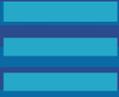




European Commission



Enterprise Directorate-General

# **BEST PROJECT ON RESTRUCTURING, BANKRUPTCY AND A FRESH START**

## **FINAL REPORT OF THE EXPERT GROUP**

September 2003





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## 1 EXECUTIVE SUMMARY

The expert group on ‘Restructuring, Bankruptcy and a Fresh Start’ was set up in 2002 to take part in a benchmarking exercise chaired by the Commission. Central to the Best Project on ‘Restructuring, Bankruptcy and a Fresh Start’, it consisted of experts from 14 Member States, 7 Candidate Countries and Norway.

In a series of five meetings, four key areas were discussed:

- **Early warning**
- **Legal system**
- **Fresh start**
- **Social attitudes**

As far as early warning is concerned, the discussions focused on the availability of **early warning** mechanisms and on the prevention of failure. Success at that point may depend on earlier recognition of distress and on the disclosure of information. The accessibility of support is also important, since it is likely that an enterprise in financial difficulties does not have the means to pay for (potentially expensive) advice.

The availability of statutory rescue and restructuring procedures is crucial. **Legal systems** should provide an option to restructure. Many rescue proceedings fail; the reasons for this are, amongst others: lack of information about their existence, high thresholds for entry, the negative impact that publicising the court order can have on the business and therefore the effectiveness of the process, cost, the excessive degree of protection certain groups of creditors may benefit from during the procedure, as well as the degree of expert knowledge and administrative efficiency of the relevant courts.

To a certain extent, legal systems can be a real deterrent to a **fresh start**. Failed entrepreneurs usually learn from their mistakes and can be more successful in the future<sup>1</sup>. The possibility of continuing or starting a new business is affected by both the general consequences of bankruptcy and on the disqualifications and restrictions imposed on those subject to bankruptcy proceedings. At present there is no distinction made between bankrupts who fail through no fault of their own and those who are culpable and little regard is given, in terms of their treatment, to the facts of an individual case. By treating each individual in a proportionate and appropriate manner, non-fraudulent debtors would not be stigmatised through association with fraudulent ones.

Last but not least, the expert group discussions looked at identifying ways of changing negative **social attitudes** towards business failure. Insolvency law can influence society’s views about failure and stigmatisation. In principle, the financial and business communities do not attach as much stigma towards business failure as consumers and the general community do.

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<sup>1</sup> According to an analysis by the Boston Consulting Group presented in the Seminar organised by the European Commission, together with the Dutch Ministry of Economic Affairs, in Noordwijk, the Netherlands (10 and 11 May 2001), failed entrepreneurs learn from their mistakes and are more successful in the future.

Following the benchmarking exercise, the recommendations below were made:

*Early warning*

- External advice should be made available at an early stage to enable earlier recognition of financial difficulties, allowing the best chance of restructuring and/or recovery measures succeeding.
- Clear information regarding the availability of ‘ways out’ should be readily accessible.
- ‘User-friendly’ and informative accountancy and other information tools that add value to existing tools should be developed.
- Training courses both for new starters and entrepreneurs’ advisors should be provided.

*Legal system and business survival*

- The intervention of crisis-managers, preferably under confidentiality, should be promoted so as to boost the survival of businesses in distress.
- Debtors who are aware that they will no longer be able to pay their debts should be encouraged to initiate insolvency procedures.
- Rescue and restructuring proceedings should be simplified, and thus cost less.
- Thresholds for entry to rescue and restructuring proceedings should be lowered, making them more accessible.
- Non-viable firms should be liquidated as quickly as possible in an organised way, taking into consideration the interests of all creditors.
- During the reorganisation process, the information provided by the debtor should be controlled via a neutral third party.
- Specialised insolvency sections of Courts should be created.
- A distinction should be made between secured and non-secured creditors in liquidation procedures rather than in rescue and restructuring procedures, so that the interests of all creditors are taken into account.

*Fresh start*

- A campaign aimed at changing mindsets in Europe and at promoting fresh start of non-fraudulent debtors should be introduced.
- The unnecessary effects of bankruptcy should be reduced: removal of outdated and harmful restrictions, disqualifications and prohibitions.
- Early discharge from remaining debts should be available, subject to certain criteria.

*Stigma of failure*

- Where the relevant body or court declares that the debtor’s bankruptcy was ‘excusable’, that information should be freely and publicly available.
- Information and education programmes should be developed against stigma on business failure.
- Special consideration should be given to the interests of those in the business and financial communities who seek to assist a struggling business to continue in trade, where it is appropriate to do so.
- A fresh start for entrepreneurs who have failed through no fault of their own should be promoted.

## 2 INTRODUCTION

### 2.1 *General background*

In 2000, the **European Council in Lisbon** set the goal for Europe of becoming by 2010 ‘the most competitive and dynamic knowledge-based economy in the world’. The Commission received a mandate to act by way of the open method of co-ordination, designed to help the Member States develop their own policies. This method consists of fixing European guidelines for achieving specific goals within a defined timeframe, to be translated into national and regional policies by setting specific targets and adapting measures to local conditions.

**The European Charter for Small Enterprises** endorsed at the Feira European Council in June 2000, considers that ‘some failure is concomitant with responsible initiative and risk-taking and must be mainly envisaged as a learning opportunity’ and called for an assessment of national bankruptcy laws in the light of good practice.

The Enterprise Directorate-General (DG) devised a methodology known as the **Best Procedure**, which is based on this open method of co-ordination. It consists of conducting benchmarking exercises on issues identified as essential to reaching the Lisbon goal and covers defining performance indicators, benchmarks and operational targets for improvements. The project ‘Restructuring, Bankruptcy and a Fresh Start’ is one of the Best Procedure Projects launched in 2002.

This report is the Final Report of the European Commission **Best Project on ‘Restructuring, Bankruptcy and a Fresh Start’**. In broad lines, this Best Project consisted of a series of five meetings between the European Commission and an expert group<sup>2</sup>, whose members were appointed by the authorities of each Member State, Norway and most of the Candidate Countries. The starting point of the discussions was the study ‘Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy’, which is considered in the following point.

### 2.2 *The study: background*

Together with the Dutch Ministry of Economic Affairs, the Commission organised a **Seminar on Business Failure** in Noordwijk (the Netherlands) in 2001 to exchange good practice and identify key issues for further attention. This event led to initial conclusions, which are outlined in a short report on the Seminar and summarised in the ‘Did you know that’ leaflet. The **brochure ‘Helping businesses overcome financial difficulties’** contains a selection of examples of good practice presented in the Seminar in Noordwijk. The conclusions of Noordwijk included the following:

1. A predictable **legal framework** is needed. Transparency, accountability and predictability are fundamental to sound credit relations.
2. **Prevention** is more efficient than cure. Support measures should focus on early warning, timely intervention, expert advice and obtaining fresh money. A rescue is in many cases preferable to liquidation. Legal systems should provide an option to restructure. If the business has no future, assets should be liquidated swiftly and efficiently.

