MYKOLAS ROMERIS UNIVERSITY
LAW SCHOOL
INSTITUTE OF PRIVATE LAW

OKSANA PANICHKOVSKA
(EUROPEAN AND INTERNATIONAL BUSINESS LAW)

COOPERATION AND COMMUNICATION BETWEEN INSOLVENCY PRACTITIONERS AND COURTS IN CROSS-BORDER INSOLVENCY PROCEEDINGS

Master thesis

Supervisor – Dr. Remigijus Jokubauskas

Vilnius, 2024

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

CJEU – Court od Justice of the European Union

CoCo Guidelines – European Communication and Cooperation Guidelines for Cross-border Insolvency

COMI – centre of main interests

EIR – Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) OJ L 141

EMP – European Model Protocol

EU – European Union

EU JudgeCo Guidelines – EU Cross-Border Insolvency Court-to-Court Communications Guidelines

InsO – Insolvenzordnung

INSOL – International Association of Restructuring, Insolvency and Bankruptcy Professionals

IP – Insolvency practitioner

OECD – Organization for Economic Co-operation and Development

UNCITRAL – United Nations Commission on International Trade Law

UNCITRAL Practice Guide – UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, 2009

INTRODUCTION

The relevance of the master thesis. In today's globalized commercial world, companies may have trading partners, operations and assets in foreign countries. Also, companies that are subunits of a corporate group become closely interdependent with each other. Application of the rules of cross-border insolvency law which regulates the treatment of financially distressed debtors who have assets or creditors in more than one country encounters various challenges caused by substantive and procedural discrepancies in the regulation of multiple aspects of insolvency proceedings, pointing to a rising need to adapt to the globalized market.[1] Uncertainty that may be encountered in cross-border insolvency cases where several concurrent proceedings are in place requires the establishment of clear and efficient cooperation and communication procedures between the parties involved.

The common rules regulating the functioning of the internal market within the EU facilitate cross-border business activities, which, when businesses fail may lead to cross-border elements in insolvency proceedings. A debtor's operations across the EU can result in the initiation of insolvency proceedings for the debtor or its affiliates in multiple jurisdictions (within or outside the EU). Creditors may seek to participate in these insolvency proceedings across borders or initiate parallel proceedings in their own countries. The EIR governs the initiation and coordination of such parallel insolvency proceedings.

Cross-border insolvency proceedings in the Member States of the EU are managed and based upon a model of main insolvency proceedings, opened in a Member State where the debtor has its centre of main interests and secondary insolvency proceedings opened in other Member States, where the debtor has an establishment. Recital 48 of EIR, that has come into effect on 26 June 2017 for insolvency proceedings that are opened on or after that date[2], sets forth that main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets provided that there is proper cooperation between the actors involved in all the concurrent proceedings. Close cooperation with trust between insolvency practitioners in main and secondary insolvency proceedings is indispensable in order to achieve an efficient and optimal administration of the insolvent debtor's assets[3].

This task is, however, hindered by the fragmentation of insolvency rules along the lines of national insolvency systems, which deliver different outcomes characterised by different degrees

[1] Jay L. Westbrook, Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court 96 (7) Texas Law Review 1473 (2018).
[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L141 Art. 84
[3]European Communication and Cooperation Guidelines for Cross-border Insolvency (2007), page 20

of efficiency across Member States in terms of the time it takes to liquidate a company and the value that can eventually be recovered[4]. The additional cost of cooperation, language barriers and national procedural rules which prohibit the disclosure of certain information may also be a source of difficulties in cooperation. This ultimately reduces the efficiency of proceedings, increases their length and costs, and, ultimately, chances to maximise the value of the assets may be lost[5].

The recent legislative proposal of for a directive aiming to harmonise certain aspects of insolvency law reveals the initiatives of the EU policymakers to harmonize certain matters of bankruptcy law.[6] Although this initiative addresses the lack of harmonisation of insolvency (bankrutpcy) law, it does not touch upon procedural issues regarding cooperation between insolvency practitioners and courts in cross-border matters. The differences in the national insolvency laws make coordination among jurisdictions difficult, and the regional and international regimes fail to provide meaningful assistance[7]. Therefore, the question arises whether there is a need for further harmonisation of the requirements for insolvency practitioner–court cooperation and communication on the regional and international level or that should be left for national authorities or the parties to decide, e.g., via insolvency agreements or protocols, whereby contributing to the construction of a contract-driven transnational law of international insolvencies, which is considered by some scholars to be 'more resourceful and customizable than "hard law" mechanisms could ever envision and, therefore, more suitable for facing the challenges imposed by the failure of companies scattered over an unpredictable, multifaceted, globalized world'[8].

As stated in Recital 20 preceding the text of the EIR, mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union. Similar to Articles 25-27 of the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter – UNCITRAL Model Law), the EIR encompasses the duty of cooperation, coordination, and communication between insolvency practitioners and courts in Article 41 of the EIR. Article 56 further regulates respective duties in the context of cross-border coordination and cooperation between multiple insolvency proceedings in different Member States relating to members of the same group of

[4] Commission Impact Assessment Report Accompanying the Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, SWD (2022) 395 final, p. 18

[5] Commission Staff Working Document Executive Summary of The Impact Assessment Accompanying The Document Revision Of Regulation (Ec) No 1346/2000 On Insolvency Proceedings, SWD (2012) 0417 final

[6] Proposal for a Directive harmonising certain aspects of insolvency law, COM (2022) 702 final

[7] Richard Herring, The Challenge of Resolving Cross-Border Financial Institutions, 31 YALE J. ON REG. 853, 859 (2014); Gabriel Moss and Christoph Paulus, The European Insolvency Regulation—The Case for Urgent Reform, 19 INSOL. INTELLIGENCE 2 (2006)

[8] Francisco Satiro and Paulo Fernando Campana Filho, Transnational insolvency: Beyond state regulation and towards cooperation agreements, http://ssrn.com/abstract=1858968

companies[9]. However, the EIR does not provide for a definition or delimitation of these duties[10]. Further, the terminology used in the EIR is not necessarily coherent or precise when using the terms 'coordination', 'cooperation', or 'communication'[11]. Although, the EIR does state that when cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (UNCITRAL)[12]. That provision leaves space for flexibility in the sphere of cooperation and communication and requires a more detailed analysis of soft law containing necessary requirements for actions of insolvency practitioners, principles and prerequisites for cooperation, in particular those concerning the prevention of conflict of interest being a novel element thereof. The general provisions in Article 43 of the EIR results in ad hoc communication and cooperation which, on the one hand, may serve as better standpoint for achieving the efficiency of cross-border insolvency proceedings or, on the contrary cause additional problems in practice.

Considering the problematic issues mentioned above, this research will evaluate the relevant legal framework to determine its ability to ensure effective cooperation between parties in cross-border insolvency proceedings, protect creditors, restructure viable businesses, and achieve economic sustainability. Due to a new paradigm in approaching insolvency law and a small number of sources devoted to this particular type of cooperation, the topic bears great significance for the development of modern cross-border insolvency law.

Scientific research problem.

An analysis of the existing literature shows that there is a lack of detailed sources that specifically address the cooperation and communication between insolvency practitioners and courts in cross-border insolvency cases. Most of the available literature relates to other aspects of cooperation in cross-border insolvency proceedings. There are attempts to establish frameworks which would provide more clarity for more effective cooperation. However, these efforts are not sufficiently comprehensive or detailed to guide practitioners and courts effectively. In addition, the EIR and UNCITRAL Model laws contain general provisions which often require interpretation. Therefore, there is a need for a deeper examination of the procedural aspects of

[9]Brinkmann M. *European Insolvency Regulation*: Article-by-Article Commentary, C.H. Beck, 1st edition (2019)
[10]Casasola, O., and Madaus, S Cross-border Insolvency Protocols: Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast. European Business Law Review (2022), 33 (6). pp. 839-880. ISSN 0959-6941
[11] Dominik Skauradszun and Andreas Spahlinger, in Brinkmann (ed.), *European Insolvency Regulation* (Munich, Oxford; Beck Hart Nomos, 2019), Art. 41, para 4
[12] Regulation 2015/848 supra n 26, Recital 48

cooperation between IPs and courts for enhanced implementation of the relevant provisions of EIR in practice.

The practical value of this research is caused by the uncertainty in the application of the provisions related to procedural matters in the EIR and UNCITRAL Model Law. A better understanding of the provisions of relevant hard and soft law which govern cross-border insolvency would help to avoid inconsistent application of the provisions in practice, lengthening of the proceedings, and violation of stakeholders' rights. It would ultimately contribute to the objectives of the effectiveness of cross-border insolvency proceedings. Unclarity in application may lead to "forum shopping" leaving the company no better choice for the protection of its rights.

In light of a number of initiatives seeking to harmonise the rules for cooperation and communication between actors in cross-border insolvency cases, the important question arises whether the existing legal regulation of cooperation between insolvency practitioners and courts in EU insolvency law contributes to the effectiveness of cross-border insolvency proceedings?

This research is aimed at answering this question. To answer this question the thesis focuses on the analysis of the current legal framework of EU insolvency law and international soft law documents regulating cross-border insolvency proceedings.

The level of analysis of the researched problem. It should be noted that there are numerous legal acts, as well as academic sources dealing with different aspects of cross-border insolvency of both substantive and procedural nature. Thus, commentaries to EIR being a valuable source of interpretation of provisions of the Regulation allow us to adopt a systematic approach to the topic of this Thesis, failing, however, to comprehensively address all the peculiarities of insolvency practitioner–court cooperation mechanism. By contrast, rather useful are soft law documents, such as European Communication and Cooperation Guidelines for Cross-border Insolvency, which are aimed to serve as a sound and well-tailored framework for cross-border cooperation and as a basic reference for individual liquidators, professional insolvency practitioners' associations, judges and other public authorities in all EU Member States and internationally.[13] Zhang D.'s book "Insolvency Law and Multinational Groups. Theories, Solutions and Recommendations for Business Failure analysed different downfalls of the existing legal framework as regards duties of insolvency practitioners in the proceedings related to companies which are part of the group. Casasola, O in the work named "Cross-border Insolvency Protocols" provided an extensive analysis of the tools for enhancing cooperation and communication, i.e. insolvency protocols. The existing literature also comprises the works of such scholars as Wessels B., Fletcher I., Virgós M., etc.

[13] European Communication and Cooperation Guidelines for Cross-border Insolvency (2007), page 24

It should be noted that the insufficient level of communication and coordination between insolvency practitioners and courts may have various reasons, such as national economic policy, underlying values of insolvency proceedings, commercial philosophy,[14] etc. However, in order to preserve an internal systematic cohesion, this master thesis focuses on the analysis of the existing regulation in EU cross-border insolvency law and namely, how to ensure effective cooperation and communication between insolvency practitioners and the national, with the purpose of reflecting upon the formulation of guidelines for those interested in achieving a better understanding of the existing regulation of such cooperation.

The scientific novelty of the master thesis. The problem of the effectiveness of cooperation between main and territorial insolvency proceedings, and, more precisely, cooperation and communication between courts and other participants in cross-border insolvency proceedings has been previously addressed in many sources. However, the terminology, nature and mechanism of cooperation still constitute concerns to national authorities dealing, in particular, with issues of the law applicable to the breach of duties by insolvency practitioners, and a wider question, of the substance of such duties, has not yet been properly examined. Such examination is especially relevant when the coordination of the administration and supervision of the debtor's assets and affairs is necessary. Further, problems still arise concerning the conduct of hearings, approval of protocols, etc. This master thesis aims to address concrete manifestations of conflict on a comparative basis, resulting in guidelines for better navigating among the various norms regulating the issue in question. Also, the relevance of the thesis reveals the recent case law of the CJEU, namely the *Air Berlin*[15] in which the court dealt with the questions of coordination of treatment of assets in main and secondary insolvency proceedings and the coordination of the actions of insolvency practitioners related to the sale of assets.

The aim of the master thesis is to determine the regulatory gaps in cooperation and communication between insolvency practitioners and courts in cross-border insolvency proceedings and to propose solutions for better application of the relevant provisions of EIR in order to ensure the effectiveness of insolvency proceedings.

The objectives of the master thesis. In order to achieve the aim of the current scientific research, the following tasks are set out to be accomplished:

1) To establish the relevance of proper cooperation between insolvency practitioners and courts for the effectiveness of insolvency proceedings;

[14] P. Millet, "Cross-Border Insolvency: The Judicial Approach" (1997) 6(2) *International Insolvency Review,* p. 109.
[15] Case C-765/22 and C-772/22 *Luis Carlos and Others v Air Berlín Luftverkehrs KG, Sucursal en España and Air Berlín PLC & CO Luftverkehrs KG* [2024] ECLI:EU:C:2024:331

2) To ascertain the notion and content of duties of cooperation and communication, their interrelation with the concept of coordination as used in present and coming cross-border insolvency law, by analysing the relevant provision of EIR and legal literature;
3) To establish existing methods of cooperation and assess them for the ability to ensure effective cooperation and communication between insolvency practitioners and courts;
4) To assess the challenges which insolvency practitioners and courts encounter when cooperating in cross-border insolvency proceedings and propose suggestions to improve cooperation between insolvency practitioners and courts in cross-border insolvency proceedings.

The practical significance of the master thesis. The current research will be useful for scholars and practitioners in the field of insolvency who deal with the procedural aspects of cross-border insolvency, in particular with the question of insolvency practitioner–court cooperation and communication.

The master thesis can also be useful for students studying insolvency law who want to understand the peculiarities and main doctrinal issues related to insolvency practitioner–court cooperation and communication.

As regards the European Union policymakers, this research presents value from the perspective of possible amendments to the current EU legislation in the sphere of insolvency law with the aim of adjusting it to meet the purpose of uniform interpretation and application of relevant provisions, along with achiving the overall aim of effectiveness.

Methodology of the master thesis. The research study will include several scientific methods:

1. Data collection and data analysis methods are used to study and systematize information from many legal texts, case law and legal doctrine, such as European Insolvency Regulation (EIR), other relevant international, regional, and national insolvency law; judicial decisions and rulings related to cross-border insolvency proceedings, focusing on cases that illustrate the cooperation and communication between insolvency practitioners and courts; academic articles, commentaries, and legal opinions that provide insights into the theoretical and practical aspects of cross-border insolvency. As a result, the collected data will be analyzed, structured and conclusions will be made.

2. The comparative method will be applied to compare, determine and analyze European and international regulations of the cooperation mechanism and rules for communication to determine similar and distinguishing features. Specifically, the comparative method will be applied to examine the different provisions of EIR governing cooperation and communication

in cross-border insolvency proceedings. By identifying similarities and differences, the research will highlight best practices and areas needing harmonization or improvement, contributing to the understanding of the practical implications of different regulatory frameworks.

3. The linguistic method will be used to analyze and compare various terminologies and concepts within the EIR and other relevant legislative texts and doctrines. This analysis will be complemented by the teleological method to discern the legislators' intentions behind specific provisions, ensuring a clear understanding of the legal language and its impact on cross-border insolvency proceedings.

4. The logical method will be used to consider the hierarchy of legal systems and to formulate scientific research conclusions in a reasonable manner.

5. The historical method allows us to understand and properly interpret the dynamic of legislative changes while analyzing various legal acts both at international, regional and national levels, contributing to a deeper understanding of the current regulatory framework.

The structure of the master thesis. This master thesis consists of the introductory part, and four chapters, which are divided into subsections, conclusions, recommendations, bibliography, and summary.

In the first chapter of the master thesis, the current legal framework is outlined in general. The European Union’s approach to communication and cooperation is analized on the basis of relevant provisions of EIR. The Chapter outlines the context for cross-border cooperation, explaining the procedure of cross-border insolvency under the Regulation.

The second chapter is devoted to cooperation between insolvency practitioners and courts, outlining the definition, purpose, meaning, development and application of cooperation and communication. It describes the purpose of cooperation as determined by the EIR and delves into the role of cooperation and coordination in improving efficiency. Section 2.3 looks into coordination in the context of the treatment of debtor’s assets.

The third chapter examines the various forms and methods of cooperation between insolvency practitioners and courts under the EIR. In particular, it provides an analysis of the phenomenon and role of insolvency protocols within the European Union. Further, their definition, legal nature and practical obstacles to their implementation are considered.

The fourth chapter focuses on the main soft law documents, developed to enable more effective cooperation and communication in practice. The advantages and disadvantages of the current legal framework are outlined, as well as the challenges which insolvency practitioners and courts encounter when cooperating in cross-border insolvency proceedings.

In conclusion, the proposals as a result of determining the main problems in the sphere within the selected limits of the research are formulated.

The defended statements.

1. The lack of definitions of cooperation and communication in the EIR reduces the effectiveness of cross-border insolvency proceedings in the EU and the possibilities of rescuing viable businesses.

2. The use of protocols and soft law documents addressing the gaps caused by the ambiguity of the terms of the EIR may improve the effectiveness of communication and cooperation.

1. THE BASIS OF COMMUNICATION AND COOPERATION IN CROSS-BORDER INSOLVENCY PROCEEDINGS

This chapter explores the critical role of effective interaction between insolvency practitioners (IPs) and courts within the insolvency framework of EU law. It begins by providing a historical background of the development of coordination and continues with an essential overview of the main and secondary insolvency proceedings under the EIR. This foundational knowledge is crucial for the establishment of the context for understanding the complexities of managing cross-border insolvencies. By examining these proceedings, the chapter sets the stage for a deeper analysis of how IPs and courts must coordinate their actions to fulfil their respective duties as mandated by the EIR. Furthermore, this chapter seeks to distinguish the three duties of cooperation, coordination and communication, and highlight their intersections.

