4. LEGAL CONSEQUENCES OF INSOLVENCY

4.1. DETECTION OF BUSINESSES IN DISTRESS AND WARNING LIGHTS

Early intervention of a business with potential financial problems is a key component to business preservation. Likewise, late recognition of these problems is an underlying cause of business failure. By the time the problems are recognised and appropriate action is taken, it is often too late to save the business. This title explains and compares the existing procedures in the Member States and the US that serve as warning lights for businesses in distress at an early stage and the provide tools for detecting these warning lights.

4.1.1. INTRODUCTION: THE CONCEPT OF WARNING LIGHTS AND THE ISSUE AT STAKE

The phrase "warning lights and prevention of insolvency" relates to the detection of problems within a company at a pre-critical stage and the adoption of measures to prevent further deterioration of the company's financial situation. Warning lights can help to detect troubled companies and limit the damages that normally occur in the case of bankruptcy. Independent organisations or institutions and/or ad hoc bodies can serve greatly to facilitate the process of screening and monitoring of warning lights.

Procedures and tools for detecting financially distressed companies at an early stage and warning outsiders of these imminent problems vary from country to country. These detection tools could be formal or informal, internal or external to a company. Important questions in addressing the above are as follows: *Are businesses systematically screened? By whom and how? What is the effect of such procedures in practice? Does it lead to timely liquidations or successful rescue operations?*

Although warning lights and detection procedures may enable early detection of financial difficulties and thus provide a basis for their eventual rescue, these are often carried out through national provisions and procedures that favour publicity of a business' deteriorating financial situation. The marketplace is likely to react negatively by placing a stigma of failure on the distressed business. This might deter creditors from granting credits to the business and cause the public and business partners to lose trust in the business, causing a downward spiral of the company's financial situation and jeopardising its any potential rescue.

4.1.2. OVERVIEW OF THE NATIONAL PROCEDURES

The European law provides for numerous directives and other acts relating to financial reporting and account obligations of companies. These acts are applicable in and addressed to all Member States. It is not the purpose of our study to deal with the acquis communautaire[1] in the matter.

[1] As examples of this acquis communautaire: Regulation 2002/3626 requiring listed companies to use International Accounting Standards by 2005; Directive of the European Parliament and of the Council amending Directives 78/660/EEC, 83/349/EEC as regards the valuation rules for the annual and consolidated accounts of certain types of companies as well as of banks and other financial institutions; Fourth Council directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the

With respect to the mandatory publication of the annual accounts, or the obligation to call the general meeting of the shareholders in case of serious loss of the subscribed capital, these are susceptible to reveal the distress status of the concerned company. However, they cannot be qualified as "warning lights" for bankruptcy in each Member State.

Therefore, the report will reconsider these obligations or other acts of the acquis communautaire as "warning lights" just where this definition is in line with the domestic law or case law, or just legal best practice of the Member State in question.

The present section focuses primarily on specific legislative detection procedures mandated by law. Therefore, the obligation to file audited financial statements, which is mandatory and standard for all companies in the EU (because of the mentioned acquis communautaire) and public companies in the U.S., shall not be described extensively, except to the extent it plays a significant role according to its use by courts, authorities or practitioners. We attempt to identify, through a comparative approach, which countries have legislation put in place to monitor and identify distressed companies and to what extent such legislation is justified despite the potential stigmas such monitoring of companies may create.

A. AUSTRIA

A national law, the Business Reorganisation Act, introduced by the Insolvency Law Reform Act of 1997, aims at enabling businesses that are only in temporary financial difficulties, but are basically healthy, to continue to exist after having undergone a reorganisation procedure. This Act provides for a "continuation forecast", which includes an evaluation of the anticipated yield of the company. Only the debtor can initiate this procedure by filing of an application with the court. If the application brings sufficient proof that the business needs reorganisation, the court will appoint the temporary reorganisation auditor to assist the company in its restructuring efforts. Such proceedings are not made public.

Apart from this specific procedure, the Austrian legislation provides for a general accounting obligation requiring companies to publish financial statements to the Trade Register of the registered office of the corporation. Large stock corporations also have the obligation to publish their statements in an official journal. Both

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annual accounts of certain types of companies; Seventh Council Directive 83/349/EEC of 13 June 1983 based on the article 54 (3) (g) of the Treaty on consolidated accounts; Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member States by certain types of company governed by the law of another State; Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings; Council directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member States of credit institutions and financial institutions having their head offices outside that Member States regarding the publication of annual accounting documents; Council directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions; Second Council Directive 77/91/EEC of 13 December 1976 on co-ordination of safeguards which, for the protection of the interest of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of formation of public limited liability companies and maintenance and alteration of their capital, with a view to making such safeguards equivalent.

publicly-held corporations and large private limited companies are subject to mandatory external audits of their financial statements and management reports.

The Austrian association for the protection of creditors' rights plays a major role in assessing the economic status of the businesses (*KSV*, *AKV*)[2]. The *KSV* collects financial data for both companies and consumers. *KSV* provides opinions on the economic situation of companies or individuals.

Lastly, a helpful warning tool in detecting distressed companies is Austrian companies' obligation to call a shareholders' meeting according to the Article 17 of the "Second Council Directive 77/91/EEC of 13 December 1976 on co-ordination of safeguards which, for the protection of the interest of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of formation of public limited liability companies and maintenance and alteration of their capital, with a view to making such safeguards equivalent": *in the case of a serious lost of the subscribed capital, a general meeting of shareholders must be called within the period laid down by the laws of the Member States , to consider whether the company should be wound up or any other measures taken. The amount of a loss deemed to be serious within the meaning of the paragraph may not be set by the laws of Member States at a figure higher than half the subscribed capital.*

B. BELGIUM

In Belgium the amended law on Judicial Composition of 1997 introduced a procedure aimed at detecting financial difficulties at an early stage. The Commercial Court systematically gathers data concerning businesses facing financial difficulties, including tax arrears, court orders, seizures, etc. A file containing this data is kept at the clerk of the Commercial Court and can be accessed by the concerned business and the public prosecutor, but not by creditors or other third parties. On the basis of the gathered information, special divisions within the Commercial Court may start an inquiry. The business pleads its case to the court and has the right to defend itself with assistance from its consultant (e.g. accountant or lawyer). Such inquiry can lead to Bankruptcy or Judicial Composition in so far as the conditions for these insolvency proceedings are fulfilled.

The objective of this system of "data collection" and subsequent "business enquiry" by the court is to monitor the financial situation of businesses in order to detect businesses in difficulties and to guide them towards the right type of insolvency procedure. The court's duty is not to consult the business on its financial difficulties, but to monitor it and investigate the seriousness of these difficulties. The decision to petition for Bankruptcy or Judicial Composition remains a responsibility of the enterprise or, ultimately, the Public Prosecutor.

Forcing a business to answer to a competent neutral third party or a judge regarding its financial difficulties can have positive effects on the business' managers, to the extent they may be forced to admit the existence of difficulties and the necessity to reorganise the business. To benefit from this guidance by the Commercial Court,

[2] The 'Kreditschutzverband' and the 'Alpenländische Kreditorverband'

businesses are urged to take precautionary measures on a timely basis, so that they do not have to be heard by the court.

C. DENMARK

Apart from the common procedures and standard requirements provided by the acquis communautaire in terms of accounting and disclosures, the Danish legislator does not provide any specific measure referring to warning lights.

D. FINLAND

Finnish law requires companies to deliver their annual financial statements to the Trade Register.

In addition, the Official Journal publishes essential informations with respect to the financial status on companies.

E. FRANCE

Two main types of early warning mechanisms can be identified.

French businesses have the general accounting obligation to provide file annual accounts and annual reports. These reports are filed with the Trade Register. In addition, the Clerk of the Commercial Court keeps the following information in special registries: the register of protests for non-payment ("Registre des Protêts"), the general company lien index ("nantissements du fonds de commerce"), a specific lien index for equipment, vendor's liens and liens on public companies and leaseback agreements on movable property, and the tax and social security lien index. These various indexes are freely accessible by the public and by the courts.

Warning procedures to detect any difficulties that could compromise the ongoing business of the company include:

a) Warnings made by the Statutory Auditor. Auditors are required by law to provide such warnings and are subject to criminal penalties in the event that these are not respected.

b) The Works Council[3] warning procedure. The works council may only request information and may draft a report addressed to the concerned company. Such procedure is optional. It however enables the employees to play an important role if the company faces difficulties.

Warning procedure of the Chief Judge of the Commercial Court. The chief judge is alerted by directors of a distressed company, if the statutory auditor was not successful in commencing a warning procedure. The chief judge then calls a meeting with the directors. He cannot force the directors to cooperate with the procedure. If the directors participate in the meeting and the judge is not satisfied with their responses, he can request further information from the statutory auditor, employee

[3] 'Comité d'entreprise': body representing the interests of the salaried.

representatives, public authorities, social security administration and other governmental bodies.

Such an external tool supports other mechanisms aimed at detecting a company's difficulties without imposing on it the stigmas linked to publicity. However, its effectiveness is dependent on the will of a company's directors.

F. GERMANY

In Germany, Companies are subjected to the standard internal auditing and reporting to the executive committee, as well as external auditing and submission of annual reports, which can be accessed either through the Industrial Chamber of Commerce and through private monitoring organisations.

The introduction of corporate governance, which appears as an adequate internal detection tool, in so far as employees are involved in the business internal control, but which may also incur stigmatising the business' difficulties if the internal "transparency" is rendered public.

G. GREECE

In Greece, company law dictates that a significant decrease in the share capital must be reported and explained to the General Assembly, accompanied by a report of a chartered auditor.

In addition, corporate information regarding the limited liability companies is filed with the respective Registry and published in the Official Gazette. In addition, this information is made available through the several Chambers operating in Greece. Corporate information on limited liability companies is filed with the First Instance Court, is published in the Official Government Gazette and made available through the Chambers. Corporate information on general partnerships and on limited partnerships is available through the respective files kept with the First Instance Court and the Chambers. However, no financial data is available through the Chambers or through the files kept with the Court.

Financial information about businesses may be available to the public through private companies specialised in the monitoring of business to banks (only) through a company called "TIRESSIAS S.A.," which collects data concerning any individual or legal entity that defaults on payments.

Companies limited by shares are systematically screened by their supervising authority, the Ministry of Development, but with little success. The systematic screening of companies limited by shares by the Ministry of Development – Division of Companies Limited by Shares, which operates at the Prefecture where the registered office of the company is located, consists of:

(i) The ascertainment of the payment of the share capital, the value of contributions in kind and the compliance with the relevant provisions of the law in general in the case of the establishment of a company, of an increase of its capital or a modification of its articles of association.

(ii) The observance of the provisions of the law, the company's articles of association and the resolutions of the general meetings, the verification of the balance sheet through verification and examination of the company books, cash, portfolio and all other movable or immovable property owned by the company and the attendance at the general meetings, whenever the Minister of Development considers it expedient, of an official of the Ministry of Development representing the Minister. The aforesaid representative is entitled to supervise the control exercised by the shareholders during a general meeting.

(iii) Furthermore, the Minister of Development is entitled to demand an inspection of a company limited by shares whenever substantial reasons exist by applying to the Court. In this case, the Court is obliged to order the inspection.

The scope for such screening is for the supervising authority to ensure that the companies comply and operate in accordance with the law, the articles of association and the resolutions of their internal bodies. To that aim, Law 2190/1920 on companies limited by shares provides for penalties and fines (up to the revocation of the company's license) in case of non-compliance of the company with the above-mentioned provisions.

Furthermore, under certain conditions, an inspection of the company can be ordered by the Court of First Instance upon an application submitted by:

(i) shareholders (representing at least 1/20 of the paid up capital),
(ii) the Stock Exchange Committee, if the shares of the company are listed on the Stock exchange,
(iii) (as already described here above) the Minister of Development whenever substantial reasons exist,
(iv) the Supervising Minister in the case of companies limited by shares carrying out public utility operations.

H. IRELAND

According to the EU Acquis, Ireland has a general accounting obligation for its companies.

In addition, directors of a company are required to call a meeting in the case that the assets of the company are half or less than half of the amount of the company's called up share capital.

The Company Law Enforcement Act, 2001 created the Office of the Director of Corporate Enforcement, an independent state-funded agency that monitors compliance with company provisions and may investigate suspected offences. The Director has various statutory functions, including the enforcement of the Companies Acts (including criminal prosecution of summary offences), the encouragement of compliance with the Companies Acts and the investigation of suspected offences under the Companies Acts. As the Office has only recently been set up, it is difficult to evaluate the extent to which it will actually intervene in the process of checking

businesses. Indictable (serious) offences against this Act are prosecuted by the Director of Public Prosecutions.

I. ITALY

The Italian legislation provides for a general accounting obligation and requires companies to file financial statements, accessible by the public. This is not the case, however, for individual entrepreneurs and partnerships, which are not required to make financial statements publicly available. The financial statements are centralised at the Chamber of Commerce data bank and are accessible on line to the public. However, the up-dating system is not very efficient and might prevent timely detection of difficulties.

Companies' credit lines and credit records are registered in a data bank, which is available only to financial institutions, but the public has access to the roll of injunctions of payment and to the roll of attachment procedures kept by Courts.

In addition, some rules that may help in detecting corporate entities with financial difficulties include:

- the call of a general meeting by directors when the company's capital is reduced by more than one third as a result of losses;
- the supervision of certain companies by a board of internal auditors (however the independence of such board is not always assured, in so far as it is appointed by the shareholders' meeting and its fees are paid by the company);
- the entrusting of the supervision of certain companies whose shares are listed on the stock exchange to an external auditing firm: where such auditing firm renders an adverse opinion or a disclaimer, CONSOB (equivalent to the US Securities and Exchange Commission) must immediately be informed;
- the supervision of financial intermediary firms by the CONSOB and the Bank of Italy to ensure transparent and proper conduct and management of authorised entities.

The national report stressed that the timely intervention of the supervised entities has drastically reduced the number of compulsory liquidation procedures and has permitted many successful rescue operations for the benefit of the investors and the financial market itself.

J. LUXEMBOURG

Luxembourg companies are subject to the protest list, a solemn declaration before notary on behalf of the holder of an instrument of payment that it has not been paid, which compels the company, by order of the court, to make payments of its debts.

In addition, companies are required to publish accounts annually in the Trade Register. However, the Trade Register is not easily accessible to the public and there is no strict control over maintaining this register. Businesses that do not respect or follow the requirements of publishing financial statements in a timely manner do not face strict penalties.

K. THE NETHERLANDS

In the Netherlands, a company is legally obligated to notify the tax authorities, social insurance board and pension funds of its inability to pay taxes/premiums. A timely notification is within two weeks after the date the debt to the tax authorities, social insurance board and/or pension fund has become due. If the inability of payment has not been notified in time, the directors of the company could be held personally liable for the unpaid claims. However, this procedure is of practical use only for the authorities that are to be notified under these rules. Other creditors are not notified. This procedure serves as a warning light to an extent, but does not lead necessarily lead to timely liquidation or successful rescue operations.

Dutch companies have a general accounting obligation and all companies registered at the Dutch stock and options exchanges are required to submit interim reports and to make public statements in case of poor financial performance.

L. PORTUGAL

It must be observed that Portugal does not have any specific early detection system, apart from the standards accounting obligations provided by EU Acquis.

M. SPAIN

Apart from the standards accounting obligations provided by EU Acquis, Spain does not provide for specific early detection tools.

Nevertheless, several ways of noticing a company's bad financial situation exist, such as obtaining information regarding a business, which can be either through official information sources (the Trade Register; the Property Registry; the Unpaid Acceptances Registry) or through private information sources, which have developed due to the limitations of the Official information sources (few databases and Private Investigation Agencies).

N. SWEDEN

There are several ways to detect Swedish companies facing financial difficulties.

First of all, Swedish law requires that limited companies be registered at the Patent and Registration Office. The Register contains information on the articles of association of the company, the board, auditor(s), share capital and other matters but not including ownership. The Office must be informed of any changes to this information and it can give information on whether the company has registered any floating charges. Copies of the financial year annual accounts must be filed with the Office. The Patent and Registration Office exercises a control over companies on a regular basis. It checks whether the limited companies are fulfilling all their obligations above. It can initiate an automatic compulsory liquidation procedure if the company does not fulfil its information duty toward the Trade Register (see Chapter 4.3, paragraph 2 of the Swedish report). Indeed, if these obligations are found not to have been fulfilled the company may be involuntary wound up as a result.

This information, including annual financial statements, is contained in the Trade Register, which is accessible to the public.

The state authority "enforcement service" executes judgements with respect to financial obligations. This authority provides information on companies' unpaid debts to the state. It is possible for the public to access such information from the enforcement service.

There are also several private credit reference agencies that sell information on late payers and non-payers of debt, as well as official publications on bankruptcies and cancellations of payments related to public debt.

O. UNITED KINGDOM

Prevention of insolvency in the UK is mainly based on the general accounting obligation, a company's constitution and financial status being available to the public. This policy of openness and transparency enables anyone who is interested in the affairs of a company to have access to information they need to make an informed judgement on the company's financial affairs and the abilities of the company's management. The official publication, consisting in the notification by the Trade Register to the Gazette of certain pieces of information, applies to all companies. The Trade Register also keeps copies of the information supplied by the company and this is made available for public inspection. Furthermore, limited companies are required by law to prepare a set of final accounts. This process is limited only to the extent that the accounts and financial statements published are fraudulent and/or are considerably out-of-date by the time they are published.

In addition to these general reporting requirements there are also statutory obligations on company directors providing penalties for those who carry on trading knowing that a company is or may become insolvent. These measures can in some cases provide a strong incentive for directors to blow the whistle at an early stage when rescue seems possible.

A number of organisations (both governmental and non-governmental) also seek to provide advice, guidance and assistance to individuals and companies experiencing financial difficulties. In recent years, there has been a particular effort made by banks to identify borrowers' problems at an earlier stage and to provide support to resolve these issues.

In addition to formal "rescue" proceedings there are many informal "workouts" of situations in which companies have got into financial difficulties. Other strategies have been developed to informally rescue a business by reaching a consensual arrangement between a company and its major creditors. An obvious example is the banks' "intensive care" strategies, which encompass both small and publicly quoted companies, of which the best known is the so-called "London Approach." This involves very large, multi-banked companies. The Bank of England has sponsored the framework for this approach in the UK.

P. USA

The U.S. does not have specific legislation or "company law" that aims at monitoring if a company is in financial distress. However, the United States capital markets provide extensive procedures, both formal and informal, that monitor and gauge the financial health of companies and provide a substantial amount of data to forecast a company's financial health and the potential for insolvency. As mentioned previously, most of these are applicable to publicly-held companies in debt.

The U.S. Securities and Exchange Commission (SEC) requires public companies to disclose meaningful financial and other information to the public, which provides a common pool of knowledge for all investors to use to judge for themselves if a company's securities are a good investment. An example of some disclosure requirements is the filing of quarterly (10-Q) and annual (10-K) audited financial statements. The essential content of these form 10-K and registration statement information packages includes audited financial statements, a summary of selected financial data appropriate for trend analysis, and a meaningful description of the registrant's business and financial condition. The SEC also oversees other key participants in the securities world, including stock exchanges, broker-dealers, investment advisors, mutual funds, and public utility holding companies, all which monitor companies and report those findings to the public. Therefore, indirectly the SEC is the governmental authority that regulates and monitors a public company's financial status.

Both large and mid-sized companies and their debt are routinely and strictly evaluated and rated in financial reports produced by investment banking, brokerage houses, and other financial institutions and research groups, such as Standard & Poor's, Moody's Investor Services, Fitch's, Forrester, IDC, etc. There are even specific investment banks and financial institutions that monitor companies for the purpose of investing and trading in their distressed debt and claims. Furthermore, the financial health of a company is extensively reported through various business newspapers, magazines and financial television networks.

In addition, a number of analyses and ratio tests have been created to determine financial health of a company. The Altman Z-score is the best known of these. The Altman Z-Score (developed in the 1960s by Professor Edward Altman) combines 5 financial ratios to predict specifically how close a company is to bankruptcy.

Management and turnaround consultants and financial advisors use these various detection mechanisms to monitor and identify companies that appear distressed. These advisors then approach distressed companies they have identified and offer services to assist management in reorganising their companies. This is an established and thriving practice for lawyers, accountants and turnaround/workout managers and widely accepted in the United States.

All of the above-mentioned factors and procedures interact to create a system that works efficiently to detect and monitor distressed companies.

4.1.3. COMPARATIVE ANALYSIS

This analysis compares the various systems existing in each country. It distinguishes between a) those that apply the most stringent measures and b) those that do not strictly monitor companies facing difficulties.

The issues are broken down in the following sections:

1. Preliminary analysis
2. Comparison of national systems for detecting and warning of distressed companies and potential insolvency
3. Specific weaknesses of the various systems

1. Preliminary comparative analysis:

a. Special legally mandated detection procedures

With the exception of Belgium and France, the rest of the countries analysed do not have specific and formal legislatively-mandated investigation/warning procedures for detecting businesses in distress or potential insolvencies. However, all countries do have general accounting obligations and public disclosure requirements.

Both Belgium and France have governmental, legislatively-mandated systems for detecting distressed businesses. For example, the French Works Council monitors potential companies in distress and has the authority to request a company to provide information about its financial situation. The Works Council then warns the distressed company's directors and allows them to react to the situation without any external interference. Additionally, the law on 1997 Judicial Composition gave the Belgian Commercial Court power to detect, investigate and collect data from businesses with potential financial difficulties. Special divisions within the Commercial Court may start an inquiry and require company management to plead its case in court.

b. Public access to information

Based on the responses from the report participants, financial data on distressed companies should be made available to the public. However, the resulting publicity generated by making information publicly available might deter creditors, business partners, or the public in general from dealing with the business facing financial difficulties. This, of course, depends on the country's individual attitude to such publicity requirements.

Our analysis shows that access to information relating to businesses can be identified through two primary means: through public sources, such as the French publicity files for liens, protests, tax and social security liens, or through private sources, such as data sold to the public by third parties at a cost. It is not clear whether either way is preferable. It seems that any public access to information might lead to future stigmas for the business. However, it depends on if the interests and protection of creditors or that of the debtors is considered.

c. *External v. internal warning lights*

Generally, procedures exist both internally and externally (to a business) that can provide a means of detecting any warning signals of financial deterioration and subsequent intervention. Some of these external procedures include business monitoring under state supervision, judicial control or intervention of judicial authorities in the detection process, private monitoring and data collection by specialised firms that then sell such data to the public, control by banks at the loan renewal stage, and other creditor checks.

Certain procedures for detecting and warning of company financial distress are also put in place internally in a company. Some of these include the internal audit function; specific company law procedures, for example the requirement of reporting changes in share capital in countries such as Finland, Greece, Italy, the U.S.; or more specific provisions, such as the introduction of corporate governance in Germany or the possibility for French shareholders to ask questions to the Board of Directors.

These provisions may be quite efficient for the detection of difficulties, but their impact may not be very significant where no mandatory measure is imposed (eg. French Works Council; questions to Board of Directors; internal auditing), or may adversely affect the debtor in a stigmatising way where the internal measures are made known publicly (eg. reporting of significant changes, such as a decrease in share capital).

As a concluding remark, efficient detection and warning of financially distressed companies may be ensured by granting external bodies (government, Commercial Court, etc.) the power to systematically screen and warn companies in distress at an early stage and subsequently implement a timely rescue operation.

d. Mandatory v. optional procedures

As previously addressed, some detection procedures are imposed by national legislation, others, such as the idea of 'recommendations' for the creation of liquidity plans and of the statement of assets and liabilities in Germany or the French works council procedure are not mandatory.

2. Comparison of national systems for detecting and warning of distressed companies and potential insolvency

Based on the analysis of national provisions, we have identified two main categories of warning lights and detection tools.

The first category (2.1) consists of tools that are created by national legislation to enable the collection and public accessibility of financial data and that might provide a basis for the detection of potential difficulties to creditors and the outside public.

The second category (2.2) describes tools aimed at monitoring businesses both internally and externally.

We will also focus on the strengths and weaknesses of these detection tools and warning lights, in light of preventing financial difficulties and distress versus preventing stigmas that might arise by enabling these tools.

2.1. Data collection tools

Data collection tools appear as the most generally used tools for the double objective of creditors information and warning light for the prevention of insolvency through early detection of difficulties.

As already mentioned previously, data collection tools include those provided under national legislation in order to collect financial data concerning businesses, such as (a) general accounting obligations and publication of financial statements, (b) the degree of specialisation of such files and (c) the impact on publicity of the company through such data collection.

The tables below provide an overview of the procedures in each country followed by an explanation of each aspect of data collection.

DATA COLLECTION TOOLS		
	General Accounting Obligation, Delivering financial statements	**Publicity of financial statements**
Austria	Exemption provided for certain traders	Yes
Belgium	Yes	Yes
Denmark	Yes	Yes
Finland	Yes (stricter obligation for public limited liable companies)	Yes
France	Yes	Yes
Germany	Yes	Yes
Greece	Yes	Yes for public companies, and for limited liability companies
Ireland	Yes	Yes
Italy	Yes	Yes
Luxembourg	Yes, but no control	No
Netherlands	Yes	Yes
Portugal	Yes	
Spain	Yes	Yes
Sweden	Yes	Yes
UK	Yes	Yes
USA	Yes	Yes

	General centralised files (public info)	**Specialised files**
Austria		Data collected by the association for the protection of creditors' rights, Internet page (enforcement proceedings levied against the goods of a company/person)
Belgium	Yes	File at clerk of Commercial Court (ex. Tax arrears) Access limited to trader and public prosecutor
Denmark		
Finland	Yes	

France	Yes	Yes: Liens , protests, tax and social security liens
Germany		Yes
Greece		Yes (Land including pledges) No public access to tax data
Ireland	Yes	Yes , no public access to tax data
Italy		Yes : credit lines / records available to financial institutions only; Roll of injunctions of payment/attachment procedures: public access
Luxembourg	No	No
Netherlands	No	No
Portugal		
Spain	Yes	Yes: Trade Register; Unpaid acceptances Registry; Property Registry
Sweden	Yes	Yes: register; enforcement service (unpaid debts); Official publication of bankruptcies/public cancellations of payments
UK		
USA	Yes	Yes

(a) General accounting obligation

Legislation in most countries requires companies to produce annual audited financial statements publicly.

The general accounting obligation may be, therefore, an effective tool for monitoring companies and providing warning signals for companies in financial distress, but this will not be discussed any further, as this is not in the framework of this report.

(b) Specialised files

Most countries have centralised files for collecting information that are sometimes available to the general public.

For example, France provides specialised files for centralising information with regard to liens, protests, tax and social security liens, which are accessible to the public. Similar data with regard to liens, protests, land, pledges, and property is publicly available in Greece, Italy, Spain, and the U.S. However, access to such information is limited to such information in Belgium (where access to these files is limited to the business and to the public prosecutor) and Greece. In Italy, access to files related to credit lines and credit records is limited to financial institutions, although the public nevertheless has access to the roll of injunctions of payment and attachment procedures. However, these limitations sometimes protect a business from the publicity harmful information early on by avoiding large diffusion of data concerning the business.

In the U.S., a vast amount of information related to business and individuals, including quarterly and annual financial statements, various liens, court records, bankruptcy filings and all related documents, etc., are available to anyone. However, an outsider is usually required to pay a nominal amount to access such information.

However, such specialised centralised files are not provided in some countries, such as Luxembourg and in the Netherlands.

(c) Publicity

As previously stated, most countries provide for availability of financial statements and other financial records through centralised files. The effect of such publicity on the status of businesses depends on the country's general economic and sociological background and on the attachment to such publicity. In some Member States, it is viewed that transparency of information leads to investor confidence. However, if the information is negative, there is a risk that investor confidence will decrease and a business might carry with it a stigma of failure. The U.S. is an example of a system whereby information is extremely transparent and almost always made available to the public. It is possible that a business in the U.S. might develop a negative reputation or investor confidence might decrease due to its financial distress. However, the information serves to warn creditors, outside shareholders and other third parties of the company's financial distress early on and allows those parties to take appropriate action to attempt to turnaround the company through reorganisation instead of liquidation. The harmful effect of negative information is therefore mitigated by the potential upside of avoiding liquidation and rescuing the company.

2.2.Business monitoring

The monitoring of businesses is one of the primary ways to actively identify companies in distress and to engage preventative measures early on. Such monitoring may be achieved through the use of internal or external detection tools available to the company or investor.

Internal detection tools

Businesses in most countries are subject to one form or another of internal detection tools, serving to detect financial difficulties within a company. Such detection and warning systems are achieved by internal company checks and through specific company law procedures.

Detection tools are more prevalent and extensive in specific forms of companies (e.g. public or regulated companies) rather than individual businesses. The extent of the detection of difficulties is thus limited to those forms of companies to which the procedure specifically applies.

(a) Internal company checks

General accounting typically leads to companies creating internal checks to act as warning signs. These checks, which are usually not mandated by law, typically include budgeting procedures, forecasting, business plans and strategic plans. This section is not intended to discuss the various types of internal checks management puts in place to detect if the company is in financial difficulty, but rather on internal company checks that is mandated by legislation.

Internal company checks are legislated in some countries, most often in particular types of companies, such as France, Germany, Greece, Ireland, Italy, the Netherlands, Spain and the US. There are however differences in the details behind the mandatory provisions required by law in each country.

These tools cover the presence of auditors and accountants and optional internal company checks.

- *Internal auditors and accountants*

  Auditors and accountants are sometimes required by legislation to warn a company when certain financial criteria are met. This section does not intend to provide an exhaustive description of such procedures. However, the role of internal auditors/accountants is worth mentioning with respect to the early identification of financial difficulties.

  In Italy, a board of internal auditors supervises public companies and certain limited liability companies (SRL). A company is considered a SRL if the SRL capital is equal or higher than € 100.000 or in the event that for two years the company does not provide for the duly publication of the required balance sheets. This board has the task to control the management of the company in order to safeguard the interests of the shareholders and of the creditors of the company. The board comprises of professionals registered with the Roll of Certified Accountants and are appointed by the shareholders. It exercises its control over the company's management, compliance with applicable rules, accounts and financial situation. However, the independence of the board, who is appointed by the shareholders' meeting and whose fees are paid by the company, is not always assured. Accordingly, the board's intervention is not always punctual and does not avoid the bankruptcy.

  In the U.S., the SEC requires the companies' accountants to maintain proper accounting records and internal controls. Although the SEC does not mandate all companies to employ internal auditors, the Blue Ribbon Committee report, which reports on good corporate governance, recommends that public companies (depending on the size) do so.

  These procedures, which must be followed on a regular and mandatory basis, provide clear warning lights for the individual business. The efficiency of these procedures may be questioned where no sanctions are provided or where the independence of the regulating body is not guaranteed.

  The use of ad hoc bodies designed to detect difficulties, although they may not per se provide warning lights, are mainly based on their preventive aim and on their confidential nature.

(b) Specific company legal procedures

In some Member States the company law provides for specific procedures as a means of detecting businesses in distress. However, such legislative procedures are not provided in some countries, for instance in the Netherlands, in Luxembourg or in Spain.

In Finland, Greece and Italy, these procedures are mainly based on the event that the capital decreases by a certain proportion.

France provides for the mandatory procedure where shareholders or partners submit written questions to the Board of Directors in case of knowledge of "*any fact that could compromise the ongoing business of the company*".

Such internal procedures ensure identification of financial difficulties early on; searching for and identifying solutions; not disclosing the information publicly that the company is in distress; and at the same time avoiding the perceived stigmatising.

Similar to the above, is the German internal procedure by which internal audit and internal control, pass on recommendations to the executive committee of a corporation, who is obligated by law to take suitable steps to detect events that might endanger the survival of the company.

US companies are not governed by a specific company law, as many Member States, but monitored by the SEC, who enforces the securities acts (e.g. Securities Act of 1933 and Securities Exchange Act of 1934). As a result of companies' compliance with SEC disclosure requirements and other third party data requests, enough information is made available to the public to identify companies in distress at an early stage.

O: optional
M: mandatory

MONITORING OF BUSINESS: Internal tools		
	Internal company check	**Specific company law procedures**
Austria	No mandatory internal auditors	Audit and management report
Belgium		Yes
Denmark		Yes, collection by employees Stock exchange introduction
Finland		Yes, for limited liability company Liquidation if equity has decreased < ½ its capital
France	Yes: Works Council (O) Statutory Auditor (M, in limited	M: questions by shareholders/partners to Board of directors
Germany	Yes, internal auditor, Or, creation of liquidity and of statement of assists and liabilities	Recommendations by the internal audit and controlling to the executive committee of corporation ⇨ must take suitable measures (M); Corporate governance
Greece	Yes , monitoring by auditor	Yes, if decrease in share capital of public company: specify purpose
Ireland	Or, inspection of books,	Yes, directors of a company must convey

	Of accounts by company officers	extraordinary general meeting where the net assets are< ½ of the amount of the called up capital
Italy	Board of international auditors in joint Stock	Yes: if decrease in capital>1/3
Luxembourg	No	No
Netherlands	Yes, international accountant	No
Portugal		
Spain	O.	No
Sweden	O.	Automatic compulsory liquidation procedure initiated by the Patent and Registration Office
UK		
USA	Yes	SEC monitoring and compliance with disclosure rules

(2) External tools

For the purpose of this report, external tools must be understood as tools used to exercise a control over the financial state of businesses by an external supervisory source/entity.

External tools basically include the monitoring of the business by (a) a state authority; (b) judicial control or intervention; (c) monitoring of businesses by private specialised businesses. Most countries mandate the audit of public companies and in some cases also private enterprises. Although external auditors have valuable insight into a company, they usually only provide an audit opinion based on historical information. Auditors are typically limited to issuing a going concern warning if substantial doubt exists that the company will continue as a going concern for the next twelve months. However, this kind of warning is not usually sufficient for identifying a company in the early stages of financial distress.

(a) State authority monitoring

Most Member States lack a legislated monitoring system governed by a national authority to detect early warning signs of distressed companies. The efficiency of early detection of financial difficulties in companies may be hampered if no other detection takes place. However, some countries have limited state authorised monitoring, discussed below:

- *Informing the competent authorities.*

  Information may take the form of notification of difficulties to competent authorities. For example, the Netherlands provides a legal obligation to timely notify the tax authorities, social insurance board, and the pension fund if the company is no longer able to pay its taxes and/or premiums (within 2 weeks the claim has become due). This procedure guarantees detection of difficulties.

  The information is achieved in Belgium by allowing access to the Public Prosecutor, along with the trader, to the financial data that is collected in the file kept at the clerk of the Commercial Court. The limited access to the said data guarantees that the potentially harmful information is not made public.

Portugal has set an original out-of-court conciliation procedure, which is conducted through the mediation of a public entity, the IAPMEI. However, this institution has not been granted any sanctioning nor enforcement powers. This procedure aiming at the prevention of bankruptcy involves the intervention of creditors and business partners, but it cannot be considered strictly speaking as a warning light. Nevertheless, in so far as it is based on reaching a consensus, it does work in favour of the idea of avoiding stigmatising a business facing difficulties.

In the US, the external auditor is required to inform the SEC and the public, through the audit report, if there exists substantial doubt that the company will continue to be a going concern for the next twelve months.

- *Direct monitoring by certain authorities*

Direct monitoring consists of the supervision of particular businesses by competent authorities.

In Finland, businesses are subject to the direct monitoring by the tax authorities and by the government guarantee authority.

In Greece, the supervising authority, the Ministry of Development systematically screens limited companies – though in practice, the screening procedures offer very little to avoid insolvency. The scope for such screening is for the supervising authority to ensure that the companies do comply and operate in accordance with the law, the articles of association and the resolutions of their internal bodies. The Irish Office of the Director of Corporate Enforcement, which is an independent state-funded agency, may play a role in the checking of businesses, in so far as it monitors compliance with company provisions and may investigate suspected offences. The Director has various statutory functions, including the enforcement of the Companies Acts (including criminal prosecution of summary offences), the encouragement of compliance with the Companies Acts and the investigation of suspected offences under the Companies Acts.

In Italy, financial intermediaries for instance are subject to the supervision of CONSOB in order to ensure transparent and proper conduct and sound and prudent management. In Italy the timely intervention of the supervisory entities has drastically reduced the recourse to the compulsory administration liquidation procedure and has permitted many successful rescue-operations.

In Sweden, the state authority for execution of judgements in respect of financial obligations (the "enforcement service") provides information relating to companies' unpaid debts to the state. Information may be obtained as to enforcements that have been started, such as levied distress on a company's goods.

The French Works Council warning procedure may be initiated in case of "*knowledge of any fact which could compromise the ongoing status of the*

company". This is performed in two steps, (1) the Works Council requests the company to provide information about the situation; (2) if the council is not satisfied with the response, it drafts a report addressed to the company. The Works Council however has no authority to call a shareholders' meeting.

This procedure is optional and does not guarantee the detection of companies in distress. Furthermore, the procedure is fairly cumbersome (based on the calling of several meetings) and has been criticised for delaying the potential preventive reactions. This procedure allows for limited publicity of the company in the case of its financial distress.

In the US, all public companies and other companies with public debt, are monitored by the SEC. Although the SEC does not per se review company filings (e.g. 10K) for the purpose to identify distressed companies, but rather ensures that the full disclosure requirements are met. The result is that sufficient information is made public, together with other third party data, so that the investor pool is in a position to identify any companies in financial difficulties.

(b) Judicial control or intervention

Less than one third of the Member States provide for some form of judicial intervention as a means to detect or prevent business difficulties, which include Austria, Belgium, France, and Sweden.

In Belgium, the Commercial Court systematically collects data concerning businesses facing financial difficulties, such as tax arrears, court orders, and seizures. Special divisions of the Commercial Court may start an inquiry at their own initiative based on the information gathered. In France, the chief judge of the Commercial Court may be alerted of a company in distress by the board of directors, the statutory auditor who was unsuccessful commencing a warning procedure or by public information. He has the power to call a meeting with the board of directors. If the judge is unsatisfied with the responses given to him, he can request further information from the statutory auditor, employee representatives, public authorities, social security administration and other governmental bodies. The judicial role is therefore quite efficient at the stage of detection and prevention, though not stigmatising the business situation, as the information collected will remain in the hands of the court. These procedures are to be assessed as successful both in terms of detection and in terms of avoiding stigmatising the business at stake.

In Austria, the Trade Register Court intervenes in the process of reviewing whether the documentation submitted to the Trade Register is complete with regard to the extent required by law. There is no systematic screening process, and the Court does not review whether the content of the submitted documentation is correct.

In Sweden, the Patent and Registration Office exercises a control over companies on a regular basis. It checks whether the limited companies are fulfilling all their obligations. It can initiate an automatic compulsory liquidation procedure if the company does not fulfil its information duty toward the Trade Register.

In a limited number of countries is there an authority that has been set up to specifically screen and monitor companies with the intention of warning the debtor and creditor in order to attempt a rescue.

MONITORING OF BUSINESS: External tools		
	State authority monitoring	**Judicial control/ intervention**
Austria		Yes, appointment of reorganisation auditor; Review of documentation: financial statements; the Trade Register court (completeness)
Belgium	Yes, Commercial Court	Yes, specific data collection by the commercial company
Denmark		
Finland	Tax authority, government guarantee authority	
France		Yes, investigation by the chief judge of the Commercial Court
Germany	No	No
Greece	For limited co , screening by minister of development	Not *ex officio* but the First Instance Court may order the control of the business where shareholders representing 1/20 of the paid-up capital of a company limited by shares request so
Ireland	Yes, office of the director of corporate enforcement (independent state-funded agency)	
Italy	Supervision of CONSOB	Upon request of board of statutory auditors, appointment of a judicial administrator upon request shareholders representing 10% of the assets.
Luxembourg	Limited (public prosecutor has insufficient means)	No
Netherlands	Notification of inability to pay to tax, social insurance, pension fund	No
Portugal	IAPMEI co-ordinates the conciliation debtor/creditors	No
Spain	No	No
Sweden	The state authority for execution of judgements in respect of financial obligations	Patent and registration office control
UK		
USA	Yes	No

(c) Private monitoring of businesses

Most countries allow private businesses to carry out the monitoring of companies and to sell the information and analysis gathered relating to businesses' financial state.

In Finland, several companies are specialised in providing companies a monitoring service of other companies. The monitoring informs of the changes in companies' clientele at desired intervals. Companies can immediately react to the improved or

weakened financial standing, for instance by following the payment pattern of the clients, the changes of business names, creditworthiness or the rating classification. In Spain, private information sources have arisen due to the limitations of the official information sources, and include a few databases as well as Private Investigator Agencies. In Sweden, private credit reference agencies sell information on late payers and non-payers of debt. Credit rating information can be received directly via computer communication (Internet). However, banks and finance companies are not obliged to release such information about their customers without their consumers' consent.

It is interesting to mention that in Belgium, certain courts have subscribed a membership with such providers in order to monitor the companies and to receive warning lights on line (see 'Trends, 6 September 2001, De Bloedkamer gaat on line').

In the US, the information and analysis that can be obtained from third parties include bond and credit ratings, analyst reports on individual companies and industries, and peer reviews in different sectors. For the American investor, whether individuals, banks, brokers, insurance companies etc., this information is valuable in order to detect companies or industries in distress early on.

Although some may consider that such sources of information on the financial difficulties of businesses may either be harmful or endanger the company's potential rescue, the U.S. bankruptcy system has proven that such publicly available information actually enhances the chances of successful reorganisation and is critical in the early identification of companies in distress.

2.3. Specific Weaknesses:

The comparative analysis reveals the following weaknesses with respect to the national tools used as means of detection and/or prevention of difficulties.

