# Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices

**TENDER No. JUST/2012/JCIV/CT/0194/A4**

Submitted by INSOL Europe

Stefania Bariatti, Robert van Galen

Date: 12/05/2014

# CONTENTS

Abstract 3

1. Introduction 5

2. Executive Summary 6

3. Different kinds of insolvency proceedings 20
3.1 Confidential proceedings 21
3.2 Public pre-insolvency proceedings 24
3.3 Debtor-in-possession proceedings (DIP) 25
3.4 Full proceedings (not DIP) 28

4. Some elements of insolvency proceedings 29
4.1 Commencement of proceedings 29
4.2 Is the debtor left in possession? 30
4.3 Stay of enforcement 33
4.4 Cram down on dissenting creditors 35
4.5 New finance 37
4.6 Court involvement 37
4.7 Confidentiality 37
4.8 Costs and length 38
4.9 Incentives and success 39

5. Recommendations for preventive pre-insolvency proceedings 42

Annex 1 – List of national experts

Annex 2 – Summaries of National Laws

# ABSTRACT

The Directorate-General Justice in the European Commission is working on a follow-up to the 2012 Communication of the Commission on "A new approach to business failure and insolvency"[1] and the 2013 public consultation on the same topic. Against this background a study has been commissioned to provide information on restructuring mechanisms already available in all Member States, their main features, effective use, rate of success, cost to the debtor and length.

INSOL Europe, the Pan-European association of insolvency professionals, has gathered from its membership a team of experts covering all 28 Member States of the European Union, to provide a comprehensive but condensed report on the restructuring mechanisms currently available in the Member States jurisdictions. Where available, information on the actual application and the rate of success has been provided as well. The study reflects the legal situation in the Member States as of October 2013.

The study provides the facts collected across the 28 Member States in an Annex and the report provides an analysis of this data, together with recommendations of the experts for an early preventive restructuring mechanism.

*The information and views set out in this study are those of the authors and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this study. Neither the Commission nor any person acting on the Commission's behalf may be held responsible for the use which may be made of the information contained therein.*

……….

La Direction générale de la justice de la Commission européenne travaille actuellement sur un suivi de la Communication 2012 de la Commission sur « une nouvelle approche européenne en matière de défaillances et d'insolvabilité des entreprises »[1] et de la consultation publique 2013 sur le même sujet. Dans ce contexte, une étude a été commandée pour fournir des informations sur les mécanismes de restructuration déjà existants dans tous les États membres et sur les caractéristiques principales, l'efficacité, le taux de réussite, le coût pour le débiteur et la durée de ces mécanismes.

INSOL Europe, l'association paneuropéenne des professionnels de l'insolvabilité, a réuni parmi ses membres une équipe d'experts couvrant l'ensemble des 28 États membres de l'Union européenne, afin d'établir un rapport exhaustif mais condensé sur les mécanismes de restructuration actuellement utilisés dans les États

[1] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee "A new European approach to business failure and insolvency", Strasbourg, 12.12.2012, COM (2012) 742 final.

Communication de la Commission au Parlement européen, au Conseil et au Comité économique et social européen « Nou-velle approche européenne en matière de défaillances et d'insolvabilité des entreprises », Strasbourg, 12 décembre 2012, COM(2012) 742 final.

membres. A toutes fins utiles, il donne également des informations sur l'efficacité et le taux de ré-ussite de ces mécanismes. L'étude reflète l'état du droit des États membres en octobre 2013.

L'étude fournit dans une annexe les données recueillies dans les 28 États membres et le rapport en offre une analyse, auquel sont jointes les recommandations des experts sur l'établissement d'un mé-canisme précoce de restructuration préventive.

*Les informations et les vues énoncées dans la présente étude sont celles des auteurs et ne reflètent pas nécessairement l'opinion officielle de la Commission. La Commission ne garantit pas l'exactitude des données incluses dans cette étude. Ni la Commission ni aucune personne agissant pour le compte de la Commission ne peut être tenue responsable de l'usage qui pourrait être fait des infor-mations qui y sont contenues.*

# 1. INTRODUCTION

This report concerns a study of proceedings in the Member States aimed at rescuing companies in financial difficulties with an emphasis on early proceedings. It contains recommendations for minimum standards for proceedings in the pre-insolvency stage or early stage of insolvency. The study reflects the legal situation in the Member States as of October 2013.

This report has been submitted by INSOL Europe, the European association of insolvency professionals. INSOL Europe is an independent organization of lawyers, accountants, academics and judges specialising in insolvency law, which organises conferences, supports research, procures international cooperation and assists at developing standards in the areas of insolvency law and practice.

……….

Ce rapport a pour objet une étude des procédures d'insolvabilité des États membres dont l'objectif est de venir en aide aux entreprises en difficultés, et en particulier des procédures précoces. Il fournit par ailleurs des recommandations quant aux règles minima susceptibles d'encadrer les procédures dans la phase de pré-insolvabilité ou dans une phase précoce de l'insolvabilité. L'étude reflète l'état du droit des États membres en octobre 2013.

Ce rapport est soumis par INSOL Europe, l'Association européenne des professionnels de l'insolvabilité. INSOL Europe est une organisation indépendante d'avocats, d'experts comptables, de membres universitaires et magistrats spécialisés dans le droit de l'insolvabilité dont la vocation est d'organiser des conférences, de soutenir la recherche, de fournir une coopération internationale et de contribuer au développement de normes dans le domaine du droit de l'insolvabilité et de sa pratique.

# 2. EXECUTIVE SUMMARY

**Introduction**

This report, submitted by INSOL Europe, the European association of insolvency professionals, to the European Commission – DG Justice, provides a comparative overview of proceedings in the Member States aimed at rescuing companies and individuals in financial difficulties with an emphasis on early proceedings, as well as recommendations for minimum standards for proceedings in the pre-insolvency stage or early stage of insolvency. It also contains an overview of full insolvency proceedings. The study reflects the legal situation in the Member States as of October 2013.

**Different kinds of insolvency proceedings**

The uniform and/or shared definition of "pre-insolvency proceedings" poses a number of problems due to the differences and divergencies in the domestic laws of the Member States. The following considerations can be drawn:

(a) rescue of businesses is typically carried out either through an out-of-court settlement, which is generally considered to be based upon contract law or corporate law, or a rescue/restructuring plan, or the sale of the assets to a new legal entity;

(b) rescue of businesses may effectively take place in very different proceedings including full insolvency proceedings aimed at liquidation;

(c) there is a great variety of cases in which (pre-) insolvency proceedings are opened, thus statistics are often not very meaningful;

(d) the insolvency test differs in the Member States: the most common criteria for initiating full insolvency proceedings are the cessation of payments test (also called the cash flow or illiquidity test), and the balance sheet test. An important distinguishing feature between proceedings is that in some proceedings the establishment of a certain stage of financial difficulty is a requirement for the opening.

***Pre-Insolvency proceedings***

*Pre-insolvency proceedings* are proceedings opened because the debtor is in financial difficulties but without any prior insolvency test, they involve the applicability of special rules of insolvency law.

***a) Confidential procedures***

Typically the following types of proceedings can be distinguished:

i. Proceedings in which the debtor tries to reach agreement with the creditors with the assistance of an expert or insolvency practitioner. Creditors may not be forced to accept a reduction or modification of their claims or a standstill period. The debtor stays in control of the proceedings. New debts entered into by the debtors do not enjoy advanced ranking in subsequent

insolvency proceedings. Transactions performed according to the agreed plan may not be set aside in case of subsequent opening of full insolvency proceedings.

ii. Proceedings as under (i) but the court can order a stay of enforcement of certain debts or can order modification of debts such as postponement of their due date. Debts incurred under these pre-insolvency proceedings may enjoy advanced ranking in subsequent insolvency proceedings. These proceedings may serve as preparation for a rescue plan, which is not confidential.

iii. Proceedings as under (ii) but with the possibility to adopt a rescue plan involving a vote by the creditors involved and binding upon such creditors. The court may subsequently cram down other creditors. Sometimes secured creditors are exempt from such cram down.

***b) Public pre-insolvency proceedings***

Public pre-insolvency proceedings are proceedings in which a supervisor / administrator / liquidator is appointed or which take place under the supervision of a court and which are opened without an insolvency test. The opening of these proceedings is public.

Two types of public pre-insolvency proceedings can be distinguished:

i. Public pre-insolvency proceedings which serve as a first phase of insolvency proceedings for assessing the requirements for opening full proceedings. The insolvency plan (or the restructuring plan were available) has to be approved by the court, that is vested with differing levels of control.

ii. Public pre-insolvency proceedings may also serve as a means to reaching an agreement with creditors. In case of failure, full insolvency proceedings are opened. The debtor may remain in possession, but an administrator is appointed by the court. The agreement has to be approved by variable majorities of creditors, but after approval or confirmation by the court it binds all creditors.

***Full insolvency proceedings***

Full insolvency proceedings are opened after the insolvency test has been carried out and the court has determined that the debtor is insolvent. They are either debtor-in-possession proceedings as defined below or proceedings conducted by a liquidator.

***Debtor-in-possession proceedings (DIP)***

Debtor in possession proceedings are pre-insolvency proceedings or full insolvency proceedings in which the debtor is not divested of the assets but administers his assets under supervision by a court or a court appointed supervisor. They are designed to avoid liquidation and facilitate restructuring.

Several models can be followed, which may be alternative to one another:

(a) a reorganisation plan voted on by the creditors and confirmed by the court, sometimes accompanied by a short moratorium;

(b) a moratorium ending with an agreement, that may be carried out under the supervision of the court and implies a stay of enforcement for claims covered by the agreement, which provides effects if the company complies with the collective agreement.

If these scenarios fail, the proceedings may end up in a reorganisation through sales ordered by the court under a judicial administrator.

## **Elements of pre-insolvency proceedings**

### ***Commencement of proceedings***

In general

(a) *confidential proceedings* can only be opened at the request of the debtor and usually involve an opening decision by the court.

(b) *public pre-insolvency proceedings* may be started by the debtor, or by creditors, or by the liquidator by national agencies or public bodies.

(c) *Full insolvency proceedings* including DIP *insolvency proceedings* are generally opened by the court upon request by the debtor only or by the debtor, a creditor, the liquidator or a public authority or agency.

The opening of *confidential* and *public pre-insolvency proceedings* is conditional upon a certain level of financial difficulties, without this being subject to a prior insolvency test by the court.

As far as *full insolvency proceedings* are concerned, in almost all Member States the cessation of payments (illiquidity) test is applied.

### ***Is the debtor left in possession?***

(a) In *confidential proceedings* the debtor is always left in possession of the assets. Sometimes a supervisor is appointed.

(b) In the majority of cases where the *public pre-insolvency proceedings* serve as a first phase of insolvency proceedings an insolvency practitioner is appointed by the court, who supervises the debtor's activities. Where the *public pre-insolvency proceedings* serve as a means of reaching an agreement with creditors the debtor may remain in possession, but a supervisor is usually appointed by the court.

(c) In DIP *insolvency proceedings* the debtor is not completely free to manage the company, even after a restructuring plan has been approved and is implemented.

(d) In *full insolvency proceedings* the debtor remains in possession only in rescue proceedings and debt relief, and not in the case of a final liquidation.

***Stay of enforcement***

(a) In *confidential proceedings* enforcement can be stayed with respect to specific creditors who are made aware of the confidential proceedings.

(b) During *public pre-insolvency proceedings* in some Member States full stay of individual enforcement and pending actions apply. Secured creditors are usually excluded from the stay. In some Member States provisional measures to secure the assets may be or have to be adopted by the court, depending upon the applicant.

(c) In *full insolvency proceedings* in almost all Member States there is an automatic stay of individual enforcement and pending actions.

***Cram down on dissenting creditors***

(a) In *confidential proceedings* restructuring plans involving voting and cram down are rare and anyway limited to the creditors involved.

(b) A composition in *public pre-insolvency proceedings* has to be approved by variable majorities of creditors, but after approval or confirmation by the court it binds all creditors.

(c) In *full insolvency proceedings*, including *DIP proceedings* the plan may involve all creditors or only classes of creditors. The majorities for the approval of the plan vary from one Member State to the other. The plan may bind all creditors, irrespective of their approval and be subject to confirmation by the court.

***New finance***

(a) Granting superpriority to new financing in *confidential proceedings* is exceptional.

(b) In general, in *public pre-insolvency proceedings* which serve as interim proceedings no superpriority is granted to new financing, however in *public pre-insolvency proceedings* which serve as a means to reaching an agreement with creditors superpriority is sometimes granted to new financing.

(c) In DIP proceedings which are *full insolvency proceedings* superpriority is the rule.

(d) In non-DIP *full insolvency proceedings* superpriority is granted in many Member States.

***Court involvement***

(a) Court involvement is usually rather limited in *confidential proceedings* and in *public pre-insolvency proceedings* and *full insolvency proceedings* involving the appointment of a supervisor.

(b) In *DIP proceedings* without supervision by a supervisor the court has to play a more active role.

***Confidentiality***

(a) *Confidential proceedings* can only be kept confidential provided (i) there are no prejudicial effects to creditors or (ii) with respect to creditors who are affected by e.g. a specific stay, the proceedings are disclosed.