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<sup>2</sup> For the expert group role, please see point 2.4. Contact details of the members of the expert group appear at the end of this report.

3. Bankrupts should be encouraged to **restart**. Often, failed entrepreneurs learn from their mistakes and are more successful in the future. In legal terms, a rapid discharge is crucial and no unnecessary restrictions should be imposed. The availability of finance should be improved and support tailored to the specific needs of restarters should be improved. On the other hand, relations with creditors are very important and responsible behaviour towards them is crucial to ensure the availability of capital. Irresponsible debtors should not, therefore, be given the chance of an easy way out.

The study '**Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy**' was launched by the European Commission to collect data on the legal and social consequences of business failure. This study provides draft performance indicators, on the basis of which the expert group has selected definitive indicators and benchmarks. It also provides comparative analysis of the legal systems of the EU Member States and the US to help define the operational elements needed to attain the benchmarking performance and identify examples of best practice.

### 2.3 *Experts' tasks*

The expert group's role in the benchmarking exercise has been:

- to define a set of policy indicators (special focus on 3-4 headline indicators);
- to exchange national practices and discuss their rationale;
- to find agreement on benchmarks on the performance in the areas defined;
- to define an implementation strategy for policy change leading to the achievement of the benchmarking performance by learning from best practice.

### 2.4 *Objectives*

The experts sought agreement on four topics, which are the basis for conclusions in point 7 of this report. Points 3 to 6 present each topic: having set up the target in the field, the members of the expert group compared the situation in their countries and then came up with some recommendations. Good practice cases further illustrate some issues raised.

## 3 **EARLY WARNING**

### 3.1 *The target*

At this point the expert group discussions sought agreement on prevention of failure and availability of early warning mechanisms.

### 3.2 *The indicators: first approach*

**Formal early warning procedures** are very rare, and often fail to intervene in time. The underlying causes for the failure of the various **early warning** mechanisms may, among others, be as follows:

- **Late recognition.** Entrepreneurs can sometimes have difficulty in recognising that their business is in financial trouble.
- **Disclosure of information.** Certain laws fail to prescribe the substance of the information to be disclosed and how and when that information is to be provided.

### 3.3 *The indicators one by one. Policy suggestions*

#### 3.3.1 Late recognition

Throughout Europe, many entrepreneurs cannot believe that ‘their’ business is in trouble and quietly hope for a solution or are persuaded that they have discovered the niche in the market. Under this illusion they often delay either making key decisions or commencing insolvency proceedings, this approach often leads to a worsening of the business’s financial position, for which liquidation usually becomes the only option. Essential among the keys for successful rescue is the early recognition of financial difficulties. Even if some entrepreneurs do recognise this, many do not take action because they are not aware of the options available to them. Accessibility to external advice at this point is crucial.

The Belgian Institute of Company Auditors has changed its rules on professional ethics in order to allow auditors to advise businesses where examination of the annual accounts has revealed signs of difficulties. This initiative seeks to speed up the solving of problems affecting businesses by shortening the time-lag between detecting financial difficulties and tackling them. In Spain, the audit standard on the application of the principle of the going concern of the *Instituto de Contabilidad y Auditoría de Cuentas (ICAC)*<sup>3</sup> is relevant as an early-warning system since it lays down the auditor’s duty to ‘pay attention to those situations or circumstances which may give rise to doubts about the continuity of the business's activity and if, once all the facts have been analysed, significant doubts persist, to mention this uncertainty in its report’.

#### 3.3.2 Disclosure of information

Some legal systems do not describe *what*, *when* and *how* relevant information for businesses has to be displayed. What kinds of information do entrepreneurs, creditors and the authorities need? For instance, audited balance sheets sometimes arrive too late to be used as an early warning detection tool.

On the one hand, some jurisdictions do not provide for a means of control or review of this information. On the other hand, a lack of transparency and accurate information regarding the debtor’s financial statement can lead to misconceptions on the part of the creditor and the inaccurate assessment of the business’s viability of the business. As a result the early warning process fails.

### 3.4 *Good practices*

#### 3.4.1 Poland: the National SME Services Network (*KSU*)

Since 2000, the National SME Network centres have been participating in the implementation of the Government's policy towards small and medium-size enterprises. This Network includes 150 not-for-profit **business counselling centres** (regional and local development agencies, business support centres, industrial and commercial chambers, and local foundations and associations) all over the country.

Upon request by the company, the *KSU* centres supply with a wide range of services: financial analysis, business plans, restructuring plans, marketing strategies, as well as any other consulting services required by SME. Having access to all financial data of the client, these centres can warn against the threat of bankruptcy. Financial analyses from *KSU* centres, which are accredited entities, are widely accepted by financial institutions. Consequently, positive endorsement from National SME Service Network is a sign of good financial condition.

#### 3.4.2 Finland: (*T&E* Centres)

In order to promote industry and employment, Finland has established 15 Employment and Economic Development Centres (*T&E* Centres). *T&E* Centres are commissioned to promote particularly SMEs and improve

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<sup>3</sup> Published by the *ICAC*, under Article 5 of the Law on the auditing of accounts (Law 19/88 of 12 July).

the operating conditions, the technological development and internationalisation of enterprises by providing them with financial, training, development and other services. **Basic advisory services** are **free of charge**. Entrepreneurs have to pay a share of the cost for services such as an analysis of the company or drawing up a development. This system has been rather successful as far as start-ups are concerned. A working group in the Ministry of Trade and Industry seeks to improve current business environment so that entrepreneurs get even better help in the case of financial difficulties. This project is implemented in co-operation with some administrative sectors, creditors and organisations of entrepreneurs.

### 3.4.3 Spain: the Information Centre and Network for Business Creation (*CIRCE*)

Law 7/2003 of 1 April (which came into force on 2 June 2003) provides decisive support for businesses by solving all the problems that create a significant barrier for entrepreneurs who decide to set up a business. The three essential elements of the **New Enterprise project** are: the Information Centre and Network for Business Creation (*CIRCE*), the legal system for the New Enterprise and the simplified accounting system.

*CIRCE* will be set up as a network of Advisory and Procedure Initiation Points (*PAIT*), which provide advice and services for entrepreneurs during the creation, administrative procedures and start-up of entrepreneurial initiatives and during the first few years of activity. The network aims to achieve two of the objectives of the New Enterprise project: the creation of an infrastructure of advice centres, information and services, accessible throughout Spain via the Internet, and the creation of a business creation network which provides as much help as possible for entrepreneurs when setting up their businesses.

