceeding as strategically important, so that the challenge of the coordinator' rejection appears to be of very limited help.

[979] Even though this objection does not result automatically in a change of the coordinator, it must be stressed the coordinator may efficiently carry out his duties only if he can rely on the respect and the approval of the other insolvency practitioners involved: see THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., 218. As stressed by MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, cit., 241, the coordinator must be an internationally recognized person for his expertise and experience, widely respected by the other insolvency practitioners. He concludes that currently «only a handful of candidates would appear suitable when the requirements are seen in this light». In other words, he affirms at 245 that in well-prepared and high-profile cases, this kind of objections will hardly be raised.

[980] MANGANO, *Group Insolvencies*, cit., para. 8.64; PRAGER, KELLER, *Der Entwicklungsstand des Europäischen Insolvenzrechts*, cit., 810.

[981] In these terms, see SCHMIDT, *Art. 64*, cit., para. 14. In this regard, WEISS, *Bridge over Troubled Water: The Revised Insolvency Regulation*, cit., 211, argues that this could facilitate to misuse the right to object in order to jeopardise group coordination proceedings.

[982] Art. 68 of the New EIR.

control required in this case only concerns the formal observation of the conditions required by the Regulation or whether, in contrast, it also extends to the substance of the request, including a cost-benefit analysis of the procedure[983]. In the silence of the text, it seems that the general structure of the proceeding suggests avoiding further modification of the outline prepared by the coordinator and on which the insolvency practitioners have agreed upon.

3.6.3.3. The Role of the Coordinator and the Non-Binding Nature of the Proceeding

The role of the coordinator is to identify and outline recommendations for the coordinated conduct of the included proceedings and to propose a group coordination plan identifying, describing and recommending a comprehensive set of measures appropriate to an integrated approach to the resolution of group members' insolvencies[984]. In particular, the plan should deal with the reestablishment of the economic performance and financial soundness of the group, the settlement of intra-group disputes and the agreements between various insolvency representatives[985]. The coordinator is also endowed with some instrumental rights that should facilitate the performance of his role: he may in fact (i) be heard and participate in any of the proceedings, particularly in creditors' meetings; (ii) mediate disputes between office-holders, e.g. pertaining to the realization of assets or to avoidance actions; (iii) present and explain his or her plan to the persons or the bodies to whom he or she is required to report; (iv) request information from office-holders to assist in coordinating proceedings[986]; (v) request a stay of up to (non-extendable) 6 months of the individual proceedings relating to participating group members, where it is necessary to implement the plan and is for the benefit of the creditors in

[983] In this sense, SCHMIDT, *Art. 68*, cit., para. 17. A different opinion is expressed by MANGANO, *Group Insolvencies*, cit., para. 8.66.

[984] For an overview of the main issues that the group insolvency plan should take into account, see FRITZ, *Die Neufassung der Europäischen Insolvenzverordnung*, cit., 1948.

[985] The plan shall in no cases include recommendations as to any consolidation of proceedings or insolvency estates, thus confirming the reluctance of the Regulation to provide for a degree of consolidation. However, REUMERS, *What is in a Name? Group Coordination or Consolidation Plan – What is Allowed Under the EIR Recast*, cit., 237, suggests that it is hard to imagine a group coordination plan holding «an integrated approach to the resolution of the group members' insolvencies», without proposed arrangements about coordinated deadlines for voting on plans in the different insolvency proceedings or about a coordinated sale of assets in case a going concern sale of a highly integrated business is envisioned. In other words, an integrated approach requires necessarily some form of procedural consolidation.

[986] According to SCHMIDT, *Art. 72*, cit., para. 38, this is a drafting error and does not make much sense, because most national laws do not even provide for a coordinator. Most likely, this provision refers to the bodies and the persons that the insolvency representatives are to report under their respective national law.

the proceedings for which the stay is requested[987]. Moreover, he has to cooperate with the insolvency practitioners appointed in relation to group members, to the extent that such cooperation is not incompatible with the rules applicable to the respective proceedings[988].