(b) The decisions opening *DIP proceedings* are usually public, even if some elements of the restructuring plan may remain confidential.

***Costs and length***

(a) The expenses of *confidential proceedings* vary considerably. Proceedings are fast in themselves or may be subject to time limits.

(b) In *public pre-insolvency proceedings* court costs are very low in many Member States, in particular in Eastern Europe, while the lawyers' fees for assisting the debtor or the creditors may vary considerably. The duration of *interim proceedings* varies considerably, from two months to 8-12 months, while *public pre-insolvency proceedings* as a means to reaching an agreement with creditors are usually faster.

(c) *DIP proceedings* are rather swift and simplified, but costs are reported high.

(d) The length of *full insolvency proceedings* varies considerably. In a large number of Member States the average length is two to three years.

***Incentives and success***

(a) *Confidential proceedings* often entail the exemption from voidability of transactions that have taken place during such proceedings, together with confidentiality. It is difficult to draw conclusions on the success of these proceedings from statistical data.

(b) As concerns *public pre-insolvency proceedings*, in several Member States early filing is encouraged through civil and/or criminal sanctions. The success of these proceedings depends upon their scope.

**Recommendations for preventive pre-insolvency proceedings**

***Confidential proceedings***

Confidentiality may reduce the risk that the continuation of the business is threatened if the value is decreased as a result of the insolvency stigma. By nature these proceedings cannot prejudice the rights of creditors who are not made aware

of the proceedings in any significant way, but where a stay or standstill and advanced ranking of debts incurred during these proceedings are provided, they stand a better chance of success. It should be considered whether power to order such stay should include a stay of claims of the creditor against third parties as co-debtors and under guarantees. The possibility to have a rescue plan that is voted on by selected creditors only and which can be crammed down on the minority of dissenters may also provide an important tool. Other important tools may be a court established moratorium with respect to specific creditors, the possibility to provide priority status to new financing and protection against avoidance actions of transactions which have been concluded in the confidential proceedings with the consent of a court appointed supervisor or the court itself.

The *confidential pre-insolvency proceedings* should be categorised as proceedings under the revised Insolvency Regulation, to be adopted at the centre of main interests (COMI) of the debtor. Two problems arise in this respect: (i) such determination of the COMI by the court should be subject to appeal by any Interested parties. However, creditors may not know of their opening or may hear about the confidential proceedings at different times; (ii) the determination of the COMI covers the duration of the confidential proceedings and does not preclude another COMI determination by a court in another Member State in relation to the opening of *public pre-insolvency* or *full insolvency proceedings*. In that case the decisions taken during the confidential proceedings and the consequences of such proceedings should remain effective.

Public *pre-insolvency proceedings* may be cost saving, because they can be conducted before an insolvency test has been carried out. They may also create a creditor controlled kind of proceedings which may save costs as well.

We do not see means specifically aimed at reducing costs.

To the extent insolvency proceedings are perceived as lengthy, duration may be reduced by imposing deposit funds in escrow for creditors who may claim unfair treatment.

### *Debtor in possession*

*Debtor in possession* proceedings are attractive, since they allow the debtor to retain control, although under some kind of supervision. However, such proceedings may be rather costly as they usually require the appointment of an experienced chief restructuring officer or court involvement at a much higher level than proceedings in which an independent bankruptcy trustee is appointed. Such level of court involvement may not be easily achievable in all Member States.

### *Cram down*

Rescue of companies may be served by the adoption of rescue plans in which all creditors (including secured creditors), can be crammed down, provided qualified majorities of creditors with parallel interests vote in favour of such plan. Rescue plans should at least meet the requirement that the creditors receive under the plan at least the value that they would receive in the absence of such plan. Moreover there should be the possibility to have limited rescue plans involving only specific creditors which can be adopted in confidential proceedings. These limited plans should contain similar voting and cram down rules.

### *Stay of enforcement*

The courts should have the ability to order a stay of enforcement for a limited time against all or specific creditors. A standstill may be needed to deleverage creditors who may threaten to blow up the rescue of the company if they do not get more than their fair share.

### *New finance*

The possibility to attract new loans during insolvency proceedings or pre-insolvency proceedings is crucial for the success of a rescue operation. New lenders should get some kind of priority ranking and protection against avoidance actions or subordination.

### *Pre-insolvency proceedings and avoidance*

In order to enable pre insolvency proceedings to result in a successful rescue often payments of essential creditors have to be made and new transactions have to be entered into, sometimes involving the sale of part of the assets. Such transactions should be protected in subsequent full insolvency proceedings, provided they have been scrutinized by the supervisor or the court.

### *Supporting measures*

In order to assure the effectiveness of an early rescue mechanism, it is imperative to implement measures safeguarding that trading of the debtor can continue unimpaired. The rights of creditors to terminate contracts or to request changes to existing contracts solely based on the fact that the debtor is making use of the rescue mechanism, although the debtor meets all contractual obligations, must be disallowed. Furthermore any contractual obligation to inform the other party of the opening of confidential proceedings should be disallowed as well.

………

## **Introduction**

Ce rapport, soumis par l'Association européenne des professionnels de l'insolvabilité (INSOL Europe) à la Direction Générale de la Commission européenne, a pour objet de comparer les procédures d'insolvabilité des États membres dont l'objectif est de venir en aide aux entreprises et aux personnes ayant des difficultés financières, et en particulier les procédures précoces. Il fournit par ailleurs des recommandations quant aux règles minima susceptibles d'encadrer les procédures dans la phase de pré-insolvabilité ou dans une phase précoce de l'insolvabilité. Il contient également un aperçu des procédures formelles d'insolvabilité. L'étude reflète l'état du droit des États membres en octobre 2013.

## **Différents types de procédures d'insolvabilité**

La définition uniforme et/ou partagée de la « procédure de pré-insolvabilité » pose un certain nombre de problèmes compte tenu des divergences entre les différentes législations des États membres. Les considérations suivantes ont été retenues :

(a) Le sauvetage des entreprises est généralement réalisé soit par un accord extrajudiciaire sur le fondement du droit des contrats ou du droit des sociétés, ou par un plan de sauvetage/ restructuration ou par la vente des actifs à une nouvelle entité juridique ;

(b) Le sauvetage des entreprises peut effectivement avoir lieu dans le cadre de procédures très différentes, y compris dans le cadre d'une procédure formelle d'insolvabilité dont l'objectif est la liquidation ;

(c) Il existe une grande variété de cas pour lesquels une procédure de (pré)-insolvabilité est ouverte ; les statistiques étant souvent peu éloquentes sur ce point ;

(d) Le test d'insolvabilité diffère d'un État Membre à l'autre : les critères le plus souvent retenus pour l'ouverture d'une procédure formelle d'insolvabilité sont la cessation des paiements (également appelée le test des flux de trésorerie ou le test d'illiquidité) et le test du bilan. Les procédures se distinguent notamment par le fait que certaines d'entre elles requièrent la constatation d'un certain niveau de difficultés financières pour l'ouverture de la procédure.

***Procédures de pré-insolvabilité***

*Les procédures de pré-insolvabilité* sont des procédures qui sont ouvertes en raison des difficultés financières du débiteur sans être accompagnées toutefois d'un test d'insolvabilité préalable. Elles sont fondées sur l'applicabilité de règles spécifiques de la législation sur l'insolvabilité.

### *a) Procédures confidentielles*

D'une manière générale, on distingue les procédures suivantes :

i. La procédure au cours de laquelle le débiteur essaie de parvenir à un accord avec les créanciers avec l'assistance d'un expert ou d'un syndic. Les créanciers ne sont pas obligés d'accepter une réduction ou une modification de leurs droits ou un moratoire. Le débiteur conserve le contrôle de la procédure. Les nouvelles dettes contractées par le débiteur ne jouissent pas d'un rang prioritaire dans le cadre d'une procédure d'insolvabilité ultérieure. Les transactions réalisées selon le plan convenu peuvent ne pas être utilisées si une procédure d'insolvabilité formelle est ouverte.

ii. La procédure visée en (i), sauf que le tribunal peut ordonner un sursis d'exécution de certaines dettes ou une modification des dettes, par exemple le report de leur échéance. Les dettes engagées pendant la procédure de pré-insolvabilité peuvent bénéficier d'un rang prioritaire lors d'une procédure d'insolvabilité ultérieure. Cette procédure peut avoir pour but la préparation d'un plan de restructuration, qui n'est pas confidentiel.

iii. La procédure visée en (ii), mais avec la possibilité d'adopter un plan de restructuration avec le vote des créanciers concernés qui les engage. Le tribunal peut ensuite imposer l'exécution de ce plan à d'autres créanciers. Parfois, les créanciers garantis sont exemptés de cette mesure.

### *b) Procédures publiques de pré-insolvabilité*

Les procédures publiques de pré-insolvabilité sont des procédures qui requièrent la nomination d'un superviseur / administrateur / liquidateur, ou des procédures qui ont lieu sous la supervision d'un tribunal, et dont l'ouverture ne demande pas de procéder à un test d'insolvabilité. L'ouverture de ces procédures est publique.

On distingue deux types de procédures publiques de pré-insolvabilité :

i. Les procédures publiques de pré-insolvabilité qui servent de phase préliminaire à une procédure d'insolvabilité afin d'évaluer les conditions nécessaires à l'ouverture d'une procédure formelle. Le plan d'insolvabilité (ou le plan de restructuration si disponible) doit être approuvé par le tribunal, dont le niveau de contrôle varie.

ii. Les procédures publiques de pré-insolvabilité qui peuvent également servir de moyen pour parvenir à un accord avec les créanciers. En cas de défaillance, la procédure formelle d'insolvabilité est ouverte. Le débiteur conserve la possession (des actifs), mais un syndic est désigné par le tribunal. L'accord doit être approuvé à des majorités divergentes des créanciers. Une fois approuvé ou confirmé par le tribunal, l'accord engage tous les créanciers.

### *Procédures formelles d'insolvabilité*

Les procédures formelles d'insolvabilité sont ouvertes une fois que le test d'insolvabilité a été effectué et que le tribunal a déterminé que le débiteur est insolvable. La procédure ouverte est soit une procédure de « débiteur non dessaisi » telle que définie ci-après soit une procédure conduite par un liquidateur.

### *Procédures de «débiteur non dessaisi» (DIP en anglais)*

Les procédures de « débiteur non dessaisi » sont des procédures publiques de pré-insolvabilité ou des procédures formelles d'insolvabilité dans lesquelles le débiteur n'est pas dessaisi de ses actifs, mais les gère sous la supervision d'un tribunal ou d'un superviseur nommé par le tribunal. Elles visent à éviter la liquidation et faciliter la restructuration.

Il s'ensuit différents modèles susceptibles de se substituer les uns aux autres :

(a) Un plan de réorganisation voté par les créanciers et confirmé par le tribunal, accompagné parfois d'un court moratorium ;

(b) Un moratorium aboutissant à un accord qui peut être obtenu sous la supervision du tribunal et entraînant une suspension des clauses de l'accord qui produit ses effets si la société exécute l'accord collectif.

Si ces scénarios échouent, la procédure peut se terminer par un redressement moyennant la vente ordonnée par le tribunal et régie par un administrateur judiciaire.

## Éléments d'une procédure de pré-insolvabilité

### *Ouverture de la procédure*

Généralités

(a) La procédure confidentielle ne peut être ouverte qu'à la demande du débiteur et impliquent généralement une décision d'ouverture par le tribunal.

(b) La procédure publique de pré-insolvabilité peut être engagée soit par le débiteur, soit par les créanciers, soit par le liquidateur, soit par des organismes nationaux ou publics.

(c) La procédure formelle d'insolvabilité, incluant la procédure du « *débiteur non dessaisi* », est généralement ouverte par le tribunal à la demande du débiteur uniquement ou par le débiteur, un créancier, le liquidateur ou une autorité ou un organisme public.

L'ouverture d'une *procédure confidentielle et publique de pré-insolvabilité* requiert la présence d'un certain niveau de difficultés financières, sans toutefois s'accompagner d'un test d'insolvabilité par le tribunal.

S'agissant des *procédures formelles d'insolvabilité*, le test de cessation des paiements (illiquidité) est appliqué dans presque tous les États membres.

### *Le débiteur conserve-t-il la disposition et gestion de ses actifs?*

(a) Dans une *procédure confidentielle*, le débiteur conserve toujours la disposition et la gestion de ses actifs. Un superviseur est parfois nommé.

(b) Dans la majorité des cas où une *procédure publique de pré-insolvabilité* sert de phase préliminaire à la procédure d'insolvabilité, un syndic est nommé par le tribunal et supervise les activités du débiteur. Lorsque *la procédure publique de pré-insolvabilité* sert de moyen pour parvenir à un accord avec les créanciers, le débiteur peut conserver la disposition et la gestion de ses actifs, mais un superviseur est habituellement désigné par le tribunal.

(c) Dans une *procédure du « débiteur non dessaisi »*, le débiteur n'est pas totalement libre de gérer l'entreprise, même après approbation et mise en œuvre d'un plan de restructuration.

(d) Dans une *procédure formelle d'insolvabilité*, le débiteur conserve la disposition et la gestion de ses actifs seulement dans le cadre d'une procédure de sauvetage/restructuration et de remise de dettes, mais pas dans le cas d'une liquidation définitive.