The main weakness is considered to be a lack of efficient use of existing mechanisms to identify financial difficulties in companies, mainly due to the fact that some procedures are optional rather than mandatory, and to the lack of penalties. The analysis shows that few legislative prevention mechanisms appear to be implemented in a majority of countries.

In Austria although the continuation-forecast procedure might be quite helpful as a prevention tool, the fact that the debtor may only initiate it is a particular weakness, and practically results in its inefficiency. It is nevertheless worth observing that granting the debtor the initiative of the prevention procedure provides an adequate shield against the harmful effects of a public procedure.

In Germany, some mechanisms are in place to detect financial difficulties, both internal and external. However, medium sized companies rarely use these control mechanisms. As a result, third parties discover crises much more frequently.

Similarly, in Luxembourg, the lack of transparency, partly due to the lack of penalties if the accounts are not timely deposited – or even not deposited at all – increases the risk not to be able to rescue businesses facing difficulties.

In Italy, the lack of efficiency of the specific internal tool of the board of statutory auditors is due to the latter's lack of independence. By contrast, the timely intervention of supervisory entities – external to the business – have led to successful rescue operations.

4.1.4. CONCLUSION

There seems to be little legislative and judicial procedures in both the EU and the U.S. to detect and warn businesses in distress. Although warning lights in the form of the accounting obligations and publication of financial statements, judgements, tax debts, etc. do exist, companies are generally not systematically and effectively screened by independent governmental bodies or other regulatory commissions.

However, it must be pointed out that several domestic legislations are undergoing changes to reform the bankruptcy and insolvency laws. Such legislation includes the 1997 amended law on Judicial Composition in Belgium, the 1997 Insolvency Law Reform Act in Austria, the Irish legislation amended in 1999 and 2001, the Italian 1998 Legislative Decree, the Portuguese Decree-Law of 1998, creating the mediation procedure. Furthermore, several legislative projects are planned in Greece, in Luxembourg, and in the Netherlands with the Dutch committee on Modernisation of Bankruptcy Law. These changes in national legislations reflect the general national concern for the matter. However, it appears that these legislations do not focus on the implementation of specific screening and warning procedures. The recent Irish Company Law Enforcement Act, 2001 creating the Office of the Director of Corporate Enforcement, which is an independent state-funded agency, may provide an example of legislation in favour of the development of screening procedures. The harmonisation of a detection process would ensure the efficiency of existing tools for warning businesses facing difficulties and would increase the chances of success of potential rescue operations.

It seems that due to the lack of such detection procedures and early warning of distressed businesses, opportunities for timely rescue operations of failing businesses are substantially diminished in most European Union countries.

It should be noted, however, that while the U.S. does not have any governmental or judicial bodies that monitor and regulate the financial health of companies with the specific intention of identifying companies in distress, there still exists a lot of distressed companies that are successfully reorganised. This is mainly due to strict disclosure requirements and the extensive monitoring of and reporting on companies to the public by independent third parties. It should also be noted that there seems to be a much more tolerant view of business failure in the U.S. society than in Europe, so adoption of the U.S. system in Europe might not have the same outcome as in the U.S.

The mechanisms used to detect and prevent business financial difficulties should perhaps strike a balance between public transparency of information that might enable a business in distress to be identified early on and subsequently rehabilitated, and confidentiality and discretion of information that might protect a business from the unnecessary harm and stigma that often arises with the publicity of failure.

4.2. LEGAL POSSIBILITIES TO CONTINUE ECONOMIC ACTIVITIES

4.2.1. INTRODUCTION

This title explores the various legal possibilities in the EU Member States and the United States that allow a business (individual or a legal entity) encountering economic or financial difficulties to continue operating and attempt a recovery instead of liquidating its assets.

Section 4.2.2. provides a descriptive summary of the legal possibilities available in each country for a distressed business to avoid bankruptcy.[1] Our analysis is based on the national reports that are annexed and attempts to outline the most important aspects of each of the national systems.

Section 4.2.3. aims to compare the national systems, identifying and underlying their similarities and dissimilarities. Finally we try to assess and criticise these systems, focusing on the relevant aspects regarding the stigma on failure.

4.2.2. OVERVIEW OF THE NATIONAL PROCEDURES

It appears that in every EU Member State, as well as in the U.S., there exist legal procedures that allow for the reorganisation or rehabilitation of businesses encountering difficulties.

In most of the countries, with the exception of the U.S., only the debtor is entitled to initiate the procedure. This requirement is based on the principle that the co-operation of the debtor is an essential condition to the success of any recovery and the procedure should not be imposed on it.

Most of these legal procedures are based on the realisation of a rescue plan. This "plan" may consist of proposals and counter-proposals, or a "scheme of arrangement," depending on the terminology used. However it is referred to, the function of a plan of reorganisation is to provide the creditors with a single document containing all information regarding the business and its plan for going forward. The goal of the plan is to provide creditors with the necessary information to decide whether or not they should choose to vote on and confirm the submitted plan.

The success of any recovery depends on the will of the creditors to give the debtor a chance to reorganise. Creditors have the choice to participate in voting on the plan and have the right to confirm or reject the proposed plan. Details regarding creditor participation and voting percentages vary from country to country. A plan must then usually be confirmed by the court once it is accepted by the legally required majority of creditors. Upon execution of the plan, remedies are usually provided to creditors if the debtor fails to comply with its obligations under the plan.

[1] The term "bankruptcy" in the above sentence actually implies a company trying to prevent liquidation or insolvency. However, for the purposes of the U.S. section, the distinction between "bankruptcy" and insolvency" should be made. Bankruptcy in the U.S. does not necessarily imply insolvency (loosely defined as the sum of all debts being greater than the sum of all property). Bankruptcy for a company refers to Chapter 11 (Reorganisation) or Chapter 7 (Liquidation) of the Bankruptcy Code. A company in the U.S. can be "bankrupt" but not insolvent. In fact, Chapter 11 "bankruptcy" in the U.S. can also be a method of preventing insolvency. In most of this report, however, bankruptcy is referring to insolvency of a company.

The majority of EU Member States' legislation regarding reorganisation or restructuring of businesses involves a high degree of information towards creditors and provides important publicity as to the initiation, progress and ending of the procedures. Practitioners consider such information necessary to protect creditors and to prevent association of a stigma with the debtor, which is often created by the publicity surrounding such a procedure (i.e., publication in the official gazette, in newspapers, in registers, and any other means of communication). In the eyes of European practitioners, potential creditors, investors, clients and partners may be deterred from doing business with an enterprise that has been publicly recognised as being distressed. This often results in the irreversible failure of the business.

On the contrary, the high degree of confidentiality characteristic to unofficial (out-of-court) recovery proceedings often allows for the maximum chances of recovery of a business. Moreover, out-of-court proceedings are usually less costly, assuming creditors can reach agreements in a timely manner. This is generally the case in most EU Member States and the U.S., the exception being France, as reorganisations in France are conducted under the supervision of the courts but still guarantee confidentiality.

Creditors and other partners or other entities related to a company in the United States are generally not as reluctant as their European counterparts to trust a business facing financial difficulties. Accordingly, publicity surrounding the reorganisation of a debtor is not considered as detrimental to the reputation of the distressed business as in Europe. Furthermore, publicity of a distressed debtor in the U.S. can even be beneficial. A Chapter 11 (referring to Chapter 11 of the U.S. Bankruptcy Code entitled "Reorganisation") filing in the U.S. allows a business to obtain credit more readily than before filing. This allows the business to continue operating and signals to creditors that it is open for business and able to pay for goods and services. It encourages vendors to provide terms to the debtor. Thus, the availability of what is called "post petition financing" reduces the stigma associated with a distressed business.

Whilst it is possible to state that all EU Member States provide reorganisation procedures close to the "judicial composition", obviously these procedures may vary from each other a great deal, not only with respect to their name but also to their conditions, effects, administration, and any other aspect.

A. AUSTRIA

The Austrian legislation provides *court proceedings* and *out-of-court proceedings*.

The court proceedings are called *Ordinary Reorganization* and *Compulsory Reorganization,* which are governed by the *Settlement and Recomposition of Debts Act of 10th December 1914* ("Ausgleichsordnung"), and the *Bankruptcy Act of 10th December 1914* ("Konkursordnung").

A.1. Court proceedings

a) The Ordinary Reorganization ("Ausgleich")

♦ *Definition*

This reorganisation proceeding attempts to rescue the **debtor** through a **partial discharge of its debt**. It is based on an agreement between the debtor and its creditors, under which the debtor is obligated to pay a certain percentage of its debt within a specified time period, in exchange for a discharge of the residual debt.

♦ *Initiators*

Only the **debtor** (whether an individual or a legal entity) may **initiate** the procedure.

♦ *Conditions*

The procedure is available to debtors who are **illiquid** (including **impending illiquidity**) or **over-indebted**. This is similar to the conditions that apply to a bankruptcy procedure.

Although this procedure is based on a consensual agreement between the parties, **minimum requirements** are legally imposed:

- 40 % of the unsecured debts shall be paid under an Ordinary Reorganization;

- The payment, of the above, is to be completed within a maximum period of two years.

♦ *Administration*

Once the procedure has been initiated, the court appoints a **reorganization administrator**. The **management** retains **control** of the enterprise, while the administrator only has a supervisory function.

b) The Compulsory Reorganization ("Zwangsausgleich")

♦ *Definition*

Similar to the Ordinary Reorganization, it is based on an agreement between the debtor and its creditors, which attempts to rescue the debtor's business through **a partial discharge of debt**.

♦ *Initiators*

Only the **debtor** (whether an individual or a legal entity) may **initiate** the procedure.

♦ *Conditions*

The procedure is available to debtors who are **illiquid** or **over-indebted**. The main difference between the Ordinary and Compulsory Reorganization procedures are that the latter may **only** be initiated **in the course of a bankruptcy proceeding**.

The following **minimum requirements** apply:

- 20 % of the unsecured debts shall be paid under a Compulsory Reorganization;

- The payment, of the above, is to be completed within a maximum period of two years.

The Ordinary Reorganization is rather unsuccessful, mainly due to the high minimum legal requirements. Accordingly, most insolvent businesses prefer to initiate bankruptcy proceedings, which then allows them to apply for a Compulsory Reorganization.

♦ *Administration*

As this procedure must be initiated in the course of bankruptcy proceedings, the **appointed bankruptcy administrator** retains **control** of the business; however, there is no reorganization administrator.

A.2. Out-of-court proceedings

Out-of-court proceedings are also referred to "informal workouts", "out-of-court reorganization" or "silent reorganization". Since these proceedings are conducted out of court, there are no minimum requirements and is based on the agreement between the debtor and its creditors.

Out-of-court proceedings prove to have a growing success rate as it avoids any detrimental publicity effect that is attached to court reorganizations. However, such proceedings require the consent of all creditors, which is not always easy to attain.

B. BELGIUM

Belgian law provides a specific legal procedure, that being the *Judicial Composition,* to assist enterprises to continue activities. The *Judicial Composition Act of 17th July 1997* (" Loi du 17 juillet 1997 relative au Concordat judiciaire") regulates the procedure. Two procedures that may also help enterprises that face difficulties are the *Provisional administrator* and the *Independent preliminary bankruptcy.*

B.1. Judicial Composition ("Le concordat judiciaire")

♦ *Definition*

This procedure attempts to recover a debtor in distress, through the court granting a **moratorium** on payments to creditors, during which time a **recovery plan** must be formulated and submitted to the creditors, including ultimately the court.

♦ *Initiators*

Either the **debtor** (whether an individual or a legal entity) or the **Public Prosecutor** may **initiate** the procedure, however usually the debtor initiates the procedure.

♦ *Conditions*

This procedure can be initiated if the debtor is **temporarily unable to pay** its debts or faces **temporary financial difficulties**.

Judicial Composition is granted on condition that there is a reasonable chance of achieving **recovery**.

♦ *Administration*

Once the procedure has been initiated, the court appoints one or more **administrator**. The **debtor** retains **control** of its business under **supervision** of the **administrator**. Certain operations can require the authorization of the administrator(s).

B.2. Provisional administrator ("Administrateur provisoire")

Although this legal procedure is not intended to be a recovery procedure, it allows any **interested party** to request **the appointment of a temporary administrator**, **to replace the current management**, when it is feared that the business is potentially bankrupt.

This legal procedure attempts to prevent the management from acting in such a way that would be prejudicial to creditors in case of a subsequent bankruptcy.

B.3. Independent Preliminary Bankruptcy ("Mandat ad hoc")

Although this mechanism is **not legally regulated**, it has already been used by courts. It is based on the **appointment,** by the court, of an independent "receiver" with a very **limited and specific assignment**.

The management retains **control** of the business, but with the efficient assistance of the independent "receiver".

C. DENMARK

Danish law provides *court proceedings* and *out-of-court proceeding*.

Court proceedings, called the *Suspension of Payments* and the *Compulsory Composition* are regulated by the *Bankruptcy Act 1975.* Out of court proceedings are referred to as *Unannounced Suspension of Payments.*

C.1. Court proceedings

a) *Suspension of Payments*

♦ *Definition*

Suspension of Payments is a procedure offered to a debtor having difficulty in meeting its obligations. It aims at examining whether there is any possibility of

continuing operations and to establish an **arrangement** with the creditors, possibly in connection with a **reorganisation** of the business.

♦ *Initiators*

Only the **debtor** may **initiate** the procedure.

♦ *Conditions*

The debtor must be or must foresee that he is **unable to fulfil his obligations**.

♦ *Administration*

Once the procedure has been initiated, the court appoints an **administrator**. The **debtor** retains **control** of its business; however, he acts **under supervision of the administrator** whose consent is required in all important transactions.

b) *Compulsory Composition*

♦ *Definition*

Compulsory Composition is a procedure whereby an **agreement** is reached between the **debtor** and the **creditors** under which a specified proportion of the creditors decides between either:
- a percentage reduction of the non-preferential debt and a distribution of the debtor's property or part thereof, in exchange for the release of the debtor from part of the debt not settled, or
- an extension of payment.

♦ *Initiators*

Only the **debtor** may **initiate** this procedure, however the procedure is often caused by pressure from the creditors.

♦ *Conditions*

No particular conditions are required.

♦ *Administration*

The **debtor** retains **control** of its business. However, in some cases, the court may subordinate the granting of the measure to the appointment of **an administrator**, who will have the same function as in a Suspension of Payments procedure.

C.2. *Out-of-court proceeding*

The *Unannounced Suspension of Payment* is an informal procedure, based on a private agreement between the debtor and its major creditors. It includes an arrangement to allow the continuation of the business.

D. FINLAND

Finnish law provides for two legal possibilities to continue economic activities for potential insolvent debtors: the *Restructuring of Enterprises*, regulated by the *Restructuring Enterprises Act of 25th January 1993* ("Laki yrityksen saneerauksesta"), and *the out-of-court proceeding.*

D.1. Restructuring of Enterprises ("Yrityssaneeraus")

- *Definition*

Restructuring of Enterprises can be utilised by **debtors** (with **debt)** experiencing **financial difficulties** with an aim to preserve its operational requirements and restructure its debts and to prevent bankruptcy.

- *Initiators*

Either the **debtor** (whether an individual or a legal entity), a **creditor** or a **potential creditor** may **initiate** the procedure.

- *Conditions*

The procedure is applicable to **viable** enterprises that is experiencing **financial difficulties**.

- *Administration*

After initiation of the procedure, the court appoints one or several **administrators**. The role of the **administrator** is to formulate a plan and to **supervise the activities** of the enterprise, however, the debtor retains control of the business.

D.2. Out-of-court proceeding

It is based on a voluntary arrangement between the debtor and its creditors. In order to achieve success through this type of restructuring, it is necessary to obtain at least the consent of the major creditors; the agreement cannot however be opposed to the creditors who did not consent to the arrangement.

This procedure has the advantage of being less costly and to avoid the detrimental publicity of an official procedure.

E. FRANCE

French law provides for two procedures, namely the *Independent Preliminary Bankruptcy ("Le mandat ad hoc")* and the *Amicable Settlement Procedure ("La procédure de règlement amiable").* These procedures are legally defined by the *law of 1st March 1984* ("Loi du 1er mars 1984 relative à la procédure du règlement amiable") (articles L.611-3 and L.612-1 of the French Commercial Code) and require the intervention of a judge.

E.1. The Independent Preliminary Bankruptcy ("Le mandat ad hoc")

♦ *Definition*

This procedure applies to **debtors** in financial difficulty, through the appointment of an **objective third party**, whose function is to assist the debtor and its creditors to reach an **agreement** in order for the debtor to continue its activities. The advantage of the procedure is its flexibility and confidentiality, since, even though the law does not address confidentiality, in practice the procedure is not public knowledge.

♦ *Initiators*

Only the **debtor** (whether an individual or legal entity) may **initiate** the procedure.

♦ *Conditions*

Debtor in **financial difficulty**, but **not yet in default** of payments (otherwise they must file for bankruptcy), may benefit from the procedure.

♦ *Administration*

Once the procedure has been initiated, the court appoints an **independent receiver**. The objective of the independent receiver is of a supervisory role, but also includes a wide range of activities, for example assisting management, negotiating payment terms with banks and business partners. However, the **debtor** still retains **control** of its business.

E.2. The Amicable Settlement Procedure ("La procédure de règlement amiable")

♦ *Definition*

Similar to the Independent Preliminary Bankruptcy procedure, this procedure is based on an **agreement** between the **debtor** and its **creditors,** concluded under the auspices of a **conciliator** and under supervision of the court. This procedure is strictly confidential, the breach of the duty of confidentiality being criminally punishable.

♦ *Initiators*

Only the **debtor** (whether an individual or a legal entity) may **initiate** the procedure.

♦ *Conditions*

The procedure is offered to enterprises that experience **legal, economic, or financial difficulties** but that are **not yet in default** of payments.

♦ *Administration*

The **conciliator** does not have the right to participate in the management of the business; the **debtor** retains **control** of its business. The conciliator is appointed to prepare a reorganization plan that will be submitted to the creditors and the court.

F. GERMANY

German law provides for *court proceedings,* the *Reorganization based insolvency plan* that must be initiated in the course of insolvency proceedings, as wells as *out-of-court proceedings*. The German legislation on insolvency has been modified significantly since the *German Insolvency Act* (" Insolvenzordnung") came into force on 1st January 1999. It is aimed at eliminating the overlap between the Bankruptcy Act and the Composition Act.

F.1. Reorganization based on insolvency plan ("Unternehmenssanierung")

- *Definition*

This procedure is based on the formulation of a **reorganization plan** in the **course of insolvency proceedings** (in a restrictive way, meaning compulsory liquidation proceedings), aimed at **rescuing** the business.

- *Initiators*

This procedure can be initiated either by the **debtor** (only legal entities) or the **insolvency trustee**. The **creditors' assembly** (not a single creditor) may instruct the insolvency trustee to compile a reorganization plan.

- *Conditions*

The procedure can be utilised by **debtors** that are **unable to pay their debts** as they fall due and/or where it can be established that the **value of the assets is less than the liabilities** (over-indebtedness) and may only be initiated **in the course of insolvency proceedings.**

- *Administration*

An **insolvency trustee** manages the enterprise; the **court** may **however order self-management**, on request of the debtor or its creditors (but in the later case, the debtor has to agree).

F.2. Out-of-court proceeding

This procedure is based on an agreement between the debtor and its creditors. Either the debtor or the creditors may start the negotiations; in practice, creditors are very often the initiators. The procedure has the advantage to be less costly and more confidential than court proceedings.

G. GREECE

Greek law provides reorganisation procedures regulated by the *Law 3562/1956 on the placing of companies limited by shares under the administration and management of creditors and the placing under special winding-up*, and the *Law 1892/1990 on modernization and development and other provisions* (articles 44, 45, 46, 46a, 46b).

G.1. Restructuring as per article 44 and winding-up or special liquidation as per article 46 a of Law 1892/1990, of companies in financial crisis

a) Restructuring

♦ *Definition*

Restructuring is based on an agreement between the **debtor** and its **creditors**, with the objective to **restructure** the business and a plan of debt settlement or reduction of its debt.

♦ *Initiators*

Either the **debtor** (whether an individual or a legal entity) or the **majority of its creditors** (as legally defined) may **initiate** the procedure.

♦ *Conditions*

This procedure is available to debtors:

- That have **suspended or discontinued their operations** for financial reasons;
- That **have ceased making payments**;
- That are **bankrupt**, or under the **administration** of the creditors or under **provisional order**, or **liquidation**;
- The **total of their debt** is 5 times more than the sum of their share capital and the reserves, and are unable to pay their debts.

♦ *Administration*

After initiating the procedure, an administrator is appointed by the court. However, the **debtor** retains **control** of its business. If the debtor fails to comply with the agreement concluded with the creditors, the administrator will manages the business.

b) Winding-up

In case the restructuring fails, the trustee has the possibility to sell the company's assets under the usual procedure of compulsory auction. Another way of proceeding is to sell the business as a whole, under the procedure of public tender.

We do not consider such a procedure as a possibility to continue business.

G.2. Placing of companies limited by shares, general partnerships and limited partnerships under administration of its creditors or under special liquidation

This procedure is not used anymore, since it was historically justified by the post-war efforts to rescue the Greek economy and will not be further discussed.

H. IRELAND

Irish law provides for two legal possibilities to continue economic activities for companies in distress: the *Examinership*, introduced by the *1990 Companies Amendment Act*, and the *Scheme of Arrangement,* which is regulated by the *1963 Companies Act*.

H.1. Examinership

♦ *Definition*

This is a procedure whereby the court appoints an independent third-party, to assess the operations, activities and assets of the **debtor's business**, consider whether **rescue** is possible or not, and if so, propose a **scheme that must be adopted** by certain classes of creditors, under supervision of the court. Some aspects of this procedure is based on the U.S. Bankruptcy Code Chapter 11, further discussed in Section P.

♦ *Initiators*

Either the **debtor** (only legal entities), a **creditor**, or a **potential creditor** may initiate the procedure. However, in the vast majority of cases, the debtor initiates it.

♦ *Conditions*

This procedure can be utilised by a debtor, with a reasonable prospect of recovery, that is or will become **unable to pay** its debt, but who is **not yet** under a resolution to **wind up**.

♦ *Administration*

Once the procedure has been initiated, the court appoints an examiner. The **examiner** is responsible for the conduct of the administration of the **procedure**; however, the **debtor** retains **control** of the **business**.

H.2. Scheme of Arrangement

♦ *Definition*

A Scheme of Arrangement is a **compromise or arrangement**, which a **debtor** negotiates with **its creditors or members**, regarding the payment of its debt (reduction and delays).

♦ *Initiators*

The **debtor** (only legal entities), the **creditors,** the **shareholders** of the company or the **liquidator,** if the company is being wound-up, may **initiate** the procedure.

The Scheme of Arrangement is rarely used, since the Examinership is effectively a sophisticated version of it.

♦ *Conditions*

This procedure is available to **companies**, even if the company is going through **a winding-up procedure**, on condition of the approval of a qualified majority of creditors and of the High Court.

♦ *Administration*

Unlike the Examinership procedure, no external administrator is appointed. The **debtor** retains **control** on its business.

I. ITALY

Italian law provides two procedures: the *Controlled Administration procedure*, and the *Preventive Creditors Settlement procedure*, both regulated by the *Royal Decree of 16th March 1942 on Discipline of the bankruptcy, of the preventive creditors settlement procedure, of the controlled administration procedure and of the compulsory administrative liquidation procedure* ("Disciplina del fallimento, del concordato preventivo, dell'administrazione controllata e della liquidazione coatta amministrativa").

I.1. The Controlled Administration procedure ("administrazione controllata")

♦ *Definition*

This procedure allows the debtor in temporary financial distress a way to continue its operations through placing the management of the business and administration of the assets under the supervision of the court, in order to find a solution to its financial woes and pay all debt.

♦ *Initiators*

Only the **debtor** (only legal entities) may **initiate** the procedure.

♦ *Conditions*

The major conditions to initiate this procedure are:

- in the **prior five years**, the debtor shall **not have been declared bankrupt** or **benefited from a judicial creditors composition procedure**;

- it has **not** been found **guilty of a bankruptcy offence** or other specified crimes;

- it is possible to **rescue the debtor**;

- the debtor has **difficulties in meeting its obligations**.

The success of the procedure depends on the ability of the debtor to finally pay all of its debt**.**

♦ *Administration*

Once the procedure has been initiated, the court appoints an **administrator**. His function is to evaluate the plan proposed by the debtor and to **supervise the procedure**. The **debtor** retains **control** of its business.

I.2. The Preventive Creditors' Settlement procedure ("concordato preventivo")

♦ *Definition*

This procedure is available to a **debtor** that is **insolvent** and that wants to **avoid to be adjudicated** into bankruptcy.

♦ *Initiators*

Only the **debtor** (only legal entities) may **initiate** the procedure.

♦ *Conditions*

The conditions in order to benefit from the procedure are the following:

- in the **prior five years**, the debtor shall **not have been declared bankrupt** or **benefited from a judicial creditors composition procedure**;

- he has **not** been found **guilty of a bankruptcy offence** or other specified crimes

- the debtor will offer **guarantees or securities** of his capacity to pay:

    - the secured creditors in its entirety;

    - 40 % of the value of the unsecured creditors;

- the debtor will **offer to sell his assets** .

♦ *Administration*

Once the procedure has been initiated, the court appoints one or more administrators. The **debtor** retains **control** of its business, under **supervision** of the **administrators**.

J. LUXEMBOURG

Luxembourg law provides for two principal procedures, namely the *Reprieve of Payment,* regulated by the *Grand Ducal Decree of 4th October 1934,* and the *Controlled Management,* regulated by the *Grand Ducal Decree of 24th May 1935.* The *Law of 5th April 1993 and of 30th March 1988* has enacted a procedure specific to banks and financial institutions.

Another Luxembourg procedure is the "*Composition in order to avoid bankruptcy",* regulated by the *Law of 14th April 1886 relating to compositions in order to avoid bankruptcy* (Loi du 14 avril 1886 relative aux concordats préventifs de faillite). However, this procedure has fallen into disuse.

J.1. The Reprieve from Payment (Le "sursis de payement")

♦ *Definition*

This procedure allows a debtor to **suspend payment** to creditors for a limited period of time, based on an **agreement** between the **debtor** and its **creditors** that is confirmed by the court.

♦ *Initiators*

Only the **debtor** may **initiate** the procedure.

♦ *Conditions*

The conditions to initiate the procedure are the following:

- The debtor is forced by extraordinary and unforeseeable events to **cease his payments** temporarily and has **sufficient assets** and funds according to its duly verified balance sheet in order to **satisfy all creditors**, in principal and interests;

- The financial situation of the debtor, although currently in deficit, shows **strong potential** that could allow a restoration of the financial situation.

♦ *Administration*

Once the procedure has been initiated, the court appoints one or more **administrators**. The **debtor loses** the right to **solely manage** the assets of the company. The **administrators must approve** all operations.

J.2. The Controlled Management

♦ *Definition*

This procedure is a remedy, granted by the court, to protect a **debtor**, in order to allow it to **reorganize** its business or to convert its assets into cash.

♦ *Initiators*

Only the **debtor** may **initiate** the procedure.

♦ *Conditions*

The debtor has **lost its creditworthiness** or **has difficulties in satisfying all its commitments**. The procedure is **not** available to debtors that have already been declared **bankrupt** by a final decision.

♦ *Administration*

Once the procedure has been initiated, the court appoints one or more **administrators**. The **debtor loses** the right to **solely manage** the assets of the company. The **administrators must approve** all operations.

J.3. Composition in order to avoid bankruptcy (Le "Concordat préventif de faillite")

This procedure is based on an **agreement** between the **debtor** and its **creditors**. The agreement may rearrange debt payments or plan a reduction of debts, however the procedure is no longer used and therefore not further discussed.

K. THE NETHERLANDS

Dutch law provides a number of possibilities for debtors that face financial distress. This include activities where the debtor may continue on the basis of a *Scheme of Arrangement,* to give the enterprise some time to put its financial affairs in order and to grant it a *Suspension of Payments*. The reorganization procedures are regulated by the *Bankruptcy act of 1st September 1896.*

K.1. Suspension of Payment ("Surseance van betaling")

♦ *Definition*

The suspension of payment is a **temporary relief** granted by the court to the debtor towards its unsecured creditors, in order to **attempt the continuation** of the business and, ultimately, the **satisfaction of all or part of the creditors**. Secured creditors are not affected by the suspension of payments, which may frustrate the success of the procedure.

The debtor may use this delay in various way; it may either use the suspension of payments to reorganize its activities, creditors being kept at distance, or to propose to its creditors a judicial scheme of arrangement, or to sell part or all of its assets.

♦ *Initiators*

Only the **debtor** (whether an individual or a legal entity) may **initiate** the procedure, except in the case of a financial institution, the **Dutch Central Bank** may initiate the procedure without being a creditor.

♦ *Conditions*

This procedure is available to an enterprise that expects to be **unable to continue payment** of its **due and payable** debt and as long as the court grants it.

♦ *Administration*

Once the procedure has been initiated, the court appoints **one or more administrators**. During the suspension, the **debtor and the administrator**(s) jointly **manage** and **dispose** of the debtor's estate.

K.2. Out-of-court scheme of arrangement ("Akkoord")

An out-of-court scheme of arrangement is a procedure that offers the debtor in distress an option to pay its creditors **a certain percentage** of the outstanding debt and the debtor being **discharged of the remaining** debt. The procedure is dependant on the **agreement of all the creditors**. This could be frustrating to the debtor and under special circumstances a judge may impose an unwilling creditors to cooperate in an out-of-court settlement (for example on the basis of abuse of power or unreasonableness).

Usually, secured creditors participate in the scheme of arrangement to the extent that they have claims that are not secured.

L. PORTUGAL

Portuguese law provides for various possibilities for the recovery of debtors that face financial difficulties. They are regulated by *the Code of Special Procedures for Company Recovery and Bankruptcy* (Códiga dos Processos Especiais de Recuperação da Empresa e de Falência"), introduced by the *Decree-Law n°132/93 of 23rd April 1993*.

♦ *Definition*

See L.1., L.2., L.3. and L.4. hereunder.

♦ *Initiators*

The **debtor** (only legal entities), a **creditor**, or the **Public Prosecutor** may **request** the adoption of an appropriate recovery measure.

♦ *Conditions*

A **debtor** in a **difficult economic situation** or that is **insolvent**, but that is considered to be **economically viable** and could be **financially recovered**, may apply for one of the following recovery measures:

L.1. Composition

The procedure allows for a **reduction** or **modification** of all or part of the debt of the business. Depending on the terms of the approved agreement, the **debtor** may retain control of its business.

L.2. Entrepreneurial reconstitution

The procedure allows for the **creation of one or more new companies** for exploiting new establishments of the debtor company, provided the creditors are ready to undertake or boost the respective activities.

In this procedure, the **directors of the new company** exercise control on the debtor's establishment.

L.3. Financial restructuring

The procedure provides for creditors a mean to adopt plans to restructure the **company's liabilities** or to **chance its share capital structure,** which places the company into a solvent position and generate a positive working capital.

Similar to the composition procedure, the **debtor** may retain **control** over its business.

L.4. Controlled management

The procedure applies a **global action plan**, orchestrated between creditors, and executed through **a new board of directors**, which provides proper supervision. The **new board of directors controls** the business.

M. SPAIN

Spanish legislation provides one legal possibility to continue business: the *Suspension of Payments ("Suspensión de pagos"),* regulated by the *Suspension of Payments Act of 1922.*

♦ *Definition*

The procedure grants a **compulsory moratorium** on all the debtor's debt with the objective of reaching a **judicially controlled arrangement** or **composition** between the **debtor** and its **creditors** in order to **restore its finances.** This is accomplished by negotiating **changes to the terms and conditions** governing the debt. The agreement may include a postponement in debt payment, a reduction of debts, or both. The majority of creditors must consent to the composition.

♦ *Initiators*

Only the **debtor** (whether an individual or a legal entity) may **initiate** the procedure.

♦ *Conditions*

To benefit from the procedure, the debtor must be **in temporary financial distress**.

♦ *Administration*

Once the procedure has been initiated, the court appoints one or more **administrators**. The **debtor** retains **control** of its business, on **condition of approval**

by the administrator. A decision taken without the authorization of the administrators is criminally punishable.

N. SWEDEN

Swedish law provides two legal possibilities to continue business: the *Reorganization procedure* and the *Judicial Composition,* both regulated by the *Company Reorganization Act of 1996*.

N.1. Reorganisation ("Företagsrekonstruktion")

♦ *Definition*

Reorganisation aims at **reorganizing the business of a debtor** in financial distress by making various reforms and/or initiating a financial settlement with its creditors.

♦ *Initiators*

Either the **debtor** (whether an individual or a legal entity) or a **creditor**, with the **consent of the debtor**, **initiates** the procedure.

♦ *Conditions*

This procedure is available to debtors that **are or will become unable** to pay their **debts**. It must be established that there is **reasonable** chance that a successful **reorganization can be achieved**.

♦ *Administration*

Once the procedure has been initiated, the court appoints an administrator, who will propose a **reorganization plan**. This must be submitted to the creditors and the court. The **debtor** retains **control** over its business; however, the debtor **cannot sell** or otherwise **dispose** of property that is of importance to the operation of business without the **authorization of the administrator**.

N.2. Judicial composition ("Ackord")

♦ *Definition*

The procedure is based on a **financial arrangement**, concluded in the course of reorganization proceedings, between an **insolvent debtor** and its **unsecured creditors**, aiming at **relieving** the debtor of **part of its debts.**

♦ *Initiators*

Only the **debtor** (whether an individual or a legal entity) may **initiate** the procedure, even though the **administrator** (appointed in the *Reorganization*) usually drafts the documents.

♦ *Conditions*

The criteria is **similar** to those applicable **to reorganization,** however, there is no need to prove bankruptcy. Judicial Composition can only **be initiated in the course of a reorganization procedure**.

♦ *Administration*

Since the Judicial Composition can only be initiated in the course of a *Reorganization procedure*, an administrator is already appointed. The **debtor** retains **control** over its business; although, the debtor **cannot sell** or otherwise **dispose** over property that is of importance to the operation of business without the **authorization of the administrator**.

O. UNITED KINGDOM

UK law provides three procedures available to companies facing difficulties: the *Receivership*, the *Administration,* and the *Company Voluntary Arrangement,* all regulated by the *Insolvency Act* 1986 and the *Companies Act* 1985 and 1989.

O.1. Receivership

♦ *Definition*

Receivership is a procedure available to companies (only legal entities), whereby a receiver is appointed with a charge to recover a debenture holder's claim or a creditor's funding (usually a bank).

♦ *Initiators*

A **debenture holder** (if the debenture so provides) or the **court** may initiate the procedure, by appointing a receiver.

♦ *Conditions*

No specific conditions apply.

♦ *Administration*

The debenture holder or the court appoints an **administrative receiver** who effectively **replaces** the management of the debtor (the company). He is authorised and empowered by the debenture holder and also attain specific powers listed in the Insolvency Act 1986.

O.2. Administration

♦ *Definition*

Administration is a court-approved scheme whereby the business obtains protection from the creditors' claims during a period where creditors approve a scheme for the sale or restructuring of the business. It is similar to the U.S. Bankruptcy Code Chapter 11 procedure.

♦ *Initiators*

Either the **debtor** (only legal entities) or one or more **creditors** may initiate the procedure.

♦ *Conditions*

The procedure is offered to a company that is **unable to pay its debt** or is likely to **become unable to pay its debt**.

The petitioner must satisfy the court that issuing an administration order would be likely to achieve one or more of the following objectives:

- the survival of the company, and the whole or any part of its undertaking as a going concern;
- the approval of a voluntary arrangement or composition in satisfaction of the company's debts, or a compromise or arrangement between the company and some or all of its members ;
- a more advantageous realization of the company's assets than it could be effected in a winding-up.

♦ *Administration*

Once the procedure has been initiated, the court appoints an **administrator**. The **administrator** retains **control** over the business.

O.3. Company Voluntary Arrangement

♦ *Definition*

The company voluntary arrangement is a contractual agreement between the company and its creditors, under which the company reaches a compromise with creditors over its outstanding debts.

♦ *Initiators*

The **debtor** (only legal entities), or if the company is under administration, the **administrator**, or if the company is being wound-up, the **liquidator**, may initiate the procedure.

♦ *Conditions*

No specific conditions apply.

♦ *Administration*

Once the procedure has been initiated, the creditors appoint "nominees". The **debtor** retains **control** over its business, under supervision of the nominees.

P. UNITED STATES OF AMERICA

The law governing bankruptcy in the United States is called the Bankruptcy Code. The Bankruptcy Code is administered by Federal judges presiding over specialised tribunals called "Bankruptcy Courts" that are located throughout the United States and that, for the most part, have national jurisdiction. The Bankruptcy Code is structured in several chapters, including Chapter 11 (entitled "Reorganization") and Chapter 7 (entitled "Liquidation"). Whether a debtor is in liquidation or restructuring proceedings, it is considered to be legally in "bankruptcy." A business has the option to liquidate or reorganize itself both in-court by filing Chapter 7 or Chapter 11, or out-of-court through receivership, assignment or "workout."

P.1. Chapter 11

Chapter 11 is the cornerstone of sophisticated bankruptcy practice in the United States and sets forth a structure for the rehabilitation of a corporate or (rarely) an individual debtor. The commencement of a Chapter 11 proceeding is not necessarily perceived in a negative way. Even though it is never easy to start such a procedure, it does not imply that the debtor has failed. The stigma of such a reorganisation is weaker than in European Member States and the commencement of a Chapter 11 case even has the effect of making the financing of a distressed debtor's operations easier than if it had never filed.

♦ *Definition*

Chapter 11 of the Bankruptcy Code (entitled "Reorganization") provides a financially troubled business with an opportunity to restructure its finances to enable the continuation of its operations. To promote this goal, chapter 11 enables a debtor to remain in control of its assets and business (as a "debtor in possession") while negotiating a restructuring of its affairs.

♦ *Initiators*

Either the **debtor** (whether an individual or a legal entity) or the **creditors** that meet certain criteria may initiate a Chapter 11 proceeding. Initiation by the debtor is called a "voluntary" proceeding, while initiation by the creditor is called an "involuntary" proceeding. Control of the Chapter 11 process is critically important to the debtor, permitting the debtor to choose the exact date it wishes to file and the venue it wishes to file in, to stockpile cash, to negotiate post-petition financing or the use of cash collateral, to control the dissemination of information to the public, and to adequately alert and prepare its employees, vendors and suppliers of the bankruptcy filing. On the contrary, the commencement of involuntary proceedings signals to third parties that the company's financial stability is in jeopardy and threatens the control debtor's

management has over its company. This forces the debtor to co-operate and negotiate with its creditors and may be used by creditors precisely for this purpose.

♦ *Conditions*

There is **no requirement** for a debtor to initiate the **voluntary proceeding**.

An **involuntary proceeding** can be commenced only on the condition that the petitioning creditors show that the debtor is generally **not paying its debts** as they become **due**.

It should be noted that the filing of an involuntary petition with the bankruptcy court by petitioning creditors does not automatically lead to the debtor's entry into Chapter 11. The debtor has 20 days to answer or contest the involuntary petition or file its own voluntary petition. The period of time between the filing of the involuntary petition and the entry for an order for relief is known as the "gap period" during which the debtor continues its normal business operations. The debtor may continue to operate its business and can use, acquire or dispose of property as if the involuntary case had not been commenced until the bankruptcy court requires otherwise. In the event that the debtor fails to timely contest the involuntary petition, the bankruptcy court may officially commence the chapter 11 case. If the debtor does contest the involuntary petition during the gap period, then the bankruptcy court will conduct a trial to determine the validity of the involuntary petition.

♦ *Administration*

The commencement of a chapter 11 reorganisation case does not usually result in the appointment of a chapter 11 trustee. Rather, the chapter 11 **debtor** remains in possession of its assets and becomes known as a **debtor in possession**. A chapter 11 debtor in possession generally may exercise all powers granted to a chapter 11 trustee under the Bankruptcy Code.

On request of a party in interest or the United States Trustee[2], the court may order the appointment of a chapter 11 **trustee** for cause, including fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor by current management. However, bankruptcy courts are usually very reluctant to install a trustee unless there is truly gross mismanagement or fraud. Furthermore, where the court has not appointed a trustee, on request of any party in interest or of the US trustee, the court may order the appointment of an examiner to conduct such investigation of the undertaking as appropriate.
Under the Bankruptcy Code, the **trustee** or the **debtor in possession** may **sell or use property** in the **ordinary** course of business without a court order. Use or sale of property **out of the ordinary** course of business requires the **court's permission**.

The goal of the Chapter 11 reorganisation is the filing and confirmation by the court of a **Chapter 11 Plan of Reorganization ("plan")**. A plan is basically a detailed term

[2] The US Trustee is an official of the US Department of Justice, appointed for each federal judicial district or group of districts, to monitor the progress of local bankruptcy cases and to represent the interest of the US Government in the expeditious and efficient prosecution of such bankruptcy cases. His function may be compared to the role of the Public Prosecutor in certain EU Member States.

sheet that sets forth the treatment to be accorded to parties in interest under the plan and the means for effectuating that treatment.

Unless a trustee has been appointed, the undertaking has the exclusive right to propose a Plan of Reorganization for 120 days after the commencement of the proceeding, called the "**exclusivity period**." After the exclusivity period, any creditor or equity security holder may propose a competing plan. Many judges view this as chaotic and expensive and often extend the exclusivity period of the debtor's right to propose the plan. However, if the debtor proposes a plan within this period, no other plan can be proposed.

P.2. Out-of-court proceeding

The *workout* is a **consensual restructuring** outside chapter 11 through which a **debtor** and its **significant creditors** attempt to reach an agreement to **restructure and adjust the debtor's debt obligations**. This includes the adjustment of payment schedules, the maturity date of the debt, and the issuance of new and additional debt instruments.

