ARTICLE

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Cooperation and communication obligations in European insolvency law

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Abstract

The European Insolvency Regulation contains obligations for insolvency practitioners and courts to cooperate and communicate. This article shows that these obligations are to be widely interpreted. The European legislature intended to mitigate the inherent inefficiency of having parallel insolvency proceedings taking place at the same time. The malady is inefficiency, the cure is cooperation. According to the European legislature, cooperation did not take place often enough before the enactment of the EIR Recast. Therefore, it created real hard law obligations. These obligations do not merely encourage insolvency practitioners and courts to cooperate, they force them to do so. Arguing that insolvency practitioners and courts may refuse to cooperate unless their insolvency proceedings are compensated, or receive a fair share of the cooperation surplus, goes against the purpose of the European legislature. This article shows that Kaldor–Hicks efficiency provides a suitable way to interpret the obligations and limitations: if a certain act of cooperation leads to more total benefits than total costs for the combined insolvency proceedings, this contributes to attaining an efficient outcome. Therefore, insolvency practitioners and courts should also cooperate if this leads to more costs than benefits in their own insolvency proceedings. Courts must sometimes cooperate in a certain way as requested by another court. This does not infringe upon judicial independence; it leads to efficiency.

1. Introduction

When it comes to European insolvency law developments over the last few decades, cooperation is the key word. For insolvency proceedings to be effective across borders, EU Member States should at least recognise proceedings that have been opened in other Member States. Without such recognition, insolvency proceedings relating to a single debtor would often have to be opened in multiple Member States and could lead to conflicting outcomes. It is therefore understandable that the first EU insolvency law instrument, the European Insolvency Regulation (EIR 2000),[1] was mainly a private international law instrument. It contained provisions on which court had jurisdiction to open insolvency proceedings, which law applied to those

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1 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (*OJ* 2000, L 160).

proceedings, and provisions regarding the recognition of insolvency proceedings and judgments in those proceedings in other Member States.

This would have been enough to ensure effective cooperation were it not for a policy decision of the European legislature. In insolvency law theory a distinction is made between the principle of universalism and the principle of territorialism.[2] Under the principle of universalism, insolvency proceedings are opened in one state and encompass all the debtor's assets irrespective of where in the world they are located. Under the principle of territorialism, insolvency proceedings can be opened in every state where assets are located and only encompass the assets that are located in that very state. If the European legislature had decided to follow the principle of universalism in its purest form, further cooperation would not have been necessary. However, the European legislature decided to opt for a compromise, which is often called modified universalism.[3] This means that multiple insolvency proceedings relating to a single debtor can exist in parallel to each other in different EU Member States.

If multiple insolvency proceedings exist in parallel to each other, this will inherently lead to inefficiency. The European legislature, therefore, introduced a specific cooperation and communication obligation for insolvency practitioners[4] appointed in parallel insolvency proceedings to cooperate and communicate with each other (Article 31 EIR 2000). When the European legislature decided to investigate the need for a new EU regulation on insolvency proceedings to succeed the EIR 2000, experts and respondents to a survey indicated that the existing cooperation and communication obligation in Article 31 EIR 2000 was not enough to create the desired level of cooperation between parallel insolvency proceedings. The outcome of the legislative process was that a new regulation was adopted: the European Insolvency Regulation (Recast) (EIR Recast).[5] The EIR Recast contains many more cooperation and communication obligations than the EIR 2000 did. Not only are insolvency practitioners required to cooperate and communicate in parallel insolvency proceedings relating to the same debtor, the EIR Recast has also introduced similar obligations for courts to cooperate and communicate with each other and for insolvency practitioners to cooperate and communicate with courts. Furthermore, unlike the EIR 2000, the EIR Recast contains provisions on insolvency proceedings for members of a group of companies. Such insolvency proceedings can also exist in parallel. In such situations, insolvency practitioners and courts face similar obligations as is the case in parallel insolvency proceedings relating to a single debtor. Finally, the EIR Recast introduces coordination proceedings in which a coordinator is appointed to assist parallel insolvency proceedings relating to members of a group of companies. This coordinator is now also

2 See for elaborate discussions of universalism and territorialism for example N.J. Howcroft, 'Universal vs. Territorial Models for Cross-Border Insolvency. The Theory, the Practice and the Reality that Universalism Prevails', *UC Davis Business Law Journal* 2008, p. 369-386; B. Wessels, B.A. Markell & J.J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, Oxford: Oxford University Press 2009, p. 39-70; B. Wessels, *International Insolvency Law Part I. Global Perspectives on Cross-Border Insolvency Law* (Wessels Insolventierecht nr. X), Deventer: Wolters Kluwer 2022, par. 10009-10031.

3 This will be further discussed in section 2.2.

4 Insolvency practitioners were called *liquidators* in the EIR 2000, because at the time when the EIR 2000 was adopted, insolvency proceedings were mostly liquidation proceedings.

5 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (*OJ* 2015, L 141).

bound by an obligation to cooperate and communicate with insolvency practitioners appointed in the parallel proceedings.

The number of cooperation and communication obligations in the EIR Recast has thus increased substantially, which indicates the importance of cooperation in the eyes of the European legislature. This article discusses how these obligations should be interpreted. It will be argued that the goal of the obligations is to ensure efficiency and that efficiency should be understood in an economic way. The article will focus on the obligations for insolvency practitioners to cooperate with one another and for courts to do the same.[6] But before the obligations can be discussed, the focus of attention should be on the goal of the EIR Recast, namely efficiency. This will be the subject of section 2. Section 3 then introduces the obligations in question. Section 4 will focus on when actors are allowed not to cooperate and how efficiency can provide a way to answer this question. Section 5 will finish with a conclusion.

2. Efficiency

2.1 Efficiency as the goal of the EIR Recast

According to Recital 3 EIR Recast, '[t]he proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. [The EIR Recast] needs to be adopted in order to achieve that objective'. The goal of the EIR Recast is, therefore, to ensure efficient and effective cross-border insolvency proceedings. Efficiency is not mentioned as a mere way to achieve some higher purpose, it is stated as a goal in and of itself.[7] This is also reflected in Recital 8 EIR Recast, according to which many of the EIR Recast's provisions have as their goal 'improving the efficiency and effectiveness of insolvency proceedings having cross-border effects'.

2.2 The inefficiency of parallel insolvency proceedings

Although efficiency is the goal of the EIR Recast, the regulation also contains provisions that do not contribute to achieving this goal. The prime example of this is the possibility to open parallel insolvency proceedings.