The Advisory and Procedure Initiation Points (*PAIT*) are structured in an open way so that both public and non-public bodies concerned with the creation of businesses can join, provided that they fulfil minimum requirements and quality guarantee mechanisms for the services that they are going to offer, from the point of view of both on-line processing and business advice.

### 3.4.4 Barclays Business Support in UK

Like other banks, Barclays Bank in UK operates an internal system that seek to alert lenders to their corporate customers' financial problems at the earliest possible time, 'The Early Warning List'. The system operates by utilising IT and other internal systems that will analyse individual accounts on a monthly basis and will refer cases to the Business Support team where certain trigger points are reached. 70% of corporate customers that are dealt with by the Business Support team return to good financial health and less than 10% of receivership appointments are made by Barclays, which banks around one in four businesses in England and Wales.

By taking a **partnership approach** with the management of the business, Barclays are going a long way towards eliminating the 'fear factor' that can often lead to delay in seeking help, and which can make the difference between rescue and failure. Change to facilitate a rescue before it is too late is sought on the basis of the consensus between all stakeholders.

As well as the benefit to the customer (and those with whom it does business) by coming out of the process better equipped to deal with problems in the future, there is a benefit to the lender through both protection of their exposure and a continuing banking relationship, and to the economy as a whole through the maintenance of economic value.

### 3.4.5 A Swedish bank-owned credit rating company

UC Risk is a system for credit rating of Swedish limited liability companies, partnerships and limited partnerships as well as sole trader business activities. UC Risk covers both UC Credit Ratings and UC Risk. UC's Credit Ratings provide with a fast and simple way of objectively assessing the **business risk** of a company or a sole trader business. They are rated from 1 to 5, taking into account the risk of becoming insolvent within a two-year period. UC's Credit Ratings are based on UC's Risk Forecast, which has been created using statistical analyses of a large and representative selection of companies and sole trader businesses.

### 3.4.6 ACCA

ACCA (the Association of Chartered Certified Accountants) is an international accounting body, with an extensive network of 70 staffed offices and other centres around the world. ACCA produces a series of high quality booklets that provide **guidance** on a range of issues that affect small business. Recent publications include 'Keeping Afloat. Your guide to avoiding business failure'. It explains the duty of directors to keep the financial performance of their companies under constant review and suggests various options for companies which are experiencing difficulties staying afloat.

The pamphlet offers a list of warning signs, of indicators to be taken into account by company's directors when maintaining regular checks on its ability to meet commitments. The last chapter, 'Plan ahead, take advice',

launches a clear message to directors: to be effective, assistance must be sought out before the alarm bells start to ring, not after. In this line, ACCA has recently published another brochure: ‘Warning signs for small businesses’<sup>4</sup>.

## 4 LEGAL SYSTEM

### 4.1 *The target*

At this point, the expert group discussed the availability of legal rescue and restructuring procedures.

### 4.2 *The indicators: first approach*

Formal proceedings aimed at rescuing viable businesses have been introduced in many jurisdictions. Examples are the ‘*redressement judiciaire*’ in France, the ‘*concordat judiciaire*’ in Belgium and the ‘*examinership*’ in Ireland. It seems however that these forms of rescue are not successful everywhere. In some countries they are rarely used and often do not achieve their aim of preventing bankruptcy proceedings. The underlying (legal) causes of the failure of these rescue proceedings could, amongst others, be the following:

- Availability of **information** about rescue procedures
- Ease of **access** to rescue procedures
- Effect of **publicity**
- Costs and **effectiveness**
- Degree of **protection** against creditors during the procedures
- Knowledge and functioning of the relevant **courts**

In Romania, there have been around 40,000 insolvency cases during the last six years. Of these, reorganisation proceedings account for less than 5 per cent (and about 70 per cent of these subsequently fail and become liquidation proceedings). Thus, despite the existence of a specific legal and regulatory framework for company rescues, successful reorganisations are relatively rare. Although several factors have an incidence on this fact, it seems that the main underlying cause of failure of rescue proceedings in Romania is not legal but the absence of a culture of negotiation when it comes to debtor-creditor relations and the inflexibility of key players.

Out-of-court settlements present both advantages and disadvantages. On the one hand, costs are lower and negotiation approaches are more flexible than in formal insolvency proceedings. On the other hand, reaching an informal work-out<sup>5</sup> can be difficult due to, for instance, the antagonistic interests of the different kinds of creditors, the fact that some creditors prefer pursuing individual enforcement actions or the improper protection of some unsecured creditors’ rights during the negotiation period.

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<sup>4</sup> [http://europa.eu.int/comm/enterprise/entrepreneurship/support\\_measures/failure\\_bankruptcy/warning\\_signs.pdf](http://europa.eu.int/comm/enterprise/entrepreneurship/support_measures/failure_bankruptcy/warning_signs.pdf)

<sup>5</sup> Examples of guidance principles for informal work-outs are:

-The London Approach, <http://www.bankofengland.co.uk/londapp.htm>

-The INSOL Global Principles for Multi-Creditor Workouts.

### 4.3 *The indicators one by one. Policy suggestions*

#### 4.3.1 Availability of information about rescue procedures

Among the criteria, this would be the only subjective one. It indicates the extent to which the community is aware of the ways out offered by the legal system.

Restructuring proceedings are, in contrast to bankruptcy, not well known in some jurisdictions. The proceedings can be very complex and external specialist advice may be compulsory. This makes it difficult to start the restructuring proceedings before the enterprise is beyond salvage. In Belgium, the commercial investigation services seem to be well placed to inform debtors of the possibilities open to them on a procedural level.

Under Belgian law, considering the high degree of protection afforded to creditors by this procedure, bankruptcy is basically the only suitable procedure for dealing with the situation of a commercial debtor who has permanently ceased paying. However, since 1977 the Belgian legislator - aware that this procedure led to a depreciation of the assets to be liquidated - has allowed courts to authorise the debtor to go into liquidation under common law, subject to the explicit or implicit agreement of the creditors.

#### 4.3.2 Access to rescue procedures

High thresholds for entry are conducive to the misuse of insolvency proceedings. This is the case if the proceedings can only be initiated by guaranteeing the creditors immediate payment.

Businesses to be saved should be distinguished from businesses to be liquidated, so that the threshold is different. The fact of having difficulty in facing debts should be the trigger to start restructuring procedures.

Under this point, there is an important issue: efficient laws should aim to balance the interests of creditors and debtors. The only possible approach is a balanced one: if entrepreneurs are too powerful, creditors will be reluctant to initiate and support rescue procedures; powerful creditors, on the other hand, would seriously affect the entrepreneur's ability to do so.