1.1. Evolution of cooperation within the EU cross-border insolvency framework

A series of conventions and initiatives preceded the establishment of the European Insolvency Regulation (EIR),[16] aimed at facilitating coordination and cooperation in cross-border insolvency cases within the EU. The process began with the Brussels Convention of 1968, which simplified the reciprocal recognition and enforcement of judgments.[17] Subsequent efforts, including the European Preliminary Draft Insolvency Convention[18] and the Istanbul Convention,[19] aimed at establishing common principles for dealing with cross-border insolvency matters. However, these initiatives faced challenges and were ultimately unsuccessful due to various factors, including differences in legal frameworks among Member States and lack of universal adoption.[20]

The turning point came in 2000, with the introduction of the EIR, which was in essence a conversion of the Insolvency Convention. Virgos Schmidt Report was used as basis for an explanatory memorandum.[21] EIR 2000 provided a comprehensive framework for handling cross-border insolvency proceedings within the EU. The EIR aimed to streamline procedures,

---

[16] Paul J Omar, "Genesis of the European Initiative in Insolvency Law" (2003) 12(3) IIR 147, 147.
[17] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 25 September 1968 [1972] OJ L 299/ 32, replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.
[18] Draft Convention E Comm Doc 3.327/1/XIV/70-F on bankruptcy, winding-up, arrangements, compositions and similar proceedings [1976] (Preliminary Draft Insolvency Convention).
[19] European Convention ETS No 136 on Certain International Aspects of Bankruptcy [1990] (Istanbul Convention).
[20] *Supra* n 16, p. 154-157.
[21] Reinhard Bork and Renato Mangano, European Cross-Border Insolvency Law (OUP 2016) 14.

establish clear jurisdictional rules, and ensure the recognition and enforcement of insolvency judgments across Member States. Despite initial challenges, the EIR has been instrumental in promoting cooperation and coordination among EU countries in handling cross-border insolvency cases.

In 2015, the EIR was recast to address shortcomings, in particular those related to its scope, jurisdiction, secondary proceedings and its publicity, the lack of rules relating to corporate groups,[22] and modernize its provisions. The recast introduced measures to enhance judicial cooperation and communication, further promoting coordination in cross-border insolvency proceedings while maintaining a delicate balance between the principles of universality and territoriality.[23] Additionally, the recast aimed to improve the functioning of the internal market and facilitate the restructuring of distressed businesses within the EU.

The evolution of European insolvency coordination reflects a commitment to fostering cooperation and coordination among Member States of the EU and a growing recognition of the need for harmonization and cooperation in addressing cross-border insolvency issues. However, full harmonisation is challenging and debtors may seek favourable forums for restructuring services, thereby disparities among Member States will remain.

1.2. Main and Secondary Insolvency Proceedings

The EU's framework for managing debtor's insolvency, as outlined in the EIR, is grounded in the modified universalism approach. This approach seeks to achieve global collective processes with optimal levels of centralization of insolvency proceedings[24] and is predominant in managing cross-border insolvencies.[25] It includes the establishment of one main insolvency proceeding with a universal scope (Recital 22 of the EIR) and secondary insolvency proceedings with a territorial scope (Recital 23 of the EIR), mainly aimed at protecting local creditors. The EIR establishes that the main insolvency proceedings can be opened where the debtor has its centre of main interests and shall be recognised across all EU Member States. In contrast, the secondary proceedings can be opened where there is an establishment.[26] The justification for the modified approach can be found in the Recitals, which acknowledge that 'as a result of widely differing substantive laws, it is

[22] *Supra* n 21, p. 16-17.
[23] Commission Staff Working Document Impact Assessment SWD (2012) 416 final accompanying the document Revision of Regulation (EC) 1346/2000 on insolvency proceedings [2012].
24 Mevorach, I. (2021). Overlapping international instruments for enforcement of insolvency judgments: Undermining or strengthening universalism? *European Business Organization Law Review*, *22*, 283–315. https://doi.org/10.1007/s40804-021-00204-4, p.286
[25] Mevorach I (2018a) The future of cross-border insolvency: overcoming biases and closing gaps. Oxford University Press, Oxford, pp 32–38
[26] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings OJ L 141, 05.06.2015, Article 3 (1), (2) and Article 19.

not practical to introduce insolvency proceedings with universal scope in the entire Community'[27] and that '[t]o protect legitimate expectations and the certainty of transactions in [other] Member States…provisions should be made for a number of exceptions to the general rule.'[28]

The system of cross-border insolvency in the EU is based on the premise of effective insolvency proceedings having cross-border effects.[29] In the context of the EIR, main and secondary insolvency proceedings often involve multiple jurisdictions and assets.[30] Coordinating parallel insolvency proceedings in different member states requires the search for effective tools to achieve such effectiveness, in which cooperation and communication between insolvency practitioners and courts play an important role.[31] This is evident from Article 43 (1) of the EIR which underscores the pivotal role of cooperation between insolvency practitioners and courts "to facilitate coordination of main, territorial and secondary insolvency proceedings". The letter, however, is complicated by the different legal regulations, fragmentation of approaches and diverse business cultures among national states. These and other factors have led to the evaluation of secondary insolvency proceedings by some authors as an obstacle to achieving the aims of the main insolvency proceedings[32]. There were extensive debates among experts about the desirability of secondary insolvency proceedings, who argued that secondary proceedings might unnecessarily complicate the administration, cause coordination and boundary problems and cost increase.[33]

Despite the intention for both types of proceedings to function equally,[34] the Regulation grants primacy to the main insolvency proceedings through various provisions. This position is clearly supported in the case law of the CJEU. Thus, in the *Air Berlin* case, the court stated that 'while the main objective of secondary insolvency proceedings is to protect local interests, main insolvency proceedings produce universal effects in that they apply to the debtor's assets situated in all the Member States. Thus, in that system, and as stated in recital 48 of that regulation, the main insolvency proceedings have a dominant role in relation to the secondary insolvency proceedings. Regulation 2015/848 implements the objective of efficient and effective cross-border insolvency proceedings through the coordination of main and secondary insolvency proceedings, while observing the priority of the main insolvency proceedings.'[35]

---

[27] Regulation 2015/848 supra n 26, Recital 22
[28] Regulation 2015/848 supra n 26, Recital 67
[29] Regulation 2015/848 supra n 26, Recital 8
[30] Virgós-Schmit Report, para. 229.
[31] Jokubauskas, Remigijus; Świerczyński, Marek *The coordination of main and secondary insolvency proceedings in European Union insolvency law* / Remigijus Jokubauskas, Marek Świerczyński International comparative jurisprudence, Vilnius: Mykolas Romeris University. 2022, vol. 8, iss. 1, p. 1-12. DOI: 10.13165/j.icj.2022.06.001, p.2, 6.
[32] Randytė, Jūratė *Rules on jurisdiction in cross-border insolvency proceedings within the EU*, master thesis, p.47.
[33] INSOL Europe. (2012). *Revision of the European Insolvency Regulation*. Retrieved from https://www.insol-europe.org/download/documents/588
[34] B Wessels in Bork and van Zwieten (eds) *Commentary on the European Insolvency Regulation* (2nd edn.), p. 523
[35] Supra n 15, para. 70;

An example can also be found in the procedure for opening the secondary insolvency proceedings. The individuals authorized to request the initiation of secondary insolvency proceedings are listed in Article 37(1) of the EIR, wherein the main insolvency practitioner is granted the power to make such a request. The EIR sets out that secondary proceedings can be opened in a Member State where a debtor has an *establishment.* Article 3 (10) thereof defines an establishment as "any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets". The notion and requirements for establishment are outlined in the 2011 *Interedil* case of the CJEU.[36]

Secondary proceedings are opened to protect the interests of local creditors. The latter were defined by the CJEU in the *Burgo Group SpA c. Illochroma SA and Jérôme Theetten* case as "the legitimate expectation of a creditor to be able to request the enforcement of a right in rem in respect of the assets of a debtor who is part of the establishment concerned, or to be granted other preferential rights, in accordance with the rules applicable in the Member State where that establishment is situated, since those rules were foreseeable for the creditor when the business relationship was established with the debtor"[37]. The objective of protecting these creditors' interests is to ensure the preservation of specific rights, particularly the protection of rights in rem concerning local assets or preferential rights, granted under the national law of the member state where secondary insolvency proceedings are initiated. These rights would not always be safeguarded by the law of the member state where the main insolvency proceedings occur.

Insolvency practitioners appointed in main proceedings not only have the duty to communicate and cooperate but also possess additional rights and powers concerning the secondary proceedings. These rights and powers are aimed at facilitating coordinated treatment of the debtor's estate.[38] Importantly, an insolvency practitioner is empowered to prevent secondary insolvency proceedings by issuing a unilateral undertaking under Article 36(1). This undertaking ensures that assets located in the member state where secondary proceedings could be opened, or proceeds from their realization, are distributed in accordance with national law, preserving creditors' expectations. Cooperation between insolvency practitioners and courts in both main and secondary proceedings becomes imperative to ensure the protection of lawful expectations of local creditors, based on the national law of the member state of establishment.

---

[36] C-396/09, *Interedil Srl v. Faillimento Interedil Srl* CJEU 20 October 2011

[37] C-327/13 *Bu*rgo *Group SpA v Illochroma SA and Jérôme Theetten*, judgement of 4 September 2014, ECLI:EU:C:2014:2158, para. 37.

[38] *Supra* n 34, p. 523.; C-116/11, *Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o*., judgment of 22 November 2012, ECLI:EU:C:2012:739, paras. 40, 60, 72.

Noteworthy, in cross-border cases, the proper exercise of creditors' rights in rem is recognized by the applicable legal rules, which creates an exception to the general lex concursus principle[39]. This exception ensures that the initiation of main insolvency proceedings does not hinder the exercise of rights in rem under *lex causae* (Article 8(1) of the EIR).

The type of proceedings to be opened, whether restructuring or liquidation, will also influence the cooperation and communication between insolvency practitioners and courts. This was evident in the landmark CJEU *Bank Handlowy* case of 2012, where the Court clarified that "it is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation"[40]. Notably, in the absence of legal tools under the previous version of the EIR to deal with situations, where the main insolvency proceedings are aimed at rescuing a business, such as French *suavgarde* proceedings in this case, and secondary proceedings aimed at liquidation, the CJEU relied heavily on the principle of cooperation between the courts dealing with the insolvency problems of the same debtor.

In conclusion, the European approach to cross-border insolvency, as delineated by the EIR reflects the principles of modified universalism, aiming for global collective processes with optimal levels of centralization of insolvency proceedings. While the main insolvency proceedings enjoy primacy in the regulation, secondary proceedings serve to protect the interests of local creditors, ensuring the preservation of specific rights under national law. Despite debates about the necessity and potential complications of secondary proceedings, the Regulation establishes a framework where both types of proceedings are intended to function equally, albeit with certain provisions granting primacy to the main proceedings. Cooperation and communication between insolvency practitioners and courts play a crucial role in both main and secondary proceedings, ensuring the protection of creditors' lawful expectations and facilitating the coordinated treatment of the debtor's estate. Furthermore, the proper exercise of creditors' rights in rem is recognized by applicable legal rules, creating exceptions to the general *lex concursus* principle. The choice between restructuring or liquidation proceedings also influences cooperation and communication, as demonstrated by landmark cases such as the CJEU *Bank Handlowy* case of 2012. Overall, the European approach to cross-border insolvency seeks to balance the interests of all stakeholders while promoting effective and efficient insolvency proceedings across multiple jurisdictions.

---

[39] Jokubauskas, Remigijus; Świerczyński, Marek *The coordination of main and secondary insolvency proceedings in European Union insolvency law* / Remigijus Jokubauskas, Marek Świerczyński International comparative jurisprudence, Vilnius: Mykolas Romeris University. 2022, vol. 8, iss. 1, p. 1-12. DOI: 10.13165/j.icj.2022.06.001, p.3.

[40] Bank Handlowy supra n 38, 2012, para. 63

1.2. The interplay between the duties of coordination, cooperation and communication under the EIR

The EIR incorporates duties of cooperation, coordination, and communication in Articles 41 and 56, which correspond to the provisions of Articles 25-27 of the 1997 UNCITRAL Model Law.[41] This necessitates their distinction and thorough examination. In practice, these duties are significantly intertwined within the EIR framework. However, the EIR does not provide a clear definition or precise boundaries for these duties, leaving the exact meaning of cooperation and communication in cross-border insolvency proceedings somewhat ambiguous.[42]

The Regulation also does not define the concept of coordination, which can be broadly interpreted.[43] Nevertheless, it is important to define that concept to ensure a comprehensive analysis of how IPs and courts interact to manage cross-border insolvencies effectively.

Coordination in cross-border insolvency proceedings often involves informal agreements among stakeholders—primarily insolvency practitioners and courts—regarding the activities necessary to manage the insolvency estate effectively.[44] The best management of the estate varies from case to case and depends on a specific goal of the proceedings, such as maximizing creditors' wealth or the protection of employees. For instance, the insolvency practitioner appointed in the main proceedings can exercise their powers in other EU jurisdictions, provided they comply with local rules. However, these powers are limited by the authority of insolvency practitioners appointed in secondary proceedings over the same assets. In scenarios where value-maximizing liquidation requires the sale of all the debtor's assets in both jurisdictions, the practitioners must coordinate the execution of their powers to ensure effective management and achieve the common interest.

The EIR does not explicitly establish a duty of coordination in a dedicated provision. However, Recital 23 emphasizes the importance of mandatory rules that ensure coordination with the main insolvency proceedings, as this aligns with the Union's goal of achieving unity.[45]

The EIR incorporates these coordination-related rules across various articles that address "cooperation and communication" between insolvency practitioners and courts involved in

[41] UNCITRAL Model Law on Cross-Border Insolvency (New York; 1997), Articles 25-27

[42] Santen, B. (2015). Communication and cooperation in international insolvency: On best practices for insolvency office holders and cross-border communication between courts. *ERA Forum*, *16*(2), 229–240. http://dx.doi.org/10.1007%2Fs12027-015-0398-8

[43] Robert van Galen, *The Recast Insolvency Regulation and Groups of Companies* 16 ERA Forum, 241 (2015).

[44] Casasola, O., and Madaus, S Cross-border Insolvency Protocols: Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast. European Business Law Review (2022), 33 (6). pp. 839-880. ISSN 0959-6941, p.5

[45] Regulation 2015/848 supra n 26, Recital 23.

cross-border insolvency proceedings.[46] The mutual duty to cooperate and communicate is a key aspect of the EIR, facilitating the efficient deployment of debtor's assets and ensuring creditor participation.[47] Recent CJEU decisions highlight the importance of cooperation to prevent conflicting judgments in parallel insolvency proceedings.[48] Effective cooperation, information sharing, and alignment of distributions among insolvency practitioners are also essential for ensuring creditors can participate effectively in all proceedings.

While the EIR does not explicitly mention a "duty of coordination" the need for coordination implies either a duty of cooperation or communication, or both.[49] The relationship between these concepts can be described as follows: coordination requires cooperation, and cooperation requires communication among the parties involved in the insolvency proceedings.

It may be said that the duty to coordinate arises as a consequence of the explicit duties of cooperation and communication imposed on insolvency practitioners and courts involved in cross-border insolvency proceedings.

In summary, the EIR requires insolvency practitioners, together with the courts, to cooperate and communicate with one another in cross-border insolvency proceedings. These duties of cooperation and communication are the foundational elements that enable the principle of coordination to be realized in practice. Insolvency practitioners, particularly those overseeing the main insolvency proceedings, have a series of specific duties and rights that serve to facilitate this coordination. The previous case law of the CJEU, such as *Bank Handlowy*, *Burgo Group SpA c. Illochroma SA and Jérôme Theette* revealed the practical problems of the absence of the common rules of cooperation and coordination of actions in main and secondary insolvency proceedings, especially when they have different characters (bankruptcy or restructuring). The EIL make a step further and address some of the challenges for the courts and insolvency practitioners in such cases by establishing certain rules how main and secondary insolvency proceeding should be coordinated in a coherent way.

The EIR's framework in essence relies on the interplay between the duties of cooperation and communication to achieve the overarching goal of coordinating cross-border insolvency cases. The duty to coordinate is not a standalone obligation, but rather an outcome that emerges from the effective fulfillment of the more fundamental duties prescribed by the regulation.

[46] Regulation 2015/848 supra n 26, Article 41-43, 56-58.
[47] *Supra* n 34, p. 522
[48] CJEU 18 September 2019, Case C-47/18 ECLI: EU:C:2019:754 (Skarb Pánstwa Rzeczpospolitej Polskiej-Generalny Dyrektor Dróg Krajowych i Autostrad v Stephan Riel, acting as liquidator of Alpine Bau GmbH).
[49] Bernard Santen, Communication and Cooperation in International insolvency 16 ERA Forum 229 (2015)

2. COOPERATION AND COMMUNICATION BETWEEN INSOLVENCY PRACTITIONERS AND COURTS

Chapter 2 explores cooperation and communication between insolvency practitioners and courts in cross-border insolvency cases. The chapter begins with an overview of the mechanisms outlined in the EIR, emphasizing their importance in streamlining procedures and fostering collaboration. Following this, Section 2.2 delves into the role of cooperation and coordination in improving efficiency. Section 2.3 looks into coordination in the contects of the treatment of debtor's assets. Through examining case studies and regulatory frameworks, this chapter aims to underscore the crucial interplay between cooperation mechanisms and the efficacy of cross-border insolvency proceedings.

2.1. General overview of mechanisms of cooperation in the EIR

In the context of international insolvency law, the coordination between liquidators and the synchronization of primary and secondary proceedings pose significant challenges. To address this issue, the European Commission has emphasized the importance of establishing a mechanism to ensure cooperation during the preparation of the Recast of the Insolvency Regulation. As a result, the Recast includes articles 41, 42, and 43, which explicitly mandate cooperation among insolvency practitioners, between courts, and between practitioners and courts.