There can be three types of parallel insolvency proceedings under the EIR Recast: main insolvency proceedings, secondary insolvency proceedings and territorial insolvency proceedings. Main insolvency proceedings are insolvency proceedings that are opened by the courts of the EU Member State where the debtor's centre of main interests (COMI) is situated (Article 3(1) EIR Recast). These proceedings cover all the debtor's assets, wherever they are located. Secondary insolvency proceedings are insolvency proceedings that are opened by a court of an EU Member State where the debtor has an establishment (Articles 2(10), 3(2) and 3(3) EIR Recast). Secondary insolvency proceedings only cover the debtor's assets that are located in the Member State where these proceedings have been opened. Main insolvency proceedings are normally the first insolvency proceedings to be opened. Secondary insolvency proceedings can

6 The cooperation and communication obligations in Arts. 43, 58 and 74 EIR Recast will therefore not be discussed.

7 Differently R. Bork, *Principles of Cross-Border Insolvency Law*, Cambridge: Intersentia 2017, par. 3.6 and 3.8.

only exist if main insolvency proceedings have already been opened (Article 3(3) EIR Recast). However, there are also some situations in which local insolvency proceedings can be opened prior to the opening of main insolvency proceedings. These local proceedings are then called territorial insolvency proceedings. If main insolvency proceedings are subsequently opened, the territorial insolvency proceedings are renamed as secondary insolvency proceedings (Article 3(4) EIR Recast).

The possibility of having parallel insolvency proceedings with a focus on main insolvency proceedings can be called modified universalism. There are various reasons as to why the European legislature has chosen to adopt this mitigated form of universalism, but the most important one is that substantive law in the Member States varies greatly, for example with regard to security rights and employment relationships. As a result of this, the European legislature decided that it would not be 'practical' – read: politically attainable – to only have the possibility of one set of insolvency proceedings in one Member State with universal effect. Instead, it should be possible to open secondary insolvency proceedings in Member States where the debtor has an establishment (Recital 22 EIR Recast).

This possibility to open secondary insolvency proceedings was already provided for in the EIR 2000. In its review of the EIR 2000, the European Commission found that the parallel existence of main and secondary insolvency proceedings can also cause problems. Therefore, Recital 41 EIR Recast now acknowledges that secondary insolvency proceedings may 'hamper the efficient administration of the insolvency estate'. This is an unsurprising conclusion. The mere fact that two sets of insolvency proceedings are opened relating to a single debtor means that more costs will have to be incurred to administer the estate, because two insolvency practitioners are appointed, two courts are involved, etc. Furthermore, just as keeping a debtor's assets together instead of selling them piecemeal will normally increase the value of the insolvency estate,[8] splitting the estate into two smaller estates that are administered in accordance with the laws that are applicable in the respective Member States will generally decrease the total value of the combined estates. The European legislature has therefore introduced provisions to prevent the opening of secondary insolvency proceedings.

If secondary insolvency proceedings are nevertheless opened, cooperation must take place between the actors involved in the parallel insolvency proceedings in order to contribute to 'the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets' (Recital 48 EIR Recast). In short, efficiency is the goal of the EIR Recast, the parallel existence of insolvency proceedings may lead to inefficiency, and cooperation is used to remedy, or at least mitigate, this problem. As such, cooperation is vital to achieve the goal of the EIR Recast.

2.3 The meaning of efficiency

The EIR Recast states that efficiency is its goal, but there is no mention of how efficiency is to be understood. Efficiency is an economic concept, but because it is used in a legal act, the question presents itself whether there is a legal understanding of efficiency that should be used or whether it should be interpreted from an economic point of view.

8 T.H. Jackson, *The Logic and Limits of Bankruptcy Law*, Washington: Beard Books 2001, p. 14.

There is no legal definition of efficiency. Lawyers normally use the term to indicate that as few costs as possible are expended to achieve a certain goal or that with a certain level of costs a goal is achieved to the greatest extent possible.[9] This legal use indicates that it is a servient principle to achieve a higher goal. It is a way to evaluate the means to achieve a goal.[10] It was shown in section 2.1 that the wording of the EIR Recast indicates that efficiency is a goal in and of itself in the EIR Recast. This also follows from the preparatory materials of the EIR Recast. The European Commission has indicated that the objective of replacing the EIR 2000 with the EIR Recast was to 'improve the efficiency of the European framework for resolving cross-border insolvency cases'.[11] This indicates that the understanding normally used by lawyers does not correspond well to the understanding of the European legislature.

There are, however, also economic understandings of efficiency that can be used as alternative interpretations.[12] The law and economics movement mainly uses two concepts to measure whether a situation is efficient or whether a specific act can lead to a superior outcome: Pareto efficiency and Kaldor-Hicks efficiency.

According to Pareto efficiency, a situation is efficient if it cannot be improved for someone without making somebody else worse off.[13] In other words, if a situation can be improved for someone without causing disadvantages for others, the situation is not yet efficient. Until the situation is Pareto optimal, there can still be Pareto improvements. However, Pareto efficiency can be a problematic concept, because if one only deems Pareto improvements to be desirable, little action will often take place. It is not difficult to find at least one person who is disadvantaged by the envisaged action.[14] An example may demonstrate this. If the legislature considers efficiency to be the goal of legislation and ponders whether to enact legislation forcing insolvency practitioners to use the debtor's assets to clean up environmental waste before distributing proceeds to the debtor's creditors, such a proposal would have little chance of becoming law. Even though the proposal could prove to be very beneficial for many people who live close to where the environmental waste is located, the creditors would be faced with a decreased insolvency estate. Even if the benefits for some outweigh the costs for others, a measure cannot be considered a Pareto improvement.

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9 H. Eidenmüller, *Effizienz als Rechtsprinzip. Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts*, Tübingen: Mohr Siebeck 2015, p. 55.

10 Eidenmüller 2015, p. 55-56 (see note 9). See also Bork 2017, par. 3.6 and 3.8 (see note 7).

11 SWD(2012) 416 final, p. 30.

12 There are more understandings than will be discussed here. See for another understanding D.F. Friedman, *Law's Order. What Economics Has to Do with Law and Why It Matters*, Princeton: Princeton University Press 2000, p. 18.