General access to rescue procedures is one of the targets of current projects of reform of Italian bankruptcy system. Royal Decree No 267 of 16 March 1942 regulates re-organisation of enterprises in crisis via the controlled administration procedure (*Amministrazione controllata*), seldom used. Since 1979, a compulsory access to a special rescue procedure (extraordinary administration) has been provided for major productive entities (Law No 95 of 3 April 1979, *Amministrazione straordinaria delle grandi imprese in crisi*)<sup>6</sup>.

The new insolvency regulation<sup>7</sup> in Spain clarifies and simplifies access to insolvency procedures. There is a common first phase to these procedures which is short and aims at examining alternatives to liquidation.

#### 4.3.3 Publicity

The vast majority of jurisdictions require publication of the court order granting the insolvency process in the official gazette of the court, which can, in extreme cases, lead to panic, or at least negative publicity and therefore loss of customers. The fact that court hearings and meeting of creditors are, generally, public and that parties who are not directly affected can follow the proceedings can have a negative impact on the course of the process. In France, the hearing is not public (*'chambre du conseil'*); it is only the day when the judgement is ordered that the hearing is open to the public.

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<sup>6</sup> This procedure has been adapted to European Union competition rules (Legislative Decree of July 8, 1999 n. 270 – D.Lgs. 270/1999).

<sup>7</sup> Law 22/2003, of 9 July, *'Concursal'*, § 4.1

Nevertheless, some publicity is essential when businesses in financial difficulty find themselves in an insolvency proceeding; otherwise the interests of all creditors could not be protected. Confidentiality can only be assured in the case of preventive measures taken before formal insolvency procedures are commenced.

#### 4.3.4 Cost and effectiveness

Insolvency proceedings are often too expensive for small and medium-sized companies. The proceedings can be relatively complex and external advice and assistance to begin and follow the process are unavoidable and expensive. Out-of-court proceedings are usually quicker and cheaper, even though the fees and expenses of any third party appointed must be paid by the company in trouble.

The inevitable long delay and the formalism of the court-based procedure can deter the enterprise from initiating reorganisation proceedings. To avoid unduly long and expensive procedures, the law could determine regulations regarding administrators' fees and/or allow judges to adapt fees according to the case. Some experts suggested exempting creditors from paying the costs of the procedure, depending on its type.

What about cases where there is a lack of assets? In Germany, proceedings are not opened in such a case. In France there is no assessment of unsecured claims if the proceedings show no likelihood of a reorganisation plan succeeding and for creditors to be partially paid.

Administrators must be aware that the survival of the company is not always desirable. In some circumstances, closing down might be the best option.

#### 4.3.5 Degree of protection against creditors during the procedures

A clear factor in the lack of success of reorganisation proceedings in certain EU Member States is the level of protection given to secured creditors in liquidation procedures (i.e.: the rights of secured creditors are not affected by the reorganisation procedure). In fact the rights of secured creditors generally take priority over all other interests: VAT, social security, etc. Sometimes the procedure has no chance of success without the consent of these creditors to the reorganisation procedure, without a reduction of credit or delays to pay. In the United Kingdom this right of veto will disappear thanks to The Enterprise Act 2002<sup>8</sup>. The UK took the view that if companies that can be rescued are going to be rescued, thereby maximising economic value, then the insolvency office-holder should be required to act in the interests of all creditors and should be answerable to all creditors.

In the Netherlands there is a distinction between secured, preferential and other creditors, whilst in Latvia claims are divided into secured, preferential and privileged.

In both reorganisation and liquidation procedures the interests of all parties are to be taken into consideration. Nowadays, banks are the main source of funds for enterprises, so it is understandable that measures seek to guarantee refunds to banks. In Belgium, in the case of restructuring procedures it has been possible since 1997 to terminate certain contracts, which can contribute to the survival of the business. With the same purpose, a new door will be opened in Spain with the new legislation: possible rehabilitation of some contracts and credits, as well as general suspension (except in a few cases) of executive actions affecting the composition of the assets in a business.

The social badge and labour contracts should not be neglected. The International Labour Organisation Standards and European Directives preserve the workers rights.

#### 4.3.6 Knowledge and functioning of the relevant Courts

In Belgian law, commercial courts have jurisdiction to examine cases of trader insolvency. The effectiveness of this jurisdiction is reinforced by the fact that the Court is made up of both

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<sup>8</sup> For further explanations about the contents of The Enterprise Act 2002, please see point 5.4.2

‘professional’ magistrates and other judges appointed from the world of business (traders or company directors). The Belgian legal code now allows accountants and company auditors to be appointed as judges in these commercial courts, too. The presence of such professionals from business enables commercial courts to take advantage of their experience in this area.

#### 4.4 Good practices

##### 4.4.1 The *Mandataire ad hoc*

France **prevents** insolvency via two contractual, voluntary and non-judicial possibilities: the *Mandataire ad-hoc* and out-of-court settlement.

Following existing practice developed in certain courts, French law introduced the possibility for Courts to appoint a *Mandataire ad-hoc*. Upon the request of an ailing firm, the court can decide without restraints on the duration, the goals and the mission of the mandate. The *Mandataire* can be a judge, consultant, lawyer, auditor etc. and is not selected from an official list of candidates.

The *Mandataire ad-hoc* establishes a financial report on the firm, contacts the creditors and attempts to find agreement about repayment of debts or restructuring of the firm, following which he will present the findings to the Court. After this survey, the president of the Court will sometimes appoint a conciliator<sup>9</sup> (proceeding ‘*règlement à l’amiable*’) whose specific mission is to reach an agreement among main creditors within a short period (3 months).

The advantages of the *Mandataire ad-hoc* are its flexibility, confidentiality and voluntary character. The inconveniences of the procedure include the costs (no restrictions or judicial control regard the *Mandataire*’s fee, which is to be paid by the debtor), particularly for small firms, and the risk of unequal treatment of creditors, favouring one specific creditor to the detriment of others. It may also delay opening an insolvency procedure if the financial situation of the debtor turns out to be worse than expected.

The *Mandataire ad-hoc* procedure is relatively unique in Europe. Only Austria has a similar system, but it is seldom used in practice. There is a similar system in the US (*the turnaround manager*).

##### 4.4.2 The success of restructuring in Austria

In Austria there is the ‘*Ausgleich*’ procedure, not frequently used, and the bankruptcy procedure. The ‘*Ausgleich*’ procedure has dissuasively high entry criteria and is only effective when problems are tackled at a very early stage. Consequently, lawyers have found in practice that the bankruptcy procedure is more effective for more serious reorganisations cases.