The required cooperation in international insolvency proceedings encompasses a range of forms, including the exchange of relevant information, the examination of restructuring possibilities for the debtor, and the coordination of asset administration and realization.[50] These actions must be consistent with applicable rules to ensure effective coordination and minimize potential conflicts.

Article 43(1) of the EIR establishes three essential duties of cooperation and communication between insolvency practitioners and courts in subparagraphs 1(a), 1(b), and 1(c). Article 43(1) specifically delineates these duties: the first duty is directed at the insolvency practitioner of secondary proceedings, while the second and third duties pertain to insolvency practitioners in territorial or secondary proceedings.

These duties play a crucial role in facilitating the coordination of insolvency proceedings. It can be suggested that the Recast of the Insolvency Regulation has taken a crucial step in addressing the challenges of cooperation in international insolvency proceedings. By mandating

[50] Position of Council At First Reading With a View To The Adoption Of A Regulation Of The European Parliament And Of The Council On Insolvency Proceedings (Recast) of 12 March 2015 Articles 41, 42, 43; OJ C 141, 28.04.2015 http://eur-lex.europa.eu/legal- content/EN/TXT/?uri=uriserv: OJ.C_.2015.141.01.0001.01.ENG

cooperation among insolvency practitioners, courts, and practitioners and courts, the Recast aims to ensure a more coordinated and efficient process for handling cross-border insolvency cases. The specific forms of cooperation outlined in the Recast, such as the exchange of information and examination of restructuring possibilities, are critical components of this coordinated approach.

Notably, the EIR does not explicitly define the specific content of the duty of cooperation, nor does it employ terms such as "coordination," "cooperation," or "communication" with consistent precision. A functional understanding[51] of cooperation within the EIR context suggests that it involves the collaborative efforts of all parties involved in multiple insolvency proceedings. In order to provide precise definitions for the terms used, some scholars have proposed substantive definitions that make it easier to distinguish between them and understand the obligations associated with each classification.[52]

The EIR offers a more detailed framework compared to its predecessor, clarifying potential cooperation methods and thus enhancing the overall mechanisms of transparency and achievability. Despite this, the EUR has faced criticism for its heavy emphasis on information exchange, which some argue falls short of the broader scope of cooperation needed. Effective international proceedings require not just information sharing but also coordination between primary and secondary proceedings and collaborative restructuring efforts.[53]

The language of Article 43, which states that insolvency practitioners "shall cooperate", underscores a binding obligation potentially circumscribed by national insolvency regulations. Given the critical independence and autonomous decision-making capacity of courts, this mandated cooperation does not entail the alignment of judicial decisions. Instead, it focuses on the exchange of pertinent information, which may be crucial for other courts when making informed decisions.

Each of these duties constitutes a substantial or 'strong form' rule, which builds upon established best practices in the field, exemplified by the EU JudgeCo Guideline 4 ("Court to Insolvency Practitioner Communication").[54]

In conclusion, the EIR has made significant strides in addressing the challenges of cooperation in international insolvency proceedings. By mandating cooperation among

[51] Regulation 2015/848 supra n 26, Article 43
[52] Santen, Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts, cit., p. 231.
[53] Norkus R., Kavalne S. Mokslinio tyrimo Pasiūlymo dėl Europos Parlamento ir Tarybos Reglamento, pakeičiančio 2000 m. Gegužės 29 d. Tarybos Reglamentą (EB) Nr. 1346/2000 dėl bankroto bylų, nuostatų galima įtaka bankroto procesams Lietuvoje ir galimas poveikis Lietuvos ekonominiams interesams bankroto srityje galutinė ataskaita [interactive]. Mykolo Romerio Universitetas. Vilnius, 2013 p. 83
[54] *Supra n* 34, p. 563.

insolvency practitioners, courts, and practitioners and courts, the Recast aims to ensure a more coordinated and efficient process for handling cross-border insolvency cases. The specific forms of cooperation outlined in the EIRt, such as the exchange of information and examination of restructuring possibilities, are critical components of this coordinated approach.

2.2. The purpose of cooperation and coordination

Cooperation and coordination among insolvency practitioners and courts are vital for managing an insolvent debtor's assets effectively.[55] The requirement to ensure efficient and effective cross-border insolvency proceedings is a clear indication that the national courts should cooperate between themselves, as well as with insolvency practitioners. Such cooperation aims to increase the overall efficiency of these proceedings.

The principle of efficiency is recognized in the practice of the CJEU. For instance, relying on the requirement for the national law to ensure the effective application of EU insolvency law, the CJEU emphasized that *locus standi* to request the opening of secondary proceedings cannot be restricted to creditors who have their domicile or registered office within the member state in whose territory the relevant establishment is situated, or to creditors whose claims arise from the operation of that establishment[56].

Similarly, in *Bank Handlowy* case Advocate General Kokkot noted that when deciding on the opening of secondary insolvency proceedings, the court having jurisdiction "<…> must take account of the objectives of the Regulation and the effects of the main proceedings, in particular, whether the creditors who were involved in the main proceedings and who consented to a rescue plan would be able to evade their obligations under that plan by instituting secondary proceedings"[57].

Effective cooperation and communication between insolvency practitioners and courts are essential for facilitating the conversion of insolvency proceedings when required. The presence of mechanisms for such conversion is recognized as an international standard in insolvency practices[58]. For instance, when a debtor's viability is restored in the member state where the main insolvency proceedings are held, concurrent secondary liquidation proceedings can undermine this recovery. In this context, Article 51(1) of the EIR plays a critical role. It permits the court of a member state, where secondary insolvency proceedings have been

[55] B. Wessels, "The Quest for Coordination of Proceedings in Cross-border Insolvency Cases in Europe," Insolvency and Restructuring in Germany Yearbook 2008 (Schultze & Braun/F.A.Z.-Institut 2007).
[56] https://curia.europa.eu/juris/document/document.jsf?text=&docid=157359&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5229107 Burgo Group SpA v. …. 2014, para. 51
[57] https://curia.europa.eu/juris/liste.jsf?num=C-116/11&language=EN, para. 68
[58] UNCITRAL. (2005). *Legislative Guide on Insolvency Law*. Retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf , p.231(?)

opened, to convert these proceedings into another type listed in Annex A. This conversion can be requested by the insolvency practitioner managing the main proceedings and is contingent on meeting the conditions set by national law. In ensuring the conversion aligns with the interests of local creditors and maintains coherence between the main and secondary proceedings, Article 51(2) of the EIR allows the court to gather information from insolvency practitioners involved in both proceedings. Consequently, communication becomes pivotal in evaluating the possibility and necessity of conversion, as it is not automatic. The purpose of such communication is to ascertain the fulfilment of cumulative conditions mandated by the EIR, including the listing of the proceeding type in Annex A; meeting the conditions for initiating such proceedings under national law; ensuring appropriateness for local creditors' interests and maintaining coherence between the main and secondary insolvency proceedings.

Having established the goals of communication and cooperation and the overarching importance of efficiency in subsection 2.2, the next subsection delves into how the debtor's assets should be managed to ensure the most efficient outcomes in cross-border insolvency proceedings.

2.3. Coordination of asset treatment to ensure the efficiency of the proceedings

The management of a debtor‘s assets is crucial for insolvency proceedings to be effective. The treament of assets in cross-border insolvency proceedings can be particularly challenging because an insolvency practitioners has to exercise his powers in another jurisdiction and realize the assets or use them in the activities of the company. Treatment of assets in such cases may require not only the knowledge of the national law of the Member State where the assets are located, but also cooperation with the governmental institutions in such state.

When main and secondary insolvency proceedings occur simultaneously and thus it is important to coordinate how the assets are handled to ensure efficiency. Opening secondary insolvency proceedings triggers legal effects regarding the treatment of the debtor‘s assets and the applicable law. According to Article 20(1) of the EIR, assets falling under secondary insolvency proceedings are isolated from the legal effects of the main proceedings. This means that the law governing the main proceedings (*lex concursus*) does not apply to secondary proceedings. Instead, the treatment of assets in the member state where secondary proceedings are opened is governed by the law of that member state.

As highlighted in the Virgós & Schmit Report, once territorial proceedings begin, the liquidator in the main proceedings loses authority over assets in the state where territorial proceedings are initiated. The liquidator in the territorial proceedings gains exclusive authority over those assets. Although the insolvency practitioner in the main proceedings doesn't have

exclusive control over assets in the member state where secondary proceedings are opened, proper cooperation between practitioners in both proceedings is necessary (Article 41 of the EIR). Recital 23 of the EIR and Article 2(2) and Article 34 reaffirm that the effects of secondary insolvency proceedings are limited to assets located in the member state where those proceedings are initiated. This principle is well-established in cross-border insolvency law. For example, Article 28 of the UNCITRAL Model Law on Cross-Border Insolvency (1997) also recognizes that the effects of secondary insolvency proceedings are confined to assets in the state where those proceedings are opened.

The EIR introduces specific provisions to this principle. Firstly, upon request from the main insolvency practitioner, the court opening secondary proceedings can temporarily halt asset realization. Additionally, the court overseeing secondary proceedings can instruct the main insolvency practitioner to take actions safeguarding creditors' interests. This pause in asset realization can last up to three months, extendable upon renewal.[59] Secondly, if secondary proceedings involve liquidation, the remaining assets must promptly transfer to the main proceedings' practitioner. This ensures assets are used to satisfy creditors' claims, with no provision for other purposes like shareholder distribution.

A key issue arises in determining the treatment of assets and the allocation of international jurisdiction between courts overseeing main and secondary insolvency proceedings when actions regarding asset legal status or ownership are submitted to courts in different member states. In the *Nortel Networks SA* (2015) case, an action to declare specific assets as part of secondary insolvency proceedings was brought forth, prompting questions about its jurisdiction.[60] Firstly, the CJEU affirmed that courts in the member state where secondary proceedings are opened have jurisdiction over actions related to those proceedings and the debtor's assets within that territory. Secondly, the Court determined that actions concerning the delineation of assets for secondary proceedings fall within the jurisdiction of courts in the member state where those proceedings are opened, as they pertain to the protection of interests addressed in secondary proceedings. Thirdly, the CJEU held that both courts overseeing main and secondary proceedings share concurrent jurisdiction to determine assets falling under secondary proceedings. This decision, while addressing the goals of both proceedings, introduces coordination challenges and potential conflicts in jurisdiction and enforcement of judgments, as the EIR lacks rules on concurrent litigation. Although concurrent jurisdiction does not fall within the scope of this master thesis, this case demonstrates that failure to provide a clear solution to avoid other issues, such as concurrent jurisdiction, may cause procedural

[59] Article 36 (1)
[60] Nortel Networks SA (2015)

inefficiency and dispute fragmentation, which hinders further cooperation between different proceedings.

The recent case law of the CJEU also reveals the challenges of the treatment of assets and cooperation between insolvency practitioners in cross-border insolvency cases. In the case *Air Berlin* the question arose whether the insolvency practitioner in the secondary insolvency proceedings may bring an action to set aside against an act that was performed by the insolvency practitioner in the main insolvency proceedings. Though the EIR is silent on such matter the situations may occur when an insolvency practitioner appointed in secondary insolvency proceedings does not agree with the decision of insolvency practitioner in main insolvency proceedings regarding the treatment of assets, for instance, removal of assets from the Member State where secondary insolvency proceedings were opened. The CJEU found that the EIR does not prohibit an insolvency practitioner in the secondary insolvency proceedings from bringing an action to set aside against an act of the insolvency practitioner in the main insolvency proceedings if it considers that action to be in the interests of the creditors and this found that such action is compatible with Article 21(2) of the EIR.[61]

To summarise, the EIR mandates cooperation among insolvency practitioners, courts, and between practitioners and courts through articles 41, 42, and 43. These mechanisms encompass various forms of cooperation, including information exchange, restructuring examination, and asset coordination. However, the EIR lacks explicit definitions of cooperation, leading to ambiguity.

Despite criticism for its emphasis on information exchange, the EIR offers a detailed framework compared to its predecessor. Cooperation and coordination are essential for managing insolvent debtors' assets effectively. Managing assets in cross-border insolvency cases presents challenges, with remedies including a temporary stay in asset realization and transfer of remaining assets to the main proceedings' practitioner.

Recent CJEU case law highlights the complexities of asset treatment and cooperation in cross-border insolvency cases. Clear guidelines within the EIR are essential to address these complexities and ensure smooth cross-border insolvency proceedings.

[61] Judgment of the CJEU of 18 April 2024 in case Joined Cases C-765/22 and C-772/22, para. 84-86.

3. FORMS AND METHODS OF COOPERATION IN CROSS-BORDER INSOLVENCY PROCEEDINGS

This Chapter examines the various forms and methods of cooperation between Insolvency Practitioners (IPs) and Courts under the recast European Insolvency Regulation (EIR). Articles 41 and 56 of the EIR Recast indicate that cooperation between administrators can take any form, recognizing the diverse legal and procedural landscapes across member states. This flexibility helps practitioners collaborate effectively, using both formal and informal methods, without being constrained by specific legal requirements.

3.1. Duty to communicate information under the EIR

The efficacy of cooperation in cross-border insolvency proceedings is contingent upon the willingness and capabilities of practitioners to collaborate effectively.62 When the European rules mention "communication," they are referring to the minimum level of collaboration, which involves only exchanging relevant information.[63] However, the lack of formal guidelines within the EIR regarding exchanging information leaves practitioners to determine the most effective and cost-efficient methods. A key aspect of cooperation under the EIR is the timely and comprehensive exchange of information between insolvency practitioners involved in proceedings concerning the same debtor.64 Despite the envisaged creation of interconnected registries for notifying the commencement of insolvency proceedings, this mechanism appears inadequate for facilitating information exchange once proceedings are underway.[65] Consequently, practitioners have advocated for the evolution of this system to streamline information exchange practically.

The obligation to exchange information, as outlined in the EIR, mandates insolvency practitioners to relay relevant information to their counterparts engaged in other proceedings 'as soon as possible'.[66] The prescribed timeframe for this exchange varies and depends on factors such as translation requirements and the urgency of the information in question.[67] However, what does this duty mean? How fast should insolvency practitioners exchange the relevant information? The absence of concrete explanation in the EIR suggests that the exercise

[62] Crawford, Carruthers, *International Private Law: A Scots Perspectove,* Edinburgh, 2015, p. 659.
[63] Santen, Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts, cit., p. 232.
[64] Mankowski, Art. 41 Zusammenarbeit und Kommunilation der Verwalter, cit., Rn. 10.
[65] I Queirolo and S Dominelli, 'Cooperation between Authorities and Insolvency Office Holders' in I Queirolo and S Dominelli (eds), European and National Perspectives on the Application of of the European Insolvency Regulation, Scritti de Diritto Privato Europeoe Internazionale, Volume 18 (Aracne editrice 2017) p. 147.
[66] Regulation 2015/848 supra n 26, Article 41(2)(a)
[67] *Supra* n 34, p. 552.

of such duty should be carried out diligently considering the need of effectiveness of cross-border insolvency proceedings. Also,

The duty of communication serves as a mechanism to implement the broader cooperation duty among insolvency practitioners and courts.[68] Article 41(2)(a) of the EIR requires insolvency practitioners to communicate relevant information promptly, covering updates on claim submission and verification, and restructuring measures, while also ensuring arrangements for safeguarding confidential information.[69]

The exchange of information is subject to the condition of protecting confidential data, vital to save companies and businesses in the modern world.[70] A teleological interpretation suggests that this provision indirectly requires administrators to reach agreements on data protection, rather than being a mere factual precondition, which would be contrary to the principle of *effet utile.*[71]

The obligation to exchange relevant information or seek data protection agreements is circumscribed by domestic laws governing the proceedings. If the transfer of information is prohibited by the relevant procedural laws, the cooperation obligation falls within the exception outlined in Article 41(1) of the EIR. It is important to note that domestic legislations cannot invoke this exception to stress the objectives of the regulation.[72]

In addressing the challenge of determining confidentiality, fundamental principles indicate that public information is not considered confidential.[73] Agreements should not be concluded prior to the exchange of such information. Additionally, debates arise concerning the confidentiality of information, particularly in cases where information is commercially and practically sensible.[74] However, the absence of a comprehensive list of non-confidential information poses challenges, given the need to consider practical elements and the laws of the states where insolvency proceedings occur.

---

[68] Bernard Santen, Communication and Cooperation in International insolvency 16 ERA Forum 229 (2015), p. 231
[69] Regulation 2015/848 supra n 26, Article 41(2)(a)
[70] Wessels, *Cooperation and Sharing of Information Between Courts and Insolvency Practitioners in Cross-Border Insolvency Cases, cit., p. 789.*
[71] I Queirolo and S Dominelli, 'Cooperation between Authorities and Insolvency Office Holders' in I Queirolo and S Dominelli (eds), European and National Perspectives on the Application of of the European Insolvency Regulation, Scritti de Diritto Privato Europeoe Internazionale, Volume 18 (Aracne editrice 2017) p. 148.
[72] Virgós, Garcimartín, The *European Insolvency Regulation: Law and Practice*, cit., p. 234.
[73] I Queirolo and S Dominelli, 'Cooperation between Authorities and Insolvency Office Holders' in I Queirolo and S Dominelli (eds), European and National Perspectives on the Application of of the European Insolvency Regulation, Scritti de Diritto Privato Europeoe Internazionale, Volume 18 (Aracne editrice 2017) p. 149.
[74] Wessels, Virgós, INSOL Europe, European Communication and Cooperation Guidelines for Cross-Border Insolvency, 2007, also published in PANNEN (ed.), Europäische Insolvenzverordnung: Kommentar, Berlin, 2007, p. 876, Guideline 7.5.

The lack of clarity on what happens if an agreement on information exchange is not reached raises concerns.[75] The EIR does not provide an effective mechanism to ensure the surrender of confidential information by secondary administrators. Although written agreements or protocols may offer guidance, their enforceability within the European judicial framework is uncertain.