The coordinator has to perform his duties impartially and with due care[989]. In case he fails to comply with this obligation, or he acts to the detriment of the creditors of a participating group member, his appointment may be revoked by the court of its own motion or at the request of an insolvency practitioner participating in the proceeding[990]. In this regard, the Regulation does not require a serious or significant violation of his obligations, so that, at least in principle, any violation to comply with his obligation can be sufficient for the revocation[991]. Albeit nor expressly provided by the Regulation, it seems reasonable that in the case of revocation the coordination might have the opportunity to challenge this decision[992]. Of course, this does not exclude that he may be requested to compensate the damages caused by his non-compliance with the above-mentioned duties, in particular concerning the information duties owed to the practitioners appointed in the individual group proceedings[993].

One of the most relevant provision is Article 70, which reveals the non-binding nature of the group coordination proceedings. In fact, the coordinator does not have the power to adopt binding unilateral decisions. In contrast, it is provided that insolvency practitioners shall consider the recommendations of the coordinator and the content of the group plan, but they are not obliged to follow them in whole or in part[994]. In this case, the insolvency practitioner at

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[987] The aim of this power is to protect the implementation of the plan. However, this could interfere significantly with the other practitioners' ability to administer their respective proceedings. Possible conflicts may be disadvantageous and make costs increase, and the possibility that some insolvency practitioners might decide to opt out of the group coordination proceedings cannot be *a priori* excluded: MOSS, FLETCHER, ISAACS (eds.), *The EU Regulation on Insolvency Proceedings*[3], cit., para. 8.799

[988] Art. 74 of the New EIR. This communication and cooperation shall take place in the language agreed 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 the group member involved (Art. 73).

[989] Art. 72, para. 5, of the New EIR.

[990] Art. 75 of the New EIR.

[991] SCHMIDT, *Art. 75*, cit., para. 13 (but precising at para. 14 that the court shall consider the discretion that the coordinator enjoys in relation to the implementation of the group coordinational proceeding)

[992] MANGANO, *Group Insolvencies*, cit., para. 8.79.

[993] In this regard, see THOLE, *Die Haftung des Koordinationsverwalters und der Einzelverwalter bei der koordinierten Konzerninsolvenz – zu den haftungsrechtlichen Auswirkungen des DiskE zur Konzerninsolvenz vom 3.1.2013*, in *Konzern*, 2013, 182 *et seq.* Actually, the liability risk for the coordinator appears limited, because the space for mistakes is actually limited. Moreover, it is questionable that such liability may be invoked with regard to the implementation of the coordination plan, when decisions are adopted in the single self-responsible proceedings involved (at 183).

[994] The coordination plan is not subject to any vote by a court, but it is simply proposed by the coordinator, with the consequence that its implementation only takes place at the level of the individual proceedings opened in

stake has only to explain the reasons for not doing so to the persons or bodies that it is to report to under its national law, and to the coordinator. This "comply or explain" approach[995] has been widely considered as insufficient to guarantee the efficient administration of the group coordination proceeding[996] and ill-conceived in so far as the Regulation does not provide for any remedy or possibility to check the soundness of the reasons invoked to reject the plan[997]. However, there are more optimistic readings in the literature, according to which this mechanism will prove to be a useful instrument, on the ground that it will not be easy for insolvency practitioners to explain why they declined to follow a coordination plan that has been drafted in the interest of all group members[998]. In this sense, it is reasonable to think that insolvency practitioners would incur in personal liability if they do not pursue the best interest of the proceeding in which they have been appointed, for instance by refusing to comply with the coordinator's guidelines and plan[999].

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relation to the group members: MADAUS, *Koordination ohne Koordinationsverfahren?*, cit., 194; ESSER, *Reform of the EU Regulation: New Framework for Insolvent Company Groups: Part II*, cit., 46. A form of judicial control, in contrast, was provided in Art. 42dc of the text proposed by the European Parliament in the Lehne Report.

[995] For a better understanding of the comply or explain mechanism, it may be useful to refer to Commission Recommendation 2014/208/EU of 9 April 2014 on the quality of corporate governance reporting [2014] OJ L109/43. See also KEAY, *Comply or explain in corporate governance codes: in need of greater regulatory oversight*, in *Leg. Stud.*, 2014, 279.