Both **debtors** and **creditors** may initiate the workout in an attempt to avoid bankruptcy under chapter 11.

The **debtor's** creditors who participate in the workout should at least include significant creditors to be successful.

If an agreement is reached (a *composition* or *workout*), it is only binding on the consenting creditors. Usually, a composition agreement provides that the agreement will be effective on the condition that it is accepted by a certain percentage of creditors whose acceptance is solicited.

The mere existence of an informal workout is generally not kept confidential. However, it is common and standard for parties to a workout to execute a confidentiality agreement with respect to the use and dissemination of financial and other non-public information provided by the company. In addition, the parties to a workout usually agree not to issue any publicity unless mutually agreed to.

4.2.3. COMPARATIVE ANALYSIS

This section considers and compares only the most relevant procedures in each country aimed strictly at rescuing a business in distress to insolvency. Section 4.3 focuses on the legal consequences of bankruptcy, or insolvency, and the ability to have a "fresh start." Our analysis was exclusively based on the national reports drafted by our EU and US correspondents annexed to the present report.

1) <u>General description of the possibilities in the EU to continue economic activities</u>

Due to the fact that each of the EU Members States and the U.S. have unique and varied in-court proceedings and out-of-court options for restructuring, comparing and contrasting these on an overall basis is a difficult task.

Overall, it can be said that all countries (EU Member States and the United States) offer one or several legal possibilities for a business in distress to stage a recovery. This is usually either by obtaining a temporary stay from or suspension of payments to creditors or by consensual agreements with creditors. This is usually done under supervision of an appointed administrator and/or court authority, with the degrees of authority of the court varying depending on the country.

However, we cannot conclude that the publicity and disclosure of information surrounding a debtor in distress necessarily engender stigma. A country's sociological perception of failure plays a huge role in the development of a stigma surrounding a distressed debtor. Strong publicity and availability of information to the public may not create stigma in a society where business partners, consumers and investors do not attach any importance to the potential failure of an enterprise. This is generally the case in the U.S. where commencement of reorganisation procedures is not perceived negatively and can even have a positive effect on the outcome of the debtor. On the other hand, in the EU Member States, where society generally distrusts businesses facing financial difficulties, even limited publicity may be a strong factor in generating a stigma. It is difficult to determine which aspect – the protection of the debtor from negative publicity of the procedure versus the protection of the creditors and the right of interested parties to access information – plays the dominant role in business recovery.

2) Nature of the procedure

In all Member States of the EU, insolvency law is a part of private law, as opposed to public law or criminal law. In the U.S., insolvency law is governed nationally by the "Bankruptcy Code," which is administered by Federal judges presiding over specialised tribunals called "Bankruptcy Courts."

The vast majority of Member States and the United States provide for informal procedures conducted out of the court's authority. These procedures are based on consensual agreements between debtors and creditors regarding the future of the business. In Europe, these agreements fall within the scope of private law, especially the law of contracts, and the common principle of the freedom of the parties. In the U.S., informal "workouts" do not fall under the Bankruptcy Code, but any agreements made are legally binding.

3) Legal conditions of reorganisation proceedings

a) Out-of-court proceedings

Out-of-court proceedings are not restrictive and refer to all contractually binding informal agreements, informal workouts and unofficial arrangements concluded between a debtor and its creditors. They are primarily based on the freedom of contracts, and may include any kind of arrangement, on condition that they comply with national law.

There is no specific or strictly defined criteria that regulates these procedures.

As the success of the "procedure" depends on the agreement between the debtor and its creditors, or of some creditors, to grant delays for payment, or reduction of debts, the only condition to fulfil is to obtain the *consent* of the creditors, or at least of most significant creditors.

Generally, a debtor can choose to arrange out-of-court proceedings, so long as the creditors consent. However, legislation in some countries obligates a debtor ceasing payments to petition for bankruptcy in court. In such cases, the possibility for a debtor to come to an informal arrangement with its creditors is limited to the debtor not yet being in default. For example, Belgian, French, German, and Luxembourg law oblige the debtor that ceases payments to its creditors to file for bankruptcy within a legally defined period.

Even though these procedures are by nature *informal,* and conducted *out-of-court*, it occurs in certain countries that the legislator intervenes in some way, or that the court has the power to ratify the agreement. In Finland, confirmation by the court of the informal arrangement gives to the parties a basis for executing their plan, or agreement. In the U.S., the interested parties generally use the Chapter 11 procedures and stipulations as a guideline for conducting an informal plan of reorganisation. In most countries, courts interfere in these agreements only in cases where disputes arise, as they would have intervened to ensure the respect of any other agreement, under contract law.

b) Court proceedings

Court proceedings and the details surrounding a company's entry into bankruptcy vary among the various EU Member States and the U.S. However, we have identified the following four factors that are, for the most part, inherent to proceedings in the countries analysed:

1. Financial and economical difficulties

A business must be facing a *difficult economic and financial situation,* either through a *cessation of payments* to its creditors (as in Austria, Belgium, Germany, Luxembourg, Ireland, Netherlands, Portugal, Sweden, the United Kingdom), or through *over-indebtedness* (Austria, Finland, Germany). In Denmark and Italy, the debtor must be facing *difficulties in meeting its obligations* in order to file for reorganisation proceedings.

In a United States Chapter 11 case, one needs to distinguish between voluntary and involuntary proceedings. A business that files for Chapter 11 voluntarily does not have to meet any requirement in order to obtain court relief. However, the Court might dismiss a voluntary petition in case of bad faith of the debtor. On the other hand, creditors who initiate involuntary proceedings carry the burden of showing that the business is generally not paying its debts as they become due. The U.S. involuntary chapter 11 can therefore be compared to a procedure of its European counterparts that requires the *cessation of payments* to be established.

2. Viability of the enterprise

Only Belgium, Finland, Ireland, Italy, Luxembourg, Portugal and to a certain extent, the United Kingdom (*Administration*), formally require that an enterprise be viable or present a strong potential to recover from its distress. Spanish law, even though not strictly requiring the viability of the enterprise, states that the enterprise must face *temporary* financial difficulties to benefit for the regime. We may thus conclude from this condition that the situation of the enterprise cannot be irreversible and that a prospect of survival exists.

In the United States, there is no such specific requirement for the introduction of the chapter 11 proceeding except that the debtor must be in the "zone of insolvency."

3. Conditions with respect to bankruptcy and/or winding-up

Several countries require that the debtor is not yet in default of payment or has *not yet* been declared bankrupt (insolvent) or put under a winding-up procedure in order to be put into reorganisation procedures.. This is the case in Belgium, France, Germany, Ireland, Luxembourg and in the United Kingdom for at least one of the procedures available.

In Italy, both the *Controlled administration procedure* and the *Preventive creditors' settlement procedure* are offered to corporate debtors having difficulties meeting their obligations. However, these companies may only apply on the condition that they have not been declared bankrupt or benefited from a judicial creditors composition procedure in the prior five years. In addition to the legal effects attached to the declaration of bankruptcy (see Title 5) that may prevent the debtor to start a new activity, there are severe conditions to benefit from the *Controlled administration procedure* and for the *Preventive creditors' settlement* that may create stigma.

On the other hand, Austria, Denmark, Finland, Greece, Italy, Netherlands, Portugal, Sweden, Spain, the United Kingdom and the U.S. offer the possibility to benefit from the recovery procedures while the debtor is already in a situation of cessation of payment.

Belgium, France, Ireland (*Examinership*), Luxembourg (*Controlled management*) and the United Kingdom (*Company voluntary arrangement*) prohibit the introduction of a recovery procedure when a judicial decision declaring the undertaking bankrupt or wound-up has already been made.

Austria, Germany, Greece and Sweden provide procedures that can only be initiated in the course of insolvency proceedings, respectively the *Compulsory reorganisation, the Reorganisation based on an insolvency plan, the Restructuring of enterprises* and the *Composition*.

In the U.S. there is no legal stipulation regarding multiple Chapter 11 filings. In fact, if a debtor is unable to comply with the provisions of a plan of reorganisation which has become effective, the debtor may file a new chapter 11 petition in a renewed effort to reorganise its affairs. Some companies have gone through chapter 11 bankruptcy several times and multiple filings have become so common that they are sometimes referenced as "Chapter 22."

Regarding the stigma on failure and the fresh start, it is noticeable that certain EU Member States provide the possibility to businesses that are already under a bankruptcy or liquidation proceeding to benefit from a reorganisation procedure in order to finally recover from such insolvent situation. In these procedures, the initiation of bankruptcy, winding-up, or liquidation proceedings does not necessarily engender failure, since a recovery procedure may be initiated *in the course* of these procedures. Bankruptcy proceedings may thus be converted into reorganisation proceedings.

Austria, Germany, Greece, and Sweden even provide procedures that may only be initiated in the course of insolvency proceedings (we mean bankruptcy or liquidation proceedings), as stated above. It may be a strategy of the debtor to first be declared bankrupt and then to apply for recovery procedures, if this way allows him to obtain more time to prepare a plan, or to benefit from less restrictive conditions.

4. Conditions with respect to creditors' reimbursement

In addition to one or more criteria described above, certain countries impose conditions regarding the distribution of the debtor's assets to creditors.

In Austria, for instance, the *Reorganisation* procedure requires the agreement that 40 percent of unsecured debts shall be paid, if it is an *ordinary* reorganisation, initiated out of any insolvency proceeding. This quota is reduced to 20 percent if the reorganisation is a *compulsory* one*,* initiated in the course of bankruptcy proceedings. As a consequence, many insolvent businesses opt rather for bankruptcy proceedings and try subsequently to convert it into a *Compulsory reorganisation*. These quotas may certainly deter the debtor from initiating the proceedings.

Moreover, in both cases, the payment of these quotas is due within a maximum time period of two years.

Similarly, in Italy, with respect to the *Preventive creditors' settlement procedure,* the debtor shall offer guarantees that he will pay all secured debts and 40 % of the unsecured debts to benefit from the procedure.

In Luxembourg, the granting of a *Reprieve of payments* is conditional upon the existence of sufficient assets to satisfy all creditors.

CONDITIONS	
Austria	
Ordinary reorganisation	· illiquidity, impending illiquidity or over indebtedness · 40 % of the unsecured debts shall be paid within 2 years
Compulsory reorganisation	· illiquidity, impending illiquidity or over indebtedness · 20 % of the unsecured debts shall be paid within 2 years · in the course of a bankruptcy proceeding

Out-of-court proceedings	· Agreement of creditors
Belgium	
	· Temporary inability to pay debts · Continuity of the business is threatened by problems that may lead to cessation of payments
Denmark	
Suspension of payments *Compulsory composition* *Out-of-court proceeding*	· inability to fulfil its obligations · no particular conditions · agreement of creditors
Finland	
Restructuring of enterprises *Out-of-court proceedings*	· Financial difficulties · Indebtedness · viability of the enterprise · Agreement of creditors
France	
Independent preliminary bankruptcy *Amicable settlement procedure*	· No default of payment · No default of payment
Germany	
Reorganisation based on insolvency plan *Out-of-court proceedings*	· No default of payment · In the course of a bankruptcy proceeding · No default of payment
Greece	
	· Suspension or discontinuation of operations · Cessation of payments · Bankrupt business or business under administration of the creditors or under provisional order of liquidation · Total of debts five times more than the sum of their share capital and the reserves · Inability to pay debts
Ireland	
Examinership	· Inability to pay debts · No resolution of winding up

	· Reasonable prospect of survival
Scheme of arrangement	· Agreement of the creditors
Italy	
Controlled administration procedure	· no bankruptcy or composition in the prior five years · no bankruptcy offence or other specified crimes · possibility to rescue the business · difficulties to meet its obligations
Preventive creditors' settlement procedure	· no bankruptcy or composition in the prior five years · no bankruptcy offence or other specified crimes · debtor shall offer guarantee to pay all secured debts and 40 % of unsecured debts · debtor offers to sell its assets
Luxembourg	
Reprieve from payment	· Temporary cessation of payments because of extraordinary circumstances · sufficient assets to satisfy all creditors · strong potential of survival
Controlled management	· lost of creditworthiness · difficulties to meet its obligations · no bankruptcy decision
The Netherlands	
Suspension of payments *Out-of-court proceedings*	· Anticipation of inability to pay due and payable debt · Agreement of the creditors
Portugal	
	· Difficult economic situation or insolvency · Economic viability and financial possibility to recover
Sweden	
Reorganisation	· Inability to pay debts as they fall due or anticipation of such inability
Composition	· Inability to pay debts as they fall due or anticipation of such inability · Reasonable prospect of survival

	· In the course of a bankruptcy proceeding
Spain	
	· Temporary financial distress
UK	
Receivership	· No particular conditions
Administration	· Inability to pay debts as they fall due or anticipation of such inability · The survival of the company, or an arrangement or composition, or a better realisation than in a winding-up, may be expected
Company voluntary arrangement	· No particular conditions
USA	
Chapter 11	· If filed by the debtor: no requirement · If filed by creditors: proof that debtor is not paying debts as they become due
Out-of-court proceedings	· Called a "workout" – consensual agreement between debtor and major creditors

4) Initiators of the procedure

a) Out-of-court proceedings

Out-of-court proceedings may be initiated by any party confronted with the financial and economical difficulties of the enterprise, since it is based on an agreement between all consenting parties and on the freedom of contract. The debtor as well as the creditor may initiate negotiations. However, usually the debtor starts the negotiation, since it wants to delay lawsuits and procedures of execution over the enterprise's assets.

b) Court proceedings

Since recovery procedures aim at the survival of the business, the cooperation of the debtor is a necessary ingredient to their success. Several EU Member States make the debtor the only possible initiator of the procedure. This will be discussed further in section 1.

However, our analysis of the national reports seems to attribute the failure of the recovery procedure to the lack of action taken by the debtor. Entrepreneurs and company management are often reluctant to recognise their difficulties and consequently delay the initiation of the proceeding. Once the procedure is finally initiated, the recovery of their business is no longer possible. Based on this concept,

several EU Member States and the United States allow debtors, as well as creditors to initiate a bankruptcy proceeding. This will be discussed further in section 2.

Specifics ally of the in- and out-of-court proceedings in the EU Member States and the United States will be discussed in section 3.

1. Only the debtor (i.e. the individual or, if it is a legal entity, its competent body)

In Austria, France, Greece (but only with regard to the *Reforming procedure*), Italy, Luxembourg, Netherlands, Spain, and Sweden (but only with regard to the *Composition* procedure) the debtor is the only possible initiator of the procedure. In Belgium, in addition to debtor initiation of the proceeding, the Public Prosecutor, to the exclusion of creditors, is also allowed to initiate recovery proceedings. However, in practice the Public Prosecutor never uses his power of initiation.

As stated above, this option is understandable as the success of the reorganisation of the enterprise depends mostly on the will of the debtor, and on its willingness to co-operate with the administrator that is usually appointed by the court.

On the other hand, experts throughout Member States stress that the failure of a reorganisation proceeding is often due to the fact that the debtor waits too long before initiating the adequate proceeding.

2. The debtor and/or its creditors (any creditor or the majority of creditors)

Finland, Greece (except for in regards to the *Reforming Procedure*), Ireland, Portugal, Sweden (but only with regard to the *Reorganisation*), the United Kingdom (but only with regard to the *Administration)* and the United States allow both the debtor and the creditors to initiate the proceeding.

However, in Greece, only the majority of creditors may initiate the procedure, whereas in the other countries, any creditor, and even a potential creditor, as in Finland and Ireland, may initiate the procedure.

We should add that in Ireland and in Sweden, in the vast majority of cases, the debtor usually makes the application, even though the creditors are entitled to do so.

3. Particularities

As discussed previously, Chapter 11 in the United States allows for both the debtor and the creditors, who meet the threshold requirements, to initiate the proceeding. Both types of initiation (voluntary in case of debtor initiation and involuntary in case of creditor initiation) leave the debtor in control of its assets (except for in cases of fraud whereby the court appoints a trustee to administer the proceeding). However, the voluntary proceeding allows the debtor to choose the exact date and the venue in which it wishes to file, to conduct the negotiations of the post petition financing and use of cash collateral, to control the dissemination of publicity, and to adequately alert and prepare its employees, vendors and suppliers of the pending filing.

In Germany, as the *Reorganisation based on insolvency plan* can only be initiated in the course of insolvency proceedings, both the debtor and the trustee in insolvency can petition for the commencement of the procedure.

In Greece, regarding the *Placing of companies limited by shares, general partnerships and limited partnerships under the administration and management of their creditors or under special liquidation*, only the majority of creditors may initiate the procedure, to the exclusion of the debtor. As we previously stated, this procedure fell into disuse.

In Ireland, in addition to the debtor and the creditor, any member of the company, and, if the company is in the course of being wound-up, the liquidator, may initiate the procedure.

In Portugal, in addition to the debtor and the creditor, the Public Prosecutor is entitled to initiate the procedure, like in Belgium. However, we remind that in Belgium, creditors are not granted that right.

In the United Kingdom, the *Receivership* may only be initiated by a debenture holder (if the debenture provides so), or by the court. The *Company voluntary arrangement* can be initiated by the debtor, by the administrator if the company is under *Administration* and by the liquidator if the company is under winding-up.

Overall, we have concluded that whether the debtor or creditor initiates the procedure has few consequences regarding the stigma on failure. Indeed, the eventual stigma attached to the introduction of a recovery procedure is first of all caused by the notification that is made to all creditors; whether the procedure had been initiated by the debtor or by one or several creditors has no significance. In the vast majority of procedures granted to debtors in difficulties, the decision that grants the procedure is public and the existence of the recovery procedure is notified to the creditors.

It should be noted, however, that in the U.S., a debtor who puts itself into bankruptcy often angers the creditors. If the debtor initiates the proceeding, the debtor chooses the time and control over notifying creditors and appeasing their worries. This is not necessarily the case if a creditor initiates the proceeding, in which case the debtor's control over the business is truly threatened.

Almost all procedures are based on the consent among creditors to reduce or rearrange the debts of the business, suggesting that creditors are all involved in the procedure and informed of its evolution individually or, for example, through a creditors' assembly.

It is difficult to strike the balance between the protection of creditors' interests, through transparency and availability of information on the debtor, and the protection of the debtor, through confidentiality of proceedings. . It seems that current European national legislation places higher emphasis on and importance to the protection of creditors. However, there are exceptions to this general rule and those will be further developed in points 7, 9 and 12 of this title.

INITIATORS OF THE PROCEDURE	
Austria	
	· Debtor (whether an individual or a legal entity)
Belgium	
	· Debtor (whether an individual or a legal entity) · Public prosecutor
Denmark	
	· Debtor
Finland	
	· Debtor (whether an individual or a legal entity) · Creditor · Potential creditor
France	
	· Debtor (whether an individual or a legal entity)
Germany	
	· Debtor (only legal entities) · Trustee in insolvency (whether instructed by the creditors' assembly or not)
Greece	
	· Debtor (whether an individual or a legal entity) · Majority of creditors
Ireland	
Examinership	· Debtor (only legal entities) · Creditor · Potential creditor
Scheme of arrangement	· Debtor (only legal entities) · Creditors · Members of the company · Liquidator

Italy	
	· Debtor (only legal entities)
Luxembourg	
	· Debtor (whether an individual or a legal entity)
The Netherlands	
	· Debtor · If the debtor is a financial institute: the Dutch Central Bank
Portugal	
	· Debtor (only legal entities) · Creditor · Public prosecutor
Spain	
	· Debtor (whether an individual or a legal entity)
Sweden	
Reorganisation *Judicial composition*	· Debtor (whether an individual or a legal entity) · Creditor, with the consent of the debtor · Debtor (whether an individual or a legal entity)
UK	
Receivership *Administration* *Company voluntary arrangement*	· Debenture holder · Court · Debtor (only legal entities) · Creditor · Debtor (only legal entities) · Administrator (companies under administration) · Liquidator (companies under winding-up)
USA	
	· Debtor · Creditor

5) Administration of the procedure

a) Out-of-court proceedings

In all countries analysed, unofficial proceedings are by nature regulated according to the will of the contracting parties. As a consequence, courts have no role and no administrator is appointed. The debtor retains its powers over its business, and the scope of the agreement is limited to the granting of delays of payment or of reductions of debts. Nevertheless, parties may for example, jointly appoint a third party to assist or to replace the management, on the condition of reaching consensus with all parties involved, or they may decide that the debtor will manage the business under the supervision of the creditors.

b) Court proceedings

In most EU Member States, once the procedure has been introduced, the court appoints an objective third party, whose function is primarily to assist and supervise the conduct of business operations during the proceedings. The U.S. chapter 11 procedure does not, however, necessarily involve the appointment of a trustee; actually, courts are even reluctant to appoint a trustee unless there is gross mismanagement or fraud.

Most EU regimes are based on the following hypothesis: the debtor has temporary financial difficulties, as a consequence of exceptional circumstances. Accordingly, the debtor is not necessarily considered a bad manager. This explains why most national procedures allow the debtor to keep the management of the enterprise, for example to make decisions relating to the disposal of the assets. Usually, these procedures, however, require a guarantee to the creditors. For the operations that might impair their rights, an authorisation of the third party (an administrator, or the trustee where the procedure has been initiated in the course of an insolvency proceeding) is required. Such procedures exist in Belgium, Luxembourg, Netherlands and Spain.

In the United States, management powers are usually left to the debtor, which officially becomes a "debtor in possession". The trustee, if any, or the debtor are entitled to sell or use property in the ordinary course of business without a court order. Use of or sale of property out of the ordinary course of business, however, requires the court's authorisation. The key point is to determine whether the operation is in the ordinary course of business or not.

In other procedures, the role of the appointed administrator is limited to the assistance and supervision of the operations that the debtor conducts. They may report to the court, for example, but are not allowed to prevent the debtor from acting. Austria, Finland, France, Ireland, Italy, Sweden and the United Kingdom (but only with regard to the Company voluntary arrangement) provide such procedures.

We already mentioned that Austria, Germany and Sweden provide the possibility to introduce a reorganisation procedure in the course of insolvency proceedings. In these cases, a trustee in insolvency is appointed to manage the bankrupt's assets. In Austria and in Germany, the control of the business remains with the trustee; no administrator is specifically appointed for the conduct of the reorganisation procedure. During the procedure, the debtor is deprived of his right to manage. In Sweden, on the other hand, the function of the administrator is limited to investigation and negotiation with the creditors in order to conclude the composition.

Portugal provides an interesting panel of recovery measures, as we mentioned in section II. In principle, the debtor keeps management powers. Actually, no third party is appointed to assist it, but the creditors may supervise its operations, depending on the measure granted and its terms.

The United Kingdom also provides procedures where a third party retains control over the business: this is the case in the *Administration* and in the *Receivership.*

As for the effects of court proceedings on stigma, it is unclear as to whether the interference of an administrator in conducting the affairs makes creditors more confident with respect to the issue of the proceedings, and thus more willing to continue business.

On the one hand, creditors may perceive this third party as a protector of their rights, who will prevent the debtor from making any decision that would be unfavourable to their interests. But on the other hand, the sole existence of an administrator who assists or controls the management of the debtor may render its difficult situation even more serious from a creditor's point of view.

Still, the presence of an administrator (instead of the debtor or even assisting him) may have a psychological effect, due to the impression that the transfer of the management of the debtor to a third party may show the inability and inaptitude of its management. This may engender a stigma, since such an impression may deter co-contractors from entering or from continuing business with this debtor.

ADMINISTRATION OF THE PROCEDURE	
Austria	
Ordinary reorganisation *Compulsory reorganisation*	Debtor retains control Supervision of the administrator Bankruptcy administrator retains control
Belgium	
	Debtor retains control Supervision of administrator Authorisation of administrators required for certain operations
Denmark	
	Debtor retains control Supervision of the administrator
Finland	
	Debtor retains control Supervision of the administrator

France	
Independent preliminary bankruptcy	Debtor retains control Supervision of independent receiver
Amicable settlement procedure	Debtor retains control Conciliator prepares the plan
Germany	
	Trustee in insolvency retains control (except if self-management ordered by the court

Greece	
	Debtor retains control Supervision of administrator If debtor fails to comply with the agreement: administrator shall retain control
Ireland	
Examinership *Scheme of arrangement*	Debtor retains control on business Examiner retains control on the procedure Debtor retains control No administrator
Italy	
	Debtor retains control Supervision of the administrator
Luxembourg	
	Debtor retains control, BUT Authorisation of administrator required
The Netherlands	
	Debtor and administrator retain control jointly
Portugal	
Composition *Entrepreneurial reconstitution* *Financial restructuring* *Controlled management*	Debtor retains control, either under conditions or not Entrepreneurial reconstitution : the board of the new company retains control Debtor retains control, either under conditions or not The new board of directors retains control

Spain	
	Debtor retains control, BUT Authorisation of administrator required
Sweden	
	Debtor retains control Supervision of the administrator Authorisation of administrators required for certain operations
UK	
Receivership *Administration* *Company voluntary arrangement*	Receiver maintains control Administrator maintains control Debtor maintains control
USA	
	Debtor maintains control Chapter 11 trustee or US trustee appointed by court only on request of an interested party or in case of fraud

6) Restructuring plan

Almost all procedures are based on the drafting of a *plan* to reorganise the business. The plan can take the form of an agreement or proposal and can be the result of an in-court or out-of-court proceeding.

Approval of the plan, including distribution of the debtor's assets to the various classes of creditors is conditional upon the viability of the enterprise and upon each creditor's chances to recover a profitable activity. A reliable plan is therefore an essential tool in convincing creditors that the debtor still has chances to recover.

a) The drafting of a plan

Legislation in all EU Member States and the United States provides for at least one type of bankruptcy proceeding that requires a restructuring plan, or proposal, whether that be prepared by the debtor or by the appointed administrator.

In Greece and in Luxembourg, however, legal reorganisation procedures that may be conducted without a plan also exist, including the *Restructuring or winding-up of enterprises* and the *Reprieve of payments.*

With the exception of these procedures, all legal procedures include the drafting of a plan that is subject to the vote and approval by the creditors, and to the subsequent ratification by the court.

b) The recovery measures

Approval by the creditors is essential to the success of a recovery, as they must approve the submitted plan.

The plan must, therefore, contain a clear description of the estate of the debtor's business, including a statement of assets and liabilities, and a complete view of the proposed recovery measures to be taken and their potential effect on the survival of the enterprise. These measures should detail proposals on restructuring the debts of the enterprise, payment schedules to the creditors, and the role of the management.

Overall, the plan should provide creditors with a clear understanding of the current and future state of the business, so they can decide whether or not the plan is in their best interests and should be approved.

c) Adoption of the plan

Confirmation by creditors is always necessary in the adoption of a plan, but minimum requirements for approval of the plan vary in each country. In all countries analysed, the power of the court is very broad, including the right to reject a plan that has been approved by the necessary majority of creditors. Such a rejection should be based, depending on the various legal systems, on the protection of the interest of creditors or of the public.

As already mentioned, the competent court in most Member States has the power to authorise ('ratify') the plan accepted by the creditors. However, in the United Kingdom (*Company voluntary arrangement)*, the court is not entitled to approve the proposals submitted by the nominees. The *Administration* procedure gives wide powers to the court regarding the proposals, under certain circumstances.

In Belgium, France, and Luxembourg, the court can authorise the plan on the condition that the required majorities have been reached. However, even in such a case, the court has the power to reject the plan.

In Austria, Finland, Germany and Ireland, law provides several conditions under which the court must reject the plan, and other conditions under which the court may reject it.

In Denmark, the court has no influence regarding the *Suspension of payments*; however, with regard to the *Compulsory composition*, the plan is an integral part of the composition proposal and dependent upon the acceptance of the court.

In Germany (in the *reorganisation based on insolvency plan*), the court has strong discretionary powers, which allows it to decide whether or not to confirm the plan.

Whilst Spain considerably limits the powers of the court. Once the plan has been adopted by the legally required majority of creditors, the court takes 8 days to announce the approval of the composition after the date of the creditors meeting. Within this period, certain legally defined creditors are entitled to oppose the composition. In the even that there is no opposition within this period of delay, the court must approve the composition. In the same way, in Portugal, powers of the court are strictly limited to a control of the respect of the applicable legal rules, to the exception of any opportunity control.

It seems that in Europe creditor protection is one of the main legislative objectives with the court guaranteeing such protection. In the U.S., however, bankruptcy judges consider the primary purpose of a chapter 11 proceeding to be preservation of the value of the debtor and its operations and avoidance of economic disruption and employee dislocation that occurs upon the piecemeal liquidation of a business. With this perspective, bankruptcy courts make decisions based on the overall goal of reorganising the business, even over strong creditors' objections. In fact, if the creditors reject the plan, the bankruptcy judge can overrule this and confirm the plan if the court finds the plan "fair and equitable."

The U.S. approach towards the creditors' rights contrasts with that of some of its European counterparts. For example, legal systems influenced by the Germanic tradition aim first at the protection of the creditors instead focusing on the recovery of the debtor.

RESTRUCTURING PLAN	
Austria	
	· plan drafted · vote of creditors · if legal majorities reached: confirmation by court (non-discretionary power)
Belgium	
	· plan drafted · vote of creditors · confirmation by the court (discretionary power)
Denmark	
Suspension of payments *Composition*	· plan drafted · vote of creditors · plan drafted · vote of creditors · confirmation by the court (non-discretionary power)

Finland	
	· plan drafted · vote of creditors · if legal majorities reached: confirmation by court (non-discretionary power)
France	
	· plan drafted · vote of creditors · confirmation by the court (discretionary power)
Germany	
	· plan drafted · vote of creditors · if legal majorities reached: confirmation by court (non-discretionary power)
Greece	
	· no plan
Ireland	
	· plan drafted · vote of creditors · if legal majorities reached: confirmation by court (non-discretionary power)
Italy	
Controlled management procedure *Preventive creditors' settlement procedure*	· plan drafted · valued by the court · vote of creditors · plan drafted · valued by the court · vote of creditors · confirmation by the court
Luxembourg	
Reprieve from payments *Controlled management*	· no plan · plan drafted · vote of creditors · confirmation by the court (discretionary power)
The Netherlands	

	· plan drafted · vote of creditors · if legal majorities reached: confirmation by court (non-discretionary power)
Portugal	
	· plan drafted · vote of creditors · confirmation by the court (non-discretionary power)
Spain	
	· plan drafted · vote of creditors · confirmation by the court (non-discretionary power)
Sweden	
	· plan drafted · vote of creditors · confirmation by the court (discretionary power)
UK	
	· plan drafted · vote of creditors
USA	
	· plan drafted · vote of creditors · confirmation by the court (discretionary power)

7) Degree of protection of creditors

a) Out-of-court proceedings

Informal, out-of-court proceedings are based on the agreement or plan made between the debtor and its creditors, which usually requires the consent of a defined percentage of creditors. Since the agreement is only binding upon consenting creditors, the success of the plan is highly dependent on the treatment and protection of those creditors.

In some countries like Austria and Germany, legal principles, such as the principle of the equality of treatment and the protection of secured creditors' claims, must still be complied with in the informal proceedings.

In the U.S. a consensual restructuring outside of chapter 11 is known as a "workout." Although the restructuring of the company's debt must be consensual in order to effectively implement a workout, a factor that strongly influences the extent to which creditors are willing to compromise on a position is the chapter 11 process itself. The debtor may even threaten the commencement of a chapter 11 case in order to exact a compromise from its creditors.

b) Court proceedings

In the vast majority of Member States, the procedure is based on a reorganisation plan. In these cases, on the condition that it has been approved by the required majorities, the court may or must confirm the reorganisation plan or arrangement. Where the plan violates the interests of all or part of the creditors (even those who voted for the plan), the court may, and sometimes must, reject the plan, which is an important feature of creditor protection. Spanish bankruptcy law dictates however that the court must approve the plan in cases where no creditors oppose it within a specified period of time.

The process as described above is similar in the U.S., except that there is perhaps less focus on the protection of the creditors. In the U.S, if the debtor is unable to obtain the acceptance of an impaired class of creditors for approval of the plan, he may nevertheless obtain confirmation of the plan if the bankruptcy court finds that the plan is "fair and equitable" and does not discriminate unfairly against any class of claims or interests that is impaired and has not accepted, the plan.

Most EU Member States distinguish between secured and unsecured creditors, in voting on and confirming the plan, while some countries' legislation calls for equal treatment of creditors in confirmation of the plan.

1. Post-petition debts

In all EU Member States and in the Unites States, post-petition debts are considered super-privileged, and are cured before all other debts. These creditors are, therefore, not subject to the plan of reorganisation.

2. Secured and unsecured debts

In Austria, Denmark, Italy, Luxembourg (in the *Reprieve of payment)*, the Netherlands, Sweden (in the *Composition*), Spain, and the United Kingdom, secured creditors benefit from a particular protection. They can choose whether or not they want to participate in the plan and are not obligated to it if they choose not to.

On the other hand, Belgium, Finland, France, Germany, Greece (except for employees), Ireland, Luxembourg (for the *Controlled management*), Portugal and the United States provide procedures for all creditors to vote on the agreement or the plan. If the legally required majorities are reached, all creditors are bound by it, even those who voted against it. It may occur, however, that the plan must comply with the legal sequence of creditors, as in Finland.

DEGREE OF PROTECTION OF CREDITORS	
Austria	
	· Privilege of debts arising after initiation of the procedure · Unsecured creditors are bound by the agreement
Belgium	
	· Privilege of debts arising after initiation of the procedure · All creditors are bound by the agreement
Denmark	
	· Privilege of debts arising after initiation of the procedure · Unsecured creditors are bound by the agreement
Finland	
	· Privilege of debts arising after initiation of the procedure · All creditors are bound by the agreement
France	
	· Privilege of debts arising after initiation of the procedure · All creditors are bound by the agreement
Germany	
	· Privilege of debts arising after initiation of the procedure · All creditors are bound by the agreement
Greece	
	· Privilege of debts arising after initiation of the procedure · All creditors are bound by the agreement (except the employees)
Ireland	
	· Privilege of debts arising after initiation of the procedure · All creditors are bound by the agreement

Italy	
	· Privilege of debts arising after initiation of the procedure · Unsecured creditors are bound by the agreement
Luxembourg	
Reprieve from payments *Controlled management*	· Privilege of debts arising after initiation of the procedure · Unsecured creditors are bound by the agreement · Privilege of debts arising after initiation of the procedure · All creditors are bound by the agreement
The Netherlands	
	· Privilege of debts arising after initiation of the procedure · Unsecured creditors are bound by the agreement
Portugal	
	· Privilege of debts arising after initiation of the procedure · All creditors are bound by the agreement
Spain	
	· Privilege of debts arising after initiation of the procedure · Unsecured creditors are bound by the agreement
Sweden	
	· Privilege of debts arising after initiation of the procedure · Unsecured creditors are bound by the agreement
UK	
	· Privilege of debts arising after initiation of the procedure · Unsecured creditors are bound by the agreement
USA	
	· Privilege of post-petition debts · All creditors are bound by the agreement

8) Termination of the procedure

Confirmation and implementation of the plan adopted ordinarily discharges the debtor from liability for all debts arising prior to the effective date of the plan of reorganisation, except to the extent that the plan of reorganisation does not apply to certain categories of them. This is the case in Austria, Belgium, Finland, France,

Germany, Greece, Ireland, Italy, Luxembourg (for the *Controlled management*), the Netherlands, Sweden, Spain, and in the U.S.. The Portuguese *Composition*, which usually includes a clause "return to better fortune," obliges the undertaking to pay its creditors proportionally as soon as its economic situation improves.

If the case of a breach of agreement by the debtor, the possibility to terminate the plan and proceeding is provided by most Member States' bankruptcy law. In this case, creditors recover their individual rights of execution against the debtor, or eventually bankruptcy or winding-up proceedings are commenced.

The Irish procedure of "*Examinership*" is terminated seventy days from the date of the petition or on the withdrawal or refusal of the petition, whichever first happens. The court may extend that period by no more than 30 days. The procedure may also cease by the coming into effect of the compromise or the scheme of arrangement or on such an earlier date that the court may direct. If no plan is confirmed by the given date, the court terminates the procedure, causing the debtor to inevitably go into liquidation.

The *Suspension of payments* under Dutch law may be terminated by the fulfilment of the restructuring plan, but it may also end on expiry of the term fixed by the court or upon request of the court, the creditors, the administrator or the debtor.

We noted earlier that the Luxembourg *Reprieve of payment* does not involve the elaboration of a plan, but only grants the undertaking of a moratorium of payments. The *Reprieve of payments* consequently expires after a certain duration fixed by the court. Moreover, the undertaking has the possibility to withdraw the application, and one or more creditors, or the appointed commissioners, may request its revocation, under certain conditions.

Apart from the *Composition*, which is based on a reorganisation plan, Portugal provides for original solutions, based on a very broad variety of recovery measures that may be granted. The *Entrepreneurial reconstitution* ends by the setting up of a new company, which determines the instantaneous extinction of the legal entity holding the company, whenever the agreement comprises all the assets of the company or the removal of the sole entrepreneur involved in the agreement. The *Financial restructuring* ends upon the decision of the judge, as soon as the full execution of the measure has been secured, but no later than 60 days after resolution of the assembly. The *Controlled management* ends on expiry of the term fixed by the plan, which cannot last more than 2 years. The company then recovers its normal activity and creditors whose claims have not been satisfied recover their rights of execution.

9) Degree of information

The degree of information accessible to creditors varies from one country to the next.

Most EU Member States and the U.S. require notifying creditors of the initiation of recovery proceedings.

However, in Finland, only the most significant creditors (regarding the amount of their claims,) as well as those the court requires, are notified of the debtor's

Restructuring petition. Other creditors are not personally contacted about the petition, except through the publication at the onset of the proceedings, that will be addressed under section 12). Only these most significant creditors are thus involved in the process and kept informed, since their consent is required to achieve a successful result.

Similarly, the French *Amicable settlement procedure* requires only the most important creditors to be invited to participate in the proceeding (i.e. those who are owed most significant amounts or those who hold important guarantees); other creditors are not advised of the commencement of the procedure, since it is strictly confidential.

In Luxembourg, the *Controlled management* is confidential until the court decides to appoint one or more administrators. Creditors are thus only consulted at the stage of the submission of the reorganisation plan, which is after the start of the *Controlled management* of the company. Creditors have a right of appeal against the decision of the court, but this right is theoretical since the decision is not published and the delay to appeal is short. Although the creditors' participation in the proceeding is limited, the prospects for debtor recovery might be substantially improved, since the debtor is protected from the negative publicity that is often generated in a recovery attempt.

In addition to the information relating to the initiation of the procedure, creditors are usually kept informed of the progress of the proceedings. They are invited to the court hearings, and have knowledge of all information contained in the plan, since they are supposed to vote on it. Austria, Belgium, Germany, Ireland, Italy, Luxembourg (with regard to the *Reprieve of payments)*, the Netherlands, Portugal, Sweden, Spain and the United Kingdom provide such a system. Greek law provides a system that ensures information of participating creditors, others being informed through the general publicity.

In France, however, only creditors who agreed to participate in the *Independent preliminary bankruptcy* are kept informed of the progress of the proceeding. Although this duty of confidentiality is not legally sanctioned, it is in practice respected. The French *Amicable settlement procedure* is interesting with regard to stigma: it provides a duty of confidentiality imposed on all persons involved in the procedure, breach of which is a criminal offence. This improves the chances of success, since it is based on the implication of only the most significant creditors, and guarantees confidentiality, which might reduce the stigma.

We believe both procedures should be used as examples of a successful reorganisation procedure. Limiting access to information, including reports on the progress of the procedure, to participating creditors, would considerably improve the chances for the enterprise to recover without suffering the stigma generated by too much general publicity.

Access to the court files is guaranteed to creditors in countries, such as Austria, Belgium, Greece (with regard to the procedure of *Placing of companies limited by shares, general partnerships, and limited partnerships either under the administration and management of their creditors, or under special liquidation*), Italy (upon authorisation of the delegated judge), the Netherlands (Dutch law provides for a right of access to a very large number and variety of documents), Portugal, and Spain.

We should underline that creditors who are not personally informed may, where such publicity is required by law, be informed of this through the use of general publicity (see point 12).

The availability of information of creditors is an essential element to the success of the procedure. Only an informed creditor who has clear insight into the prospects for the debtor to reorganise is going to accept a proposal, scheme of arrangement, restructuring plan, or any sort of agreement. No creditor will support an attempt to continue business despite temporary difficulties if it is not 'proven' that the chance of the undertaking to recover is realistic. Indeed, recovery procedures are unanimously considered as expensive; administrator's fees, as well as procedure's costs, must be paid first, reducing the guarantees of those who were creditors at the time of the commencement of the proceedings. In order to commence recovery procedure, it is necessary to convince all or at least the majority of creditors that they will receive more by supporting the procedure than they would receive upon liquidation.

To assess the real chances of a debtor to recover from its difficulties, it is necessary for the creditors to be guaranteed minimum information relating to the assets and liabilities of the undertaking. This right of information must however be balanced with the potential detrimental effect of publicity on the continuation of business operations.

The disclosure of the economic and financial situation of the debtor to its potential partners, its creditors, and its consumers, may indeed be an important factor of stigma.

To that extent, we recollect however that the disclosure of information does not automatically generate stigma, depending on the sociological perception of failure. As already mentioned, in the United States, the initiation of a reorganisation procedure has no effect to that point, and may even have beneficial effects.

However, we agree with our correspondents that in the EU Member States, business partners, investors and consumers are traditionally reluctant to trust a debtor who is in a difficult financial situation. The legislator itself shows reluctance to trust the debtor in such a case, since in general, national legislation provides for the appointment of an administrator to supervise, assist, and approve the decisions of the debtor. In the United States, on the other hand, the legislator provides for the appointment of a third party only where there was gross mismanagement and fraud.