The issue is complicated by the necessity for protocols to be consistent with the laws applicable to all involved proceedings. This has the potential to limit the occasions of formal cooperation agreements. In that respect, it was suggested that insolvency officeholders should consider informal contact with the court to ascertain possible limits on such agreements, particularly in legal orders where protocols are uncommon.[76]

The absence of sanctions under the EIR Recast raises questions about the enforcement of cooperation duties.[77]

According to the Virgos/Schmit Report, legal scholars generally agree that *lex fori concursus* in which the non-compliant practitioner is involved would determine whether and how they can be compelled to fulfil cooperation obligations and be held responsible for not doing so.[78] For example, determining the liability of a Dutch insolvency trustee (curator) in a Dutch bankruptcy proceeding (faillissement) for failing to fulfill cooperation obligations under the EIR falls under Dutch law, which regulates practitioners' liability through general tort norms.[79]

Similarly, the liability of insolvency practitioner in Germany (a German Insolvenzverwalter) (insolvency administrator) is governed Article 60 of Insolvenzordnung (InsO). This section of German law specifically outlines rules regarding the liability of Insolvenzverwalter for breaching their duties under the InsO. While the EIR outlines cooperation duties, the actual enforcement and liability for non-compliance depend on the laws of the country where the insolvency proceedings take place.

While some argue that domestic laws should not frustrate the regulation's effectiveness, others emphasize the need for smooth information exchange. The absence of punitive measures could undermine the incentive for compliance with cooperation duties. Thus, achieving a

---

[75] Mankowski, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 13 ff

[76] Koutsoukou, Part 2: Cooperation Between Main and Secondary Proceedings – Protocols, cit., p. 87 ff.

[77] Mankowski, Art. 41 Zusammenarbeit und Kommunikation der Verwalter, cit., Rn. 87 ff., MÄSCH, Art. 31 EG-InsVO, cit., p. 1212 f., and PANNEN, RIEDERMANN, Artikel 31, cit., p. 469.

[78] André Berends, Grensoverschrijdende insolventie(Uitgeverij Paris 2017) 170; Konold (n 107) 125–126; Himmer (n 9), 334; Skauradszun and Spahlinger (n 17), §41.09 and 56.12; Vallender/Hermann EuInsVO, 2. Aufl. 2020, §56.37; MüKoInsO/Reinhart 4. Aufl. 2021, VO (EU) 2015/848, §56.09; Braun/Honert EuInsVO, 9. Aufl. 2022, §59.23; Kübler/Prütting/Bork EuInsVO, 96. Aufl. 2023, §56.22. See also in relation to the CoCo obligations included in Article 41, Recast EIR, Graf-Schlicker/Borneman EuInsVO, 6. Aufl. 2022, §41.23–26; Braun/Delzant, EuInsVO, 9. Aufl. 2022, §41.26.

[79] Article 6:162, Dutch Civil Code.

balance between regulatory effectiveness and harmonious information sharing remains a key challenge.

Regarding the content of shared information, Article 41(2)(a) of the EIR Recast provide a non-exhaustive list, favouring quick and cost-effective informal exchange. Article 42(2)(a) extends this communication obligation to encompass "any" relevant information, although specific examples are provided thereafter. Insights into the scope of this information exchange are provided in the Virgós-Schmit Report, which further elaborates on the scope of this information exchange, suggesting that it should cover topics such as the debtor's assets, actions to recover assets, liquidation possibilities, lodged claims, verification and disputes of claims, ranking of creditors, planned reorganization measures, proposed compositions, plans for the allocation of dividends, and the progress of operations in the proceedings.[80] This comprehensive list underscores the multifaceted nature of the information that needs to be shared to achieve effective cooperation. Parties should inform each other of any necessary formal requirements imposed by local laws to ensure compliance with rules of evidence in court proceedings.

The EIR refrains from prescribing specific means of communication and cooperation, providing courts and insolvency practitioners with autonomy in determining suitable channels.[81] This flexibility may be justified by the need to ensure adaptability to varying procedural contexts and allowing courts and insolvency practitioners the freedom to choose appropriate channels.

The EIR explicitly prohibits courts from imposing costs or fees among themselves to prevent disincentivizing communication and cooperation.[82] However, it allows for the incorporation of communication costs within the broader framework of court fees under national insolvency laws. Similarly, costs incurred by insolvency practitioners or courts in facilitating cooperation and communication are deemed inherent expenses of the respective insolvency proceedings.[83]

In summary, the EIR obliges insolvency practitioners to share relevant information with their counterparts engaged in similar proceedings without delays. This requirement aims to enhance collaboration and facilitate the exchange of essential details, such as claim submissions and restructuring efforts. However, challenges arise in ensuring the protection of confidential data and clarifying the consequences of failing to reach agreements on information sharing. The

[80] 1996, para. 230
[81] Regulation 2015/848 supra n 26, Article 41(1), Article 43(3)(b) and Article 57(2)(b).
[82] Regulation 2015/848 supra n 26, Article 44
[83] Casasola, O., and Madaus, S Cross-border Insolvency Protocols: Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast. European Business Law Review (2022), 33 (6). pp. 839-880. ISSN 0959-6941, page 10

absence of sanctions under the EIR raises questions about how cooperative duties will be enforced, highlighting the need to balance regulatory effectiveness with practical information exchange. Despite the flexibility granted in choosing communication methods, the Regulation emphasizes the importance of considering costs to encourage cooperation among courts and practitioners.

The emphasis on information exchange in the EIR may not fully address broader coordination needs in complex international proceedings involving multiple entities. Effective international insolvency proceedings require not only information sharing but also comprehensive coordination between primary and secondary proceedings, collaborative restructuring efforts, and the resolution of conflicts of interest.

Building upon the obligation to exchange information outlined in the EIR, the next section delves into insolvency protocols and agreements. Expanding on the need for effective cooperation highlighted earlier, this part examines how formalized protocols and agreements improve communication and collaboration among insolvency practitioners.

3.2. Insolvency protocols as a method of cooperation between IPs and courts

3.2.1. Definition

The duty of cooperation in cross-border insolvency proceedings introduces a new concept known as "protocols." According to Recital 49 of the EIR Recast, these agreements can take various forms, including written or oral, and vary in scope, from general to specific, as well as involve different parties.[84]

It is crucial to distinguish between various instruments utilized to facilitate communication and cooperation in cross-border insolvency proceedings. These instruments can be classified into two main categories.

Firstly, there are "cross-border insolvency agreements", as defined by the United Nations Commission on International Trade Law (UNCITRAL). They are agreements, either oral or written, designed to coordinate cross-border insolvency proceedings and promote cooperation among courts, insolvency representatives, and other involved parties.[85]

On the other hand, the frequently employed term 'protocols' often refers to agreements established by courts or integrated into court orders to coordinate and endorse agreements between insolvency representatives.[86]

[84] Regulation 2015/848 supra n 26, Recital 49
[85] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, New York, 2010, p. 4.
[86] Koutsoukou, Part 2: Cooperation Between Main and Secondary Proceedings – Protocols, in the Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013- /JCIV/AG/4679, 2016, p. 85.

The EIR does not provide a specific definition of 'protocol'. In practice, it is used to refer to various forms of cooperation, including agreements or protocols between insolvency practitioners, as well as court-approved protocols.[87]

These protocols and agreements serve the ultimate goal of facilitating cooperation in general.[88] Some of the key functions of protocols include promoting certainty and efficiency in managing proceedings, clarifying parties' expectations, reducing disputes and aiding in their resolution, preventing jurisdictional conflicts, facilitating restructuring, achieving cost savings by avoiding duplication of effort and unnecessary delays, promoting mutual respect for court independence, fostering international cooperation and understanding among judges and insolvency representatives, and contributing to maximizing the value of the estate.[89]

Often protocols are distinguished between specific to generic. Additionally, these agreements can vary in terms of their level of involvement, ranging from simple communication to more formal coordination and cooperation. Further, they may differ in their legal enforceability, with some agreements being non-binding while others are legally binding. This classification is not exhaustive and it can be said to derive from the flexible nature of developed practices in cross-border insolvency proceedings regarding protocols.

In summary, the flexibility and broad usage of the terms "protocol" and "agreement" allow for various forms of cooperation to be encompassed within them. These agreements may involve different degrees of involvement and legal enforceability, ranging from simple communication to binding agreements.

3.2.2. The legal nature of protocols

Understanding the phenomenon of protocols contributes significantly to the academic discussion of their legal nature. Further, a better understanding of the legal nature of protocols might encourage their wider use across the EU Member States.[90]

Protocols are the most commonly used method for establishing cross-border cooperation among business enterprise groups.[91] They are used to address various issues related to procedural coordination, court-to-court communication, as well as some substantive issues.[92]

As a general rule, protocols are not legally binding, but they serve to convey information and express the parties' willingness to act in a specific way when fulfilling their responsibilities as

[87] Regulation 2015/848 supra n 26, Article 41 (1), 42 (3)(e).
[88] Regulation 2015/848 supra n 26, Recital 49
[89] Practice Guide, part III/A para 8.
[90] Kokorin and Wessels, para. 6.22, p. 83.
[91] Janis Sarra, Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings, 44 Tex Intl L J 547, 547-48 (2008), 562.
[92] IBID Janis Sarra, Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings, 44 Tex Intl L J 547, 547-48 (2008), 562-72.

insolvency practitioners. Article 56(2) of the EIR permits protocols, but they're not obligatory.[93] However, if parties explicitly agree to be bound by the terms of the protocol, it may indeed become legally binding, establishing obligations for all involved.

Scholars such as Gabriel Moss and Raffaele L. Mangano highlight the significance of the EIR Recast's explicit acknowledgement of protocols since it provides reassurance to continental judges who may be hesitant about supporting such agreements without clear legal authorization.[94]

The cross-border element of protocols results in their resemblance with the treaties that oversee the resolution of conflicting rights across various jurisdictions. However, although some scholars have described protocols as "case-specific, private international insolvency treaties"[95], the prevailing view is that such description does not correctly reflect their nature because protocols are not binding on courts, and each principal can refuse to adopt them.[96]

It is more accurate to consider protocols as contracts between the various principals in an insolvency case. As such, the parties may agree to be bound by the terms of the protocol which would transform it into a legally binding contract. Notably, such protocols would almost always be considered binding, according to modern practice.

As stated previously, protocols are "agreements entered into for the purpose of facilitating cross-border cooperation and coordination of multiple insolvency proceedings in different States concerning the same debtor".[97] Despite not having a specific format, the written format prevails in practice due to its certainty and enforceability.[98]

Usually, protocols are negotiated by key parties and endorsed by the relevant courts who oversee the proceedings.[99] Importantly, it is crucial to differentiate between protocols concluded by insolvency practitioners and those issued by courts.

When insolvency courts issue a protocol, guideline, or principles for court-to-court communication, it is a decision made either for a specific case or as a general rule. These decisions are subject to the *lex fori* and, in insolvency cases, the lex fori concursus. Legally, these court-

[93] *Supra* n 18, Article 41
[94] Moss, Smith, Commentary on Regulation 1346/2000 and Recast Regula- tion 2015/848 on Insolvency Proceedings, in MOSS, FLETCHER, ISAACS (eds.), Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings, Oxford, 2016, p. 482 f., art, 41; Bork, Mangano, European Cross-Border Insolvency Law, cit., p. 211.
[95] Evan D. Flaschen and Ronald J. Silverman, Cross-BorderInsolveng CooperationProtocols, 33 Tex Ind L J 587, 589-91 (1998)
[96] Sexton, Anthony V. (2012) "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," Chicago Journal of International Law: Vol. 12: No. 2, Article 10. p. 818
[97] Practice Guide, part III/A para 4
[98] Practive Guide, para. 24
[99] Janis Sarra, Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings, 44 Tex Intl L J 547, 547-48 (2008), 563.

issued protocols are considered unilateral acts which determine modalities of communication[100] and serve as internal decisions on procedural matters that are made public.

They do not necessarily impact the substantive rights of the parties involved. The above identification of the legal nature of court-issued protocols contrasts with protocols concluded by insolvency practitioners, which tend to be regarded as contracts for several reasons[101]. Thus, similar to contracts, the process for establishing such protocols relies on the mechanism of agreement. All involved parties must reach a consensus on the protocol's content and finalize the agreement. Discussions regarding the validity of this consensus, the interpretation of the provisions, and the applicable private international law rules would be grounded in the contractual nature of these protocols.[102] On the other hand, protocols serve a procedural purpose by helping parties fulfill their responsibilities in insolvency proceedings, with the ultimate goal of facilitating coordination in cases of concurrent insolvency proceedings. Their content is restricted by the laws governing insolvency proceedings,[103] and the involved parties are typically insolvency officeholders. This procedural context ties their nature to public law instruments, rather than purely to contract law.

If duties outlined in the protocols are violated, the situation may indeed constitute a breach of contract. The determination of whether a breach has occurred and the appropriate remedies would depend on various factors, including the specific terms of the protocol, applicable contract law principles, and the jurisdiction in which the breach occurred. In such instances, the aggrieved party may pursue legal action to seek remedies for the breach, such as damages or specific performance.

Some authors suggest understanding protocols as memoranda of understanding emphasizing transformative nature of protocols and their effectiveness despite their non-binding nature.[104]

To summarise, the legal nature of protocols in cross-border insolvency proceedings revolves around their binding status and the implications of violations. While protocols are typically not inherently binding, insolvency practitioners have the option to agree to be bound by their terms. In cases where parties explicitly agree to the terms of the protocol, it transforms into a legally

[100] "Modalities for court-to-court communications" of the Judicial Insolvency Network, available at https://jin-global.org/modalities.html

[101] Sexton, Anthony V. (2012) "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," Chicago Journal of International Law: Vol. 12: No. 2, Article 10. p. 818

[102] Kokorin and Wessels, para. 7.10 ff and 7.19 ff. See also Bob Wessels, International Insolvency Law Part II, Wolters Kluwer, 4 th ed. [2017], para. 10843q, p. 581.

[103] Salvatore Orlando and Giuseppina Capaldo, *The Legal Nature of the Insolvency Protocols between Insolvency Practitioners under the EIR 2015/848 and t he "comply or explain" regime*, in Daniele Vattermoli, Stephan Madaus, Federica Pasquariello, Andrés Recalde Castells, p. 16.

[104] Casasola, O., and Madaus, S. "Cross-border Insolvency Protocols: Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast." European Business Law Review, vol. 33, no. 6, 2022, pp. 839-880. ISSN 0959-6941, p.47.

binding contract, establishing obligations for all involved parties. In this case, breaches of its terms may give rise to legal consequences applicable to breach of contractual obligations.

3.2.3. Practical implementation of insolvency protocols

Member States' insolvency laws and national courts are tasked with enforcing the obligations of coordination and cooperation. In the context of insolvency proceedings, the effective implementation of protocols is crucial, given the vagueness in coordination, cooperation, and communication rules within the current legal framework. Enforcing the duties of coordination and cooperation is the responsibility of Member States' insolvency laws and national courts. This section of master thesis examines the practical application of protocols and evaluates their effectiveness in achieving the objectives of cross-border insolvency proceedings.

Protocols or insolvency agreements have become an essential tool in cross-border insolvency proceedings, aimed at developing case-specific solutions in accordance with the applicable lex fori concursus, and indeed they are better places to provide case-specific solutions, rather than model laws or guidelimes.[105]

One of the primary functions of insolvency protocols is to streamline the administration of the proceedings. In cross-border cases, different jurisdictions often have varying legal requirements and procedures, which can complicate the management of the insolvency process. Protocols or insolvency agreements can facilitate the administration of the proceedings and contribute to maximization of the value of the insolvency estate.[106]

Protocols help create a coherent framework that aligns the activities of insolvency practitioners from different jurisdictions, ensuring that the proceedings are conducted in a more coordinated and efficient manner.[107]

Cross-border insolvency cases can be particularly resource-intensive due to the complexities involved in navigating multiple legal systems. Protocols may contribute to the reduction of administrative costs. For instance, in the Everfresh case, the implementation of an insolvency protocol led to an estimated 40% increase in the aggregate value of the insolvency estate.[108] This example highlights the potential financial benefits of adopting well-structured protocols in cross-border insolvency proceedings.

Additionally, protocols play a crucial role in preventing disputes or conflicts between insolvency practitioners. In the absence of a clear framework, conflicts can arise due to differences

[105] Kamalnath, Cross-Border Insolvency Protocols: A Success Story?, International Journal of Legal Studies and Research (IJLSR) 2013, 172, 173, 186.
[106] Wessels, Cross-border insolvency agreements: what are they and are they here to stay?, in Faber et all (eds.), Overeenkomsten en insolventie (2012), p. 359, 370.
[107] *Ibid.*
[108] 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 28

in legal standards, priorities, or approaches between jurisdictions. Protocols establish agreed-upon guidelines and procedures, reducing the likelihood of such conflicts and promoting a more collaborative working relationship among practitioners.

Protocols or insolvency agreements are particularly crucial when a debtor's assets are spread across multiple jurisdictions or when the insolvency estate is particularly complex. 304 These agreements are also essential when a debtor's assets are intermingled, such as in cases where a common cash management system is in place.109 However, the use of insolvency protocols may not be appropriate if the debtor's assets are limited, as the benefits may not justify the additional complexity and costs involved.[110] This is without prejudice to the requirement that the debtor's assets must be sufficient to cover the expenses of the conclusion and implementation of the protocol.