[996] MERLINI, *Reorganisation and Liquidation of Group of Companies: Creditor's Protection vs. Going concern Maximization, the European Dilemma, or simply a misunderstanding in light of the new EU Insolvency Regulation No. 2015/848*, in *IILR*, 2016, 135; THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., 220 («blunt sword»); WEISS, *Bridge over Troubled Water: The Revised Insolvency Regulation*, cit., 212 («lame duck»); DAMMANN, MENJUCQ, ROUSSEL GALLE, *Le nouveau règlement européen sur les procedures d'insolvabilité*, cit., para. 40. Critical on the voluntary nature of the proceeding also MCCORMACK, *Something Old, Something New: Recasting the European Insolvency Regulation*, cit., 144; and LEANDRO, *A First Critical Appraisal of the New European Insolvency Regulation*, cit., 249-250 (proposing, as an alternative, to provide for a binding role of the coordinator at least when all of the insolvency practitioners opt in and enter into choice of court agreement to open the coordination proceeding).

[997] MANGANO, *Group Insolvencies*, cit., para. 8.75.

[998] SCHMIDT, *Art. 70*, cit., para. 6 *et seq.* (also indicating the information which a statement of reasons for non-compliance should be substantiated of). In this regard, it is interesting to note that Art. 42dd, para. 2, of the version presented by the European Parliament in the Lehne Report provided expressly that «non-compliance with [the duty to consider the recommendations of the coordinator or to explain the reasons for deviation] shall be treated as a breach of the duties of the insolvency representative under the laws of the relevant Member State». Although this amendment has not been retained, it is held that also in such situation, as seen above with regard to cooperation and communication duties, damages actions may be filed subject to national laws, in addition to the revocation of their appointment under national law: PRAGER, KELLER, *Der Entwicklungsstand des Europäischen Insolvenzrechts*, cit., 811; MADAUS, *Koordination ohne Koordinationsverfahren?*, cit., 194.

[999] D'AVOUT, *Le traitement des groupes de sociétés: entre formalisme et réalisme*, cit., 144 (affirming that «le jeu souple des pouvoirs et cointre-pouvoirs devrait favoriser l'émergence de la solution optimale dans le respect des divers intérêts concernés»). In this sense, also JAULT-SESEKE, ROBINE, *Le règlement 2015/848: le vin nouveau et le vieilles outres*, cit., para. 74.

Also the costs of the coordination proceeding deserve particular attention[1000]. As rightly specified by Recital (58), they should not exceed the benefits deriving from the proceeding. The evaluation of the costs is performed at three different stages: first, as mentioned above, when the request for the opening of the coordination proceeding is submitted, together with an outlined of estimated costs which has to be confirmed by the court seised before the opening of the proceeding; second, during the course of the proceeding, Article 72 urges the coordinator to inform immediately the participating insolvency practitioners and to seek the approval of the opening court in case there is an increase of costs higher than 10 percent of the estimated costs; third, pursuant to Article 77, the coordinator, once having completed its functions, has to establish the final statement of costs and the share to be paid by each member, and to submit this statement to each participating insolvency practitioner and to the opening court. In this last regard, in absence of provisions, distribution of costs is left to negotiation within the group coordination proceedings.

After the final statement is communicated, insolvency practitioners have the possibility to object within thirty days of its receipt, both concerning the amount of the costs and the distribution among the individual insolvency proceedings. Within the same term, if requested by their national law, they have also to obtain the approval from the local court or the local creditors' committee. In the case of disputes, the opening court will decide on costs and apportionment, with a decision that may be challenged a further means of appeal under the law of the Member State where the group proceeding have been opened.

3.6.4. A First Appraisal of the New Rules Addressing Group Insolvencies

The will of the European legislator to include in the New EIR a discipline dedicated specifically to the groups is noticeable and has to be welcomed. This is certainly the first step ahead towards the unitary appraisal of groups of companies, which extends the tools available for the treatment of complex insolvency cases concerning groups and tries to give a legal basis to a solution developed in the practice. However, the new rules present some evident

[1000] These costs include remuneration of the coordinator, which under Art. 77 shall be adequate, proportionate to the tasks fulfilled and reflect reasonable expenses. However, the Regulation does not provide further guidance as to how to calculate it (arrangement with other insolvency practitioners, hourly base, contingent fee, etc.).

shortcomings, both from a formal point of view, if one considers the drafting technique of some provisions, and from a substantive perspective, if one focuses on the overly cautious and timid approach. Accordingly, it seems that the introduction of such group coordination proceeding will not make a significant difference in the practice of group insolvencies[1001]. What is sure is that it is a first set of rules upon which the European legislator may build upon for next discussions and future amendments of the Regulation.