We assume that the legislator's view reflects the society's opinion on that point. We thus think that it may be confirmed that in EU Member States, the commencement of reorganisation proceedings is perceived in a negative way rather than in a neutral or positive way. Accordingly, information and publicity may then generate stigma since it brings the existence of this procedure to the attention of the public.

DEGREE OF INFORMATION

Austria	
	· Notification of the initiation of the procedure to all creditors · Access to court files · Information contained in the plan
Belgium	
	· Notification of the initiation of the procedure to all creditors · Access to court files · Information contained in the plan
Denmark	
	· Notification of the initiation of the procedure to all creditors · Information contained in the plan
Finland	
	· Notification of the initiation of the procedure only to significant creditors · Information contained in the plan
France	
	· Notification of the initiation of the procedure only to significant creditors · Only creditors who agreed to take part to the procedure · Participation to the court hearings
Germany	
	· Notification of the initiation of the procedure to all creditors · Information contained in the plan
Greece	
	· Notification of the initiation of the procedure to significant creditors
Ireland	
	· Notification of the initiation of the procedure to all creditors · Information contained in the plan
Italy	
	· Notification of the initiation of the procedure to all creditors · Information contained in the plan · Access to court files if authorised by the court
Luxembourg	

Controlled management *Reprieve from payments*	· Notification of the initiation of the procedure after · Appointment of the administrator · Notification of the initiation of the procedure to all creditors
The Netherlands	
	· Notification of the initiation of the procedure to all creditors · Access to court files · Information contained in the plan
Portugal	
	· Notification of the initiation of the procedure to all creditors · Access to court files · Information contained in the plan
Spain	
	· Notification of the initiation of the procedure to all creditors · Access to court files · Information contained in the plan
Sweden	
	· Notification of the initiation of the procedure to all creditors · Information contained in the plan
UK	
	· Notification of the initiation of the procedure to all creditors · Information contained in the plan
USA	
	· Notification of the initiation of the procedure to all creditors · Information contained in the plan

10) Costs

In all EU Member States and in the United States, out-of-court proceedings are generally less expensive than in-court proceedings.

In-court proceedings include judicial costs and the fees of the third party appointed by the judge, expert costs and all costs regarding the creditors' meetings, the notifications to creditors, correspondence, and all other expenses, which are usually high. In addition, in all EU Member States and in the U.S. in-court proceedings, these fees are treated as privileged claims and paid first, before all pre-petition debts.

The high cost of official proceedings can be seen as an obstacle that may prevent and discourage the debtor to initiate rehabilitation proceedings. This is one of the reasons

that the decision by the debtor to initiate reorganisation proceedings is often made too late.

Likewise, unless the debtor shows strong recovery potential, creditors, knowing that an official proceeding will subordinate their claims to the fees related to the proceedings, will be more likely to object to the proceeding. They take on the added risk that in the event that the recovery fails, creditors will often obtain less in value than what they would have obtained through liquidation.

11) Structure of the bankruptcy courts

In European Member States, reorganisation proceedings are a matter of private law. These proceedings are done under civil law courts (commercial courts). In certain EU Member States, these courts have (specialised) units or sections for insolvency matters, which are sometimes called "reorganisation courts" or "bankruptcy courts," depending on their function in a specific case. These units and sections have exclusive jurisdiction over reorganisation cases (complying with territorial competence). In Finland for example, there are 19 specific district courts that deal with restructuring matters. This results in a high degree of expertise. The Irish *Examinership* and *Scheme of arrangement* are matters that are dealt with by the High Court. Since the High Court is not divided into units, Irish law states that the President of the High Court shall assign three judges to deal with reorganisation matters. These assigned judges accordingly have the requisite specific expertise.

The restructuring function is entrusted to well-experienced judges who make overall decisions in the interest of the general public and the national economy. The experience and reputation of the judges presiding over a case may serve to reassure potential co-contractors, suppliers, consumers, and the public in general. The idea of judicial proceedings under the surveillance of specialised courts with judges experienced in the field of reorganisation provides a sort of protection of the rights of all parties involved and of general public interest.

Unlike in all EU Member States and the U.S., in Spain there are neither special courts nor special units of civil law courts in charge of insolvency or reorganisation procedures. Civil courts hear *Suspension of payments* cases. Judges of this court do not receive specialised education on business law or insolvency matters. Their qualification in insolvency matters is consequently sometimes considered as unsatisfactory. Nevertheless, we should mention that in practice these judges usually tend to entrust the handling of the procedure to the supervising auditors that they appoint. The most significant decisions that the judge makes in the course of the proceeding are based on the reports issued by the auditors. In practice it is quite unusual that the decision of the judge differs from the opinion expressed by the auditors.

While this practice compensates for the judges' lack of specialised knowledge, it should be emphasised that supervising auditors are selected from a reduced circle of accounting experts. This situation brings into question the independence and objectivity of the auditors. Furthermore, it reduces the possibilities to enhance the qualifications of the persons acting as supervising auditors.

Spanish insolvency practitioners severely criticise the current Spanish insolvency procedure.

STRUCTURE OF THE COURT
Austria
Specialised court, or specialised section or unit of civil courts
Belgium
Specialised court, or specialised section or unit of civil courts
Denmark
Specialised court, or specialised section or unit of civil courts
Finland
Specialised court, or specialised section or unit of civil courts
France
Specialised court, or specialised section or unit of civil courts
Germany
Specialised court, or specialised section or unit of civil courts
Greece
Specialised court, or specialised section or unit of civil courts
Ireland
Specialised court, or specialised section or unit of civil courts
Italy
Specialised court, or specialised section or unit of civil courts
Luxembourg
Specialised court, or specialised section or unit of civil courts
The Netherlands
Specialised court, or specialised section or unit of civil courts

Portugal
Specialised court, or specialised section or unit of civil courts
Spain
Neither specialised court, nor specialised section or unit of civil courts
Sweden
Specialised court, or specialised section or unit of civil courts
UK
Specialised court, or specialised section or unit of civil courts
USA
Specialised court, or specialised section or unit of civil courts

12) Publicity

Publicity refers to both official, court documents submitted in relation to the reorganisation proceeding, as well as any printed, published or reported news about a company's reorganisation proceedings through official gazettes, newspapers, magazines, the Internet, TV, or any other official or unofficial news source.

In this report, we are concerned about the impact publicity of a proceeding might have on the debtor's overall chance of recovery. It seems that such publicity often results in a stigma being placed on a distressed debtor by potential investors, business partners and consumers. A debtor in distress is perceived as having failed. This can often result in investors being reluctant to finance new or ongoing activities, business partners being reluctant to enter into or continue relationships and consumers being reluctant to buy the services or products offered by the company. Instead of helping the debtor, this attitude of clients, creditors, partners and investors further precipitates the company's failure. The more publicly known the debtor's problems are, the higher the potential a negative stigma against the debtor.

Court proceedings usually provide at least a public announcement of the initiation of the procedure and of its ending. This can cause irreversible damage to the debtor right from the onset of the proceeding.

Out-of-court procedures, however, are based on agreements between the debtor and all or part of the creditors that are kept confidential. Only participating parties are kept informed of the process, according to the terms of the agreement. It can be said that this mitigates the effect such proceedings have on the stigma of the debtor.

The degree of publicity varies depending on how information is made public and on what kind of information is publicly revealed.

In most EU Member States, the commencement and termination of reorganisation or winding-up proceedings is published in official national gazettes and on one or two national newspapers, determined by either the court or by law. This is the case in Belgium, Denmark, Finland, Germany, Ireland, Luxembourg, the Netherlands, Portugal, Sweden and the United Kingdom.

In Austria, commencement of a reorganisation is made public on the Internet (http://www.edikte.justiz.gv.at). The announcement contains the essential data on the proceeding, resulting in the proceeding being highly publicised.

Irish law and UK law are severe regarding publicity of the initiation of the reorganisation procedures. As soon as a debtor is under *Examinership* (Irish law), or *Administration* or *Receivership* (UK law), every invoice, every order for goods and every business letter by the debtor or on behalf of it shall mention that the debtor is being put under these procedures. Furthermore, in Ireland the failure to comply with this obligation is an offence that may lead to a conviction for a fine of up to 12.700 €.

In addition, Finland, Germany, Ireland, Italy, Spain, and the United Kingdom require commencement of the proceedings to be published in the Trade Register and other related registers.

In the UK*, company voluntary arrangement* is not made public.

Powers of the Spanish judges are really strong regarding the publicity to be given to a reorganisation procedure. The judge has the freedom to give the necessary publicity to the situation of the debtor for the general knowledge, taking into account the importance of the suspension granted, the number of creditors and the extension of the business. Usually such publicity is made through a publication in the national official gazette and/or in the regional official gazettes.

In Italy, it is sometimes the case that modern ways of communication and advertisement are used (instead of by personal registered mail) in the largest and most important procedures that concern a large number of creditors difficult to attain. Of course, such a possibility may engender a detrimental publicity to the debtor.

In addition to the publication of the opening of the procedure, certain countries provide for a public access to court files, notably the plan, as in Finland and the Netherlands (where the drafted plan is published in the official gazette)

Regarding prevention of stigma, French law provides for a very interesting procedure, as we already mentioned it in § 9. In the *Independent preliminary bankruptcy*, there is no legal requirement for publication. Confidentiality is not legally guaranteed however, but in practice only creditors who agree to participate in the process are kept informed of its evolution. The *Amicable settlement procedure* goes even further, since there is a duty of confidentiality imposed on all involved parties, and violation of which is criminally punishable. As a result, if the reorganisation is successful, no one will ever know that the debtor had difficulties at one time and that it has been reorganised.

The Greek *Restructuring of enterprises* is not publicly announced. Only a notification is made to creditors.

Information on a Chapter 7 or Chapter 11 filing is generally widely available and easily accessible to the public, especially depending on the size of the filing. When a business files for Chapter 11 with the court, it must submit certain schedules related to the business, operations and financials of the company to the court. Thereafter, a company's actions are monitored by the court in the form of official schedules that must be submitted to the court regularly. Among reports that a debtor must submit to the court includes cash flow forecasts, biweekly income statements, etc.

Any schedules or documents that are submitted to the court are accessible to the public through the federal court that the case was filed in. The federal courts have a number of electronic public access systems available, including Voice Case Information System (VCIS) (toll free number for ordering), Public Access to Court Electronic Records (PACER) (modem-based access), the U.S. Party/Case Index (USPCI), Electronic Case Filing (ECF), which also provides electronic access to filings and related documents, but is simply a different source than PACER.

All bankruptcy court websites are accessible free of charge through www.uscourts.gov.

In addition, there are a number of other non-court related services available to the public for retrieving the bankruptcy documents filed with the courts. Usually, these are available instantly online on a pay-per-report basis. One of these services is called www.bankruptcydata.com.

Other information sources that are dedicated to reporting news on bankruptcies, but do not provide access to the actual documents filed by a debtor to the court, include:
- www.bankruptcydata.com
- www.fedfil.com/bankruptcy/
- www.uscourts.gov
- www.bankrupt.com
- www.abiworld.org
- www.turnaround.org
- www.turnarounds.com

In the United States as well as in all EU Member States, the initiation of a reorganisation procedure will be published in all major online and printed business newspapers and magazines, and through television, depending on the size of the enterprise involved.

PUBLICITY OF THE PROCEDURE	
Austria	
	· publication through Internet

Belgium	
	· official Gazette · newspapers
Denmark	
	· official Gazette
Finland	
	· official Gazette · newspapers · trade register · public access to court files
France	
Independent preliminary bankruptcy *Amicable settlement procedure*	· no publicity · no publicity · duty of confidentiality
Germany	
	· official Gazette · newspapers · trade register
Greece	
	· no publicity
Ireland	
	· official Gazette · newspapers · trade register · mention "in examination" on every invoice, order of goods and business letters
Italy	
	· trade register
Luxembourg	

	· official Gazette · newspapers
The Netherlands	
	· official Gazette · newspapers · public access to court files
Portugal	
	· official Gazette · newspapers
Spain	
	· if decided by the court: Official Gazette · trade register · other measures of publicity decided by the court
Sweden	
	· official Gazette · newspapers
UK	
	· official Gazette · newspapers · trade register · mention of the reorganisation procedure on every invoice, order of goods and business letters
USA	
	· publication through Internet · newspapers, TV · public access to court files

4.2.4. CONCLUSION

Analysis of each of the national reports reveals that EU Member States legislation is not harmonised at this point. Many EU Member States and the U.S. have several in-court and out-of-court options for reorganisation.

It appears that every country analysed has a similar legal framework for reorganisation of a distressed business. All proceedings seem to focus heavily on participation of creditors in the process, which suggests that the success of reorganisation proceedings depends strongly on the best protection of the creditors' interests.

Analysis of the EU Member reports indicates a strong preference by all participants for informal agreements and a strong belief that formal reorganisation proceedings attach too much negative publicity to the creditor. Debtors fear this publicity, knowing or fearing that it will precipitate their failure, and consequently delay initiation of any reorganisation to the point that their businesses are beyond recovery.

Two countries appear to offer slightly different options. France developed a confidential procedure based on the sole participation of the major creditors. The confidentiality of this procedure protects the debtor from negative publicity, while offering possibilities for restructuring. Portugal offers the possibility for a business in distress to be granted recovery measures among a large panel of measures.

In examining the influence of the reorganisation proceedings in the EU Member States on the launching of new commercial activities, it is necessary to discuss the US Chapter 11 procedure.

In the United States, consumers, business partners and investors do not fear entering into or continuing business relationships with a debtor in distress. Even though the initiation of a Chapter 11 case is publicly announced (and this publicity is strong in the United States: Internet, access to court files), the debtor's reputation does generally not get destroyed. This is perhaps due to the more tolerant attitude toward failure and failed companies in the US.

In fact, initiation of such a procedure is even seen positively, as it indicates to creditors and other related parties that the business is addressing its problems and taking steps to solve those and start over in a financially strong position than before. This is the case even though Chapter 11 sometimes ends up in the company's winding-up or liquidating. Management is not afraid of petitioning for such a procedure and therefore reacts with enough time to increase its chances of recovery

Procedures in the EU Member States lean toward a traditional pro-creditors approach, while in the United States practice favours recovery of the debtor, even at the expense of the creditors. All EU Member States provide procedures based on the agreement of creditors, and these would definitely not give their consent to a reorganisation procedure except if it is more advantageous than a liquidation. The court's confirmation, if any, is conditional upon the reaching of legally required majorities and complying with the interests of the creditors.

This is also the case in the U.S. system. However, U.S. courts also consider that the interest of preserving the going concern value of an operating enterprise and avoiding a disastrous liquidation should prevail over the interests of creditors that might be opposed to reorganisation. As a consequence, a plan that has not been adopted by the legally required majorities of creditors may be confirmed by the court anyway; if it is deemed to be "fair and equitable," this concept being legally defined.

Critical analysis provided by the EU national reports showed that unpopularity of reorganisation procedures and their too frequent failure may be a consequence of the reluctance of many managers or individual businesses, undertakings or debtors to consider taking advice from insolvency experts at an early stage of distress, in order to determine whether they should petition for insolvency or reorganisation procedures.

This may be due, among other reasons:

- to a lack of understanding of what options are available, or
- to the desire to maintain their own positions and income for as long as possible, or
- to a reluctance to accept how serious the situation really is, or
- to the fear to be classified as a business that failed, whereas that is not (or maybe not yet) the case.

These managers or individual businesses, undertakings or debtors may also be reluctant to alert creditors at an early stage, as this might result in them taking actions to execute their rights instead of allowing the business to attempt a recovery.

On the contrary, in the U.S., there is an established and extensive practice surrounding corporate recovery and turnaround. Many independent experts are dedicated solely to corporate turnaround and prevention of insolvency and any actions taken by companies to hire such experts is kept fully confidential.

For all these reasons, the legal possibilities to continue economic activities throughout EU Member States are generally perceived as unsuccessful and unsatisfactory. The number of procedures initiated and successful reorganisations is very low. In a downward spiralling trend, the more reorganisations fail, the less creditors, suppliers, and customers will gain confidence in such proceedings. In other words, more proof that rehabilitation can be successful is necessary to change the existing negative attitude towards entrepreneurs facing financial difficulties.

4.3.LEGAL CONSEQUENCES OF BANKRUPTCY AND POSSIBILITIES FOR A FRESH START

This title summarises the bankruptcy procedures organised in the EU Member States and in the U.S. (hereafter "targeted Countries"). A thorough comparison between the different procedures is presented, in order to emphasise their particularities and to evaluate their degree of adequacy.

This title also describes the legal consequences arising from such procedures as well as the stigma that may result therefrom. These consequences will then be compared in order to highlight the general causes of a stigma of failure and develop the possibilities for a fresh start.

4.3.1.INTRODUCTION

Contrary to restructuring procedures aimed at rescuing a business (see section 4.2 of this report), bankruptcy is a formal judicial or administrative procedure that aims principally at realising the bankrupt's assets for the purpose of distributing the net proceeds to its creditors, usually as a result of its insolvency. In some countries however, the initiation of bankruptcy proceedings may result in the reorganisation of the business.

Bankruptcy procedures have important consequences regarding the liability of management and entrepreneurs, the prohibition from practising certain professions, criminal offences, etc. Currently the bankruptcy procedures create a stigma on failure, prohibiting entrepreneurs from starting new businesses.

4.3.2. INITIATION OF BANKRUPTCY PROCEDURES AND DIRECT EFFECT OF THESE PROCEDURES

4.3.2.1. OVERVIEW OF THE NATIONAL PROCEDURES

A. AUSTRIA[1]

In Austria, bankruptcy ("*konkurs*") is governed by the Bankruptcy Act of 1914.

Austrian bankruptcy law is primarily creditor oriented and mainly aims at liquidating the debtor's assets instead of trying to rescue the business.

1. Initiation of the proceedings

Bankruptcy applies to companies only, unlike the "private bankruptcy" (or *"privatkonkurs"*) for which only individuals may petition. The latter will not be further considered in this report.

Bankruptcy can be petitioned by:

- the debtor

[1] See the Austrian Bankruptcy Act of 1914

- or a creditor
- or the court (only when the court has rejected an application by the business) for the opening of reorganisation proceedings or when such proceedings did not lead to a successful settlement).

2. Criteria for the petition:

The ground for initiating bankruptcy proceedings is the *illiquidity* of the debtor (i.e. when he can no longer meet his financial obligations for a certain period of time). He must also be in a situation of *over-indebtedness* (i.e. his liabilities must exceed his assets. A pre-bankruptcy balance sheet must be established to determine whether the debtor is overly indebted).

The debtor must also have sufficient assets to cover the costs of the proceedings.

3. Effects:

A bankruptcy order is made by the court. The main effects of the judgement of Bankruptcy are:
- creditors must declare their claim within a specific deadline;
- a *bankruptcy administrator* is appointed, in order to continue, if possible, the debtor's business, inventory and liquidate the assets;
- a *creditors' committee* is appointed by the court. Such committee is composed of three to seven members, for the purpose of checking the cash management, assisting the bankruptcy administrator and approving certain transactions;
- a *creditors' assembly* supervises the bankruptcy *administrator* and the creditors' committee
- a peculiar body is the *Association for the Protection of Creditors' Rights:* there are in Austria 3 associations, created upon approval of the Federal Ministry of Justice, that represent and secure creditors in the course of insolvency proceedings.
- the assets can be distributed following the distribution plan drafted by the bankruptcy administrator and approved by the creditors' committee.

4. Publicity:

Since 2000, the court's bankruptcy judgement must be published on the Internet.

In general, the bankrupt's name is not mentioned in a specific register but only on the Internet, except for companies registered in the Commercial Register, for which the opening of bankruptcy proceedings will be published in this Register.

5. End of the procedure:

The procedure ends:
- When all assets of the bankrupt have been distributed;
- Or when it appears that that the assets are not sufficient to cover the costs of the proceedings;
- Or with the consent of all creditors;

- Or when the bankruptcy proceedings are converted into "compulsory reorganisation" proceedings (see Title 4), after the reorganisation plan has been accepted by the creditors and confirmed by the court.

B. BELGIUM

In Belgium, bankruptcy ("*faillite*" or "*faillissement*") is governed by the Belgian law of August 8, 1997 on bankruptcy.

1. Initiation of the proceedings

Bankruptcy proceedings apply to traders (individuals or companies) only.

They are initiated by the debtor (who is obliged to do so within one month of the cessation of his payments), a creditor or the Public Prosecutor.

2. Criteria for the petition:

The law requires that the debtor:
- has ceased its payments, and
- has lost its creditworthiness.

3. Effects:

The main effects of the bankruptcy order are:
- a receiver in bankruptcy ("*Curateur/Curator*") is appointed to recover and realise the debtor's assets, and to distribute the net proceeds to the creditors;
- creditors must declare their claim within a specific period of time;
- the debtor is automatically divested from the control of its assets;
- all claims against the bankrupt become due;
- a stay of legal proceedings and execution measures against the debtor or his property.

4. Publicity:

The court's bankruptcy order must be published in the Official Belgian Gazette and in two newspapers.

A file relating to the bankrupt will be kept at the clerk of the commercial court and any interested party may consult it for free.

5. End of the procedure:

The procedure ends when all assets are distributed and the company's liquidation is achieved or if the assets are not sufficient.

C. DENMARK

Under Danish law, bankruptcy *("Konkurs")* is governed by the Danish Bankruptcy Act of June 8, 1977 (consolidated in September 1986).

An insolvent debtor's property is liquidated and its proceeds are distributed among its creditors following the *bankruptcy/winding-up* procedure ("*konkurs*") or the *Liquidation Composition* procedure ("*likvidationsakkord*"). The difference between these procedures is that, in case of *liquidation composition* as opposed to *bankruptcy/winding-up*, the trader is discharged for his remaining debts.

Liquidation composition may be carried out voluntarily by agreement or as a compulsory composition (see Title 4 for the description of this procedure). In this section we will only address the *bankruptcy/winding up proceedings*.

1. Initiation of the proceedings:

Bankruptcy/winding-up proceedings, which apply to both natural and legal entities (company), are initiated either by the debtor or his creditors.

2. Criteria for the petition:

In order to apply for bankruptcy/winding-up, a company must be insolvent. Under Danish law, insolvency is defined as a state of "illiquidity", i.e. the debtor is not able to meet his financial obligations as they fall due.

3. Effects:

The purpose of this procedure is to ensure that the creditors receive an equal treatment in the distribution of their debtor's assets, with priority to secured or preferential creditors.

After a bankruptcy/winding-up order is issued by the court, trustees/liquidators will be appointed who will take over the business management and realise its assets.

There is a stay of all legal proceedings and executions of enforcement against the bankrupt's property: creditors may no longer levy execution or attachment, they must wait for the assets' distribution by the liquidator.

4. Publicity:

Publicity is generated by the bankruptcy proceedings.

5. End of the procedure:

The procedure ends when all assets are distributed among the creditors and, if the debtor is a company, when it is dissolved.

D. FINLAND

In Finland, bankruptcy *("konkurssi")* is governed by the Finish Bankruptcy Act of 1968, the Act on the Recovery of the Bankruptcy Estate of 1991, the Act on the Priority of Claims of 1992 and the Act on the Supervision of the Administration of Bankruptcy Estates of 1995. A proposal for a government bill has recently been

approved which will result in a new Bankruptcy Act that clarifies the existing legislation. It is expected to become law in 2003.

1. Initiation of the proceedings:

Bankruptcy applies both to individuals and companies.
It is initiated by the debtor (voluntary) or a creditor (involuntary).

2. Criteria for the petition:

A particularity of the Finish system is that a debtor may voluntarily file for bankruptcy, *without regard* to any preconditions of its financial status.

However, in case of involuntary bankruptcy, creditors must prove one of the six conditions set out in the Bankruptcy Act (e.g. an unsuccessful attempt of execution, negligence to satisfy creditors eight days after receiving a certified request for payment from a bailiff, etc…).

After proceedings are initiated voluntarily, a provisional administrator is appointed, for the purpose of submitting an inventory of the debtor's estate in order to check if it is sufficient to merit full bankruptcy proceedings.

3. Effects:

Various actors intervene in the procedure:

- a *provisional administrator* (see above) who will be replaced, when bankruptcy is accepted, by:
- a *trustee*: his role is to take care of the procedure of acceptance of creditors' claims and to act as executor after the expiration of the time limit for the proof of claims.
- The *creditors' meeting* plays an important role in the bankruptcy estate's administration, while the administrator and trustee must comply with all of its major decisions.
- A bankruptcy *ombudsman* supervises all actions of the administrator and trustee. It is an independent and impartial authority, who may not prejudice the rights of the debtor nor the creditors.

Other effects are:

- Execution of the debtor' assets are suspended;
- Interest on a debtor's debt continues to accrue, unlike in other countries;
- The debtor loses all control over its property and assets. This authority is taken over by the body of creditors;
- After the creditors' claims have been lodged and accepted, the assets will be distributed among the creditors. Secured creditors will receive payment prior to the other creditors. Claims secured by a floating charge (security not attached to a particular asset but to a category of assets that may be modified through the evolution of the business. In the case of bankruptcy, the "floating charge" becomes a "fixed charge") also enjoy a priority of payment.

4. Publicity:

Bankruptcy judgements are made public in newspapers. There is no specific bankruptcy register.

5. End of the procedure:

The procedure ends when all assets have been distributed and the company is liquidated.

E. FRANCE

French bankruptcy *("faillite")* is governed by the Law of January 25, 1985 on restructuring and judicial liquidation of companies, as modified by the law of June 10, 1994.

The French bankruptcy is not favorable to creditors, for its main priority is to save the company and not only to settle its debts.

Judicial liquidation (or *"liquidation judiciaire")* of a company may however be ordered by the court either:
- after an observation period (that lasts from 4 to 20 months) during which the company may continue its business, and at the end of which the judge must decide between a reorganisation or a liquidation procedure; or
- immediately, when the business has ceased all activities or when its restructuring is clearly impossible.

1. Initiation of the proceedings:

Bankruptcy proceedings are open for both:
- companies (practising commercial activities or not);
- individuals (merchants, registered craftsmen and farmers).

Proceedings may be initiated by:
- the debtor itself (it is obliged to declare its default of payment within 15 days of cessation of payments);
- a creditor, regardless of the amount of its claim;
- the Public Prosecutor (seldom);
- the Court.

2. Criteria for the petition:

A Bankruptcy order can be made by the court, on the following grounds:
- default of payment, i.e. when the debtor's available capital (defined as the assets that can be liquidated within a few days) does not meet its debt obligations (debts due and payable);
- breach of the terms of the amicable settlement or of the continuation plan (see Title 4);

- penalties against managerial misconduct (i.e. bankruptcy opened against the director of a company if he was found liable for the company's debts and did not pay them, or if he misappropriated corporate funds, signed interested transactions...).

3. Effects:

The Bankruptcy order governing the company's liquidation has the following main effects:
- a liquidator is appointed for the purpose of selling the business' assets and dividing them among the creditors;
- an '*insolvency judge'* is appointed, in order to supervise the liquidation and to ensure the protection of the interests of all parties;
- in case an observation period precedes the liquidation, it has the following effects upon the creditors:
  a) all court proceedings involving debts that arose prior to the commencement of the bankruptcy proceedings are suspended, as well as the enforcement of any judgement;
  b) the debtor is prohibited from paying any debt that arose prior to the commencement of the bankruptcy proceedings;
  c) interest accrual on prior debts is suspended;
  d) any acceleration of payment of outstanding debt is prohibited.
- Creditors are paid following specific rules (e.g. waged workers first, then legal expenses, creditors with pledges or mortgages…).

4. Publicity:

The judgement initiating the liquidation procedure must be published in the Commercial Registry for companies and entrepreneurs, in the Professions Registry for craftsmen and in a newspaper.

5. End of the procedure:

The liquidation procedure ends either when all the company's debts are settled, or when its assets are insufficient to settle all of its debts (which is mostly the case).

F. GERMANY

German insolvency proceedings ("*insolvenzverfahren")* are governed by the German Insolvency Act of October 5, 1994 (entry into force on January 1, 1999).

They do not regulate only a bankrupt's compulsory winding-up. These proceedings may also lead to reorganisation measures.

They apply to companies or individuals ("customer insolvency procedures").

For the purposes of this report, we will consider these proceedings as far as they govern compulsory winding-up of companies.

1. Initiation of the proceedings:

"*Insolvenzverfahren"* procedure can be initiated by:
- the debtor himself
- a creditor;
- against any individual or company (except the Federal or State government or any company subject to the latter's supervision)[2].

2. Criteria for the petition:

The criteria for commencement are quite flexible and include the following:
- A debtor's inability (or imminent inability) to pay its debts as they fall due. Even an inability to balance *minor* outstanding payments can justify the commencement of insolvency proceedings, or
- bankrupt's liabilities exceeding its assets (excessive indebtedness).

3. Effects:

A petition for "*insolvenzverfahren"* has the following effects:

a) Preliminary measures: in order to secure the bankrupt's property, the court will appoint a preliminary trustee who will run the bankrupt's business until the opening of insolvency proceedings.

b) Insolvency proceedings: if the court agrees to open insolvency proceedings:
- A final trustee in insolvency is appointed to manage the company. He will dispose of the debtor's assets instead of the bankrupt, unless the court orders self-management (i.e. the bankrupt continues to manage its business under supervision of the trustee);
- Creditors register their claim, within a specified period of time;
- The trustee collects the bankrupt's claims and realises the assets. In this regard, like in most countries, he is required to respect certain rules, notably:
  a) the assets of creditors with a right of ownership against the bankrupt (owners with a retention title, landlord, lessor…) will be segregated out of the insolvency's estate.
  b) Other creditors (having security on movable or immovable property) will have a privileged claim against the insolvent estate at its realisation.

4. Publicity:

The court resolution over the initiation of the insolvency proceedings is made public by the office of the insolvency court in the German Federal Gazette ("*Bundesanzeiger")*.

The public announcement takes the form of an entry in the publication for official notices of the court. The insolvency court can arrange further and repeated

[2] They however do not apply against individuals who are not self-employed or have been self-employed, to whom a simplified insolvency procedure applies.

publications. In particular, the court resolution should serve the interests of the creditors and debtors of the company.

Furthermore the initiation of insolvency proceedings must be recorded in the land register ("*Grundbuch"*).

5. End of the procedure:

The procedure will end:
- when all assets have been realised and distributed among the creditors;
- after the preliminary measures are taken, investors may show interest in the insolvent company.

G. GREECE

In Greece, bankruptcy is governed by Articles 525 to 596 of the Greek Commercial Code and Act of 12 December 1878, amended by the Law of 22 February 1910 and the N.L. 635 of 1937.

1. Initiation of the proceedings:

Bankruptcy proceedings apply only to traders, whether individuals or companies.

They can be initiated by the debtor (who is obliged to do so by the law), a creditors or the court (exceptionally).

2.Criteria for the petition:

Cessation of payments is a pre-condition for bankruptcy. It refers to the permanent inability for the debtor to pay its due and entitled debts. It does not depend on the financial situation of the debtor but on the non-payment of his debts.

3.Effects:

The main effects of a bankruptcy judgement can be summarised as follows:

- a '*Judge Rapporteur'* is appointed for the purposes of verifying the creditors' claims and calling the general meeting of shareholders, that will protect the creditors' interests during the proceedings;
- an Administrator is appointed for the purpose of representing, assisting and monitoring the debtor during the bankruptcy procedure, and to draw up a list of assets and liabilities in order to be distributed to the creditors;
- all proceedings based on ordinary claims are suspended (not claims secured by pledge, mortgage or lien);
- as regards the distribution of assets, secured creditors will be satisfied by preference and may only participate in the creditors' meetings for the unsatisfied portion of their claims. The creditors' meeting will attempt to reach a settlement with the debtor by means of a contract, on how to distribute the assets.

4.Publicity:

The declaration of bankruptcy must be published in the Lawyers' Pension Fund Bulletin and the bankrupt's name should be mentioned in a special registry.

5.End of the procedure:

The procedure is terminated when the bankrupt's estate is liquidated, when the court decides to end it for lack of assets, or if a judicial composition is reached.

H. IRELAND

In Ireland, "*compulsory liquidation"* is governed b the Irish Companies (Consolidation) Act of 1908, the Companies Act of 1913, the Companies Act of 1963, the Companies Act of 1990 and the Company Law Enforcement Act of 2001.

1. Initiation of the proceedings:

The liquidation of an Irish company may result from a compulsory liquidation, ordered by the court, following the petition of the company itself, any creditor or the Director of Corporate Enforcement (an independent, state-funded agency, responsible for the enforcement of the Companies Act).

2. Criteria for the petition:

A petition for '*compulsory liquidation'* may be initiated when a company is unable to pay its debts (e.g. when a creditor has obtained a judgement for debts but has been unsuccessful in attempting to execute it).

3. Effects:

The court will appoint a liquidator who will take over the management, wind up the company's business, realise and distribute its assets (with a priority to preferential creditors or creditors whose claims are secured by a floating charge).

Once the company is declared to be liquidated there is a stay of all legal proceedings and executions of enforcement against the bankrupt's property.

4. Publicity:

The application for liquidation proceedings must be published in local newspapers.

5. End of the procedure:

The procedure ends when the assets of the company have been completely wound up and the company is dissolved.

I. ITALY

In Italy, bankruptcy is governed by the Italian Royal Decree n° 267 of March 16, 1942 (also referred to as the Bankruptcy Act).

As the aim of the Italian legislator was clearly to protect the interest of creditors and to eliminate insolvent companies from the market by liquidating them, Italy has developed several insolvency procedures, whereas the restructuring of companies has not captured much of its attention.

The three major insolvency procedures in Italy will briefly be described, i.e. the liquidation bankruptcy (*"fallimento"*), the compulsory administrative liquidation (*"liquidazione coatta amministrativa"*) and the extraordinary administration (*"amministrazione straordinaria"*). These procedures are often linked, as one procedure may lead to another.

I.1. Liquidation Bankruptcy

1. Initiation of the proceedings:

This procedure may only be initiated by private entrepreneurs with a substantial business organisation in terms of capital, work force and equipment. It excludes companies, public entities, agricultural entrepreneurs and small individual entrepreneurs from the application of liquidation bankruptcy.

It can be initiated by:
- the debtor
- a creditor
- the Public Prosecutor
- the Court.

2. Criteria for the petition:

In order to apply for this procedure, the private entrepreneur must be in a state of "functional impotence", i.e. it is impossible to meet its financial obligations regularly and through normal business practices, due to a lack of liquidity and credit.

3. Effects:

As soon as the Court renders a judgement adjudicating the debtor bankrupt:
- a 'bankruptcy trustee' is appointed to realise the bankrupt's property and to distribute it among the creditors;
- a '*delegated judge'* is appointed to supervise the procedure;
- the creditors must lodge their claim;
- no execution measure may be taken against the bankrupt;
- Preferred and secured creditors (e.g. claims for the trustee's fees, costs of judicial proceedings, employees' wages…) will be paid prior to unsecured creditors.

4. Publicity:

The adjudication in *"fallimento"* is published in the Public Record kept by the court and the proceedings are published in the Register kept by the Chamber of Commerce accessible on line.

5. End of the procedure:

This procedure may lead to a creditors' settlement[3] and the bankrupt will then recover the possession and management of its assets.

Or, if such settlement could not be reached, the bankrupt's business will be wound-up.

I.2. Compulsory administration liquidation

1. Initiation of the proceedings:

This is an administrative procedure that only applies to certain categories of companies owned partially by the State or subject to the control of administrative authorities (e.g. banks, insurance companies...).

It is initiated by the company itself.

2. Criteria for the petition:

The company has a discretionary power to decide whether it needs to be removed from the market, not only in case of financial distress, but also for any problems that may jeopardise its ability to carry on business. In order to protect the rights of creditors and third parties, the Court may however check the insolvent status of the company.

3. Effects:

When the company has declared that it wishes to initiate this procedure (and unless the court rejects such action):
- a '*liquidating commissioner'* (an administrative entity) is entrusted with the power to evaluate and liquidate the assets, and to distribute them amongst the creditors;
- this commissioner is appointed and controlled by a public administrative body with the same powers and functions as the bankruptcy court.
- the creditors will be reimbursed (secured and favoured creditors first) and they may appeal to the court against the distribution of the assets.

4. Publicity:

The proceedings are carried out under the control of the Industry and Trade Ministry, whose decisions and orders are rendered by a Decree which is duly published in the *Gazetta Ufficiale della Republica.*

The proceedings are also published in the Register kept by the Chamber of Commerce, which is accessible on line.

5. End of the procedure:

[3] See above, Title 4. In such case, the bankrupt must have offered full payment of secured creditors and a pro-rata payment to unsecured creditors. A majority of creditors and the court must also have approved the bankrupts' offer.

Again, this procedure may result in a settlement by the creditors, or in a liquidation of the company.

I.3. Extraordinary administration[4]

This procedure aims not only at satisfying creditors' rights but also at reducing the negative effects of bankruptcy on a company's work force, by trying to find an alternative solution to bankruptcy.

1. Initiation of the proceedings:

The extraordinary administration applies only to major companies (of at least 200 employees).

It can be triggered by:
- the debtor
- a creditor
- the Public Prosecutor
- the court.

2. Criteria for the petition:

In order for the court to accept the application for this procedure, the liabilities of the failing business must amount to at least one third of the total of its assets and its sales and services profits of the last financial year.

3. Effects:

The procedure starts with an **observation period** (of max. 2 months), during which a '*judicial commissioner'* may be appointed to manage the company, under the supervision of the court; or the entrepreneur may keep its management power.

After this observation period, if it appears that no reorganisation procedure is possible, the procedure is converted into a liquidation bankruptcy procedure (see point *I.1*)

4. Publicity:

We refer to the compulsory administrative procedure. (point *I.II*)

5. End of the procedure:

See the liquidation bankruptcy procedure (point *I.1*).

J. LUXEMBOURG

[4] Introduced by the law of April 3, 1979.

In Luxembourg, bankruptcy (*"faillite")* is governed by articles 437 to 592 of the Luxembourg Commercial Code.

1. Initiation of the proceedings:

Bankruptcy only applies to traders (whether companies or individuals).

It may be initiated by creditors, the court or the debtor himself (who is obliged to do so within one month from the cessation of payments).

2. Criteria for the petition:

Both of the following conditions must be met in order for bankruptcy to be ordered by the court:
- suspension of payments (the debtor can no longer pay his liquid and due debts 'illiquidity');
- Loss of credit worthiness (the debtor's business is not trustworthy anymore).

3. Effects:

As soon as the court orders bankruptcy:
- he will appoint a judge to supervise the bankruptcy proceedings as well as a trustee who will take over the management of the business and who will draw up a state of the bankrupt's assets;
- creditors must lodge and prove their claims;
- no individual action or execution may be taken against the debtor;
- interests on claims that are not secured stop accruing;
- the assets are distributed among the creditors in accordance with the distribution plan voted by them and signed by the court.

4. Publicity:

The bankruptcy judgement must be published in newspapers and displayed in the hearing rooms of the commercial court for a period of three months.
The public may also consult the company's file at the commercial court.

5. End of the procedure:

The procedure is brought to an end when all assets are distributed and the company is liquidated.

It may also be closed if the assets are not sufficient to cover the administration and liquidation costs of the bankruptcy or if a composition after bankruptcy is reached.

K. THE NETHERLANDS

In the Netherlands, bankruptcy (or *"faillissement")* is governed by the Dutch Bankruptcy Act of September 1, 1896 and its numerous amendments.

The Dutch legislation provides for three different legal procedures in relation to insolvency. The *suspension of payment* was discussed above (see Title 4), whereas the *debt restructuring* involves private individuals only and will not be further considered in this report[5]. We will briefly describe the *bankruptcy* procedure that applies to companies and individuals.

1. Initiation of the proceedings:

The proceedings can be initiated both against individuals and companies, by:
- the debtor himself;
- creditors (case law has established that there should be more than one creditor);
- the Public Prosecutor, in case the public interest is involved.

2. Criteria for the petition:

A declaration for bankruptcy requires the existence of facts and circumstances evidencing:
- that the debtor has ceased to pay, *and*
- that the debtor has several creditors.

3. Effects:

The opening of bankruptcy proceedings has the following effects:

- the court appoints a '*trustee'* charged with the administration and liquidation of the bankruptcy estate. The bankrupt loses all free disposal and administration of its property;
- the court also appoints a '*bankruptcy judge'* to supervises the administration and liquidation;
- creditors lodge their claim;
- secured creditors (mortgagees and pledges) may exercise their security rights as if bankruptcy had not taken place. If they wish to sell the secured goods, they must however do so through a public sale (which is likely to generate less proceeds than a private sale), or through a private sale but with the co-operation of the trustee;
- however, secured creditors (as well as third parties) are not allowed to exercise their rights if a "cooling down period" (i.e. period of up to one month (with a possible extension to two months) is ordered by the *bankruptcy judge*, during which claims of third parties or secured creditors against assets belonging to the bankruptcy estate may only be executed with the trustee's authorisation);

4. Publicity:

The publicity surrounding insolvency proceedings consists of:
- the publication of the declaration of insolvency and the termination of the insolvency proceedings;
- the public register held by the court;
- notification with the Trade Registry

[5] See the Dutch report, p. 32-34.

5. End of the procedure:

The bankruptcy ends by:
- closing due to lack of assets;
- closing if the bankrupt is in a position to resume payment of its debts;
- a scheme of arrangement with the creditors.

L. PORTUGAL

In Portugal, bankruptcy *("insolvencia")* is governed by the Bankruptcies Code of 1935 and the Decree-law of January 3, 1990

1. Initiation of the proceedings:

Bankruptcies apply only to "debtors holding an entrepreneurial organisation" (individuals or companies).

