

JUDICIAL COOPERATION PANEL:

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JCOERE

Judicial Co-Operation
European Economic Recovery

SETTING THE SCENE- CONSIDERING EUROPEAN JUDICIAL CO-OPERATION – A CASE STUDY FROM BUSINESS FAILURE

Judicial Co-operation for Economic Recovery
in Europe. The JCOERE Project

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Part of the JCOERE Project (EU Commission 800807) examines the relationship between the EU harmonisation agenda, judicial co-operation across the member states and the relationship of both to the further integration of the European Union. This panel uses the doctrinal subject matter of JCOERE, namely preventive corporate restructuring (arising in the context of insolvency or near insolvency) as a case study to further examine these issues and provide groundwork for future research in these areas.

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PI of [JCOERE](#)

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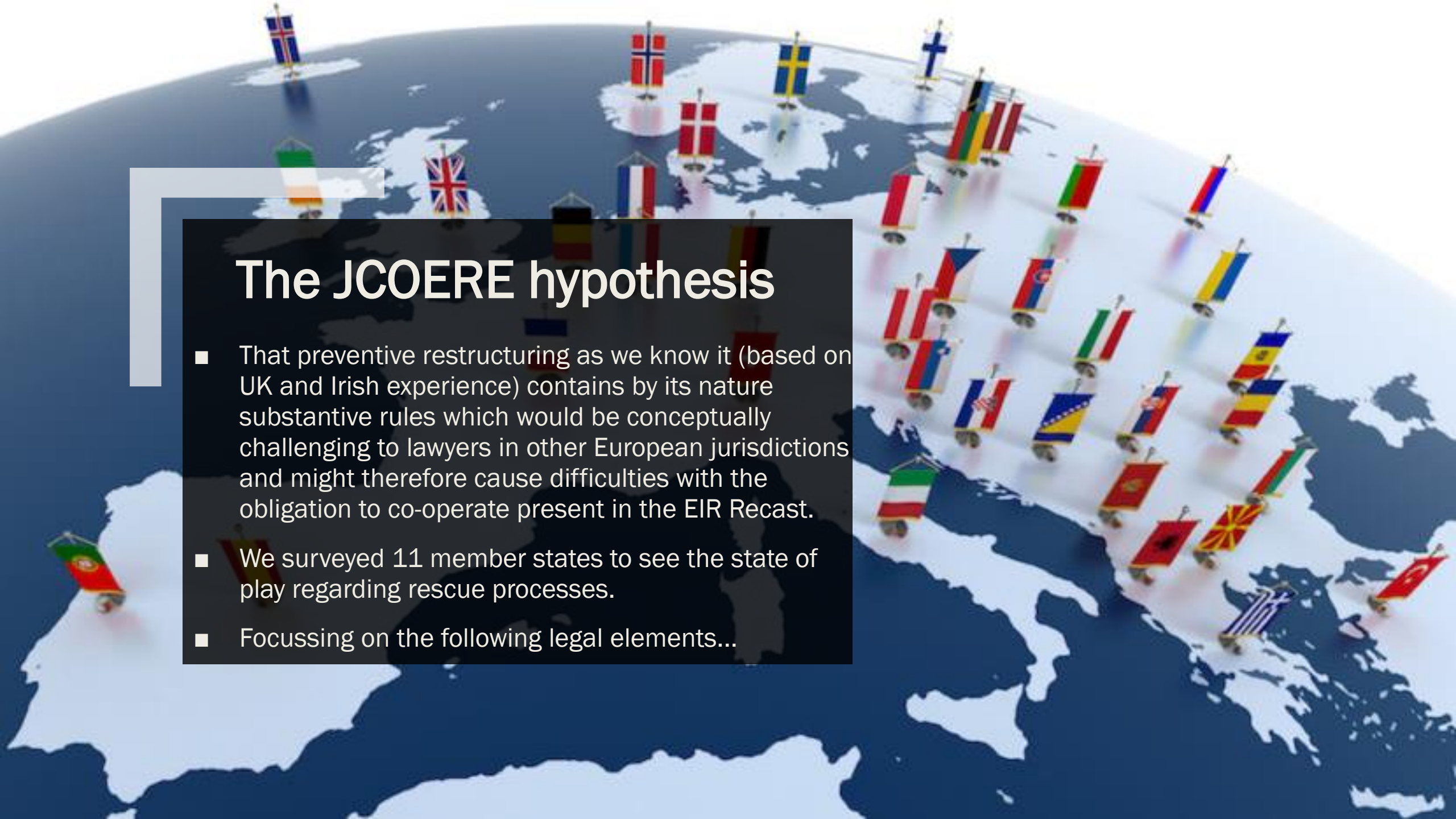
Corporate restructuring at a point of near insolvency - a simple test case