In practical terms, the initial part of an insolvency agreement or protocol usually details the case background and the rationale behind the agreement's formulation. This introductory section is crucial as it provides context and explains why the protocol is necessary. For example, the Lehman Brothers protocol[111] featured a section called "Need for a Cross-Border Insolvency Protocol," which underscored the "global and integrated nature" of Lehman's business operations across various jurisdictions. Including such an explanatory section can greatly improve the likelihood of judicial approval for the protocol or agreement and can also help mitigate objections from creditors during court proceedings.[112]

Including a clear and comprehensive background section in an insolvency agreement or protocol can address potential concerns from the court and creditors. It provides a detailed explanation of the necessity and benefits of the protocol, demonstrating how it facilitates better coordination and efficiency in managing the insolvency proceedings. This, in turn, can help ensure smoother administration and reduce the likelihood of disputes or conflicts arising from misunderstandings or lack of information. Moreover, by fostering cooperation and minimizing conflicts, protocols can reduce administrative costs and contribute to the maximization of the value of the insolvency estate. They enable more effective asset management and recovery, ultimately benefiting creditors and other stakeholders. The example of the *Lehman Brothers* protocol underscores the significant positive impact that well-structured insolvency agreements can have in complex cross-border cases.

[109] 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 25 ff.
[110] Berends, Insolventie in het internationaal privaatrecht (2005), 53.
[111] Lehman Protocol, p. 3 f.
[112] 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p.130.

Still, protocols in European civil-law countries are less common compared to the United States.[113] Empirical research reveals that practitioners operating within continental civil law legal frameworks often lack familiarity with various types of instruments for cooperation. In Italy and Bulgaria, practitioners don't have much direct experience with cooperation agreements, even though they work with others in cooperation. In contrast, in some countries, there's been more use of protocols or similar instruments to enhance coordination in cross-border administration of insolvency cases[114] and make them less confrontational in case of different legal procedures. [115] Nevertheless, there are lot of unresolved issues. For example, in Germany, practitioners expressed concerns regarding language barriers and a lack of best practices. [116]

One interesting example is the protocol in the 1998 *AIOC* case involving a U.S.-Swiss debtor, which outlined that the Swiss administrator would ensure claims filed in the U.S. case were recognized in the Swiss counterpart, avoiding extra filings.[117] It provided for approval from the Swiss administrator before settling with certain banks to maintain consistency in claims. The protocol also tried to define which court had jurisdiction over different aspects of the case. It stated that the administration and the disposition of the assets belonging to the holding company would be subject to the joint jurisdiction of the two courts, the Swiss court would have exclusive jurisdiction over the subsidiaries incorporated in Switzerland, irrespective of the location of their assets, and that the U.S. court would have jurisdiction over all other companies belonging to the group. However, it didn't clarify consequences for not obtaining approval, weakening joint jurisdiction. This example shows that in cross-border insolvency cases, protocols help establish a coherent framework for managing assets and proceedings across different jurisdictions. They ensure that the actions of insolvency practitioners are aligned and coordinated, reducing the risk of conflicting legal requirements and procedural discrepancies. This alignment is particularly important in complex cases where assets and operations span multiple countries, as it helps streamline processes and enhance overall efficiency.

[113] Matias Wittinghofer, Der Nationale unde International Insolvenvezverwaltungsvertrag: Koordination Paralleler Insolvenzverfahren durch Ad Hoc-Vereinbarungen (Gieseking Verlad, 1st ed. 2004). UNCITRAL, Practice Guide on Cross-Border Insolvency Cooperation, 115-40

[114] Esplugues Mota, Procedimientos de insolvencia transfronterizos, in Esplugues Mota (dir.), Derecho del Comercio Internacional, Valencia, 2015, p. 387, p. 389

[115] Expert Committee Report on Cross-Border Insolvency Access and Recognition, Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies, in International Insolvency Review, 1996, p. 140, p. 151.

[116] I Queirolo and S Dominelli (eds), European and National Perspectives on the Application of of the European Insolvency Regulation, Scritti de Diritto Privato Europeoe Internazionale, Volume 18 (Aracne editrice 2017) p. 121.

[117] Evan D. Flaschen & Romand J. Silberman, Cross-Border Insolvency Cooperation Protocols, supra n 30, p. 593.

Another example was the protocol in the *Sendo International* case.[118] The protocol was concluded between British administrators and French liquidators, simultaneously dealt with by courts in London (main proceedings) and Nanterre (secondary proceedings). It was a private agreement between the representatives of the two proceedings and wasn't approved by the courts involved. Rather than creating new rules, it interpreted and added to existing rules of the EU Regulation on how courts cooperate. This approach is evident in the recitals, where the parties acknowledged the broad principles outlined in the Regulation and sought to establish practical means of coordination. For example, the protocol's interpretation of Article 40 focused on notifying only the British representative, who would then inform English creditors. Similarly, provisions regarding Article 32 and Article 33 were tailored to specific circumstances, such as not lodging British claims in French proceedings due to minimal assets, and refraining from requesting a stay of the liquidation process before the French court. In essence, the Sendo protocol operated within the flexibility allowed by the E.U. Regulation, without introducing new regulatory frameworks.[119]

A comparable approach to cross-border insolvency proceedings was taken by the signing of the non-binding protocol known as the "French-Italian Protocol". This protocol, jointly entered into by the Italian Bar Association, the Italian Association of Public Accountants, and the French Association of Bankruptcy Receivers and Administrators, aimed to provide general guidelines rather than addressing a specific bankruptcy case. It's noteworthy that the protocol explicitly acknowledges the supremacy of both E.U. and domestic laws over its provisions, thereby making it non-binding.

Like the Sendo Protocol, the French-Italian Protocol also interprets and supplements certain provisions of the E.U. Regulation. Notably, it addressed issues such as notice to foreign creditors and lodging claims in foreign proceedings, verifying proofs of claims, staying secondary proceedings, and distributing proceeds. The French-Italian protocol serves as an example that the effectiveness of protocols ultimately depends on the willingness of parties to adhere to its recommendations within the framework of existing legal regulations.

A notable example of a protocol, which was however not approved, occurred in the case of *Lernout & Hasupie Speech Products*, where the debtor, a company incorporated in Belgium and headquartered in Delaware with most of its assets in the U.S., initiated parallel bankruptcy proceedings in Belgium and Delaware. A significant issue emerged regarding a claim filed by a creditor, which needed to be treated as a subordinated claim in the U.S. case under § 510(b) of the

[118] Protocol Agreement for The Coordination of A Main Insolvency Proceeding With A Secondary Insolvency Proceeding Filed In Conformity With European Regulation N° 1346-2000 Of 29 May 2000
[119] Bob Wessels, Bruce a. Markell & Jason j. Kilborn, p. 189

Bankruptcy Code and as a general unsecured claim in the Belgian case. The debtor obtained an injunction from the U.S. bankruptcy court to prevent the creditor from pursuing its claim in the Belgian case.[120] However, the Third Circuit reversed this order, deeming it an impermissible interference in Belgian jurisdiction, and sent the case back to the bankruptcy court for comity considerations.[121] In its ruling, the Court of Appeals explicitly referenced the protocol adopted in the *Maxwell* case and strongly recommended that dialogue or attempts at agreement between courts of different jurisdictions be pursued to resolve such matters. Specifically, the Court urged communication between courts regarding cooperation or the drafting of a protocol, emphasizing its potential benefit for the orderly administration of justice.[122]

Despite this, the Belgian court declined, citing concerns about violating Belgian public order, as Belgian law prohibits creditors' subordination. Consequently, without a protocol in place, the Delaware Bankruptcy Court approved a reorganization plan directing a portion of recovered assets to the Belgian estate for the benefit of Belgian creditors, including Stonington. The district court later affirmed this decision, noting that while coordination with the Belgian court was recommended, it was not mandatory. Consequently, the failure to agree on the claim's priority led to Belgian creditors receiving only the portion of proceeds determined unilaterally in the US.

In considering the approach of the EIR, it is often regarded as a rule-based approach, unlike the UNCITRAL Model Law. Due to this, it may be criticized for its lack of flexibility in addressing specific case circumstances. Despite this, the EIR has the advantage of reducing uncertainties associated with cross-border proceedings and lessening the need for parties to establish coordination rules individually, as these are largely predetermined by the Regulation itself. Essentially, protocols adopted within the EIR aim to address the inflexibilities inherent in its rule-based approach, rather than exercising discretionary powers. These protocols often interpret ambiguous provisions or clarify those provisions which are considered too general in the EIR.

In conclusion, this section looks into how insolvency protocols are put into practice. Although some countries use protocols to improve coordination in cross-border insolvency cases, there are still unresolved issues. Examples like the *AIOC* and *Sendo International* cases show how protocols can help interpret and supplement EU Regulation provisions without making new rules. The French-Italian Protocol is another example where associations agreed on general guidelines. However, in cases like Lernout & Hasupie Speech Products, disagreements between courts can lead to different outcomes for creditors. Despite the EU Regulation's rule-based approach having

[120] Lernout & Hauspie Speech Products, N.V. v. Stonington Partners, Inc., 268 B.R. 395 (D. Del. 2001).
[121] Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V., 310 F.3d 118 (3d. Cir. 2002).
[122] *Ibid.*

some limitations, protocols aim to address them by providing practical coordination within the existing legal framework.

3.2.4. The use of insolvency protocols in group insolvencies

The effectiveness of an insolvency protocol hinges on several factors. One critical consideration is whether the protocol contributes to preserving group synergies. In cases where an enterprise group operates in a decentralized manner, lacks significant intra-group operational and financial links, or comprises separate and independent entities, the justification for adopting an insolvency protocol may diminish. Similarly, if the interests of group members are divergent to the extent that reconciliation is unattainable, the benefits of entering into a protocol may be limited. Legal restrictions on communication and cooperation, such as conflicts of interest arising from related-party transactions, can further impede the efficacy of an insolvency protocol.

Conversely, if an enterprise group has operated as a cohesive economic unit with integrated business models and close operational and financial ties, the adoption of an insolvency protocol can yield substantial advantages. Such protocols can play a pivotal role in preserving and maximizing the overall group insolvency estate value, safeguarding key production assets, and ensuring the continuity of operational activities and contractual obligations. Moreover, by preempting disputes between insolvency practitioners and reducing administration expenses, protocols can lead to cost savings. Additionally, insolvency protocols can facilitate business rescue and restructuring efforts by coordinating the adoption of reorganization plans in a synchronized manner, particularly in jurisdictions lacking detailed rules on transnational cooperation and recognition of foreign insolvencies.

An insolvency protocol can lead to the preservation and maximization of the overall group insolvency estate value, as opposed to the alternative entity-by-entity asset liquidation value. It may help safeguard key production assets and ensure continuous operational activity of the group and performance under existing contracts.[123]

Additionally, in insolvency protocol may lead to the reduction of costs by preventing disputes between IPs and bringing down administration expenses. In the European context, this may result in the elaboration of rules contained in the EIR Recast. Protocols can also be a valuable alternative to unpopular synthetic proceedings.[124]

[123] I. Kokorin, The Rise of 'Group Solution' in Insolvency Law and Bank Resolution, European Business Organization Law Review, 2021, DOI: 10.1007/s40804-021-00220-4

[124] Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups by Ilya Kokorin and Bob Wessels, 1 edn. Cheltenham: Edward Elgar Publishing; 2021. xxvii + 343 pp., GBP 145, ISBN 978 180088 053 5

The use of insolvency protocols in civil law jurisdictions, namely the Netherlands, Germany, Sweden, France, and Spain, was analysed by B. Wessels and I. Kokorin.[125] Thus, in the Netherlands, the absence of a developed framework for administering transnational insolvencies has historically hindered the active participation of Dutch courts and practitioners in cross-border insolvency cases. However, recent developments, including the new provisions of the EIR and international trends promoting cooperation, have prompted a shift towards greater openness to foreign insolvencies. Dutch courts have begun to demonstrate a more cooperative attitude, as evidenced by cases such as *Yukos*, where the Dutch Supreme Court ruled in favour of recognizing foreign insolvency proceedings.[126]

Similarly, Germany has recently reformed its insolvency law to incorporate rules on group insolvencies, facilitating communication and cooperation between courts and practitioners handling insolvencies of domestic corporate groups. The introduction of a coordination procedure under the German Insolvency Code aims to supplement general cooperation duties and facilitate coordination of parallel insolvency proceedings while retaining their separate character. While German law permits the conclusion of insolvency protocols, there are practical challenges, including concerns about liability and the strict adherence to statutory rights and guarantees by German courts. Despite the legal permissibility of insolvency protocols, there have been no published cases where such protocols have been concluded, indicating a reluctance among practitioners due to the associated risks.

In contrast, Swedish law imposes fewer obstacles to the conclusion of insolvency protocols, provided they comply with formal administration rules. French and Spanish laws also provide frameworks for cooperation and the approval of insolvency protocols, although the actual utilization of such protocols in practice remains limited.

In summary, in the European context, insolvency protocols can complement the provisions of the European Insolvency Regulation (EIR) Recast and serve as a flexible alternative to synthetic proceedings. Moreover, they can address gaps in international insolvency law and cater to the specific needs of stakeholders and the peculiarities of various industries. However, it is imperative to tailor protocols to the unique circumstances of each case and ensure compliance with relevant legal frameworks.

Overall, while civil law jurisdictions have made strides towards facilitating cross-border insolvency cooperation, challenges remain in effectively implementing and utilizing insolvency protocols in complex group insolvency scenarios.

---

[125] Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups by Ilya Kokorin and Bob Wessels, 1 edn. Cheltenham: Edward Elgar Publishing; 2021. xxvii + 343 pp., GBP 145, ISBN 978 180088 053 5

[126] Yukos Capital Limited (formerly Yukos Capital SARL) v Russian Federation, UNCITRAL (Geneva Tribunal), PCA Case No. 2013-31

3.3. Limitations on Cooperation and Communication

While the EIR aims to facilitate cooperation in cross-border insolvency, there are certain limitations that require careful consideration. This section delves into two important limitations regarding cooperation and communication in cross-border insolvency: incompatibility with rules governing respective proceedings and conflicts of interest.

3.3.1. Incompatibility with the Rules Applicable to the Respective Proceedings

Article 43 (1) of the EIR provides that cooperation should take place 'to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings.[127] Thus, similar to Article 41 (1) the duty to communicate information under Article 43 will be limited by national legislation on data exchange, for example, legislation relating to the protection of personal data.[128]

In *Alitalia Linee Aeree Italiene S.p.A,* English court interpreted Article 31 of the EIR 2000, which contained similar limitation. The issue in the case was whether assets located in England should be used to discharge liabilities that were not preferential under English law but would be given priority under Italian law.[129]

The debtor in question was Alitalia, the Italian airline, which was heavily insolvent with liabilities exceeding €2.8 billion and approximately 13,000 claims against the group by the end of 2010. Alitalia was placed under an extraordinary administration procedure for large companies, as its COMI (center of main interests) was in Italy.

In October 2008, Alitalia's administrator received an offer for the assets and contracts of the Alitalia group, amounting to €1.05 billion. The complexity of structuring this deal increased following a ruling by the European Commission in November 2008, which determined that Alitalia had received unlawful State aid from the Italian government. Furthermore, the Commission stipulated that if the proposed sale to Compagnia Aerea Italia S.p.A. (CAI) contained elements leading to 'economic continuity' between Alitalia and CAI, the Italian government would be obliged to recover the unlawful State aid from CAI. However, if CAI were to assume only those staff members essential to Alitalia's operational activities, without an automatic transfer of employment contracts, 'economic continuity' would not be established. To avoid this scenario and facilitate the sale to CAI, Alitalia's administrator, Professor Fantozzi, terminated the contracts of all existing Alitalia employees. Subsequently, a consultation process with employee representatives across more than 40 countries was initiated, resulting in compromise agreements with 46 employees based in England and Wales in January 2009.

[127] Regulation 2015/848 supra n 26, Article 43
[128] B Wessels and I Kokorin Cross-border Cooperation and Communication: How to comply with data protection rules in matters of insolvency and restructuring (2019) 16 International Corporate Rescue 98 -103 page?
[129] *Alitalia Linee Aeree Italiane S.p.A* [2011] EWHC 15 (Ch) (High Court of Justice, 18 January 2011).

These agreements stipulated that the employees would receive payments from Alitalia in two tranches: a 'termination payment' within 28 days and a 'protective award payment' within 14 days of 13 April 2009, contingent upon no proceedings being brought in the Employment Tribunal.

The transfer of assets to CAI was completed on 12 January 2009, coinciding with the termination of employment contracts for all employees, including those in England and Wales. In England, winding-up proceedings were instigated at the behest of the trustees of the Alitalia Italian Airlines Pension and Assurance Scheme, due to indebtedness amounting to approximately £20,631,000. Consequently, a winding-up order was issued on 22 January 2009. Alitalia held two bank accounts in England with Barclays Bank, which were utilized for trading purposes both prior to and following its administration in Italy. The first tranche of payments to employees under the English compromise agreements, totaling £576,175.23, was disbursed in early February 2009. However, the second tranche, amounting to £363,522, remained long overdue. The administrator of the main insolvency proceedings in Italy contended that the second payment should be fully covered by the English liquidators using the assets held in the Barclays accounts, partially invoking their duty of cooperation under Article 31 EIR 2000. He emphasized that these liabilities would be prioritized under Italian law, stating: 'It is confirmed that under Italian law, if the sums due to the Former Employees under the Compromise Agreements are not paid from assets in the UK, then I will be obliged to use the funds otherwise available to me to pay the Former Employees in full'. Consequently, the joint administrators sought a declaration regarding the payment of the second tranche, to the extent that they were A provable debt owed by Alitalia, which was unsecured, was to be ranked pari passu with all other debts of Alitalia in the English proceedings. The English liquidators cited Articles 4 and 28 EIR 2000, arguing that English law should govern the distribution of Alitalia's assets in England and Wales, mainly the funds in the Barclays accounts, to unsecured creditors according to the Insolvency Act 1986. In contrast, the Italian administrator argued that the funds in the Barclays accounts should be used to settle the outstanding debts to the English employees under the compromise agreements. He suggested that the court either direct the liquidators to remit the funds, after settling preferential debts under English law., to the Italian liquidator or pay the English employees directly.[130]

Alitalia Linee Aeree Italiane S.p.A. case raised critical question regarding the allocation of assets in cross-border insolvency proceedings. The significance of this case concerning limitation under Article 43 centers on the Italian liquidator's assertion that the English court

[130] *Alitalia Linee Aeree Italiane S.p.A* [2011] EWHC 15 (Ch) (High Court of Justice, 18 January 2011).

could direct the English liquidators to use the Barclays accounts to settle debts owed to English employees, based on the duty of cooperation under Article 31 EIR 2000. However, this argument was not accepted. Newey J emphasized that Article 31(2) of the EIR 2000 states that assets in secondary proceedings should be distributed according to the local law of the Member State where the proceedings take place. Newey J referred to Article 28 of the EIR 2000, which specifies that the law applicable to secondary proceedings is that of the Member State where they occur. Similarly, Article 4 of the EIR 2000 states that insolvency proceedings opened in a Member State are governed by that State's law, including how assets are distributed. Additionally, according to Article 17 of the EIR 2000, a judgment opening main proceedings has effects in another Member State only if no secondary proceedings have been opened there. Furthermore, a liquidator in main proceedings can only exercise powers in another Member State if no other insolvency proceedings have been opened there, as stated in Article 18 of the EIR 2000.