13 There is a vast array of introductory literature about Pareto efficiency. See for example D. Wittman, *Economic Foundations of Law and Organization*, Cambridge: Cambridge University Press 2006, p. 16-18; R. Cooter & T. Ulen, *Law & Economics*, Boston: Addison-Wesley 2012, p. 14; Eidenmüller 2015, p. 48-50 (see note 9); B.C.J. van Velthoven & P.W. van Wijck, *Recht en efficiëntie. Een inleiding in de economische analyse van het recht*, Deventer: Wolters Kluwer 2019, p. 18-19. Cf. R.A. Posner, *Economic Analysis of Law*, Austin: Wolters Kluwer Law & Business 2014, p. 14.

14 Cf. Friedman 2000, p. 24-25 (see note 12); Posner 2014, p. 14 (see note 13); Eidenmüller 2015, p. 49 (see note 9).

The second efficiency concept is Kaldor-Hicks efficiency.[15] According to Kaldor-Hicks efficiency, a situation can be regarded as an improvement if the benefits of a change for some *could* be used to compensate the disadvantages faced by others. To come back to the environmental waste example used above, the proposal would be an improvement if the benefits for the people who live close to the environmental waste are greater than the costs for the creditors. This does not mean that the creditors should be compensated for the disadvantages that they face as a result of the change. If they had to be compensated, the result would be a Pareto improvement, because in that situation there would be benefits for some and no disadvantages for others. However, in theory those facing disadvantages in a Kaldor-Hicks improvement *could* be compensated for their disadvantages from the benefits gained by others. As such, a Kaldor-Hicks improvement is also called potential Pareto superiority.[16] Because actual compensation is not required under Kaldor-Hicks efficiency, it is more often used than Pareto efficiency to evaluate efficiency.[17]

One might object that there is no reference in the EIR Recast to either Pareto efficiency or Kaldor-Hicks efficiency and that to interpret efficiency in the regulation's recitals based on these economic concepts is an entirely free and unbased interpretation. It is not argued here that all provisions in the EIR Recast must be interpreted using Pareto or Kaldor-Hicks efficiency. However, it will be shown in section 4.1.2 that Kaldor-Hicks efficiency is a useful concept to interpret when actors should not have to cooperate and communicate. But first it is necessary to find out when actors actually do have to cooperate and communicate.

3. The obligations

The cooperation and communication obligations for insolvency practitioners can be found in Articles 41 and 56 EIR Recast and those for courts in Articles 42 and 57 EIR Recast. The coming sections will focus on Articles 41 and 42 EIR Recast, which concern cooperation between parallel insolvency proceedings relating to the same debtor. Furthermore, the focus will be on cooperation. Communication is a form of cooperation and is also covered by these provisions, although specific rules sometimes apply to communication. Generally speaking, however, it is unhelpful to make a strict distinction between cooperation and communication.[18] Therefore, wherever only cooperation is mentioned hereafter, this also includes communication.

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15 N. Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility', *The Economic Journal* 1939, p. 549; J.R. Hicks, 'The Foundation of Welfare Economics', *The Economic Journal* 1939, p. 696. See for introductory treatments of Kaldor-Hicks efficiency for example Wittman 2006, p. 22-29 (see note 13); Cooter & Ulen 2012, p. 42 (see note 13); Posner 2014, p. 14 (see note 13); Eidenmüller 2015, p. 51-54 (see note 9); Van Velthoven & Van Wijck 2019, p. 22-24 (see note 13).

16 See for some introductory thoughts about why it is not always desirable to require actual compensation W.J.E. Nijnens, *Cooperation and Communication Obligations in European Insolvency Law* (Recht & Praktijk, nr. InsR21), Deventer: Wolters Kluwer 2023, p. 64, fn. 305.

17 Posner 2014, p. 15 (see note 13).

18 D. Skauradszun & A. Spahlinger, 'Article 41', in: M. Brinkmann (ed.), *European Insolvency Regulation. Article-by-Article Commentary*, Munich: C.H. Beck 2019, par. 4. See also B. Wessels, 'Article 41', in: R. Bork & K. van Zwieten (eds.), *Commentary on the European Insolvency Regulation*, Oxford: Oxford University Press 2022, par. 41.52.

3.1 Cooperation between insolvency practitioners

Article 41(1) first sentence EIR Recast reads 'The insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners in secondary insolvency proceedings concerning the same debtor shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings'. This provision contains three aspects that need to be discussed: (i) the addressees, (ii) the obligation, and (iii) the limitation.

3.1.1 The addressees

According to the wording of Article 41(1) first sentence EIR Recast, the actors who shall cooperate are 'the insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners in secondary insolvency proceedings concerning the same debtor'. Considering the characteristics of main, secondary and territorial insolvency proceedings, the following cooperation streams can be imagined: between main insolvency proceedings and secondary insolvency proceedings, between different secondary insolvency proceedings, and between different territorial insolvency proceedings.[19] The wording of Article 41(1) EIR Recast clearly indicates that the first cooperation stream (between main insolvency proceedings and secondary insolvency proceedings) is covered by the obligation. Therefore, insolvency practitioners in main insolvency proceedings must cooperate with their counterparts in secondary insolvency proceedings and vice versa. The wording does not, however, make clear whether insolvency practitioners appointed in different sets of secondary proceedings or territorial proceedings must cooperate with each other.

Nevertheless, there are good arguments as to why insolvency practitioners appointed in secondary insolvency proceedings are also addressed by the obligation to cooperate. Even though main insolvency proceedings will normally be the proceedings that cover most of the debtor's assets, practice has shown that this is not always the case.[20] It may be that main insolvency proceedings are commenced in a Member State where only a minority of the debtor's assets are located. In this case, it is likely that secondary proceedings will be opened in the place where most of the assets are located.[21] If these assets are spread out over multiple Member States, it is not unlikely that parallel secondary insolvency proceedings will be opened. The value of these insolvency estates could be significantly higher than the value of the estate in the main insolvency proceedings. In such a situation it would not be logical that the insolvency practitioner in

19 It is not possible to have a cooperation stream between secondary insolvency proceedings and territorial insolvency proceedings because secondary insolvency proceedings presuppose the existence of main insolvency proceedings, and territorial insolvency proceedings cannot exist if main insolvency proceedings have already been opened.

20 P. Oberhammer, 'Coordination of Proceedings', in: B. Hess, P. Oberhammer & T. Pfeiffer (eds.), *European Insolvency Law. The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No. 1346/2000/EC on Insolvency Proceedings*, Munich: C.H. Beck 2014, par. 897.

