JCOERE
Judicial Co-operation Supporting Economic Recovery in Europe

Report 2

Report on Judicial Co-operation in Preventive Restructuring and Insolvency in the EU

Substantive and procedural harmonisation, judicial practice and guidelines.

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IV.Chapter 4: Influences of Judicial and Legal Culture in Europe

4.1 Introduction

Chapters 1 and 3 of this Report described the connections that have been made by the EU between the harmonisation of laws and judicial co-operation, in turn leading to ever closer integration of the European Union. The obstacles to harmonisation of substantive laws on preventive restructuring measures, which have been described in the JCOERE Report 1 and summarised in Chapter 3 of this Report, are connected to similar, if not identical, issues that also present obstacles to jurisdictional co-operation between courts and practitioners generally. These include differences in legal culture, and for the purpose of this Chapter, judicial culture. While differences in legal and judicial culture are not the sole reasons why harmonisation and co-operation continue to be challenging within the EU, the differences underpin many of the conflicts that do arise.

Effective cross-border court-to-court co-operation is predicated on the principle of sincere co-operation and mutual trust, as set out in the EIR Recast:

> This Regulation should provide for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which fall within its scope, and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. *The recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust*. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise that court's decision.[1]

As discussed in Chapter 2 of this Report, while the EIR Recast increased the duties of co-operation and communication between practitioners and between courts, this is not always

[1] Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19 (hereinafter referred to as the EIR Recast) Recital 65.

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easy to achieve in practice, particularly between courts. The objective of this Chapter is to explore aspects of legal and judicial culture and how these can impact on harmonisation of substantive laws. Lack of close harmonisation can cause difficulties in achieving mutual trust between jurisdictions and courts, which by extension presents obstacles to effective co-operation and co-ordination of cross-border matters generally and in particular, cross-border insolvency and restructuring cases. Challenges to harmonisation, mutual trust and co-operation connect closely with the issues surrounding European integration and an ever-closer union, which were outlined in Chapters 1 to 3 of this Report.

It must be emphasised that within the European Union there is an agreed backdrop to these differences including a strong European commitment to and acknowledgement of what can be broadly described as rule of law issues. The ever-closer integration of the European Union underpins the issues that are the focus of the JCOERE Project. Of particular relevance are the foundational principles concerning adherence or respect for the rule of law discussed in section 4.2 of this Chapter, under which falls liberal democratic ideals such as judicial independence and impartiality, certainty and predictability, as well as aspects of justice and fairness. One of the issues that seems to be central to preventive restructuring particularly is the role of the courts in 'robust restructuring frameworks', as explained in Chapter 3. In our discussions at conferences and other forums, the recognition of the importance of the role of the court is perceived as problematic amongst some academics and policymakers. A difference has also been detected between common law and civil law systems in this context. This is considered in Section 4.3.

In addition to setting 'ground rules,' on rule of law issues, as it were, the EU has also taken a proactive role in trying to harmonise the functioning of the European judiciary in all Member States, which is described in section 4.4 of this Chapter. Nevertheless, differences persist that continue to challenge mutual trust, such as issues, albeit in a small number of Member States, concerning judicial independence, discussed in section 4.5, and differing approaches to training, experience, competence, and specialism or expertise, described in section 4.6 and in Chapter 8 of this Report. Section 4.7 will conclude with the challenge of harmonising legal and judicial cultures in light of the discussion of the preceding sections, with some thoughts as to how this may impact co-operation when it comes to coordinating preventive restructuring procedures under the PRD.

4.2 Mutual Trust and the Rule of Law in the EU

The EU has actively adopted and promoted the rule of law principle through the legal orders of its Member States, requiring as it does that any acceding Member State has stable institutions guaranteeing democracy, the rule of law, human rights and respect for and

protection of minorities.[2] The Treaty on European Union states unequivocally that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights, and fundamental freedoms, the rule of law, principles that are common to the Member States.'[3] Along with a number of Communications that have presented frameworks and policy initiatives for protecting and promoting the rule of law among the Member States, which will be discussed below, the Charter of Fundamental Rights of the European Union provides specific protection for human rights and fundamental freedoms, the infringement of which on an institutional level could also lead to sanctions by the EU.[4]

As described in Chapter 1 of this Report, Article 7 of the TEU provides a formal mechanism to address such matters in relation to Member States. In addition, it has been noted by the Commission that the rule of law 'makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts'.[5] A coherent and consistent approach to rule of law principles is a key factor in ensuring the independence and impartiality of all Member State courts, which is why there has been a focus placed on a common approach to the rule of law among the Member States in the last decade in particular.

In 2014, the European Commission issued a Communication on a new framework to strengthen the rule of law in the EU. This Framework also acknowledged that the way in which the rule of law is implemented among the Member States plays a key role in the foundation of mutual trust upon which the functioning of the EU is built.[6] However, it also acknowledged that the content and even standards associated with the rule of law may vary at a national level, depending on each Member State's constitutional framework, offering some reason, if not justification, for the differences in approach to rule of law issues. The Commission listed a number of key principles defining the core common meaning and perhaps expectation that Member States should strive to protect:

> Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.[7]

The 2014 Communication introduced a mechanism that could be utilised if a legal system at a national level were unable to cope with a threat to the rule of law, which in turn could

[2] The EU's minimum standards regarding the principle of the 'rule of law' is derived from the Copenhagen criteria on the accession of new Member States: <https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhague.html> [Last accessed 10 April 2020].
[3] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, [Hereinafter TEU] art 6(1).
[4] Charter of Fundamental Rights of the European Union of 26 October 2012 OJ C 326/02 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> accessed 14 September 2020.
[5] European Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 0158 final 4 [hereinafter referred to as the Framework].
[6] Framework 2.
[7] Framework 4.

present a potential systemic threat to the rule of law and the stability of the EU.[8] The Framework suggested a fairly strong assessment and action protocol[9] that aimed at preventing the need to issue proceedings under article 7(1) TEU.[10] The original strong mechanism recommended in the Framework was watered down by the Council, who claimed that such a strong approach would be unlawful.[11] It was decided instead to have a 'dialogue' on an annual basis to discuss rule of law issues, but these dialogues did little to confront Member States with their rule of law shortcomings. The Framework was used twice between 2014 and 2019: once by the Commission in respect of Poland in December 2017[12] and by the European Parliament in September 2018 in respect of Hungary.[13] It was observed in the first rule of law related Communication in 2019[14] that 'progress by the Council in these two cases could have been more meaningful.'[15]

Another Communication focused on the rule of law was issued on 3rd April 2019. It repeats much of the positioning of the 2014 Framework with the added aim of enriching the debate on further strengthening the rule of law in the EU and inviting reflection and comment by stakeholders.[16] In July 2019, another Communication was issued by the Commission that offered a 'blueprint for action' in relation to strengthening the rule of law in the EU.[17] The two 2019 Communications were based on certain core principles, including Member State accountability to ensure adherence to the rule of law; treating Member States equally; and finding solutions rather than imposing sanctions 'with co-operation and mutual support at the core.'[18] The Commission identified three pillars to reinforce its approach: 'promoting the rule of law culture, preventing rule of law problems from emerging and deepening, and how best to mount an effective common response when a significant problem has been identified'.[19] In addition, a consultation on the rule of law and the creation of a mechanism to protect it was issued in March 2020, which resulted in the first annual Rule of Law Report published 30 September 2020.[20]

[8] Framework 5-6.
[9] A three-stage process based on four principles were suggested that began with a dialogue and ended with 'swift and concrete actions to address the systemic threat' followed by recommendations by the Commission. See Framework 7.
[10] TEU - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 *OJ C326/1* ('TEU') art 7(1), which can be invoked if there is 'a clear risk of a serious breach by a Member State of the values referred to in Article 2.'
[11] Peter Oliver and Justine Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54(5) JCMS 1075, 1076.
[12] European Commission, 'Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' (Communication) COM (2017) 835 final.
[13] European Parliament, 'resolution of 12 September 2018 calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded(2017/2131 (INL))' [2019] OJ C 433/66.
[14] European Commission, 'Communication from the Commission to the European Parliament, the European Council, and the Council on Further Strengthening the Rule of Law within the Union – State of play and next possible steps' COM (2019) 163 final (hereinafter referred to as the '2019 Communication 163')
[15] 2019 Communication 163, 3.
[16] 2019 Communication 163, 2.
[17] European Commission, 'Communication from the Commission to the European Parliament, The European Council, The Council, the European Economic and Social Committee, and the Committee of the Regions on Strengthening the Rule of Law within the Union – a Blueprint for Action' COM (2019) 343 final. (Hereinafter '2019 Communication 343').
[18] 2019 Communication 163, 7.
[19] 2019 Communication 343, 5.
[20] European Commission, *2020 Rule of Law Report* (European Commission 23 March 2020) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report_en> accessed 8 October 2020.