Therefore, although proceedings in the Member State of the debtor's center of main interests (COMI) are considered the main proceedings, the Insolvency Regulation requires assets in secondary proceedings to be handled according to the law of that Member State. Consequently, Article 43(1) should not be construed too broadly to permit practitioners to handle assets differently from what the Regulation dictates. Some scholars argue that these applicable rules should only serve to prevent conflicting functions and duties imposed by the national law applicable to each insolvency proceeding.[131] For instance, they may relate to requirements for specific approvals from creditors or a supervisory judge regarding cross-border cooperation.[132]

Another interesting case concerning the law which should govern the procedural questions, specifically the lodgement of the creditors' claims submitted in secondary insolvency proceedings that were already submitted in the main insolvency proceedings is the *Alpine BAU* case. In that case, the main insolvency proceedings were initiated by an Austrian court in 2013 and the liquidator was appointed. In the same year, secondary insolvency proceedings were opened by a Slovenian court, which limited the submission of creditors' claims. On January 30, 2018, the liquidator in the main proceedings sought to lodge claims from the main proceedings in Austria in the Slovenian secondary proceedings. However, the Slovenian court rejected these claims as they were filed past the deadline according to Slovenian national law.

The primary issue addressed by the Court concerned the applicability of national provisions on the time limits for lodging claims, as well as the consequences of late submissions, in

[131] Wessels, Art. 43 – Cooperation and Communication Between Insolvency Practitioners and Courts, in Bork, van Zwieten (eds.), Commentary on the European Insolvency Regulation, Oxford, 2016, p. 551.
[132] M Virgós, F Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary (Kluwer 2004) 440; Geroldinger (n 29) p. 271.

secondary insolvency proceedings. Specifically, the Court examined whether claims that had already been submitted in the main insolvency proceedings by the liquidator of the secondary proceedings were subject to these national time limits and related consequences under the law of the member state where the secondary proceedings were opened. Notably, Article 55(6) of the EIR applies to the claims lodged by foreign creditors, not insolvency practitioners. Upholding the principle of equal treatment of creditors, the CJEU ruled that the consequences of failing to meet the time limits for lodging claims, as established by the law of the member state opening the proceedings, must be assessed according to that law and that insolvency administrator is bound by these time limits.

The above analysis suggests that one can adopt the view, this interpretation keeps things clear and fair in cross-border insolvency cases. By sticking to the laws of the country where the secondary proceedings occur, everyone involved follows the same rules. This helps avoid confusion or disagreements caused by different laws and encourages cooperation between different countries. Also, by respecting each country's laws, this approach finds a balance between making cross-border insolvency smoother and respecting each country's legal system. Thus, restrictive interpretation of respective provision of Article 43(1) fosters more efficient and equitable resolution of cross-border insolvency cases.

3.3.2. Conflict of Interest

The EIR Recast introduces specific requirements in Article 43(1) that limit cooperation and communication between insolvency practitioners and courts to avoid conflict of interests. This limitation is also present in Chapter V of the EIR Recast, particularly in Articles 56(1), 57(1), 58, and 71(2), which address cooperation in proceedings involving corporate group members.

Recital 21 of the EIR Recast stresses the need for national regulatory frameworks to address potential conflicts of interest, especially concerning the appointment of insolvency practitioners.[133] This indicates that conflicts of interest are mainly a domestic issue to be regulated by Member States. However, the EIR Recast does not provide a clear definition of "conflict of interest", which has been criticized by scholars.[134] The lack of a precise definition can lead to inconsistent interpretations and applications.

In practice, a conflict of interest might occur when disclosing information to a foreign court or insolvency practitioner benefits creditors in one proceeding but harms those in another. Sanctions for breaching duties related to conflicts of interest are determined by national law. It is unclear whether these sanctions fall under "lex concursus" principle and what the

[133] Regulation 2015/848 supra n 26, Recital 21

[134] I Queirolo and S Dominelli, 'Cooperation between Authorities and Insolvency Office Holders' in I Queirolo and S Dominelli (eds), European and National Perspectives on the Application of of the European Insolvency Regulation, Scritti de Diritto Privato Europeoe Internazionale, Volume 18 (Aracne editrice 2017) p. 143

consequences would be in other Member States where the implicated insolvency practitioner is active in a secondary proceeding.[135]

The EIR sets different limits on cooperation based on the nature of the proceedings. Article 41 limits cooperation to the compatibility of applicable rules, while Article 56 imposes additional constraints, including avoiding conflicts of interest and ensuring cooperation facilitates effective administration. This differentiation aligns with the legal framework that treats companies within a group as separate legal entities, each with its own principal procedure, even if all centers of main interests (COMIs) are localized within a single Member State.[136] In terms of practical application, determining whether cooperation entails a conflict of interest is often the responsibility of the insolvency practitioners and, ultimately, the Court of Justice of the European Union. If one practitioner refuses to cooperate due to a conflict of interest, they are not obliged to do so, unless a uniform definition of 'conflict of interest' is established.

In summary, further clarity and consistency in defining and managing conflicts of interest are necessary to maximize the effectiveness of the Regulation.

3.4. Cooperation and communication in group insolvency

Following the implementation of the EIR, it became evident through frequent discourse that the Regulation lacked explicit provisions concerning the insolvencies of corporate groups. This absence of specific guidelines within the EIR was perceived by the EU legislator as a significant impediment to the effective management of insolvency proceedings involving entities within a multinational conglomerate. Furthermore, it was identified as a barrier to the comprehensive restructuring of the group as a cohesive entity.[137]

The objective of the reform was to enhance and guarantee the effective handling of insolvency proceedings pertaining to various entities comprising a corporate group, as explicitly stated in Recital 51 of the EIR.

In the context of group insolvency, coordination involves managing multiple proceedings against different companies within the same group, making it crucial for effective group management.

As a consequence, new provisions for groups of companies were introduced. One can now distinguish three scenarios for cases involving the insolvency of members of the group of

[135] Wessels, Art. 43 – Cooperation and Communication Between Insolvency Practitioners and Courts, in Bork, van Zwieten (eds.), Commentary on the European Insolvency Regulation, Oxford, 2016, p. 499, p. 501.
[136] *Supra* n 119 I Queirolo and S Dominelli, 'Cooperation between Authorities and Insolvency Office Holders' in I Queirolo and S Dominelli (eds), European and National Perspectives on the Application of of the European Insolvency Regulation, Scritti de Diritto Privato Europeoe Internazionale, Volume 18 (Aracne editrice 2017) p. 142.
[137] The Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013-/JCIV/AG/4679, 2016, p. 100.

companies. First, the coordination between main and secondary insolvency proceedings in group settings, second, the coordination between main insolvency proceedings opened against different group members, and finally the newly introduced group coordination proceedings

Cooperation and communication are defined in Articles 56-59 of the EIR. Relevant to this thesis Article 58 stipulates the powers of an insolvency practitioner when it comes to Cooperation and communication between insolvency practitioners and courts. Thus, an insolvency practitioner appointed in insolvency proceedings concerning a member of a group of companies shall cooperate and communicate with any court before which a request for the opening of proceedings in respect of another member of the same group of companies is pending or which has opened such proceedings. Subparagraph b gives powers to request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed. The article also contains limitations characteristic for cooperation and communication as provided in Article 43 stating that to the powers enlisted above shall be exercised to an extent that such cooperation and communication are appropriate to facilitate the effective administration of the proceedings, do not entail any conflict of interest and are not incompatible with the rules applicable to them.

Notably, the provisions governing cooperation and communication in group insolvency proceedings align significantly with the corresponding regulations pertaining to the coordination between primary and ancillary proceedings, which seems to be a deliberate decision by the legislator.[138] Although distinctions exist between the group-specific regulations and those solely addressing primary and secondary proceedings,[139] the fundamental objective remains consistent across the EIR's regulations on cooperation and communication, namely to facilitate the efficient administration of the insolvency estate. These regulations aim to foster effective collaboration and information exchange among involved parties, ultimately contributing to the streamlined management of insolvency proceedings within corporate groups.

Article 61 of the Recast EIR allows any insolvency practitioner (IP) to request the initiation of group coordination proceedings, introducing a formal mechanism to ensure coordination among group insolvency cases. Group coordination proceedings establish a formal framework for coordinating the insolvency proceedings of group members.

The introduction of group coordination proceedings aims to synchronize insolvency proceedings among various group members for coordinated restructuring and efficient coordination.[140] The impartial group coordinator plays a pivotal role in this process, which

[138] Regulation, Recital 52 sentence 2.
[139] Bork and Mangano, European Cross-Border Insolvency Law (2016) margin no. 8.35.
[140] Recital 54

involves four stages: initiation, decision to open proceedings, coordination activities by the coordinator, and confirmation of remuneration.

Any court with jurisdiction over a group member's insolvency can decide on opening group coordination proceedings, with priority given to the first-seised court. Insolvency practitioners have thirty days to opt-out or object to the proposed coordinator.

The group coordinator, qualified under a Member State's law, proposes coordination plans aimed at integrating the insolvency processes of group members and oversees it. A stay of proceedings for up to six months is possible if it benefits creditors. The coordination plan may include provisions for interim financing, intra-group settlements, and agreements with insolvency practitioners handling the insolvency of individual group members.

Participation in the formal coordination procedure is voluntary. Each group's insolvency practitioner evaluates the costs and benefits before deciding whether to join. If an insolvency practitioner opts out of the coordination proceedings, they are not obligated to cooperate or communicate with the coordinator. Article 74 of the Recast EIR limits such obligations to participants in the coordination proceedings, ensuring that non-participating insolvency practitioners retain their autonomy. Under Article 60(1)(a) Recast EIR, insolvency practitioners appointed in the proceedings of one group member have the right to be heard in the proceedings of any other group member. This provision fosters cooperation between IPs and courts by ensuring that IPs' perspectives are considered across different insolvency cases within the same group. By allowing IPs to present their views and concerns in court, the provision helps align strategies, mitigate conflicts, and promote a unified approach to the group's financial recovery.

Despite EIR not determining specifically what is covered under the 'right to be heard',[141] this concept should be interpreted autonomously within the framework of the Recast EIR. In paragraph 42 of the CJEU's *Interedil* judgment[142], the CJEU stated: 'The Court has consistently held that it follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question.'[143]

The right to be heard enhances judicial cooperation by encouraging courts to listen to and incorporate the input from IPs of other group members. Such cooperation is vital for coordinating decisions on key issues like asset sales, restructuring plans, and distribution

[141] Dominik Skauradszun and Andreas Spahlinger, in Moritz Brinkmann (ed), *European Insolvency Regulation: Article-by-Article Commentary* (first edn) (C.H. Beck, 2019), §60.07.
[142] C-396/09, *Interedil Srl v. Faillimento Interedil Srl* CJEU 20 October 2011, para. 42
[143] Case C-174/08 NCC Construction Danmark [2009] ECR I-10567, para 24 and case-law cited.

schemes. Effective judicial cooperation ensures that the interests of the group as a whole are considered, leading to more coherent and efficient restructuring efforts. However, the success of this cooperation depends significantly on the willingness of the courts to engage with IPs and consider their input.

Article 60(1)(b) Recast EIR empowers IPs to request a stay of any measure related to the realisation of assets in the proceedings of another group member. This instrument is crucial for managing the timing and coordination of asset sales and other realisation measures across the group. By synchronising these activities, IPs and courts can prevent scenarios where the premature sale of one group member's assets negatively impacts the overall restructuring efforts or the value of assets in other proceedings.

Requesting a stay requires IPs to demonstrate that it is necessary to facilitate the effective administration of the group insolvency proceedings. Courts play a pivotal role in this process, as they must assess and approve such requests based on the provided evidence. The courts' cooperation is essential to ensure that the stay is used appropriately to promote genuine coordination efforts, rather than to delay proceedings or create unnecessary obstacles.

Judicial cooperation is critical in the implementation of group coordination proceedings. Courts must be willing to appoint a competent coordinator, support the development of the coordination plan, and ensure compliance with the plan's recommendations. The success of Group coordination proceedings relies on the active involvement and cooperation of both IPs and courts to streamline decision-making processes, reduce conflicts, and enhance the efficiency of the restructuring process.

Despite the tools provided under the EIR, there may be instances where an insolvency practitioner or a court is reluctant to engage in cooperation or outright refuses to comply with their duties. In such cases, the affected insolvency practitioners can take several steps to address these issues. They can appeal to higher courts for enforcement of their rights under the EIR, seek sanctions against non-compliant parties, or leverage diplomatic and professional channels to encourage cooperation.

Courts play a crucial role in resolving these conflicts by providing a forum for insolvency practitioners to raise their concerns and by enforcing compliance with the EIR's provisions. Judicial support in addressing reluctance and refusals is essential for maintaining the integrity and effectiveness of the cooperation framework established by the EIR.

An important practical consideration in group insolvency proceedings is the allocation of costs arising from cooperation efforts. The EIR does not explicitly address this issue, leaving it to national laws and the discretion of the courts. Costs are determined by the law of the Member State where proceedings are opened (Recital 58), with court intervention only if an objecting

practitioner disputes the coordinator's cost allocation. Courts must ensure that cost-sharing arrangements are fair and reflect the benefits derived by each group member from the cooperation activities. Transparent and equitable cost allocation can prevent disputes and ensure that cooperation efforts are sustainable throughout the restructuring process.

The ultimate goal of the cooperation provisions under the EIR is to enable efficient restructurings of group companies. This efficiency is achieved through enhanced communication and coordination between IPs and courts. By strategically using the tools provided to IPs, such as the right to be heard, and requesting stays, courts and IPs can facilitate more effective and unified restructuring efforts.

The cooperation provisions of the EIR offer a robust framework for IPs and courts to coordinate insolvency proceedings across group companies. By leveraging their rights to be heard, requesting stays, and initiating GCPs, IPs can facilitate more effective and unified restructuring efforts with the support of courts. The creation of group coordination proceedings, driven more by political motives than practical analysis, may result in time and cost expenditure without clear advantages. It remains possible that future cases may exploit this new legal framework in unforeseen ways, notwithstanding its bureaucratic nature.[144] The practical implementation of these provisions requires careful navigation of legal, procedural, and interpersonal challenges. The efficiency of group restructurings ultimately depends on the commitment of IPs and courts to uphold the principles of cooperation and coordination embedded in the Recast EIR.

[144] The Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013-/JCIV/AG/4679, 2016, p. 119.

4. SOFT LAW AND BEST PRACTICES IN CROSS-BORDER INSOLVENCY: FACILITATING COOPERATION BETWEEN INSOLVENCY PRACTITIONERS AND COURTS

Recital 48 of the EIR encourages insolvency practitioners and courts to consider the best practices emerging at the international level in the field of cooperation.[145] Soft law instruments are meant to support cooperation and communication among the main actors in cross-border insolvency proceedings.[146] However, their effective utilization is often hindered by a lack of awareness among intended users and the increasing number of such instruments, which complicates their management.[147] For instance, some main soft law instruments include UNCITRAL Model Law on Cross-border Insolvency 1997, American Law Institute Principles of Cooperation among the North American Free Trade Association (USA, Canada, Mexico) 2000 ("ALI NAFTA Principles"), American Law Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases 2000 ("ALI NAFTA Guidelines"), European Bank of Reconstruction and Development Core Principles for an Insolvency Law Regime 2004, American Law Institute/UNIDROIT Principles of Transnational Civil Procedure 2004, UNCITRAL Legislative Guide on Insolvency Law Recommendations 2004, in 2009 supplemented with a Part Three: "Treatment of enterprise groups in insolvency", European Bank of Reconstruction and Development Office Holders Principles 2007, European Communication & Cooperation Guidelines for Cross-border Insolvency 2007, UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009 (the "Practice Guide").

Recital 48 of the EIR highlights the importance of incorporating best practices for cooperation in cross-border insolvency cases, as outlined in principles and guidelines concerning communication and collaboration, into the practices of insolvency practitioners and courts. In this regard, mention must be made of the "European Communication and Cooperation Guidelines for Cross-Border Insolvency" of 2007 commonly referred to as "CoCo Guidelines"; the "Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines" of 2014, or "EU JudgeCo Principles" and of the "Draft INSOL Europe Statement of Principles and Guidelines for Insolvency Office Holders in Europe" of 2014. These documents provide essential frameworks for enhancing communication and cooperation among stakeholders involved in cross-border insolvency proceedings, thus promoting more efficient and effective resolution of such cases.

---

[145] Recital 48

[146] The Implementation of the New Insolvency Regulation: Recommendations and Guidelines JUST/2013/JCIV/AG/4679, available at http://insreg.mpi.lu/Guidelines.pdf, p.77.

