

How to measure the success of national implementations of the Preventive Restructuring Directive?

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Agenda

1. Introduction; some examples
2. Background and research scope
3. Aims and objectives of the PRD
4. PRD success assessment approaches
5. The Preventive Restructuring *Cafeteria*
6. Conclusion and next steps

Introduction

"How to measure success?" presumes that the PRD and its implementation in national legislation in MS – the preventive restructuring framework (PRF) – is successful (or not)

A working definition of '**success**' is that the national PRFs are **effective** in achieving the aims of the PRD; so what does 'effective' mean?

Examples of success?

Debtor reaches a consensual deal with its stakeholders reducing his exposure

Debtor is able to negotiate a plan without being disturbed by enforcement actions (attachment, bankruptcy filing etc.) because of a (temporary) stay

Debtor is able to reject onerous contracts and include damages in the plan

Debtor convinces the court to cram down opposing (classes of) affected stakeholders and to confirm the plan

Court rejects confirmation as plan lacks sufficient information for affected creditors to make an informed decision

Background and research scope

Art. 1(1) PRD: “This Directive lays down rules on: (a) **preventive restructuring frameworks** available for **debtors in financial difficulties** when there is a **likelihood of insolvency**, with a view to **preventing the insolvency** and **ensuring the viability of the debtor**; [...]”

Research scope is limited to Preventive Restructuring Frameworks based on **Title II (Art. 4-19 PRD)** solely aimed at **financial (debt) restructuring** and not operational restructuring (employees' redundancy)

Art. 4(1) PRD: “**Member States shall ensure** that, where there is a likelihood of insolvency, debtors have **access to a preventive restructuring framework** that enables them to restructure, with a view to **preventing insolvency** and **ensuring their viability**, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity.”

Background and research scope

Assumption is that a **debtor is viable and eligible for a preventive restructuring framework (PRF)**, so

- **no false Type I** (viable business is incorrectly excluded from PRF; (Almost) impossible to discern; unlikely to be discovered)
- **nor false Type II** (accidentally unviable business is attempted to be rescued through PRF; Rescue appears to be in vain because of insolvency shortly afterwards)

The **primary aim of the PRD** is to keep **viable business alive**, which requires a **dialogue** with all stakeholders (Recital 10 PRD)

Recital 10 PRD: “Any **restructuring operation**, in particular one of major size which generates a significant impact, should be **based on a dialogue with the stakeholders**. That dialogue should cover the choice of the measures envisaged in relation to the **objectives of the restructuring operation**, as well as alternative options [...]”

Background and research scope

Restructuring is in essence a **deviation of *pacta sunt servanda*** which requires **restatement/amendment of existing *pacta*** based on **negotiations with and consent from affected stakeholders** (including *nolens volens* consent due to the terrible financial situation)

The **success of a restructuring** of a debtor in financial difficulties trying to **survive and save his business** should be measured in accordance with **aims and objectives of the PRD**

Aims and objectives of the PRD

“The **Directive** aims to remove **obstacles** to the **exercise of fundamental freedoms**, such as free movement of capital and freedom of establishment (Recital 1 PRD)

by ensuring that **viable enterprises** and **entrepreneurs** that are in **financial difficulties** have **access to effective national preventive restructuring frameworks** [...]” (Recital 1 PRD)

“Preventive restructuring frameworks should, above all, enable debtors to **restructure effectively** at an **early stage** and to **avoid insolvency**” (Recital 2 PRD)

“Those frameworks should help to **prevent job losses** and the loss of **know-how** and **skills**, and **maximise** the total **value** to **creditors** [...] as well as to **owners** and the **economy as a whole** [...]” (Recital 2 PRD)

Aims and objectives of the PRD

“Removing the barriers to **effective** preventive restructuring of viable debtors in financial difficulties

- contributes to minimising **job losses** and losses of value for creditors in the supply chain,
- preserves **know-how** and **skills** and hence benefits the wider economy.” (Recital 16 PRD)

Such procedures enable better assessment of lending/borrowing risks and facilitate the debt adjustment for debtors, minimising economic and social costs of that process (Recital 16 PRD)

“To promote **efficiency** and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures.” (Recital 29 PRD)

“Member States should ensure that procedures concerning restructuring, insolvency and discharge of debt can be carried out in an **efficient** and expeditious manner.” (Recital 86 PRD)

Aims and objectives of the PRD: an overview

National preventive restructuring frameworks (PRFs) should

Prevent/minimise loss of

- Jobs
- Know-how
- Skills

Stimulate debt rescheduling

- Better assessment financing risks
- Facilitate debt adjustment
(Recital 16 PRD)

Maximise value to

- Creditors (compared with liquidation in bankruptcy or next-best-alternative)
- Owners (equity holders)
- Economy as a whole
(Recital 2 PRD)

Include flexible and expeditious procedures

- Promote efficiency
- Reduce delays and costs
(Recital 29/86 PRD)

Evaluation criteria

Implementation of the PRD is successful if the goals of the PRD have been achieved and PRFs turn out to be effective, but *how* can we evaluate and measure these results?