They are initiated by the debtor, a creditor, the Department of Public Prosecution or the court (if an opposition to the recovery procedure is lodged by creditors representing at least 51% of the recognised outstanding debts).

2. Criteria for the petition:

The company must be unable to meet its financial obligations in time because its available assets are insufficient to satisfy its current liabilities.

3. Effects:

Once bankruptcy has been ordered by the court:
- a 'judicial liquidator', in charge of the recovery and sale of the debtor's assets, is appointed;
- 'creditors' committees' are appointed to supervise the liquidator;
- suspension of execution measures;

4. Publicity:

Bankruptcy judgements are published.

5. End of the procedure:

The procedure ends when the company is liquidated (after all assets have been distributed) or where the creditors have agreed a recovery plan.

M. SPAIN

In Spain, bankruptcy (or "*quiebra*") is governed by various legislation: the Spanish Commercial Code of 1885, the Civil Procedural Rules of 1881 and articles 1001 to 1177 of the former Commercial Code of 1829, which remains in force for the specific provisions on bankruptcy.

1. Initiation of the proceedings:

Bankruptcy proceedings apply to traders (whether individuals or companies).

They can be initiated by:
- the debtor himself ((following a legal obligation, when he is facing a situation of stay of payment of his debts);
- any legitimate creditor.

2. Criteria for the petition:

The business must be in a situation of "generalised stay of payments", which is a broad concept defined case-by-case by the court, that corresponds to an economic imbalance whereby the business' liabilities exceed its assets.

Examples of facts that have led to the opening of bankruptcy proceedings are:
- unsuccessful seizure of assets by a creditor;
- suspension of a payment if this suspension indicates that the business is insolvent;
- non-compliance by the business of a convention reached with its creditors, within the procedure of suspension of payments.

3. Effects:

The main effect of a bankruptcy order are:

- the appointment of several '*mandatories'* (more than in foreign bankruptcy procedures):
  a) a '*Depository'*: responsible for the recovery of the bankrupt's assets and for the management of its business until Receivers are appointed;
  b) a *Creditors' Meeting*: that will vote on any proposal submitted by the debtor and approve the classification and ranking of debts. Receivers are appointed at this meeting;
  c) *Receivers*: creditors that represent the main body of creditors, manage and liquidate the bankruptcy estate. Unlike most bankruptcy procedures, the debtor's assets are therefore managed by the creditors themselves;
  d) a '*Commissioner'*: delegate of the court who supervises the function of the Receivers;
- the creditors must declare their claim within a specific period of time;
- the assets are, after being recovered by the Depository, distributed among the creditors, following the ranking approved by the Creditors' Meeting;
- secured creditors may however enforce their security separately.

4. Publicity:

The declaration of bankruptcy must be published in the Official Gazette and in certain newspapers, and registered in the Civil, Commercial and Property Registry.

5. End of the procedure:

The procedure is brought to an end when:

- all assets are distributed and the company is liquidated;
- the application for bankruptcy is dismissed for lack of assets or absence of creditors;
- a composition agreement is reached between the debtor and its creditors, within the bankruptcy procedure.

N. SWEDEN

In Sweden, bankruptcy (*"konkurs")* is governed by the Bankruptcy Act of 1987 and the Preferential Rights of Creditors Act (1979).

1. Initiation of the proceedings:

The Swedish *konkurs* applies to companies and individuals, traders or non traders.

It can be initiated either by the debtor or its creditors. When the *debtor* petitions for bankruptcy, it will be declared bankrupt the same day, whereas if the procedure is initiated by *creditors*, the company will be considered bankrupt only when the court declares it.

2. Criteria for the petition:

The debtor must be unable to pay its debts as they fall due and such inability must not be merely temporary.

3. Effects:

The court will appoint a receiver who will recover and realise the company's assets, and distribute the proceeds among to the creditors. He will also take over the company's management.

A dividend is distributed to preferential and secured creditors first. A particularity is that non-preferred creditors are not required to automatically declare and prove their claim. The receiver will ask them to lodge a proof of their claim only if it appears that they will receive a dividend after the preferential and secured creditors have been paid (this seldom occurs).

4. Publicity:

The declaration of bankruptcy is announced in the Swedish Official Gazette (the *Post- och Inrikes Tidningar*).

The bankruptcy is also recorded in an official register where all Swedish bankruptcies are gathered. The Patent and Registration office keeps this Register and the information is public and is open to inquiries by members of the general public.

5. End of the procedure:

The procedure is brought to an end when the receiver submits his final report and his dividend proposal to the court.

O. UNITED KINGDOM

In the United Kingdom, the Insolvency Act 1986 and the Insolvency Rules 1986, amended by the Insolvency Bill 2000, govern insolvent companies' proceedings.

The term "bankruptcy" refers to the procedure applied only to individuals unable to pay their debts, and not to companies. It will not be discussed in this report.

In order to bring the existence of a company to an end and to distribute its assets, a compulsory or voluntary (not discussed here) liquidation may take place, sometimes through the mechanism of receivership.

0.1. Compulsory liquidation

1. Initiation of the proceedings:

Compulsory liquidation is initiated by the failing company itself, any creditor, a shareholder of the company and, in very limited circumstances, by the Department of Trade and Industry.

2. Criteria for the petition:

A petition for compulsory liquidation may be presented to the court on a number of grounds, usually on the ground that a company is unable to pay its debts (e.g. if it has neglected a demand of payment for more than £750 or if it is proved that the value of the company's assets is less then the amount of its liabilities).

3. Effects:

When a winding-up order is made, the official receiver of the court becomes the liquidator of the company until meetings of creditors decide to appoint someone else. The directors' powers will cease as from that moment.

No action can be started unless the leave of the court is obtained and any execution started after the commencement of a compulsory liquidation is void.

The liquidator will apply the proceeds of the realised assets and pay creditors, who are required to submit their claims (by sending particulars of it to the liquidator by way of a proof of debt) in the following order:

(a) creditors secured by a fixed charge or mortgage, out of the proceeds of the asset subject to the fixed charge or mortgage;
(b) the liquidator's costs and remuneration;
(c) preferential creditors (e.g. Inland Revenue, the Department of Social Security, occupational pension schemes and employees who are owed remuneration up to a set amount);
(d) creditors secured by a floating charge, out of the proceeds of the assets subject to the floating charge;
(e) unsecured creditors; and

(f) any claims arising from post-liquidation interest.

4. End of the procedure:

The procedure ends when all assets are liquidated and the company's existence is brought to an end.

5. Publicity:

Once a winding up order has been made by the court, the official receiver (who is the liquidator until another liquidator is appointed) will file a copy of the order with the Registrar of Companies, ensure that the order is published in the government gazette and will advertise the order in a newspaper of his choice.

6. Receivership:

This procedure, discussed above in section 4.2, by which a creditor may appoint a receiver in order to realise his security, may also lead to a company's liquidation.

P. UNITED STATES

U.S. companies can be either liquidated under Chapter 7 (usually smaller companies) or under Chapter 11 (typically large companies) of the Bankruptcy Code of 1978.

P.1. Chapter 7 Liquidation

1. Initiation of the proceedings:

The liquidation procedure under Chapter 7 applies to individuals, partnerships and corporations, excluding railroads, domestic or foreign insurance companies or banks.

The debtor can initiate the procedure (voluntary case) or by three or more of its creditors (holders of a claim against the debtor that is not a contingent liability or subject to a bona fide dispute) where the company has more than 12 creditors or a trustee representing such creditors. After a creditor group has filed a petition for a Chapter 7 case, the debtor has the right to oppose the petition in court, to either change it to a Chapter 11 case or dismiss the case.

2. Criteria for the petition:

The basis for filing a petition under Chapter 7 is similar to the filing of a petition under Chapter 11 and has been discussed under title 4.2.

3. Effects:

Under Chapter 7, the company stops all operations and goes completely out of business. A trustee is appointed to pursue any estate claim, liquidate the debtor's assets, and distribute it to the creditors in order of priority; secured creditors first, then holders of administrative expense claims, holders of priority claims, employee claims, tax obligations, etc. and lastly holders of unsecured claims. A creditors committee

could be appointed, representing the unsecured creditor group, if the creditor group so decides.

4. Publicity:

The publicity generated from a bankruptcy filing is dependant on the size of the company and not on the type of chapter filing. Therefore, since most companies filing under Chapter 7 are smaller companies, the publicity generated is not as much as when a large company files under Chapter 11. Pleadings are filed with the Bankruptcy court and maintained by the clerk of the court in a docket that may be viewed by the public.

5. End of the procedure:

The procedure ends when all assets have been liquidated and distributed.

P.2. Chapter 11

A company can also liquidate its business under Chapter 11. During a liquidating Chapter 11 case, the debtor in possession attempts to sell or dispose of all or substantially all the assets of the debtor's estate, ordinarily as a going concern. The plan of reorganisation provides for the liquidation of any remaining assets and for the distribution of the proceeds of the liquidation.

Refer to Title 4.2 of the report regarding proceedings under Chapter 11 and the effects.

P.3. Choice between Chapter 7 and Chapter 11

A **debtor** may prefer liquidation in a chapter 11 case over liquidation in a chapter 7 case because (unless a chapter 11 trustee is appointed), the debtor will remain in control of its business and property may continue to operate while the liquidation is conducted. This may make it more likely to obtain going concern values rather than liquidation values.

Creditors may agree to a chapter 11 liquidation in order to avoid chapter 7 expenses, because they believe the debtor will be able to maximise the value of the its property better than a trustee unfamiliar with the debtor's business and property, or because the creditors committee plays a more important role in chapter 11 and tends to surrender its powers to a chapter 7 trustee.

4.3.2.2. COMPARATIVE ANALYSIS

The common aim of most countries' bankruptcy procedures is to liquidate insolvent businesses. A comparison of the various bankruptcy procedures and its direct effect is discussed under the following sections:

A. Objective of the procedure:
B. Nature of the procedure
C. Quality of the debtor

D. Potential triggers for bankruptcy procedures
E. Possible initiators
F. Main effects of bankruptcy
G. Key players involved in the procedure
H. Creditors' role and distribution of the assets
I. End of the procedure.

A. Objective of the procedures:

Traditionally, the objective of bankruptcy procedures was to sanction failing businesses that betrayed its creditors' trust. The civil and criminal sanctions resulting from this betrayal, will be discussed in the next chapter (Chapter 4.3.3).

Three major trends have been observed:

- bankruptcy should only achieve one goal: maximum reimbursement of the debtor's creditors;
- the desire to liquidate failing businesses as soon as possible, to ensure a stable market;
- it is more advantages to the stakeholders of the company (i.e. creditors and employees) that a failing business be saved and reorganised, rather than be liquidated. This help people realise that failing companies are not always liquidated and the stigma of bankruptcy could therefore be reduced.

These trends do not only result from policies followed by national governments, but also from historical considerations and from the date of the national legislation (bankruptcies in Austria, Greece, Italy and Spain are still based on rather old legal sources). Traditional legislation tends to punish failing businesses, whereas recent developments promote restructuring.

The majority of the countries analysed favour the first two trends (i.e. reimbursement of creditors and efficient liquidation of failing businesses).

In other countries, however, (such as France and Germany), the initiation of bankruptcy procedures begins with an observation period in order to determine the business' best outcome: a traditional (liquidation) procedure or a restructuring procedure. Such perspective seems a good way to reduce the stigma on bankruptcy. That is, the announcement that a company has entered into bankruptcy proceedings should not be perceived that the company is to be liquidated, but rather that there is a chance of reorganisation. However, it is not clear whether the French and German citizens are aware of this aspect, or if to them, any bankruptcy procedure is assimilated as the end of a company. In line with countries such as France and Germany, the U.S. Bankruptcy code specifically makes a distinction between a reorganisation bankruptcy (Chapter 11) and a liquidation bankruptcy (Chapter 7). This distinguishes between a company that still has a chance to reorganise versus a company that is going out of business.

In other countries, (such as Austria, Italy, and the Netherlands) a creditors' settlement or scheme of arrangement may be reached at the end of the procedure in which case the company will not be liquidated.

CREDITOR- OR DEBTOR- ORIENTED PROCEDURE	
Austria	· Creditor-oriented
Belgium	· Creditor-oriented
Denmark	· Creditor-oriented
Finland	· Creditor-oriented
France	· Creditor-oriented (unless it becomes a reorganisation procedure: debtor-oriented)
Germany	· Creditor-oriented (unless it becomes a reorganisation procedure: debtor-oriented)
Greece	· Creditor-oriented
Ireland	· Creditor-oriented
Italy	· *liquidation bankruptcy and compulsory administrative liquidation :* creditor-oriented · *extraordinary administration* : debtor-oriented
Luxembourg	· Creditor-oriented
The Netherlands	· Creditor-oriented
Portugal	· Creditor-oriented
Spain	· Creditor-oriented
Sweden	· Creditor-oriented
UK	· Creditor-oriented
USA	· Creditor-oriented

B. Nature of the procedure:

A similarity between the various procedures results from the desire, in every country, to dispose of a regulated, formal and controlled procedure.

All procedures are of a judicial nature (except for Italy which also provides for an administrative procedure, that applies to State-owned companies only, which is controlled by administrative authorities). The courts responsible for bankruptcy proceedings are often specialised courts (such as in Germany, Italy and the U.S.). A special judge may even be appointed for every bankruptcy case. The court's role varies: sometimes its only task is to provide a general control of the procedure, namely in bankruptcy proceedings where the creditors play an important role in the proceedings (Finland, Spain, Greece, Portugal), whereas in other countries (Germany, France, Italy, United Kingdom and mostly Austria), the court's decisions strongly influence the outcome of the procedure.

Although it is important to have judiciary control and to allow the judge to decide on some issues, giving creditors the possibility to intervene and to propose a plan may be favorable to a positive outcome for the company. Their intervention and their

concessions could help save the company and therefore reduce the stigma on bankruptcy.

In all Member States and the U.S., a bankruptcy order is made by the court, in which it determines the moment of cessation of payments and appoints the persons (e.g. trustee, administrator, liquidator) responsible for the follow-up of the bankruptcy.

JUDICIARY OR ADMINISTRATIVE PROCEDURE	
Austria	· Judiciary. · Court very powerful.
Belgium	· Judiciary.
Denmark	· Judiciary.
Finland	· Judiciary.
France	· Mostly judiciary (two periods: observation period and liquidation or reorganisation procedure)
Germany	· Judiciary (two periods: preliminary measures and liquidation or reorganisation)
Greece	· Judiciary.
Ireland	· Judiciary.
Italy	· *liquidation bankruptcy and extraordinary administration* : judiciary · *compulsory administrative liquidation* : administrative
Luxembourg	· Judiciary.
The Netherlands	· Judiciary.
Portugal	· Judiciary.
Spain	· Judiciary.
Sweden	· Judiciary.
UK	· Judiciary.
USA	· Judiciary.

C. Recognised types of debtor

The various country bankruptcy systems/regimes are not consistent with respect to the debtors that may initiate bankruptcy proceedings.

Most countries (Belgium, the Netherlands, Greece, Luxembourg, Portugal, Spain…) provide for a different procedure for traders and non-traders.

Some countries' procedures apply either to companies or to individuals, whereas other countries' procedures apply to both (e.g. Belgium, Finland, France, Germany, Greece). However, none of the countries' bankruptcy proceedings apply to a state or to government institutions.

RECOGNISED TYPES OF DEBTOR	
Austria	· Legal entities
Belgium	· Traders (legal entities and individuals)
Denmark	· Legal entities and individuals
Finland	· Legal entities and individuals
France	· Legal entities (traders or not) and individuals (traders, farmers and registered craftsmen)
Germany	· Legal entities and individuals
Greece	· Traders (legal entities and individuals)
Ireland	· Legal entities
Italy	· *liquidation bankruptcy* : private entrepreneurs · *compulsory administrative liquidation* : company owned by the State · *extraordinary administration* : major companies
Luxembourg	· Traders (legal entities and individuals)
The Netherlands	· Legal entities and individuals
Portugal	· Traders (legal entities and individuals)
Spain	· Traders (legal entities and individuals)
Sweden	· Traders (legal entities and individuals)
UK	· Legal entities (liquidation) and individuals (bankruptcy)
USA	· Legal entities and individuals (not railroads and domestic or foreign insurance companies and banks)

D. Criteria to initiate bankruptcy procedures

A debtors' poor financial condition is the most common reason for companies going into bankruptcy. However, the bankruptcy procedures can only be initiated if certain criteria have been met. The strictness of the criteria differs significantly from country to country as discussed. The criteria can be generally summarised into the following categories:

- A cessation or suspension of payments, (France, Greece, Spain); or
- Insolvency/Over-indebtedness (Germany, Portugal, Italy); or
- Lost of creditworthiness; or
- Debtor unable to meet its obligations.

Some countries are quite strict and require that two conditions be met (Austria: illiquidity and over-indebtedness, Belgium: cessation of payments and lost of creditworthiness), whereas the criteria is applied more liberally in other countries, e.g. Germany, UK, U.S. and Ireland.

France provides that judicial liquidation may also be initiated as penalty against managerial misconduct (e.g. director found liable for all the debts of the company or for misappropriation of corporate funds).

It seems that the requirement of a strict criteria has a negative consequence, since it prohibits the debtor or its creditors from petitioning for bankruptcy. The debtor's business will continue, with the possibility that its financial situation might worsen, resulting in diminishing value to creditors. However, petitioning for bankruptcy is an act filled with important consequences (the negative publicity being one of them) and it is therefore essential that the introduction of such procedure be controlled.

CRITERIA TO INITIATE PROCEDURE	
Austria	· Illiquidity and over- indebtedness
Belgium	· Cessation of payments and lost of creditworthiness
Denmark	· Illiquidity (not being able to meet obligations as they fall due)
Finland	· *Voluntary:* no criteria required · *Involuntary:* proof of one out of 6 legal conditions
France	· Default of payment · Or breach of amicable settlement · Or penalties against managerial misconduct
Germany	· Flexible: inability to pay any (minor) debt or liabilities exceeding assets
Greece	· Cessation of payments only (financial situation not relevant)
Ireland	· Flexible: debtor unable to pay its debts
Italy	· *Liquidation bankruptcy* : functional impotence · *Compulsory administrative liquidation* : discretionary power of debtor · *Extraordinary administration* : liabilities equal to a third of the assets, sales and profits
Luxembourg	· Suspension of payments and exhaustion of commercial debts
The Netherlands	· Cessation of payments and other conditions
Portugal	· Inability to meet obligations on time because assets are insufficient to satisfy liabilities
Spain	· Flexible: generalised stay of payments
Sweden	· Permanent inability to pay debts
UK	· Flexible: inability to pay debts (in general) or other criteria
USA	· *Voluntary*: no specific criteria · *Involuntary*: Flexible - debtor unable to meet its obligation

E. Possible initiators

The debtor, its creditor(s), the court or the Public Prosecutor can initiate bankruptcy procedures in most countries. However, in Belgium, Finland, Germany, Spain, U.S. and Sweden, the court alone do not initiate bankruptcy proceedings.

INITIATORS OF THE PROCEDURE	
Austria	· Debtor · Creditor · Court
Belgium	· Debtor · Creditor · Public Prosecutor
Denmark	· Debtor · Creditor
Finland	· Debtor · Creditor
France	· Debtor · Creditor · Court · Public Prosecutor
Germany	· Debtor · Creditor
Greece	· Debtor · Creditor · Court
Ireland	· Debtor · Creditor · Director of corporate enforcement
Italy	· *liquidation bankruptcy* : debtor, creditor, court, Public Prosecutor · *compulsory administrative liquidation :* debtor only · *extraordinary administration :* debtor, creditor, court, Public Prosecutor
Luxembourg	· Debtor · Creditor · Court
The Netherlands	· Debtor · Creditors (more than one) · Public Prosecutor
Portugal	· Debtor · Creditor · Court · Public Prosecutor
Spain	· Debtor · Creditor
Sweden	· Debtor · Creditor
UK	· Debtor · Creditor · Contributor · Department of Trade and industry
USA	· Debtor · Three or more creditors or their trustee

F. Main effects of bankruptcy:

As regards the debtor:

In most of the countries' bankruptcy systems[6], the debtor looses control over its assets and a special person (trustee, receiver, administrator, or liquidator) assumes control of the estate and assets.

In Finland, where the creditors play an important role, the trustee is required to submit important decisions for the approval by the creditors' meeting. Similarly in the U.S., since the trustee represents the unsecured creditors, the creditors committee has the right to consult with the trustee, make recommendations and submit questions regarding the liquidation of the debtor's estate.

MANAGEMENT OF THE BUSINESS DURING BANKRUPTCY	
Austria	· Bankruptcy administrator · Creditors' committee
Belgium	· Receiver
Denmark	· Trustee
Finland	· Creditors' meeting
France	· Trustee (during observation period) then liquidator
Germany	· Trustee or debtor (if court allows self-management)
Greece	· Administrator
Ireland	· Liquidator
Italy	· *liquidation bankruptcy* : bank, trustee · *compulsory administrative liquidation :* liquidation commissioner · *extraordinary administration* :judicial commissioner
Luxembourg	· Trustee
The Netherlands	· Trustee
Portugal	· Judicial liquidator
Spain	· Depository then receiver
Sweden	· Receiver
UK	· Liquidator
USA	· Trustee

As regards the creditors:

One of the main goals of bankruptcy procedures is to provide a means to equally distribute the assets among the creditors (depending on priority). Therefore a creditor that seeks execution of its claim before other creditors is not in line with the above

[6] In Germany the court may order the debtor to self-management his business.

stated objective. In some countries, secured creditors typically receive payment on its claims before other creditors.

This is an automatic effect of all bankruptcy procedures, except for the Netherlands, where execution measures will be suspended only if the court has ordered a "cooling down period".

In some countries (e.g. Finland), interest on the debtor's debts continues to accrue, whereas in others (e.g. Belgium or France) such interest is suspended.

Other rules, regarding the compensation between debts-claims, the continuity of contractual commitments etc. vary from country to country.

G. Key players involved in the procedure

A number of key player or parties are involved when a company enters into bankruptcy, which includes:

- A trustee (also known as receiver, administrator or liquidator)
- A specialised judge or court (see point B.)
- Creditors Committees
- Other creditor group (e.g. secured or preferential creditors)

In the majority of the countries, these persons are court appointed; however in some countries, like Spain, the creditors have the authority to make these appointments.

The trustee is usually responsible for managing the debtor's estate, liquidating the assets and the distribution to creditors. Some countries require that this trustee be a lawyer or an accountant.

In order to protect the creditors' rights, some countries make provision that specific organisations represent the creditors: Austria - presence of a creditors' assembly and control by the Association for the Protection of Creditors' Rights; Finland, Greece, Spain, U.S. and Portugal - creditors' committee. In other countries (e.g. Belgium, Luxembourg, Ireland), the creditors are not protected through such committees.

A particular appointed authority in Finland is the '*Bankruptcy Ombudsman'*, whose specific duty is to control the bankruptcy procedure. It is an independent and impartial authority that does not represent the creditors or the debtor.

KEY PLAYERS INVOLVED IN THE PROCEDURE	
Austria	· Bankruptcy administrator · Creditors' committee · Creditors' assembly · Association for the protection of creditors' rights
Belgium	· Receiver · Court

Denmark	· Trustee
Finland	· Provisional administrator (becomes trustee) · Creditors' meetings · Ombudsman
France	· Liquidator · Insolvency judge
Germany	· Preliminary trustee (becomes final trustee) · Court
Greece	· Judge rapporteur · Administrator · Creditors' meeting
Ireland	· Liquidator · Court
Italy	· *Liquidation bankruptcy :* bankruptcy trustee, judge · *compulsory administrative liquidation :* liquidating commissioner and administrative control · *extraordinary administration* :judicial commissioner
Luxembourg	· Trustee · Judge
The Netherlands	· Trustee · Bankruptcy judge · Creditors' committees
Portugal	· Judicial liquidator · Creditors' committees
Spain	· Depository · Creditors' meeting · Receivers · Commissioner
Sweden	· Receiver
UK	· Liquidator · Creditors' meeting · Contributors' meeting
USA	· Trustee · Judge · Creditors Committee

H. Creditors' role and distribution of the assets

In most countries creditors are usually requested, after the commencement of bankruptcy, to declare their claim within a specific period of time. These claims will then be accepted or partially/totally rejected, following a review by the court, the trustee (France and U.S), the debtor (Chapter 11 in the U.S.) or the creditors (Italy, Spain, Germany, and the Netherlands).

Generally the proceeds of the estates' recovered assets (transformed into cash) is distributed to the creditors following a special priority:

- The debts arising after the introduction of the procedure (e.g. the procedural costs) are usually paid before any other debt.
- In most countries, *the law* determines the order of payment, usually based on a system of prior payment to owners of securities, privileges, floating charges or

rights of ownership; followed by a pro rata payment to the other non-preferential creditors. The latter sometimes receive no payment after the preferred creditors have been paid. The Swedish system provides, in contrary to other countries, that non-preferential creditors are not even required to declare their claim except if it appears that they will receive a dividend. Similar to the Swedish system, in a Chapter 7 liquidation in the U.S., where a company has no unsecured assets, the unsecured creditor also is not required to file a claim.

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This inability for unsecured creditors to be paid after secured creditors is an essential point in the stigma surrounding bankruptcy. Who would wish to have contractual relationship with a company, knowing that if this company went bankrupt, all debts which are outstanding would be lost? All creditors would accordingly try to have a security but it is impossible to provide securities to everyone. In other countries (Austria, Greece), the distribution to creditors results from a *bankruptcy plan or settlement* submitted for the creditors' approval. However, even in this case, secured creditors have a right to be paid first, the same problem still subsists.

CREDITORS' ROLE AND DISTRIBUTION OF THE ASSETS	
Austria	· Declaration of claim · Distribution: following the distribution plan drafted by the bankruptcy administrator and approved by the creditors' committee
Belgium	· Declaration of claim · Distribution: secured claims prior to others
Denmark	· Declaration of claim · Distribution following a specific order
Finland	· Declaration of claim · Secured claims prior to others
France	· Declaration of claim · Distribution following a specific order (waged workers, then legal expenses, then creditors with pledges or mortgages…)
Germany	· Declaration of claim · Special rules of distribution: right of ownership first, secured creditors and others afterwards
Greece	· Declaration of claim · Distribution: priority to secured creditors and settlement with creditors on distribution
Ireland	· Declaration of claim · Distribution following a specific order (preferential and secured creditors first)
Italy	· *liquidation bankruptcy :* · Declaration of claim · Distribution: specific order (preferred and secured creditors first) · *Compulsory administrative liquidation :* · Declaration of claim · Distribution: specific order (preferred and secured creditors first) · *Extraordinary administration* : · Declaration of claim · Distribution: specific order
Luxembourg	· Declaration of claim · Distribution: specific order

The Netherlands	· Declaration of claim · Distribution: secured creditors may exercise their rights as if there were no bankruptcy. · Suspension of creditors' execution measures only if "cooling-down" period ordered
Portugal	· Declaration of claim · Distribution: specific order
Spain	· Declaration of claim · Secured creditors first and proposal by the debtor on ranking and classification of debts (to be approved by the creditors' meeting)
Sweden	· No automatic declaration of claim(only if it appears that non-secured creditors will receive something) · Distribution: secured creditors first
UK	· Declaration of claim · Distribution: creditors secured by a fixed charge or mortgage first, then liquidator, preferential creditors…
USA	· Declaration of claim · Distribution: by priority starting at secured creditors and ending with unsecured claims

I. End of the procedure

The Bankruptcy process is usually concluded after all assets have been liquidated and distributed and administration of the liquidation of the company is completed; or, when a restructuring plan has been successfully adopted; or, as in most countries, when it becomes evident that the assets of the business are insufficient to cover the procedural costs.

4.3.3. FURTHER CONSEQUENCES OF BANKRUPTCY AND CAUSES OF THE STIGMA ON FAILURE AND POSSIBILITIES FOR A FRESH START?

Apart from the liquidation and distribution of the debtor's assets as a result from bankruptcy procedures, the management of a bankrupt company may also be held civilly or criminally liable. In some cases, special prohibitions will refrain entrepreneurs from starting a new business.

However, in circumstances, described hereunder, that varies in every country, debtors may benefit from "excusability" (i.e. a procedure that will provide for the discharge of payment of their remaining debts and/or the release of certain prohibitions). This excusability will make it easier for the debtor to initiate a "fresh start" of a business.

4.3.3.1. OVERVIEW OF NATIONAL PROCEDURES

Every national system applies specific restrictions to debtors and provide for various conditions in order to grant "excusability".

The negative consequences resulting from bankruptcy are analysed in light of the following topics:
- liability for remaining debts (bankrupts are not always discharged from unpaid debts. Such debts may sometimes be satisfied with the assets or income that the bankrupt may acquire in the future.)
- criminal offences or

- exclusion from certain professional activities.

The analysis will focus on sole proprietors and the directors of the companies, because the negative consequences have no practical relevance to the legal entities, since it usually is dissolved at the end of the process. The founders or partners of a limited liability company are usually liable only to the amount of capital invested.

A. AUSTRIA

1. Negative consequences of bankruptcy

a) Director's liability for the remaining debts

An important effect of bankruptcy is that creditors may continue to bring individual actions against the directors of a bankrupt company. This is the case, for example, if the directors did not file for judicial insolvency proceedings in due time, where they can be held liable for part/ the total of the company's debts.

b) Criminal offences

Directors may be held criminally liable if they did not respect the essential principle of equal treatment of equal creditors.

c) Professional interdictions

Directors may also be prohibited from engaging in an independent trade or business, after a bankruptcy. Exemptions are however applicable (upon proof that they are likely to fill their obligations as regards the intended business and the settlement of previous debts).
Directors are, however, not excluded from being director of another company.

2. Excusability and possibility for a fresh start

A discharge from these negative consequences of bankruptcy may be obtained only:
- if the bankruptcy proceedings are converted into reorganisation proceedings;
- or in the course of private bankruptcies (that apply to individual non-traders only).

The Austrian system seems to be quite severe as regards the limitations to excuse bankrupt entrepreneurs. If no reorganisation is possible, they may not be excused. This is quite unfair for "innocent" bankrupts who were lead to bankruptcy by misfortune.

This could be an important cause of the stigma on bankruptcy: why start a business knowing that if you fail and become bankrupt, your creditors may continue to sue you forever?

However, this negative effect will concretely not always affect the directors of bankrupt companies, for bankrupt companies are usually liquidated after the proceedings, so there is no company left for the payment of debts preceding

bankruptcy (unless the directors are held civilly or criminally liable for the company's debts, as mentioned above).

B. BELGIUM

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

A bankrupt company's directors responsibility may be invoked, and they can be declared liable for all or part of the company's debts in several circumstances, such as:

- if they committed a serious fault that led to the bankruptcy,
- if they did not declare bankruptcy on time (or failed to convene a meeting of shareholders to deliberate, when the net assets of the company had fallen down below half of its share capital).

Such responsibility may go far, in situations where the bankrupt company is only a screen, hiding the "real master" of the company (i.e. the person or company owning most of the bankrupt company's shares and taking important decisions, and whose assets and activities are mixed with those of the bankrupt company). In such cases, the liability may be extended to the "real master" of the business.

If their company's bankruptcy has caused a damage to a third party, the liability of its directors could be engaged, which may lead to serious financial sanctions.

The *founders* of a bankrupt company may be held liable for part or all the liabilities of the company, in case its registered capital was manifestly insufficient to ensure its normal activities during at least two years.

b) Criminal offences

Entering into contractual relations without sufficient counterpart, misappropriating or concealing assets, and fraudulently organising an insolvency… are some of the possible criminal offences sanctioned by Belgian law.

c) Professional interdictions

Directors of a bankrupt company may be banned from the exercise of certain professions (such as the profession of auditor) or certain mandates (e.g. the management of an insurance company).

2. Excusability and possibility of a fresh start:

Excusable bankrupts are those that failed because of misfortune or because of certain circumstances in life, and that co-operated during the bankruptcy procedures. Excusability is decided by the court that has a wide margin of interpretation.

If a bankrupt is excused, he will be discharged from his remaining debts. None of his creditors may institute proceedings against him, except for his future debts (that arise after the bankruptcy procedure).

This procedure seems to be a good way to reduce the stigma on bankruptcy and to favour fresh starts, especially since Belgian courts are usually ready to grant excusability to those who "deserve" it, those who failed because of misfortune or because of certain circumstances of life

C. DENMARK

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

After *bankruptcy/winding-up* proceedings, creditors regain their right against the bankrupt to the part of the claim that was not paid through distribution, unlike in *compulsory composition* where the bankrupt is released of all debts not accepted in the composition.

Directors of a bankrupt company face several civil sanctions:

- they may be forced to repay up to five years' of bonuses granted while the company was insolvent;
- the liquidator may bring an action for damage against them, even if they were discharged, within 2 years after the date of the discharge;
- creditors who did not receive payment and who prove that the directors had foreseen the company's impending liquidation, may claim reimbursement of his loss.

Creditors may also sue them if the assets have not been distributed equally.

b) Criminal offences

They may also be convicted of economic crime if they illegally removed the company's assets from a company bought for the purpose of preventing assets being recovered, after which the company may be dissolved.

2. *Excusability and possibility for a fresh start*

Bankrupts still liable for the remaining debts not paid through bankruptcy proceedings, may obtain discharge of debt if they are excused after 5 or 20 years (depending on the type of debt and whether special legal steps were taken to secure it).

Directors may also obtain debt rescheduling if they can prove that they are not able and not expected to be able to fulfil their debt obligations in the next few years, and that their circumstances speak in favour hereof.

D. FINLAND

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

Directors may be held liable for part or all of the company's debts if they did not file for bankruptcy on time or if they did not convene a meeting of shareholders when the company's equity decreased below half of its share capital.

They may also be held liable to compensate a loss caused through an error or negligence while performing their duties.

b) Criminal offences

Directors intentionally acting to the detriment of the interest of their creditors (destroying their property, transferring it abroad in order to make it unreachable to their creditors…) may be criminally sanctioned.

c) Professional interdictions

Prohibition on certain business activities may result from bankruptcy.

2. Excusability and possibility for a fresh start

Approximately three-quarters of all persons who have been involved in bankruptcy are still in business[7], for directors who have not committed the above-mentioned faults will not be liable for the remaining debts. As for other entrepreneurs, they remain liable for their remaining debts, which may cause a long and vicious circle of debt collection. There has been a vivid discussion about the excusability of debts after 10 or 15 years, but to date there does not exist such provisions.

E. FRANCE

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

A. Reimbursement of debt:
In case of mismanagement that contributed to the insufficiency of assets of their company, the directors may be ordered to reimburse all or part of the company's debts.

[7] According to the author of the Finish report.

B. Involuntary bankruptcy:
Directors not respecting the above-mentioned reimbursement of debts or who misappropriated corporate funds, committed self dealing, may be sued in an involuntary bankruptcy procedure, independent from the company's bankruptcy proceedings.

C. Personal bankruptcy:
If the directors do not reimburse debts imposed to them by the court, if the court decides to include their assets for the reimbursement of creditors, or if they violate a restriction on management imposed to them, a declaration of personal bankruptcy could apply to them. The consequences of this declaration is that they will be prohibited from managing companies with a commercial purpose, lose civil rights and be ineligible for positions before the commercial courts.

b) Criminal offences

Criminal penalties may apply to individuals who organised fraudulent bankruptcies, e.g. who fraudulently obtained funding or sold assets below their value in order to avoid bankruptcy.

c) Professional interdictions

The court may decide that persons subject to fraudulent bankruptcy may no longer practice certain activities.

2. Excusability and possibility of a fresh start:

Directors of a bankrupt company may, although pecuniary penalties have been imposed on them, continue their activities within the entity or the ongoing entity itself, if restructuring resulted from bankruptcy proceedings. This will not be the case if civil or criminal sanctions were imposed on them.

They are usually discharged from payment of the debts not satisfied by the liquidator, unless, for example, they committed criminal offences or fraud with respect to creditors, or in the case of personal bankruptcy

The French system therefore makes a distinction between "innocent" and "voluntary or fraudulent" bankruptcy, as regards the consequences that such bankruptcies may have on the possibility for entrepreneurs or directors to continue their activities or to start new businesses.

F. GERMANY

1. Negative consequences of bankruptcy

a) Director's liability for the remaining debts

Directors who failed to petition for bankruptcy proceedings when they should have (within three weeks as from the date on which the company became

insolvent), could be held personally liable for the resulting losses incurred by the company.

b) Criminal offences:

The German Criminal Code specifically provides for criminal insolvency offences: directors who fail to exercise the diligence expected from responsible businessmen or who committed fraudulent insolvencies may be liable to a prison term.

Directors who did not call a shareholders' meeting when half or more of the company's capital was eroded, may be liable to a prison term of up to three years or a fine.

c) Professional interdictions

Directors who committed a criminal offence are prohibited to practice for 5 years.

2. Excusability and possibility of a fresh start:

Individual customers may, under the customer insolvency procedure, benefit from a debt release granted by the insolvency court, if they have shown their good behavior during 6 years. Such judicial debt release does not exist for bankrupt companies which are usually wounded up and whose directors will only be held liable in the above mentioned circumstances.

G. GREECE

A particularity of the Greek system is that, in some aspects, it is much more severe towards individual bankrupts than towards the directors of a bankrupt company.

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

A. If a director's conduct causes damage to the bankrupt company, the Board of directors (and not the company's creditors or shareholders) may sue him. In case of bankruptcy, this possibility will be transferred to the administrator of the bankruptcy (who seldom pursue the director, due to the difficulty of finding evidence and the high costs resulting from judicial proceedings, and mostly because such proceedings do not affect the status of the director;
B. Creditors may however sue directors following the general rules of tort (proof of a damage may be based on the fact that directors have intentionally violated the rules imposed on them by bankruptcy law.)
C. They may also sue them if they prove that they have suffered damage because the directors did not notify them of their company's cessation of payment, which is a legal obligation.

b) Criminal offences

Directors may be convicted of plain bankruptcy, when they provoked bankruptcy through their faulty behaviour.

In case of a fraudulent bankruptcy, the court may order the bankrupt's physical detention or house confinement, in order to ensure his physical availability during the bankruptcy procedure.

c) Professional interdictions

Only individual bankrupt lose their trading capacity and are therefore excluded from any commercial or industrial profession. They also face the prohibition of exercising certain functions (i.e. civil servant in the administrative, judicial and public sector, custodian, lawyer or official administrative, employees in a company of public law);

2. Excusability and possibility for a fresh start

Under Greek law, *directors* are not considered as merchants and may therefore never be declared personally bankrupt. They merely represent a company and although most of the time, due to their wrong judgements, they are responsible for a company's bankruptcy, they are not professionally affected since they are free to start a new business, be appointed as directors or work as independent entrepreneurs.

Individual bankrupts are, however, as mentioned above, deprived from their status of merchant and incapable of starting a new commercial business. In order to obtain discharge of bankruptcy and to recover their status of merchant, one of the following conditions must be filled:

- a lapse of 10 years from the date of the bankruptcy's declaration (long period of time);
- a judicial composition amongst the creditors, validated by the court, not subject to appeal and not declared void;
- full satisfaction of all creditors (unlikely to occur, since the entrepreneur who is declared bankrupt does not usually have enough assets to satisfy his creditors).

If one of these conditions is fulfilled (which rarely is the case), the court has the obligation to discharge the individual bankrupt. No discharge may however be granted in case of fraudulent bankruptcy.

As a conclusion, it appears that the Greek system creates a very important stigma on bankruptcy as regards individual entrepreneurs, who have little chance of starting a commercial business again (even though they are considered as "innocent bankrupts"). To the contrary, the directors are not very affected by their company's bankruptcy, for their status is unchanged and they will be forced to reimburse their creditors only if the latter prove that they have suffered damage because of their acts. Such conception stimulates the trend to practice business activities through a company, and not as individual entrepreneurs.

H. IRELAND

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

Directors may be made personally liable for all or part of the company's debts, in case of:

- *Fraudulent trading*: acting with the intent to defraud creditors (civil and criminal offence);
- *Reckless trading*: carrying out a company's business in a reckless manner (i.e. with "gross carelessness");
- *Misfeasance proceedings*: retaining the company's money or property, being guilty of misfeasance or breach of duty or trust in relation to the company;
- *Return of improperly transferred assets*: obligation to return company's property that was disposed of in order to perpetrate a fraud on the company, its creditors or members;
- *Failure to keep proper books and records*: contravention to the obligation to keep proper books of accounts, that resulted to the company's inability to pay all its debts (or its winding up) or caused a substantial uncertainty as to its assets and liabilities.

b) Criminal offences

Directors of a bankrupt company may be criminally sued if they committed fraud, dishonesty, …

c) Professional interdictions

- *Restriction of directors*

Any person who was a director of an insolvent company within twelve month of its winding up, may not be appointed as a directors of a company or take part in the incorporation of a new company for a term of five years, unless:

- such company has a share capital of a certain amount[8],
- or unless that person proves that it has acted honestly and responsibly or that he was director of the company solely by reason of his nomination and without taking part of the management.

- *Disqualification of directors*

Directors who were convicted of an indictable offence (see above) in relation to a company, may not be appointed as a directors of a company or take part in the incorporation of a new company for a term of five years.

2. Excusability and possibility for a fresh start

I. ITALY

[8] EUR 63.487 (or EUR 317.435 for public limited companies).

1. Negative consequences of bankruptcy

a) Directors liability for the remaining debts

Under Italian law, directors have a special duty to act in protection of the company's creditors. The breach of such duty will automatically trigger their liability.