21 This is also because of the effect of the opening of insolvency proceedings on rights *in rem* on assets located in Member States other than where the insolvency proceedings are opened (Art. 8(1) EIR Recast). This, however, goes beyond the scope of the present article.

the secondary insolvency proceedings would have to cooperate with his counterpart in the main insolvency proceedings but not with his counterpart in the other secondary insolvency proceedings. In the past, some authors favoured an approach in which the main insolvency proceedings functioned as a clearing house, collecting information from one set of insolvency proceedings and forwarding it to the other insolvency proceedings.[22] If the value of the estate in the main insolvency proceedings is low, it would not be logical to use this clearing house function. The insolvency practitioners in the parallel secondary insolvency proceedings should then cooperate directly. Another argument is that courts in secondary insolvency proceedings are obligated to cooperate with other courts before which a request to open insolvency proceedings is pending or which have already opened such proceedings (Article 42(1) EIR Recast). If courts are under this obligation, why would insolvency practitioners not be faced with a similar obligation? This holds especially true because it can be expected that more cooperation can take place between insolvency practitioners than between courts.

What about insolvency practitioners appointed in parallel territorial insolvency proceedings? There is even more reason to support an obligation for these actors than for insolvency practitioners appointed in secondary insolvency proceedings, mainly because there is no insolvency practitioner in main insolvency proceedings to fall back on. The clearing house function, therefore, cannot work in this scenario.[23]

The conclusion is that insolvency practitioners appointed in main, secondary and territorial insolvency proceedings are faced with an obligation to cooperate with each other.[24] Cooperation is, therefore, obligatory in all three cooperation streams: between main and secondary insolvency proceedings, between different secondary insolvency proceedings and between different territorial insolvency proceedings. This is the first indication that the cooperation and communication obligations must be interpreted in a broad manner.

3.1.2 The obligation

Now that it is clear who is addressed by Article 41 EIR Recast, the next question is what these actors must do. According to the wording of Article 41(1) EIR Recast, they 'shall cooperate with each other'. This provision creates a legal basis in EU law for insolvency practitioners to

22 M. Virgós & F. Garcimartín, *The European Insolvency Regulation. Law and Practice*, The Hague: Kluwer Law International 2004, par. 435. Cf. K. Pannen & S. Riedemann, 'Article 31', in: K. Pannen (ed.), *European Insolvency Regulation*, Berlin: De Gruyter Recht 2007, par. 12. The term *clearing house* goes back to M. Balz, 'The European Union Convention on Insolvency Proceedings', *American Bankruptcy Law Journal* 1996, p. 525, fn. 198.

23 See for more arguments Nijnens 2023, p. 45-46 (see note 16). Similarly A.J. Berends, 'Cooperation and Communication Obligations in European Insolvency Law. Bespreking van het proefschrift van mr. W.J.E. Nijnens', *Maandblad voor Vermogensrecht* 2024, p. 23.

24 See for example M. Brinkmann, 'Artikel 41', in: K. Schmidt (ed.), *Insolvenzordnung*, Munich: C.H. Beck 2023, par. 3; L.F.A. Welling-Steffens, Commentary on Article 41, in: M.L.D. Akkaya et al. (eds.), *Sdu Commentaar Insolventierecht*, The Hague: Sdu Uitgevers 2023, par. 1. See also Berends 2024, p. 23 (see note 23).

cooperate,[25] but it does not end there.[26] The wording signals the obligatory nature of the provision. Insolvency practitioners are not just allowed or advised to cooperate. It is not that they merely *may* or *should* cooperate, they *shall* cooperate, which essentially means that they *must* cooperate. This is a hard law obligation.[27] This is an essential notion and can only be understood by considering why the European legislature decided to introduce cooperation and communication obligations in the first place, namely, to remedy or mitigate the inefficiency of having parallel insolvency proceedings. In the eyes of the European legislature, only cooperation can ensure efficiency.

Because cooperation is so vital, it is unsurprising that the EIR Recast does not just contain a recommendation to cooperate but real obligations. It is, therefore, unhelpful to refer to these cooperation provisions as merely introducing 'Wohlverhaltensregel'.[28] The obligatory nature can also be explained by looking at previous experience with cooperation, or more precisely the lack of previous experience. Nearly half of the stakeholders questioned by the European Commission during its review of the success of the EIR 2000 were of the opinion that coordination between main and secondary insolvency proceedings was taking place in an unsatisfactory manner.[29] Furthermore, the Commission noticed that 'all actors involved report that there is a lack of coordination between the main and secondary proceedings'.[30] The remedy that the European legislature introduced for this problem was more cooperation obligations. The European legislature's intention was therefore to create more cooperation and communication between actors than before. The obligatory nature of the cooperation and communication provisions fits well in this picture.

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25 Whether insolvency practitioners would be allowed to cooperate without a legal basis in EU law is a matter for national insolvency law.

26 If the European legislature had intended to merely create a legal basis for cooperation, in other words to only empower insolvency practitioners to cooperate, it could easily have indicated this in the preparatory materials of the EIR Recast. Instead, the preparatory materials contain terms like 'cooperation requirements', 'obliging […] to cooperate and communicate', and 'obligation to cooperate', which makes it clear beyond doubt that the legislature's intention went further than to merely allow insolvency practitioners to cooperate. See for example COM(2012) 744 final, p. 5 and 8.

27 See for example A. Bornemann, in: K. Wimmer, A. Bornemann & M.D. Lienau, *Die Neufassung der EuInsVO*, Cologne: Luchterhand 2016, par. 564; P. Mankowski, 'Artikel 41', in: P. Mankowski, M.F. Müller & J. Schmidt, *EuInsVO 2015*, Munich: C.H. Beck 2016, par. 10; G. Cuniberti, 'La coordination des procédures d'insolvabilité', in: G. Cuniberti, P. Nabet & M. Raimon, *Droit européen de l'insolvabilité*, Issy-les-Moulineaux: LGDJ 2017, par. 402; Skauradszun & Spahlinger 2019, par. 8 (see note 18); P. Kindler, 'Artikel 41', in: J. von Hein (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 13*, Munich: C.H. Beck 2021, par. 4 and 9; C.G. Paulus, 'Artikel 41', in: C.G. Paulus, *Europäische Insolvenzverordnung. Kommentar*, Cologne: Fachmedien Recht und Wirtschaft dfv Mediengruppe 2021, par. 6; E. Delzant, 'Artikel 41', in: E. Braun (ed.), *Insolvenzordnung. Kommentar*, Munich: C.H. Beck 2022, par. 5.