There is little doubt that the rule of law is an elementary principle forming the foundation of the European Union, as well as the process of integration that can cause difficulties in mutual trust and effective co-operation where differences in adherence to it persist among the Member States. The differences in approach to the rule of law can often be influenced by differences in legal or judicial culture. The next section will look at the unique aspects of legal culture from a theoretical perspective to lend context to a discussion surrounding the difficulties of co-operating across borders when individual jurisdictions may differ on key legal principles, such as those associated with the rule of law.

4.3 The Influence of Legal Culture on Rule of Law Principles: Common Law and Civil Law Traditions

As noted above, co-operation between courts relies on mutual trust and confidence as set out in recital 65 of the EIR Recast. Where there are variances in legal principles underpinning mutual trust, then courts/judges may be less likely to respect decisions of other jurisdictions and to co-operate effectively. For judges, it is important to have at least some kind of consensual idea of the legal culture[21] within which their decision-making takes place so that they are operating within the same regulative ideal, particularly if they are co-operating within a cross-border context.[22]

A legal culture can be characterised by a number of factors, such as the nature of institutions, the way that judges are appointed, the role of lawyers, and even public attitudes as they relate to litigation and incarceration. The legal culture of a jurisdiction also extends to more nebulous concepts, such as ideas, values, aspirations, and mentalities that underpin the respect for legal principles, such as the rule of law.[23] The differences in legal culture are also connected to the influence of a jurisdiction's historical evolution,[24] which go beyond simple design aspects of government and institutions.[25]

The key characterises of legal culture in individual Member States tend to be deeply rooted and path dependent in nature.[26] Much of the groundwork for modern legal culture was laid at earlier stages in history prior to the creation of the European Union, with small jurisdiction-specific differences that have been retained and that are sometimes at odds with other

[21] For a discussion around the concept of legal culture, see Sally Engle Merry, 'What is Legal Culture? An Anthropological Perspective' (2010) 5 J Comp L 40, 41; M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 193-194 as cited in Roger Cotterell, 'The Concept of Legal Culture' in David Nelkin (ed), *Comparing Legal Cultures* (Dartmouth Publishing 1997) 13-31, 15

[22] David Nelkin, 'Thinking about Legal Culture' (2014) 1 Asian J L & Soc'y 255, 257

[23] See David Nelkin, 'Using the Concept of Legal Culture' (2004) 29 Austl J Leg Phil 1; Disclosing/Invoking Legal Culture: An Introduction' (1995) 4 Soc & Leg Stud 435; 'Thinking about Legal Culture' (2014) 1 Asian Journal of Law and Society 255, 255; and Roger Cotterell, 'The Concept of Legal Culture' in David Nelkin (ed), *Comparing Legal Cultures* (Dartmouth Publishing 1997) 13-31. .

[24] For a discussion of the historical underpinnings of European legal culture, see Franz Wieacker and Edgar Bodenheimer, 'Foundations of European Legal Culture' (1990) 38(1) The American Journal of Comparative Law 1.

[25] Lawrence M Friedman, 'Legal Culture and Social Development' (1969) 4(1) Law & Society Review 29, 35.

[26] Path dependence describes the theory that a social or legal system is limited by the decisions made in the past or by the events experienced, even though past circumstances may no longer be relevant. For in-depth discussions of path dependency and the law, see, for example, Oona A Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2000-2001) 86 Iowa L Rev 601; John Bell, 'Path Dependence and Legal Development' (2012-2013) 87 Tul L Rev 787; and Lucian Arye Bebchuk and Mark J Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 Stan L Rev 127, who provide an application of legal path dependency to corporate law.

jurisdictions. It is these deeply rooted, path dependent characteristics and norms that are particularly difficult to dislodge or change in order to harmonise the nature and function of EU Member State judiciaries. The complexities of even understanding the nature of a jurisdiction's legal culture is one of the reasons why it continues to be so difficult to ensure an equal understanding and approach to legal principles generally among the Member States, which the Commission admits it needs in order to implement its Blueprint for enhancing the rule of law.

4.3.1 Judicial culture and legal origins

The legal origins[27] of a jurisdiction can sometimes explain why differences in approach to legal regulation and court co-operation persist, despite the influence of globalisation and the relative benefit that more homogenous legal systems could provide in terms of efficient cross-border solutions. The legal origins hypothesis claims that national judicial and regulatory styles are influenced by the origins of that legal system from specific legal families. However, this often appears to focus on the common law / civil law divide, which has been criticised as being too limited and dualistic.[28] Although the EU is comprised of legal systems derived from several different legal families, a discussion of general differences between the common and civil law judiciaries is a good place to begin for the purpose of this Report, as the comparison does reveal key differences upon which other cultural differences are layered.[29]

The clearest example of the difference between common law and civil law legal systems is the codification of law in civil law countries, as opposed to the heavier reliance on judicial interpretation and jurisprudence in common law systems.[30] Under civil law systems, legal codes describe which specific actions are prohibited, restricting the actions of participants in a legal system, making it possible to apply the law strictly, and to at least some extent, circumscribing judicial discretion by the content of legal codes.[31] In contrast, codes in common law countries often serve to summarise previous judicial decisions. In addition, a common law judge has the discretion to disregard the provisions of a code when it conflicts with the basic principles of common law, though this discretion is not used capriciously in any sense. In relation to civil law systems, Glaeser and Shleifer note:

[27] For a detailed discussion of the legal origins hypothesis, it originated in Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W Vishny, 'The Legal Determinants of External Finance' (1997) 52(3) The Journal of Finance 1131 and 'Law and Finance' (1998) 106(6) Journal of Finance 1113 and was developed further by Juan C Botero, Simeon Dhankov, Rafael La Porta, Florecio Lopez-de-Silanes, and Andrei Schleifer, 'The Regulation of Labour' (2004) 119(4) Quarterly Journal of Economics 1339.

[28] See John Armour, Simon Deakin, Prabirjit Sarkar, Mathias Siems, and Ajit Singh, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' (2008) 6(2) Journal of Empirical Legal Studies 343 for criticism of the legal origins hypothesis and John Armour, Simon Deakin, Priya Lele, and Mathias Siems, 'How do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection' (2009) 57 Am J Comp L 579 for a discussion of the literature around legal origins as well as an application of the hypothesis.

[29] Franz Wieacker and Edgar Bodenheimer, 'Foundations of European Legal Culture' (1990) 38(1) The American Journal of Comparative Law 1, 6.

[30] Edward L Glaeser and Andrei Shleifer, 'Legal Origins' (2002) 117(4) The Quarterly Journal of Economics 1193, 1194.

[31] Edward L Glaeser and Andrei Shleifer, 'Legal Origins' (2002) 117(4) The Quarterly Journal of Economics 1193, 1211.

> In civil law countries, in contrast, judges are not even supposed to interpret the codes very much, and in principle must seek not to differentiate a specific situation, but to fit it into the existing provisions of a code. As a restraint on the judge, codes are much more powerful in civil than in common law countries.[32]

The differences associated with legal origins have made harmonisation in the EU difficult due to the diverse characteristics of legal systems among the Member States. In the context of restructuring, particularly where court decisions seem to be central to robust restructuring processes, it is difficult to reconcile the common law perspective of law-making and judging with the perspective of a civil lawyer.[33] A civil law practitioner may consider the common law as being overly traditional, uncertain, and peculiar in the interconnected quality of law and equity, while the same characteristics seem to a common lawyer as practical, flexible, rooted in national culture, and natural and productive.[34]

As will be shown in Chapter 5 of this Report, the civil law perspective makes it difficult sometimes to grasp fully how common law procedures such as the Irish Examinership, English Scheme of Arrangement, and American Chapter 11 operate, given the need for judicial application of the various tests of fairness throughout the operation of the process and in final approval of the restructuring plan. In civil law jurisdictions, the function of a code or statute is to seen as giving a judge clear instructions on how to come to a clear decision, whereas the ambiguities and vagaries of the common law allow a judge to make a decision that can take into account a wider set of circumstances than might be available to a civil lawyer, although this also opens the door for legal uncertainty. These differences do go some way to explaining why common law and civil law judges often approach co-operation in cross-border cases differently.