EIR Recast 848/2015

- Arts 42-44
- Arts 56 -58
- Imposes obligations on courts to co-operate with each other in insolvency proceedings listed in Annex A of the EIR Recast.
- Also imposes obligations on courts and practitioners to co-operate across national boundaries.

Preventive Restructuring Directive 1023/2019

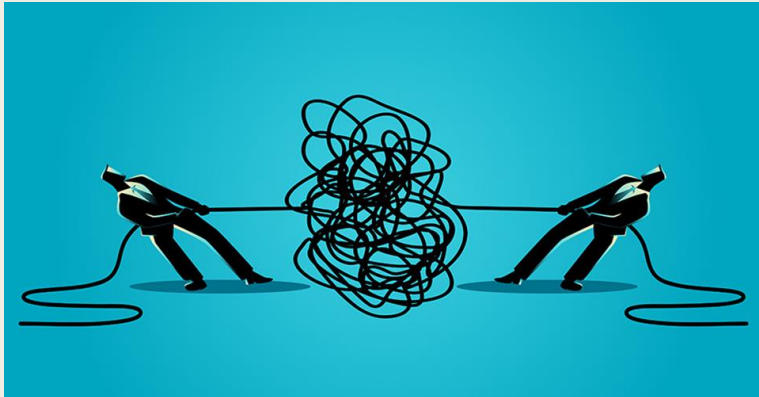
- Introduces a new insolvency procedure in the European Union.
- Requires member states to have a preventive restructuring, corporate rescue process in place by June 2021.
- JCOERE combines an enquiry into the interface between these two pieces of regulation.



The JCOERE hypothesis

- That preventive restructuring as we know it (based on UK and Irish experience) contains by its nature substantive rules which would be conceptually challenging to lawyers in other European jurisdictions and might therefore cause difficulties with the obligation to co-operate present in the EIR Recast.
- We surveyed 11 member states to see the state of play regarding rescue processes.
- Focussing on the following legal elements...

Some radical aspects to corporate restructuring



- A pan European stay on creditors' claims.
- A cram down of creditors' existing claims...forcing creditors within a class to agree.
- Protection for new investors.
- Cross class cram down....forcing creditors in dissenting classes to agree.

Different policy, academic and legal responses- categorisation of state responses

- **Robust or radical restructuring** states where legislative framework contains for example a stay and a cross class cramdown- were present in common law countries
- **Adaptive** states responding to EU requirements in anticipation of harmonisation and increased restructuring business
- **Newer accession states**
- **Resister states-** states (civil law) with traditional insolvency law provisions and outlooks
- **Outliers**