### *Suspension des poursuites*

(a) Dans une *procédure confidentielle*, l'exécution peut être suspendue à l'égard de certains créanciers qui sont informés de la procédure confidentielle.

(b) Au cours d'une *procédure publique de pré-insolvabilité* ouverte dans certains États membres, la pleine suspension des poursuites et des procédures en cours s'appliquent. Les créanciers garantis sont généralement exclus de la suspension. Dans certains États membres, des mesures provisoires visant à garantir les actifs peuvent ou pourront être adoptées par le tribunal, en fonction du demandeur.

(c) Dans la *procédure formelle d'insolvabilité*, les poursuites et les procédures en cours sont automatiquement conservées dans presque tous les États membres.

***Plan de redressement (cram down) pour les créanciers dissidents***

(a) Dans une *procédure confidentielle*, les plans de restructuration prévoyant un vote et un cram down sont rares et, de toute façon, limités aux créanciers concernés.

(b) Un arrangement dans le cadre d'une *procédure publique de pré-insolvabilité* doit être approuvé à une majorité des créanciers qui varie. Après approbation ou confirmation par le tribunal, il engage tous les créanciers.

(c) Dans une *procédure formelle d'insolvabilité*, incluant la *procédure du « débiteur non dessaisi »*, le plan peut faire participer tous les créanciers ou seulement certaines catégories de créanciers. La majorité pour l'approbation du plan varie d'un État membre à l'autre. Le plan peut engager tous les créanciers, indépendamment de leur approbation et être soumis à la confirmation du tribunal.

***Nouveaux financements***

(a) Dans une procédure confidentielle, il est exceptionnel d'accorder un privilège à de nouveaux financements.

(b) En général, dans une procédure publique de pré-insolvabilité servant de procédure provisoire, aucun privilège n'est accordé aux nouveaux financements. Toutefois, dans une procédure publique de pré-insolvabilité servant de moyen pour parvenir à un accord avec les créanciers, un privilège est parfois accordé aux nouveaux financements.

(c) Dans une procédure du « débiteur non dessaisi », qui est une procédure formelle d'insolvabilité, le privilège est la règle.

(d) débiteur non dessaisi », un privilège est accordé dans beaucoup d'États membres.

***Intervention du tribunal***

(a) L'intervention du tribunal est généralement assez limitée dans une *procédure confidentielle, une procédure publique de pré-insolvabilité et une procédure formelle d'insolvabilité* prévoyant la nomination d'un superviseur.

(b) Dans une procédure du « *débiteur non dessaisi* » sans la surveillance d'un superviseur, le tribunal est appelé à jouer un rôle plus actif.

***Confidentialité***

(a) Une *procédure confidentielle* ne peut être gardée confidentielle que si (i) elle n'a aucune conséquence préjudiciable vis-à-vis des créanciers ou (ii) concernant les créanciers lésés entre autres par une suspension spécifique, la procédure est rendue publique.

(b) Les décisions concernant l'ouverture d'une *procédure du « débiteur non dessaisi* » sont généralement publiques, même si certains éléments du plan de restructuration peuvent rester confidentiels.

***Coûts et durée***

(a) Les frais d'une procédure confidentielle varient considérablement. La procédure en elle-même est rapide ou peut être soumise à des limites de temps.

(b) Dans une procédure publique de pré-insolvabilité, les frais de justice sont très faibles dans de nombreux États membres, en particulier en Europe de l'Est, tandis que les frais d'avocats pour l'assistance au débiteur ou aux créanciers peuvent varier considérablement. La durée des procédures provisoires varie considérablement, de 2 mois à 8-12 mois alors que les procédures publiques de pré-insolvabilité ayant pour objectif de parvenir à un accord avec les créanciers sont généralement plus rapides.

(c) La procédure du « débiteur non dessaisi » est plutôt rapide et simplifiée, mais il est fait état de coûts élevés.

(d) La longueur de la procédure formelle d'insolvabilité varie considérablement. Elle dure en moyenne deux à trois ans dans un grand nombre d'États membres.

***Incitations et succès***

(a) Les *procédures confidentielles* ne permettent pas, le plus souvent, l'annulation des transactions qui ont eu lieu au cours de cette procédure caractérisée par la confidentialité. Il est difficile de tirer des conclusions sur le succès de ces procédures à partir de données statistiques.

(b) En ce qui concerne les *procédures publiques de pré-insolvabilité*, une ouverture anticipée est encouragée dans plusieurs États membres sous peine de sanctions civiles et/ou pénales. Le succès de ces procédures dépend de leur champ d'application.

**Recommandations pour des procédures préventives de pré-insolvabilité**

***Procédures confidentielles***

La confidentialité peut réduire le risque de voir la pérennisation de l'entreprise menacée si sa valeur diminue en raison du discrédit imputable à l'insolvabilité. De par leur nature, ces procédures ne peuvent porter atteinte aux droits des créanciers qui ne sont pas informés de la procédure, mais lorsqu'une suspension, un moratoire ou un privilège sont mis en place au cours de ces procédures, elles ont une

meilleure chance de succès. Il convient de se demander si le pouvoir d'ordonner une telle suspension doit inclure une suspension des poursuites du créancier contre des tiers débiteurs solidaires et garants. La possibilité d'avoir un plan de restructuration voté par les créanciers retenus uniquement et susceptible d'être imposé à la minorité de dissidents peut également être un outil important. D'autres outils importants peuvent être le moratoire ordonné par un tribunal à l'égard de créanciers spécifiques, la possibilité d'accorder un privilège aux nouveaux financements et la protection contre les mesures d'annulation de transactions qui ont été conclues dans le cadre d'une procédure confidentielle avec le consentement d'un superviseur nommé par un tribunal ou du tribunal lui-même.

Il convient de classer les *procédures confidentielles de pré-insolvabilité* comme des procédures relevant du Règlement révisé relatif aux procédures d'insolvabilité, ouvertes au centre des intérêts principaux du débiteur. Deux problèmes se posent à cet égard : (i) une telle détermination du centre des intérêts principaux par le tribunal doit être susceptible de recours par les parties intéressées. Toutefois, les créanciers peuvent ne pas être au courant de l'ouverture d'une procédure confidentielle ou peuvent en être informés à des moments différents. (ii) La détermination du centre des intérêts principaux couvre la durée de la procédure confidentielle et n'exclut pas une autre détermination du centre des intérêts principaux par un tribunal d'un autre État membre dans le cadre de l'ouverture d'autres procédures publiques de pré-insolvabilité ou de procédures d'insolvabilité formelle. Dans ce cas, les décisions prises au cours des procédures confidentielles et les conséquences de ces procédures devraient conserver leurs effets.

Les *procédures publiques de pré-insolvabilité* peuvent permettre de faire des économies de coûts, car elles peuvent être ouvertes avant la réalisation d'un test d'insolvabilité. Elles peuvent également permettre l'institution d'un type de procédures contrôlées par le créancier, ce qui peut également réduire les coûts.

Nous ne voyons pas de moyens visant spécifiquement à réduire les coûts.

Dans la mesure où les procédures d'insolvabilité sont perçues comme longues, la durée peut être réduite en imposant la mise sous séquestre de fonds pour les créanciers susceptibles de revendiquer un traitement injuste.

### *Procédure du débiteur non dessaisi*

Les *procédures du « débiteur non dessaisi »* sont attrayantes, car elles permettent au débiteur de conserver le contrôle de leurs affaires, bien que sous une certaine supervision. Cependant, ces procédures peuvent être assez coûteuses, du fait qu'elles nécessitent en général la nomination d'un chef de restructuration expérimenté ou l'intervention d'un tribunal à un niveau beaucoup plus élevé que la procédure dans laquelle un syndic de faillite indépendant est nommé. Un tel niveau d'intervention d'un tribunal peut être difficile à atteindre dans certains États membres.

### *Cram down*

Le sauvetage d'entreprises peut être réalisé par l'adoption de plans de restructuration dans lesquels tous les créanciers (y compris les créanciers titulaires d'une sûreté), y sont soumis, sous réserve qu'une majorité qualifiée de créanciers ayant des intérêts parallèles vote en faveur de ce plan. Les plans de restructuration

doivent au minimum prévoir l'obligation que les créanciers reçoivent, en vertu du plan, la valeur minimale qu'ils recevraient en l'absence d'un tel plan. En outre, il devrait être possible d'avoir des plans de restructuration limités impliquant uniquement des créanciers spécifiques et pouvant être adoptés dans le cadre de procédures confidentielles. Ces plans limités devraient prévoir des règles de vote et de cram down similaires.

***Suspension des poursuites***

Les tribunaux devraient avoir la possibilité d'ordonner la suspension temporaire de la restructuration contre l'ensemble ou certains des créanciers. Un moratoire peut être nécessaire pour éviter que les créanciers menacent de faire échouer le sauvetage de l'entreprise s'ils ne perçoivent pas plus que leur juste part.

***Nouveaux financements***

La possibilité d'attirer de nouveaux fonds pendant la procédure d'insolvabilité ou la procédure de pré-insolvabilité est cruciale pour le succès d'une opération de restructuration. Les nouveaux prêteurs doivent bénéficier d'une sorte de classement des priorités et de protection contre les mesures d'annulation ou la subordination.

***La procédure de pré-insolvabilité et l'annulation***

Afin de permettre à la procédure de pré-insolvabilité d'aboutir à un sauvetage réussi, des paiements réguliers doivent être versés aux principaux créanciers et de nouvelles transactions doivent être conclues, et parfois impliquer la vente d'une partie des actifs. Ces transactions doivent être protégées lors des futures procédures formelles d'insolvabilité, à condition d'avoir été examinées par le superviseur ou le tribunal.

***Mesures de soutien***

Afin d'assurer l'efficacité d'un mécanisme de restructuration précoce, il est impératif de mettre en œuvre des mesures garantissant que les activités commerciales du débiteur peuvent se poursuivre sans entrave. Il est impératif de rejeter les prétentions des créanciers de mettre fin à des contrats ou de demander des modifications aux contrats existants uniquement sur la base du fait que le débiteur fait usage d'un mécanisme de restructuration, bien que le débiteur respecte toutes ses obligations contractuelles. En outre, il conviendrait également de rejeter toute obligation contractuelle d'informer l'autre partie de l'ouverture d'une procédure confidentielle.

# 3. DIFFERENT KINDS OF INSOLVENCY PROCEEDINGS

In the Commission's preparatory documents pre-insolvency proceedings are referred to as "*structured procedures (both in-court and out-of-court) which allow the debtor to address his financial difficulties with his creditors at an early stage before an obligation to file for insolvency under national law is triggered.*" Such definition poses a problem because in several jurisdictions there is no obligation to file for insolvency. Therefore another useful categorization had to be identified. In doing so we observed the following considerations:

(a) Rescue of businesses typically follows one of the following scenarios (i) a settlement agreed upon between the debtor and the creditors with no involvement of the court at all[2] ("out-of-court settlement") (ii) a rescue plan adopted by the creditors and/or established by the court in some kind of formal proceedings in which special rules apply ("rescue plan") (iii) continuation of the business after a sale of the assets to a new legal entity ("sale"). Although scenario (iii) does not usually save the debtor-company it does save the business or part thereof including contracts with suppliers and/or employment and it should therefore be considered a rescue scenario. Economically scenario (iii) often amounts to the same as scenario (ii) although the applicable proceedings and the treatment in statistics may be quite different;

(b) Rescue of businesses may effectively take place in very different proceedings including full insolvency proceedings aimed at liquidation. However, insolvency proceedings which are often published quickly impair the chance of success of rescue and the value of the business. For that reason finding, negotiating and procuring solutions outside of or prior to the opening of such public proceedings may be crucial.

(c) There is a great variety of cases in which (pre-) insolvency proceedings are opened. This applies to the sizes of the companies, the markets and so on. Therefore statistics are often not very meaningful. Even if a small number of businesses can be rescued, such rescue can still have a significant meaning on a macro-economic scale. Furthermore we consider it a fact of capitalist society that many businesses that find themselves unable to cope with their financial problems cannot be saved by some kind of proceedings and sometimes it is not prudent to artificially sustain the weakest businesses, sometimes to the detriment of their competitors. Survival of the fittest in business ensures a healthier breed. Nevertheless there are situations in which rescue can avoid unnecessary destruction and in those cases the availability of adequate rescue proceedings and measures at an early stage may be crucial.

(d) Since the Member States use different criteria for "insolvency" it is not useful to distinguish proceedings as to whether the debtor is insolvent. A

---

[2] Not even protection against applications seeking the opening of formal insolvency proceedings during the negotiations.

situation which may be perceived as insolvency in one Member State may be seen as mere financial difficulty in another Member State. However an important distinguishing feature between proceedings is that in some proceedings a requirement for opening is that it has been established prior to opening that a certain stage of financial difficulty has been reached (usually designated as "insolvency") whereas other proceedings are opened without such a test. In the latter type of proceedings often an official is appointed to investigate whether the debtor is indeed insolvent.

(e) In this study we have not considered out-of-court settlements, referred to as scenario (i). These informal settlements do not require the opening of proceedings or any court involvement and are generally considered to be based upon contract law or corporate law.

