



**BUILDING
TRUST:**
enhancing courts'
performance
in corporate
restructuring and
insolvency



Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement

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ACURIA project aims to identify legal and procedural strategies, blockages and best practices that can be replicated or prevented in different legal and judicial systems, therefore enabling courts to provide a more accurate and fair response.

The project therefore seeks to support the improvement of legislation and policies at national and EU levels regarding business recovery and insolvency, including issues related to the enforcement of cross-border insolvency rules and of enterprise groups restructuring and insolvency practices.

Project **ACURIA** also aims to strengthen the research at EU level and promote cooperation between academia, practitioners and economic players to reinforce mutual learning and knowledge dissemination.

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Aim and method- ology

The availability of a sounding, efficient insolvency framework is a fundamental tool in a well-functioning market economy, one that promotes efficient allocation of goods and services, boosts corporate investment and productivity, and stimulates job creation. Furthermore, from a European perspective, timely and effective judicial responses do have a positive impact on the overall competitiveness of EU enterprises and on the consolidation of the internal market

(See EUROPEAN COMMISSION, 2018) ¹.

¹

The 2018 EU Justice Scoreboard

EUROPEAN COMMISSION (2018)

LUXEMBOURG: PUBLICATIONS OFFICE - EUROPEAN UNION

https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf

The purpose of the research project **ACURIA – Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement** is to help improve national and EU rules, enforcement practices and public policies on business restructuring and insolvency by identifying the elements that can promote or obstruct courts' performance on the matter.

The project relies on content analysis and empirical research on legal, procedural and institutional aspects of business failure and insolvency, carried out in four EU countries: **PORTUGAL, ITALY, POLAND**, and the **NETHERLANDS**. Countries were chosen in accordance with a combination of both legal – restructuring and insolvency regimes with dissimilar maturity and rules – and non-legal factors – different economic, social and political conditions, including distinct level of exposure to the 2008 financial crisis.

Based on data collected from court cases brought to a close between 2012 and 2016, and from the opinions and perceptions of judicial key players on the performance of the insolvency legal framework, gathered through interviews and focus groups, project **ACURIA** sought to identify the normative and institutional barriers to an effective law enforcement that overall promotes social and economic justice.

Obsta- cles and best practices

The field work carried out showed that, in general, in all surveyed legal systems, insolvency proceedings are long and bureaucratic, offer a low rate of credit recovery and, overall, do not inspire great interest or cooperation from debtors and creditors. Restructuring procedures suffer from delayed action by debtors, which prolongs the resolution of corporate difficulties and compromises business continuity.

What's more, these procedures make it difficult to introduce new financing (new money), to fuel the reorganisation of the business model of companies in crisis.

SEVERAL BARRIERS
AND SOME COPING MEASURES
WERE FOUND RELATED TO
THREE MAIN TOPICS ◉

◉ THE SHAPE
OF THE LAW

◉ COURTS'
PERFORMANCE
AND THE ROLE
OF JUDICIAL
ENFORCERS

◉ STRATEGIC
BEHAVIOUR
OF CREDITORS
AND DEBTOR

THE SHAPE OF THE LAW

In every country under study there are insolvency and pre-insolvency proceedings available, including out-of-court restructuring solutions.

Domestic rules follow closely the EU political and legal trends and recent reforms, notably the [EUROPEAN COMMISSION RECOMMENDATION 2014/135/EU](#) of 12 March 2014, on **business failure and insolvency**, the [REGULATION \(EU\) 2015/848](#) of 20 May 2015, on **cross-border insolvencies** and the [DIRECTIVE \(EU\) 2019/1023](#) of the [EUROPEAN PARLIAMENT](#) and of the [COUNCIL](#) of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

Although insolvency law is not overly criticized and the option for specialized courts is positively highlighted, some remarks were yet done regarding the legal framework and the organisation of the judicial system.

Among them, it is worth mentioning

- (a) the instability of the legal framework,
- (b) the discontinuities between insolvency law and other legal areas, such as labour law, tax law or social security law,
- (c) the bureaucratic load of the insolvency procedure, namely for smaller companies and cases with little or no assets
- (d) the excessive rotation of judges and their overload.

COURTS' PERFOR- MANCE AND THE ROLE OF JUDICIAL ENFORC- ERS

Courts' performance may be assessed in three complementary dimensions: procedural slowness, technological equipment (digital justice) and availability of specialized human resources.

Time is a crucial factor in recovery and insolvency procedures. Early detection of a business crisis allows for a carefully prepared restructuring plan that makes continued business activity viable. Liquidation within a reasonable time lapse prevents deterioration of the estate, reduces the procedural costs and expenses and assists with quicker and hopefully greater compensation for creditors. But the fluidity established in the procedural law, namely in insolvency proceedings, is almost never translated into practice and the legal timeframes rarely correspond to the actual timings of the cases.