On the one hand, the extension of the rules of coordination and communication between the proceedings is positively considered, although in reality the actual scope and effectiveness of such extension will depend on the will of the practitioners and judges involved. On the other hand, as regards the new coordination procedure, it is appropriate to reiterate the non-binding character, not only from the perspective of the inclusion of the proceedings relating to the individual group members, but also as regards compliance with the recommendations of the coordination plan by the participating administrators[1002]. In addition, particular attention should be paid to limiting the costs and duration of the proceeding, in order to preserve its efficiency and to ensure its success in the interest of creditors. Accordingly, it should be treated with care as it may result in a «significant additional layer of cost and unnecessary complexity»[1003].

This proceeding will most likely be useful only in a very limited number of cases. However, only time will reveal whether the insolvency practitioners will use the tools offered by the New

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[1001] This is the conclusion reached by VAN GALEN, *The Recast Insolvency Regulation and groups of companies*, cit., 252-253; and MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, cit., 246-247. In addition, with regard to the German group insolvency bill, criticism is also raised by VERHOEVEN, *Konzerne in der Insolvenz nach dem Regierungsentwurf zur Erleichterung der Bewältigung von Konzerninsolvenzen (RegE)*, in *ZInsO*, 2014, 221-222; FRIND, *Gefahren und Probleme bei der insolvenzgesetzlichen Regelung der Insolvenz der „Unternehmensgruppe"*, in *ZInsO*, 2014, 936-937; EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 7; WIMMER, *Konzerninsolvenzen im Rahmen der EulnsVO*, cit., 1349-1350; FÖLSING, *Konzerninsolvenz: Gruppen-Gerichtsstand, Kooperation und Koordination*, in *ZInsO*, 2013, 419; RÖMERMANN, *Die Konzerninsolvenz auf der Agenda des Gesetzgebers*, in *ZRP*, 2013, 204-205; HARDER, LOJOWSKI, *Der Diskussionsentwurf für ein Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen – Verfahrensoptimierung zur Sanierung von Unternehmensverbänden?*, in *NZI*, 2013, 329-330; PLEISTER, *Das besondere Koordinationsverfahren nach dem Diskussionsentwurf für ein Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen*, in *ZIP*, 2013, 1017

[1002] HENRY, *Le nouveau règlement «insolvabilité»: entre continuité et innovations*, cit., 979, para. 24: «la dimension contractuelle (qui) se retrouve à tous les stades de la procédure». D'AVOUT, *Le traitement des groupes de sociétés: entre formalisme et réalisme*, cit., 130, speaks of a «principe démocratique et non contraignant»

[1003] LAUGHTON, *The European Insolvency Regulation: Amendment proposals from the European Commission and the European Parliament – What next?*, in *eurofenix*, spring 2014, 23. In the sense that an additional increase in the number of decision-makers or consultants only increases the already high complexity of these procedures and thus their costs without offering a tangible gain, see MADAUS, *Koordination ohne Koordinationsverfahren?*, cit., 195. Similarly, REUMERS, *What is in a Name? Group Coordination or Consolidation Plan – What is Allowed Under the EIR Recast*, cit., 239; and THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., 220.

Regulation and, if so, what benefits these tools will actually produce[1004]. It will also be interesting to see which will be the role of procedural consolidation in light of Recital (53).

3.7. The Insolvency of Groups Located in Third States: A Missed Opportunity

As highlighted above, the rules on groups of companies introduced in the New EIR have a limited spatial scope of application, which reflects the general Euro-centrism of the whole Regulation. This is particularly disappointing because groups of companies are a truly international phenomenon, which goes far beyond the geographical boundaries of the EU.

In this respect, it must be stressed that the economic rationale underlying the "enterprise" approach, *i.e.* that a group often operates as a single functional entity and that a comprehensive approach would simplify a going-concern sale of the business or a group restructuring, does not change depending on the place where the different members of the groups are located. Accordingly, it is interesting to investigate whether, concerning groups of companies partially located outside the EU, it is still possible to envisage the solution mostly adopted by national EU courts, *i.e.* procedural consolidation[1005], both concerning the treatment of non-EU subsidiaries of EU groups and the treatment of EU subsidiaries of non-EU groups[1006].