A fresh start with the business is possible, if a reorganisation plan (*Zwangsausgleich*) is accepted by the majority of the creditors and confirmed by the court. Although the quota offered to the unsecured creditors must be a minimum of 20% and must be paid within a maximum of 2 years, there are many **reorganisation** plans in Austria (in 2002 a reorganisation plan was confirmed in 34% of the bankruptcy proceedings). Keys to the success of restructuring in Austria:

- The low number of preferential claims. Furthermore, the court may ban the enforcement of secured rights for a period of 90 days, if such enforcement prevents the debtor from continuing his business.
- The Associations for the protection of creditors’ rights (*bevorrechtete Gläubigerschutzverbände*). These associations examine whether the reorganisation plan and, in particular, the quota offered by the debtor to the creditors, is fair and reasonable.
- The administration of the business. As long as the administrator investigates if a reorganisation plan is in the interest of creditors, he has to carry on with the business. It will be closed down only if continuing the business clearly implies a disadvantage for creditors.

##### 4.4.3 Finland: towards a fair and equitable system

Finland has **separate** legislation on a bankruptcy procedure concluding with liquidation (Bankruptcy Act) and on restructuring aimed at the rehabilitation of an enterprise (Reorganization of Enterprises Act). If an enterprise has filed for restructuring it cannot be declared bankrupt. If the restructuring procedure has been started, any bankruptcy petition is suspended. If restructuring is refused, the processing of the bankruptcy petition may be

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<sup>9</sup> The conciliator's role is separate and independent from the two contractual, voluntary and non-judicial possibilities mentioned in point 4.4.1.

continued. Initiation of restructuring proceedings requires, among other things, that the enterprise can be made profitable through restructuring.

A review of the bankruptcy legislation is under way and a Government Bill will be probably introduced in the Finnish Parliament in the summer of 2003. The overall objective of the revision is to create clear and predictive rules on bankruptcy, to create an effective, efficient and transparent bankruptcy procedure. Another aim is to take sufficient account of the different needs relating to various types of debtors and the fact that the estates of bankruptcy are of different size.

The Finnish enforcement order has been amended by an act adopted in 2003 that will enter into force on 1 March 2004. The aim of the new act is to establish an effective and flexible procedure for enforcement that would not take an unreasonable time. Another objective of the review is to promote the general criteria for recovery proceedings, such as effectiveness, reasonableness and legal protection.

#### 4.4.4 Italy and access to rescue procedures: update of the Royal Decree of March 16, 1942, n.267

Two reform bills are being drawn up in Italy to modify the rules now in force<sup>10</sup>. One will introduce some variations to the rules of the 'Controlled administration procedure' and the 'Preventive creditors settlement procedure'. The main change is abolition the condition of 'merit' to be admitted to the procedures.

The actual rules (see article.181, par.1, n.4); 188, par.1 R.D.267/1942) provide that the debtor may accede to these procedures only if he is deemed 'worthy'. This condition refers not only to the ethical qualities but also to the technical and professional capacities of the entrepreneur. Some difficulties have arisen about the individual identification of this requirement for companies and the impossibility to verify it for limited companies. The change proposed is due to the opinion that best satisfying the creditors' interest prevails over any distinction between honest and dishonest business difficulties/failure. This is the opposite to the current approach.

The text of the second bill, which is in course of completion, should acknowledge the principal guidelines which have appeared in the evolution of the various projects drawn up in these last years<sup>11</sup>, as follows:

- to maximise the value of productive assets and estates;
- to favour the timely recognition of difficulties and to provide remedies;
- to encourage cooperation from the debtor and from the creditors;
- to provide efficiency, speed, transparency and simplification of the procedures.

These principles should be carried out through warning and prevention instruments, as well as a settlement procedure and a bankruptcy procedure. These procedures would replace all procedures regulated in R.D. 242/1942. The compulsory administrative liquidation (*Liquidazione coatta amministrativa*) for insurance companies, banks and bank groups, financial intermediaries etc., would be maintained.

The second reform bill includes the following measures:

- a settlement plan in the bankruptcy procedure, as an alternative to the judicial liquidation of assets.
- continuation of business activity during judicial liquidation, provided that the value of assets is preserved. The business, partially or as a whole, could also be rented or incorporated into new companies, if advantageous.
- a complete discharge, provided that all unsecured creditors have been paid in a minimal percentage (20% is under discussion), except in cases of debtor's uncooperative or obstructive behaviour and criminal offences.

#### 4.4.5 The Norwegian Advisory Council on Bankruptcy

Norway in 1994 established The Norwegian Advisory Council on Bankruptcy (*Konkursrådet*). The Norwegian Ministry of Justice appoints the Council. The Council consists of representatives from the courts, lawyers, accountants, the administrative authority and the public prosecutor. The Ministry of Justice is secretariat for the Council. The Council gives **recommendations** on the need for change in the Norwegian insolvency and bankruptcy **law**, and in the practice thereof. Although the Council only deals with questions of principle and not individual cases, the Council has a wide range of general information addressed to the general public. The Council has an Internet site [www.konkursradet.no](http://www.konkursradet.no) to publish information about insolvency and make it easily accessible for both professional and non-professional users. The Internet site had more than 100 000 hits in 2002 and is

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<sup>10</sup> Royal Decree of March 16, 1942, n.267. The reform bill partially described in this point is the *Disegno di legge recante modifiche urgenti al regio decreto 267/42 recante disciplina del fallimento*, having been deliberated by the Council of Ministers on March 1, 2002, but not yet discussed in Parliament (DDL 1243/00, presented in the Senate on March 14, 2002, assigned to the Justice Committee, but not yet examined).

<sup>11</sup> *Disegno di legge delega per la riforma delle procedure relative alle imprese in crisi*, having been deliberated by the Council of Ministers on October 27, 2000; *Progetto di legge n.970. Delega al Governo per la riforma delle procedure della crisi di impresa*, presented in the Chamber of Deputies on June 21, 2001.

considered as important tool to spread general information on insolvency. Parts of the Internet site are also available in English.

## 5 FRESH START

### 5.1 *The target*

From a legal point of view, the expert group sought agreement on lowering the barriers to a fresh start after business failure.

### 5.2 *The indicators: first approach*

A comparison of the various bankruptcy systems in the EU Member States indicates that the common goal of procedures is, generally, to provide for the efficient liquidation of businesses in distress and the efficient reimbursement of its creditors, either in full or in part.

Although all countries' procedures seem to achieve this goal, i.e. the liquidation of a company, some (e.g. Germany, France and U.S. and upon commencement of the Enterprise Act 2002, the UK) also emphasise the restructuring of companies in order to (1) continue the business, (2) continue the employment of employees and (3) maximise the return to creditors and other stakeholders.

In seeking a fresh start the possibility of continuing or starting a new business after a bankruptcy should be encouraged. Two conditions are required in order to allow for a new fresh start:

- a) the discharge of the debtors' remaining debts;
- b) a limitation of the restrictions that are imposed on the individual debtor or director in a 'bone fide' bankruptcy.