The introduction of **electronic platforms** in the field of justice has altered work methods, models of communication and expectations. They are considered an example of best practice regarding the judicial system as a whole. However, the configuration of these electronic platforms does not yet wholly respond to the requirements of current restructuring and insolvency case management. Several reasons are pointed out: courts' platforms are not designed specifically for insolvency cases; are not user-friendly; have limited capacity to process large amounts of data; provide limited or no access to certain interested parties; or lack interoperability with other relevant platforms like tax or register databases.

The **judge**, together with the insolvency practitioner, are the main enforcers of insolvency law. Their specialisation, as well as their experience and education, are of the utmost importance, since they affect their interplay and, therefore, the overall outcome of the procedure.

Constraints on the training and experience of judges produce undesirable effects on procedural protocol, specifically with regards to control of the insolvency practitioners' performance. Judges are not always at liberty to provide adequate supervision and control over the proceedings, nor do the conditions allow it, as they are largely dependent on the information provided and the decisions taken by insolvency practitioners.

The **insolvency practitioner** is at the core of the liquidation proceedings, where his or her main task is to manage and liquidate the debtor's assets, under the court's supervision. Besides their skills and expertise, the professional organisation at their disposal is relevant to their professional recognition and appointment. The appointment of the insolvency practitioner is a critical aspect. From systems based on randomisation to systems based on judge selection, with or without room for suggestions from creditors and debtor, each system present advantages and limitations.

The research carried out suggests that a combined model – a general random system of appointment that includes a failsafe measure that allows the court to nominate a particular insolvency practitioner best suited to a particular case – is a more appropriate solution.

Courts' performance does not solely depend on the specialisation of its judges, the competency of its insolvency practitioners or the sophistication and sounding operation of its technological platforms. It requires, as the empirical research demonstrates, **court clerks** in sufficient numbers and with adequate training. It also requires specialised technical **consultancy** (v.g. in economics, management or accountability) capable of providing judges with an adequate decision-making support in procedures.

STRATEGIC BEHAVIOUR OF CREDITORS AND DEBTOR

The main common feature among all the surveyed jurisdictions is a lack of incentives for greater involvement of stakeholders in the proceedings.

All national legal regimes emphasize the need for early action from debtors in order to maximize the outcomes of the procedures; guarantee that companies are able to overcome difficulties; assure that winding up provides for creditors to be reimbursed, and to company partners and managers to sort out the problem. They also encourage the effective participation of creditors in restructuring and insolvency procedures, thereby turning them into key decision-makers in the future of the company and supervisors of the insolvency process itself.