3.7.1. Procedural Consolidation of Groups Partially Located in Third States

Concerning the treatment of non-EU subsidiaries of EU groups, procedural consolidation could in principle apply also with regard to companies incorporated outside the EU. Indeed, national courts could in principle decide to consolidate before the venue of the EU parent company also the main insolvency proceedings concerning non-EU subsidiaries, by adopting the interpretation provided for the first time in the well-known *BRAC-Rent-a-car International* case. According to this well-established principle, the EIR applies to debtors who carry out all or a large part of their business in Europe, albeit being incorporated under the laws of a non-

[1004] As affirmed in general by GARCIMARTÍN, *The EU Insolvency Regulation Recast: Scope, Jurisdiction and Applicable Law*, cit., 731, the practical impact of the new rules will depend on the expertise of authorities that are going to apply them and their willingness to cooperate.

[1005] It is clear that such possibility is not even expressly provided with regard to groups located in third States: GRUBER, in FLÖTHER (Hrsg.), *Handbuch zum Konzerninsolvenzrecht*, cit., Ch 8, para. 138.

[1006] BARBE, MARQUETTE, *Les procédures d'insolvabilité extracommunautaires*, cit., 543.

EU country in which they also had their registered office[1007]. More precisely, if one acknowledges that the criteria used by national courts to assume COMI-based jurisdiction on the insolvent companies belonging to the same group are legitimate, there is no reason why the procedural consolidation should not apply also to non-EU companies.

However, as a result of the countries' reluctance to give away their sovereignty and to cede jurisdiction concerning companies incorporated within their territory, it is very likely that insolvency proceedings would also be opened in the countries where the non-EU subsidiaries have their seats[1008]. This would, in turn, raise a problem of recognition of the EU proceedings in the third state concerned with the outcome that they would not produce any effect on the assets situated in that non-EU country, thus frustrating the objectives of centralisation[1009]. In such cases, it turns out to be very difficult to preserve unity and avoid a split of the group estate that would be detrimental for the entirety of creditors. Therefore, the only way to guarantee an effective administration of the group insolvency is to provide for specific cooperation duties between EU proceedings and non-EU ones.

By the same token, procedural consolidation is hardly conceivable when the parent company has its COMI in a third State but some subsidiaries are located in the EU. From the European perspective, the question as to whether the EIR might accept the opening of non-EU proceedings with regard to all the group members, although some of them are incorporated in the EU and operate their businesses there, should be answered in the negative. In fact, according to the CJEU's "atomistic" approach, the Regulation applies to each entity separately, so that national courts shall deny recognition of non-EU proceedings opened with regard to companies whose COMI is considered to be located in a Member State. A solution could be the

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[1007] See *BRAC Rent-a-Car International*, [2003] EWHC (Ch) 128. This interpretation was then followed by other courts in the UK: *Salvage Association* [2003] EWHC 1028 (Ch); *Ci4Net.Com Inc*. [2004] EWHC 1941 (Ch); *Sendo Ltd*, [2005] All. E.R. (D) 356 (Ch). See WESSELS, *International Insolvency Law*, cit., para. 10573.

[1008] At least in the abstract, there are procedural mechanisms aimed at diminishing such risk: see NISI, *La refundición del reglamento de insolvencia europeo y los grupos de empresas de terceros Estados*, in *AEDIPr.*, 2013, 245, referring to (i) *synthetic non-EU main proceedings*, aimed at avoiding the opening of non-EU proceedings against the subsidiaries located outside the EU by promising local creditors that they will not fare worse than if a parallel non-EU proceeding had been opened; and (ii) *anti-suit injunctions*, aimed at restraining the possibility for creditors to file a bankruptcy claim in the non-EU country of the subsidiary's registered office. In this last regard, it is worth stressing that such anti-suit injunctions would not run against the underlying principles of the EIR (e.g. mutual trust), because they would influence the exercise of jurisdiction by non-EU courts, thus reinforcing EU jurisdiction: see FIORINI, *Le règlement Bruxelles I bis à l'épreuve des institutions de common law – le cas particulier des injonctions anti-suit*, in GUINCHARD (dir.), *Le nouveau règlement Bruxelles I*-bis, Bruxelles, Bruylant, 2013, 397; RAPHAEL, *The Anti-Suit Injunction*, Oxford, OUP, 2008, 271-274.