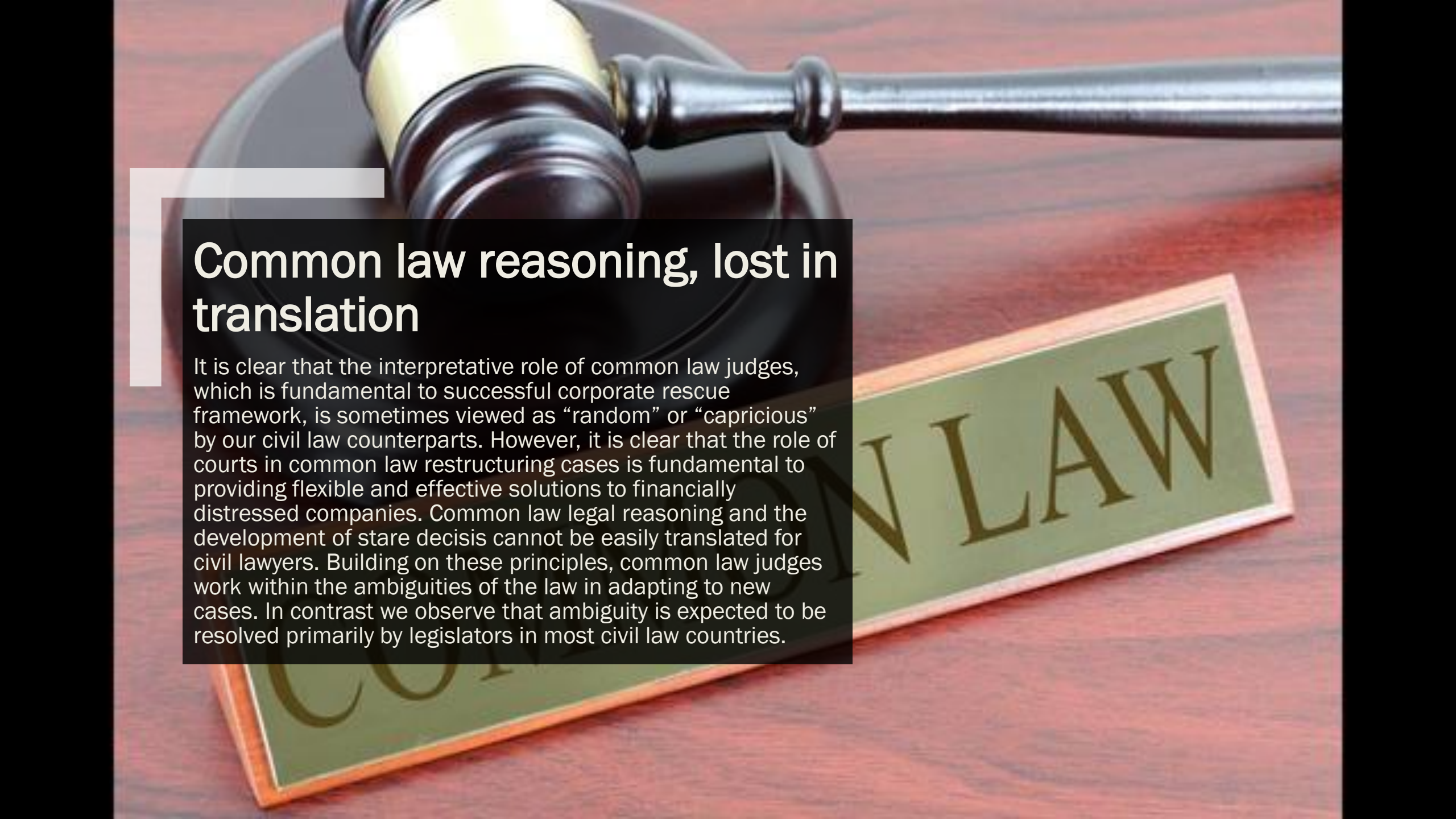
The hypothesis proven...

- Civil lawyers view of the role of the court in monitoring and guiding restructuring processes.
- Scepticism about the 'gate keeping' function of the courts- the adjudication of the 'threshold' question.
- Scepticism regarding the decisionmaking function of the courts- the court adjudicating technical information.
- Scepticism regarding common law reasoning- the issue of precedent and decision making from case to case.

The role of courts....



- Scepticism amongst civil law commentators regarding the central role played by common law courts in gatekeeping entry to radical restructuring processes. How can a court decide whether a company has a reasonable prospect of being rescued and surviving? What evidence is brought to bear on this question? Are the courts independent enough to decide this?
- Some civil lawyers were even sceptical about the ability of courts to adjudicate questions of complicated fact. Corporate rescue schemes in common law jurisdictions typically involve significant adjustment to pre-agreed contractual rights and are usually subject to court approval, wherein the scheme is considered against criteria such as reasonableness, ‘unfair prejudice’ and what is ‘fair and equitable’ between all the creditors.