4.3.2 Legal culture and the judicial role

Clearly, judiciaries in common law and civil law jurisdictions have sometimes starkly different roles. While this can often be traced to the fundamental difference between institutional structures, there are enough differences between civil law jurisdictions alone to indicate that the underlying conflicts go beyond a simple binary comparison. The EU Member States are influenced by a number of legal systemic characteristics due to the variety of civil law systems present, whether they are based on French or Austro-Germanic civil law, the cooperative Scandinavian/Nordic system, the transitioning Eastern European economies that have been influenced by the Soviet era, and those systems that have adopted a hybrid or mixed approach. Therefore, there are many factors that might challenge the ease of mutual trust between courts and practitioners among the variety of legal systems present within the EU.

[32] Edward L Glaeser and Andrei Shleifer, 'Legal Origins' (2002) 117(4) The Quarterly Journal of Economics 1193, 1212.
[33] Pierre Legrand, *Fragments of Law as Culture* (WEJ Tjeenk Willink, 1999) 11.
[34] R Zimmerman, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' (1996) 112(Oct) LQR 576, 587.

Mangano describes two particular issues that may affect the willingness of practitioners in particular to co-operate: lack of certainty and foreseeability of legal frameworks leading to a reluctance to defer to another jurisdiction, despite the practical benefit that such co-operation would create.[35] This may have an impact on court co-operation as it is generally through practitioners that such co-operation takes place, usually in a negotiation phase, according to practitioners engaged by the Project at various events. When faced with a lack of certainty or familiarity due to the differences in law and language, Mangano notes that if given the choice, a court or an IP would tend to choose the law with which they are comfortable and familiar rather than accede to another jurisdiction's procedural primacy, despite appearing that it would be in the interests of all parties to co-operate.[36] These potential choices demonstrate an impulse to protect local interests over the benefit of the collective of cross-border creditors as well as a certain understandable discomfort with the unknown, whether due to language differences or lack of available and easily accessible information about legal systems and process in other jurisdictions. Fundamentally, this means that if legal frameworks lack certainty and foreseeability (or are perceived in such a way), then courts and practitioners dealing with the same case in different jurisdictions may not opt to co-operate because, regardless of what the other courts and practitioners do, in the short term not co-operating is viewed as being in the best interests of their local creditors as outcomes appear more predictable.[37]

The difference between civil law and common law approaches as well as the more nuanced differences between legal families among the civil law systems of Europe (which it must be acknowledged is replicated in the wider common law world) may be a key issue in the willingness and ability to co-operate in cross-border insolvency and restructuring cases. Common law jurisdictions tend to be more at ease with interpreting their obligation to co-operate and making private arrangements to do so, such as bespoke co-operation protocols, which will be described in Chapter 7 section 7.3. Mangano observes, however, that civil law jurisdictions sometimes remain attached to a more public interest approach to insolvency law, which is often incompatible with an effective conclusion to such private arrangements or protocols.[38] Although the EIR Recast has set an enhanced obligation to co-operate and communicate in cross-border insolvency cases,[39] it is still not entirely clear how this is intended to occur. There is still scope to interpret the enhanced obligations to co-operate because they leave mode and method up to the cooperating parties themselves. In other

[35] Renato Mangano, 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Co-operation in European Cross-Border Cases' (2017) 26 IIR 314.
[36] The *Eurofood* case is an example of this dilemma occurring in reality. See Chapter 2 section 2.3.1, Chapter 3 section 3.6.1, and Chapter 5 section 5.2.
[37] Renato Mangano, 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Co-operation in European Cross-Border Cases' (2017) 26 IIR 314, 319-321.
[38] Renato Mangano, 'Path Dependence and Paradox in Harmonising Out-of-Court Procedures across Europe: The Evidence from Italy' (Lecture at the 7th International Symposiom on Out-of-court Restructuring Proceedings in Europe, Cologne 26 August 2016 as cited in 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Co-operation in European Cross-Border Cases' (2017) 26 IIR 314, 329.
[39] Renato Mangano, 'From "Prisoner's Dilemma" to Reluctance to Use Judicial Discretion: The Enemies of Co-operation in European Cross-Border Cases' (2017) 26 IIR 314, 330.

words, there is no specified framework or protocol judges can refer to that unequivocally explains how co-operation should materialise. While there are a number of guidelines available for judges to rely upon as will be discussed in Chapter 6 of this Report, it seems that these are rarely used in practice, which became apparent in the analysis of the Judicial Survey in Chapter 8 of this Report.

The challenge of ambiguous, open-textured obligations under the EIR Recast combined with different approaches to the judicial role mean that approaches to co-operation can differ with some significance. Combine that with the weight and importance of judicial interpretation in decision-making and deeply ingrained differences between European legal systems creates a web of potential conceptual conflicts to co-operation in cross-border insolvency cases. Considering the scope of implementation possibilities and the controversial provisions in the PRD, for example, these issues may indeed create conflicts that could be more difficult to surmount in negotiation to achieve co-operation in a cross-border restructuring. Despite the efforts by the EU to Europeanise the judiciaries of the Member States, which will be discussed in the next section, differences in practical judicial independence and aspects of the judicial profession persist, making mutual trust an elusive pursuit at times.

4.4 Creating a European Judicial Culture – Networks and Training

4.4.1 Harmonising judiciaries through training and the European Judicial Training Network

Within the last two decades, there has been a lot of focus and discussion on the need to harmonise the judiciaries of EU Member States through training as a means of ensuring that the rule of law and its associated principles are equally applied throughout the EU,[40] thereby ensuring mutual trust and effective co-operation. Training and networking organisations have been key promoters of harmonisation and the development of a European judicial culture, such as the European Judicial Training Network,[41] the European Law Academy,[42] the INSOL Europe Judicial Forum,[43] and various other organisations created by the EU institutions.[44] This

[40] For a discussion about judicial harmonisation, see for example, Wolfgang Heusel (ed), 'The Future of Legal Europe: An emerging judicial culture?' (2008) 9 ERA Forum 109; Simone Benvenuti, 'Building a Common Judicial Culture in the European Union through Judicial Networks' Paper presented at the RC09 2013 Interim Meeting on 'The Changing Nature of Judicial Power in Supranational, Federal, and Domestic Systems' Dublin, Ireland July 22-24 2013; 'The European Judicial Training Network and its Role in the Strategy for the Europeanisation of National Judges' (2015) 7(1) International Journal for Court Administration 59; Dr Herman van Harten, 'Who's Afraid of a True European Judicial Culture' (2012) Working Paper presented at the Second REALaw Research forum 'Pluralism in European Administrative Law' Groningen 3rd February 2012.

[41] EJTN Website: http://www.ejtn.eu/ [Last accessed 26 June 2020].

[42] ERA Website: http://www.era.int/ [Last accessed 26 June 2020].

[43] INSOL Europe 'Judicial Wing Introduction and Members' (INSOL Europe Website) <https://www.insol-europe.org/judicial-wing-introduction-and-members>[Last accessed 26 June 2020].

[44] Other networks include the Association of the Council of State and Supreme Administrative Jurisdictions (ACA-Europe), The Association of European Administrative Judges (AEAJ), The Network of Presidents of the Supreme Courts of the European Union (NSPC), and the EU Forum of Judges for the Environment (EUFJE) (non-exhaustive list).

move commenced as an aim of the EU institutions with the Hague Programme in 2005, which emphasised that:

> Judicial co-operation…could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law.[45]

Since that time, a number of other Communications and Resolutions on this matter have been released, which have further promoted the ideals of networking and training to promote mutual trust and respect for the rule of law.[46] Fundamentally, the aim has been to take a practical approach to judicial training, making it relevant to every day work, encompassing both initial and continuous training, and enabling Member States to view it as an investment in the quality of justice. These goals were set as objectives to be achieved by 2020 in a Communication in 2011[47] and would be achieved by relying upon existing training structures in Member States while maintaining respect to their subsidiarity and judicial independence.