In view of the above we have made the following classification:

*Pre-insolvency proceedings* are proceedings which are opened because the debtor is in financial difficulties but without any prior insolvency test. They involve the applicability of special rules of insolvency law, e.g. certain transactions may require consent by the court or a bankruptcy trustee or certain creditors may be stayed. After determination that the debtor is indeed insolvent under the national standards pre-insolvency proceedings are converted into *full insolvency proceedings*. Essentially there are two types of pre-insolvency proceedings: (a) confidential proceedings and (b) proceedings which require some kind of publicity. The latter type is referred to as *public pre-insolvency proceedings*. Pre-insolvency proceedings do not necessarily result in full insolvency proceedings. They may aim at and achieve a rescue solution which precludes the necessity to open full insolvency proceedings.

So-called "debtor-in-possession" proceedings are proceedings in which the debtor himself administers the estate under supervision of the court with or without the appointment of a supervisor. In confidential proceedings the rule is that the debtor stays in possession (just like in out of court settlements) and we have therefore limited the use of the term "debtor in possession proceedings" to public pre-insolvency proceedings and full insolvency proceedings in which the debtor himself administers the estate. They may involve some form of continuation of the business as well as winding up thereof. Although debtor-in-possession proceedings are not typically pre-insolvency proceedings, they were nevertheless included in our study, because debtor-in possession proceedings are often seen as an avenue towards rescue. The main attractive feature of debtor-in-possession proceedings from the perspective of those who plan the insolvency proceedings is that there is no transfer of control to an unknown entity at the inception of the proceedings. This may help to carry out a rescue strategy that was adopted prior to the opening of the proceedings.

## 3.1 Confidential proceedings

Typically the following types of proceedings can be distinguished:

i. Proceedings in which the debtor tries to reach agreement with the creditors. An expert or insolvency practitioner is usually appointed to assist the debtor but there are no means to force any creditors to accept a reduction or modification of their claims or a standstill period. However these proceedings

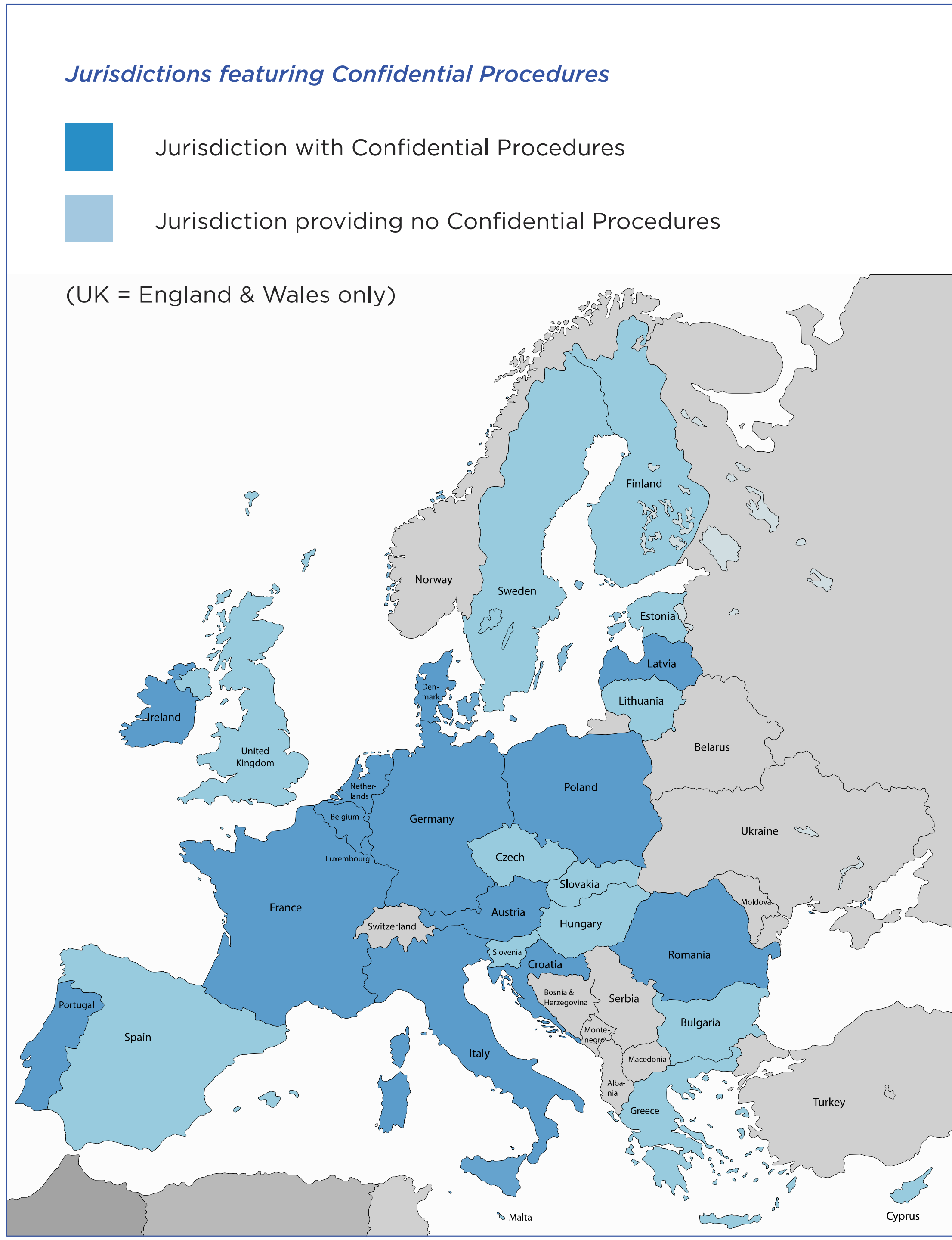
usually involve protection against applications for the opening of public pre-insolvency proceedings or full insolvency proceedings. Furthermore in proceedings of this kind no restructuring plan can be established in which a dissenting minority is bound by a majority subject to confirmation by the court. The debtor stays in full control of his estate. New debts entered into by the debtors do not enjoy advanced ranking in subsequent insolvency proceedings. However, transactions performed according to the agreed plan may not be set aside in case of subsequent opening of full insolvency proceedings.

ii. Proceedings as under (i) but with the additional features that the court can order a stay of enforcement of certain debts or can order modification of debts such as postponement of their due date. Some decisions may need the consent of a court appointed trustee[3]. In some Member States secured creditors cannot be stayed[4]. The proceedings can also involve a decision that debts incurred under these pre-insolvency proceedings enjoy advanced ranking in subsequent insolvency proceedings. Often decisions involving these additional features will entail publicity. These proceedings may not entail the adoption of a regular rescue plan which involves voting and confirmation but they may serve as preparation for such rescue plan[5]. In such case the plan proceedings are not confidential.

iii. Proceedings as under (ii) but with the possibility to adopt a rescue plan involving a vote by the creditors involved and binding upon such creditors. The court may subsequently cram down other creditors, including those that were not involved in the negotiations[6]. Sometimes secured creditors are exempt from such cram down (which makes these proceedings less effective).

Confidential procedures are available in several Member States[7] (*as illustrated overleaf*). Most of the confidential proceedings are fairly recent dating from the last 20 years.

[3] Germany.
[4] Denmark, Latvia.
[5] France, Germany, Denmark.
[6] Portugal.
[7] Not in Bulgaria, Cyprus, Czech Republic, England, Estonia, Finland, Greece, Hungary, Lithuania, Malta, Slovakia, Slovenia, Spain, Sweden.


Jurisdictions featuring Confidential Procedures
Jurisdiction with Confidential Procedures
Jurisdiction providing no Confidential Procedures
(UK = England & Wales only)
Norway
Sweden
Finland
Estonia
Latvia
Lithuania
Belarus
Den-
mark
Ireland
United
Kingdom
Nether-
lands
Belgium
Luxembourg
Germany
Poland
Ukraine
Czech
Slovakia
Moldova
Austria
Hungary
Switzerland
France
Slovenia
Croatia
Romania
Bosnia &
Herzegovina
Serbia
Monte-
negro
Bulgaria
Macedonia
Alba-
nia
Greece
Turkey
Portugal
Spain
Italy
Malta
Cyprus

## 3.2 Public pre-insolvency proceedings

Public pre-insolvency proceedings are proceedings in which a supervisor / administrator / liquidator is appointed or which take place under the supervision of a court and which are opened without an insolvency test. They are to be distinguished from confidential proceedings in that the opening of these proceedings is published in a public register or in the papers and that they are therefore not confidential.

Two types of public pre-insolvency proceedings can be distinguished:

i. Public pre-insolvency proceedings may serve as a first phase of insolvency proceedings which serves the goal of assessing the requirements for opening full proceedings. After this preliminary phase, if all the conditions are met, full insolvency proceedings are opened, which continue with the filing and admission of claims[8] and either restructuring or sale of the assets[9]. This kind of public pre-insolvency proceedings will be referred to as "interim proceedings". However, in some countries interim proceedings may also lead to restructuring or recovery without the opening of full insolvency proceedings[10]. The insolvency plan (or the restructuring plan were available) has to be approved by the court, that usually controls that formalities have been respected, the necessary majorities have approved it, creditors have been regularly represented and equally treated. In some Member States the court also checks if the plan has some chance of success.

ii. Public pre-insolvency proceedings may also be designed as a means to reaching an agreement with creditors. In some Member States the attempt to enter into an agreement with creditors aimed at restructuring qualifies as preliminary phase under local law. In case of failure, full insolvency proceedings are opened[11]. The debtor may remain in possession, but an administrator is appointed by the court[12]. The meetings with the creditors may be convened by the court[13]. The agreement has to be approved by

---

[8] Bulgaria, Lithuania (in Estonia the list of assets and debts is part of the interim phase).

[9] Austria, Bulgaria, Germany, Italy (*concordato con riserva*, in view of opening a *concordato preventivo*), Poland. In Hungary liquidation proceedings are the only insolvency proceedings that are widely used.

[10] Croatia, Germany, Malta (as per Article 329B Companies Act), Poland.

[11] Cyprus, Czech Republic, Denmark, France (*sauvegarde and sauvegarde financière accélérée*), Italy (*concordato con riserva* in view of validating *accordi di ristrutturazione*), Malta (scheme of compromise or arrangement in the context of company recovery proceeding), Portugal (if the debtor is in an insolvency situation at the closing of the interim proceedings), Slovakia, Slovenia, Spain (*Acuerdo Extrajudicial de Pagos*), UK (CVAs).

[12] Denmark (supervisor, who is responsible for preparing the business plan), France (*sauvegarde and sauvegarde financière accélérée*), Ireland (examiner, who is in charge of preparing the scheme of arrangement and may ask for directors' powers to be transferred to him), Italy, UK (CVAs), Malta (provisional administrator may be appointed by the Court but this does not, of itself, relieve directors from their duties), Portugal (interim judicial administrator), Slovakia (compulsory settlement administrator) and Slovenia. Under the law of Cyprus if a receiver is appointed the debtor does not remain in possession and the proceedings last longer). Under English law, in case of administration the debtor is divested.

[13] Cyprus, UK (CVAs).

variable majorities of creditors[14], but after approval or confirmation by the court it binds all creditors[15]. As these are public pre-insolvency proceedings the plan may be accepted by the creditors without an insolvency test. However in virtually all systems a creditor opposing the plan may seek refusal of the court to confirm the plan, on the basis that the debtor is not insolvent or the court may apply such test regardless whether a creditor seeks such refusal[16].

Public pre-insolvency proceedings are not available in several Member States[17]. In the majority of the Member States public pre-insolvency proceedings are regulated in the insolvency code or act[18] or in a special statute[19]. Only in a few Member States the relevant provisions are part of company law[20].

## 3.3 Debtor-in-possession proceedings (DIP)

Debtor in possession proceedings are public pre-insolvency proceedings or full insolvency proceedings in which the debtor is not divested of the assets but administers his assets under supervision by a court or a court appointed supervisor.

The laws of several Member States offer independent proceedings where the debtor remains in possession of the business, that are designed to avoid bankruptcy and facilitate restructuring[21]. In some countries DIP have been enacted many years ago[22], while in some other Member States they are fairly recent. The assessment of the use and success of DIP varies among the Member States: in some countries

[14] Cyprus (75%), Denmark (50%+1), Italy (60% for accordi di ristrutturazione), Malta (75%, by classes), Portugal (66,66%+1 of total claims + 50%+1 of non-subordinated claims), Slovenia (60%), UK (CVAs 75%), Slovenia (60%), Spain (60% or 75% if the agreement entails that the secured creditor has to accept ownership of the secured asset against reduction of his claim).

[15] Cyprus, Ireland (by classes), Denmark, Italy (in *concordato preventivo* proceedings, while *accordi di ristrutturazione* only bind creditors who agreed), Malta (scheme of compromise or arrangement), Portugal, Slovenia (for unsecured creditors), UK (but CVAs do not require approval by the court), Spain (*acuerdo extrajudicial de pagos*). Under Croatian law, the agreement is approved by FINA and concluded in court.

[16] Usually the test is whether the creditor would receive better value if the plan were not adopted. If the debtor is solvent the creditor would receive full value of his claim which defeats his discounted claim under the plan.

[17] Belgium, Finland, Latvia, Luxembourg, Romania, Spain, Sweden.