Common law reasoning, lost in translation

It is clear that the interpretative role of common law judges, which is fundamental to successful corporate rescue framework, is sometimes viewed as “random” or “capricious” by our civil law counterparts. However, it is clear that the role of courts in common law restructuring cases is fundamental to providing flexible and effective solutions to financially distressed companies. Common law legal reasoning and the development of stare decisis cannot be easily translated for civil lawyers. Building on these principles, common law judges work within the ambiguities of the law in adapting to new cases. In contrast we observe that ambiguity is expected to be resolved primarily by legislators in most civil law countries.



LEGAL CULTURE

Influencing mutual trust and co-operation between EU
Member State courts



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The European Integration Project

- *‘If the European Union is to succeed as a political project sustained and continued attention must be paid to issues of co-operation and co-ordination in legal spheres.’*

Emanuel Macron



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Court-to-court co-operation and the EIR Recast

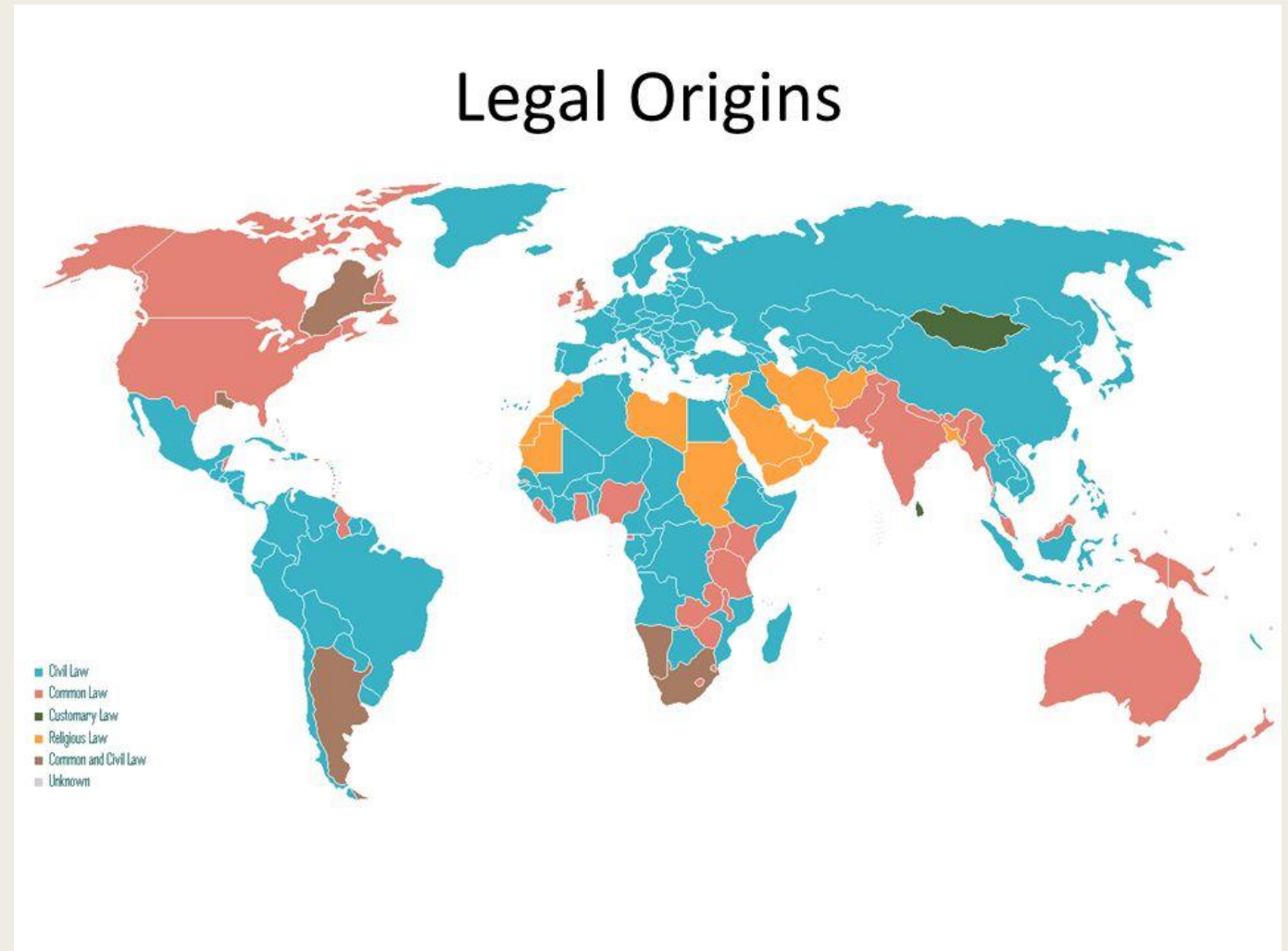
- Obligation on Courts (and Practitioners) to Cooperate in cases of cross-border insolvency and restructuring
- *'The recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust.'* (Recital 65)
 - *Mutual trust and the Rule of Law*
 - *Legal origins and the influence of legal culture*
 - *Europeanising the judiciary*
 - *Challenges to judicial independence*
 - *Resolving the challenge of mutual trust and co-operation*