The following indicators help analyse to what extent legal systems act as a deterrent to a fresh start:

- **Effects** of bankruptcy
- **Restrictions, disqualifications and prohibitions**
- Distinction between **honest and dishonest** bankrupts
- **Discharge** from remaining debts

### 5.3 *The indicators one by one. Policy suggestions*

#### 5.3.1 *Effects of Bankruptcy*

The particular legal effects of a bankruptcy can create stigma. In many cases, the bankrupt is to some extent limited in his freedom of action: he may have to communicate any changes of address or be forbidden to abandon his domicile. Sometimes, the administrator monitors correspondence addressed to the bankrupt. In a majority of countries, the bankrupt is automatically divested of control of (almost) all of his assets. This measure exists to ensure that he will not dispose of his assets and by doing so, breach the equality between the creditors.

The new legal framework in France is less 'repressive' than before. Fraudulent behaviour aside, it considers that business failure is an accident and that debtors do not deserve to be deprived of their belongings.

In Europe, all the property of an entrepreneur (including future income) must be used to repay his debts (depending on rules governing marriage, those belonging to his spouse included).

Essential household items and tools of the trade could be excluded). Apart from the fact that assets linked to the business and individual property are sometimes merged, having to give as a guarantee to banks the personal possessions of one's spouse blurs the separation that the couple may have established when they married. It was also discussed whether a common homestead exemption for the whole EU would be useful or not. In the UK, following consultation, such a possibility was removed from the Enterprise Act 2002.

Some experts suggested facilitating incorporation of small businesses as a way to avoid some of these problems. Nevertheless, sometimes it makes no difference since banks often ask managers and owners of limited companies for personal guarantees. It should be highlighted that most major banks in the UK now seek to avoid an early call on personal guarantees whenever possible. In France, personal guarantees given by directors cannot be used during the observation period.

In order to avoid bank financing and personal liabilities, entrepreneurs could resort to more imaginative sources of capital, e.g. business angels, family, friends, etc.

### 5.3.2 Restrictions, Disqualifications and Prohibitions

Bankruptcy laws usually impose restrictions, disqualifications or prohibitions on those who are subject to bankruptcy proceedings. Most EU Member States' systems impose certain restrictions, whether of a pecuniary or criminal nature, on individual debtors or directors, or certain prohibition to perform certain activities or to be appointed in certain functions. This has the potential to create negative stigma, since these restrictions create an environment that deters entrepreneurs from making a fresh start.

These restrictions can be justified where the individual debtor or directors committed fraud, behaved against the creditors interests or willingly caused the company's bankruptcy. However, in *bona fide* cases of bankruptcy, some of the restrictions could be considered excessive and prohibits entrepreneurs from making a fresh start.

Among the EU Member States, only UK legislation currently includes automatic restrictions, disqualifications and prohibitions. The Enterprise Act, and subordinate legislation, will remove the majority of those. In the rest of the EU, most restrictive measures are not automatic but imposed by Courts.

According to current Polish regulation, a fresh start is excluded for bankrupts for five years. Article 372 of The Act of The Law on Bankruptcy and Redress, which will come into force in October 2003, establishes that the court may deprive the bankrupt for three to ten years of the right to conduct economic activity on his own account and to serve as member of the supervisory board, representative or attorney in a commercial company, state owned enterprise or co-operative.

Some prohibitions can be erased and, thus, rehabilitation becomes feasible, in cases of partial payment of debts by the debtor. In the Netherlands, a useful practice is sometimes observed: bankrupts may get a letter of reference from an insolvency administrator so that they can ask a bank for financing and restart.

Obtaining discharge of the remaining debts is not the only condition for a successful fresh start. How can the entrepreneur/director launch a new business if he has been prohibited from exercising certain commercial activities or professions?

As mentioned above, Greece seems to have the strictest regime in that regard, for bankrupt entrepreneurs will immediately lose their trading capacity and are therefore excluded from any commercial or industrial profession.

In Finland, Courts may impose on an entrepreneur a ban on engaging in commercial activities for seven years at the maximum. A precondition for imposing a ban is that the entrepreneur has seriously failed to meet his legal obligations relating to business activities or has been involved in criminal proceedings that cannot be considered minor. Another condition

is that the activities of the entrepreneur as a whole must be considered detrimental to creditors, his partners, the public economy and to a sound and functioning competition.

Some professions (e.g. trustee, lawyer, employee in a company of public law, auditor...) may not be exercised by individuals while the bankruptcy proceedings are under way (in Finland, for instance). Often, such a prohibition can be extended to individuals previously bankrupt, either automatically as a result of the bankruptcy, either under certain conditions, as illustrated hereafter. In Hungary, in the case of a court order of liquidation affecting a business association, a person who acted as an executive officer of the association cannot be appointed as executive officer in another business association for three years, unless he was specially appointed as an executive officer for the purpose of avoiding the liquidation<sup>12</sup>.

France bases such prohibition on the existence of criminal penalties or fraudulent acts (even if no criminal proceeding have commenced) and applies it only to the activities for which the bankrupt was subject to fraudulent bankruptcy, which appears to be a sound limitation.

The Netherlands has a specific regime that is not linked to bankruptcy alone: all entrepreneurs must, before incorporating a new company, obtain a 'declaration of non-objection' by the Ministry of Justice. The granting of such a declaration can be refused on several grounds among which a previous fraudulent bankruptcy or some other economic crime or a succession of several previous bankruptcies that are not necessarily proven fraudulent but are sufficient to raise doubts about the entrepreneur.

In contrast, the US Bankruptcy Code provides for a complete discharge of debt, subject to litigation involving objections by creditors and other limited exceptions. The discharge constitutes a permanent statutory injunction prohibiting creditors from taking any action designed to collect the discharged debt.

In general, the US Bankruptcy Code does not place any restrictions on the directors or individual entrepreneur subsequent to the discharge of the debt, which allows them to enter freely into other business ventures thereafter. However, restrictions will be placed on any individual who has been convicted of a criminal offence related to any fraud, gross negligence or wilful misconduct that led to the bankruptcy.

### 5.3.3 Distinction between Honest and Dishonest Bankrupts

If no clear distinction is made between honest but unlucky and dishonest or fraudulent bankrupts, honest bankrupts will be stigmatised through association with the dishonest.

The Panel recognised that there is no clear-cut dividing line between dishonest and honest bankrupts, there are many grey areas. Furthermore, what is legally acceptable sometimes differs from what is acceptable by society. Court judgements can help to clarify levels of misconduct (this has been the case in UK company director disqualification cases).