[1009] EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 14.

introduction of a *forum non conveniens* exception, according to which insolvency proceedings shall be conducted in the most convenient or natural forum with which the proceeding has the most substantial connection[1010]. In the case here at stake, such a court should be identified as the non-EU court where the group headquarters are located and where all the group proceedings are procedurally consolidated[1011]. However, this possibility seems scarcely viable because of the CJEU's case law concerning the Brussels I Regulation[1012]. Accordingly, despite the English courts' tendency to preserve this doctrine by limiting the impact of *Owusu*[1013], it seems that also in insolvency matters *forum non conveniens* is left untouched only in relation to conflicts of jurisdiction involving a Member State whose jurisdiction derives from national law and not from the European regime[1014].

3.7.2 Procedural Coordination without Consolidation: Communication and Cooperation Duties with non-EU Proceedings

As illustrated above, procedural consolidation cannot find application in all situations involving a group of companies, because it only matches the economic reality of integrated groups, while, in the case of decentralised groups, the interest of creditors may be best served

[1010] On *forum non conveniens* in insolvency matters, see DAWSON, *The Doctrine of* Forum Non Conveniens *and the Winding Up of Insolvent Foreign Companies*, in *J. Bus. L.*, 2005, 28; SMART, Forum Non Conveniens *in Bankruptcy Proceedings*, in *J. Bus. L.*, 1989, 126. For recent cases, see *Akers & Ors v Samba Financial Group* [2014] EWHC 540 (Ch); and *Rodenstock GmbH* [2011] EWHC 1104 (Ch). On the functioning of this mechanism, in a comparative perspective, see § 305 of the US Bankruptcy Code, on which BUFFORD, *United States International Insolvency Law*, cit., 200-210, and the rule 1014 of the US Federal Rules on Bankruptcy Procedure.

[1011] A recent judgment delivered by the High Court of Justice Isle of Man explains such possibility in the light of the principles of (modified) universalism and international comity: see *Interdevelco Limited v Waste2Energy Group Holdings PLC* [2012] CHP 12/0056. See WEITZ, WIENER, *Offshore Jurisdictions Embrace Universalism in Waste2energy*, in *Am. Bankr. Inst. J.*, 2013, 42.

[1012] Case C-281/02, *Andrew Owusu* [2005] ECR I-1383, para. 41.

[1013] See HARRIS, *The Brussels I Regulation and the Re-Emergence of the English Common Law*, in *Eur. L. Forum*, 2008, I-181; BRIGGS, *The death of Harrods:* forum non conveniens *and the European court*, in *L. Quart. Rev.*, 2005, 535; HARTLEY, *The European Union and the Systematic Dismantling of the Common Law Conflicts of Laws*, in *Int. Comp. L. Quart.*, 2005, 813; FENTIMAN, *Civil jurisdiction and third States:* Owusu *and after*, in *CMLRev.*, 2006, 705. Recently, see *Ferrexpo AG v Gilson Investments Ltd & Ors* [2012] EWHC 721 (Comm) and, in family matters, *Mittal v Mittal* [2013] EWCA Civ 1255.

[1014] DICKINSON, *Background and Introduction to the Regulation*, in DICKINSON, LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, OUP, 2015, para. 1.137; BRIGGS, REES, *Civil Jurisdiction and Judgments*[5], London, Informa, 2009, 365-367; KRUGER, *Civil Jurisdiction Rule of the EU and Their Impact on Third States*, Oxford, OUP, 2008, 297-302; HARRIS, *Stays of Proceedings and the Brussels Convention*, in *Int. Comp. L. Quart.*, 2005, 948-949. In any case, a recent decision of the English High Court recognised *obiter* the possibility of declining jurisdiction based upon the EIR on the ground that a foreign court is more suitable to make a winding-up order: see *Re Buccament Bay Ltd and Harlequin Property (SVG) Ltd* [2014] EWHC 3130 (Ch), para. 25.

by the opening of insolvency proceedings in the States where the subsidiaries have their registered offices. Moreover, considering the difficulties relating to the consolidation of proceedings relating to groups partially located in third States, it is evident that the ability to cooperate with non-EU main proceedings and to engage in court-to-court communications deeply influences the possibility of achieving the group insolvency goals[1015]. This holds true with the new regime provided in the EIR Recast, which except for Recital (53) presents an horizontal model of cooperation and coordination between the proceedings opened in several Member States, similar to that already proposed by the UNCITRAL Legislative Guide dedicated to groups of companies[1016]. Therefore, despite the introduction of a non-binding group coordination proceeding, on which the doctrine has already cast significant doubts, the attention has to be focused on coordination and cooperation duties.