[147] *Ibid.*

Some deem the existing soft law principles and guidelines to be sufficient to support cooperative efforts by insolvency practitioners and courts, and the real issue appears to be a lack of awareness and knowledge of these instruments, along with mistrust towards the new rules outlined in Articles 41-44 of the EIR.[148]

This section will mainly focus on the analysis of the European Communication and Cooperation Guidelines for Cross-Border Insolvency, by Professor Bob Wessels and Professor Miguel Virgós in 2007 (CoCo Guidelines), the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines, by Professor Bob Wessels, Professor Jan Adriaanse and Paul Omar (EU JudgeCo Principles and Guidelines, 2015), [149] and The European Model Protocol.

4.1. The European Communication and Cooperation Guidelines for Cross-Border Insolvency

The 'CoCo Guidelines' are a substantive source that informs insolvency protocol provisions. They seek to facilitate coordination of the proceedings involving the same debtor.[150] They serve as a significant resource shaping provisions in insolvency protocols. [151] Drafted by Professor Bob Wessels of Leiden University in the Netherlands and Professor Miguel Virgós of Universidad Autónoma de Madrid in Spain, these guidelines codified best practices and proposed non-binding provisions, particularly regarding insolvency proceedings governed by the EIR.

They play a crucial role as a complementary framework to the EIR, which lacks specific guidance on implementing protocols in cases with concurrent insolvency proceedings.[152] The 18 CoCo Guidelines establish a model framework for communication and cooperation in cross-border proceedings. Additionally, Appendix I of the CoCo Guidelines presents a 'Checklist Protocol' that enumerates and describes certain basic requirements and specific provisions to be addressed in cross-border insolvency protocols.

While drafted against the backdrop of the EIR, the CoCo Guidelines reflect best practices both inside and outside Europe. The CoCo Guidelines have been incorporated into recent successful protocols in the US, Canada and the UK, and have become an important substantive source for protocols, including the protocol in the Lehman Brothers bankruptcy proceedings.[153]

---

[148] *Ibid,* p.75.
[149] Dominik Skauradszun and Andreas Spahlinger, in Brinkmann (ed.), European Insolvency Regulation (Munich, Oxford; Beck Hart Nomos, 2019), Art. 41 para 2.
[150] European Communication and Cooperation Guidelines for Cross-Border Insolvency (2007) Guideline 2.
[151] Cravath, Swaine & Moore LLP, Paul H Zumbro, *Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool,* Business Law Internation, Vol 11, No 2, [2010], p. 167.
[152] *Ibid.*
[153] Speech by Bob Wessels, 'Judicial Cooperation in Cross- Border Cases', University of Leiden Law School, 6 June 2008

The CoCo Guidelines address courts, as well as 'all interested parties in the cross-border insolvency proceedings.'[154] Thus, they are referring to the insolvency practitioners of the main and secondary proceedings and the debtor in possession.

Guideline 6 encourages prompt and direct communication between the insolvency practitioners.[155] This guideline not only advocates for timely interaction but also reinforces the pivotal role of the insolvency practitioner overseeing the main insolvency proceedings. It explicitly states that the main insolvency practitioner should proactively initiate and maintain communication with other liquidators involved in the proceedings.[156]

The Guidelines require the insolvency practitioner to share promptly, periodically, and in full, all relevant information to the other insolvency practitioners.[157]

This duty extends not only to communication among insolvency practitioners but also to interactions with foreign courts. The guideline emphasizes that insolvency practitioners should communicate with foreign courts to the same extent as with their own national courts.[158]

In relation to the duty of cooperation, Guideline 12 suggests that insolvency practitioners 'are required to cooperate in all aspects of the case' to minimise possible conflicts among procedures.[159] Insolvency practitioners involved in secondary proceedings are urged to communicate with and provide advice to the main insolvency practitioner.

The guideline underscores the possibility of formalizing cooperation through a protocol, which is further detailed in the abovementioned document's checklist.

This checklist outlines crucial elements, notably emphasizing the inclusion of a clause safeguarding court independence, sovereignty, and jurisdiction. This provision highlights the significance of upholding the legal frameworks and authority of each jurisdiction involved in cross-border insolvency proceedings.[160] By incorporating such clauses into a protocol, parties can ensure transparency, adherence to legal standards, and mutual respect for the legal systems governing the proceedings.

Additionally, the protocol should contain specific provisions identifying the insolvency practitioner, the debtor, and the procedure involved, with a clear delineation of their roles and responsibilities. Concerning the insolvency practitioner, it's crucial to specify their jurisdiction and outline mechanisms for their participation in foreign proceedings without subjecting themselves to the jurisdiction of those courts. Furthermore, the protocol should mandate adherence to

[154] European Communication and Cooperation Guidelines for Cross-Border Insolvency (2007) Guideline 1.
[155] *Ibid,* Guidelines 6.1. and 6.3.
[156] *Ibid,* Guideline 6.2.
[157] *Ibid,* Guideline 7.1. and 7.2.
[158] *Ibid*, Guideline 7.3.
[159] *Ibid,* Guideline 12.
[160] *Ibid,* Appendix I.

communication guidelines among insolvency practitioners, ensuring effective collaboration throughout the proceedings. Regarding the debtor, the protocol must detail the nature and extent of their involvement in the insolvency process. Finally, with respect to procedures, the protocol should unambiguously designate proceedings using domestic nomenclature, classifying them as main or secondary proceedings.[161] Following such practices would contribute to enhancing clarity, coherence, and efficiency in cross-border insolvency proceedings, minimizing potential conflicts and ensuring smooth collaboration among all parties involved. Thirdly, the protocol should address both preliminary and core issues. Preliminary matters encompass language preferences, cost-sharing arrangements, communication methods, and the potential involvement of additional parties in the cooperation process. Meanwhile, the core content of the protocol should focus on specific issues requiring cooperation in the particular case under consideration. These may include determining the location and disposition of assets, facilitating the lodging of claims, and coordinating the exercise of voting rights.[162]

In practice, there can be identified common terms of the protocols, which are similar to the ones listed above. Particularly, protocols often emphasize the importance of cooperation to streamline proceedings across different jurisdictions, determining the framework for communication.[163] They may outline some general tools for facilitating cooperation, including cooperation and direct communication among tribunals, information and data sharing, asset preservation, comity and inter-company claim reconciliation.[164] Further, the common term is the stakeholder participation clause.[165] In cases where disputes arise among parties to the protocol, mechanisms for resolution are essential. Protocols may establish procedures for mediation, arbitration, or other alternative dispute resolution methods to address conflicts efficiently and minimize disruptions to the insolvency proceedings. With the increasing emphasis on data protection and privacy laws globally, protocols may incorporate provisions to ensure compliance with relevant regulations. This could include safeguards for handling sensitive personal or financial information exchanged between parties, and protecting confidentiality and privacy rights. Given the international nature of many insolvency cases, protocols may include provisions for

[161] *Ibid.*
[162] *Ibid.*
[163] Cross-border Insolvency Protocol for Nortel Networks Inc and its Affiliates, *In re Nortel Networks Inc*, Case No 09-10138 (Bankr D Del 15 June 2009) and Case No 09-CL-7950 (Ont Sup Ct 14 June 2009); Cross-border Insolvency Protocol for Loewen Group Inc and its Affiliates, *In re Loewen Group Inc*, Case No 99-1244 (Bankr D Del 30 June 1999) and Case No 99-CL-3384 (Ont Sup Ct 1 June 1999).
[164] E.g., Cross-border Insolvency Protocol, *In re Smurfit-Stone Container Corporation*, Case No 09- 10235 (Bankr D Del 12 March 2009) and Case No 09-7966-00CL (Ont Sup Ct 12 March 2009)
[165] Cross-border Insolvency Protocol, In re Smurfit-Stone Container Corporation, Case No 09- 10235 (Bankr D Del 12 March 2009) and Case No 09-7966-00CL (Ont Sup Ct 12 March 2009)

cross-border asset tracing and recovery.[166] This could involve cooperation between insolvency practitioners, law enforcement agencies, and other relevant authorities to locate and repatriate assets held in different jurisdictions. Protocols may address the protection of employee rights and interests in insolvency proceedings, ensuring that labor laws and regulations are upheld. This could include provisions for timely payment of wages and benefits, consultation with employee representatives, and measures to minimize job losses or disruptions. Further to the above, in case of groups, including provisions on settlement of i*nter-company claims* may be justified.[167] Inter-company claims provisions may also require that a particular accounting methodology be agreed on and used to quantify inter-company claims, in an effort to minimise the time and expense associated with disputes among members of the corporate group.[168]

4.2. The EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines

Similar to CoCo Guidelines, the EU JudgeCo Principles and Guidelines the EU JudgeCo Principles and Guidelines recognize the potential of protocols as a suitable means to implement coordination and communication among courts involved in cross-border insolvency proceedings.[169]

While the scope of the EU JudgeCo Principles and Guidelines is more limited compared to the CoCo Guidelines, focusing solely on courts in such proceedings and excluding communication between parties, they still acknowledge the value of protocols in facilitating cooperation.

A protocol can serve as a mechanism to nominate an independent intermediary who acts as a liaison between the courts involved. This intermediary plays a crucial role in ensuring smooth communication and coordination, helping to overcome potential barriers and misunderstandings.[170]

Furthermore, protocols can streamline cooperation among insolvency practitioners and courts by exempting practitioners from seeking approval from the courts for actions that affect assets or operations within their respective jurisdictions. This flexibility enables practitioners to

---

[166] E.g., Cross-border Insolvency Protocol, *In re Smurfit-Stone Container Corporation*, Case No 09-10235 (Bankr D Del 12 March 2009) and Case No 09-7966-00CL (Ont Sup Ct 12 March 2009).
[167] E.g., Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies, *In re Lehman Brothers Holdings Inc*, Case No 08-13555 (Bankr SDNY 12 May 2009); Cross-border Insolvency Protocol for Calpine Corporation and its Affiliates, *In re Calpine Corp*, Case No 05-60200 (Bankr SDNY 9 April 2007) and Case No 0501-17864 (ABQB 7 April 2007).
[168] Cravath, Swaine & Moore LLP, Paul H Zumbro, *Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool,* Business Law Internation, Vol 11, No 2, [2010], p. 169.

[169] EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines (EU JudgeCo Principles and Guidelines, 2015) Principle 4.1, Principle 16.5
[170] *Ibid,* Principle 17.1.

act swiftly and efficiently, especially when faced with non-mandatory national procedural rules that may impede cross-border judicial cooperation.[171]

Moreover, protocols can establish reporting mechanisms for insolvency practitioners to update the courts on the progress of coordination, cooperation, and communication with other proceedings. These reports not only facilitate transparency but also enable courts to address practical challenges encountered during the proceedings, fostering a collaborative approach to problem-solving.[172]

Lastly, the EU JudgeCo Principles and Guidelines advocate for the use of protocols to design procedural rules that enable courts to conduct joint hearings.[173] 261 Joint hearings provide an opportunity for courts to address common issues, exchange information, and streamline decision-making processes, enhancing the efficiency and effectiveness of cross-border insolvency proceedings.

To summarise, The EU JudgeCo Principles and Guidelines, akin to the CoCo Guidelines, underscore the importance of protocols in facilitating coordination and communication among courts engaged in cross-border insolvency proceedings. While their focus is narrower, since they solely address courts communication, they still recognize the significant role of protocols in promoting cooperation. Protocols are deemed to be a mechanism to appoint independent intermediaries, facilitating seamless communication and coordination between involved courts. This intermediary plays a pivotal role in overcoming potential obstacles and fostering mutual understanding. Additionally, protocols are understood to streamline cooperation between insolvency practitioners and courts by exempting practitioners from seeking court approval for jurisdiction-specific actions. This flexibility enables practitioners to act promptly and efficiently, particularly in navigating non-mandatory procedural rules that may hinder cross-border cooperation. Establishing reporting mechanisms in a protocol for practitioners to update courts on coordination progress enhances transparency and enables courts to address practical challenges encountered during proceedings collaboratively. The EU JudgeCo Principles and Guidelines advocate for using protocols to design procedural rules enabling joint hearings, providing an avenue for courts to collectively address common issues and streamline decision-making processes, ultimately enhancing the efficiency and effectiveness of cross-border insolvency proceedings.

4.3. The European Model Protocol

[171] *Ibid,* Principle 19.1.
[172] *Ibid,* Principle 19.4.
[173] *Ibid,* Guideline 10.

All of these new developments were reflected in the design of a European Model Protocol (EMP), which was published in 2021.[174] It reflects the evolving landscape of cross-border insolvency practice, incorporating insights gleaned from recent developments and initiatives spearheaded by UNCITRAL and the European Union. This comprehensive framework comprises two integral components, each tailored to address distinct aspects of cross-border insolvency proceedings.

The first part of the EMP offers a template of clauses designed to guide insolvency practitioners through the negotiation and establishment of a protocol. Drawing from extensive cross-border practice experiences and guidance provided by UNCITRAL and EU initiatives, these clauses aim to streamline the protocol development process by providing practitioners with a structured framework informed by best practices. Moreover, each clause has been meticulously vetted to ensure alignment with the European Insolvency Regulation (EIR) framework and international standards, enhancing their applicability and effectiveness.

Conversely, the second part of the EMP offers court guidelines intended for adoption by judicial authorities. These guidelines provide courts with invaluable insights into the key considerations and procedural aspects involved in cross-border insolvency proceedings. By adopting these guidelines, courts can enhance their understanding of the complexities inherent in such cases and ensure a more consistent and coherent approach to adjudicating cross-border insolvency matters.

The development of the EMP was made possible through a collaborative research effort funded by the European Commission and led by Professor Vattermoli of the Università degli Studi di Roma "La Sapienza". This endeavor involved contributions from esteemed academic institutions such as the Universidad Autónoma de Madrid, the Martin Luther Universität Halle-Wittenberg, and the Università degli Studi di Verona, underscoring the collaborative and interdisciplinary nature of the project.

In contrast to existing guidelines, the EMP distinguishes itself by offering practitioners tangible samples that can be seamlessly incorporated into a protocol. Furthermore, it provides practitioners with a range of options tailored to their specific needs and the level of cooperation they aim to achieve. By offering practitioners a versatile and user-friendly framework, the EMP seeks to expedite the adoption and implementation of protocols, thereby facilitating enhanced

[174] Daniele Vattermoli, Stephan Madaus, Federica Pasquariello, Andrés Recalde Castells (eds.)Aurora Martínez Flórez, Meaning, Function and Nature of the Protocols or Agreements among Insolvency Practitioners, in Daniele Vattermoli, Stephan Madaus, Federica Pasquariello, Andrés Recalde Castells (eds.), Transnational Protocols: A Cooperative Tool for Managing Cross-border Insolvency (Milan, Wolters Kluwer 2021), pages 35-37.

cooperation and communication in cross-border insolvency proceedings.[175] In summary, the European Model Protocol represents a significant milestone in the evolution of cross-border insolvency practice, offering practitioners and judicial authorities alike a comprehensive and practical framework for navigating the complexities of cross-border insolvency proceedings. Through its innovative approach and collaborative development process, the EMP holds the potential to significantly enhance the efficiency and effectiveness of cross-border insolvency cooperation, ultimately benefiting all stakeholders involved.

[175] Casasola, O., and Madaus, S. "Cross-border Insolvency Protocols: Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast." European Business Law Review, vol. 33, no. 6, 2022, pp. 839-880. ISSN 0959-6941., p. 40

CONCLUSIONS

1. The approach to cross-border insolvency in the EU, rooted in the modified universalism, seeks to achieve global collective processes with optimal centralization of insolvency proceedings. While the main proceedings enjoy primacy in the EIR, the secondary proceedings serve to protect the interests of local creditors, ensuring the preservation of specific rights under national law. Despite the debates regarding the necessity and potential complications of secondary proceedings, the EIR establishes a framework where both types of proceedings are intended to function equally, albeit with certain provisions granting primacy to main proceedings. However, both proceedings are not isolated and thus the need for coordinated solutions arises.

2. Cooperation and communication between IPs and courts play a crucial role in both main and secondary proceedings to ensure the effectiveness of insolvency proceedings and protection of creditors' lawful expectations. The choice between restructuring or liquidation proceedings influences cooperation and communication, as demonstrated by landmark cases such as the CJEU *Bank Handlowy*. The EIR addresses the previous gaps of the lack of rules of cooperation and communication in insolvency cases by establishing how IPs and courts should seek coordinated solutions to insolvency problems. By emphasizing the importance of cooperation, communication, and coordination, the EIR provides a robust framework for managing complex cross-border insolvency cases within the EU.

3. The main purpose of the rules on cooperation and coordination in the EIR is to improve the efficiency of cross-border insolvency proceedings. It was elucidated that effective cooperation and communication are vital for managing insolvent debtors' assets and ensuring the overall success of the proceedings. This includes the examination of restructuring possibilities, coordination of asset administration, and realization, all aimed at maximizing creditor recovery and preserving the debtor's assets. Moreover, the analysis revealed the challenges associated with managing assets in cross-border insolvency cases and outlined the remedies available, such as temporary stays in asset realization and the transfer of remaining assets to the main insolvency proceedings. The case law of the CJEU, such as *Burgo Group* and *Air Berlin* cases underscores the complexities of asset treatment and cooperation in cross-border insolvency cases, emphasizing the need for clear guidelines within the EIR.

4. To be effective, the rules on cooperation and coordination have to be clear and give flexibility. The flexibility inherent in Articles 41 and 56 of the EIR facilitates diverse cooperation strategies, allowing practitioners to adapt to the varied legal landscapes within the EU. The duty to communicate, as prescribed under the EIR, represents a fundamental aspect of

this cooperation. Effective information exchange is pivotal for the seamless progression of cross-border insolvency proceedings. However, the enforcement of cooperation duties remains a contentious issue, particularly given the absence of specific sanctions within the EIR Recast. The reliance on domestic laws to enforce these obligations underscores a significant gap, as the effectiveness of cross-border cooperation is contingent upon the varied enforcement mechanisms of individual member states. This discrepancy could potentially undermine the incentive for compliance, posing a threat to the regulation's overall effectiveness.