28 In this way S. Reinhart, 'Artikel 41', in: H-P. Kirchhof, R. Stürner & H. Eidenmüller (eds.), *Münchener Kommentar zur Insolvenzordnung. Band 4*, Munich: C.H. Beck 2016, par. 1 and 3 ('Wohlverhaltensrichtlinien' and 'Wohlverhaltensregel'); Kindler 2021, par. 6 ('kaum mehr als eine Appellfunktion') (see note 27). Cf. A.J. Bělohlávek, *EU and International Insolvency Proceedings. Regulation (EU) 2015/848 on Insolvency Proceedings. Commentary*, The Hague: Lex Lata 2020, par. 41.39 and 41.59.

29 COM(2012) 744 final, p. 4.

30 SWD(2012) 416 final, p. 24.

Now that it is clear that insolvency practitioners *must* cooperate, the question is what cooperation actually entails. Unsurprisingly, this depends on the specifics of the case at hand.[31] Cooperation may take any form (Article 41(1) second sentence EIR Recast). One can think, for example, of dividing the registration of claims between the proceedings, settling claw-back claims, organising joint creditors' meetings, waiting to realise assets until a common business sale can be arranged with the other proceedings, or drafting a common reorganisation plan.[32] Basically everything that can contribute to the coordination of parallel insolvency proceedings may be the subject of cooperation,[33] unless the limitation applies (see below).[34] These examples also show another important aspect of the obligation: it is reciprocal.[35] This means that cooperation is not a one-way street. It takes two to tango and also to cooperate.[36]

As was the case with the addressees, the obligatory nature and encompassing wording indicate that the cooperation obligations are to be interpreted in a broad manner. There are, however, situations in which insolvency practitioners do not have to cooperate and communicate.

3.1.3 The limitation

According to Article 41(1) EIR Recast, insolvency practitioners must cooperate 'to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings'. The rationale of this limitation is to help insolvency practitioners who are at the same time faced with, on the one hand, an obligation in the EIR Recast to cooperate and communicate and, on the other hand, an obligation preventing cooperation.[37]

It is understandable that unlimited cooperation is not always desirable. Other interests also exist in insolvency proceedings, and these require protection. An example may clarify this. Debtors in insolvency proceedings often possess a great deal of personal data from people who are not necessarily involved in the proceedings, for example personal data relating to customers. From a cooperation perspective it may make perfect sense to communicate these data to an insolvency practitioner in parallel insolvency proceedings. However, the customers whose personal data are involved have a right that their personal data are not shared in an unlimited way.[38]

So which rules are intended by the notion *the rules applicable to the respective proceedings*? It is generally accepted that this is a reference to the *lex fori concursus* of both sets of insolvency

31 See for example L.F. Flöther, 'Artikel 41', in: B.M. Kübler, H. Prütting & R. Bork (eds.), *InsO. Kommentar zur Insolvenzordnung*, Cologne: RWS (the most recent edition in June 2019), par. 16; Delzant 2022, par. 9 (see note 27).

32 See for a list of potential cooperation measures Delzant 2022, par. 9 (see note 27).

33 Flöther 2019, par. 14 (see note 31); Kindler 2021, par. 5 (see note 27); Delzant 2022, par. 9 (see note 27).

34 This will be discussed in sections 3.1.3 and 4.

35 See for example Mankowski 2016, par. 3 (see note 27); Cuniberti 2017, par. 403 (see note 27); R. Dammann & M. Sénéchal, *Le droit de l'insolvabilité international*, Issy-les-Moulineaux: Joly éditions 2018, par. 1058; Wessels 2022, par. 41.54 (see note 18).

36 See more elaborately Nijnens 2023, p. 67-68 (see note 16).

37 Skauradszun & Spahlinger 2019, par. 15 (see note 18); O. Hermann, 'Artikel 41', in: H. Vallender (ed.), *EuInsVO. Kommentar zur Verordnung (EU) 2015/848 über Insolvenzverfahren*, Cologne: RWS 2020, par. 26; Wessels 2022, par. 41.58 (see note 18).

38 See for an elaborate discussion of the impact of EU data protection law on the cooperation and communication obligations in the EIR Recast Nijnens 2023, p. 173-236 (see note 16).

proceedings that would be involved in the cooperation and communication. There can be no question that it first and foremost refers to insolvency law rules. An example of such a rule is Article L 659-2(I), al 2 of the French *Code de commerce*, which provides that a French *mandataire judiciaire*, an insolvency practitioner, must ask permission from the *juge-commissaire*, a judge, to communicate confidential data to insolvency practitioners in other Member States.[39] Furthermore, in line with the example provided above, legal literature also accepts that general data protection rules may limit cooperation.[40] But the list does not end there. Rules of civil procedure, environmental law, employment law, social security law, etc., can limit cooperation and communication. To give just one example, if environmental law rules provide that the insolvency practitioner must make sure that the debtor's environmental waste is removed, the insolvency practitioner must remove the environmental waste, even if, from a cooperation point of view, the money used for this could have been deployed elsewhere. The limitation does not necessarily prevent a redistribution of assets from one set of proceedings to another, as will be shown below.[41] Finally, these rules that are applicable to the respective proceedings may be national rules or EU law rules.[42]

3.2 Cooperation between courts

Not only insolvency practitioners must cooperate with each other. Similar obligations apply to courts. According to Article 42(1) EIR Recast, 'a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings'.

When it comes to the addressees of Article 42 EIR Recast, there is less uncertainty as to who is obligated to cooperate. However, it is important to note that both courts that have opened insolvency proceedings and courts that are seized with a request to open insolvency proceedings are addressed. This again shows the intention of the European legislature to enact wide-ranging cooperation obligations.

The wording used by the European legislature to denote the obligatory nature of the provision is that courts 'shall cooperate'. As was the case with Article 41 EIR Recast, cooperation is, therefore, compulsory and not merely optional.[43] Historically speaking, courts in civil law juris-

39 Dammann and Sénéchal 2018, par. 1062 and 1864 (see note 35).

40 Bornemann 2016, par. 568 (see note 27); Mankowski 2016, par. 9 (see note 27); Dammann and Sénéchal 2018, par. 1061 (see note 35); Skauradszun and Spahlinger 2019, par. 11 (see note 18); Wessels 2022, par. 41.55 (see note 18); B. Wessels & S. Madaus, *International Insolvency Law. Part II European Insolvency Law* (Wessels Insolventierecht nr. X), Deventer: Wolters Kluwer 2022, par. 10855v.