[18] Bulgaria, Czech Republic, Denmark, Estonia, Germany, Italy, Lithuania, Portugal, Slovenia, UK (CVA, Administration).

[19] Croatia.

[20] Cyprus, Ireland, Malta, UK (schemes of arrangement).

[21] Austria, Belgium, Finland, Germany (self-administration), Greece, Hungary, Italy (*concordato preventivo*), Latvia, Lithuania, Luxembourg, Slovakia, Spain (if filing for voluntary insolvency is made by the debtor, but the court may exceptionally divest the debtor also in this case or leave the debtor in possession even in involuntary insolvency), Sweden. No DIP are reported in Cyprus, Estonia, Malta and the Netherlands.

[22] Austria (in 1915, Ausgleich), Belgium (but 1997 was replaced in 2009), Germany (1999, modified 2012), Italy (in 1942, substantially modified starting 2005), Lithuania 2001, Luxembourg (since 1935), Sweden (since 1996).

they are used regularly[23] and are successful[24], in other countries they are seldom used[25]. Statistics are rather rare.

Independent DIP is not the only model that can be found in the Member States' legal systems. Some Member States that follow model (i) above for public pre-insolvency proceedings do provide that the debtor may remain in possession also after the opening of full insolvency proceedings and/or for some of the stages thereof[26].

In some countries the only DIP are the public pre-insolvency proceedings described above (model (ii))[27]. Independent DIP may consist of out of court negotiations and possibly voting on a plan followed by court approval or formal reorganisation proceedings.

Several models can be followed, which may be alternative to one another:

(a) a reorganisation plan voted on by the creditors and confirmed by the court, sometimes accompanied by a short moratorium;

(b) a moratorium ending with an agreement, that may be carried out under the supervision of the court and implies a stay of enforcement for claims covered by the agreement, which provides effects if the company complies with the collective agreement.

If these scenarios fail, the proceedings may end up in a reorganisation through sales ordered by the court under a judicial administrator[28].

---

[23] In Austria the amount has declined considerably in recent decades, from 50% of all proceedings to 5% in 2012: they are used frequently in Belgium, Italy, Spain and Sweden.

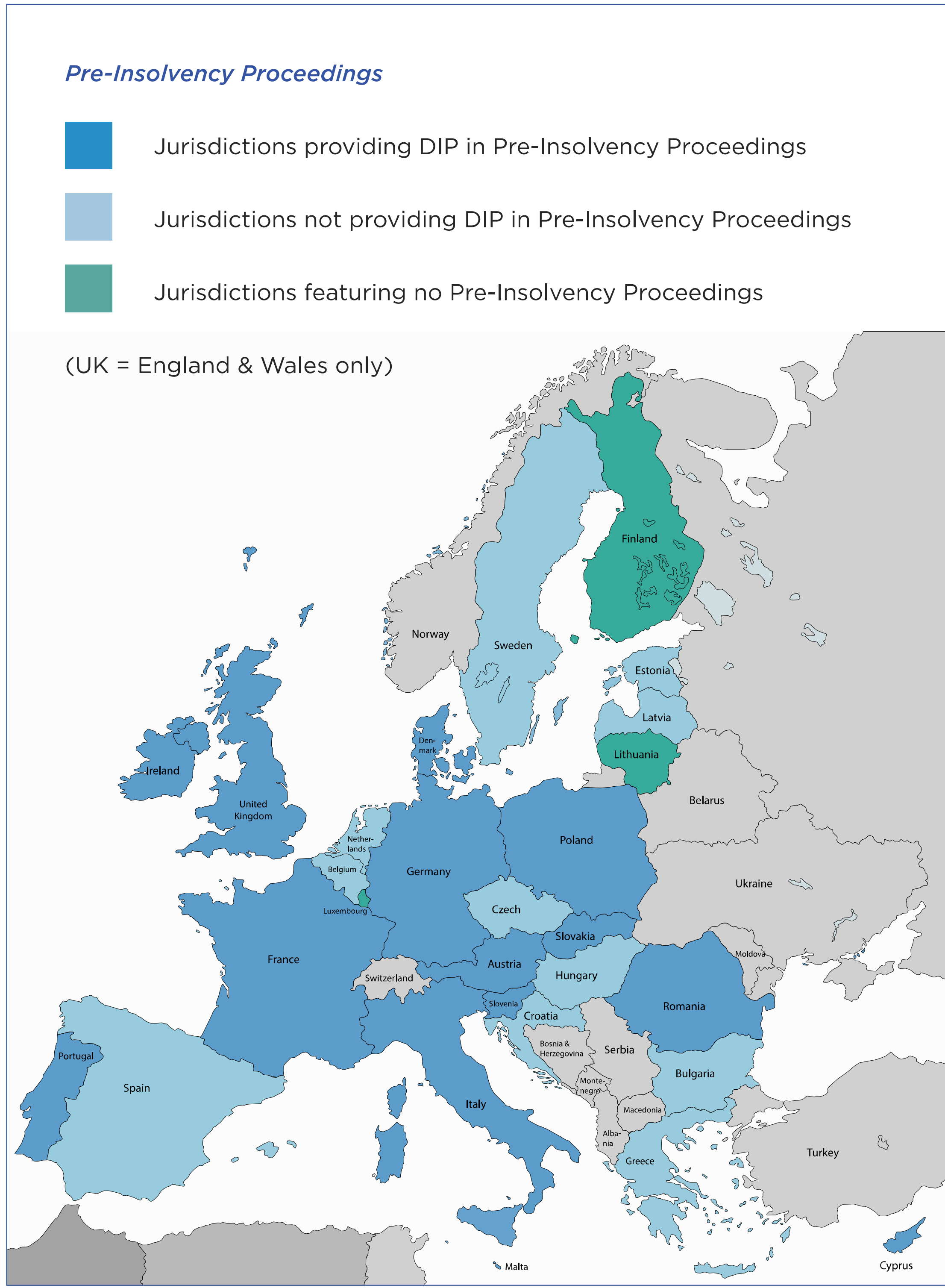
[24] Austria only 15% re-application in 10 years (this figure relates to restructurings under full insolvency proceedings), Finland (more successful for bigger firms).

[25] Germany, Hungary, Lithuania, Luxembourg.

[26] Bulgaria (first phase after opening is dedicated to an attempt to restructure), Czech Republic (after moratorium), Germany (preliminary insolvency proceedings, see Q1), Poland (both composition bankruptcy and reorganisation have a DIP option), Romania.

[27] Denmark, France, Ireland, Portugal (PER), UK (CVA).

[28] Belgium, Luxembourg, Spain (if the composition agreement is not approved or no composition agreement is presented by the debtor or the creditors).


Pre-Insolvency Proceedings
Jurisdictions providing DIP in Pre-Insolvency Proceedings
Jurisdictions not providing DIP in Pre-Insolvency Proceedings
Jurisdictions featuring no Pre-Insolvency Proceedings
(UK = England & Wales only)
Finland
Norway
Sweden
Estonia
Latvia
Lithuania
Den-
mark
Ireland
United
Kingdom
Belarus
Poland
Nether-
lands
Belgium
Germany
Luxembourg
Czech
Ukraine
Slovakia
Moldova
France
Austria
Hungary
Switzerland
Slovenia
Romania
Croatia
Bosnia &
Herzegovina
Serbia
Portugal
Spain
Monte-
negro
Bulgaria
Italy
Macedonia
Alba-
nia
Greece
Turkey
Malta
Cyprus

## 3.4 Full proceedings (not DIP)

Full insolvency proceedings are insolvency proceedings which are not pre-insolvency proceedings. Leaving aside DIP proceedings, which have been discussed above, three types of full insolvency proceedings are mentioned: liquidation, reorganisation/restructuring and discharge or debt relief (clearing off of debts and making a fresh start) proceedings. In the full insolvency proceedings, liquidation proceedings have a preponderant position: in many Member States all full insolvency proceedings are liquidation proceedings[29], whereas in some Member States[30] there are both liquidation and restructuring proceedings.

Only the Czech Republic, the Netherlands, Slovakia and Sweden have separate debt discharge procedures. Many other Member States have included debt discharge provisions for individuals in their statutory rules with respect to full insolvency proceedings[31].

It should be emphasized that often there is an overlap between liquidation and restructuring.

For example, in some Member States a composition plan may be adopted in liquidation proceedings[32].

In some Member States[33] it is also possible to sell the business of the company after liquidation proceedings have been opened. On the other hand, as Professor Philip Wood mentions in *Principles of International Insolvency*[34], many reorganisation proceedings are in fact slow motion liquidations.

---

[29] Belgium, Croatia, Cyprus, Estonia (restructuring agreement within full insolvency proceedings are possible, but very rare), Finland, Hungary, Ireland (corporate), Italy, Latvia, Lithuania, Luxembourg, Malta and Sweden. The larger occurrence of liquidation proceedings is also shown by the following figures: Slovakia: 2012: 1251 bankruptcy against 115 restructurings; France: 32627 liquidation proceedings opened, against 10685 reorganisation proceedings; the Netherlands: 2013, up to 1 October: 9381 bankruptcy as opposed to 335 reorganisation procedures; Poland: 2012: 711 liquidation bankruptcies versus 166 composition bankruptcies, 2011: 620 versus 103; Slovenia: 636 full insolvency proceedings against 43 compulsory settlement proceedings.

[30] Bulgaria, Czech Republic, France, Germany, the Netherlands, Poland. In Slovakia there are separate bankruptcy and separate restructuring proceedings.

[31] Malta, Ireland (corporate and individuals) and the Netherlands.

[32] Malta, Poland, the Netherlands, Spain, Ireland and Lithuania.

[33] Belgium, Ireland, Germany, Greece, Italy, Luxembourg, Portugal, Spain, and the Netherlands.

[34] Wood, 2-001 (p. 31).

# 4. SOME ELEMENTS OF INSOLVENCY PROCEEDINGS

## 4.1 Commencement of proceedings

In general the confidential proceedings can only be opened at the request of the debtor[35]. They usually but not always involve an opening decision by the court[36].

Public pre-insolvency proceedings may be started by the debtor[37], or by creditors[38], or by the liquidator[39], or by national agencies or public bodies[40].

DIP proceedings are generally opened by the court[41] upon request by the debtor only[42] or by the debtor and creditors and a public authority or agency[43].

Full insolvency proceedings may be opened at the request of the debtor or a creditor[44], or public authorities[45], or in a few Member States the liquidator[46].

---

35 Austria, France, Germany, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Spain. In Denmark they can also be opened at the request of a creditor.

36 Not in Italy, nor in Portugal.

37 Bulgaria, Croatia (only), Czech Republic (only debtor may apply), Estonia, Germany (provisional measures), Italy, Malta (company recovery procedure), Poland, Slovenia (only debtor may apply), Spain (only debtor may apply). In Portugal, the debtor must obtain a written statement whereby the debtor and at least one of its creditors express their willingness to initiate negotiations.

38 Austria, Bulgaria, Estonia, Germany (provisional measures), Malta (company recovery procedure), Poland.

39 Bulgaria, Poland.

40 Bulgaria, Hungary, Poland.

41 Belgium, Finland, Germany, Greece (opened by court, supervisor appointed by court), Hungary (court validation), Italy, Lithuania (opened by court, supervisor appointed by court), Luxembourg (a court judge is appointed to report on financial situation), Slovakia (approved by court), Slovenia (approved by court), Spain (supervision of insolvency trustee), Sweden (opened by court).

42 Italy.

43 May be started only by the debtor in Austria, Belgium (reorganisation plan), Germany (self-administration), Greece (under certain conditions also by creditors), Hungary, Luxembourg, Slovenia. DIP may be started by the debtor, the creditors and public authorities in Belgium, and by the debtor and the creditors in Finland, Slovakia, Sweden, Spain (although, as a general rule, if the insolvency proceedings are opened by the creditors, the debtor will not remain in possession).

44 Both the debtor and creditors are mentioned by Cyprus, Finland, Ireland, Lithuania, Luxembourg, Malta, Spain, Sweden, UK, Austria, Bulgaria, Belgium, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Portugal Slovakia, Slovenia and Romania.

45 Austria, Bulgaria, Belgium, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Slovakia, Romania. The public authorities are: Austria, Czech Republic, Estonia, Germany, the Netherlands: in the case of banks and financial institutions or insurance undertakings, the supervising authority. Public Prosecutor (Belgium, Denmark, Estonia, Greece, Italy, the Netherlands, Romania). National revenue agency for private state receivables (Bulgaria), State or municipality (public debts) (Bulgaria), Director of Corporate Enforcement, Registrar of Companies, Public Guarantee, Maintenance and Disability Fund (Slovenia).

46 In Slovakia in bankruptcy, the liquidator (i.e. the person appointed by company shareholders or by court within the framework of company winding-up proceeding (which

The most common criteria for initiating full insolvency proceedings are the cessation of payments test (also called the cash flow or illiquidity test), and the balance sheet test. The cessation of payments, cash flow or illiquidity test requires that the debtor has generally ceased making payments and will not have sufficient cash flow to service its existing obligations as they fall due in the ordinary course of business. The balance sheet test concerns an excess of liabilities over assets as an indication of financial distress.

The cessation of payments test (sometimes combined with the balance sheet test) is applied in almost all Member States[47].