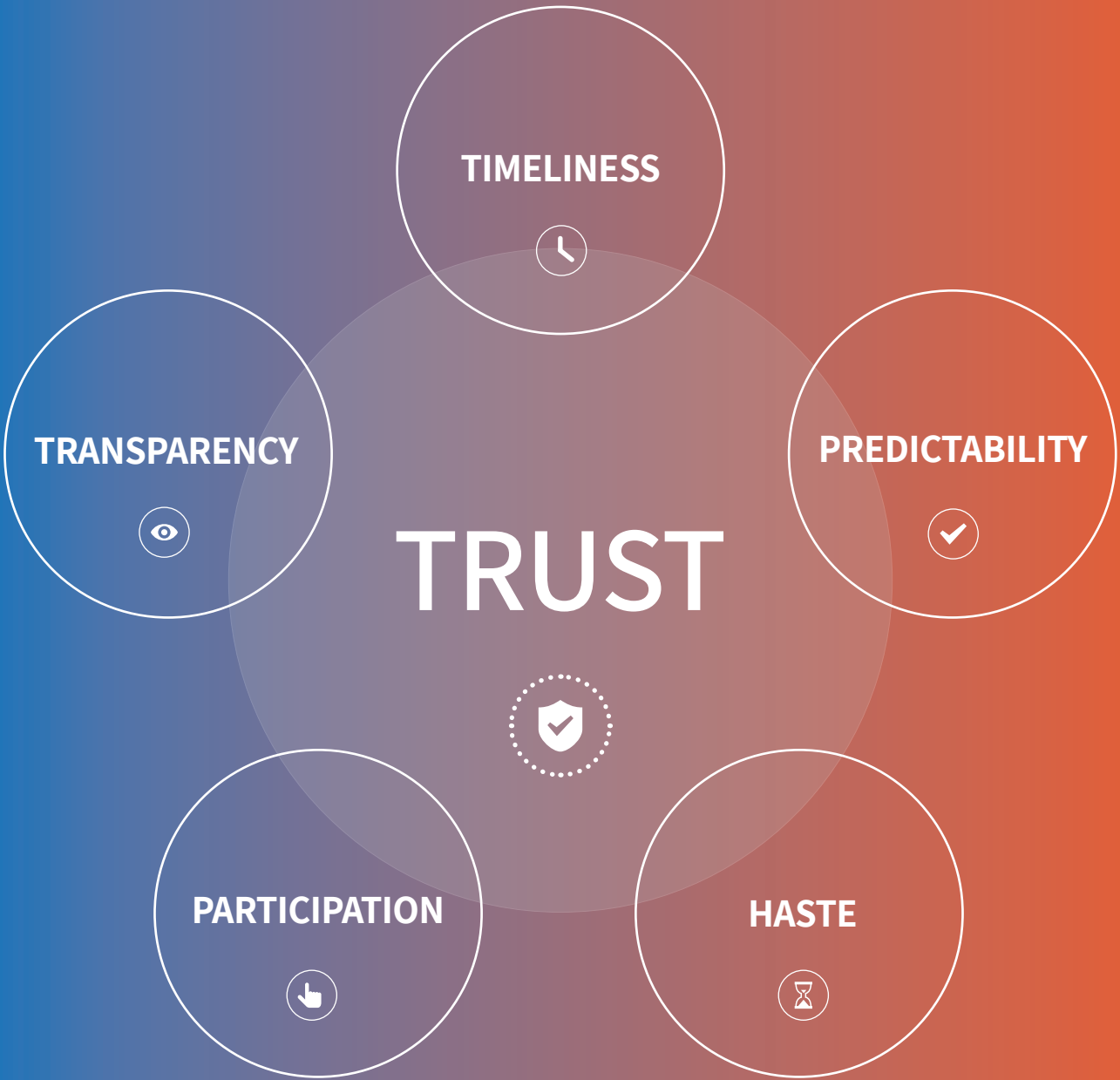
Empirical research shows a very different picture: debtors take too long to turn to the available legal mechanisms; creditors act according to their individual interests (which are oftentimes contradictory among themselves), and do not commit themselves into the legal process, mainly when such process becomes time-consuming and there is a low probability of reimbursement. In most cases, the restructuring and insolvency procedures do not offer enough incentives for either creditors or debtors to invest time and financial resources in their own participation. The main reason identified during the field work for the apathy of creditors and debtors is the low expectations they have on the outcome of the procedures.

Ways of improve- ment

From all the obstacles and shortcomings identified during field work analysis, one common thread has emerged: **the need for investment in BUILDING TRUST in judicial and extra-judicial proceedings related to corporate restructuring and insolvency.**

This trust can be further enhanced by strengthening **five key areas** deemed to have optimization potential:

- a) **TIMELINESS**
- b) **PREDICTABILITY and LEGAL CERTAINTY**
- c) **HASTE and EFFICIENCY**
- d) **PARTICIPATION**
- e) **TRANSPARENCY**



TIMELINESS



1. Predicting *ex ante* structures to follow up and support business development, so that the necessary support is given to the deployment of sounding business plans;
2. Creating and developing early warning devices, to allow for the early detection of structural problems or cyclical fluctuations in business activities. Fostering incentives for their timely use;
3. Establishing more demanding conditions for the use of restructuring processes, as a key-element in the creation of trust among creditors regarding the debtor's efforts.

PREDICTABILITY AND LEGAL CERTAINTY



1. Stabilising laws so as to create a body of established interpretations of case law;
2. Enhancing a legislative harmonisation among the different dimensions of the law that interfere in insolvency proceedings;
3. Providing specialized training not only in insolvency law, but in related areas, such as economic sciences or accounting, so that judges can identify and interpret more accurately the issues that need to be addressed.
4. Stabilizing judges' allocation to courts, in order to maximize their expertise.

HASTE AND EFFICIENCY



1. Using new information technologies to streamline the communication between all parties involved in the judicial process and to eliminate repetitive tasks.
2. Fostering interoperability among relevant information systems and ensuring that all insolvency practitioners have easy access to all public asset databases, therefore providing for a proper identification of company assets and, consequently, for the increase of creditors' reimbursement.
3. Regulating and supervising the activities of insolvency practitioners, both internally (by the judge) and externally (by a supervisory body).

PARTICIPATION



1. Making available forms tailored to creditors and debtors who lack professional structures, thus simplifying their interaction with the process. These forms will also facilitate the work of insolvency practitioners and judges;
2. Implementing technological tools that allow for creditors meetings to be held at a distance, and thereby preventing costly trips to the court.

TRANSPARENCY



1. Using clear language when communicating with stakeholders;
2. Disclosing information at the decisive stages of the process, such as the sale of assets, through transparent methods (v.g. publicized virtual auctions that can increase the number of potential bidders).



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