41 Cf. Wessels and Madaus 2022, par. 10855v (see note 40).

42 Bělohlávek 2020, par. 41.53 (see note 28).

43 Cf. P. Mankowski, 'Artikel 42', in: P. Mankowski, M.F. Müller & J. Schmidt, *EuInsVO 2015*, Munich: C.H. Beck 2016, par. 2; Bornemann 2016, par. 576 (see note 27); D. Skauradszun & A. Spahlinger, 'Article 42', in: M. Brinkmann (ed.), *European Insolvency Regulation. Article-by-Article Commentary*, Munich: C.H. Beck 2019, par. 7; L.F. Flöther, 'Artikel 42', in: B.M. Kübler, H. Prütting & R. Bork (eds.), *InsO. Kommentar zur Insolvenzordnung*, Cologne: RWS (the most recent edition in June 2019), par. 7; H. Zipperer, 'Artikel 42', in:

dictions have much less experience with cooperation than courts in common law jurisdictions.[44] In a European Union where most Member States are civil law jurisdictions and insolvency law harmonisation has been historically difficult due to its public policy nature,[45] it is remarkable that cooperation has been made obligatory for courts.

How should these courts cooperate? According to Article 42(3) EIR Recast, cooperation can take place 'by any means that the court considers appropriate'. This provision also lists some examples of cooperation, such as coordination in the appointment of insolvency practitioners (sub. a), communication of information (sub. b), and coordination of the conduct of hearings (sub. d).

Finally, Article 42(1) EIR Recast again contains a limitation to the obligation to cooperate. Courts must cooperate 'to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings'. This limitation is unsurprising because it resembles the limitation in Article 41(1) EIR Recast.

4. Costs and judicial independence

Sections 3.1.3 and 3.2 already introduced the limitations provided in Articles 41(1) and 42(1) EIR Recast. The most important aspect that may potentially limit cooperation and communication has, however, not yet been mentioned: costs. Furthermore, hesitations may arise about the possibility that an obligation to cooperate for courts could lead to problems with regard to judicial independence. These topics will be discussed next.

4.1 Costs

When it comes to costs resulting from cooperation and communication, a distinction can be made between two types: administrative cooperation costs and costs that lead to a significant decrease in the value of the insolvency estate. Examples of the former type are postage costs, travelling costs, and the time spent on cooperation. An example of the latter type is a reduction of the insolvency estate due to an insolvency practitioner having to refrain from selling an asset to a potential buyer and instead having to sell it to the parallel insolvency proceedings so that the latter proceedings may result in a successful reorganisation.

H. Vallender (ed.), *EuInsVO. Kommentar zur Verordnung (EU) 2015/848 über Insolvenzverfahren*, Cologne: RWS 2020, par. 2; C.G. Paulus, 'Artikel 42', in: C.G. Paulus, *Europäische Insolvenzverordnung. Kommentar*, Cologne: Fachmedien Recht und Wirtschaft dfv Mediengruppe 2021, par. 11; L.F.A. Welling-Steffens, Commentary on Article 42, in: M.L.D. Akkaya et al. (eds.), *Sdu Commentaar Insolventierecht*, The Hague: Sdu Uitgevers 2023. Differently L-C. Henry, H. Bourbouloux & M. Sénéchal, 'Article 42', in: L. Sautonie-Laguionie & C. Lisanti (eds.), *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, p. 265.

44 See for a list of obstacles to judicial cooperation and communication B. Wessels, 'Cooperation and sharing of information between courts and insolvency practitioners in cross-border insolvency cases', in M-L. Graf-Schlicker, H. Prütting & W. Uhlenbruck (eds.), *Festschrift für Heinz Vallender zum 65. Geburtstag*, Cologne: RWS 2015, p. 779. The result of these obstacles was that cross-border cooperation and communication between courts was, according to Wessels, 'non-existent or (at most) weak'.

45 J.H. Dalhuisen, 'Harmonization of Substantive Insolvency Law in the EU', *Maandblad voor Vermogensrecht* 2021, p. 159.

4.1.1 Administrative costs

With regard to the first type of costs, Article 59 EIR Recast provides in the context of parallel insolvency proceedings relating to members of a group of companies that costs incurred by insolvency practitioners and courts are regarded as 'expenses incurred in the respective proceedings'. In other words, if an insolvency practitioner has to incur costs to cooperate, these costs are allocated to the proceedings in which he has been appointed. There is no similar provision for cooperation costs resulting from the obligation in Article 41 EIR Recast. Nevertheless, there seems to be no good reason why what is provided in the context of insolvency proceedings relating to members of a group of companies should not also apply in the context of insolvency proceedings relating to a single debtor. Furthermore, one may also argue that if an actor has an obligation to do something, it is normal that he should also pay the resulting costs,[46] unless the obligation would provide otherwise. The EIR Recast does not provide otherwise, so it is reasonable to argue that the proceedings which are faced with costs should also incur them.

Is it allowed for national law to provide that insolvency practitioners obtain a right of recourse to claim compensation from the insolvency proceedings with which they cooperated? Some authors have argued in favour of such a possibility.[47] This view should not be followed, because it incentivises insolvency practitioners not to ask their counterparts in parallel insolvency proceedings to cooperate. After the cooperation they could be confronted with an unexpected bill. If this possibility exists, they may think twice before engaging in cooperation. Furthermore, such a right of recourse would go against the intention of the European legislature, because it has introduced an allocation provision in Article 59 EIR Recast which already determines which insolvency proceedings have to incur the costs.

4.1.2 Costs that lead to a significant decrease in the value of the insolvency estate

Although the administrative costs discussed in the previous section apply to all cases of cooperation and communication, costs that lead to a significant decrease in the value of the insolvency estate are more important for present purposes. To address these costs, it is necessary to first discuss the goal of insolvency proceedings.[48]

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46 Mankowski 2016, par. 20 (see note 27); S. Reinhart, 'Artikel 41', in: R. Stürner, H. Eidenmüller & H. Schoppmeyer (eds.), *Münchener Kommentar zur Insolvenzordnung. Band 4*, Munich: C.H. Beck 2021, par. 25.

47 Mankowski 2016, par. 20 (see note 27); O. Hermann, 'Artikel 41', in: H. Hirte & H. Vallender (eds.), *Uhlenbruck. Insolvenzordnung. Kommentar*, Munich: Franz Vahlen 2020, par. 16. Probably also Berends 2024, p. 22 (see note 23).