In Germany, as in many other countries, bankruptcy procedure is different in the case of fraud. Nevertheless, German creditors are reluctant to initiate it since the provision of evidence is up to them.

What is the approach of legislation in Europe as regards good and bad faith? Procedures should vary depending on debtors' behaviour. In the UK, for instance, there is the possibility of suspending the discharge of an individual who is not co-operating; criminal law provisions also tackle dishonesty. It is not easy to collect evidence proving good faith in a collective procedure. If good faith were presumed, rehabilitation would be possible in many cases.

### 5.3.4 Discharge for Remaining debts

A consequence of bankruptcy applied in almost all countries is the bankrupt's liability for his remaining debts. Bankruptcy legislation that has a conservative approach in its application to discharge of debts can have a negative effect on a fresh start. Not only do long discharge

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<sup>12</sup> Section 23 of Act CXLIV of 1997 on Business Associations.

periods obstruct the possibility of fresh starts, but also the requirements necessary to obtain that discharge. In some Member States discharge is automatic but in others certain criteria must be fulfilled or opposition to the discharge is possible. Some countries allow a total or a partial discharge of debts. Most countries accept such discharge, but only following a special procedure (e.g. rehabilitation in Austria, Belgium, Germany), often linked to the notion of 'innocent' bankruptcy.

Some countries (Denmark, Italy) allow such discharge, but only upon fulfilment of strict conditions, e.g.:

- the total satisfaction of creditors (which seems almost impossible to achieve for a small bankrupt with nothing left), or
- the expiration of a certain period of time during which the bankrupt has proved his good behaviour.

In Germany, discharge would apply after six years. Nevertheless, if the debts have been partially paid, a fresh start would be possible before the end of that period. In Austria, where discharge is after seven years, the debtor could also restart if an agreement with creditors is reached. The length of the discharge periods appears not to be determinant: there are about 20 000 personal bankrupts per year in the UK (where discharge is after two or three years), double in Germany.

Very few countries provide for an automatic discharge of debts. In the United Kingdom in cases where the debtor co-operates there is automatic discharge. In Greece, this advantage is strongly counterbalanced by the loss of the individual bankrupt's status of trader. That is also the case in Poland, where from October 2003 there will be automatic discharge<sup>13</sup> but only in case of insolvency for major reasons. According to current French model<sup>14</sup>, discharge is automatic after the closing of the bankruptcy procedure. This way, already busy courts and officials are not overloaded with additional work such as following for some years the activities of debtors.

For directors of a bankrupt company discharge is also important. The director of a company can be stigmatised when his mandate as director of an undischarged company is disclosed.

In France, restrictions, disqualifications and prohibitions are published and Courts decide whether Criminal Law penalties are subjected to publicity or not. In some countries, such as Austria and Germany, bankruptcies are displayed on the Internet. Publicity of succinct information on-line, such as the amount of debts, which would be erased as soon as creditors are satisfied, seems appropriate. Moreover, it must be stressed that information is also a means to preserve rights. Administrative notification is necessary for creditors.

## 5.4 *Good practices*

### 5.4.1 The Finnish Act on the Adjustment of the Debts of a Private individual and the European Court of Human Rights

The Finnish Act on the Adjustment of the Debts of a Private individual entered into force in 1993. The Act stipulates that a private person can be exempted from his liability for debt if he follows a **payment schedule** confirmed by the court that corresponds to his ability to pay. An individual person with financial difficulties can see his or her financial situation improved, thereby preventing the negative effects of insolvency on society as a whole such as social exclusion, health and social problems and an expanding grey sector of the economy. The payment schedule is usually confirmed for five years. Under the Act, **debt adjustment** has been granted to about 55 000 debtors. Settlement of debts can also be granted to an entrepreneur who has ceased his activity and to an

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<sup>13</sup> Good and non-fraudulent behaviour will also be conditions for the automatic discharge.

<sup>14</sup> France is preparing a draft reform act according to which the discharge will not be automatic any more, but subject to the courts discretion.

entrepreneur who continues his business activities if his insolvency is not due to the present business but derives, for instance, from a company that has been closed down.

On 22 October 2002, the European Court of Human Rights declared the following complaint admissible, without prejudging the merits. The facts are that N. was unable to meet the reimbursement conditions of a loan, so the guarantors of the loan were required to repay the debt to the bank. In 1995 N. applied for debt adjustment in accordance with the 1993 Act on the Adjustment of the Debts of a Private Individual. Despite the opposition of one of the guarantors, the District Court granted N. debt adjustment. The guarantor complains that the almost total extinction of his claim against N. by virtue of the debt adjustment scheme violated the applicant's rights to the peaceful enjoyment of his possessions. The Finnish Government submits that there has been no violation of Article 1 of Protocol No. 1 to the Convention since the adjustment of N.'s debt to the applicant was granted in application of the 1993 Act.

The European Court of Human Rights met on 1 July 2003, but the on day that this report was published no conclusions about it had been disseminated.

#### 5.4.2 UK reform project on a fresh start: 'The Enterprise Act 2002. Reform of Personal Insolvency'

Approximately 200 restrictions, prohibitions and disqualifications are currently automatically attached to all bankrupts, irrespective of the facts of the case. Most are outdated and are generally irrelevant to the protection of the public and commercial community. The Enterprise Act 2002 provides a power to amend or remove those statutory disqualifications on bankrupts.

The Enterprise Act reduces the **discharge** period for most bankrupts, from the current two (where debts are less than £20,000) or three years to a maximum of one. This one-year term would be suspended in cases of non-cooperation. Earlier discharge is possible in cases where all administration and investigation matters have been concluded by the Official Receiver.

The investigation by the Official Receiver may, in a minority of cases, show grounds for Bankruptcy Restrictions Orders (BROs), such as trading whilst insolvent, incurring debts without reasonable prospect of paying or failure to account. Via BROs, the Court would apply **restrictions** on bankrupts for between two and fifteen years, which means, in fact, an extension of some of the restrictions of bankruptcy. Interim BROs are contemplated for very serious cases.

The civil BRO regime will extend the range of sanctions available in the UK to deal with culpable bankrupts, beyond the criminal sanctions currently in place and which are only used in about 2% of cases.

It should be noted that BROs are intended to apply not only to the dishonest but also to the negligent and reckless, be they trading or consumer bankrupts. To talk in general terms about 'dishonest bankrupts' in the UK context is only shorthand for a whole range of issues that determine whether or not a bankrupt's behaviour could pose a threat to the public and commercial community.

The Act also contains provisions for Bankruptcy Restriction Undertakings (BRUs): bankrupts will be able to agree to be subjected to restrictions without going to Court. The court's time will therefore be reserved for contested cases.

