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Intra-group financing and enterprise group insolvency: problems, principles and solutions

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Citation

Kokorin, I. (2023, November 14). *Intra-group financing and enterprise group insolvency: problems, principles and solutions*. Meijers-reeks.

Retrieved from <https://hdl.handle.net/1887/3663098>

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Note: To cite this publication please use the final published version (if applicable).

Annex

Summary of Problems and Solutions

Transactions and contractual arrangements	Problems in insolvency	Proposed solutions
Cross-guarantees, co-debtorship, joint and several liability, and collateral arrangements (Chapter 6)	• Destruction of value as a result of simultaneous (group-wide) enforcement • Group restructuring is complicated and less efficient due to: (i) the possible existence of a recourse claim of a guarantor against the principal debtor post-restructuring ("ricochet problem"), and (ii) the failure of a group guarantor and the loss of group synergies ("orphan restructuring problem") • Misalignment of creditors' interests and the holdout position of a guaranteed creditor, resulting in the problem of the anticommons	• Third-party releases (Chapter 10) • Extension of an enforcement stay to group guarantors, co-debtors and collateral providers (Chapter 11)
	• Uncertainty and a lack of predictability in ex post review of transactions involving group members, especially with respect to the recognition of group considerations or group interest → transaction avoidance risk is not easily calculable, which contributes to legal uncertainty (Chapter 8) • Risk of transaction avoidance may discourage efficient intra-group rescue financing, e.g. in the form of a cross-guarantee to secure rescue financing from outside lenders, giving rise to the problem of under-investment	• Inclusion of group considerations in ex post review of transactions (Chapter 12) • Ex ante authorisation of transactions – a safe harbour regime, offering protection against future transaction avoidance actions (Chapter 12) • Pre-emptive support arrangements (contractual and structural) (Chapter 12)

Intra-group loans, including centralised cash management (Chapter 7)	• Risk of subordination may discourage intra-group rescue financing and lead to the problem of underinvestment • Loss of access to centrally managed cash • Risk of transaction avoidance may discourage efficient intra-group rescue financing, e.g. in the form of an intra-group loan, contributing to the problem of underinvestment (Chapter 8)	• Disapplication of subordination rules with respect to intra-group rescue financing (Chapter 12) • Inclusion of group considerations in ex post review (Chapter 12) • Ex ante authorisation of a transaction (i.e. safe harbour regime), offering protection against future transaction avoidance or permitting the continued use of a cash pool (Chapter 12) • Pre-emptive support arrangements (contractual and structural) (Chapter 12)
Intercompany ipso facto clauses (Chapter 9)	• Increased dependence and correlation between group entities • Destruction of value due to the collapse of an entire group enterprise, facilitated by the enforcement of an intercompany ipso facto clause (domino effect) • Reduced negotiation power of the debtor • Discouragement of taking early measures to address financial distress and avoid insolvency → late action reduces the chances of recovery	• Limitation of enforceability of intercompany ipso facto clauses, e.g. with respect to specific enterprises, situations and contracts (Chapter 13)
Intercompany cross-default clauses (Chapter 9)	• Increased dependence and correlation between group entities • Destruction of value due to the collapse of an entire group enterprise, facilitated by the enforcement of an intercompany cross-default clause (domino effect) • Reduced negotiation power of the debtor • Survival of cross-defaults post-restructuring	• Temporary freeze on the enforceability of intercompany cross-default clauses (Chapter 13) • Neutralisation (“curing”) of intercompany cross-defaults through a restructuring plan (Chapter 13) • Contract assumption or reinstatement of a cross-defaulted contract, without the need to cure defaults in substantially unrelated (economically separate) contracts of non-debtor group entities (Chapter 13)

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