48 It will be clear from the following discussion that mostly liquidation proceedings will be the topic of consideration. Different arguments can be made for purely restructuring proceedings such as the Dutch *akkoordprocedure buiten faillissement* under the *Wet homologatie onderhands akkoord* (Act on the Confirmation of Private Restructuring Plans) or the German *Restrukturierungssache* under the *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen (Unternehmensstabilisierungs- und -restrukturierungsgesetz - StaRUG).*

In Dutch *faillissement* proceedings, the primary interests that the insolvency practitioner must take into account are those of the general body of creditors.[49] There may be other interests that need to be taken into account as well, such as societal interests, and sometimes these take precedence,[50] but they are normally not the main interests. Therefore, the primary aim for insolvency practitioners is to attain the best possible outcome for creditors. The same applies to insolvency practitioners appointed in the German *Insolvenzverfahren*.[51]

The limitation in Article 41(1) EIR Recast provides that insolvency practitioners must co-operate 'to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings'. It was stated above[52] that the rationale of this limitation is to help insolvency practitioners who are at the same time faced with, on the one hand, an obligation in the EIR Recast to cooperate and communicate and, on the other hand, an obligation preventing cooperation. It is not unlikely that an insolvency practitioner asks his counterpart in parallel insolvency proceedings to do something that would significantly reduce the value of the latter's estate. An example of this could be a request from insolvency practitioner A to insolvency practitioner B to sell an important asset to the proceedings in which insolvency practitioner A has been appointed.[53] However, insolvency practitioner B could sell the asset for a higher price to another buyer. It happens to be the case that insolvency practitioner A needs the asset to implement a restructuring. In such a situation, insolvency practitioner B is faced with two conflicting interests: his obligation to cooperate and his obligation under national law to attain the best possible outcome for the creditors in the proceedings in which he has been appointed. Is he allowed to decide not to cooperate by pointing towards his national law obligation?

Flöther has argued that the obligation for insolvency practitioners to cooperate ceases to exist if the cooperation leads to a – temporary – reduction of the insolvency estate.[54] This cannot be the case, as all forms of cooperation lead to costs. It may be that in the end the benefits outweigh the costs, but this is not always clear at the start and if one follows Flöther's interpretation, insolvency practitioners could immediately decide upfront not to cooperate, which goes against the obligatory nature of Article 41 EIR Recast. This approach is, therefore, unhelpful in answering the question.

Skauradszun and Spahlinger have approached the issue slightly differently. According to these authors, cooperation is not required if it leads to disadvantages for the insolvency estate. Such disadvantages must be compensated in order for the obligation to apply. Furthermore,

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49 *Hoge Raad* (Dutch Supreme Court) 17 April 2020, ECLI:NL:HR:2020:753 (*FNV/Heiploeg*), par. 3.5.2.

50 *Hoge Raad* 24 February 1995, ECLI:NL:HR:1995:ZC1643 (*Sigmacon II*); *Hoge Raad* 19 April 1996, ECLI:NL:HR:1996:ZC2047 (*Maclou/Curatoren Van Schuppen*).

51 *BT-Drucksache* 12/2443, p. 108; *Bundesgerichtshof* (German Federal Court of Justice) 21 April 2005, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* 2005, p. 2016; *Bundesverfassungsgericht* (German Federal Constitutional Court) 23 May 2006, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* 2006, p. 454.

52 See section 3.1.3.

53 See also the examples provided by Wessels and Madaus 2022, par. 10855bb (see note 40) ('The result may be that the main insolvency practitioner will be able, for example, to prevent the sale of particular assets involved in the secondary proceedings, the preservation of which may be deemed desirable in respect of the reorganisation of the business at the debtor's centre of main interests.') and Welling-Steffens 2023, par. 4 (see note 24).

54 Flöther 2019, par. 42 (see note 31).

insolvency practitioners may make cooperation conditional upon their receiving a 'fair share of the overall surplus resulting from such cooperation'.[55] This will be called the compensation approach and the fair share approach respectively. The compensation and fair share approaches are problematic because they are not in line with the goal of the European legislature. If no obligation had existed and insolvency practitioner A would have asked insolvency practitioner B to cooperate, insolvency practitioner B would normally have entertained this request if it at least would not have led to any disadvantages for the estate in the proceedings in which he had been appointed. Furthermore, if he could have increased the value of the estate by way of cooperation, he would probably have done this, also because he could have been liable under national law if he did not do so. This was the actual situation before the enactment of the EIR 2000 and EIR Recast. The fact remains, however, that this situation did not lead to enough cooperation between parallel proceedings, at least not enough in the eyes of the European legislature. Therefore, the European legislature introduced actual cooperation obligations. The compensation and fair share approaches were, in other words, ineffective and the European legislature decided that change was necessary to improve the situation that existed under the compensation and fair share approaches. The means that the European legislature adopted to do this was to introduce hard law obligations. Therefore, the hard law obligations signal a clear desire of the European legislature to move away from the compensation and fair share approaches. It would be illogical to interpret the new obligations in line with the old approaches that the European legislature wanted to move away from, which would essentially lead to the conclusion that little has changed, which simply cannot be the case. As a result, the compensation and fair share approaches are unhelpful in answering the question of whether insolvency practitioner B in the above example may refuse to cooperate.

If these approaches cannot give an answer to the question of when insolvency practitioners are allowed to refrain from cooperation, then what can? Here is where Kaldor-Hicks efficiency provides a helpful alternative. The fact that the European legislature decided to introduce obligations to cooperate and communicate combined with the goal of cooperation, namely to achieve an efficient outcome, means that insolvency practitioners should also cooperate if this leads to costs for the proceedings in which they have been appointed without there being compensation for these costs. According to Kaldor-Hicks efficiency, cooperation leads to an improvement on the efficiency scale if the total benefits of cooperation are higher than the total costs for the combined proceedings. In other words, cooperation leads to an improvement if there is a cooperation surplus. To answer the question of when insolvency practitioner B is allowed to refrain from cooperation, Kaldor-Hicks efficiency provides that insolvency practitioner B may do this if the foreseen total benefits of cooperation for the parallel insolvency proceedings do not outweigh the foreseen total costs.[56]

One may object that it is normally hard to foresee at the start whether cooperation will actually lead to more total benefits than total costs. This is indeed the case. However, the European legislature assumes that cooperation contributes to achieving an efficient outcome (Recital 48 EIR Recast). Therefore, there should be a presumption that cooperation will lead to more total benefits than total costs and that, therefore, cooperation will lead to a Kaldor-Hicks

55 Skauradszun and Spahlinger 2019, par. 3 and 15 (see note 18). Berends views the compensation approach favourably. See Berends 2024, p. 22 (see note 23).

56 See Nijnens 2023, p. 80-81 (see note 16) for concrete examples.

improvement. If such a presumption did not exist, insolvency practitioners could easily say that they can foresee the costs for their proceedings but not the benefits for the parallel proceedings, which would lead to much less cooperation than desired by the European legislature.