Mutual trust and the Rule of Law in the EU

- European Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM (2014) 0158 final
- 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
- 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

Legal origins influencing legal culture

- Legal Culture
 - *The Nature of Institutions*
 - *Principles and Norms*
 - *Path Dependency*
- Judicial Culture and Legal Origins
 - *Legal Families*
 - *Common Law vs Civil Law*



Europeanisation of EU judiciaries

MUTUAL TRUST

- The European Judicial Training Network
- Training and Mutual Trust
- Protecting the Rule of Law through Shared Knowledge and Values



Challenges to judicial independence

The Copenhagen Criteria

Constitutional protections

The challenge of judicial reforms

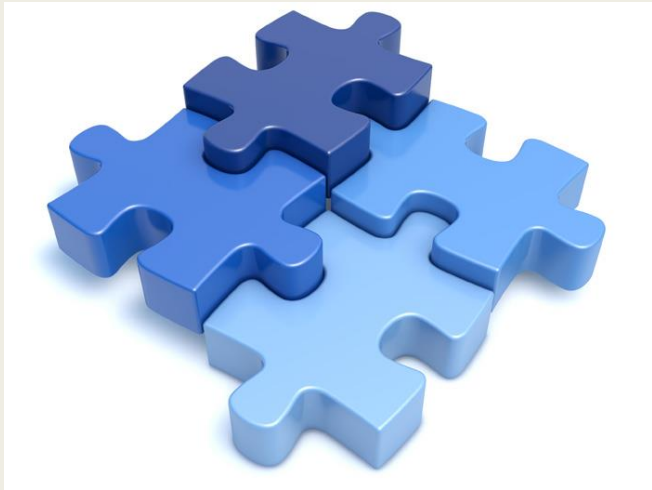




Toward resolving challenges to Court Co-operation

- A dialogue with Member State authorities and stakeholders
- The Rule of Law Checklist
- Judicial Training Network
- European Semester
- Judicial Scoreboard

Conclusion: achieving integration – the judicial connection



- EU integration aims
- Enhancing judicial co-operation
- Awareness of co-operation guidelines



“SO, IT’S ALL JUST RANDOM THEN?”

How *unfamiliarity* breeds contempt
amongst members of the EU judiciary

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Introduction

- Purpose of the paper
 - *“So, it’s all just random then?”*
 - *Primary Premise: Differences can lead to mistrust of / contempt for other legal traditions*

- Structure of the paper:
 - *Explanation of the Judicial Survey*
 - *Two Areas of Focus:*
 - Judicial Competency
 - (Lack of) Formality

Judicial survey



- Place within the JCOERE Project
 - *Deliverable: Gather data on the experience of members of the European Judiciary with court-to-court co-operation and to assess the level of knowledge of current co-operation guidelines.*