In this last regard, the need for specific rules on cooperation and coordination of insolvency proceedings outside the EU has emerged very clearly[1017]. The assumption that all relevant international cases have their main and secondary proceedings within the geographical borders of the EU has proved to be flawed and outdated[1018]. The same holds true concerning parallel proceedings opened against members of groups composed of both EU and non-EU companies[1019]. The Commission is of the view that «the lack of harmonized provisions for recognition of non-EU insolvency proceedings or the coordination between proceedings inside and outside the EU has not caused any significant problems in practice»[1020]. Conversely, legal literature shares the view that wide national divergences resulting from different degrees of openness towards non-EU insolvency proceedings are capable of jeopardizing the objectives pursued by the uniform application of the EIR, such as the proper functioning of the internal market[1021]. Indeed, filling the gap currently present in the law through the harmonization of

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[1015] See MAZZONI, *Cross-border insolvency of multinational groups of companies*, cit., 762. In general, on the need for cooperation in group insolvency cases, see the authors mentioned at fn. 772.

[1016] UNCITRAL, *Legislative Guide on Insolvency Law, Part Three*, cit., 83-111. See *supra* fn. 897 for further references.

[1017] See REUß, *Europäisches Insolvenzrecht 3.0 oder doch nur Version 1.1?*, cit., 168; and BUFFORD, *Revision of the European Union Regulation on Insolvency Proceedings – Recommendations*, cit., 348-349.

[1018] The European Commission took into account this concern with regard to banking groups active in third countries, in a proposal COM(2012) 280 final of 6 June 2012 for a directive establishing a framework for the recovery and resolution of credit institutions and investment firms, where it is provided a framework for resolution needs for cooperation with third country authorities. See in particular Art. 84 *et seq*. of the proposed directive.

[1019] MAZZONI, *Cross-border insolvency of multinational groups of companies*, cit., 762 and 767.

[1020] Report from the Commission COM(2012) 743 final, cit., 8.

[1021] INSOL Europe Proposal, cit., 110. Concerning the Brussels I Regulation, see WEBER, *Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation*, in *RabelsZ*, 2011, 643; and CARBONE,

these rules would represent the best way to eliminate further obstacles to the orderly administration of truly international proceedings[1022].

The preferred solution would be the extension of cooperation and communication duties to insolvency proceedings opened outside the EU, whenever it is in the best interests of European stakeholders[1023]. It is, in fact, evident that a unified approach would increase the possibility of achieving the effective administration of insolvency proceedings. Alternatively, the adoption of the UNCITRAL Model Law would lead to the same result, by ensuring cooperation through similar standards to the ones provided in the EIR[1024]. Indeed, the Model Law establishes appropriate conditions to ensure expedited and direct cooperation, which is encouraged from the earliest stages of proceedings and does not require a formal recognition of the foreign proceeding, thus avoiding costly and time-consuming procedures[1025].

What about the recognition of third States' foreign judgments?, in POCAR, VIARENGO, VILLATA (eds.), *Recasting Brussels I*, Padova, Cedam, 2012, 302.

[1022] JAULT-SESEKE, *Les relations avec les états tiers*, in JAULT-SESEKE, ROBINE (dir.), *Le droit européen des procédures d'insolvabilité à la croisée des chemins*, cit., 109.

[1023] NISI, *The Recast of the Insolvency Regulation: A Third Country Perspective*, cit., in the sense that the limitations provided by the EIR to the duty to communicate and cooperation leave room for discretionary evaluations, which are effective for safeguarding the interests of the EU stakeholders and could work well also with regard to proceedings opened in third countries. In this regard, EIDENMÜLLER, FROBENIUS, *Ein Regulierungkonzept zur Bewältigung von Gruppeninsolvenzen*, cit., 17, proposed to add an Art. 42f to the Commission's proposal, extending communication and cooperation duties to non-EU proceedings.