The European Judicial Training Network has been instrumental as a hub for the implementation of EU policy with regard to the judicial profession as it connects national and European institutions to help define training policies and standards, as well as coordinate judicial academies.[48] The EJTN, funded by the EU, adopts a decentralised approach, relying on a strong commitment from Member States and their individual training institutions.[49] The EU has absorbed these networks in the framework of EU governance under the EJTN and exerts some influence over their activities and objectives. These networks generally engage in four main areas of activity: co-operation in the field of training; cultural exchange and socialisation for a better knowledge of other legal systems or for the sharing of practical experiences; standard setting and exchange of best practices; and lobbying and representation of the interests of network members. The various networks relied upon or set up by the EU institutions help to facilitate and enhance judicial co-operation, improve the functioning of the EU judicial system, and increase mutual trust.[50] It is likely that these networks also play an

[45] European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union OJ C 53 (3.3.2005) 11-12.
[46] See for example, European Commission, 'Communication from the Commission to the European Parliament and the Council on judicial training in the European Union' COM(2006) 356 final; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Delivering an Area of Freedom, Security and Justice for Europe's Citizens – Action Plan implementing the Stockholm Programme' COM(2010) 171 final; European Parliament 'Resolution of 17 June 2010 on Judicial Training – Stockholm Programme' (P7_TA(2010)0242); European Parliament 'Resolution of 14 March 2012 on judicial training' (2012/2575(RSP)).
[47] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Building Trust in Eu-Wide Justice – A New Dimension to European Judicial Training' COM(2011) 551 final, 6.
[48] Simone Benvenuti, 'The European Judicial Training Network and its Role in the Strategy for the Europeanization of National Judges' (2015) 7(1) Int'l J for Court Administration 59, 59.
[49] Simone Benvenuti, 'Who Defines Judicial Training Standards in the EU, and for Whom? The Case of the European Judicial Training Network (EJTN)' (2013) Paper presented at the RC12 2013 International Conference on 'Sociology of Law and Political Action' Toulouse France September 3-6 2013, 7.
[50] Monica Claes and Maartje de Visser, 'Are you Networked Yet? On Dialogues in European Judicial Networks (2012) 8(2) Utrecht L Rev 100, 107-108

important role in encouraging convergence in national judicial practices, gathering European judiciaries into a closer judicial culture.[51]

4.4.2 Judicial training and mutual trust

In June 2014, the European Commission issued a press release, the cornerstone of which was judicial training and the aim of fostering mutual trust among the Member States' judiciaries.[52] Viviane Reding, the EU's Justice Commissioner at the time, stated that:

> Mutual trust is the bedrock upon which EU justice policy is built, and high-quality training of legal practitioners is paramount in fostering this trust. As heads of state and government are meeting today and tomorrow to define the future strategic priorities for Europe's justice area, my call to leaders is to put mutual trust high on the future justice agenda. Trust is not made by decree. It grows with knowledge.

Reding emphasised the importance of training in EU law as the most effective way of ensuring that the single market area can deliver the most for citizens and businesses. Training ensures that legal practitioners are equipped to implement EU law and to foster a sense of a common European judicial culture based on mutual trust. Training does not necessarily fix all of the problems that are associated with mutual trust when considering the obligation to co-operate. Rather, the respect a system and its judiciary have for legal principles and norms is also an important aspect that engenders respect as well as trust between judiciaries of different jurisdictions. Without mutual respect, there can be no mutual trust.

The 2019 Communication 343 also acknowledged the importance of judicial networks as playing an important role in exchanging ideas and best practices and suggested that the existing networks should be supported to further promote the rule of law.[53] It was noted that national judiciaries themselves have an important role to play in promoting the rule of law standards and that participation in councils and national debates on judicial reforms are an important part of national checks and balances.[54]

4.4.3 Protecting the rule of law through shared knowledge and values

The Commission's Communications on the rule of law in 2019 identified that some of the political developments in several Member States that have led to the undermining of the rule

[51] Simone Benvenuti, 'The European Judicial Training Network and its Role in the Strategy for the Europeanization of National Judges' (2015) 7(1) Int'l J for Court Administration 59, 66. See also Dr Herman van Harten, 'Who's Afraid of a True European Judicial Culture' (2012) Working Paper presented at the Second REALaw Research forum 'Pluralism in European Administrative Law' Groningen 3rd February 2012, 15 and Simone Benvenuti, 'Building a Common Judicial Culture in the European Union through Judicial Networks' (2013) Paper presented at the RC09 2013 Interim Meeting on 'The Changing Nature of Judicial Power in Supranational, Federal and Domestic Systems, Dublin, July 22-23 2013, 2.

[52] European Commission, 'Press Release: Getting the priorities for future Justice polices right: European Commission boosts judicial training to foster mutual trust' (European Commission, 26 June 2014) < https://ec.europa.eu/commission/presscorner/detail/en/IP_14_745> [Last accessed 26 June 2020].

[53] 2019 Communication 343, 6.

[54] 2019 Communication 343, 7.

of law could be attributed to a lack of information and limited public knowledge about the it.[55] This came through clearly in a special Eurobarometer Survey in 2019.[56] In order to rectify this, the Commission has proposed taking action to embed the rule of law in national and European political discourse by:

> …disseminating knowledge about EU law requirements and standards and the importance of the rule of law for citizens and business, and by empowering stakeholders with an interest in in promoting rule of law themes. For citizens and businesses to appreciate the role and importance of justice systems, these need to be modern and accessible. Of key importance is the mutual trust in each other's judicial systems, which is a pre-condition for a truly functioning Single Market.[57]

The activities of the European Commission in this area and the multitude of judicial, social and training networks have helped to create a greater understanding of differences in legal and judicial cultures, while also drawing judiciaries closer together. This accompanied by checks such as the Judicial Scorecard, along with the Rule of Law framework and inter-institutional and related Member State dialogues, have continued to help on the march towards judicial Europeanisation. In addition to these supranational and EU level activities, Member State professional guidelines and efforts to harmonise these have also helped to draw judiciaries closer together, at least in terms of understanding each other, although this is also dependent on the engagement of Member State judiciaries in these activities, which can be inhibited by heavy case loads and limited time for additional training.

While on paper there is a set of shared values regarding independence, impartiality, integrity and professionalism, current guidelines and ethical codes developed on the basis of these values are still diverse among the Member States.[58] For example and as summarised by Mak, Graaf, and Jackson, judges in 'old' Member States tend to be critical towards centralised judicial management and approach the value of individual judicial autonomy differently than do those in 'new' Member States, who, depending on their individual history, are still adjusting to a greater degree of self-governance in many cases.[59] The next section will explore aspects of the challenges in this area, specifically focusing on problems of judicial independence.

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[55] 2019 Communication 343, 5.
[56] Special Eurobarometer 489 Report on the Rule of Law (European Commission 2019) <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/special/surveyky/2235>[Last accessed 15 June 2020].
[57] 2019 Communication 343, 5
[58] See Elaine Mak, 'Researching Judicial Ethical Codes, or: How to Eat a Mille-Feuille?' (2018) 9(2) Int'l J for Court Administration 55 for a discussion on judicial ethical codes and guidelines.
[59] Anja Siebert Fohr (ed), *Judicial Independence in Transition* (Springer 2012); see also David Kosar, *Perils of Judicial Self-Government in Transitional Societies* (CUP 2016) as cited in Elaine Mak, Niels Graaf, and Erin Jackson, 'The Framework for Judicial Co-operation in the European Union: Unpacking the Ethical, Legal, and Institutional Dimensions of 'Judicial Culture' (2018) 34(1) Utrecht Journal of International and European Law 24, 33.

4.5 Challenges to Judicial Independence in the EU

The Judiciary sits at the heart of the rule of law and judicial independence is a key element to ensuring its protection. Without independence, courts may be influenced by politics and special interest lobbies, potentially leading to systematic bias and arbitrary decision making.[60] While judicial independence is clearly an important value ascribed to by all EU Member States, the relative independence of Member State judiciaries can still differ along a fairly broad spectrum in reality, ranging from fully independent, to judicial systems less protected by constitutional checks on political and governmental influence. These differences can be attributed, at least in part, to legal culture and tradition as it influences the judicial function and profession in individual Member States.

Countries wishing to join the EU are required to satisfy the Copenhagen Criteria, as noted in section 1.3 of Chapter 1. Of particular importance to this discussion around legal culture and its influence on mutual trust and co-operation is the requirement that institutions are stable enough to guarantee democracy and the rule of law.[61] These two aspects are also some of the most deeply embedded in terms of the way in which a country has developed over time and sometimes difficult to change without deep structural adjustments. Coman notes that while the Western European judiciaries are perceived as having good systems in place to protect judicial independence and impartiality (apart from a few notable exceptions), many newer Member States are still developing in line with EU expected criteria.[62] The challenges faced by newer Member States have been particularly acute, though that is not to say that there are not challenges to judicial independence and the rule of law elsewhere in the EU. Where there has been a long history of a politicised or an otherwise non-independent judiciary, it is difficult to create new habits and protocols to assure judicial independence if constitutional mechanisms are not also in place to protect it.