## 4.2 Is the debtor left in possession?

In confidential proceedings the debtor is always left in possession of the assets. Sometimes a supervisor is appointed. In this respect we do not use the term debtor in possession proceedings to refer to confidential proceedings, but only to public pre-insolvency proceedings and full insolvency proceedings in which the debtor remains in possession of the assets and administers the estate.

In the majority of cases where the public pre-insolvency proceedings serve as interim proceedings an insolvency practitioner is appointed by the court[48], but in some Member States the debtor remains in possession and the activity of the insolvency practitioner is limited to supervising[49]. Where the public pre-insolvency proceedings serve as a means of reaching an agreement with creditors the debtor may remain in possession, but an administrator is appointed by the court[50]. The meetings with the creditors may be convened by the court[51].

---

may or may not result in company going bankrupt) and charged with the sale of assets and satisfaction of company creditors) has to file an application within thirty days after establishing the debtor's over-indebtedness and Latvia mentions the administrator in restructuring and the liquidator in main proceedings.

[47] Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France (balance sheet test as the debtor's cessation of payments *('état de cessation des paiements')* describes situations where the current liabilities that are due exceed the available assets, that include reserve credit and moratoriums), Germany, Greece, Hungary (combined with the balance sheet test), Ireland, Italy, Latvia, Lithuania (with some elements of the balance sheet test), Luxembourg (together with creditworthiness test), Malta, the Netherlands, Poland (combined with the balance sheet test), Romania, Portugal (combination with the balance sheet test), Slovakia (combination with the balance sheet test), Slovenia, Spain, Sweden, UK.

[48] Bulgaria (not mandatory), Croatia, Italy (not mandatory), Malta (court may appoint provisional administrator). Poland (not mandatory), Slovakia (not mandatory), Lithuania.

[49] Slovakia, Slovenia. Under Polish law the debtor remains in possession if a temporary supervisor is appointed, while he is divested if a compulsory administrator is appointed. Also German law distinguishes between a "light-touch" preliminary insolvency proceedings and a tight preliminary proceedings. Under Austrian law the debtor may be partially divested. Under Italian law the supervisor appointed by the court provides opinions on acts exceeding the ordinary course of business.

[50] Denmark (supervisor, who is responsible for preparing the business plan), France (*sauvegarde* and *sauvegarde financière accélérée*); Ireland (examiner, who is in charge of preparing the scheme of arrangement and may ask for directors' powers to be transferred to him), Italy, UK (CVAs), Malta (appointment of provisional administrator does not necessarily terminate the role of directors), Portugal (interim judicial administrator), Slovakia (compulsory settlement administrator), Slovenia (compulsory

In DIP proceedings the debtor is not completely free to manage the company, even after a restructuring plan has been approved and is implemented. In the phase leading to the approval of the plan he may not dispose of assets, but such prohibition usually does not apply. Also, after the approval of the plan, he may not dispose of assets outside the plan[52]. While in some countries it is reported that the debtor is not subject to any influence by the court[53], in the majority of cases not only does the court control the correct implementation of the plan, either directly or through an administrator/insolvency practitioner[54], but it may restrict the powers of the debtor[55] or even approve all transactions/acts[56].

Also the creditors may have a say on the implementation of the restructuring plan. They may nominate the administrator[57], or ask the court to limit the powers of the debtor[58]. Creditors appear in person but are usually also organised in committees[59].

As far as full proceedings are concerned, DIP proceedings only occur in rescue proceedings and in debt relief, and not in the case of a final liquidation[60]. In eleven EU Member States[61], there are DIP proceedings in full insolvency proceedings.

settlement administrator), Spain (mediator). Under the law of Cyprus if a receiver is appointed the debtor does not remain in possession and the proceedings last longer). Under English law, in case of administration the debtor is divested.

51 Cyprus, UK (CVAs).

52 Lithuania, Luxembourg.

53 Belgium, Finland.

54 Greece (prior to the court ratification of the plan), Italy, Spain, Slovakia (only for extraordinary acts), Portugal.

55 Czech Republic, Greece, Italy, Portugal, Slovenia.

56 Bulgaria, France, Italy (extraordinary acts only).

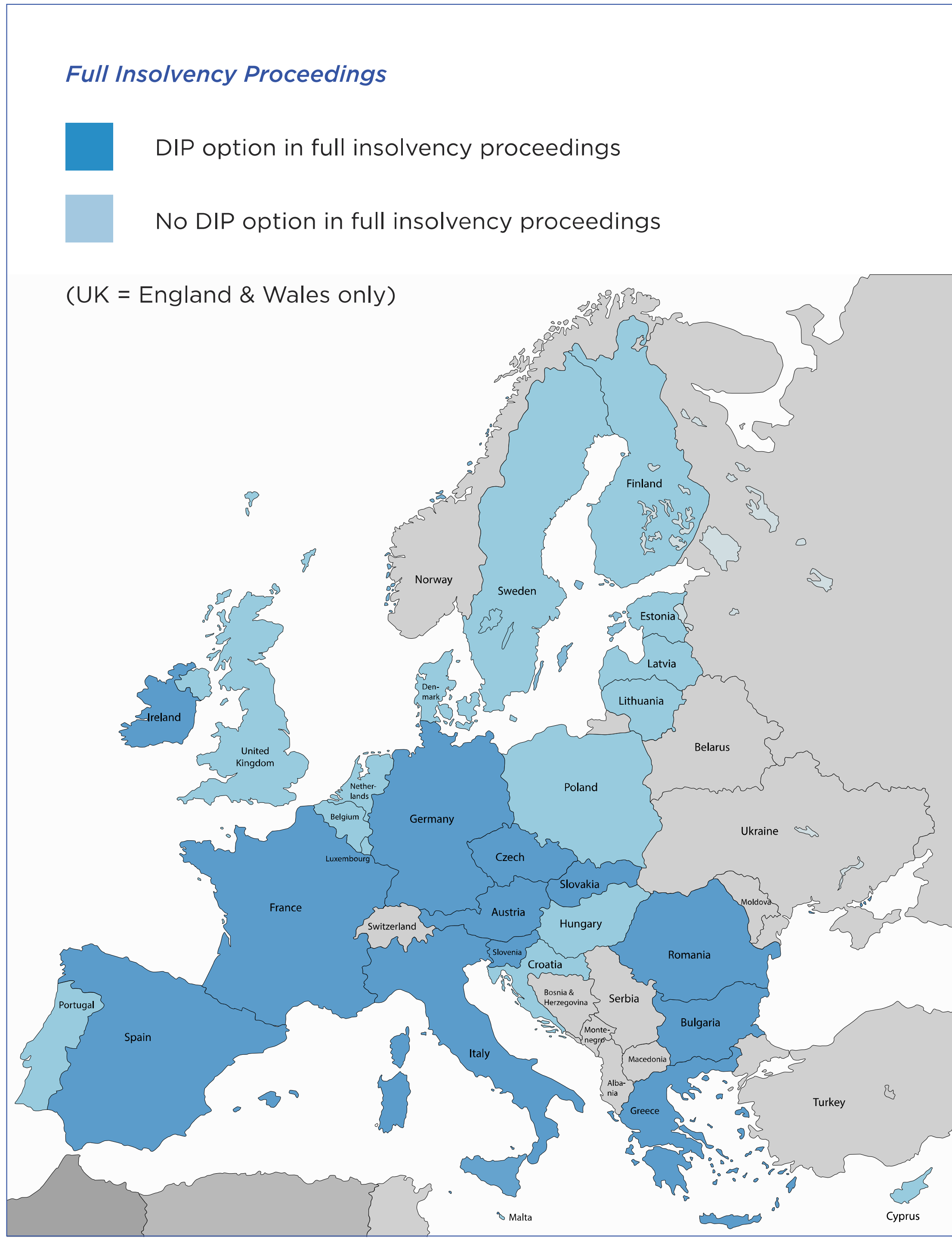
57 Bulgaria.

58 Czech Republic.

59 Czech Republic, Germany (creditors' committee controls all legal transactions of material evidence). In Portugal, a creditors' committee shall be appointed in the context of full insolvency proceedings.

60 P.R. Wood, Principles of Insolvency Law, 2007 10-005.

61 Austria, Bulgaria, Czech Republic (in reorganisation and discharge, but not in bankruptcy), France (in reorganisation, but not in liquidation), Germany (DIP in insolvency with self-administration), Greece (at the beginning of full insolvency proceedings, the debtor is divested of the estate, but a debtor may request for DIP), Ireland (Corporate) (the debtor company is not divested once it enters liquidation, but in voluntary and in a court liquidation, the liquidator will assume the powers of the board of directors); Italy (concordato preventivo aimed at liquidating the debtor's assets), Romania (reorganisation proceedings); Slovakia (in restructuring proceedings and in debt relief), Slovenia (in restructuring proceedings and in debt relief), Spain (if the debtor files for voluntary insolvency, there will be DIP proceedings under the supervision of the receiver).


Full Insolvency Proceedings
DIP option in full insolvency proceedings
No DIP option in full insolvency proceedings
(UK = England & Wales only)
Finland
Norway
Sweden
Estonia
Latvia
Lithuania
Den-
mark
Ireland
United
Kingdom
Belarus
Poland
Nether-
lands
Belgium
Germany
Ukraine
Luxembourg
Czech
Slovakia
Moldova
France
Switzerland
Austria
Hungary
Romania
Slovenia
Croatia
Bosnia &
Herzegovina
Serbia
Portugal
Spain
Monte-
negro
Bulgaria
Italy
Macedonia
Alba-
nia
Greece
Turkey
Malta
Cyprus

## 4.3 Stay of enforcement

In confidential proceedings there cannot be a general stay of enforcement. However enforcement can be stayed with respect to specific creditors who are made aware of the confidential proceedings[62].

During public pre-insolvency proceedings in some Member States full stay of individual enforcement and pending actions apply[63], while in other Member States only the stay of pending actions is provided[64]. Secured creditors are usually excluded from the stay[65].

In some Member States provisional measures to secure the assets may be or have to be adopted by the court, depending upon the applicant[66]. Also where the public pre-insolvency proceedings serve as a means to reach an agreement with the creditors full stay of individual enforcement actions and of pending actions is set forth by the law[67].

[62] France (pursuant to the Civil Code, Article 1244-1), Hungary, Portugal (the opening of confidential proceedings bars the commencement of any enforcement proceedings against the debtor or of any other proceedings for the payment of pecuniary obligations and stays those pending as long as the proceedings are not terminated, except in relation to creditors that have expressed their unwillingness to take part therein).

[63] Bulgaria, Croatia, Germany (stay of enforcement proceedings is ordered by the court, while stay of pending actions is ordered in tight proceedings only), Hungary (but the stay of pending actions has to be requested by the debtor), Italy, Malta (224(2) Companies Act re provisional administrator; Article 329B Companies Act re company recovery procedure), Poland (to be asked by the debtor), Portugal (the opening of interim proceedings bars the commencement of any debt collection proceedings against the debtor and, while the negotiations are pending, stays any proceedings for such purpose against the debtor).

[64] Estonia. In Austria no stay is provided.

[65] They are included in England (administration), Hungary, Ireland, Italy, Portugal, Slovenia. In Belgium, during pre-insolvency proceedings the enforcement by secured creditors with a security on a determined good can be stayed but the amount of the claim cannot be crammed down. Those claims can only be spread in the time to be paid. In Denmark some security holders can be stayed.