[1024] See the INSOL Europe Proposal, cit., Art. 81 *et seq*. In fact, one may see that Arts. 25-27 of the Model Law resemble closely Arts. 41-43 of the New EIR: see UNCITRAL, *Practice Guide on Cross-Border Insolvency Cooperation*, cit., 17-25. In favour of the EU-wide adoption of the Model Law, among many, see BEWICK, *The EU Insolvency Regulation, Revisited*, cit., 190; BUFFORD, *Improving the Revision of the European Union Regulation on Insolvency*, in SANTEN, VAN OFFERED (eds.), *Perspectives on International Insolvency Law: A tribute to Bob Wessels*, Deventer, Kluwer, 2014, 24-5; INSOL Europe Proposal, cit., 15; ROUSSEL GALLE, *Deux idées utopiques (?) de révision du règlement européen pour 2010… ou 2022…*, in *Sem. Jur.-Entr. Aff.*, 2012, 1546; VALLENS, SORIEUL, *Codifier le droit international privé en matière de procédures collectives?*, in *Dalloz*, 2007, 1225; BARBE, MARQUETTE, *Les procédures d'insolvabilité extracommunautaires*, cit., 525-31; WORLD BANK, *Principles and Guidelines for Effective Insolvency and Creditor Rights*, cit., 53.

[1025] This approach is considered by UNCITRAL as a tool to achieve also group insolvency goals: see UNCITRAL, *Legislative Guide on Insolvency Law, Part Three*, cit., 86. The UNCITRAL approach has also inspired other global initiatives: see for instance the WORLD BANK, *Principles and Guidelines for Effective Insolvency and Creditor Rights*, cit., Principles C16 and C17.

Conclusions

As written in the initial analysis of the scope of the work, the thesis approaches from a private international law perspective the multinational enterprise. In particular, this topic has been investigated with a focus on the jurisdictional aspects. The interim conclusion of the first chapter is that, according to the traditional view, a "pluralist approach", entailing a distributive application of the laws governing the various subsidiaries, is preferable both under an economic and a legal point view. This was the starting point to evaluate whether, with regard to the determination of jurisdiction, a different approach is suitable. The thesis, indeed, pleads in favour of a unitary appraisal of groups, in the sense that, when several proceedings are brought against different companies of the same group, the need to take into due account the reality of groups should lead to a consolidation of the overall litigation before one single forum. Accordingly, jurisdictional rules in the area of competition (Regulation No. 1215/2012), and insolvency law (Regulation No. 2015/848, which has recently replaced Regulation No. 1346/2000) have been thoroughly analyzed in order to verify whether they make it possible to aggregate the group's litigation.

On the one hand, as to damages claims for breach of competition law brought against different companies belonging to the same group, it is argued that, in the light of the most recent case law, Article 7(2) of the Brussels I-*bis* Regulation allows to some extent conferring jurisdiction upon a single court, either at the place where the victim's registered office is located (place of damage) or at the place where the cartel was concluded (place of acting). Yet, a more important role is played by Article 8(1), which enables a number of defendants from different Member States to be sued in one action in a Member State provided that one of them is domiciled there. This provision fits particularly with the context of litigation involving groups and has been interpreted broadly in order to facilitate the consolidation of proceedings. On the other hand, as regards the insolvency of transnational groups, it is held that the most recent CJEU's case law and the Recast Regulation do not oppose the pragmatic approach developed by some national courts, according to which main insolvency proceedings over all the companies belonging to the same group can be opened in the Member State where the parent has its registered office. Also the newly introduced group coordination proceeding, despite the critical appraisal of the first commentators, is an evident sign of the fact that a proper regime

for the insolvency of groups cannot overlook the economic links existing between affiliated companies.

The analysis of the functioning of jurisdictional rules in the area of competition and insolvency gives the opportunity to conclude that, depending on the level of integration of the group and the degree of autonomy enjoyed by the group companies, the traditional pluralist view has to be definitively abandoned in favor of a unitary approach. However, while in insolvency matters such centralization takes place at the forum of the parent company, in the context of competition claims there is more space for *forum shopping* practices, with the consequence that some limitations are necessary in order to ensure that proceedings are consolidated before a forum which is relevant for the dispute and for the group's business activities overall considered. This outcome is not only beneficial for the pursuit of the objectives of European judicial cooperation in civil matters and in terms of economic efficiency, but it also specific to the characteristics of groups of companies: the attribution of procedural relevance to the affiliations among companies, indeed, proves to be necessary to reflect the decision-making functioning of a group in a way that guarantees the sound administration of justice.

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