Judicial reforms were required of most of the newer Member States prior to joining the EU as many of them had to adjust to a post-communism approach to justice and administration in order to meet the EU's requirements on judicial and administrative capacity. Coman observes that these attributes are difficult to change in the short term.[63] In some Member States, existing law still tends to be insufficient to ensure real judicial independence. Batory attributes this in part to the layers of legislation and controls introduced that have often been added to existing rules, indicating a 'knee-jerk' reaction to compliance, which can lead to policy design

[60] For a discussion on the nature and importance of judicial independence, see for example, Pablo Jose Castillo Ortiz, 'Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe' (2017) 9 Hague J Rule Law 315 and John Frerejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 S Cal L Rev 353.

[61] European Council, 'Conclusions of the Presidency, European Council in Copenhagen, 21 and 22 June 1993' (1993) SN180/1/93 <https://www.consilium.europa.eu/media/21225/72921.pdf>, para 7(A)(iii).

[62] Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892, 892-893.

[63] Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892, 893.

being out of step with effective implementation.[64] As observed by Fleck, the quick reformative reactions appeared at times to have merely moved power and undue influence from one bureaucratic institution to another with some radical reforms having an opposite effect to increasing mutual trust, introducing lack of efficiency, decline in trust in the judiciary, corruption and ideological bias.[65]

The EU has tried to help in the area of judicial reform in issues of judicial independence, in particular for new Member States. For example, a Co-operation and Verification Mechanism was created as a transitional measure for Romania and Bulgaria to assist them in addressing several judicial reform shortcomings, corruption, and organised crime. The Mechanism established a set of criteria for the Commission to assess on an annual basis;[66] although it has been viewed as efficient, recent reports show some setbacks, which has raised the question as to whether the demand for progress is stringent enough and whether changes should be more concrete in the system before the Mechanism is terminated.[67] While Romania and Bulgaria continued to follow these benchmarks, Poland, Hungary, and the Czech Republic saw increased tensions as political parties tested their autonomy against EU judicial governance to empower elected branches of government over the judiciary. It is interesting to note that if some of these governments were exhibiting the same characteristics at the time that they joined the EU, they would not have been permitted to do so.[68]

In conclusion, it is not the intention of this Chapter or this Report to detail the problems that have been encountered since the accession of some of the newer Member States, which risk the rule of law and judicial independence. It is sufficient to note that the issues confronting newer Member States are closely connected to cultural trends that have informed their legal systems for decades, as are the difficulties that continue to be encountered by older Member States in this area. These paths are hard to break and require more than just legislative changes, rather entire paradigm shifts in the values and principles that underpin a jurisdiction's existential foundation.[69] If judicial harmonisation is to be achieved, these paradigm shifts will continue to require a close working relationship between EU institutions and Member States to ensure developing principles are aligned. A commonly held view and approach to the rule of law and judicial independence are essential to establishing and maintaining mutual trust in order to ensure effective co-operation between the courts of Member States. Differences in education and training, for example, may colour perspectives

[64] Agnes Batory, 'Why do Anti-Corruption Laws Fail in Central Eastern Europe? A Target Compliance Perspective' (2012) 6 Regulation & Governance 66, 67.
[65] J Fleck, 'Judicial Independence in Hungary' in A Sievert-Fohr (ed), *Judicial Independence in Transition* (Springer 2011) as cited in Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892, 893-894.
[66] EESC Opinion para 4.6.1.
[67] EESC Opinion para 4.6.2.
[68] Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892, 894.
[69] For a discussion around the issues encountered by newer Member States after joining, see for example: Ramona Coman, '*Quo Vadis* Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66(6) Europe-Asia Studies 892; Agnes Batory, 'Why do Anti-Corruption Laws Fail in Central Eastern Europe? A Target Compliance Perspective' (2012) 6 Regulation & Governance 66; Daniel J Beers, 'Judicial Self-Governance and the Rule of Law: Evidence from Romania and the Czech Republic' (2012) 59(5) Problems of Post-Communism 50; and Martin Mendelski, 'EU-Driven Reforms in Romania: a Success Story?' (2012) 28(1) East European Politics 23.

on the relative respect to such principles, making mutual trust more difficult to achieve in practice.

4.6 European Judicial Education and Qualification

As noted in section 4.3 of this Chapter, there are fairly significant differences between the common law and civil law judicial roles, with the former including an interpretative duty that tends to be avoided in the latter. There are also a number of differences between the education, experience, and training requirements to be appointed as a judge among the Member States generally, with some fairly substantial differences between common and civil law countries due to the difference in the judicial role. Question 14 of the JCOERE Questionnaire targeted this area of interest, as has the Judicial Survey, which will be discussed in Chapter 8 of this Report. This section will draw primarily from the responses to the JCOERE Questionnaire to the following question: 'In your jurisdiction, what are the training and competency requirements for insolvency judges?'

Italy

In Italy, judges may qualify through a number of avenues. Either a candidate must already have a PhD or other post graduate law degree, have attended a stage or training course in Court, worked as an honorary judge for at least six years, attained a lawyers licence, worked as a regular university law professor, occupied certain managerial roles in Public Administration, or been appointed as a judge of the administrative and accounting courts. There is also a compulsory initial induction and training period over 18 months including internships.[70] Training sessions are also required every four years.[71] Judges are selected through a public competitive exam published by the Minister of Justice, with some exceptions. For example, university law professors of at least 15 years' standing enrolled in a specific register can also be appointed Counsellors of the Supreme Court of Cassation by the Superior Council of the Judiciary.[72]

France

Commercial court judges, who hear insolvency cases in France, are a special category of unpaid judge, elected by their peers from a constituency formed of persons registered as running a business for at least five years.[73] They are generally elected for a period of generally two years in the first instance, but can be re-elected for an additional four years.[74] Newly

[70] Legislative Decree 30 January 2006, art 25 as amended by Law 30 July 2007.
[71] European Commission, 'Judicial Training Structures: Italy' (European Commission 2012) <https://e-justice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do> [Last accessed 16 June 2020].
[72] Marco Gubitosi, 'Legal Systems in Italy: Overview' (Reuters 2019) <https://uk.practicallaw.thomsonreuters.com/w-007-7826?transitionType=Default&contextData=(sc.Default)> [Last accessed 16 June 2020].
[73] Code de Commerce, L721-3.
[74] Greffe du Tribunal de Commerce, 'Presentation du Tribunal de Commerce' (Greffe du Tribunal de Commerce CAEN) <http://www.greffe-tc-caen.fr/pres_tribunal.php#:~:text=Les%20juges%20consulaires,ni%20indemnit%C3%A9%20d'aucune%20sorte> [Last accessed 26 June 2020].

elected judges are required to undertake training composed of six modules of one or two days each within the first 20 months of their election to the bench.[75] There is now a specific obligation to acquire relevant professional skills and education with a continuing requirement for further professional development. Failure to complete the requisite courses following election will deem the judge to have resigned from office.[76] This differs from judges in the ordinary and civil courts, which require that an individual has completed a bachelor's degree in law, requiring three years of legal studies; and a master's degree in law for two years; and the completion of a competitive examination generally preceded by preparatory classes. Successful candidates can then be appointed as judges' assistants, at which time they receive the same training given by the École Nationale de la Magistrature,[77] which lasts for 31 months and is comprised of 27 months general training followed by a phase to prepare the judicial candidates for the positions they will undertake.[78]

Spain

Admission to careers in the Spanish judiciary is based on the principles of merit and ability. The selection process is objective and transparent, guaranteeing equal opportunity for everyone who meets the criteria and who has the necessary skills, professional competence and qualifications to serve as a judge.[79] There are three ways to become a judge in Spain. First and probably most traditional, upon completion of a law degree, the candidate can pass a free public competitive examination followed by a theoretical and practical selection course at a judiciary school. The average preparation time for the examination tends to be around 3 to 5 years. Then the candidate is required to spend a year at the Spanish Judicial School in Barcelona followed by a one-year internship in the jurisdiction in which they wish to practice. One can also come to judgeship if they are a legal professional with 'renowned competence' and 10 years of practice experience. The candidate would still have to complete a training course at the judicial school, after which they can apply for a merit-based appointment. Finally, a candidate can be a renowned legal professional with more than 15 years of legal practice experience and the ask the general counsel of the judiciary for a discretionary appointment. [80]

[75] Ecole Nationale de la Magistrature, 'Judges Consulaires' (ENM Website) <http://www.enm.justice.fr/formation-juges-consulaires> [Last accessed 26 June 2020].