In the context of a bankruptcy, such breach of duty could arise from:
- the payment with preference to certain creditors;
- negligence, imprudence or technical incompetence that lead to the reduction of the company's assets, to detriment of the creditors' interests.

Claims for damages could also be grounded on the breach of a specific rule (i.e. the duty to convene a shareholders' meeting in the event of severe loss).

b) Criminal offences

Directors of a bankrupt company may be applied "bankruptcy crimes", such as:
- fraudulent bankruptcy offence (when the directors have concealed property, made false statements, fraudulent disposal of assets in favour of some creditors…);
- obtaining credit in order to conceal the insolvency;
- concealing bankruptcy assets, making false statements…

c) Professional interdictions

Bankrupts are unable to exercise certain professions (i.e. attorney at law or stockbroker), or to assume certain charges (trustee, tax collector, director, statutory auditor and liquidator of a company).
If bankruptcy crimes have been applied, they may be prohibited from exercising entrepreneurs' activities for ten years.

2. *Excusability and possibility for a fresh start*

Directors of a bankrupt company may usually continue business activities, unless that have been applied the professional activities.

Bankrupts could benefit from a judicial discharge. Such discharge may be obtained only if the bankrupt:
- has integrally paid his debts;
- or has regularly fulfilled its obligations from the creditor's settlement procedure;
- or has effectively and continuously proved his good behaviour for at least five years from the end of the bankruptcy procedure.

This discharge may never be granted if the bankrupt was found guilty of bankruptcy crimes or crimes against the patrimony, the public faith, the industry and the commerce.

J. LUXEMBOURG

1. Negative consequences of bankruptcy

a) Directors liability for the remaining debts

Directors of a bankrupt company may be held civilly liable for any misconduct in their management (the company may sue them in order to obtain reimbursement) or for the non-compliance of the law of August 10, 1915 or the company's statutes (the company, the trustee or any third party may sue them jointly, e.g. in case of failure to convene a general meeting when needed, to publish the annual accounts…).

If they committed a gross and indisputable mistake that contributed to the company's bankruptcy, they may be ordered to pay all or part of the company's debts.

They may also be declared personally bankrupt under certain conditions (if they dispose of the company's assets in their personal interest, continue a deficient exploitation…).

b) Criminal offences:

- in case of simple bankruptcy:
  the bankrupt may be sanctioned by imprisonment for a term between one month and two years, if it is discovered during the bankruptcy procedure, that he has committed a criminal offence, such as: payment to a favoured creditor to the detriment others, not declaring bankruptcy when required to, not keeping regular accountancy…
- in case of fraudulent bankruptcy:
  the crime of fraudulent bankruptcy may be imposed if the bankrupt has removed records or falsified their content, if he has concealed part of his assets or if he states that he was debtor of sums while he was not. He will be sentenced to imprisonment for a term of five to ten years.

c) Professional interdictions

The bankrupt may be prohibited from performing a business activity (including being director of a company), for a period of one to twenty years, if:

- the trustee or public prosecutor request it within three years from the judgement declaring bankruptcy;
- the bankrupt has contributed by a gross and indisputable mistake to the bankruptcy, mistake that no diligent and careful director would commit.

It automatically applies to any person convicted of fraudulent bankruptcy.

2. Excusability and possibility for a fresh start

If the debtor's assets were insufficient to cover the liquidation costs of bankruptcy, this procedure is closed and the creditors may still sue the insolvent entrepreneur. This constitutes an important obstacle to the possibility to start a new business.

Another element is that a bankrupt could continue its business or start new commercial activities only in the following circumstances:

- if he manages to negotiate a composition after bankruptcy with his creditors (and if he was not sentenced for fraudulent bankruptcy)
- if he is rehabilitated by the court, (i.e. if he has totally paid his debts and if he is not a fraudulent bankrupt nor has been sentenced for robbery, speculation or breach of trust).

It seems difficult for individual bankrupts who have lost all their assets to obtain a composition after bankruptcy or to pay all of their debts! Therefore, entrepreneurs/directors who were sanctioned through by prohibiting further commercial activities may seldom be rehabilitated and start a new business again… Luckily, this sanction is not automatic and does not apply to "innocent" bankrupts, who did not commit any gross and indisputable mistake.

K. *THE NETHERLANDS*

1. Negative consequences of bankruptcy

a) Director's liability for the remaining debts

The directors may be jointly liable towards the company if they failed to properly perform their duty and if this failure contributed to the bankruptcy of the company (e.g. acts contrary to the company's object, disproportionately large securities provided to banks in order to obtain credits…).

Certain creditors (tax authorities, social insurance and pension funds) may sue the directors of a bankrupt company for any outstanding tax, if the latter failed to notify these creditors in a timely manner, as legally required, of the company's inability to pay them.

Creditors may also sue them for other unlawful acts (e.g. undertaking an obligation on behalf of the company knowing that the company would not be able to fulfil it).

b) Criminal offences

Directors who do not, during the bankruptcy proceedings, respect their obligation to provide the trustee, the bankruptcy judge and the creditors' committee with the required information may be criminally sanctioned.
Other criminal offences linked to bankruptcy are:

- prejudicing one creditor above the others;
- transferring assets below their value;
- not taking account of certain assets or withdrawing assets from the estate.

c) Professional interdictions

In order to start a new business, individual bankrupts and directors must obtain a "declaration of non-objection" by the Ministry of Justice, with regard to the

incorporation of a new company. Such declaration is difficult to obtain if the founders were previously involved in fraudulent businesses/bankruptcies or if they leave behind a trail of bankruptcies. This declaration will also be refused if there is reasonable doubt with regard to the reliability or the integrity of the individual.

2. Excusability and possibility for a fresh start

Bankrupts do not benefit from an automatic discharge of payment of their remaining debts, at the end of the bankruptcy procedure. They will only be released from their debts if they have reached a scheme of arrangements with their creditors. The *Debt Restructuring of Private Individuals Act* aims at helping them liquidate their assets in such a way that they will negotiate with creditors to obtain full discharge of their debts. This arrangement may include the transfer of their business to a third party.

As regards the possibility to start a new business, both individual bankrupts and directors are confronted with the requirement of obtaining a "declaration of non-objection" as explained above.

L. PORTUGAL

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

Directors who have significantly contributed to the bankruptcy of their company through actions performed within the last two years previous to the declaration of bankruptcy, may be declared responsible for the bankrupt's debts (if requested by the public prosecutor or any creditor).

b) Criminal offences

- Crime of fraudulent bankruptcy: committed by directors who, with the intention to cause detriment to their creditors, destroy or hide their assets, artificially aggravate losses…
- Crime of negligent insolvency: committed by directors who created a state of insolvency through serious negligence or imprudence and failed to apply for any recovery measures on time.
- Crime of favouring creditors: committed by directors, aware of their state of insolvency, who favoured certain creditors to the detriment of others.

c) Professional interdictions

As from the declaration of bankruptcy (and if no agreement was found to satisfy its creditors), individual bankrupts and directors of bankrupt companies are prohibited from carrying on any business, unless the judge recognises that they acted correctly and with normal diligence in the exercise of their activity, and if no criminal proceedings have been started.

2. Excusability and possibility for a fresh start

The possibility to start a new business is limited by the above-mentioned prohibition that may apply to bankrupts. This prohibition can however be set aside if the judge expressly authorises the bankrupt to practice a business in order for him to earn the indispensable means of sustenance and if such practice does not adversely prejudice the liquidation of the bankrupt's estate.

M. SPAIN

Spanish bankruptcies are qualified by the judge, according to the bankrupt's conduct, as follows:

- **fortuitous** bankruptcy: accidental bankruptcy, produced by the misfortune of a debtor with good commercial management of his business.
- **tortuous** bankruptcy: caused by a negligent debtor who lacked diligence in the administration of its business and the respect of basic commercial rules.
- **fraudulent** bankruptcy: caused by the debtor's intentional illegal acts (e.g. concealment of all or part of its assets, abuse of confidence to the detriment of third parties…).

Only fortuitous bankruptcies are exempted from criminal liabilities.
Fortuitous and tortuous bankruptcies allow the bankrupt to reach agreements with his creditors and to request rehabilitation.

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

In cases where the directors did not file for bankruptcy when they should have, the bankruptcy will be qualified as tortuous and the management will be held liable.

b) Criminal offences

Insolvency due to negligent conduct, tort, provoking, hiding or aggravation one's bankruptcy are criminal offences.
Directors can therefore be imposed criminal sanctions if they have caused the insolvency or provided false information regarding the company's accounts. Should they wish to start a new business or manage another company, they will have to comply with their criminal sanction before starting it.

c) Professional interdictions

After the bankruptcy proceedings, bankrupts are barred from engaging in any business in the future, unless they are rehabilitated (see above).

2. Excusability and possibility for a fresh start:

After the closing of fortuitous or tortuous bankruptcy proceedings, the bankrupt may request its rehabilitation, in order to engage into business again.

This rehabilitation is not automatic. The latter must request it to the judge, under the following conditions:

- all debts must be paid or an arrangement with the creditors must be obtained
- in the event the bankrupt is also charged with criminal sanctions, these penalties must be complied with.

A fraudulent bankrupt may never be rehabilitated, even if all his debts are paid.

The Spanish system is based on a coherent distinction between the nature of the bankruptcy, based on the innocent, negligent or fraudulent character of the bankrupt. However, it does seem difficult for bankrupts to obtain an arrangement with their creditors if they have nothing left, and it would therefore seem fair to adjudicate automatic rehabilitation to the fortuitous bankrupt.

N. SWEDEN

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

Directors who deliberately or negligently cause loss or damage to the company, its shareholders or third parties, are liable to pay damages.

If a distribution of dividends is made without respecting the law, then the beneficiary must repay what he has received. If he is unable to do so, the directors involved in the decision of distribution may be liable for repayment.

b) Criminal offences

Depriving the creditors of assets of considerable value, not keeping the company's books correctly, etc. is a criminal offence.

c) Professional interdictions

According to Swedish law, directors of a bankrupt company should be prohibited from carrying on a business, if:

- it is in the public's interest
- and if they have severally neglected his business duties or its creditors' interests.

2. Excusability and possibility for a fresh start

Although the above-mentioned rules on prohibition seem quite strict, bankrupts are seldom really prohibited from trading[9]. The idea is to refrain only persons who were involved in several bankruptcies from trading.

[9] According to the authors of the Swedish Report.

As regards the numerous sanctions that may apply to directors in case of their company's bankruptcy, it seems that it does not frighten them. At the contrary, most of them continue their business for as long as possible, in the hope of finding new investors to turn around the business and even improve the company's business.

In that sense, Swedish bankruptcy legislation works well to facilitate a fresh start of bankrupt businesses.

O. UNITED KINGDOM

1. Negative consequences of liquidation

a) Directors' liability for the remaining debts

Management of a liquidated company can be held personally liable for the company's remaining debts in case of:

- misfeasance or breach of any fiduciary or other duty
- fraudulent trading (carrying out a company's business with the intent to defraud creditors or for any other fraudulent purpose)
- wrongful trading (continuing to trade when the director knew or ought to have known that there was no reasonable prospect of the company avoiding liquidation).

b) Criminal offences

Fraud, misconduct, falsification of the company's books, material omissions from statements and false representations are criminally sanctioned.

c) Professional interdictions

Under the Company Directors Disqualification Act of 1986, directors may be disqualified from being a director, acting as receiver of a company's property or being concerned with the promotion, formation or management of a company, in the following circumstances:

- criminal offences connected with the Companies Acts legislation
- wrongful trading
- failure to comply with filing requirements
- unfit conduct in insolvent companies.

The minimum period of disqualification is 2 years and the maximum 15 years.

2. Excusability and possibility for a fresh start

The UK system seems to distinguish between fraudulent and non-fraudulent insolvency, providing a wide range of sanctions and prohibitions for directors that have acted unlawfully or against the company's or creditors' interests. Should this not be the case, directors are apparently free to start a new business again.

P. UNITED STATES

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

The confirmation of a plan of reorganisation in a Chapter 11 case ordinarily discharges the corporate debtor from liability for all debts arising prior to the effective date of the plan of reorganisation, except to the extent that the plan of reorganisation otherwise provides.

If the liquidation of the business was achieved through Chapter 7, the company ceases to exits and typically all pre-petition debts are discharged. Technically the Bankruptcy Code stipulates that a corporate debtor in Chapter 7 will not discharged of pre-petition debt, however since the entity ceases to exits, granting a discharge is irrelevant. However, a creditor can object to the discharge by filing a complaint in the bankruptcy court, called an "adversary proceeding". A discharge may also be denied entirely if the individual debtor has engaged in bankruptcy-related wrongs (e.g. concealing assets from creditors).

Certain debts of an individual debtor are not discharged based on the nature of the debt or the fact that the debts were incurred due to improper behaviour of the debtor. The most common types of non-discharged debt are typically related to individual debtor rather than the corporate debtor, and include certain types of tax claims, child support, alimony, debts for wilful and malicious injuries to person or property, debt to government units for fines and penalties. In general the directors and officers of a corporate debtor, will not be responsible for any debts from the estate.

Outside of bankruptcy, directors and officers have a duty of care (applying the same care as an ordinary prudent person) and a duty of loyalty (prohibits faithlessness and self-dealing), referred to as a fiduciary duty, towards the company's *shareholders.*

When a company moves into the "zone of insolvency", the fiduciary duty shifts from the stockholders to the *creditors*. Zone of insolvency refers to when a company becomes insolvent. A company is typically considered insolvent when it is unable to pay its obligations or the company's liabilities exceed the assets.

Directors and officers can be held personally liable for certain actions that are in breach of their fiduciary duty to creditors, during the time the company is insolvent. Usually this fiduciary duty towards creditors stops when the company files for bankruptcy, because most significant decisions are subject to review by interested parties and approval by the court. There is no uniform rule governing the releases and indemnification for directors and officers. However, the Business Judgement rule provides a safe harbour for directors, which operates from the presumption that directors' actions are in good faith.

Traditionally, large companies carry director and officer insurance which protects officers and directors for any actions taken in derogation of their twin duties of

loyalty and care generally to the extent such actions are not the result of gross negligence or wilful misconduct. In Chapter 7 cases, the trustee directly replaces the management.

b) Criminal offences

Directors and officers in a Chapter 7 or Chapter 11 case may be criminally indicted for fraud or gross negligence in performing duties and responsibilities.

c) Professional interdictions

After a company emerges from chapter 11, there are no penalties assessed on management. Absent a release, a management member may be held civilly liable if a creditor successfully prosecutes a cause of action against such individual. Unless management is subject to a non-compete agreement, individuals are free to engage in new enterprises. The only deterrent is whether such individual's reputation is adversely impacted by an unsuccessful reorganisation.

2. Excusability and possibility for a fresh start

The commencement of a Chapter 7 liquidation is an admission that the business enterprise has failed. Although the public may perceive such liquidation negatively, it does not necessarily mean that the directors and officers are stigmatised to be able to start new business.

The initiation of Chapter 11 proceedings, although newsworthy, does not necessarily create negative publicity, since the outcome of the proceedings is not always liquidation, but usually reorganisation. Even if the case is a "liquidating" Chapter 11, the debtor attempts to dispose the assets, as a going concern, which usually creates more value to the creditor if the assets are sold at liquidation values.

Rather than chilling new investments in the company, the procedure encourages and facilitates mergers and acquisitions by providing a mechanism for the debtor to identify parties interested in acquiring its assets. The latter are sold free and clear of liens, claims, and other interests, including secured claims.

During a Chapter 11 case, management is often rewarded through retention bonus and incentive compensation programs (subject to Bankruptcy Court approval) and is proposed to ensure that key management does not leave the company during its reorganisation. These programs are another way to mitigate the stigma of chapter 11 by encouraging management to remain with the company.

In general, the American system regards bankruptcies in a much more positive manner than in Europe, as further discussed hereunder.

4.3.3.2.COMPARATIVE ANALYSIS

Bankruptcy affects the debtor in many ways; his reputation may be prejudiced (depending on the publicity made regarding the bankruptcy); he may be faced with

creditors still requesting reimbursement or encounters difficulty in starting a new business because of restrictions resulting from the bankruptcy.

We shall describe hereunder, the major restrictions applied to debtors (individual entrepreneurs and directors of a company), sanctions that may constitute major obstacles to a new start.

We shall then discuss the possibilities offered by the European Member States to allow for the fresh start of new businesses and contrast it to the U.S. system.

I. Restrictions applied as a result of bankruptcy:

Restrictions that generally apply to bankrupt individuals or directors of bankrupt companies are:

- of a *pecuniary* nature (liable for all or part of the company's debts to the estate or creditors);
- of a *civil* nature (e.g. obligation to provide repair of damage suffered as a consequence of the bankruptcy);
- of a *criminal* nature (in case of fraudulent bankruptcy, concealing assets..);
- of a *prohibitive* nature (i.e. prohibited to exercise certain functions or to assume certain charges).

- *Individual entrepreneurs vs. directors:*

  In some countries, the sanctions that apply to individuals and to directors of companies are quite similar, except of course for legal specificities that result from the fact that directors have, unlike individual entrepreneurs, the duty to answer for their acts to the company's shareholders.

  The Greek system imposes stricter sanctions to individual entrepreneurs than to directors (only individuals automatically lose their trading capacity and are prohibited from exercising certain functions). This concept promotes the use of corporations for launching a new business rather than a sole proprietary.

- *pecuniary or civil sanctions vs. prohibitions:*

  All countries apply pecuniary or civil sanctions (that do not necessarily result from bankruptcy legislation but from general principles of tort or the obligation to repair a damage caused to others).

  The automatic prohibition of exercising certain functions or assuming certain charges after bankruptcy does not exist in all countries or is seldom applied. It is mostly in Greece or in Portugal that they are applied.

  It seems that, among these various sanctions, the sanction of prohibition constitutes a greater obstacle to the possibility of a fresh start.

- *sanctions in the interest of creditors vs. in the interest of the "society" in general*

  A common feature is the duty to protect the creditors and to respect the creditors' equality in the distribution of assets. Directors of bankrupt companies are often sued in this regard, if they favoured creditors to the detriment of others, before bankruptcy proceedings were initiated.

  The objective of other sanctions lies within the idea of "purifying" the market: expunging incapable entrepreneurs or making sure that they will not be able to launch a new business again (e.g. through the prohibition sanction).

- *"innocent" bankruptcy vs. fraudulent bankruptcy:*

  After having observed the various sanctions resulting from bankruptcies, one can not refrain from considering that some appear to be "normal" whereas others seem "unfair". Such consideration results from the fact that one tends to accept more easily sanctions applied as a result of wilfully fraudulent bankruptcies than the sanctions applied to "innocent" bankrupts, that suffered misfortune or following certain circumstances of life. It is easier to accept that fraudulent bankrupts be held liable for their remaining debts, or be prohibited from launching a new business again.

  Although this appears to be an essential element to consider when providing for post-bankruptcy sanctions, it seems that not all countries make a clear distinction between innocent or honest and fraudulent bankruptcies. Belgium, France, Luxembourg and mostly Spain tend to apply different sanctions to innocent bankrupts and fraudulent bankrupts. The Spanish system seems to be an example to follow in that regard, with its qualification of bankruptcies as fortuitous, tortuous or fraudulent.

  It is essential that a distinction is made between the two kinds of bankruptcies, so that honest bankrupts do not continue to be stigmatised through association with the dishonest.

II. Possibilities for a fresh start and stigma on bankruptcy:

What exactly is meant by "fresh start"? Fresh start is the possibility of continuing or starting a new business after a bankruptcy. Fresh start is rendered possible where the stigma on bankruptcy is low (i.e. the negative attitudes and barriers for entrepreneurs that discourage them from risk-taking and entrepreneurship).

Concretely, the stigma on bankruptcy can result from:

- the importance of sanctions applied to bankrupts;
- the prohibition to carry out economic activities;
- the negative publicity (e.g. mention of the bankrupt's name on a special list with the commercial jurisdiction, publication in local or national newspapers…) ;

- the possibility to invoke the directors' liability and the importance of the insurance coverage they may benefit from
- the confusion between fraudulent and non fraudulent bankruptcy.

In order for a bankrupt to bypass this stigma and to start a new business again, two important elements must be considered:

a) Discharge of the remaining debts:

As described above, a consequence of bankruptcy applied in almost all countries is the bankrupt's liability for his remaining debts.

In order to allow fresh start, the notion of discharge of debt is essential, but for individual entrepreneurs only. Bankrupt companies are usually, after the bankruptcy procedure is finished, totally liquidated so that their creditors no longer have anyone to turn to for the reimbursement of their claims (unless they can sue the company's directors at fault).

As for individual bankrupts, how could they possibly envisage the possibility of starting a new business if, as soon as they make any profit, their previous creditors will come knocking on their door in order to obtain satisfaction of their claims?

Some countries allow a total or a partial discharge of debts.

Very few countries provide for an automatic discharge of debts (e.g. Greece, but this advantage is strongly counterbalanced by the deprivation of the individual bankrupt's status of trader).

Most countries accept such discharge, but only following a special procedure (e.g. rehabilitation in Austria, Belgium, Germany, or Spain). This rehabilitation is often linked to the notion of "innocent" bankruptcy, which seems quite logical.

Some countries (Denmark, Italy) allow such discharge, but only upon fulfilment of strict conditions, e.g.:

- the total satisfaction of creditors (which seems almost impossible to achieve for a small bankrupt with nothing left), or
- the expiration of a certain period of time during which the bankrupt has proved his good behaviour.

Other countries (Austria or Finland) are very strict. They provide that discharge may only be granted if the debtor manages to obtain a reorganisation plan with its creditors (which is clearly difficult in a "traditional" bankruptcy where there are hardly no assets left, but might appear easier in countries where the initiation of bankrupt does not necessarily lead to the company's winding-up but may result in its reorganisation and continuity of its business).

In the countries where release of debts exists, such release is sometimes never granted if the bankrupt has been convicted with criminal offences (e.g. Italy, Luxembourg).

LIABILITY FOR THE REMAINING DEBTS AND POSSIBILITY OF DISCHARGE	
Austria	· Directors liable if committed a fault (e.g. did not file for judicial insolvency on time)µ · Discharge if reorganisation or in the course of private bankruptcies (non-traders)
Belgium	· Directors liable if committed a serious fault that led to bankruptcy or if did not declare bankruptcy on time · Discharge if excusability is granted by the court (in case of innocent bankruptcy)
Denmark	· Directors liable after *bankruptcy/winding-up* procedure but not after *compulsory composition* · Discharge in case of release after 5 or 20 years or in case of debt rescheduling
Finland	· Directors liable if did not file for bankruptcy on time or did not convene shareholders on time · Discussion on discharge
France	· Directors liable in case of mismanagement · Yes, unless specific offences committed
Germany	· Directors liable if failed to petition for bankruptcy on time · Discharge under customer insolvency procedure
Greece	· Directors liability if committed tort or did not notify creditors of cessation of payments · Discharge for individual bankrupts after 10 years or in case of judicial composition
Ireland	· Directors liable if fraudulent/reckless trading, misfeasance proceedings… · Discharge: possible
Italy	· Directors liable if do not respect their duty to protect the company's creditors · Discharge for individual bankrupts if good behaviour or creditors' settlement
Luxembourg	· Directors liable for misconduct in management or fault that led to company's bankruptcy · Discharge if composition after bankruptcy or rehabilitation
The Netherlands	· Directors liable if their failure contributed to bankruptcy · Discharge if scheme of arrangement reached with creditors
Portugal	· Directors liable if significantly contributed to the company's bankruptcy · Discharge
Spain	· Directors liable if did not file for bankruptcy on time · Discharge if rehabilitation is granted (in case of non-fraudulent bankruptcy)
Sweden	· Directors liable if deliberately or negligently caused damage to company · Discharge
UK	· Directors liable if misfeasance, fraudulent / wrongful trading · Discharge if non-fraudulent insolvency
USA	· Individual debtor discharged from debt, except certain debts (e.g. alimony, taxes, damages for fraud…) · Corporate debtor discharged from debts

b) *Non-prohibition of carrying-out commercial activities:*

Having obtained discharge of the remaining debts is not the only condition for a successful fresh start. How could the entrepreneur/director be able to launch a new business if he has been subject to a prohibition from exercising certain commercial activities or professions?

As mentioned above, Greece seems to have the strictest regime in that regard, for bankrupt entrepreneurs will immediately lose their trading capacity and are therefore excluded from any commercial or industrial profession.

Some professions (e.g. trustee, lawyer, employee in a company of public law, auditor...) may not be exercised by individuals previously bankrupt, either automatically as a result of the bankruptcy, either under certain conditions, as illustrated hereafter.

France bases such prohibition on the existence of criminal sanctions and applies it only to the activities for which the bankrupt was subject to fraudulent bankruptcy, which appears to be a sound limitation.

The Netherlands have a specific regime: bankrupt entrepreneurs and directors of a bankrupt company must, before incorporating a new company, obtain a "declaration of non-objection" by the Ministry of Justice. The granting of such declaration is mainly based on the distinction innocent vs. fraudulent bankruptcy.

In contrast, the U.S. Bankruptcy Code provides for a complete discharge of debt, subject to litigation involving objections by creditors and other limited exceptions. The discharge constitutes a permanent statutory injunction prohibiting creditors from taking any action designed to collect the discharged debt.

In general, the US Bankruptcy Code does not place any restrictions on the directors or individual entrepreneur subsequent to the discharge of the debt, which allows them to enter freely into other business ventures thereafter. However, restrictions will be placed on any individual that has been convicted to a criminal offence related to any fraud, gross negligence or wilful misconduct that led to the bankruptcy.

POSSIBLE PROHIBITION OF CARRYING -OUT COMMERCIAL ACTIVITIES AND CONDITIONS THEREFORE	
Austria	· Prohibition from engaging in an independent trade or business (with exemptions)
Belgium	· Prohibition from carrying out certain professions (auditor) or mandate (management of insurance company) under certain conditions (fraud…)
Denmark	· Business prohibitions (if illegal removal of company's assets)

Finland	· Possible business prohibitions
France	· Prohibition to practice certain activities (in case of fraudulent bankruptcy)
Germany	· Prohibition to practice for 5 years for directors who committed criminal offences.
Greece	· Individual bankrupts are excluded from any commercial or industrial profession, and from certain functions (civil servant, lawyer…)
Ireland	· Restriction from being appointed director of a company or incorporating a new company for a term of five years (unless proof of good conduct)
Italy	· Prohibition to carry out certain professions (lawyer, stockbroker) or charges (trustee, director..)
Luxembourg	· Under certain conditions (gross and indisputable mistake that lead to bankruptcy), prohibition from performing business activity
The Netherlands	· Prohibition unless "declaration of non-objection" obtained with the Ministry of Justice
Portugal	· Prohibition from carrying out any business, unless judge provides that they may and if no criminal proceedings
Spain	· Prohibition from engaging in any business, unless rehabilitated.
Sweden	· Prohibition from carrying out a business if in public interest and if severe negligence
UK	· Prohibition from being a director, receiver or incorporating a company under certain conditions (if criminal offences, wrongful trading…)
USA	· None, except if directors were criminally prosecuted

4.3.4. CONCLUSION

A comparison of the various bankruptcy systems in the EU Member States indicate that the common goal of these procedures is to provide for the efficient liquidation of businesses in distress and the reimbursement of its creditors.

The various country systems follow a similar theme:

- Judiciary procedure initiated by the debtor or its creditors or other party;
- Creditors declare their claim in order to obtain reimbursement;
- A specific authority (trustee, receiver, liquidator, etc.) replaces the directors of the company;
- Distribution to creditors of the remaining assets, following a specific priority.

In order to benefit from such procedures, various criteria's are required that all have to do with the impossibility for a business to recover. Some criteria's are quite flexible (e.g. Germany and Ireland: inability to pay any minor debt), whereas others are more strict (e.g. Austria where the company must suffer illiquidity and over-indebtedness

Although all countries' procedures seem to reach their goal, i.e. the liquidation of a company, some countries' systems (e.g. Germany, France and U.S.) also emphasis the restructuring of companies in order to (1) continue the business, (2) continue the employment of employees and (3) maximising the return to creditors and other stakeholders.

Most EU Member States' systems impose certain restrictions, whether of a pecuniary or criminal nature, on individual debtors or directors, or certain prohibition to perform certain activities or to be appointed in certain functions. This has the potential to create negative stigma, since these restrictions creates an environment that deters entrepreneurs to make a fresh start.

These restrictions are considered to be justified where the individual debtor and directors committed fraud or willingly caused the company's bankruptcy. However, in bone fide cases of bankruptcy, some of the restrictions could be considered excessive and prohibits entrepreneurs to make a fresh start. Not all countries make a clear distinction between bone fide and fraudulent bankruptcies and the restrictions related to a bone fide versus fraudulent bankruptcy.

According to our study, it appears that two conditions are required in order to allow for a new fresh start:

a) the total discharge of the debtors' remaining debts;
b) limited restrictions should be imposed on the individual debtor or director in a bone fide bankruptcy.

Under these circumstances, previously bankrupt entrepreneurs may find the motivation to launch a new business again.

4.3.LEGAL CONSEQUENCES OF BANKRUPTCY AND POSSIBILITIES FOR A FRESH START

This title summarises the bankruptcy procedures organised in the EU Member States and in the U.S. (hereafter "targeted Countries"). A thorough comparison between the different procedures is presented, in order to emphasise their particularities and to evaluate their degree of adequacy.

This title also describes the legal consequences arising from such procedures as well as the stigma that may result therefrom. These consequences will then be compared in order to highlight the general causes of a stigma of failure and develop the possibilities for a fresh start.

4.3.1.INTRODUCTION

Contrary to restructuring procedures aimed at rescuing a business (see section 4.2 of this report), bankruptcy is a formal judicial or administrative procedure that aims principally at realising the bankrupt's assets for the purpose of distributing the net proceeds to its creditors, usually as a result of its insolvency. In some countries however, the initiation of bankruptcy proceedings may result in the reorganisation of the business.

Bankruptcy procedures have important consequences regarding the liability of management and entrepreneurs, the prohibition from practising certain professions, criminal offences, etc. Currently the bankruptcy procedures create a stigma on failure, prohibiting entrepreneurs from starting new businesses.

4.3.2. INITIATION OF BANKRUPTCY PROCEDURES AND DIRECT EFFECT OF THESE PROCEDURES

4.3.2.1. OVERVIEW OF THE NATIONAL PROCEDURES

A. AUSTRIA[1]

In Austria, bankruptcy ("*konkurs*") is governed by the Bankruptcy Act of 1914.

Austrian bankruptcy law is primarily creditor oriented and mainly aims at liquidating the debtor's assets instead of trying to rescue the business.

1. Initiation of the proceedings

Bankruptcy applies to companies only, unlike the "private bankruptcy" (or *"privatkonkurs"*) for which only individuals may petition. The latter will not be further considered in this report.

Bankruptcy can be petitioned by:

- the debtor

[1] See the Austrian Bankruptcy Act of 1914

- or a creditor
- or the court (only when the court has rejected an application by the business) for the opening of reorganisation proceedings or when such proceedings did not lead to a successful settlement).

2. Criteria for the petition:

The ground for initiating bankruptcy proceedings is the *illiquidity* of the debtor (i.e. when he can no longer meet his financial obligations for a certain period of time). He must also be in a situation of *over-indebtedness* (i.e. his liabilities must exceed his assets. A pre-bankruptcy balance sheet must be established to determine whether the debtor is overly indebted).

The debtor must also have sufficient assets to cover the costs of the proceedings.

3. Effects:

A bankruptcy order is made by the court. The main effects of the judgement of Bankruptcy are:
- creditors must declare their claim within a specific deadline;
- a *bankruptcy administrator* is appointed, in order to continue, if possible, the debtor's business, inventory and liquidate the assets;
- a *creditors' committee* is appointed by the court. Such committee is composed of three to seven members, for the purpose of checking the cash management, assisting the bankruptcy administrator and approving certain transactions;
- a *creditors' assembly* supervises the bankruptcy *administrator* and the creditors' committee
- a peculiar body is the *Association for the Protection of Creditors' Rights:* there are in Austria 3 associations, created upon approval of the Federal Ministry of Justice, that represent and secure creditors in the course of insolvency proceedings.
- the assets can be distributed following the distribution plan drafted by the bankruptcy administrator and approved by the creditors' committee.

4. Publicity:

Since 2000, the court's bankruptcy judgement must be published on the Internet.

In general, the bankrupt's name is not mentioned in a specific register but only on the Internet, except for companies registered in the Commercial Register, for which the opening of bankruptcy proceedings will be published in this Register.

5. End of the procedure:

The procedure ends:
- When all assets of the bankrupt have been distributed;
- Or when it appears that that the assets are not sufficient to cover the costs of the proceedings;
- Or with the consent of all creditors;

- Or when the bankruptcy proceedings are converted into "compulsory reorganisation" proceedings (see Title 4), after the reorganisation plan has been accepted by the creditors and confirmed by the court.

B. BELGIUM

In Belgium, bankruptcy ("*faillite*" or "*faillissement*") is governed by the Belgian law of August 8, 1997 on bankruptcy.

1. Initiation of the proceedings

Bankruptcy proceedings apply to traders (individuals or companies) only.

They are initiated by the debtor (who is obliged to do so within one month of the cessation of his payments), a creditor or the Public Prosecutor.

2. Criteria for the petition:

The law requires that the debtor:
- has ceased its payments, and
- has lost its creditworthiness.

3. Effects:

The main effects of the bankruptcy order are:
- a receiver in bankruptcy ("*Curateur/Curator*") is appointed to recover and realise the debtor's assets, and to distribute the net proceeds to the creditors;
- creditors must declare their claim within a specific period of time;
- the debtor is automatically divested from the control of its assets;
- all claims against the bankrupt become due;
- a stay of legal proceedings and execution measures against the debtor or his property.

4. Publicity:

The court's bankruptcy order must be published in the Official Belgian Gazette and in two newspapers.

A file relating to the bankrupt will be kept at the clerk of the commercial court and any interested party may consult it for free.

5. End of the procedure:

The procedure ends when all assets are distributed and the company's liquidation is achieved or if the assets are not sufficient.

C. DENMARK

Under Danish law, bankruptcy *("Konkurs")* is governed by the Danish Bankruptcy Act of June 8, 1977 (consolidated in September 1986).

An insolvent debtor's property is liquidated and its proceeds are distributed among its creditors following the *bankruptcy/winding-up* procedure ("*konkurs*") or the *Liquidation Composition* procedure ("*likvidationsakkord*"). The difference between these procedures is that, in case of *liquidation composition* as opposed to *bankruptcy/winding-up*, the trader is discharged for his remaining debts.

Liquidation composition may be carried out voluntarily by agreement or as a compulsory composition (see Title 4 for the description of this procedure). In this section we will only address the *bankruptcy/winding up proceedings*.

1. Initiation of the proceedings:

Bankruptcy/winding-up proceedings, which apply to both natural and legal entities (company), are initiated either by the debtor or his creditors.

2. Criteria for the petition:

In order to apply for bankruptcy/winding-up, a company must be insolvent. Under Danish law, insolvency is defined as a state of "illiquidity", i.e. the debtor is not able to meet his financial obligations as they fall due.

3. Effects:

The purpose of this procedure is to ensure that the creditors receive an equal treatment in the distribution of their debtor's assets, with priority to secured or preferential creditors.

After a bankruptcy/winding-up order is issued by the court, trustees/liquidators will be appointed who will take over the business management and realise its assets.

There is a stay of all legal proceedings and executions of enforcement against the bankrupt's property: creditors may no longer levy execution or attachment, they must wait for the assets' distribution by the liquidator.

4. Publicity:

Publicity is generated by the bankruptcy proceedings.

5. End of the procedure:

The procedure ends when all assets are distributed among the creditors and, if the debtor is a company, when it is dissolved.

D. FINLAND

In Finland, bankruptcy *("konkurssi")* is governed by the Finish Bankruptcy Act of 1968, the Act on the Recovery of the Bankruptcy Estate of 1991, the Act on the Priority of Claims of 1992 and the Act on the Supervision of the Administration of Bankruptcy Estates of 1995. A proposal for a government bill has recently been

approved which will result in a new Bankruptcy Act that clarifies the existing legislation. It is expected to become law in 2003.

1. Initiation of the proceedings:

Bankruptcy applies both to individuals and companies.
It is initiated by the debtor (voluntary) or a creditor (involuntary).

2. Criteria for the petition:

A particularity of the Finish system is that a debtor may voluntarily file for bankruptcy, *without regard* to any preconditions of its financial status.

However, in case of involuntary bankruptcy, creditors must prove one of the six conditions set out in the Bankruptcy Act (e.g. an unsuccessful attempt of execution, negligence to satisfy creditors eight days after receiving a certified request for payment from a bailiff, etc…).

After proceedings are initiated voluntarily, a provisional administrator is appointed, for the purpose of submitting an inventory of the debtor's estate in order to check if it is sufficient to merit full bankruptcy proceedings.

3. Effects:

Various actors intervene in the procedure:

- a *provisional administrator* (see above) who will be replaced, when bankruptcy is accepted, by:
- a *trustee*: his role is to take care of the procedure of acceptance of creditors' claims and to act as executor after the expiration of the time limit for the proof of claims.
- The *creditors' meeting* plays an important role in the bankruptcy estate's administration, while the administrator and trustee must comply with all of its major decisions.
- A bankruptcy *ombudsman* supervises all actions of the administrator and trustee. It is an independent and impartial authority, who may not prejudice the rights of the debtor nor the creditors.

Other effects are:

- Execution of the debtor' assets are suspended;
- Interest on a debtor's debt continues to accrue, unlike in other countries;
- The debtor loses all control over its property and assets. This authority is taken over by the body of creditors;
- After the creditors' claims have been lodged and accepted, the assets will be distributed among the creditors. Secured creditors will receive payment prior to the other creditors. Claims secured by a floating charge (security not attached to a particular asset but to a category of assets that may be modified through the evolution of the business. In the case of bankruptcy, the "floating charge" becomes a "fixed charge") also enjoy a priority of payment.

4. Publicity:

Bankruptcy judgements are made public in newspapers. There is no specific bankruptcy register.

5. End of the procedure:

The procedure ends when all assets have been distributed and the company is liquidated.

E. FRANCE

French bankruptcy *("faillite")* is governed by the Law of January 25, 1985 on restructuring and judicial liquidation of companies, as modified by the law of June 10, 1994.

The French bankruptcy is not favorable to creditors, for its main priority is to save the company and not only to settle its debts.

Judicial liquidation (or *"liquidation judiciaire")* of a company may however be ordered by the court either:
- after an observation period (that lasts from 4 to 20 months) during which the company may continue its business, and at the end of which the judge must decide between a reorganisation or a liquidation procedure; or
- immediately, when the business has ceased all activities or when its restructuring is clearly impossible.

1. Initiation of the proceedings:

Bankruptcy proceedings are open for both:
- companies (practising commercial activities or not);
- individuals (merchants, registered craftsmen and farmers).

Proceedings may be initiated by:
- the debtor itself (it is obliged to declare its default of payment within 15 days of cessation of payments);
- a creditor, regardless of the amount of its claim;
- the Public Prosecutor (seldom);
- the Court.

2. Criteria for the petition:

A Bankruptcy order can be made by the court, on the following grounds:
- default of payment, i.e. when the debtor's available capital (defined as the assets that can be liquidated within a few days) does not meet its debt obligations (debts due and payable);
- breach of the terms of the amicable settlement or of the continuation plan (see Title 4);

- penalties against managerial misconduct (i.e. bankruptcy opened against the director of a company if he was found liable for the company's debts and did not pay them, or if he misappropriated corporate funds, signed interested transactions...).

3. Effects:

The Bankruptcy order governing the company's liquidation has the following main effects:
- a liquidator is appointed for the purpose of selling the business' assets and dividing them among the creditors;
- an '*insolvency judge'* is appointed, in order to supervise the liquidation and to ensure the protection of the interests of all parties;
- in case an observation period precedes the liquidation, it has the following effects upon the creditors:
  a) all court proceedings involving debts that arose prior to the commencement of the bankruptcy proceedings are suspended, as well as the enforcement of any judgement;
  b) the debtor is prohibited from paying any debt that arose prior to the commencement of the bankruptcy proceedings;
  c) interest accrual on prior debts is suspended;
  d) any acceleration of payment of outstanding debt is prohibited.
- Creditors are paid following specific rules (e.g. waged workers first, then legal expenses, creditors with pledges or mortgages…).

4. Publicity:

The judgement initiating the liquidation procedure must be published in the Commercial Registry for companies and entrepreneurs, in the Professions Registry for craftsmen and in a newspaper.

5. End of the procedure:

The liquidation procedure ends either when all the company's debts are settled, or when its assets are insufficient to settle all of its debts (which is mostly the case).

F. GERMANY

German insolvency proceedings ("*insolvenzverfahren")* are governed by the German Insolvency Act of October 5, 1994 (entry into force on January 1, 1999).

They do not regulate only a bankrupt's compulsory winding-up. These proceedings may also lead to reorganisation measures.

They apply to companies or individuals ("customer insolvency procedures").

For the purposes of this report, we will consider these proceedings as far as they govern compulsory winding-up of companies.

1. Initiation of the proceedings:

"*Insolvenzverfahren"* procedure can be initiated by:
- the debtor himself
- a creditor;
- against any individual or company (except the Federal or State government or any company subject to the latter's supervision)[2].

2. Criteria for the petition:

The criteria for commencement are quite flexible and include the following:
- A debtor's inability (or imminent inability) to pay its debts as they fall due. Even an inability to balance *minor* outstanding payments can justify the commencement of insolvency proceedings, or
- bankrupt's liabilities exceeding its assets (excessive indebtedness).