- Survey Focus Areas
 - *Training, length of service and applicable jurisdiction*
 - *Experience with co-operating in cross-border cases (or cases generally)*
 - *Awareness of co-operation frameworks and guidelines such as Model Law and CoCo Guidelines*



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Judicial survey

- 3 Focus Groups of Judges:
 - *INSOL Judicial Wing / Irish Judges*
 - *Italian Judges*
 - *Romanian Judges*
- Survey Highlights
 - *Produced in 3 different languages*
 - *Total of 50 responses*
 - *Respondents came from 12 jurisdictions*

Judicial competency: key differences



- The profession or role itself
 - *The concept of 'lay' judges*
- Education and training requirements
 - *Actual requirements vs how they can be described or perceived*
 - *Not comparing 'like with like': The Commercial Court in France and Ireland*

Concept of 'lay judges'

- Lay Judges
 - *Various jurisdictions allow for the role of 'lay judge'*
 - *Volunteer judges / judges appointed from the public*
 - *Often in criminal matters (akin to a jury) but also civil matters*
 - *Often understood to have the "same voting rights as professional judges"*

- Common Law: Role of the Judge
 - *Professional Requirements (specific legal practice experience)*
 - *Sufficient "degree of competence and probity"*
 - *Suitability "on the grounds of character and temperament"*
 - *Position commands considerable respect – Constitutional protection*
 - *Viewed as a 'vocation'*
 - *Therefore, the concept of 'lay judges' is alien within the common law... Or is it?*



- The role of Magistrate in England & Wales is broadly similar to the idea of the lay judge.
- They are: volunteers who hear cases in criminal and family court (legal advisor present to advise on the law and ensure procedures are followed).
- They received some training, but have no legal qualifications
- Key Difference: No involvement in business or insolvency related matters



Education and training requirements

- Judicial training
 - Respondents from 4 jurisdictions; “No Training” required to become a judge
 - Contradictory responses within jurisdictions
- But...
 - Of the jurisdictions that answered ‘no’ to the training requirement, all actually had some formal requirement to become a professional judge.
 - Higher Courts in Ireland: Not less than 12 years’ practising as a solicitor or barrister.
- Key point
 - If discussing training with international judges statements such as “no training required” can lead to suspicion or distrust of the legal system within that country, even though that is not the case.



Not comparing “like with like”

- Irish Commercial Court
 - *Requires 12 years’ experience as a practising barrister or solicitor*

- French Commercial Court
 - *Volunteer traders elected by other traders*
 - *Training required (6-12 days)*

- But...
 - *1 Commercial Court in Ireland (High Court) vs 130+ Commercial Courts in France*

(Lack of) formality

- Perceptions: Appropriate formality or unnecessary barriers to co-operation?
 - (Informal) communication between courts can be impeded by either system:
 - *The formality associated with common law rules (perceived as appropriate within the adversarial system) could be seen as unnecessarily formal by a civil law judge.*
 - *Communication and co-operation between courts must be expressly provided for by a civil law system, otherwise it is impermissible.*
 - *Where co-operation is expressly provided for by a civil law system, particularly of an informal nature, then this could be seen as too loose or contrary to public policy / administration of justice by common law courts.*
- => all have potential to undermine the other system
- => all potential barriers to co-operation





Judicial survey: formalities

- Awareness of one or more of the existing guidelines varied considerably between the 3 surveys: 88% - 28% (average 54%)
- Use of one of the guidelines: 4/50 judges
- Existence of jurisdictional rules about the receipt of information external to the case was unclear:
 - *Judges within the same jurisdiction gave conflicting responses*
- Around 50% of the judges surveyed had a preference for creating co-operation protocols on a case-by-case basis

Conclusion

- The European Union undoubtedly has challenges where court-to-court is concerned:
 - *Inherent differences in the systems (evidenced in part by ‘lay judges’)*
 - *The difficulty comparing the systems (‘like with like’)*
 - *Differing understandings of what is meant by ‘training’ leading to misrepresentations and misunderstandings*
 - *Certain formality is typical within the common law but dependent on the particular rules within a civil law system => either may appear inconsistent to the other system*





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Thank you for tuning in!

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