[76] Law no. 2016-1547 of 18 November 2016, rewriting the section in the Commercial Code on the status of commercial court judges, article 95, introducing new Article L722-17 of the Commercial Code.
Thank you as well to Dr Paul Omar of INSOL Europe and Dr Emilie Ghio, lecturer at Birmingham City University, for their contribution of the content of the country report on France. The French Country Report can be found here: JCOERE Consortium, Ghio E and Omar P, 'Country Report: France' (JCOERE Website 2020) <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionfrance/>.

[77] Ecole Nationale de la Magistrature (ENM): http://www.enm.justice.fr/.[Last accessed 26 June 2020].

[78] Ecole Nationale de la Magistrature, National School for the Judiciary Information Pamphlet, (ENM) <https://www.enm.justice.fr/sites/default/files/publications/plaquette2017_EN.pdf> [Last accessed 25 June 2020].

[79] 'Legal Professions – Spain' (European e-Justice) <https://e-justice.europa.eu/content_legal_professions-29-es-en.do?member=1> [Last accessed 25 June 2020].

[80] 'Get to Know Another Country's Judiciary: Spain' (The National Judicial College 2018) < https://www.judges.org/news-and-info/get-to-know-another-countrys-judiciary-spain/> [Last accessed 25 June 2020]; see also Antonio Tapia and Amalia del Campo, 'Legal Systems in Spain: Overview' (Thomson Reuters Practical Law 2018) <https://uk.practicallaw.thomsonreuters.com/7-634-0207?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#co_anchor_a897703> [Last accessed 25 June 2020].

Austria

Austrian judges are required to complete a degree programme of at least 4 years in Austrian law, which is followed by practical experience as an intern in the courts. Internships last for four years and in principle can take place in a variety of legal environments, including of course district and regional courts. The practical experience concludes with a judicial office examination. After passing the exam, candidate judges can then apply for vacant permanent positions as judges. Appointments are made by the Federal President who delegates this task to the Federal Minister for Justice for most positions. Only Austrian nationals can be appointed judges.[81] There are only 35-40 insolvency judges in Austria and these are usually drawn from experienced judges of the higher courts, such as *Landesgerichte* and *Handelsgericht Wien*. Once appointed, an insolvency judge usually stays in this position until retirement. There is no specific training for insolvency judges, but there is an annual seminar organised by the informal association of insolvency judges.[82]

Germany

Judges are required to undertake the same general legal education as all other regulated legal professions. The legal qualification, uniform for all legal professions, is acquired by passing two examinations with the first examination taking place after undergraduate university studies and the second exam after a state-organised practical training. The general criteria for judicial appointment are set out in the German Constitution (*Grundgesetz*). Professional competence is assessed with an emphasis on the examination results, while personal and social competences are assessed in interviews with appointment commissions or staff managers of the ministries of justice.[83] New judges begin their career on probation, then after three to five years they become judicial officials for life.[84] Insolvency judges are required to have special competences in insolvency, company and trade law and sufficient basic knowledge in labour, social and tax law, as well as in accounting.[85] In practice, however, the huge number of about 185 insolvency courts in Germany results in many judges lacking such competences. There are no specific continuing training rules for insolvency judges and in general, judges are not obliged to prove training.[86]

[81] 'Legal Professions in Austria' (Federal Ministry of the Republic of Austria 2018) <Justizwww.justiz.gv.at> accessed 25 June 2020, 18; see also 'Legal Professions – Austria' (European e-Justice) <https://e-justice.europa.eu/content_legal_professions-29-at-en.do?member=1> [Last accessed 25 June 2020].

[82] Thanks to Dr Susanne Fruhstorfer, partner at Taylor Wessing, for her contribution of the content of country report on Austria, available here: :JCOERE Consortium and Fruhstorfer S, 'Country Report: Austria' (JCOERE Website 2020), https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionaustria/.

[83] Johannes Riedel, 'Training and Recruitment of Judges in Germany' (2013) <https://www.iacajournal.org/articles/abstract/10.18352/ijca.12/> [Last accessed 25 June 2020].

[84] Julia Broder, 'How Judges in Germany Work' (Deutschland.de 2019) <https://www.deutschland.de/en/topic/politics/the-way-judges-work-in-germany-five-facts#:~:text=Requirements%20for%20judges,a%20minimum%20of%208.0%20points> [Last accessed 25 June 2020].

[85] Gerichtsverfassungsgesetz (Law on the Structure of Courts) s 22(6).

[86] Thanks to Professor Stephan Madaus of the University of Halle-Wittenburt for his contribution of the content of the country report on German, available here: JCOERE Consortium and Madaus S, 'Country Report: Germany' (JCOERE Website 2020), https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictiongermany/.

The Netherlands

To qualify as a judge in the Netherlands, a candidate must have both an undergraduate and master's degree in Dutch law and at least two years of working experience outside of the judiciary. In addition, a candidate must be of irreproachable standing, have met the selection criteria of the National Selection Committee for Judges (*Landelijke Selectiecommissie Rechters*, LSR),[87] and complete the initial training programme for trainee judges.[88] The duration of the initial training program depends on the duration of the experience that the trainee judge has.[89] For those with at least two and up to five years working experience, the training will take four years. For trainee judges with more experience, there is a shortened training period from 15 months to three years. In addition to the initial training program,[90] optional training is also available.[91] This is particularly relevant since within the Dutch judiciary judges will usually switch to a different section of the court system about every 3-6 years. As such, there are no specialised insolvency judges in the Netherlands.[92] However, with respect to the WHOA (the new Dutch restructuring process),[93] a so-called 'WHOA pool' will be formed with eleven judges and eleven legal supporters (one for each district court) for building up 'knowhow' and expertise on the operation and application of the WHOA within the Dutch judiciary. To this end, these judges and legal supporters will receive specific training. Furthermore, whereas professional standards provide a quality check for several areas of law, there is no such standard yet available for insolvency judges in the Netherlands.[94]

Denmark

In order to qualify to become a judge in Denmark, an LLM in law is a prerequisite, preceded by an undergraduate degree in law. In addition, a three-year internship as an attorney or within the courts is required. Judges must undertake an initial training programme of 11 courses. Continuous training following appointment is available, but is not required.[95] There are no specific training requirements for insolvency judges but all judges, including insolvency

[87] See further: De Rechtspraak, 'LSR' (De Rechtspraak Website) www.werkenbijderechtspraak.nl/de-organisatie/lsr/ [Last accessed 26 June 2020].

[88] See: De Rechtspraak, 'Recht Voor Jou' (De Rechtspraak Website) <www.rechtvoorjou.nl/home/werken-bij-de-rechtbank/hoe-word-je-rechter-> [Last accessed 26 June 2020]. Judicial training is, in particular, provided for by the SSR. See also SSR, 'Initial Training Programmes' (SSR Website) <https://ssr.nl/ssr-excellent-training-for-a-just-society/initial-training-programmes/> [Last accessed 26 June 2020].

[89] See SSR,' Summary of information about the new Dutch initial training programme' (SSR Website) <https://ssr.nl/wp-content/uploads/2020/03/Summary-new-Dutch-initial-training-programme.pdf > [Last accessed 26 June 2020].

[90] Much training for judges is provided by the SSR. See also SSR, 'Initial Training Programmes' (SSR Website) <https://ssr.nl/ssr-excellent-training-for-a-just-society/initial-training-programmes/> [Last accessed 26 June 2020].

[91] See SSR, 'Life Long Education' (SSR website) https://ssr.nl/ssr-excellent-training-for-a-just-society/life-long-education/. [Last accessed 25 June 2020].

[92] At the start of the legislative program providing for a recalibration of the DBA, it was considered that specialised insolvency judges could be facilitated to better enable knowledge building. This was not included in later updates from the Ministry. See *Kamerstukken II* 2012/13, 29911, 74, at. 2.1.