5. Insolvency protocols emerge as a practical solution to challenges caused by lack of harmonisation. Protocols can take various forms and serve multiple functions, from promoting certainty and efficiency in managing proceedings to reducing disputes and fostering international cooperation. The flexible nature of these protocols allows them to adapt to specific case needs, providing a structured yet adaptable framework for cooperation. Typically, protocols are not legally binding unless explicitly agreed upon by the parties involved. This transforms them into binding contracts, establishing obligations and potentially leading to legal consequences if violated. The examples from the cases like Everfresh, AIOC, and Sendo International illustrate the effectiveness of well-structured protocols in achieving these goals. However, the adoption of protocols is less common in European civil-law countries compared to common-law jurisdictions like the United States. Empirical research highlights a lack of familiarity and practical experience with these instruments among practitioners in countries like Italy and Bulgaria. Despite this, there are notable successes, such as the French-Italian Protocol, which, although non-binding, provides general guidelines and enhances cooperation.

6. International soft law instruments play a crucial role in promoting effective communication and collaboration among stakeholders involved in cross-border insolvency proceedings. However, their utility is often impeded by a lack of awareness among stakeholders and the proliferation of such instruments, which can complicate their management. Various soft law instruments have been developed over the years to guide cooperation in cross-border insolvency cases, including the European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines), the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines (EU JudgeCo Principles and Guidelines), and the European Model Protocol (EMP). These instruments provide essential frameworks for enhancing communication and cooperation among stakeholders, thereby facilitating more efficient and effective resolution of cross-border insolvency cases.

7. Soft law instruments and best practices play a vital role in facilitating cooperation between insolvency practitioners and courts in cross-border insolvency cases. By promoting effective communication, enhancing transparency, and streamlining procedures, these

instruments contribute to the efficient resolution of cross-border insolvency matters, ultimately benefiting all stakeholders involved. Through continued collaboration and awareness-building efforts, stakeholders can leverage the potential of soft law instruments to further improve cross-border insolvency cooperation and foster a more harmonized and efficient insolvency framework within the EU and beyond.

RECOMMENDATIONS

Based on the conclusions drawn in the result of the analysis in the first chapter regarding the critical role of effective interaction between insolvency practitioners and courts within the framework of EU insolvency law, several recommendations can be made for practitioners, policymakers, and scholars involved in cross-border insolvency proceedings.

There is a need for enhanced cooperation mechanisms between IPs and courts involved in cross-border insolvency proceedings. IPs should actively engage in communication and collaboration to ensure the efficient and coordinated management of debtor estates across multiple jurisdictions. This may involve the development of standardized protocols or guidelines for communication and cooperation. IPs and judicial authorities should receive specialized training and education on the intricacies of cross-border insolvency proceedings under the EIR. This will enable them to better understand their roles and responsibilities and navigate the complexities of managing such cases effectively.

The policymakers should work towards harmonizing legal frameworks across EU member states to minimize conflicts and inconsistencies in cross-border insolvency proceedings. This may involve revisiting and refining certain provisions of the EIR to ensure greater clarity and consistency in its application. Additionally, it is essential to actively engage all stakeholders, including creditors, debtors, and other interested parties, in cross-border insolvency proceedings. Clear communication channels should be established to ensure that stakeholders are adequately informed and involved throughout the process.

It is crucial to establish clearer definitions within the EIR concerning the terms "cooperation," "coordination," and "communication." The current EIR lacks precise definitions, which leads to ambiguities and inconsistent interpretations. By clearly defining these terms, the EIR can provide a more robust and unambiguous framework for insolvency practitioners and courts to follow. This can be achieved through amendments to the EIR that incorporate detailed explanations and examples of what constitutes effective cooperation and coordination.

There should be an emphasis on developing standardized protocols and best practices for information exchange among insolvency practitioners and courts. While the EIR mandates cooperation, the practical implementation often faces hurdles due to varying national procedures and legal systems. Creating standardized protocols that are recognized and adopted across member states can facilitate smoother information flow and enhance mutual understanding. This could include guidelines on the types of information to be exchanged, the format of such exchanges, and the timelines for sharing critical data.

The use of secure, interoperable digital platforms can facilitate real-time information exchange and collaboration among insolvency practitioners and courts. These platforms should be designed to ensure data security and privacy while allowing for efficient communication. The European Commission could spearhead the development of such a platform, ensuring it is accessible and user-friendly for practitioners and judicial officers across member states.

In addition, it is recommended to enhance the role of secondary insolvency proceedings to better align with the objectives of the main proceedings. This involves creating mechanisms that allow for more substantial influence of the main insolvency practitioner over the secondary proceedings, particularly concerning the treatment of assets. The EIR should be amended to provide clearer guidelines on how secondary proceedings should complement the main proceedings, including specific provisions for asset management and realization.

Enhancing the framework for cooperation and communication between insolvency practitioners and courts in cross-border insolvency cases requires a multi-faceted approach. Clear definitions, standardized protocols, comprehensive training, advanced technological tools, improved oversight, and a culture of collaboration are essential components of a more effective and efficient insolvency regime. By implementing these recommendations, the European Union can significantly improve the management of cross-border insolvency cases, benefiting creditors, debtors, and the overall economic landscape.

While Article 41 of the EIR Recast allows for flexibility in communication methods, structured protocols for information exchange are necessary. Policymakers should advocate for the development of standardized protocols to facilitate prompt, cost-effective, and comprehensive communication among stakeholders involved in cross-border insolvency. Additionally, the promotion of insolvency protocols as practical solutions to legal disparities is crucial. Policymakers should prioritize raising awareness, providing training, and offering incentives to encourage their adoption in cross-border insolvency cases, particularly in jurisdictions where uptake is low.

Comprehensive training and capacity-building initiatives should be provided for practitioners and courts across EU member states. By offering resources and organizing workshops, stakeholders can enhance their understanding and implementation of cooperation mechanisms under the EIR Recast. To improve cross-border insolvency cooperation based on the conclusions drawn from the study of the soft law instrument stakeholders, including insolvency practitioners and judges, should undergo comprehensive training programs to understand and implement soft law instruments such as the CoCo Guidelines, EU JudgeCo Principles and Guidelines, and the European Model Protocol (EMP). The national authorities should encourage the integration of soft law instruments into national insolvency frameworks,

providing guidance to practitioners and courts on their application. Another recommendation may be to develop standardized protocol templates based on best practices outlined in soft law instruments to streamline the protocol development process and promote consistency across jurisdictions.

LIST OF BIBLIOGRAPHY

Books:

1. Brinkmann, M., European Insolvency Regulation: Article-by-Article Commentary, C.H. Beck, 1st edition (2019).
2. Bork, Reinhard, and Mangano, Renato, European Cross-Border Insolvency Law, OUP (2016).
3. Casasola, O., and Madaus, S. "Cross-border Insolvency Protocols: Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast." European Business Law Review, vol. 33, no. 6, 2022, pp. 839-880. ISSN 0959-6941
4. Cravath, Swaine & Moore LLP, Paul H Zumbro, Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool, Business Law International, Vol 11, No 2 (2010).
5. Flaschen, Evan D., and Silverman, Ronald J., Cross-Border Insolvency Cooperation Protocols, 33 Tex Ind L J 587 (1998).
6. I Queirolo and S Dominelli, 'Cooperation between Authorities and Insolvency Office Holders' in I Queirolo and S Dominelli (eds), European and National Perspectives on the Application of of the European Insolvency Regulation, Scritti de Diritto Privato Europeoe Internazionale, Volume 18 (Aracne editrice 2017)
7. Kokorin, Ilya, and Wessels, Bob, Cross-Border Protocols in Insolvencies of Multinational Enterprise Groups, Edward Elgar Publishing (2021).
8. Sarra, Janis, Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings, 44 Tex Intl L J 547 (2008).
9. Sexton, Anthony V., 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, Chicago Journal of International Law, Vol. 12: No. 2 (2012).
10. Van Galen, Robert, The Recast Insolvency Regulation and Groups of Companies, ERA Forum, Vol. 16, p. 241 (2015).
11. Vattermoli, Daniele, Madaus, Stephan, Pasquariello, Federica, Recalde Castells, Andrés (eds.), European Cross-Border Insolvency Law: Aurora Martínez (1913-2013) Memorial Book, Springer (2015).
12. Wessels, Bob, Cross-border Insolvency Agreements: What Are They and Are They Here to Stay?, in Faber et al. (eds.), Overeenkomsten en insolventie (2012).
13. Westbrook, Jay L., Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court, Texas Law Review, Vol. 96, Issue 7, p. 1473 (2018).

Scientific Articles:

14. Crawford, Carruthers, "International Private Law: A Scots Perspective," *Edinburgh* (2015).
15. Herring, Richard, The Challenge of Resolving Cross-Border Financial Institutions, 31 YALE J. ON REG. 853 (2014).
16. INSOL Europe, Revision of the European Insolvency Regulation (2012).
17. Jokubauskas, Remigijus; Świerczyński, Marek, The Coordination of Main and Secondary Insolvency Proceedings in European Union Insolvency Law, International Comparative Jurisprudence, Vilnius: Mykolas Romeris University, Vol. 8, Iss. 1, p. 1-12 (2022).
18. Kamalnath, Cross-Border Insolvency Protocols: A Success Story?, International Journal of Legal Studies and Research (IJLSR), p. 172 (2013).
19. Mevorach, I., Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?, European Business Organization Law Review, 22, 283–315 (2021).
20. Mevorach, I., The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps, Oxford University Press, Oxford (2018).
21. Millet, P., Cross-Border Insolvency: The Judicial Approach, International Insolvency Review, Vol. 6, Issue 2, p. 109 (1997).
22. Moss, Gabriel, and Paulus, Christoph, The European Insolvency Regulation—The Case for Urgent Reform, 19 INSOL. INTELLIGENCE 2 (2006).
23. Randytė, Jūratė, Rules on Jurisdiction in Cross-Border Insolvency Proceedings within the EU, Master Thesis.
24. Santen, Bernard, Communication and Cooperation in International Insolvency, ERA Forum, Vol. 16, p. 229 (2015).
25. Santen, Bernard, Communication and cooperation in international insolvency: On best practices for insolvency office holders and cross-border communication between courts. ERA Forum, Vol. 16, p. 229 (2015).

Statutory acts:

26. Article 6:162, Dutch Civil Code.
27. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 25 September 1968 [1972] OJ L 299/32, replaced by Council Regulation (EC) No 44/2001

of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.
28. Draft Convention E Comm Doc 3.327/1/XIV/70-F on bankruptcy, winding-up, arrangements, compositions and similar proceedings [1976] (Preliminary Draft Insolvency Convention).
29. European Communication and Cooperation Guidelines for Cross-border Insolvency (2007)
30. European Convention ETS No 136 on Certain International Aspects of Bankruptcy [1990] (Istanbul Convention).
31. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L141
32. UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, New York, 2010

Case law:

33. Case C-765/22 and C-772/22 Luis Carlos and Others v Air Berlín Luftverkehrs KG, Sucursal en España and Air Berlín PLC & CO Luftverkehrs KG [2024] ECLI:EU:C:2024:331.
34. C-396/09, Interedil Srl v. Faillimento Interedil Srl CJEU 20 October 2011.
35. C-327/13 Burgo Group SpA v Illochroma SA and Jérôme Theetten, judgement of 4 September 2014, ECLI:EU:C:2014:2158, para. 37.
36. C-116/11, Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o., judgment of 22 November 2012, ECLI:EU:C:2012:739, paras. 40, 60, 72.
37. CJEU 18 September 2019, Case C-47/18 ECLI: EU:C:2019:754 (Skarb Pánstwa Rzeczpospolitej Polskiej-Generalny Dyrektor Dróg Krajowych i Autostrad v Stephan Riel, acting as liquidator of Alpine Bau GmbH).
38. Nortel Networks SA (2015).
39. Judgment of the CJEU of 18 April 2024 in case Joined Cases C 765/22 and C 772/22, para. 84-86.
40. Lernout & Hauspie Speech Products, N.V. v. Stonington Partners, Inc., 268 B.R. 395 (D. Del. 2001).
41. Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V., 310 F.3d 118 (3d. Cir. 2002).
42. Yukos Capital Limited (formerly Yukos Capital SARL) v Russian Federation, UNCITRAL (Geneva Tribunal), PCA Case No. 2013-31.
43. Alitalia Linee Aeree Italiane S.p.A [2011] EWHC 15 (Ch) (High Court of Justice, 18 January 2011).

Websites:

44. Francisco Satiro and Paulo Fernando Campana Filho, Transnational insolvency: Beyond state regulation and towards cooperation agreements, http://ssrn.com/abstract=1858968.
45. INSOL Europe. (2012). Revision of the European Insolvency Regulation. Retrieved from https://www.insol-europe.org/download/documents/588.
46. "Modalities for court-to-court communications" of the Judicial Insolvency Network, available at https://jin-global.org/modalities.html.
47. https://curia.europa.eu/juris/liste.jsf?num=C-116/11&language=EN, para. 68.
48. UNCITRAL. (2005). Legislative Guide on Insolvency Law. Retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf, p.231(?).

ABSTRACT

This Master Thesis is dedicated to the research of problematic issues related to cooperation in cross-border insolvency proceedings through analysing the duties of cooperation and communication outlined in the EIR, and the mechanism for their realization. This research examines of relevant legislation, as well as soft law instruments, best practices, and protocols.

Beginning with an examination of the EIR, the research highlights the importance of effective communication and collaboration mechanisms among insolvency practitioners and courts across Member States. Despite the relatively flexible approach of the EIR, there are still challenges such as the absence of formal guidelines for the exchange of information and enforcement mechanisms.

The Thesis delves into the role of soft law instruments, focusing on documents such as the European Communication and Cooperation Guidelines for Cross-Border Insolvency European Model Protocol. These instruments provide essential frameworks for promoting cooperation and streamlining communication in complex cross-border proceedings, and increased knowledge thereof is necessary for their better implementation.

Keywords: cross-border insolvency, cooperation and communication, duties of insolvency practitioners, soft law, best practices, insolvency protocols, European Insolvency Regulation

SUMMARY

This Master Thesis analyses the EU legal framework for cooperation in cross-border insolvency cases, focusing on the role of soft law instruments and best practices in order to facilitate cooperation among insolvency practitioners and courts across different jurisdictions. The Thesis examines the provisions of EIR through a comprehensive review of the relevant literature, as well as other guidelines and principles.

The Thesis identifies that the EU's approach to cross-border insolvency is rooted in a modified universalism approach and aims to achieve global collective processes with optimal centralization of insolvency proceedings. The EIR establishes a framework where main proceedings are considered dominant, while secondary proceedings serve to mainly protect local creditors' interests. The goal of effectiveness determined in the EIR, along with the express obligation to cooperate causes the need for main actors in cross-border insolvency cases to seek coordinated solutions.

Thus, cooperation and communication between insolvency practitioners (IPs) and courts are crucial for effective insolvency proceedings and the protection of creditors' and other stakeholders' rights. The EIR addresses previous gaps by setting rules for coordination, emphasizing the importance of these elements in managing complex cross-border insolvency cases. Effective cooperation and communication are particularly important for managing insolvent debtors' assets and ensuring efficient proceedings, as demonstrated by the case law of the CJEU.

Analysis conducted in the Master Thesis reveals that flexibility in the EIR, particularly in Articles 41 and 56, which allows diverse cooperation strategies. However, the enforcement of cooperation duties remains contentious due to the lack of specific sanctions, relying on domestic laws, which vary across Member States. Insolvency protocols emerge as practical solutions to the challenges posed by the lack of harmonization and address the gaps in regulation, but their conclusion depends on specific circumstances and their application is not very common in civil-law countries.

International soft law instruments, such as the European Communication and Cooperation Guidelines for Cross-Border Insolvency, the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines, and the European Model Protocol, play a crucial role in promoting effective communication and collaboration. These instruments enhance communication and cooperation among stakeholders, facilitating more efficient and effective resolution of cross-border insolvency cases. However, raising awareness is necessary to achieve their wider implementation and contribute to effective insolvency proceedings.

Finally, the Thesis highlights the need for regular review and updating of soft law instruments to ensure their relevance and responsiveness to evolving practices and emerging challenges. The research emphasizes the need to align soft law instruments and best practices across jurisdictions in order to create a more cohesive and integrated framework for cross-border insolvency cooperation.

Based on the conclusions, the thesis offers several recommendations, including to:

- Enhance cooperation mechanisms between IPs and courts involved in cross-border insolvency proceedings through standardized protocols or guidelines.
- Provide specialized training and education for IPs and judicial authorities on cross-border insolvency proceedings under the EIR.
- Harmonize legal frameworks across EU member states to minimize conflicts and inconsistencies.
- Engage all stakeholders in cross-border insolvency proceedings through clear communication channels.
- Establish clearer definitions within the EIR for terms like "cooperation," "coordination," and "communication."
- Develop standardized protocols and best practices for information exchange.
- Use secure, interoperable digital platforms for real-time information exchange and collaboration.
- Enhance the role of secondary insolvency proceedings to better align with main proceedings.
- Promote awareness and adoption of insolvency protocols, especially in civil-law jurisdictions.
- Integrate soft law instruments into national insolvency frameworks and provide standardized protocol templates.

Overall, this Master Thesis contributes to the discussions among scholars on cross-border insolvency cooperation by providing an analysis of the hard and soft law instruments from the perspective of their relevance to insolvency practitioner – court cooperation. It sheds light on the inherent challenges and opportunities in cross-border insolvency proceedings and offers practical recommendations for addressing them, promoting fair, efficient, and effective resolution of cross-border insolvency cases.