Notwithstanding this outcome, one caveat should be made. It is one thing to argue that insolvency proceedings must accept that there is a reduction in the value of the insolvency estate if it leads to more benefits for parallel insolvency proceedings. It is another thing to argue that the reduction in value can go so far that the insolvency proceedings lose the reason for their existence, their *ratio essendi*. An example can clarify this. If restructuring proceedings are opened in Germany and liquidation proceedings in France, the insolvency practitioner appointed in the German proceedings should not be allowed to ask the insolvency practitioner appointed in the French proceedings to simply hand over all assets. That would remove the *ratio essendi* of the French proceedings. In other words, the French proceedings should not be allowed to be cooperated to death. Admittedly, it is not always clear where the line is between forced cooperation that leads to acceptable costs and forced cooperation that removes the *ratio essendi*. An example of the latter is that as a result of the cooperation the insolvency proceedings would have to be discontinued due to a lack of assets. For the rest, the line will have to be drawn in each specific situation.

4.2 Judicial independence

Article 42 EIR Recast contains an obligation for courts to cooperate along with the corresponding limitation. Kaldor-Hicks efficiency can also provide a way to interpret the limitation for courts when it comes to costs.[57] Generally speaking, the same considerations apply as for the limitation in Article 41(1) EIR Recast. However, there might be some concerns when it comes to judicial independence. What if a court asks another court in parallel insolvency proceedings to appoint a specific insolvency practitioner or to instruct an insolvency practitioner in a specific way? Is the other court obligated to do this? Especially German authors find this problematic.[58]

Imagine that a French judge, an Austrian judge, and an Italian judge are faced with requests to open insolvency proceedings. The French judge proposes to appoint insolvency practitioner A in all parallel insolvency proceedings. The Italian judge considers A to be suitable, but the Austrian judge does not consider A to be suitable. Nevertheless, the Austrian judge believes that he must cooperate based on Article 42 EIR Recast and appoints A in the Austrian proceedings.[59] This example is straightforward: in this situation the Austrian judge was not under an obligation to cooperate, because the appointment of A was contrary to national law. But if the example is slightly modified, the case becomes less clear. Imagine that the Austrian judge intended to appoint insolvency practitioner B but receives a request from the French judge to appoint A. The Austrian judge considers A just as suitable as B. Furthermore, it is established that appointing A does not contravene Austrian national law and will probably contribute to achieving an efficient result, although the benefits might be limited to the French and Italian proceedings. Is the Austrian judge allowed to refuse the French judge's request to appoint A?

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57 See Nijnens 2023, p. 123 (see note 16) for a concrete example.

58 Mankowski 2016, par. 21 and 29 (see note 43); Skauradszun & Spahlinger 2019, par. 10 (see note 43); Flöther 2019, par. 16 and 25 (see note 43); Zipperer 2020, par. 2 and 8 (see note 43).

59 This example comes from Skauradszun & Spahlinger 2019, par. 10 (see note 43).

The view proposed here is that the Austrian judge is obligated to appoint A.[60] If this were not the case, Article 42 EIR Recast would lose its obligatory nature and essentially only encourage courts to cooperate.[61] If the European legislature only intended to encourage courts to cooperate, it would have sufficed to merely give courts the power to do so. That is not what the European legislature did; it introduced an obligation. Therefore, there can be situations in which a court is obligated to cooperate in a certain way that another court requested.[62]

There is no need to argue that this infringes judicial independence. The EIR Recast also contains other obligations for courts and few would argue that these infringe judicial independence. An example can be derived from Article 19(1) EIR Recast. According to this provision, '[a]ny judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings'. If a court in one Member State has decided that a debtor's COMI is in that Member State, this decision shall be recognised in other Member States. Only if the court's decision goes against the *ordre public* of the other Member States are the latter allowed to refuse recognition (Article 33 EIR Recast).[63] As a result, if a Dutch court decides that the debtor's COMI is in the Netherlands, Belgian courts must accept this and can only open secondary proceedings in Belgium. In the example regarding the appointment of insolvency practitioners, the Austrian judge establishes that appointing A does not contravene Austrian national law and will probably contribute to achieving an efficient result, and can, therefore, only appoint A. The main difference between the situation resulting from Article 19 EIR Recast and the appointment example is that the restriction which only allows the Belgian courts to open secondary insolvency proceedings directly follows from a statutory provision, whereas the restriction that only allows the Austrian court to appoint A follows indirectly from a statutory provision (Article 42 EIR Recast) through a request from a foreign court. One may view this as a fundamental difference,[64] but the outcomes are similar: the court is not allowed to do something and instead has to do something else. If, therefore, Article 19(1) EIR Recast does not infringe judicial independence, neither should the interpretation of Article 42(1) EIR Recast proposed here.

5. Conclusion

The previous sections have shown that the obligations to cooperate and communicate are to be widely interpreted. The European legislature intended to mitigate the inherent inefficiency of having parallel insolvency proceedings taking place at the same time. The malady is inefficiency, the cure is cooperation. According to the European legislature, cooperation did not take place often enough before the enactment of the EIR Recast. Therefore, it created real hard law obligations. These obligations do not merely encourage insolvency practitioners and courts

60 Differently Berends 2024, p. 24 (see note 23).

61 Berends still views this as a step forward. See Berends 2024, p. 24 (see note 23).

62 Differently Mankowski 2016, par. 21 (see note 43); Cuniberti 2017, par. 420 (see note 27); Flöther 2019, par. 25 (see note 43); Zipperer 2020, par. 8 (see note 43).

63 S. Mock, 'Artikel 19', in: A. Fridgen, A. Geiwitz & B. Göpfert (eds.), *BeckOK Insolvenzrecht*, Munich: C.H. Beck (online, the most recent edition on 15 October 2023), par. 8.

64 Berends 2024, p. 24 (see note 23).

to cooperate, they force them to do so. Arguing that insolvency practitioners and courts may refuse to cooperate unless their insolvency proceedings are compensated, or receive a fair share of the cooperation surplus, goes against the purpose of the European legislature. Kaldor-Hicks efficiency shows a way to interpret the obligations and limitations: if a certain act of cooperation leads to more total benefits than total costs for the combined insolvency proceedings, this contributes to attaining an efficient outcome. Therefore, insolvency practitioners and courts should also cooperate if this leads to more costs than benefits in their own insolvency proceedings. Courts must sometimes cooperate in a certain way as requested by another court. This does not infringe upon judicial independence; it leads to efficiency.