[93] *Wet homologatie onderhands akkoord ter voorkoming van faillissement* (Act on the confirmation of a private restructuring plan in order to prevent bankruptcy) [hereinafter WHOA]; see also Chapter 7 of JCOERE Report 1 <https://www.ucc.ie/en/jcoere/research/report1/report1chapter/report1chapter7/> accessed 8 October 2020.

[94] Thanks to Gert-Jan Boon, PhD Researcher and Lecturer at the University of Leiden for his contribution of the content of country report on The Netherlands, available here: JCOERE Consortium and Gert Jan Boon, 'Country Report: The Netherlands' (JCOERE Website 2020), https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionthenetherlands/>

[95] European Commission, 'Judicial Training Structures in the EU: Denmark' (European Commission 2012) <https://ejustice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do> accessed 26 June 2020.

judges, are required to do a training programme,[96] which includes a module on procedural insolvency law.[97]

Romania

In Romania, a judicial candidate must first hold an undergraduate and masters degree in law. They must then undertake a two-year National Institute of Magistracy Course and pass a final examination. It is also possible to apply directly for a judicial position, which is open to lawyers with five years of experience and who have passed the required exam. It has been observed that the experience qualification tends to be exceptional, with most appointments undertaking the 2-year magistracy course. This means that a majority of newly appointed judges in Romania do not have practical experience. The 2-year course is also comprised of a a 2-week internship in first instance courts, the prosecutor's office, and the probation office. At the end of the first year, candidates must then undertake a 1-month internship at a lawyer's office with additional hands-on experience during the second year.[98]

Poland

Judges in Poland must first have been admitted to a legal profession, which can be done in a number of ways. A candidate to the bar must have a master's degree followed by bar training and a bar exam; have a master's degree in law followed by five years professional experience and a bar exam; have a PhD in law followed by either the bar exam or three years of professional experience; or they must possess a high academic qualification in the legal sciences.[99] Judicial training is managed by the National School of Judiciary and Prosecution in Krakow.[100] A three year training course is required to become a judge, which includes attendance at lectures and working within the courts. After undergoing one year of training, the candidates then proceed to specialised training as a judge or public prosecutor for an additional 30 months. Finally, trainee judges serve internships as law clerks for 12 months. There is also the possibility of switching from another legal profession; at present, however, this is strongly limited.[101] There is no additional competency requirements for insolvency judges.[102]

[96] According to The Administration of Justice Act section 19 the content of the mandatory training program is decided by *Domstolsstyrelsen*.
[97] Thanks to Dr Line Lanjkaer of Arhus University for her contribution to the content of the country report on Denmark, available here: JCOERE Consortium and Line Langkaer, 'Country Report: Denmark' (JCOERE Website 2020), <https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictiondenmark/>.
[98] 'Judicial Training Structures in the EU: Romania (European Commission 2012) <https://e-justice.europa.eu/content_national_training_structures_for_the_judiciary-406-en.do> [Last accessed 16 June 2020].
[99] Act of 26 May 1982 - Law on Advocates; Act of 6 July 1982 on Legal Advisors.
[100] Act of 23 January 2009 on The National School of Judiciary and Public Prosecution.
[101] Thank you to Michał Barłowsk, senior counsel at Wardynski & Partners, and Sylwester Zydowicz of Taylor Wessing for his contribution of the Polish Country Report: JCOERE Consortium, Barłowski Mand Zydowicz S, 'Country Report: Poland' (JCOERE Website 2020), < https://www.ucc.ie/en/jcoere/research/report1/report1jurisdiction/report1jurisdictionpoland/> .
[102] Polish Restructuring Law, s 150.

Ireland

In Ireland, which along with Cyprus will be the only common law jurisdiction remaining in the EU post Brexit,[103] judges are appointed to the High Court, the Court of Appeal and the Supreme Court by the President of Ireland on the advice of the Government.[104] A Judicial Appointments Advisory Board,[105] established pursuant to the Courts and Court Officers Act 1995 (as amended) and comprised of senior judges, the Attorney General, legal professionals and nominees from the Minister for Justice has the function of identifying 'persons and informing the Government of the suitability of those persons for appointment to judicial office.' To be appointed to the Circuit and District court benches, a candidate must be a practising barrister or solicitor with at least ten years' experience whereas to be appointed to the High Court, the Court of Appeal, or the Supreme Court, a candidate must have at least 12 years' standing and have been practising continuously 2 years before the appointment.[106] The reality is that judges in the Commercial Courts tend to have considerably more experience than that. The individual must be a qualified legal practitioner in order to obtain the practice experience necessary, which usually requires an undergraduate law degree and a professional qualification as either a solicitor qualified with the Incorporated Law Society of Ireland or a barrister qualified with the Honourable Society of the Kings Inns. In addition, the candidate must possess a sufficient 'degree of competence and probity' and must be 'suitable on grounds of character and temperament.'[107]

England and Wales

Judges in the normal courts of England and Wales must be qualified legal practitioners, which requires an undergraduate law degree and qualification with the Law Society of England and Wales or qualification as a barrister. Following training, a candidate must have had at least 5 or 7 years of post-qualification experience to be a judge.[108] In terms of continuing training, the Judicial College is directly responsible for training full (salaried) and part-time (fee-paid) judges in the courts in England and Wales, and for training judges and members of tribunals within the scope of the Tribunals, Courts and Enforcement Act 2007. An essential element of

[103] Malta demonstrates a hybrid civil law / common law jurisdiction.
[104] Irish Constitution, article 35.1 and 13.9. Article 35.1 of the Constitution provides that "[t]he judges of the Supreme Court, the Court of Appeal, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by President." While the formal appointment of judges is made by the President through the presentation of warrants of appointment to those appointed, this power is, pursuant to Article 13.9, exercised "only on the advice of the Government."
[105] www.jaab.ie [Last accessed July 07, 2020]
[106] Section 5 of the Courts (Supplemental Provisions) Act 1961, s5(2)(a) as amended by section 4 of the Courts and Court Officers Act 2002, and section 11 of the Court of Appeal Act 2014, provides that:
'a person shall be qualified for appointment as a judge of the Supreme Court or the Court of Appeal or the High Court if the person is for the time being a practising barrister or practising solicitor of not less than 12 years standing who has practised as a barrister or a solicitor for a continuous period of not less than two years immediately before such appointment.'
[107] Court of Appeal Act 2014 s12(d)(ii).
[108] https://www.judicialappointments.gov.uk. See also for further information https://www.judiciary.uk/ [Last accessed July 07, 2020]
United Kingdom Courts and Tribunals Judiciary, 'Eligibility for legally qualified candidates' (Judicial Appointments Commission) <https://www.judiciary.uk/about-the-judiciary/training-support/judiciary-trained/> [Last accessed 25 June 2020].

the philosophy of the Judicial College is that the training of judges, tribunals members, and magistrates is under judicial control and direction.[109]

Conclusion

Out of the examples from our contributing jurisdictions, there appears to be a wide range of requirements for post education training and apprenticeships to qualify as a judge. There is no specific training requirement to gain a judgeship in the Irish or English jurisdictions, however, given the interpretative role of the judiciary and the need for barristers and solicitors to understand, interpret and apply case law in their advisory and advocacy roles, the experience requirements mitigate this. With minimum ten-years-experience Irish practitioners will have been steeped in judicial interpretation and decision-making to a much higher degree than their civil law counterparts, though it is perhaps less satisfying that the English experience requirement is less than the Irish. Interpretation and experience is an important legal cultural aspect of the common law system that does not align with the judicial role in civil law systems.

The differences among the civil law systems also seem significant, though there are a number of parallels. Most of the judgeships require education in law of either undergraduate or master's level, though this depends on the legal education requirements generally in each jurisdiction. The length of training in terms of courses and internships vary from 8 days in France to 4 years court internship in Austria with a variety of course requirements and on the job training in between. French commercial judges are a particular anomaly, drawn from the business community and elected for fairly short periods of time. Though there is some logic in asking businesspeople to hear commercial cases, by comparison the training seems relatively limited. It is also interesting to note that it is among the newer Member States that some of the most stringent training and education requirements arise.

Apart from France, all of the other civil jurisdictions interrogated provide a much higher level of training on the surface than either Ireland or the UK. While the difference in training is clearly connected to the differences in civil and common law and the fact that the interpretation and understanding of judicial decision-making is a part of the job of a common lawyer, without an understanding of that key legal culture difference, it would be easy to view the Irish and English judicial training as inadequate. In the JCOERE team's experience, there is certainly some dissonance between many civil lawyers' understanding of the common law system that has given them pause, particularly with regard to the interpretative obligation that clarifies ambiguities in legislation and creates precedents that can be used habitually to determine things like fairness; this can be seen in the unfair prejudice test in Ireland, for example.