3. Effects:

A petition for "*insolvenzverfahren"* has the following effects:

a) Preliminary measures: in order to secure the bankrupt's property, the court will appoint a preliminary trustee who will run the bankrupt's business until the opening of insolvency proceedings.

b) Insolvency proceedings: if the court agrees to open insolvency proceedings:
- A final trustee in insolvency is appointed to manage the company. He will dispose of the debtor's assets instead of the bankrupt, unless the court orders self-management (i.e. the bankrupt continues to manage its business under supervision of the trustee);
- Creditors register their claim, within a specified period of time;
- The trustee collects the bankrupt's claims and realises the assets. In this regard, like in most countries, he is required to respect certain rules, notably:
  a) the assets of creditors with a right of ownership against the bankrupt (owners with a retention title, landlord, lessor…) will be segregated out of the insolvency's estate.
  b) Other creditors (having security on movable or immovable property) will have a privileged claim against the insolvent estate at its realisation.

4. Publicity:

The court resolution over the initiation of the insolvency proceedings is made public by the office of the insolvency court in the German Federal Gazette ("*Bundesanzeiger")*.

The public announcement takes the form of an entry in the publication for official notices of the court. The insolvency court can arrange further and repeated

[2] They however do not apply against individuals who are not self-employed or have been self-employed, to whom a simplified insolvency procedure applies.

publications. In particular, the court resolution should serve the interests of the creditors and debtors of the company.

Furthermore the initiation of insolvency proceedings must be recorded in the land register ("*Grundbuch"*).

5. End of the procedure:

The procedure will end:
- when all assets have been realised and distributed among the creditors;
- after the preliminary measures are taken, investors may show interest in the insolvent company.

G. GREECE

In Greece, bankruptcy is governed by Articles 525 to 596 of the Greek Commercial Code and Act of 12 December 1878, amended by the Law of 22 February 1910 and the N.L. 635 of 1937.

1. Initiation of the proceedings:

Bankruptcy proceedings apply only to traders, whether individuals or companies.

They can be initiated by the debtor (who is obliged to do so by the law), a creditors or the court (exceptionally).

2.Criteria for the petition:

Cessation of payments is a pre-condition for bankruptcy. It refers to the permanent inability for the debtor to pay its due and entitled debts. It does not depend on the financial situation of the debtor but on the non-payment of his debts.

3.Effects:

The main effects of a bankruptcy judgement can be summarised as follows:

- a '*Judge Rapporteur'* is appointed for the purposes of verifying the creditors' claims and calling the general meeting of shareholders, that will protect the creditors' interests during the proceedings;
- an Administrator is appointed for the purpose of representing, assisting and monitoring the debtor during the bankruptcy procedure, and to draw up a list of assets and liabilities in order to be distributed to the creditors;
- all proceedings based on ordinary claims are suspended (not claims secured by pledge, mortgage or lien);
- as regards the distribution of assets, secured creditors will be satisfied by preference and may only participate in the creditors' meetings for the unsatisfied portion of their claims. The creditors' meeting will attempt to reach a settlement with the debtor by means of a contract, on how to distribute the assets.

4.Publicity:

The declaration of bankruptcy must be published in the Lawyers' Pension Fund Bulletin and the bankrupt's name should be mentioned in a special registry.

5.End of the procedure:

The procedure is terminated when the bankrupt's estate is liquidated, when the court decides to end it for lack of assets, or if a judicial composition is reached.

H. IRELAND

In Ireland, "*compulsory liquidation"* is governed b the Irish Companies (Consolidation) Act of 1908, the Companies Act of 1913, the Companies Act of 1963, the Companies Act of 1990 and the Company Law Enforcement Act of 2001.

1. Initiation of the proceedings:

The liquidation of an Irish company may result from a compulsory liquidation, ordered by the court, following the petition of the company itself, any creditor or the Director of Corporate Enforcement (an independent, state-funded agency, responsible for the enforcement of the Companies Act).

2. Criteria for the petition:

A petition for '*compulsory liquidation'* may be initiated when a company is unable to pay its debts (e.g. when a creditor has obtained a judgement for debts but has been unsuccessful in attempting to execute it).

3. Effects:

The court will appoint a liquidator who will take over the management, wind up the company's business, realise and distribute its assets (with a priority to preferential creditors or creditors whose claims are secured by a floating charge).

Once the company is declared to be liquidated there is a stay of all legal proceedings and executions of enforcement against the bankrupt's property.

4. Publicity:

The application for liquidation proceedings must be published in local newspapers.

5. End of the procedure:

The procedure ends when the assets of the company have been completely wound up and the company is dissolved.

I. ITALY

In Italy, bankruptcy is governed by the Italian Royal Decree n° 267 of March 16, 1942 (also referred to as the Bankruptcy Act).

As the aim of the Italian legislator was clearly to protect the interest of creditors and to eliminate insolvent companies from the market by liquidating them, Italy has developed several insolvency procedures, whereas the restructuring of companies has not captured much of its attention.

The three major insolvency procedures in Italy will briefly be described, i.e. the liquidation bankruptcy (*"fallimento"*), the compulsory administrative liquidation (*"liquidazione coatta amministrativa"*) and the extraordinary administration (*"amministrazione straordinaria"*). These procedures are often linked, as one procedure may lead to another.

I.1. Liquidation Bankruptcy

1. Initiation of the proceedings:

This procedure may only be initiated by private entrepreneurs with a substantial business organisation in terms of capital, work force and equipment. It excludes companies, public entities, agricultural entrepreneurs and small individual entrepreneurs from the application of liquidation bankruptcy.

It can be initiated by:
- the debtor
- a creditor
- the Public Prosecutor
- the Court.

2. Criteria for the petition:

In order to apply for this procedure, the private entrepreneur must be in a state of "functional impotence", i.e. it is impossible to meet its financial obligations regularly and through normal business practices, due to a lack of liquidity and credit.

3. Effects:

As soon as the Court renders a judgement adjudicating the debtor bankrupt:
- a 'bankruptcy trustee' is appointed to realise the bankrupt's property and to distribute it among the creditors;
- a '*delegated judge'* is appointed to supervise the procedure;
- the creditors must lodge their claim;
- no execution measure may be taken against the bankrupt;
- Preferred and secured creditors (e.g. claims for the trustee's fees, costs of judicial proceedings, employees' wages…) will be paid prior to unsecured creditors.

4. Publicity:

The adjudication in *"fallimento"* is published in the Public Record kept by the court and the proceedings are published in the Register kept by the Chamber of Commerce accessible on line.

5. End of the procedure:

This procedure may lead to a creditors' settlement[3] and the bankrupt will then recover the possession and management of its assets.

Or, if such settlement could not be reached, the bankrupt's business will be wound-up.

I.2. Compulsory administration liquidation

1. Initiation of the proceedings:

This is an administrative procedure that only applies to certain categories of companies owned partially by the State or subject to the control of administrative authorities (e.g. banks, insurance companies...).

It is initiated by the company itself.

2. Criteria for the petition:

The company has a discretionary power to decide whether it needs to be removed from the market, not only in case of financial distress, but also for any problems that may jeopardise its ability to carry on business. In order to protect the rights of creditors and third parties, the Court may however check the insolvent status of the company.

3. Effects:

When the company has declared that it wishes to initiate this procedure (and unless the court rejects such action):
- a '*liquidating commissioner'* (an administrative entity) is entrusted with the power to evaluate and liquidate the assets, and to distribute them amongst the creditors;
- this commissioner is appointed and controlled by a public administrative body with the same powers and functions as the bankruptcy court.
- the creditors will be reimbursed (secured and favoured creditors first) and they may appeal to the court against the distribution of the assets.

4. Publicity:

The proceedings are carried out under the control of the Industry and Trade Ministry, whose decisions and orders are rendered by a Decree which is duly published in the *Gazetta Ufficiale della Republica.*

The proceedings are also published in the Register kept by the Chamber of Commerce, which is accessible on line.

5. End of the procedure:

[3] See above, Title 4. In such case, the bankrupt must have offered full payment of secured creditors and a pro-rata payment to unsecured creditors. A majority of creditors and the court must also have approved the bankrupts' offer.

Again, this procedure may result in a settlement by the creditors, or in a liquidation of the company.

I.3. Extraordinary administration[4]

This procedure aims not only at satisfying creditors' rights but also at reducing the negative effects of bankruptcy on a company's work force, by trying to find an alternative solution to bankruptcy.

1. Initiation of the proceedings:

The extraordinary administration applies only to major companies (of at least 200 employees).

It can be triggered by:
- the debtor
- a creditor
- the Public Prosecutor
- the court.

2. Criteria for the petition:

In order for the court to accept the application for this procedure, the liabilities of the failing business must amount to at least one third of the total of its assets and its sales and services profits of the last financial year.

3. Effects:

The procedure starts with an **observation period** (of max. 2 months), during which a '*judicial commissioner'* may be appointed to manage the company, under the supervision of the court; or the entrepreneur may keep its management power.

After this observation period, if it appears that no reorganisation procedure is possible, the procedure is converted into a liquidation bankruptcy procedure (see point *I.1*)

4. Publicity:

We refer to the compulsory administrative procedure. (point *I.II*)

5. End of the procedure:

See the liquidation bankruptcy procedure (point *I.1*).

J. LUXEMBOURG

[4] Introduced by the law of April 3, 1979.

In Luxembourg, bankruptcy (*"faillite")* is governed by articles 437 to 592 of the Luxembourg Commercial Code.

1. Initiation of the proceedings:

Bankruptcy only applies to traders (whether companies or individuals).

It may be initiated by creditors, the court or the debtor himself (who is obliged to do so within one month from the cessation of payments).

2. Criteria for the petition:

Both of the following conditions must be met in order for bankruptcy to be ordered by the court:
- suspension of payments (the debtor can no longer pay his liquid and due debts 'illiquidity');
- Loss of credit worthiness (the debtor's business is not trustworthy anymore).

3. Effects:

As soon as the court orders bankruptcy:
- he will appoint a judge to supervise the bankruptcy proceedings as well as a trustee who will take over the management of the business and who will draw up a state of the bankrupt's assets;
- creditors must lodge and prove their claims;
- no individual action or execution may be taken against the debtor;
- interests on claims that are not secured stop accruing;
- the assets are distributed among the creditors in accordance with the distribution plan voted by them and signed by the court.

4. Publicity:

The bankruptcy judgement must be published in newspapers and displayed in the hearing rooms of the commercial court for a period of three months.
The public may also consult the company's file at the commercial court.

5. End of the procedure:

The procedure is brought to an end when all assets are distributed and the company is liquidated.

It may also be closed if the assets are not sufficient to cover the administration and liquidation costs of the bankruptcy or if a composition after bankruptcy is reached.

K. THE NETHERLANDS

In the Netherlands, bankruptcy (or *"faillissement")* is governed by the Dutch Bankruptcy Act of September 1, 1896 and its numerous amendments.

The Dutch legislation provides for three different legal procedures in relation to insolvency. The *suspension of payment* was discussed above (see Title 4), whereas the *debt restructuring* involves private individuals only and will not be further considered in this report[5]. We will briefly describe the *bankruptcy* procedure that applies to companies and individuals.

1. Initiation of the proceedings:

The proceedings can be initiated both against individuals and companies, by:
- the debtor himself;
- creditors (case law has established that there should be more than one creditor);
- the Public Prosecutor, in case the public interest is involved.

2. Criteria for the petition:

A declaration for bankruptcy requires the existence of facts and circumstances evidencing:
- that the debtor has ceased to pay, *and*
- that the debtor has several creditors.

3. Effects:

The opening of bankruptcy proceedings has the following effects:

- the court appoints a '*trustee'* charged with the administration and liquidation of the bankruptcy estate. The bankrupt loses all free disposal and administration of its property;
- the court also appoints a '*bankruptcy judge'* to supervises the administration and liquidation;
- creditors lodge their claim;
- secured creditors (mortgagees and pledges) may exercise their security rights as if bankruptcy had not taken place. If they wish to sell the secured goods, they must however do so through a public sale (which is likely to generate less proceeds than a private sale), or through a private sale but with the co-operation of the trustee;
- however, secured creditors (as well as third parties) are not allowed to exercise their rights if a "cooling down period" (i.e. period of up to one month (with a possible extension to two months) is ordered by the *bankruptcy judge*, during which claims of third parties or secured creditors against assets belonging to the bankruptcy estate may only be executed with the trustee's authorisation);

4. Publicity:

The publicity surrounding insolvency proceedings consists of:
- the publication of the declaration of insolvency and the termination of the insolvency proceedings;
- the public register held by the court;
- notification with the Trade Registry

[5] See the Dutch report, p. 32-34.

5. End of the procedure:

The bankruptcy ends by:
- closing due to lack of assets;
- closing if the bankrupt is in a position to resume payment of its debts;
- a scheme of arrangement with the creditors.

L. PORTUGAL

In Portugal, bankruptcy *("insolvencia")* is governed by the Bankruptcies Code of 1935 and the Decree-law of January 3, 1990

1. Initiation of the proceedings:

Bankruptcies apply only to "debtors holding an entrepreneurial organisation" (individuals or companies).

They are initiated by the debtor, a creditor, the Department of Public Prosecution or the court (if an opposition to the recovery procedure is lodged by creditors representing at least 51% of the recognised outstanding debts).

2. Criteria for the petition:

The company must be unable to meet its financial obligations in time because its available assets are insufficient to satisfy its current liabilities.

3. Effects:

Once bankruptcy has been ordered by the court:
- a 'judicial liquidator', in charge of the recovery and sale of the debtor's assets, is appointed;
- 'creditors' committees' are appointed to supervise the liquidator;
- suspension of execution measures;

4. Publicity:

Bankruptcy judgements are published.

5. End of the procedure:

The procedure ends when the company is liquidated (after all assets have been distributed) or where the creditors have agreed a recovery plan.

M. SPAIN

In Spain, bankruptcy (or "*quiebra*") is governed by various legislation: the Spanish Commercial Code of 1885, the Civil Procedural Rules of 1881 and articles 1001 to 1177 of the former Commercial Code of 1829, which remains in force for the specific provisions on bankruptcy.

1. Initiation of the proceedings:

Bankruptcy proceedings apply to traders (whether individuals or companies).

They can be initiated by:
- the debtor himself ((following a legal obligation, when he is facing a situation of stay of payment of his debts);
- any legitimate creditor.

2. Criteria for the petition:

The business must be in a situation of "generalised stay of payments", which is a broad concept defined case-by-case by the court, that corresponds to an economic imbalance whereby the business' liabilities exceed its assets.

Examples of facts that have led to the opening of bankruptcy proceedings are:
- unsuccessful seizure of assets by a creditor;
- suspension of a payment if this suspension indicates that the business is insolvent;
- non-compliance by the business of a convention reached with its creditors, within the procedure of suspension of payments.

3. Effects:

The main effect of a bankruptcy order are:

- the appointment of several '*mandatories'* (more than in foreign bankruptcy procedures):
  a) a '*Depository'*: responsible for the recovery of the bankrupt's assets and for the management of its business until Receivers are appointed;
  b) a *Creditors' Meeting*: that will vote on any proposal submitted by the debtor and approve the classification and ranking of debts. Receivers are appointed at this meeting;
  c) *Receivers*: creditors that represent the main body of creditors, manage and liquidate the bankruptcy estate. Unlike most bankruptcy procedures, the debtor's assets are therefore managed by the creditors themselves;
  d) a '*Commissioner'*: delegate of the court who supervises the function of the Receivers;
- the creditors must declare their claim within a specific period of time;
- the assets are, after being recovered by the Depository, distributed among the creditors, following the ranking approved by the Creditors' Meeting;
- secured creditors may however enforce their security separately.

4. Publicity:

The declaration of bankruptcy must be published in the Official Gazette and in certain newspapers, and registered in the Civil, Commercial and Property Registry.

5. End of the procedure:

The procedure is brought to an end when:

- all assets are distributed and the company is liquidated;
- the application for bankruptcy is dismissed for lack of assets or absence of creditors;
- a composition agreement is reached between the debtor and its creditors, within the bankruptcy procedure.

N. SWEDEN

In Sweden, bankruptcy (*"konkurs")* is governed by the Bankruptcy Act of 1987 and the Preferential Rights of Creditors Act (1979).

1. Initiation of the proceedings:

The Swedish *konkurs* applies to companies and individuals, traders or non traders.

It can be initiated either by the debtor or its creditors. When the *debtor* petitions for bankruptcy, it will be declared bankrupt the same day, whereas if the procedure is initiated by *creditors*, the company will be considered bankrupt only when the court declares it.

2. Criteria for the petition:

The debtor must be unable to pay its debts as they fall due and such inability must not be merely temporary.

3. Effects:

The court will appoint a receiver who will recover and realise the company's assets, and distribute the proceeds among to the creditors. He will also take over the company's management.

A dividend is distributed to preferential and secured creditors first. A particularity is that non-preferred creditors are not required to automatically declare and prove their claim. The receiver will ask them to lodge a proof of their claim only if it appears that they will receive a dividend after the preferential and secured creditors have been paid (this seldom occurs).

4. Publicity:

The declaration of bankruptcy is announced in the Swedish Official Gazette (the *Post- och Inrikes Tidningar*).

The bankruptcy is also recorded in an official register where all Swedish bankruptcies are gathered. The Patent and Registration office keeps this Register and the information is public and is open to inquiries by members of the general public.

5. End of the procedure:

The procedure is brought to an end when the receiver submits his final report and his dividend proposal to the court.

O. UNITED KINGDOM

In the United Kingdom, the Insolvency Act 1986 and the Insolvency Rules 1986, amended by the Insolvency Bill 2000, govern insolvent companies' proceedings.

The term "bankruptcy" refers to the procedure applied only to individuals unable to pay their debts, and not to companies. It will not be discussed in this report.

In order to bring the existence of a company to an end and to distribute its assets, a compulsory or voluntary (not discussed here) liquidation may take place, sometimes through the mechanism of receivership.

0.1. Compulsory liquidation

1. Initiation of the proceedings:

Compulsory liquidation is initiated by the failing company itself, any creditor, a shareholder of the company and, in very limited circumstances, by the Department of Trade and Industry.

2. Criteria for the petition:

A petition for compulsory liquidation may be presented to the court on a number of grounds, usually on the ground that a company is unable to pay its debts (e.g. if it has neglected a demand of payment for more than £750 or if it is proved that the value of the company's assets is less then the amount of its liabilities).

3. Effects:

When a winding-up order is made, the official receiver of the court becomes the liquidator of the company until meetings of creditors decide to appoint someone else. The directors' powers will cease as from that moment.

No action can be started unless the leave of the court is obtained and any execution started after the commencement of a compulsory liquidation is void.

The liquidator will apply the proceeds of the realised assets and pay creditors, who are required to submit their claims (by sending particulars of it to the liquidator by way of a proof of debt) in the following order:

(a) creditors secured by a fixed charge or mortgage, out of the proceeds of the asset subject to the fixed charge or mortgage;
(b) the liquidator's costs and remuneration;
(c) preferential creditors (e.g. Inland Revenue, the Department of Social Security, occupational pension schemes and employees who are owed remuneration up to a set amount);
(d) creditors secured by a floating charge, out of the proceeds of the assets subject to the floating charge;
(e) unsecured creditors; and

(f) any claims arising from post-liquidation interest.

4. End of the procedure:

The procedure ends when all assets are liquidated and the company's existence is brought to an end.

5. Publicity:

Once a winding up order has been made by the court, the official receiver (who is the liquidator until another liquidator is appointed) will file a copy of the order with the Registrar of Companies, ensure that the order is published in the government gazette and will advertise the order in a newspaper of his choice.

6. Receivership:

This procedure, discussed above in section 4.2, by which a creditor may appoint a receiver in order to realise his security, may also lead to a company's liquidation.

P. UNITED STATES

U.S. companies can be either liquidated under Chapter 7 (usually smaller companies) or under Chapter 11 (typically large companies) of the Bankruptcy Code of 1978.

P.1. Chapter 7 Liquidation

1. Initiation of the proceedings:

The liquidation procedure under Chapter 7 applies to individuals, partnerships and corporations, excluding railroads, domestic or foreign insurance companies or banks.

The debtor can initiate the procedure (voluntary case) or by three or more of its creditors (holders of a claim against the debtor that is not a contingent liability or subject to a bona fide dispute) where the company has more than 12 creditors or a trustee representing such creditors. After a creditor group has filed a petition for a Chapter 7 case, the debtor has the right to oppose the petition in court, to either change it to a Chapter 11 case or dismiss the case.

2. Criteria for the petition:

The basis for filing a petition under Chapter 7 is similar to the filing of a petition under Chapter 11 and has been discussed under title 4.2.

3. Effects:

Under Chapter 7, the company stops all operations and goes completely out of business. A trustee is appointed to pursue any estate claim, liquidate the debtor's assets, and distribute it to the creditors in order of priority; secured creditors first, then holders of administrative expense claims, holders of priority claims, employee claims, tax obligations, etc. and lastly holders of unsecured claims. A creditors committee

could be appointed, representing the unsecured creditor group, if the creditor group so decides.

4. Publicity:

The publicity generated from a bankruptcy filing is dependant on the size of the company and not on the type of chapter filing. Therefore, since most companies filing under Chapter 7 are smaller companies, the publicity generated is not as much as when a large company files under Chapter 11. Pleadings are filed with the Bankruptcy court and maintained by the clerk of the court in a docket that may be viewed by the public.

5. End of the procedure:

The procedure ends when all assets have been liquidated and distributed.

P.2. Chapter 11

A company can also liquidate its business under Chapter 11. During a liquidating Chapter 11 case, the debtor in possession attempts to sell or dispose of all or substantially all the assets of the debtor's estate, ordinarily as a going concern. The plan of reorganisation provides for the liquidation of any remaining assets and for the distribution of the proceeds of the liquidation.

Refer to Title 4.2 of the report regarding proceedings under Chapter 11 and the effects.

P.3. Choice between Chapter 7 and Chapter 11

A **debtor** may prefer liquidation in a chapter 11 case over liquidation in a chapter 7 case because (unless a chapter 11 trustee is appointed), the debtor will remain in control of its business and property may continue to operate while the liquidation is conducted. This may make it more likely to obtain going concern values rather than liquidation values.

Creditors may agree to a chapter 11 liquidation in order to avoid chapter 7 expenses, because they believe the debtor will be able to maximise the value of the its property better than a trustee unfamiliar with the debtor's business and property, or because the creditors committee plays a more important role in chapter 11 and tends to surrender its powers to a chapter 7 trustee.

4.3.2.2. COMPARATIVE ANALYSIS

The common aim of most countries' bankruptcy procedures is to liquidate insolvent businesses. A comparison of the various bankruptcy procedures and its direct effect is discussed under the following sections:

A. Objective of the procedure:
B. Nature of the procedure
C. Quality of the debtor

D. Potential triggers for bankruptcy procedures
E. Possible initiators
F. Main effects of bankruptcy
G. Key players involved in the procedure
H. Creditors' role and distribution of the assets
I. End of the procedure.

A. Objective of the procedures:

Traditionally, the objective of bankruptcy procedures was to sanction failing businesses that betrayed its creditors' trust. The civil and criminal sanctions resulting from this betrayal, will be discussed in the next chapter (Chapter 4.3.3).

Three major trends have been observed:

- bankruptcy should only achieve one goal: maximum reimbursement of the debtor's creditors;
- the desire to liquidate failing businesses as soon as possible, to ensure a stable market;
- it is more advantages to the stakeholders of the company (i.e. creditors and employees) that a failing business be saved and reorganised, rather than be liquidated. This help people realise that failing companies are not always liquidated and the stigma of bankruptcy could therefore be reduced.

These trends do not only result from policies followed by national governments, but also from historical considerations and from the date of the national legislation (bankruptcies in Austria, Greece, Italy and Spain are still based on rather old legal sources). Traditional legislation tends to punish failing businesses, whereas recent developments promote restructuring.

The majority of the countries analysed favour the first two trends (i.e. reimbursement of creditors and efficient liquidation of failing businesses).

In other countries, however, (such as France and Germany), the initiation of bankruptcy procedures begins with an observation period in order to determine the business' best outcome: a traditional (liquidation) procedure or a restructuring procedure. Such perspective seems a good way to reduce the stigma on bankruptcy. That is, the announcement that a company has entered into bankruptcy proceedings should not be perceived that the company is to be liquidated, but rather that there is a chance of reorganisation. However, it is not clear whether the French and German citizens are aware of this aspect, or if to them, any bankruptcy procedure is assimilated as the end of a company. In line with countries such as France and Germany, the U.S. Bankruptcy code specifically makes a distinction between a reorganisation bankruptcy (Chapter 11) and a liquidation bankruptcy (Chapter 7). This distinguishes between a company that still has a chance to reorganise versus a company that is going out of business.

In other countries, (such as Austria, Italy, and the Netherlands) a creditors' settlement or scheme of arrangement may be reached at the end of the procedure in which case the company will not be liquidated.

CREDITOR- OR DEBTOR- ORIENTED PROCEDURE	
Austria	· Creditor-oriented
Belgium	· Creditor-oriented
Denmark	· Creditor-oriented
Finland	· Creditor-oriented
France	· Creditor-oriented (unless it becomes a reorganisation procedure: debtor-oriented)
Germany	· Creditor-oriented (unless it becomes a reorganisation procedure: debtor-oriented)
Greece	· Creditor-oriented
Ireland	· Creditor-oriented
Italy	· *liquidation bankruptcy and compulsory administrative liquidation :* creditor-oriented · *extraordinary administration* : debtor-oriented
Luxembourg	· Creditor-oriented
The Netherlands	· Creditor-oriented
Portugal	· Creditor-oriented
Spain	· Creditor-oriented
Sweden	· Creditor-oriented
UK	· Creditor-oriented
USA	· Creditor-oriented

B. Nature of the procedure:

A similarity between the various procedures results from the desire, in every country, to dispose of a regulated, formal and controlled procedure.

All procedures are of a judicial nature (except for Italy which also provides for an administrative procedure, that applies to State-owned companies only, which is controlled by administrative authorities). The courts responsible for bankruptcy proceedings are often specialised courts (such as in Germany, Italy and the U.S.). A special judge may even be appointed for every bankruptcy case. The court's role varies: sometimes its only task is to provide a general control of the procedure, namely in bankruptcy proceedings where the creditors play an important role in the proceedings (Finland, Spain, Greece, Portugal), whereas in other countries (Germany, France, Italy, United Kingdom and mostly Austria), the court's decisions strongly influence the outcome of the procedure.

Although it is important to have judiciary control and to allow the judge to decide on some issues, giving creditors the possibility to intervene and to propose a plan may be favorable to a positive outcome for the company. Their intervention and their

concessions could help save the company and therefore reduce the stigma on bankruptcy.

In all Member States and the U.S., a bankruptcy order is made by the court, in which it determines the moment of cessation of payments and appoints the persons (e.g. trustee, administrator, liquidator) responsible for the follow-up of the bankruptcy.

JUDICIARY OR ADMINISTRATIVE PROCEDURE	
Austria	· Judiciary. · Court very powerful.
Belgium	· Judiciary.
Denmark	· Judiciary.
Finland	· Judiciary.
France	· Mostly judiciary (two periods: observation period and liquidation or reorganisation procedure)
Germany	· Judiciary (two periods: preliminary measures and liquidation or reorganisation)
Greece	· Judiciary.
Ireland	· Judiciary.
Italy	· *liquidation bankruptcy and extraordinary administration* : judiciary · *compulsory administrative liquidation* : administrative
Luxembourg	· Judiciary.
The Netherlands	· Judiciary.
Portugal	· Judiciary.
Spain	· Judiciary.
Sweden	· Judiciary.
UK	· Judiciary.
USA	· Judiciary.

C. Recognised types of debtor

The various country bankruptcy systems/regimes are not consistent with respect to the debtors that may initiate bankruptcy proceedings.

Most countries (Belgium, the Netherlands, Greece, Luxembourg, Portugal, Spain…) provide for a different procedure for traders and non-traders.

Some countries' procedures apply either to companies or to individuals, whereas other countries' procedures apply to both (e.g. Belgium, Finland, France, Germany, Greece). However, none of the countries' bankruptcy proceedings apply to a state or to government institutions.

RECOGNISED TYPES OF DEBTOR	
Austria	· Legal entities
Belgium	· Traders (legal entities and individuals)
Denmark	· Legal entities and individuals
Finland	· Legal entities and individuals
France	· Legal entities (traders or not) and individuals (traders, farmers and registered craftsmen)
Germany	· Legal entities and individuals
Greece	· Traders (legal entities and individuals)
Ireland	· Legal entities
Italy	· *liquidation bankruptcy* : private entrepreneurs · *compulsory administrative liquidation* : company owned by the State · *extraordinary administration* : major companies
Luxembourg	· Traders (legal entities and individuals)
The Netherlands	· Legal entities and individuals
Portugal	· Traders (legal entities and individuals)
Spain	· Traders (legal entities and individuals)
Sweden	· Traders (legal entities and individuals)
UK	· Legal entities (liquidation) and individuals (bankruptcy)
USA	· Legal entities and individuals (not railroads and domestic or foreign insurance companies and banks)

D. Criteria to initiate bankruptcy procedures

A debtors' poor financial condition is the most common reason for companies going into bankruptcy. However, the bankruptcy procedures can only be initiated if certain criteria have been met. The strictness of the criteria differs significantly from country to country as discussed. The criteria can be generally summarised into the following categories:

- A cessation or suspension of payments, (France, Greece, Spain); or
- Insolvency/Over-indebtedness (Germany, Portugal, Italy); or
- Lost of creditworthiness; or
- Debtor unable to meet its obligations.

Some countries are quite strict and require that two conditions be met (Austria: illiquidity and over-indebtedness, Belgium: cessation of payments and lost of creditworthiness), whereas the criteria is applied more liberally in other countries, e.g. Germany, UK, U.S. and Ireland.

France provides that judicial liquidation may also be initiated as penalty against managerial misconduct (e.g. director found liable for all the debts of the company or for misappropriation of corporate funds).

It seems that the requirement of a strict criteria has a negative consequence, since it prohibits the debtor or its creditors from petitioning for bankruptcy. The debtor's business will continue, with the possibility that its financial situation might worsen, resulting in diminishing value to creditors. However, petitioning for bankruptcy is an act filled with important consequences (the negative publicity being one of them) and it is therefore essential that the introduction of such procedure be controlled.

CRITERIA TO INITIATE PROCEDURE	
Austria	· Illiquidity and over- indebtedness
Belgium	· Cessation of payments and lost of creditworthiness
Denmark	· Illiquidity (not being able to meet obligations as they fall due)
Finland	· *Voluntary:* no criteria required · *Involuntary:* proof of one out of 6 legal conditions
France	· Default of payment · Or breach of amicable settlement · Or penalties against managerial misconduct
Germany	· Flexible: inability to pay any (minor) debt or liabilities exceeding assets
Greece	· Cessation of payments only (financial situation not relevant)
Ireland	· Flexible: debtor unable to pay its debts
Italy	· *Liquidation bankruptcy* : functional impotence · *Compulsory administrative liquidation* : discretionary power of debtor · *Extraordinary administration* : liabilities equal to a third of the assets, sales and profits
Luxembourg	· Suspension of payments and exhaustion of commercial debts
The Netherlands	· Cessation of payments and other conditions
Portugal	· Inability to meet obligations on time because assets are insufficient to satisfy liabilities
Spain	· Flexible: generalised stay of payments
Sweden	· Permanent inability to pay debts
UK	· Flexible: inability to pay debts (in general) or other criteria
USA	· *Voluntary*: no specific criteria · *Involuntary*: Flexible - debtor unable to meet its obligation

E. Possible initiators

The debtor, its creditor(s), the court or the Public Prosecutor can initiate bankruptcy procedures in most countries. However, in Belgium, Finland, Germany, Spain, U.S. and Sweden, the court alone do not initiate bankruptcy proceedings.

INITIATORS OF THE PROCEDURE	
Austria	· Debtor · Creditor · Court
Belgium	· Debtor · Creditor · Public Prosecutor
Denmark	· Debtor · Creditor
Finland	· Debtor · Creditor
France	· Debtor · Creditor · Court · Public Prosecutor
Germany	· Debtor · Creditor
Greece	· Debtor · Creditor · Court
Ireland	· Debtor · Creditor · Director of corporate enforcement
Italy	· *liquidation bankruptcy* : debtor, creditor, court, Public Prosecutor · *compulsory administrative liquidation :* debtor only · *extraordinary administration :* debtor, creditor, court, Public Prosecutor
Luxembourg	· Debtor · Creditor · Court
The Netherlands	· Debtor · Creditors (more than one) · Public Prosecutor
Portugal	· Debtor · Creditor · Court · Public Prosecutor
Spain	· Debtor · Creditor
Sweden	· Debtor · Creditor
UK	· Debtor · Creditor · Contributor · Department of Trade and industry
USA	· Debtor · Three or more creditors or their trustee

F. Main effects of bankruptcy:

As regards the debtor:

In most of the countries' bankruptcy systems[6], the debtor looses control over its assets and a special person (trustee, receiver, administrator, or liquidator) assumes control of the estate and assets.

In Finland, where the creditors play an important role, the trustee is required to submit important decisions for the approval by the creditors' meeting. Similarly in the U.S., since the trustee represents the unsecured creditors, the creditors committee has the right to consult with the trustee, make recommendations and submit questions regarding the liquidation of the debtor's estate.

MANAGEMENT OF THE BUSINESS DURING BANKRUPTCY	
Austria	· Bankruptcy administrator · Creditors' committee
Belgium	· Receiver
Denmark	· Trustee
Finland	· Creditors' meeting
France	· Trustee (during observation period) then liquidator
Germany	· Trustee or debtor (if court allows self-management)
Greece	· Administrator
Ireland	· Liquidator
Italy	· *liquidation bankruptcy* : bank, trustee · *compulsory administrative liquidation :* liquidation commissioner · *extraordinary administration* :judicial commissioner
Luxembourg	· Trustee
The Netherlands	· Trustee
Portugal	· Judicial liquidator
Spain	· Depository then receiver
Sweden	· Receiver
UK	· Liquidator
USA	· Trustee

As regards the creditors:

One of the main goals of bankruptcy procedures is to provide a means to equally distribute the assets among the creditors (depending on priority). Therefore a creditor that seeks execution of its claim before other creditors is not in line with the above

[6] In Germany the court may order the debtor to self-management his business.

stated objective. In some countries, secured creditors typically receive payment on its claims before other creditors.

This is an automatic effect of all bankruptcy procedures, except for the Netherlands, where execution measures will be suspended only if the court has ordered a "cooling down period".

In some countries (e.g. Finland), interest on the debtor's debts continues to accrue, whereas in others (e.g. Belgium or France) such interest is suspended.

Other rules, regarding the compensation between debts-claims, the continuity of contractual commitments etc. vary from country to country.

G. Key players involved in the procedure

A number of key player or parties are involved when a company enters into bankruptcy, which includes:

- A trustee (also known as receiver, administrator or liquidator)
- A specialised judge or court (see point B.)
- Creditors Committees
- Other creditor group (e.g. secured or preferential creditors)

In the majority of the countries, these persons are court appointed; however in some countries, like Spain, the creditors have the authority to make these appointments.

The trustee is usually responsible for managing the debtor's estate, liquidating the assets and the distribution to creditors. Some countries require that this trustee be a lawyer or an accountant.

In order to protect the creditors' rights, some countries make provision that specific organisations represent the creditors: Austria - presence of a creditors' assembly and control by the Association for the Protection of Creditors' Rights; Finland, Greece, Spain, U.S. and Portugal - creditors' committee. In other countries (e.g. Belgium, Luxembourg, Ireland), the creditors are not protected through such committees.

A particular appointed authority in Finland is the '*Bankruptcy Ombudsman'*, whose specific duty is to control the bankruptcy procedure. It is an independent and impartial authority that does not represent the creditors or the debtor.

KEY PLAYERS INVOLVED IN THE PROCEDURE	
Austria	· Bankruptcy administrator · Creditors' committee · Creditors' assembly · Association for the protection of creditors' rights
Belgium	· Receiver · Court

Denmark	· Trustee
Finland	· Provisional administrator (becomes trustee) · Creditors' meetings · Ombudsman
France	· Liquidator · Insolvency judge
Germany	· Preliminary trustee (becomes final trustee) · Court
Greece	· Judge rapporteur · Administrator · Creditors' meeting
Ireland	· Liquidator · Court
Italy	· *Liquidation bankruptcy :* bankruptcy trustee, judge · *compulsory administrative liquidation :* liquidating commissioner and administrative control · *extraordinary administration* :judicial commissioner
Luxembourg	· Trustee · Judge
The Netherlands	· Trustee · Bankruptcy judge · Creditors' committees
Portugal	· Judicial liquidator · Creditors' committees
Spain	· Depository · Creditors' meeting · Receivers · Commissioner
Sweden	· Receiver
UK	· Liquidator · Creditors' meeting · Contributors' meeting
USA	· Trustee · Judge · Creditors Committee

H. Creditors' role and distribution of the assets

In most countries creditors are usually requested, after the commencement of bankruptcy, to declare their claim within a specific period of time. These claims will then be accepted or partially/totally rejected, following a review by the court, the trustee (France and U.S), the debtor (Chapter 11 in the U.S.) or the creditors (Italy, Spain, Germany, and the Netherlands).

Generally the proceeds of the estates' recovered assets (transformed into cash) is distributed to the creditors following a special priority:

- The debts arising after the introduction of the procedure (e.g. the procedural costs) are usually paid before any other debt.
- In most countries, *the law* determines the order of payment, usually based on a system of prior payment to owners of securities, privileges, floating charges or

rights of ownership; followed by a pro rata payment to the other non-preferential creditors. The latter sometimes receive no payment after the preferred creditors have been paid. The Swedish system provides, in contrary to other countries, that non-preferential creditors are not even required to declare their claim except if it appears that they will receive a dividend. Similar to the Swedish system, in a Chapter 7 liquidation in the U.S., where a company has no unsecured assets, the unsecured creditor also is not required to file a claim.

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This inability for unsecured creditors to be paid after secured creditors is an essential point in the stigma surrounding bankruptcy. Who would wish to have contractual relationship with a company, knowing that if this company went bankrupt, all debts which are outstanding would be lost? All creditors would accordingly try to have a security but it is impossible to provide securities to everyone. In other countries (Austria, Greece), the distribution to creditors results from a *bankruptcy plan or settlement* submitted for the creditors' approval. However, even in this case, secured creditors have a right to be paid first, the same problem still subsists.

CREDITORS' ROLE AND DISTRIBUTION OF THE ASSETS	
Austria	· Declaration of claim · Distribution: following the distribution plan drafted by the bankruptcy administrator and approved by the creditors' committee
Belgium	· Declaration of claim · Distribution: secured claims prior to others
Denmark	· Declaration of claim · Distribution following a specific order
Finland	· Declaration of claim · Secured claims prior to others
France	· Declaration of claim · Distribution following a specific order (waged workers, then legal expenses, then creditors with pledges or mortgages…)
Germany	· Declaration of claim · Special rules of distribution: right of ownership first, secured creditors and others afterwards
Greece	· Declaration of claim · Distribution: priority to secured creditors and settlement with creditors on distribution
Ireland	· Declaration of claim · Distribution following a specific order (preferential and secured creditors first)
Italy	· *liquidation bankruptcy :* · Declaration of claim · Distribution: specific order (preferred and secured creditors first) · *Compulsory administrative liquidation :* · Declaration of claim · Distribution: specific order (preferred and secured creditors first) · *Extraordinary administration* : · Declaration of claim · Distribution: specific order
Luxembourg	· Declaration of claim · Distribution: specific order

The Netherlands	· Declaration of claim · Distribution: secured creditors may exercise their rights as if there were no bankruptcy. · Suspension of creditors' execution measures only if "cooling-down" period ordered
Portugal	· Declaration of claim · Distribution: specific order
Spain	· Declaration of claim · Secured creditors first and proposal by the debtor on ranking and classification of debts (to be approved by the creditors' meeting)
Sweden	· No automatic declaration of claim(only if it appears that non-secured creditors will receive something) · Distribution: secured creditors first
UK	· Declaration of claim · Distribution: creditors secured by a fixed charge or mortgage first, then liquidator, preferential creditors…
USA	· Declaration of claim · Distribution: by priority starting at secured creditors and ending with unsecured claims

I. End of the procedure

The Bankruptcy process is usually concluded after all assets have been liquidated and distributed and administration of the liquidation of the company is completed; or, when a restructuring plan has been successfully adopted; or, as in most countries, when it becomes evident that the assets of the business are insufficient to cover the procedural costs.

4.3.3. FURTHER CONSEQUENCES OF BANKRUPTCY AND CAUSES OF THE STIGMA ON FAILURE AND POSSIBILITIES FOR A FRESH START?

Apart from the liquidation and distribution of the debtor's assets as a result from bankruptcy procedures, the management of a bankrupt company may also be held civilly or criminally liable. In some cases, special prohibitions will refrain entrepreneurs from starting a new business.

However, in circumstances, described hereunder, that varies in every country, debtors may benefit from "excusability" (i.e. a procedure that will provide for the discharge of payment of their remaining debts and/or the release of certain prohibitions). This excusability will make it easier for the debtor to initiate a "fresh start" of a business.

4.3.3.1. OVERVIEW OF NATIONAL PROCEDURES

Every national system applies specific restrictions to debtors and provide for various conditions in order to grant "excusability".

The negative consequences resulting from bankruptcy are analysed in light of the following topics:
- liability for remaining debts (bankrupts are not always discharged from unpaid debts. Such debts may sometimes be satisfied with the assets or income that the bankrupt may acquire in the future.)
- criminal offences or

- exclusion from certain professional activities.

The analysis will focus on sole proprietors and the directors of the companies, because the negative consequences have no practical relevance to the legal entities, since it usually is dissolved at the end of the process. The founders or partners of a limited liability company are usually liable only to the amount of capital invested.