- **WHAT** is it that you want to measure?
 - definition
- **WHO** will measure?
 - perspective
- **HOW** will you measure?
 - methodology
- **WHEN** do you measure?
 - comparison ex ante – ex post [ideally *ceteris paribus*]

Effectiveness from whose perspective?

Objectives differ depending on the **perspective**; effective for who?

- *MS/government*: overall effectivity
- *Debtor*: business continuity and lowering liabilities
- *Creditors*: better off than in bankruptcy or next-best-alternative
- *Equity*: maintaining control and perspective on future profits
- *Employees*: restrict job losses
- *Suppliers*: continuation business relationship
- *Judiciary*: no work overload and clearly defined proceedings
- *PiFoR*: adequate tools for performing its tasks (Art. 2(12) PRD)

Operationalisation of objectives

- **No – or less – losses of jobs, know-how and skills**
 - *Definition*; which jobs, know-how and skills?
 - *Methodology*; how do we measure? Publicly available data? Etc.
- **Maximisation of creditor value, equity value and value of economy as a whole**
 - *Definition*; what is creditor value, equity value and value of economy as a whole?
 - *Methodology*; best-interest-of-creditors' test? Comparison among MS
- **Stimulation and facilitation of debt rescheduling for better risk assessment**
 - *Definition*; what are the relevant lending/borrowing risks (repayment risk, market risk, interest risk, delay, insolvency etc.)? What types of debt adjustments are we looking for (legal/non-legal)?
 - *Methodology*; when are risks better assessed? And when is debt rescheduling stimulated and facilitated?
- **Efficiency in flexible and expeditious procedures that reduce delay and costs**
 - *Definition*; what is a flexible and expeditious procedure and which types of delay and costs are relevant?
 - *Methodology*; when are such procedures efficient? Law in the books vs law in action
- Etc. etc. etc. ...

Different methods

	Doctrinal research	Comparative research	Empirical research
	<ul style="list-style-type: none"> • Primary/secondary legislation • Case law • Doctrinal debate 		<ul style="list-style-type: none"> • Statistical analysis (descriptive, regressions, etc.) • Interviews • Survey • Longitudinal studies
No – or less – losses of jobs, know-how and skills			
Maximisation of creditor value, equity value and value of economy as a whole			
Stimulation and facilitation of debt rescheduling			
Efficiency in flexible and expeditious procedures			

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No – or less – losses of jobs, know-how and skills	?	?	?
Maximisation of creditor value, equity value and value of economy as a whole	?	?	?
Stimulation and facilitation of debt rescheduling	?	?	?
Efficiency in flexible and expeditious procedures	?	?	?

Methodological complications

- Measuring whether or not the PRD objectives will be achieved, requires a so-called '**Zero measurement**' (before PRD implementation), to be repeated before 26 July 2026 (Art. 33 PRD; review clause)
- **No clarity** about the **data** to be collected
- Even if such clarity exists, it may be **difficult to find**, obtain and have **access to the data** (not (publicly) available, confidential)
- No valid *ceteris paribus* assumption
- Etc. etc. etc. ...

In other words: we end in a **Preventive Restructuring Cafeteria**



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The Preventive Restructuring *Cafeteria*



Next steps; invitation

- **Who is interested to join the quest for best practices and successful implementation of the PRD?**
Finetuning research question, methodology, etc.
 - 1-pager per (home)jurisdiction with the features of the existing or new PRF, clarifying research question(s)
 - Historical, doctrinal, comparative, empirical research methods
- **Discuss methodology how research question(s) can/will be answered**
 - History of European legislative process that led to PRD with national and cross-border trajectories in the implementation process (primary/secondary legislation, case law, doctrinal debate etc.)
 - Discovery of court/administrative databases related to PRD and its national implementations
 - Financial and other data (statistical analysis – descriptive, regressions etc.)
 - Interviews and surveys, longitudinal studies
 - Other methods?
- **Cooperation and joint project with other interested parties**
 - INSOL Europe (IEAF), CERIL, others?

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