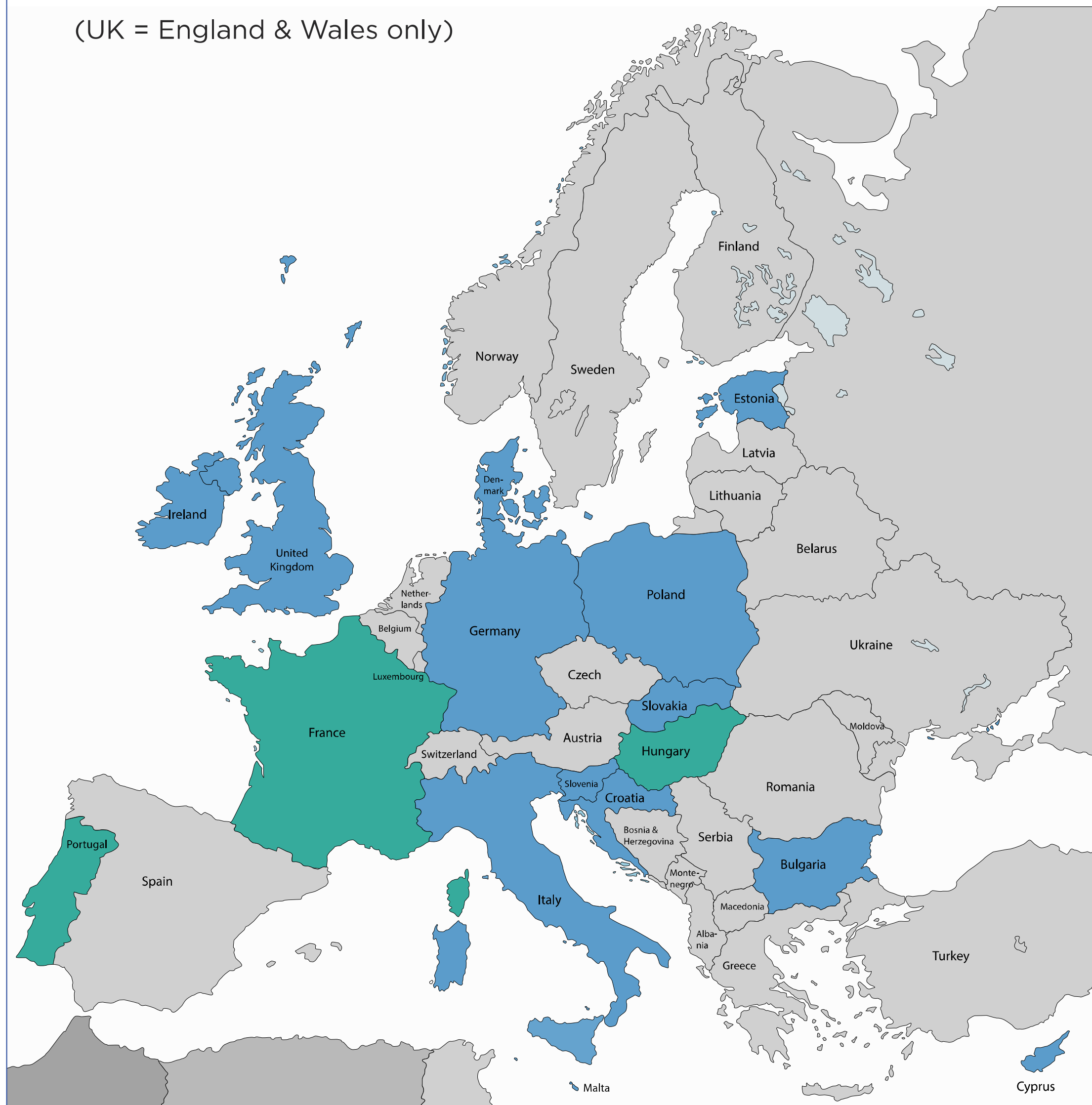
[66] Bulgaria, Germany, Lithuania, Poland. Under Austrian law provisional measures may be disposed by the court upon request of the creditors.

[67] Cyprus, Denmark (only for new claims), France (*sauvegarde* and *sauvegarde financière accélérée*), Ireland, Malta, Portugal (as mentioned above), Slovakia, Slovenia. Under Italian and English law (CVAs) stay has to be requested by the debtor.

*Map showing where Stay of Enforcement/Pending Actions are available*

Stay available in Pre-Insolvency Proceedings

Stay available in Confidential and Pre-Insolvency Proceedings



In full insolvency proceedings, there is an automatic stay in almost all Member States[68], sometimes with exceptions for certain proceedings[69]. In a substantial number of Member States[70], secured creditors can still enforce their claims; in other Member States[71] no enforcement is possible for this group of creditors.

In most Member States[72], attachments are lifted after the start of full insolvency proceedings. Also in most Member States[73], there is a stay on general legal proceedings that are pending when the insolvency proceedings are opened.

## 4.4 Cram down on dissenting creditors

In this report cram-down is defined as the overriding of the votes of creditors who vote against the reorganisation plan.

In confidential proceedings restructuring plans involving voting and cram down are rare and anyway limited to the creditors involved[74].

A composition in public pre-insolvency proceedings has to be approved by variable majorities of creditors[75], but after approval or confirmation by the court it binds all creditors[76].

---

[68] Except Spain and Malta. In the latter country in the case of bankruptcy of traders (i.e. not companies) there is no stay, as Article 484 of the Commercial Code states that during bankruptcy, precautionary and conservatory acts may be sued out by the creditors against the curators of the bankrupt. In the case of Maltese insolvency of companies there is no complete stay: once a winding up order has been issued, the court has to give leave if a creditor wants to take action against the company or its property.

[69] The following countries answer that there is an automatic stay with exceptions: Bulgaria, Cyprus (after a winding up order has been made or a provisional liquidator has been appointed), Estonia, Spain, the Netherlands, Sweden and UK.

[70] Belgium (holders of security rights in rem can enforce their claims), Czech Republic (secured claims should be satisfied from the selling of the respective security), Finland, Germany (that is, titles secured on real estate), Ireland, Italy (financial institutions that entered into certain secured loans with the debtor), Latvia (that is, after two months after the declaration of insolvency), Luxembourg, Malta, the Netherlands, Poland (in composition bankruptcy), Romania (but only after permission of the syndic judge), Spain (but only after certain conditions are met), Sweden.

[71] Cyprus, Denmark, France, Greece (that is, execution measures by secured creditors on the debtor's assets used for business activities), Hungary, Italy, Poland (in liquidation bankruptcy), Portugal, Slovakia, UK.

[72] Belgium, Cyprus, Czech Republic, Denmark, Finland, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain.

[73] Austria, Bulgaria, Belgium, Cyprus, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden, UK. On the other hand, in the case of Spain, it is very striking that (with some exceptions) pending legal proceedings are not interrupted after the opening of insolvency proceedings.

[74] Portugal.

[75] Cyprus (75%), Denmark (50%+1), Italy (50%+1 for *concordato preventivo*, 60% for *accordi di ristrutturazione*), Portugal (66%), Slovenia (60%), Spain (60% or 75% if the agreement entails that the secured creditor has to accept ownership of the secured asset against reduction of his claim), UK (CVA 75%).

[76] Cyprus, Ireland (by classes), Denmark, Italy (only concordato preventivo), Slovenia, Spain (*Acuerdo Extrajudicial de Pagos*), UK (but CVAs do not require approval by the court). Under Croatian law, the agreement is approved by FINA and concluded in court.

In many countries DIP proceedings require that a restructuring plan be submitted to the court by the debtor, by certain creditors, by the shareholders or by an administrator[77]. The plan may involve all creditors[78] or only classes of creditors[79]. The majorities for the approval of the plan vary from one Member State to the other[80]. The plan may bind all creditors, irrespective of their approval[81]. The plan is subject to approval by the court[82], which may carry out only a formal control in respect of procedural rules[83] or alternatively play a more substantive role and may check the soundness of the plan[84].

In full insolvency proceedings, a composition or recovery plan also has to be approved by variable majorities of creditors[85], but after approval or confirmation by the court it binds all creditors[86].

---

[77] Austria (by the debtor), Belgium (by the debtor), Finland (drafted by administrator or submitted by the debtor, or by qualified shareholders, qualified secured creditors or qualified creditors), Germany ( all parties mentioned could submit a restructuring plan, however predominantly the debtor or the shareholder do so), Greece, Hungary (by the debtor), Italy (by the debtor), Lithuania (prepared by debtor), Luxembourg (prepared by the administrator/commissaire), Sweden (reorganisation plan submitted by reorganisation administrator upon consultation with the debtor, public composition to be voted by creditors and approved by court), Slovakia (restructuring plan to be accompanied by the opinion drafted by a restructuring administrator, approved by creditors and by the court), Slovenia (by the debtor), Spain (composition agreement).

[78] Austria (all unsecured creditors), Belgium, Germany, Italy (*concordato preventivo*).

[79] Italy (*accordi di ristrutturazione*), Germany, Spain (only ordinary and subordinated creditors, unless privilege creditors expressly accept to be bound by the composition agreement).

[80] Belgium (50%+1 in terms of value of claims + 50%+1 in terms of number of creditors), Finland (50%+1 of group + 50%+1 of total claims, but exceptions are possible), Germany (50%+1 of groups, approval of the group requires 50%+1 by amounts and heads), Greece (60% of all claims, including 40% of secured claims), Hungary (66%), Italy (50%+1, if classes are set up, also the majority of classes), Portugal (66,66% + 1 of total claims + 50% + 1 of non-subordinated claims), Slovenia (60%), Spain (half of the ordinary creditors), Sweden (60% of unsecured creditors if they receive >50% of their claims, 75% if they receive <50%).

[81] Belgium, Germany, Italy (only *concordato preventivo*), Portugal, Spain (binding for all ordinary and subordinated creditors, it binds secured creditors only if they approve it).

[82] Austria, Belgium, Czech Republic, Finland, Germany, Greece, Hungary, Lithuania, Luxembourg, Portugal, Romania, Spain, Slovenia.

[83] Austria, Belgium, Czech Republic, Germany, Italy, Lithuania, Portugal, Romania, Slovenia, Spain.

[84] Luxembourg, Romania.

[85] France, Germany, Italy, the Netherlands, Hungary, Luxembourg, Belgium, Poland, Czech Republic, Slovakia, Romania, Austria, Cyprus, Estonia, Lithuania, Portugal, Romania, Slovenia, Spain, Sweden. See Restructuring & Insolvency 2013 (http://gettingthedealthrough.com/) and Clifford Chance European Insolvency Procedures 2012 (http://www.cliffordchance.com/publicationviews/publications/2012/05/european_insolvencyprocedures2012edition.html).

[86] France, Germany, Italy, the Netherlands, Hungary, Luxembourg, Belgium, Poland, Czech Republic, Slovakia, Romania, Austria, Cyprus, Estonia, Lithuania, Portugal, Romania, Slovenia, Spain, Sweden. See the literature mentioned in the preceding footnote.

## 4.5 New finance

Granting superpriority to new financing in confidential proceedings is exceptional. In general, in interim proceedings no superpriority is granted to new financing[87] however in public pre-insolvency proceedings which serve as a means to reaching an agreement with creditors superpriority is sometimes granted to new financing[88]. In DIP proceedings which are full insolvency proceedings superpriority is the rule.

In non-DIP full insolvency proceedings superpriority is very often granted[89].

## 4.6 Court involvement

The proceedings discussed here generally require an opening decision by the court in some Member States. Apart from that, court involvement is usually rather limited in confidential proceedings, because the decisions that may prejudice the interests of groups of creditors are few. In public pre-insolvency proceedings and full insolvency proceedings which involve the appointment of a bankruptcy trustee or some kind of supervisor, the court involvement also tends to be limited, because in those cases there is little need for the court to supervise. Obviously in debtor in possession proceedings without supervision by a supervisor the court has to play another role which entails much more involvement. Furthermore, courts are almost always involved in the context of adoption of the confirmation of rescue plans.

Where the court is involved all Member States mention court validation as a requirement to open full insolvency proceedings.

## 4.7 Confidentiality

Confidentiality has been made a distinctive criterion for confidential proceedings on the one hand and public pre-insolvency proceedings and full proceedings on the other hand. Because of its effects in respect of third parties, the starting point is

---

[87] Bulgaria, Croatia, Estonia, Hungary, Lithuania, Malta, Poland. Under Austrian law superpriority for new financing in interim proceedings is not provided by the law but granting of collateral for new financing would be possible. Under German law superiority of new financing is possible. In Portugal, the creditors may agree in granting security in relation to new financing.

[88] Cyprus, Czech Republic, Denmark (if agreed by supervisor), France (conciliation proceedings), Germany, Ireland (if certified by examiner), the Netherlands, Italy, Portugal, Spain (where fresh money granted in the framework of a refinancing agreement meeting certain conditions will have the following priority: 50% will be considered as a post-insolvency creditor credit against the insolvency estate *("crédito contra la masa"*) and the other 50% will be a credit with general privilege *("crédito con privilegio general"*)).

[89] Belgium, Czech Republic (if a credit is made to the creditor after approval of the reorganisation and the lender who made the credit is not a secured creditor, the receivables of that lender rank pari passu with the receivables of the secured creditor), Spain, Sweden, the Netherlands, Italy, Poland, France (under the redressement judiciaire, creditors after the opening judgment rank ahead of existing secured creditors and tax claims, but after employee claims and the insolvency expenses), Germany, UK (new security granted to secure new credit can only take priority over pre-existing security if this is permitted under the terms of the pre-existing security), Greece, Slovakia, Slovenia, Portugal. See the literature mentioned in footnote 87 and Wood, Principles of International Insolvency (pp. 718-723).

that insolvency proceedings need to be made public. Confidential proceedings can only be kept confidential provided (i) there are no prejudicial effects to creditors or (ii) with respect to creditors who are affected by e.g. a specific stay, the proceedings are disclosed. The decisions opening DIP proceedings are usually public[90], even if some elements of the restructuring plan may remain confidential.

Full insolvency proceedings are also usually public.

## 4.8 Costs and length

The expenses of confidential proceedings vary considerably and many respondents were not able to give a general estimate. In public pre-insolvency proceedings court costs are very low in many Member States, in particular in Eastern Europe, while the lawyers' fees for assisting the debtor or the creditors may vary considerably. The courts control the costs of the insolvency practitioner/administrator, which thus may be rather low. In certain countries, however, the amount of their fees is determined as a percentage of the turnover of the debtor or of the value of the assets, or depends upon the activities to be carried out. It may also be determined based on hourly fees.

With respect to confidential proceedings, fast track proceedings are the exception, but in general the proceedings are fast in themselves[91] or may be subject to time limits[92]. The duration of interim proceedings varies considerably, from two months to 8-12 months[93]. Public pre-insolvency proceedings as a means to reaching an agreement with the creditors are usually quite fast, they may last between a few weeks and a few months[94]. In some Member States there are fast track proceedings for SME's[95] or fast track DIP proceedings[96], but no fast track DIP proceedings are offered in the majority of the Member States since this type of proceedings is rather swift and simplified[97].