[109] United Kingdom Courts and Tribunals Judiciary, 'The Judicial College' (Judiciary UK) <https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/>

4.7 Towards Resolving Challenges to Judicial Co-operation

Political powers shift and, as has been evident over the last several years, this shift can be in a direction away from balancing political power and toward more authoritarian impulses. Where internal structures of a Member State are not developed or strong enough to resist such movements, the EU has tried to provide early warning systems and mechanisms to assist and recalibrate legal structures as noted in section 4.2 of this Chapter. The Commission needs a deep knowledge of Member State legal culture and systemic characteristics to be able to provide oversight on rule of law problems among the Member States and to identify warning signs that a problem is coming. Country-specific knowledge is essential to respond effectively to rule of law risks as these may arise in different guises in different countries due to the inherent differences among the 27 Member State legal cultures. Thus, a dialogue with Member State authorities and stakeholders is also essential.[110]

A number of mechanisms have been developed to assist the EU in monitoring issues arising from rule of law and judicial independence problems. The Council of Europe has also developed The Rule of Law Checklist, intended to be a tool for assessing the Rule of Law from the viewpoint of its constitutional and legal structure, legislation in force, and existing case law. It aims at enabling objective, thorough, equal, and transparent assessment of the legal safeguards in place to protect the rule of law in a given jurisdiction.[111] In addition, the European Judicial Training Network produced a publication in 2019 about perspectives on the rule of law from both practitioners and academics in the EU. Its objective is to increase knowledge and awareness of professional standards within the rule of law framework and strengthen the rule of law culture in the EU.[112]

The European Semester and the Judicial Scoreboard have also been created to help develop country-specific knowledge relating to the rule of law, highlighting positive and negative trends in the judiciaries of the Member States.[113] The Judicial Scoreboard offers Member States the opportunity to reflect on their own strengths and weaknesses with indicators on efficiency, quality, and independence of judiciaries.[114] It also feeds into the Semester by providing elements for assessing the quality independence and efficiency of national justice systems. The aim of the European Semester is to provide a framework within which economic policies can be coordinated across the EU, also covering the fight against corruption, effective

[110] 2019 Communication 163, 9.
[111] Venice Commission of the Council of Europe, 'Rule of Law Checklist', CDL-AD(2016)007. Retrieved from: <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> [Last accessed 15 June 2020]. 12.
[112] EJTN, 'Rule of Law in Europe: Perspectives from Practitioners and Academics' (EJTN 2019) <http://www.ejtn.eu/News/Rule-of-Law-in-Europe--Perspectives-from-Practitioners-and-Academics1/> [Last accessed 15 June 2020].
[113] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf> accessed 15 June 2020.
[114] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020.

justice systems, and reform of public administration.[115] It provides country specific assessments carried out through a bilateral dialogue with national authorities and the stakeholders involved.[116] However, it has been criticised for not being inclusive enough of social partners and that recommendations are not being implemented in a satisfactory manner in the Member States tasked with them.[117] These tools could be further developed in order to explore how the challenges to harmonisation in this area can be further resolved.[118]

In 2019, the Judicial Scoreboard assessed a number of qualities of Member State justice systems, including efficiency, quality standards, independence and training. Given the focus on independence and training in the foregoing sections, it is interesting to consider what the 2019 Scoreboard showed. In terms of training, the 2019 Scoreboard demonstrated that most Member States provide continuous training in EU Law, the law of other Member States, and judgecraft, though most Member States continue to devote less time to judicial ethics overall. Notably and in contrast, Romania provides continuous training in judicial ethics to 80% of its judges, by far the highest proportion in that area among all of the other Member States.[119] While judgecraft is clearly important, as indicated by the high proportion of judges who receive continuous training in this area, for newer Member States that may have suffered from systemic corruption in the past, judicial ethics should likely form a reasonably high proportion of judicial training practices. Other newer Member States dealing with the challenges of governmental corruption do not devote near as much time to judicial ethics, as Romania in this context.

A whole section of the Scoreboard is devoted to judicial independence. The findings in 2019 show that judicial independence perceived among the general public is skewed in the negative toward newer Member States, with two notable exceptions in the bottom five (Spain and Italy). Most of the negative perceptions are based on interference or pressure from governments and politicians.[120] Where perceptions were positive, this was usually noted as being due to the guarantees provided by the status and position of judges. There has been little change in the perception of either businesses or individuals in the independence of the judiciary among the Member States in terms of the ranking; however, there is a trend in a perception that independence has improved among the Member States that had been

[115] EESC Opinion para 4.4.1.
[116]European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020, 3.
[117] EESC Opinion para 4.4.2.
[118] 2019 Communication 9
[119] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en>
<https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020], 42 and figure 37.
[120] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020], figure 47 and 48.

experiencing challenges over a four year period. Compared with the 2018 Scoreboard, however, the perception of judicial independence has decreased overall.[121]

While the Scoreboard presents only the perceptions of individuals and businesses in relation to the relative success of their own Member States, it does give some indication as to how the main recipients of a justice systems' services feel about the services they are receiving: the public. The perceived improvement among the Member States, which were facing challenges in the last four years, may show that the EU's efforts to enhance the rule of law principles throughout all of the Member States, the mechanisms it has created, and the frameworks it has put in place have begun to make some impact on improving mutual trust, thereby creating an environment in which co-operation can occur more effectively. However, and as noted previously, legal and judicial culture will be difficult to change without serious structural adjustments where the differences are far from expectations within the EU legal framework. 'Knee-jerk' legislative reactions often just transfer responsibility and power to a different institution. That said, the goal of judicial Europeanisation as part of the integration project of the EU is essential for its success if true mutual trust is to be established within the framework of the rule of law, allowing for effective co-operation between the courts of different Member States.

4.8 Conclusion and Transition

The EU, its institutions and associated organisations have clearly been busy implementing the 2019 Communications' frameworks and recommendations in the latter half of 2019. The efforts to gather knowledge and increase understanding are a step in the right direction in trying to create a true European judicial culture by challenging the deeply rooted presumptions within Member State legal cultures from which differences stem, making mutual trust more difficult to achieve, and thereby pushing effective co-operation in cross-border matters further out of reach.

This chapter has explored the rule of law within the framework of the EU and how it has been a focus of policy discussion and initiatives towards change, particularly in the last decade. These policies have promoted support for existing judicial training networks and for the introduction of training at national levels through organisations such as the European Judicial Training Network. While there has certainly been a move towards a closer relationship between EU judiciaries and a rise in the level of awareness of foundational principles, such as the rule of law, and associated principles such as judicial independence, this has not prevented actions that have risked the integrity of the rule of law in the EU by some Member State

[121] European Commission, 'The 2019 EU Justice Scoreboard' (Communication) COM (2019) 198/2 final. Retrieved from: <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> [Last accessed 13 June 2020], 138.

governments.[122] Legal culture, coupled with political forces, influence diverse approaches to similar problems. This is one important reason why enhancing harmonisation and co-operation is vital to ensure the strength of the EU. The JCOERE Project is focussed on the integration of a particular aspect of market behaviour, namely the rescue of failing businesses and economic recovery in Europe, but nevertheless our findings and observations can be applied in other spheres.

The next Chapter will discuss and analyse cases arising in the context of co-operation in cross-border insolvency and rescue. The cases discussed in Chapter 5 will demonstrate the different approaches taken by practitioners and courts and how these will influence developments within the EU over time as well as some situations in which difficulties in co-operation have arisen.

[122] As noted in section 4.2 of this Chapter, both Poland and Hungary have been subject to notifications under the Rule of Law Framework. In addition, while Romania and Bulgaria have been seen to follow the benchmarks set out in the Cooperation and Verification Mechanisms, Poland, Hungary, and the Czech Republic have seen increased political tensions as political parties tested their autonomy against EU judicial governance to empower elected branches of government over the judiciary. See Opinion of the European Economic and Social Committee on the Communication COM(2019) 163 final from the Commission to the European Parliament, the European Council, and the Council on Further Strengthening the Rule of Law within the Union – State of play and next possible steps (Brussels 3.4.2019) para 4.6.1.