A. AUSTRIA

1. Negative consequences of bankruptcy

a) Director's liability for the remaining debts

An important effect of bankruptcy is that creditors may continue to bring individual actions against the directors of a bankrupt company. This is the case, for example, if the directors did not file for judicial insolvency proceedings in due time, where they can be held liable for part/ the total of the company's debts.

b) Criminal offences

Directors may be held criminally liable if they did not respect the essential principle of equal treatment of equal creditors.

c) Professional interdictions

Directors may also be prohibited from engaging in an independent trade or business, after a bankruptcy. Exemptions are however applicable (upon proof that they are likely to fill their obligations as regards the intended business and the settlement of previous debts).
Directors are, however, not excluded from being director of another company.

2. Excusability and possibility for a fresh start

A discharge from these negative consequences of bankruptcy may be obtained only:
- if the bankruptcy proceedings are converted into reorganisation proceedings;
- or in the course of private bankruptcies (that apply to individual non-traders only).

The Austrian system seems to be quite severe as regards the limitations to excuse bankrupt entrepreneurs. If no reorganisation is possible, they may not be excused. This is quite unfair for "innocent" bankrupts who were lead to bankruptcy by misfortune.

This could be an important cause of the stigma on bankruptcy: why start a business knowing that if you fail and become bankrupt, your creditors may continue to sue you forever?

However, this negative effect will concretely not always affect the directors of bankrupt companies, for bankrupt companies are usually liquidated after the proceedings, so there is no company left for the payment of debts preceding

bankruptcy (unless the directors are held civilly or criminally liable for the company's debts, as mentioned above).

B. BELGIUM

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

A bankrupt company's directors responsibility may be invoked, and they can be declared liable for all or part of the company's debts in several circumstances, such as:

- if they committed a serious fault that led to the bankruptcy,
- if they did not declare bankruptcy on time (or failed to convene a meeting of shareholders to deliberate, when the net assets of the company had fallen down below half of its share capital).

Such responsibility may go far, in situations where the bankrupt company is only a screen, hiding the "real master" of the company (i.e. the person or company owning most of the bankrupt company's shares and taking important decisions, and whose assets and activities are mixed with those of the bankrupt company). In such cases, the liability may be extended to the "real master" of the business.

If their company's bankruptcy has caused a damage to a third party, the liability of its directors could be engaged, which may lead to serious financial sanctions.

The *founders* of a bankrupt company may be held liable for part or all the liabilities of the company, in case its registered capital was manifestly insufficient to ensure its normal activities during at least two years.

b) Criminal offences

Entering into contractual relations without sufficient counterpart, misappropriating or concealing assets, and fraudulently organising an insolvency… are some of the possible criminal offences sanctioned by Belgian law.

c) Professional interdictions

Directors of a bankrupt company may be banned from the exercise of certain professions (such as the profession of auditor) or certain mandates (e.g. the management of an insurance company).

2. Excusability and possibility of a fresh start:

Excusable bankrupts are those that failed because of misfortune or because of certain circumstances in life, and that co-operated during the bankruptcy procedures. Excusability is decided by the court that has a wide margin of interpretation.

If a bankrupt is excused, he will be discharged from his remaining debts. None of his creditors may institute proceedings against him, except for his future debts (that arise after the bankruptcy procedure).

This procedure seems to be a good way to reduce the stigma on bankruptcy and to favour fresh starts, especially since Belgian courts are usually ready to grant excusability to those who "deserve" it, those who failed because of misfortune or because of certain circumstances of life

C. DENMARK

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

After *bankruptcy/winding-up* proceedings, creditors regain their right against the bankrupt to the part of the claim that was not paid through distribution, unlike in *compulsory composition* where the bankrupt is released of all debts not accepted in the composition.

Directors of a bankrupt company face several civil sanctions:

- they may be forced to repay up to five years' of bonuses granted while the company was insolvent;
- the liquidator may bring an action for damage against them, even if they were discharged, within 2 years after the date of the discharge;
- creditors who did not receive payment and who prove that the directors had foreseen the company's impending liquidation, may claim reimbursement of his loss.

Creditors may also sue them if the assets have not been distributed equally.

b) Criminal offences

They may also be convicted of economic crime if they illegally removed the company's assets from a company bought for the purpose of preventing assets being recovered, after which the company may be dissolved.

2. *Excusability and possibility for a fresh start*

Bankrupts still liable for the remaining debts not paid through bankruptcy proceedings, may obtain discharge of debt if they are excused after 5 or 20 years (depending on the type of debt and whether special legal steps were taken to secure it).

Directors may also obtain debt rescheduling if they can prove that they are not able and not expected to be able to fulfil their debt obligations in the next few years, and that their circumstances speak in favour hereof.

D. FINLAND

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

Directors may be held liable for part or all of the company's debts if they did not file for bankruptcy on time or if they did not convene a meeting of shareholders when the company's equity decreased below half of its share capital.

They may also be held liable to compensate a loss caused through an error or negligence while performing their duties.

b) Criminal offences

Directors intentionally acting to the detriment of the interest of their creditors (destroying their property, transferring it abroad in order to make it unreachable to their creditors…) may be criminally sanctioned.

c) Professional interdictions

Prohibition on certain business activities may result from bankruptcy.

2. Excusability and possibility for a fresh start

Approximately three-quarters of all persons who have been involved in bankruptcy are still in business[7], for directors who have not committed the above-mentioned faults will not be liable for the remaining debts. As for other entrepreneurs, they remain liable for their remaining debts, which may cause a long and vicious circle of debt collection. There has been a vivid discussion about the excusability of debts after 10 or 15 years, but to date there does not exist such provisions.

E. FRANCE

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

A. Reimbursement of debt:
In case of mismanagement that contributed to the insufficiency of assets of their company, the directors may be ordered to reimburse all or part of the company's debts.

[7] According to the author of the Finish report.

B. Involuntary bankruptcy:
Directors not respecting the above-mentioned reimbursement of debts or who misappropriated corporate funds, committed self dealing, may be sued in an involuntary bankruptcy procedure, independent from the company's bankruptcy proceedings.

C. Personal bankruptcy:
If the directors do not reimburse debts imposed to them by the court, if the court decides to include their assets for the reimbursement of creditors, or if they violate a restriction on management imposed to them, a declaration of personal bankruptcy could apply to them. The consequences of this declaration is that they will be prohibited from managing companies with a commercial purpose, lose civil rights and be ineligible for positions before the commercial courts.

b) Criminal offences

Criminal penalties may apply to individuals who organised fraudulent bankruptcies, e.g. who fraudulently obtained funding or sold assets below their value in order to avoid bankruptcy.

c) Professional interdictions

The court may decide that persons subject to fraudulent bankruptcy may no longer practice certain activities.

2. Excusability and possibility of a fresh start:

Directors of a bankrupt company may, although pecuniary penalties have been imposed on them, continue their activities within the entity or the ongoing entity itself, if restructuring resulted from bankruptcy proceedings. This will not be the case if civil or criminal sanctions were imposed on them.

They are usually discharged from payment of the debts not satisfied by the liquidator, unless, for example, they committed criminal offences or fraud with respect to creditors, or in the case of personal bankruptcy

The French system therefore makes a distinction between "innocent" and "voluntary or fraudulent" bankruptcy, as regards the consequences that such bankruptcies may have on the possibility for entrepreneurs or directors to continue their activities or to start new businesses.

F. GERMANY

1. Negative consequences of bankruptcy

a) Director's liability for the remaining debts

Directors who failed to petition for bankruptcy proceedings when they should have (within three weeks as from the date on which the company became

insolvent), could be held personally liable for the resulting losses incurred by the company.

b) Criminal offences:

The German Criminal Code specifically provides for criminal insolvency offences: directors who fail to exercise the diligence expected from responsible businessmen or who committed fraudulent insolvencies may be liable to a prison term.

Directors who did not call a shareholders' meeting when half or more of the company's capital was eroded, may be liable to a prison term of up to three years or a fine.

c) Professional interdictions

Directors who committed a criminal offence are prohibited to practice for 5 years.

2. Excusability and possibility of a fresh start:

Individual customers may, under the customer insolvency procedure, benefit from a debt release granted by the insolvency court, if they have shown their good behavior during 6 years. Such judicial debt release does not exist for bankrupt companies which are usually wounded up and whose directors will only be held liable in the above mentioned circumstances.

G. GREECE

A particularity of the Greek system is that, in some aspects, it is much more severe towards individual bankrupts than towards the directors of a bankrupt company.

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

A. If a director's conduct causes damage to the bankrupt company, the Board of directors (and not the company's creditors or shareholders) may sue him. In case of bankruptcy, this possibility will be transferred to the administrator of the bankruptcy (who seldom pursue the director, due to the difficulty of finding evidence and the high costs resulting from judicial proceedings, and mostly because such proceedings do not affect the status of the director;
B. Creditors may however sue directors following the general rules of tort (proof of a damage may be based on the fact that directors have intentionally violated the rules imposed on them by bankruptcy law.)
C. They may also sue them if they prove that they have suffered damage because the directors did not notify them of their company's cessation of payment, which is a legal obligation.

b) Criminal offences

Directors may be convicted of plain bankruptcy, when they provoked bankruptcy through their faulty behaviour.

In case of a fraudulent bankruptcy, the court may order the bankrupt's physical detention or house confinement, in order to ensure his physical availability during the bankruptcy procedure.

c) Professional interdictions

Only individual bankrupt lose their trading capacity and are therefore excluded from any commercial or industrial profession. They also face the prohibition of exercising certain functions (i.e. civil servant in the administrative, judicial and public sector, custodian, lawyer or official administrative, employees in a company of public law);

2. Excusability and possibility for a fresh start

Under Greek law, *directors* are not considered as merchants and may therefore never be declared personally bankrupt. They merely represent a company and although most of the time, due to their wrong judgements, they are responsible for a company's bankruptcy, they are not professionally affected since they are free to start a new business, be appointed as directors or work as independent entrepreneurs.

Individual bankrupts are, however, as mentioned above, deprived from their status of merchant and incapable of starting a new commercial business. In order to obtain discharge of bankruptcy and to recover their status of merchant, one of the following conditions must be filled:

- a lapse of 10 years from the date of the bankruptcy's declaration (long period of time);
- a judicial composition amongst the creditors, validated by the court, not subject to appeal and not declared void;
- full satisfaction of all creditors (unlikely to occur, since the entrepreneur who is declared bankrupt does not usually have enough assets to satisfy his creditors).

If one of these conditions is fulfilled (which rarely is the case), the court has the obligation to discharge the individual bankrupt. No discharge may however be granted in case of fraudulent bankruptcy.

As a conclusion, it appears that the Greek system creates a very important stigma on bankruptcy as regards individual entrepreneurs, who have little chance of starting a commercial business again (even though they are considered as "innocent bankrupts"). To the contrary, the directors are not very affected by their company's bankruptcy, for their status is unchanged and they will be forced to reimburse their creditors only if the latter prove that they have suffered damage because of their acts. Such conception stimulates the trend to practice business activities through a company, and not as individual entrepreneurs.

H. IRELAND

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

Directors may be made personally liable for all or part of the company's debts, in case of:

- *Fraudulent trading*: acting with the intent to defraud creditors (civil and criminal offence);
- *Reckless trading*: carrying out a company's business in a reckless manner (i.e. with "gross carelessness");
- *Misfeasance proceedings*: retaining the company's money or property, being guilty of misfeasance or breach of duty or trust in relation to the company;
- *Return of improperly transferred assets*: obligation to return company's property that was disposed of in order to perpetrate a fraud on the company, its creditors or members;
- *Failure to keep proper books and records*: contravention to the obligation to keep proper books of accounts, that resulted to the company's inability to pay all its debts (or its winding up) or caused a substantial uncertainty as to its assets and liabilities.

b) Criminal offences

Directors of a bankrupt company may be criminally sued if they committed fraud, dishonesty, …

c) Professional interdictions

- *Restriction of directors*

Any person who was a director of an insolvent company within twelve month of its winding up, may not be appointed as a directors of a company or take part in the incorporation of a new company for a term of five years, unless:

- such company has a share capital of a certain amount[8],
- or unless that person proves that it has acted honestly and responsibly or that he was director of the company solely by reason of his nomination and without taking part of the management.

- *Disqualification of directors*

Directors who were convicted of an indictable offence (see above) in relation to a company, may not be appointed as a directors of a company or take part in the incorporation of a new company for a term of five years.

2. Excusability and possibility for a fresh start

I. ITALY

[8] EUR 63.487 (or EUR 317.435 for public limited companies).

1. Negative consequences of bankruptcy

a) Directors liability for the remaining debts

Under Italian law, directors have a special duty to act in protection of the company's creditors. The breach of such duty will automatically trigger their liability.

In the context of a bankruptcy, such breach of duty could arise from:
- the payment with preference to certain creditors;
- negligence, imprudence or technical incompetence that lead to the reduction of the company's assets, to detriment of the creditors' interests.

Claims for damages could also be grounded on the breach of a specific rule (i.e. the duty to convene a shareholders' meeting in the event of severe loss).

b) Criminal offences

Directors of a bankrupt company may be applied "bankruptcy crimes", such as:
- fraudulent bankruptcy offence (when the directors have concealed property, made false statements, fraudulent disposal of assets in favour of some creditors…);
- obtaining credit in order to conceal the insolvency;
- concealing bankruptcy assets, making false statements…

c) Professional interdictions

Bankrupts are unable to exercise certain professions (i.e. attorney at law or stockbroker), or to assume certain charges (trustee, tax collector, director, statutory auditor and liquidator of a company).
If bankruptcy crimes have been applied, they may be prohibited from exercising entrepreneurs' activities for ten years.

2. *Excusability and possibility for a fresh start*

Directors of a bankrupt company may usually continue business activities, unless that have been applied the professional activities.

Bankrupts could benefit from a judicial discharge. Such discharge may be obtained only if the bankrupt:
- has integrally paid his debts;
- or has regularly fulfilled its obligations from the creditor's settlement procedure;
- or has effectively and continuously proved his good behaviour for at least five years from the end of the bankruptcy procedure.

This discharge may never be granted if the bankrupt was found guilty of bankruptcy crimes or crimes against the patrimony, the public faith, the industry and the commerce.

J. LUXEMBOURG

1. Negative consequences of bankruptcy

a) Directors liability for the remaining debts

Directors of a bankrupt company may be held civilly liable for any misconduct in their management (the company may sue them in order to obtain reimbursement) or for the non-compliance of the law of August 10, 1915 or the company's statutes (the company, the trustee or any third party may sue them jointly, e.g. in case of failure to convene a general meeting when needed, to publish the annual accounts…).

If they committed a gross and indisputable mistake that contributed to the company's bankruptcy, they may be ordered to pay all or part of the company's debts.

They may also be declared personally bankrupt under certain conditions (if they dispose of the company's assets in their personal interest, continue a deficient exploitation…).

b) Criminal offences:

- in case of simple bankruptcy:
  the bankrupt may be sanctioned by imprisonment for a term between one month and two years, if it is discovered during the bankruptcy procedure, that he has committed a criminal offence, such as: payment to a favoured creditor to the detriment others, not declaring bankruptcy when required to, not keeping regular accountancy…
- in case of fraudulent bankruptcy:
  the crime of fraudulent bankruptcy may be imposed if the bankrupt has removed records or falsified their content, if he has concealed part of his assets or if he states that he was debtor of sums while he was not. He will be sentenced to imprisonment for a term of five to ten years.

c) Professional interdictions

The bankrupt may be prohibited from performing a business activity (including being director of a company), for a period of one to twenty years, if:

- the trustee or public prosecutor request it within three years from the judgement declaring bankruptcy;
- the bankrupt has contributed by a gross and indisputable mistake to the bankruptcy, mistake that no diligent and careful director would commit.

It automatically applies to any person convicted of fraudulent bankruptcy.

2. Excusability and possibility for a fresh start

If the debtor's assets were insufficient to cover the liquidation costs of bankruptcy, this procedure is closed and the creditors may still sue the insolvent entrepreneur. This constitutes an important obstacle to the possibility to start a new business.

Another element is that a bankrupt could continue its business or start new commercial activities only in the following circumstances:

- if he manages to negotiate a composition after bankruptcy with his creditors (and if he was not sentenced for fraudulent bankruptcy)
- if he is rehabilitated by the court, (i.e. if he has totally paid his debts and if he is not a fraudulent bankrupt nor has been sentenced for robbery, speculation or breach of trust).

It seems difficult for individual bankrupts who have lost all their assets to obtain a composition after bankruptcy or to pay all of their debts! Therefore, entrepreneurs/directors who were sanctioned through by prohibiting further commercial activities may seldom be rehabilitated and start a new business again… Luckily, this sanction is not automatic and does not apply to "innocent" bankrupts, who did not commit any gross and indisputable mistake.

K. *THE NETHERLANDS*

1. Negative consequences of bankruptcy

a) Director's liability for the remaining debts

The directors may be jointly liable towards the company if they failed to properly perform their duty and if this failure contributed to the bankruptcy of the company (e.g. acts contrary to the company's object, disproportionately large securities provided to banks in order to obtain credits…).

Certain creditors (tax authorities, social insurance and pension funds) may sue the directors of a bankrupt company for any outstanding tax, if the latter failed to notify these creditors in a timely manner, as legally required, of the company's inability to pay them.

Creditors may also sue them for other unlawful acts (e.g. undertaking an obligation on behalf of the company knowing that the company would not be able to fulfil it).

b) Criminal offences

Directors who do not, during the bankruptcy proceedings, respect their obligation to provide the trustee, the bankruptcy judge and the creditors' committee with the required information may be criminally sanctioned.
Other criminal offences linked to bankruptcy are:

- prejudicing one creditor above the others;
- transferring assets below their value;
- not taking account of certain assets or withdrawing assets from the estate.

c) Professional interdictions

In order to start a new business, individual bankrupts and directors must obtain a "declaration of non-objection" by the Ministry of Justice, with regard to the

incorporation of a new company. Such declaration is difficult to obtain if the founders were previously involved in fraudulent businesses/bankruptcies or if they leave behind a trail of bankruptcies. This declaration will also be refused if there is reasonable doubt with regard to the reliability or the integrity of the individual.

2. Excusability and possibility for a fresh start

Bankrupts do not benefit from an automatic discharge of payment of their remaining debts, at the end of the bankruptcy procedure. They will only be released from their debts if they have reached a scheme of arrangements with their creditors. The *Debt Restructuring of Private Individuals Act* aims at helping them liquidate their assets in such a way that they will negotiate with creditors to obtain full discharge of their debts. This arrangement may include the transfer of their business to a third party.

As regards the possibility to start a new business, both individual bankrupts and directors are confronted with the requirement of obtaining a "declaration of non-objection" as explained above.

L. PORTUGAL

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

Directors who have significantly contributed to the bankruptcy of their company through actions performed within the last two years previous to the declaration of bankruptcy, may be declared responsible for the bankrupt's debts (if requested by the public prosecutor or any creditor).

b) Criminal offences

- Crime of fraudulent bankruptcy: committed by directors who, with the intention to cause detriment to their creditors, destroy or hide their assets, artificially aggravate losses…
- Crime of negligent insolvency: committed by directors who created a state of insolvency through serious negligence or imprudence and failed to apply for any recovery measures on time.
- Crime of favouring creditors: committed by directors, aware of their state of insolvency, who favoured certain creditors to the detriment of others.

c) Professional interdictions

As from the declaration of bankruptcy (and if no agreement was found to satisfy its creditors), individual bankrupts and directors of bankrupt companies are prohibited from carrying on any business, unless the judge recognises that they acted correctly and with normal diligence in the exercise of their activity, and if no criminal proceedings have been started.

2. Excusability and possibility for a fresh start

The possibility to start a new business is limited by the above-mentioned prohibition that may apply to bankrupts. This prohibition can however be set aside if the judge expressly authorises the bankrupt to practice a business in order for him to earn the indispensable means of sustenance and if such practice does not adversely prejudice the liquidation of the bankrupt's estate.

M. SPAIN

Spanish bankruptcies are qualified by the judge, according to the bankrupt's conduct, as follows:

- **fortuitous** bankruptcy: accidental bankruptcy, produced by the misfortune of a debtor with good commercial management of his business.
- **tortuous** bankruptcy: caused by a negligent debtor who lacked diligence in the administration of its business and the respect of basic commercial rules.
- **fraudulent** bankruptcy: caused by the debtor's intentional illegal acts (e.g. concealment of all or part of its assets, abuse of confidence to the detriment of third parties…).

Only fortuitous bankruptcies are exempted from criminal liabilities.
Fortuitous and tortuous bankruptcies allow the bankrupt to reach agreements with his creditors and to request rehabilitation.

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

In cases where the directors did not file for bankruptcy when they should have, the bankruptcy will be qualified as tortuous and the management will be held liable.

b) Criminal offences

Insolvency due to negligent conduct, tort, provoking, hiding or aggravation one's bankruptcy are criminal offences.
Directors can therefore be imposed criminal sanctions if they have caused the insolvency or provided false information regarding the company's accounts. Should they wish to start a new business or manage another company, they will have to comply with their criminal sanction before starting it.

c) Professional interdictions

After the bankruptcy proceedings, bankrupts are barred from engaging in any business in the future, unless they are rehabilitated (see above).

2. Excusability and possibility for a fresh start:

After the closing of fortuitous or tortuous bankruptcy proceedings, the bankrupt may request its rehabilitation, in order to engage into business again.

This rehabilitation is not automatic. The latter must request it to the judge, under the following conditions:

- all debts must be paid or an arrangement with the creditors must be obtained
- in the event the bankrupt is also charged with criminal sanctions, these penalties must be complied with.

A fraudulent bankrupt may never be rehabilitated, even if all his debts are paid.

The Spanish system is based on a coherent distinction between the nature of the bankruptcy, based on the innocent, negligent or fraudulent character of the bankrupt. However, it does seem difficult for bankrupts to obtain an arrangement with their creditors if they have nothing left, and it would therefore seem fair to adjudicate automatic rehabilitation to the fortuitous bankrupt.

N. SWEDEN

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

Directors who deliberately or negligently cause loss or damage to the company, its shareholders or third parties, are liable to pay damages.

If a distribution of dividends is made without respecting the law, then the beneficiary must repay what he has received. If he is unable to do so, the directors involved in the decision of distribution may be liable for repayment.

b) Criminal offences

Depriving the creditors of assets of considerable value, not keeping the company's books correctly, etc. is a criminal offence.

c) Professional interdictions

According to Swedish law, directors of a bankrupt company should be prohibited from carrying on a business, if:

- it is in the public's interest
- and if they have severally neglected his business duties or its creditors' interests.

2. Excusability and possibility for a fresh start

Although the above-mentioned rules on prohibition seem quite strict, bankrupts are seldom really prohibited from trading[9]. The idea is to refrain only persons who were involved in several bankruptcies from trading.

[9] According to the authors of the Swedish Report.

As regards the numerous sanctions that may apply to directors in case of their company's bankruptcy, it seems that it does not frighten them. At the contrary, most of them continue their business for as long as possible, in the hope of finding new investors to turn around the business and even improve the company's business.

In that sense, Swedish bankruptcy legislation works well to facilitate a fresh start of bankrupt businesses.

O. UNITED KINGDOM

1. Negative consequences of liquidation

a) Directors' liability for the remaining debts

Management of a liquidated company can be held personally liable for the company's remaining debts in case of:

- misfeasance or breach of any fiduciary or other duty
- fraudulent trading (carrying out a company's business with the intent to defraud creditors or for any other fraudulent purpose)
- wrongful trading (continuing to trade when the director knew or ought to have known that there was no reasonable prospect of the company avoiding liquidation).

b) Criminal offences

Fraud, misconduct, falsification of the company's books, material omissions from statements and false representations are criminally sanctioned.

c) Professional interdictions

Under the Company Directors Disqualification Act of 1986, directors may be disqualified from being a director, acting as receiver of a company's property or being concerned with the promotion, formation or management of a company, in the following circumstances:

- criminal offences connected with the Companies Acts legislation
- wrongful trading
- failure to comply with filing requirements
- unfit conduct in insolvent companies.

The minimum period of disqualification is 2 years and the maximum 15 years.

2. Excusability and possibility for a fresh start

The UK system seems to distinguish between fraudulent and non-fraudulent insolvency, providing a wide range of sanctions and prohibitions for directors that have acted unlawfully or against the company's or creditors' interests. Should this not be the case, directors are apparently free to start a new business again.

P. UNITED STATES

1. Negative consequences of bankruptcy

a) Directors' liability for the remaining debts

The confirmation of a plan of reorganisation in a Chapter 11 case ordinarily discharges the corporate debtor from liability for all debts arising prior to the effective date of the plan of reorganisation, except to the extent that the plan of reorganisation otherwise provides.

If the liquidation of the business was achieved through Chapter 7, the company ceases to exits and typically all pre-petition debts are discharged. Technically the Bankruptcy Code stipulates that a corporate debtor in Chapter 7 will not discharged of pre-petition debt, however since the entity ceases to exits, granting a discharge is irrelevant. However, a creditor can object to the discharge by filing a complaint in the bankruptcy court, called an "adversary proceeding". A discharge may also be denied entirely if the individual debtor has engaged in bankruptcy-related wrongs (e.g. concealing assets from creditors).

Certain debts of an individual debtor are not discharged based on the nature of the debt or the fact that the debts were incurred due to improper behaviour of the debtor. The most common types of non-discharged debt are typically related to individual debtor rather than the corporate debtor, and include certain types of tax claims, child support, alimony, debts for wilful and malicious injuries to person or property, debt to government units for fines and penalties. In general the directors and officers of a corporate debtor, will not be responsible for any debts from the estate.

Outside of bankruptcy, directors and officers have a duty of care (applying the same care as an ordinary prudent person) and a duty of loyalty (prohibits faithlessness and self-dealing), referred to as a fiduciary duty, towards the company's *shareholders.*

When a company moves into the "zone of insolvency", the fiduciary duty shifts from the stockholders to the *creditors*. Zone of insolvency refers to when a company becomes insolvent. A company is typically considered insolvent when it is unable to pay its obligations or the company's liabilities exceed the assets.

Directors and officers can be held personally liable for certain actions that are in breach of their fiduciary duty to creditors, during the time the company is insolvent. Usually this fiduciary duty towards creditors stops when the company files for bankruptcy, because most significant decisions are subject to review by interested parties and approval by the court. There is no uniform rule governing the releases and indemnification for directors and officers. However, the Business Judgement rule provides a safe harbour for directors, which operates from the presumption that directors' actions are in good faith.

Traditionally, large companies carry director and officer insurance which protects officers and directors for any actions taken in derogation of their twin duties of

loyalty and care generally to the extent such actions are not the result of gross negligence or wilful misconduct. In Chapter 7 cases, the trustee directly replaces the management.

b) Criminal offences

Directors and officers in a Chapter 7 or Chapter 11 case may be criminally indicted for fraud or gross negligence in performing duties and responsibilities.

c) Professional interdictions

After a company emerges from chapter 11, there are no penalties assessed on management. Absent a release, a management member may be held civilly liable if a creditor successfully prosecutes a cause of action against such individual. Unless management is subject to a non-compete agreement, individuals are free to engage in new enterprises. The only deterrent is whether such individual's reputation is adversely impacted by an unsuccessful reorganisation.

2. Excusability and possibility for a fresh start

The commencement of a Chapter 7 liquidation is an admission that the business enterprise has failed. Although the public may perceive such liquidation negatively, it does not necessarily mean that the directors and officers are stigmatised to be able to start new business.

The initiation of Chapter 11 proceedings, although newsworthy, does not necessarily create negative publicity, since the outcome of the proceedings is not always liquidation, but usually reorganisation. Even if the case is a "liquidating" Chapter 11, the debtor attempts to dispose the assets, as a going concern, which usually creates more value to the creditor if the assets are sold at liquidation values.

Rather than chilling new investments in the company, the procedure encourages and facilitates mergers and acquisitions by providing a mechanism for the debtor to identify parties interested in acquiring its assets. The latter are sold free and clear of liens, claims, and other interests, including secured claims.

During a Chapter 11 case, management is often rewarded through retention bonus and incentive compensation programs (subject to Bankruptcy Court approval) and is proposed to ensure that key management does not leave the company during its reorganisation. These programs are another way to mitigate the stigma of chapter 11 by encouraging management to remain with the company.

In general, the American system regards bankruptcies in a much more positive manner than in Europe, as further discussed hereunder.

4.3.3.2.COMPARATIVE ANALYSIS

Bankruptcy affects the debtor in many ways; his reputation may be prejudiced (depending on the publicity made regarding the bankruptcy); he may be faced with

creditors still requesting reimbursement or encounters difficulty in starting a new business because of restrictions resulting from the bankruptcy.

We shall describe hereunder, the major restrictions applied to debtors (individual entrepreneurs and directors of a company), sanctions that may constitute major obstacles to a new start.

We shall then discuss the possibilities offered by the European Member States to allow for the fresh start of new businesses and contrast it to the U.S. system.

I. Restrictions applied as a result of bankruptcy:

Restrictions that generally apply to bankrupt individuals or directors of bankrupt companies are:

- of a *pecuniary* nature (liable for all or part of the company's debts to the estate or creditors);
- of a *civil* nature (e.g. obligation to provide repair of damage suffered as a consequence of the bankruptcy);
- of a *criminal* nature (in case of fraudulent bankruptcy, concealing assets..);
- of a *prohibitive* nature (i.e. prohibited to exercise certain functions or to assume certain charges).

- *Individual entrepreneurs vs. directors:*

  In some countries, the sanctions that apply to individuals and to directors of companies are quite similar, except of course for legal specificities that result from the fact that directors have, unlike individual entrepreneurs, the duty to answer for their acts to the company's shareholders.

  The Greek system imposes stricter sanctions to individual entrepreneurs than to directors (only individuals automatically lose their trading capacity and are prohibited from exercising certain functions). This concept promotes the use of corporations for launching a new business rather than a sole proprietary.

- *pecuniary or civil sanctions vs. prohibitions:*

  All countries apply pecuniary or civil sanctions (that do not necessarily result from bankruptcy legislation but from general principles of tort or the obligation to repair a damage caused to others).

  The automatic prohibition of exercising certain functions or assuming certain charges after bankruptcy does not exist in all countries or is seldom applied. It is mostly in Greece or in Portugal that they are applied.

  It seems that, among these various sanctions, the sanction of prohibition constitutes a greater obstacle to the possibility of a fresh start.

- *sanctions in the interest of creditors vs. in the interest of the "society" in general*

  A common feature is the duty to protect the creditors and to respect the creditors' equality in the distribution of assets. Directors of bankrupt companies are often sued in this regard, if they favoured creditors to the detriment of others, before bankruptcy proceedings were initiated.

  The objective of other sanctions lies within the idea of "purifying" the market: expunging incapable entrepreneurs or making sure that they will not be able to launch a new business again (e.g. through the prohibition sanction).

- *"innocent" bankruptcy vs. fraudulent bankruptcy:*

  After having observed the various sanctions resulting from bankruptcies, one can not refrain from considering that some appear to be "normal" whereas others seem "unfair". Such consideration results from the fact that one tends to accept more easily sanctions applied as a result of wilfully fraudulent bankruptcies than the sanctions applied to "innocent" bankrupts, that suffered misfortune or following certain circumstances of life. It is easier to accept that fraudulent bankrupts be held liable for their remaining debts, or be prohibited from launching a new business again.

  Although this appears to be an essential element to consider when providing for post-bankruptcy sanctions, it seems that not all countries make a clear distinction between innocent or honest and fraudulent bankruptcies. Belgium, France, Luxembourg and mostly Spain tend to apply different sanctions to innocent bankrupts and fraudulent bankrupts. The Spanish system seems to be an example to follow in that regard, with its qualification of bankruptcies as fortuitous, tortuous or fraudulent.

  It is essential that a distinction is made between the two kinds of bankruptcies, so that honest bankrupts do not continue to be stigmatised through association with the dishonest.

II. Possibilities for a fresh start and stigma on bankruptcy:

What exactly is meant by "fresh start"? Fresh start is the possibility of continuing or starting a new business after a bankruptcy. Fresh start is rendered possible where the stigma on bankruptcy is low (i.e. the negative attitudes and barriers for entrepreneurs that discourage them from risk-taking and entrepreneurship).

Concretely, the stigma on bankruptcy can result from:

- the importance of sanctions applied to bankrupts;
- the prohibition to carry out economic activities;
- the negative publicity (e.g. mention of the bankrupt's name on a special list with the commercial jurisdiction, publication in local or national newspapers…) ;

- the possibility to invoke the directors' liability and the importance of the insurance coverage they may benefit from
- the confusion between fraudulent and non fraudulent bankruptcy.

In order for a bankrupt to bypass this stigma and to start a new business again, two important elements must be considered:

a) Discharge of the remaining debts:

As described above, a consequence of bankruptcy applied in almost all countries is the bankrupt's liability for his remaining debts.

In order to allow fresh start, the notion of discharge of debt is essential, but for individual entrepreneurs only. Bankrupt companies are usually, after the bankruptcy procedure is finished, totally liquidated so that their creditors no longer have anyone to turn to for the reimbursement of their claims (unless they can sue the company's directors at fault).

As for individual bankrupts, how could they possibly envisage the possibility of starting a new business if, as soon as they make any profit, their previous creditors will come knocking on their door in order to obtain satisfaction of their claims?

Some countries allow a total or a partial discharge of debts.

Very few countries provide for an automatic discharge of debts (e.g. Greece, but this advantage is strongly counterbalanced by the deprivation of the individual bankrupt's status of trader).

Most countries accept such discharge, but only following a special procedure (e.g. rehabilitation in Austria, Belgium, Germany, or Spain). This rehabilitation is often linked to the notion of "innocent" bankruptcy, which seems quite logical.

Some countries (Denmark, Italy) allow such discharge, but only upon fulfilment of strict conditions, e.g.:

- the total satisfaction of creditors (which seems almost impossible to achieve for a small bankrupt with nothing left), or
- the expiration of a certain period of time during which the bankrupt has proved his good behaviour.

Other countries (Austria or Finland) are very strict. They provide that discharge may only be granted if the debtor manages to obtain a reorganisation plan with its creditors (which is clearly difficult in a "traditional" bankruptcy where there are hardly no assets left, but might appear easier in countries where the initiation of bankrupt does not necessarily lead to the company's winding-up but may result in its reorganisation and continuity of its business).

In the countries where release of debts exists, such release is sometimes never granted if the bankrupt has been convicted with criminal offences (e.g. Italy, Luxembourg).

LIABILITY FOR THE REMAINING DEBTS AND POSSIBILITY OF DISCHARGE	
Austria	· Directors liable if committed a fault (e.g. did not file for judicial insolvency on time)µ · Discharge if reorganisation or in the course of private bankruptcies (non-traders)
Belgium	· Directors liable if committed a serious fault that led to bankruptcy or if did not declare bankruptcy on time · Discharge if excusability is granted by the court (in case of innocent bankruptcy)
Denmark	· Directors liable after *bankruptcy/winding-up* procedure but not after *compulsory composition* · Discharge in case of release after 5 or 20 years or in case of debt rescheduling
Finland	· Directors liable if did not file for bankruptcy on time or did not convene shareholders on time · Discussion on discharge
France	· Directors liable in case of mismanagement · Yes, unless specific offences committed
Germany	· Directors liable if failed to petition for bankruptcy on time · Discharge under customer insolvency procedure
Greece	· Directors liability if committed tort or did not notify creditors of cessation of payments · Discharge for individual bankrupts after 10 years or in case of judicial composition
Ireland	· Directors liable if fraudulent/reckless trading, misfeasance proceedings… · Discharge: possible
Italy	· Directors liable if do not respect their duty to protect the company's creditors · Discharge for individual bankrupts if good behaviour or creditors' settlement
Luxembourg	· Directors liable for misconduct in management or fault that led to company's bankruptcy · Discharge if composition after bankruptcy or rehabilitation
The Netherlands	· Directors liable if their failure contributed to bankruptcy · Discharge if scheme of arrangement reached with creditors
Portugal	· Directors liable if significantly contributed to the company's bankruptcy · Discharge
Spain	· Directors liable if did not file for bankruptcy on time · Discharge if rehabilitation is granted (in case of non-fraudulent bankruptcy)
Sweden	· Directors liable if deliberately or negligently caused damage to company · Discharge
UK	· Directors liable if misfeasance, fraudulent / wrongful trading · Discharge if non-fraudulent insolvency
USA	· Individual debtor discharged from debt, except certain debts (e.g. alimony, taxes, damages for fraud…) · Corporate debtor discharged from debts

b) *Non-prohibition of carrying-out commercial activities:*

Having obtained discharge of the remaining debts is not the only condition for a successful fresh start. How could the entrepreneur/director be able to launch a new business if he has been subject to a prohibition from exercising certain commercial activities or professions?

As mentioned above, Greece seems to have the strictest regime in that regard, for bankrupt entrepreneurs will immediately lose their trading capacity and are therefore excluded from any commercial or industrial profession.

Some professions (e.g. trustee, lawyer, employee in a company of public law, auditor...) may not be exercised by individuals previously bankrupt, either automatically as a result of the bankruptcy, either under certain conditions, as illustrated hereafter.

France bases such prohibition on the existence of criminal sanctions and applies it only to the activities for which the bankrupt was subject to fraudulent bankruptcy, which appears to be a sound limitation.

The Netherlands have a specific regime: bankrupt entrepreneurs and directors of a bankrupt company must, before incorporating a new company, obtain a "declaration of non-objection" by the Ministry of Justice. The granting of such declaration is mainly based on the distinction innocent vs. fraudulent bankruptcy.

In contrast, the U.S. Bankruptcy Code provides for a complete discharge of debt, subject to litigation involving objections by creditors and other limited exceptions. The discharge constitutes a permanent statutory injunction prohibiting creditors from taking any action designed to collect the discharged debt.

In general, the US Bankruptcy Code does not place any restrictions on the directors or individual entrepreneur subsequent to the discharge of the debt, which allows them to enter freely into other business ventures thereafter. However, restrictions will be placed on any individual that has been convicted to a criminal offence related to any fraud, gross negligence or wilful misconduct that led to the bankruptcy.

POSSIBLE PROHIBITION OF CARRYING -OUT COMMERCIAL ACTIVITIES AND CONDITIONS THEREFORE	
Austria	· Prohibition from engaging in an independent trade or business (with exemptions)
Belgium	· Prohibition from carrying out certain professions (auditor) or mandate (management of insurance company) under certain conditions (fraud…)
Denmark	· Business prohibitions (if illegal removal of company's assets)

Finland	· Possible business prohibitions
France	· Prohibition to practice certain activities (in case of fraudulent bankruptcy)
Germany	· Prohibition to practice for 5 years for directors who committed criminal offences.
Greece	· Individual bankrupts are excluded from any commercial or industrial profession, and from certain functions (civil servant, lawyer…)
Ireland	· Restriction from being appointed director of a company or incorporating a new company for a term of five years (unless proof of good conduct)
Italy	· Prohibition to carry out certain professions (lawyer, stockbroker) or charges (trustee, director..)
Luxembourg	· Under certain conditions (gross and indisputable mistake that lead to bankruptcy), prohibition from performing business activity
The Netherlands	· Prohibition unless "declaration of non-objection" obtained with the Ministry of Justice
Portugal	· Prohibition from carrying out any business, unless judge provides that they may and if no criminal proceedings
Spain	· Prohibition from engaging in any business, unless rehabilitated.
Sweden	· Prohibition from carrying out a business if in public interest and if severe negligence
UK	· Prohibition from being a director, receiver or incorporating a company under certain conditions (if criminal offences, wrongful trading…)
USA	· None, except if directors were criminally prosecuted

4.3.4. CONCLUSION

A comparison of the various bankruptcy systems in the EU Member States indicate that the common goal of these procedures is to provide for the efficient liquidation of businesses in distress and the reimbursement of its creditors.

The various country systems follow a similar theme:

- Judiciary procedure initiated by the debtor or its creditors or other party;
- Creditors declare their claim in order to obtain reimbursement;
- A specific authority (trustee, receiver, liquidator, etc.) replaces the directors of the company;
- Distribution to creditors of the remaining assets, following a specific priority.

In order to benefit from such procedures, various criteria's are required that all have to do with the impossibility for a business to recover. Some criteria's are quite flexible (e.g. Germany and Ireland: inability to pay any minor debt), whereas others are more strict (e.g. Austria where the company must suffer illiquidity and over-indebtedness

Although all countries' procedures seem to reach their goal, i.e. the liquidation of a company, some countries' systems (e.g. Germany, France and U.S.) also emphasis the restructuring of companies in order to (1) continue the business, (2) continue the employment of employees and (3) maximising the return to creditors and other stakeholders.

Most EU Member States' systems impose certain restrictions, whether of a pecuniary or criminal nature, on individual debtors or directors, or certain prohibition to perform certain activities or to be appointed in certain functions. This has the potential to create negative stigma, since these restrictions creates an environment that deters entrepreneurs to make a fresh start.

These restrictions are considered to be justified where the individual debtor and directors committed fraud or willingly caused the company's bankruptcy. However, in bone fide cases of bankruptcy, some of the restrictions could be considered excessive and prohibits entrepreneurs to make a fresh start. Not all countries make a clear distinction between bone fide and fraudulent bankruptcies and the restrictions related to a bone fide versus fraudulent bankruptcy.

According to our study, it appears that two conditions are required in order to allow for a new fresh start:

a) the total discharge of the debtors' remaining debts;
b) limited restrictions should be imposed on the individual debtor or director in a bone fide bankruptcy.

Under these circumstances, previously bankrupt entrepreneurs may find the motivation to launch a new business again.