In some Member States the amount of the liquidator's fees in full proceedings is determined as a percentage of the turnover of the debtor or of the value of the

[90] Austria, Belgium, Greece, Italy, Luxembourg, Finland, Romania, Slovenia, Spain.

[91] Austria (2-4 months, but this type of proceedings is not used any more), France (3 months, but renewable, as the law does not provide any time limits for the Mandate ad hoc), Luxembourg (3-12 months), Spain (4 months).

[92] France (mediator maximum 4 months, renewable for one month for Conciliation proceedings), Germany, Portugal (3-4 months).

[93] Bulgaria (8-12 months), Estonia (2 months), Germany (3 months), Hungary (2 months), Italy (2-4 months, renewable once), Poland (2 months), Slovakia (3m).

[94] Croatia (4 months), Cyprus (few weeks), Czech Republic (4 months), Denmark (6 months, +2+2), France (6-18 months sauvegarde, 2 months *sauvegarde financière accélérée*), Ireland (70-100 days), Italy (6 months), Portugal (2-3 months), UK (8 weeks CVA, 12-18 months administration).

[95] Croatia, Spain.

[96] Slovenia. No insolvency practitioner is appointed but the agreement has to be submitted to the court within 4 months for validation, after being approved by a majority of unsecured creditors.

[97] Austria, Bulgaria, Czech Republic, Greece, Hungary, Romania, Slovakia, Luxembourg (value of the assets sold by the receiver), Poland. In Belgium the out-of-court proceedings involving a mediator may offer a faster option.

assets[98], or depends upon the activities to be carried out. It may also be determined on the basis of hourly fees[99].

The length of full insolvency proceedings varies considerably in most Member States: in a large number[100] of States the average length is two to three years.

In twelve Member States[101] there are fast-track/expedited full insolvency proceedings. In only two countries (Czech Republic[102], Spain[103]) there are special rules to make full insolvency proceedings speedier, simpler and less costly for SME's and micro-enterprises.

In seven countries[104], there are provisions for maximum duration of full insolvency proceedings.

## 4.9 Incentives and success

An important incentive for the use of confidential proceedings may be exemption from voidability of transactions that have taken place during such proceedings[105] as may be the waiver of the requirement to file for full insolvency proceedings[106] and

---

98 Belgium, Czech Republic, France (liquidation proceedings), Germany, Lithuania, Luxembourg, Portugal (fixed and variable component), Romania, Slovakia, Slovenia, Spain.

99 The Netherlands for bankruptcy and suspension of payments and Finland. They are often a combination of the hourly rate with other factors (Denmark): number of hours worked, kind of work, responsibility, financial results.

100 Czech Republic, Estonia, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia.

101 Belgium; Croatia (expedited proceedings are possible if i) the debtor does not have any employees, ii) the debtor is illiquid and iii) no other proceedings for deletion of the debtor from the court registry are pending); Greece (simplified proceeding for small insolvencies (if the insolvency estate has a value of less than 100,000 Euros) and if ii) there is no immovable property in the insolvency estate); Hungary (also a simplified liquidation, if i) the company has no assets at all and if ii) the formal management is not available.); Ireland (corporate); Lithuania (under the Law on Enterprise Bankruptcy, the court may apply the simplified bankruptcy proceeding to the enterprise if the debtor has no assets or that its assets are insufficient to cover the legal and administrative expenses. Under the Law on Personal Bankruptcy, a simplified proceeding is also possible); Luxembourg; Malta; Slovakia (simplified proceedings for small bankruptcies, e.g. assets less than EUR 165,000); Spain (the court may apply summary proceedings when i) there are less than 50 creditors, ii) the liabilities do not exceed 5 million Euros and iii) the assets and rights are less than 5 million Euros).

102 For non-entrepreneurs and small entrepreneurs who have less than fifty creditors and whose turnover was below CZK 2,000,000, there is a possibility of "minor bankruptcy".

103 A summary insolvency proceeding applies to SME's meeting the requirements that i) there are no more than 50 creditors, ii) the liabilities do not exceed 5 million euros, iii) the valuation of assets and rights does not reach 5 million euro.

104 Greece (the Insolvency Code provides that after the lapse of ten years from the commencement of the union of creditors and fifteen years after the declaration of insolvency, the insolvency is brought to an end); Hungary; Ireland (individuals); Italy (if it is longer than 8 years, according to case law of the European Court of Human Rights, the Italian State may be asked to reimburse damages); Lithuania; the Netherlands; Romania (a reorganization plan may not exceed 3 years from its conformation date. However, this period may be extended once, by not more than one year).

105 Austria, Belgium, Italy, Portugal.

106 Belgium, Portugal, Spain.

protection against creditors filing for full insolvency proceedings. Of course the confidentiality itself may constitute an incentive[107].

As concerns incentives in public pre-insolvency proceedings, while there are certain countries where no incentives are offered[108], in other countries proceedings are provided for encouraging early filing[109]. In other Member States incentives are construed as sanctions for late filing or breach of the duty to file for insolvency[110]. Sanctions may be civil (damages) and/or criminal. In the latter countries filing is mandatory. In Germany, if preliminary insolvency proceedings are commenced, it is possible to make use of up to three months payroll funding.

As to the success of confidential proceedings it is difficult to infer an opinion from the statistical data we received. In some Member States confidential proceedings have rarely been used. In others, they have been more popular and consequently more successful[111]. In a number of instances data is not available. Moreover it is difficult to assess the reason for such differences. It is possible that it relates to certain features of the confidential proceedings, but the effectiveness of full insolvency proceedings may also be of importance, because confidential pre-insolvency proceedings may be more attractive if reorganisation in full proceedings stands a smaller chance of success. It may also be that a requirement that the confidential proceedings cannot be continued if the company is actually insolvent may have a negative influence on the effectiveness of such proceedings. In any event, it seems that proceedings of type (ii) are more successful than proceedings of type (i), although exclusion of secured creditors from a stay or cram down may lessen the chance of success.

As far as the assessment of the success of public pre-insolvency proceedings is concerned, the scope of such proceedings should be taken into account. Indeed, they mainly aim at securing the assets while the conditions for opening full insolvency proceedings are checked. Thus, public pre-insolvency proceedings succeed if they lead swiftly to the second phase.

Where public pre-insolvency proceedings are used in order to reach an agreement with creditors, they are successful if the agreed plan is carried out, which apparently is not always the case.

---

107 France, the Netherlands.

108 Austria (proceedings primarily for protecting assets for the benefit of creditors), Cyprus, Denmark, Greece, Ireland, Lithuania, Slovakia, Slovenia.

109 Belgium, Italy (protection of debtor's assets, exemption from criminal sanctions, exemption in particular cases from claw-back for transactions that have taken place according to the plan), Portugal (stay of enforcement against the debtor, three venture capital funds.

110 Bulgaria (civil and criminal sanctions), Croatia (criminal sanctions), Czech Republic (civil), Italy (criminal sanctions in case of late filing for full insolvency proceedings as well as directors' liability), Malta (liability for wrongful trading), Poland, Portugal (civil and criminal sanctions for breach of the duty to file for insolvency), Slovenia (civil sanction), UK (wrongful trading, disqualification), Germany (civil and criminal sanctions).

111 E.g. France and Belgium.

Incentives for full insolvency proceedings may consist of measures to encourage early filing. The incentives to encourage early filing may be negative (sanctions in case of late filing)[112] or positive in the form of rewards[113].

An incentive to encourage early filing might also exist in the form of a wrongful trading doctrine[114].

Poland has an interesting phenomenon: it has a reward for the administrator in the form of an increase in the fees when the said insolvency proceedings are expeditious and offer creditors a high return, i.e. (i) when the final distribution plan has performed within one year from the deadline for filing claims and (ii) at least 50 percent of the non-privileged unsecured claims are satisfied.

Romania also mentions that a success fee may be granted for the diligent execution and implementation of a reorganisation plan.

[112] Belgium, Bulgaria, France, Germany, Greece, Italy, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain. As Wood (9-011) points out: if the law imposes penalties on management if they fail to commence proceedings, it is more difficult to achieve a private work-out: this is a disadvantage of this system of penalties.

[113] Austria.

[114] UK, Czech Republic, Germany, Greece, Italy, Malta, the Netherlands, Portugal.

# 5. Recommendations for preventive Pre-Insolvency Proceedings

**Confidential proceedings**

Confidential proceedings are developed in several Member States. A very important feature of such proceedings is that confidentiality may reduce the risk that the continuation of the business is threatened if the value is decreased as a result of the insolvency stigma. By nature these proceedings cannot prejudice the rights of creditors who are not made aware of the proceedings in any significant way. On the other hand from the responses it seems that confidential proceedings involving the possibility of a stay or standstill and advanced ranking of debts incurred during the pre-insolvency proceedings stand a better chance of success. It should be considered whether power to order such stay should include a stay of claims of the creditor against third parties as co-debtors and under guarantees, because in the absence thereof the stay against the debtor may not be very effective and the standstill may in fact be undermined. The possibility to have a rescue plan that is voted on by selected creditors (e.g. finance parties) only and which can be crammed down on the minority of dissenters may also provide an important tool, because only a limited set of creditors is involved in the negotiation and adoption of such a plan. Other important tools may be a court established moratorium with respect to specific creditors, the possibility to provide priority status to new financing and protection against avoidance actions of transactions which have been concluded in the confidential proceedings with the consent of a court appointed supervisor or the court itself.

The confidential pre-insolvency proceedings should be categorised as proceedings under the revised Insolvency Regulation. They should be opened at the centre of main interests of the debtor. As to the consequences of the determination of the centre of main interests by the court opening the confidential proceedings there are in essence two possibilities:

i. Interested parties may appeal the COMI-determination. The problem here is that, since the proceedings are confidential, creditors may not know of their opening or may hear about the confidential proceedings at different times. This makes it difficult to have the opening decision become irrevocable.

ii. The determination of the centre of main interests is only for the duration of the confidential proceedings and does not preclude another COMI determination by a court in another Member State in relation to the opening of public pre-insolvency proceedings or full insolvency proceedings. However in that case the decisions taken during the confidential proceedings and the consequences of such proceedings should remain effective (e.g. granting of superpriority to new finance and possible invulnerability of transactions entered into or payments made during the confidential proceedings).

Public pre-insolvency proceedings may be cost saving, because they can be conducted before an insolvency test has been carried out. They may also create a creditor controlled kind of proceedings which may save costs as well.
We do not see means specifically aimed at reducing costs. Most Member States have already abolished cumbersome formalities and both sales and rescue plans

can be achieved in fairly little time. To the extent insolvency proceedings are perceived as lengthy, this may be the case because litigation has to take place or because fair trial requirements are to be observed. An alternative may be to deposit funds in escrow for creditors who may claim unfair treatment, which may enable the process to go ahead and which avoids litigation to entail a delay[115].

**Debtor in possession proceedings**

Debtors obviously find the idea of debtor in possession proceedings attractive. It is however not obvious that debtor in possession proceedings result in more rescues or less costs. Successful debtor in possession proceedings require the appointment of an experienced chief restructuring officer or court involvement at a much higher level than proceedings in which an independent bankruptcy trustee is appointed and they require specialist judges. Such level of involvement may not be easily achievable in all Member States. Although such data are difficult to compare, there is an impression that debtor in possession proceedings in the United States (the cradle of DIP proceedings) are very expensive.

**Cram down**

Rescue of companies may be served by the adoption of rescue plans in which all creditors (including secured creditors) can be crammed down, provided qualified majorities of creditors with parallel interests vote in favour of such plan. Rescue plans should at least meet the requirement that the creditors receive under the plan at least the value that they would receive in the absence of such plan (usually through winding up). Moreover there should be the possibility to have limited rescue plans involving only specific creditors which can be adopted in confidential proceedings. These limited plans should contain similar voting and cram down rules.

**Stay of enforcement**

In the absence of statutory rules providing for a stay of enforcement the courts should have the ability to order a stay of enforcement for a limited time against all or specific creditors. A standstill may be needed to deleverage creditors who may threaten to blow up the rescue of the company if they do not get more than their fair share.

**New finance**

The possibility to attract new loans during insolvency proceedings or pre-insolvency proceedings is crucial for the success of a rescue operation. Often such new finance can only be obtained provided the new lender gets some kind of priority ranking and protection against avoidance actions or subordination etc. The laws should provide for that possibility.

**Pre-insolvency proceedings and avoidance**

In order to enable pre insolvency proceedings to result in a successful rescue often payments of essential creditors have to be made and new transactions have to be

[115] This instrument is available in Germany.

entered into, sometimes involving the sale of part of the assets. The flexibility to proceed on this path would be endangered if such transactions are the object of avoidance actions in subsequent full insolvency proceedings. Therefore such transactions should be protected, provided they have been scrutinized by the supervisor or the court.

**Supporting measures**

In order to assure the effectiveness of an early rescue mechanism, it is imperative to implement measures safeguarding that trading of the debtor can continue unimpaired. This applies in particular to confidential proceedings. The rights of creditors to terminate contracts or to request changes to existing contracts solely based on the fact that the debtor is making use of the rescue mechanism, although the debtor meets all contractual obligations, must be disallowed. Furthermore any contractual obligation to inform the other party of the opening of confidential proceedings should be disallowed as well.