Several provisions are aimed at increasing returns to creditors, with lower costs and earlier payment. The Act changes the arrangements for Income Payments Orders (IPOs) to ensure that mechanisms remain in place to require bankrupts to pay if they are able to do so. A new administrative alternative is being introduced, the Income Payments Agreement, a legally binding written agreement that will be enforced in the same manner as IPOs, but will not involve a court application.

#### 5.4.3 Spain: from a treatment from the XIX century to a far less repressive one; the new bankruptcy law.

In the case of an **agreement**, i.e. an agreement between the debtor and the creditors, the contents of the agreement may mean a discharge or reduction of the debts. As a general rule, a discharge may not be more than 50%. However, if the agreement is infringed, the discharge of the part of the debts concerned ceases to apply.

In the event of **winding-up**, no discharge or reduction is provided for. Inasmuch as winding up for lack of realisable assets means the termination of the legal person and the cancellation of unmet debts, commercial corporation will be stimulated.

**Liability** of the administrators of the legal person for outstanding debts can only be declared by courts in the case of winding-up (not in the fulfilment of an agreement). It requires that the bankruptcy is defined as 'culpable' (blameable), that is to say, the presence is ascertained of serious fault or fraud which has caused or led to a worsening of the debtor's state of insolvency.

As regards the **restrictions** after the bankruptcy proceedings which are imposed on the individual debtor or the administrators of the bankrupt legal person, restrictions or limitations may be laid down only if the bankruptcy has been declared as '*culpable*'. In that case will the debtor or administrator or their colleagues be subject to the

restrictive measure of disqualification to administer the assets of somebody else and represent or administer for any other persons for a period of 2 to 15 years, depending on the seriousness of the facts and the damage.

Finally, as already provided for under the new Spanish penal code of 1995, the 'civil' adjudication of bankruptcy, which occurs in bankruptcy proceedings, is independent of the criminal consequences that certain acts of the debtor may entail.

#### 5.4.4 Norway: the *Akkord* Arrangement Act

Norway has reformed the Norwegian *Akkord* Arrangement Act (*gjeldsordningsloven*) in 2002 / 2003. The amendment of the *Akkord* Arrangement Act entered into force on 1 of July 2003. One of the objectives of the reform has been to promote the ability for private persons to achieve an *akkord* arrangement in situations where **public debt** is the main liability. Originally public debt was privileged and made it difficult to achieve an *akkord* arrangement. Furthermore there have also been some procedural changes to promote uniform implementation of the *Akkord* Regulation Act and simplification of the procedures to make the proceedings more time-effective and less expensive. One of the targets during the reform has been to make the act as user-friendly and easy to understand as possible for the general public who have no legal training.

#### 5.4.5 Belgium: the excusability

The Law of 4 September 2002 links **excusability** to good faith bankrupts who failed due to misfortune. For this, it is necessary that the court considers that a fresh start does not endanger the general community.

In addition, Belgium has included in the scope of excusability those persons who stood surety free of charge, as well as the spouse of the bankrupt. The legislator regards discharge of all of them as a means to boost start-ups and economic growth.

## 6 SOCIAL ATTITUDES

### 6.1 *The target*

The expert group discussions at this point aimed at identifying means to change negative social attitudes towards business failure.

### 6.2 *Facts and comments*

#### 6.2.1 Introduction. Law and stigma. Financial community and entrepreneurs.

A negative and conservative approach of law may stigmatise entrepreneurs who failed once. Apart from the fact that the legal approach to bankruptcy can be a deterrent to a fresh start as such, there is no doubt that law can influence society's attitude towards failure. Bankruptcy has represents not only a **legal** and **financial** badge, but also a **social** one (losing one's home, resigning, friends...).

The legal system should clearly distinguish between fraudulent and non-fraudulent bankruptcies and be more understanding in the latter case. Legislators must be aware that the stigma on bankruptcy can result from:

- the sanctions applied to bankrupts;
- the prohibition from carrying out economic activities;
- the negative publicity (e.g. mention of the bankrupt's name on a special list within the commercial jurisdiction, publication in local or national newspapers...);
- the possibility that the directors' personal liability may be invoked and the importance of the insurance coverage they may benefit from
- the confusion between fraudulent and non fraudulent bankruptcy.

A fresh start is rendered possible where the stigma on bankruptcy is low (i.e. the negative attitudes and barriers for entrepreneurs that discourage them from risk-taking and entrepreneurship).

Some entrepreneurs could look down on those who fail. However, the business community does not stigmatise so much: one day the situation could be the other way round. Even though on paper the financial community would have the same positive reaction, reality may prove to turn out differently in some individual cases.

### 6.2.2 Social attitudes

Although consumers, generally, lack information regarding what bankruptcy means, it is among them that real stigma exists. **Flash Eurobarometer** indicates that about 80% of people would allow a **fresh start**. By contrast, more than 50% of those who answered the questionnaire would not invest in a business that had previously failed.

The European average relating to the willingness to **order** from someone who has failed in business overshadows some discrepancies at Member State level. Clearly, Sweden (64%) is where people seem the most strongly opposed to the idea of ordering from someone who has already failed in a business. At the other end of the scale Germany (39%) and Finland (40%) are where people are the most inclined to do so. There are marked discrepancies between the various results observed in the countries of the European Union when it comes to **investing** money in a business managed by someone who failed in the past. Sweden (70%) is where people are the least likely to invest money in such a business. On the other hand, people in France (41%) and Spain (42%) seem less reluctant to do so<sup>15</sup>.

When **setting up** a business, Europeans have two main fears: losing one's property (50%) and the possibility of going bankrupt (45%). They are also afraid of: 1.- the uncertainty of income, 2.- job insecurity, 3.- personal failure or 4.- devoting too much energy/time.

In many Member States, there is an unmistakably negative attitude towards entrepreneurs who have failed. Nevertheless, in Latvia, where a bankruptcy law for individuals is expected in two years time and rates of self-employed people are relatively low, a significant part of society would 'admire' bankrupt managers rather than stigmatising them. Except in the case of certain abuses, Poles are quite indifferent to business failure: in Poland, bankrupts are not stigmatised by society.

Publicity is not negative as such, however the interpretation people attach to it is rather negative. Could an information campaign change this? The most effective way to eradicate the stigma of business failure would be to change attitudes within society, starting by education.

## 6.3 Good practices

### 6.3.1 Programme *SIRME* – *Sistema de Incentivos à Revitalização e Modernização Empresarial* (incentive system for business revitalisation and modernisation )

The objective of *SIRME* is to link the existing financial and fiscal instruments suitable to the revitalisation and modernisation of companies. The aim is the **acquisition** or **merger** of companies in financial difficulties, by other companies, as well as by company workers (*MBI* and *MBO*). *SIRME* offers direct capital participation (funds) of buyer enterprises, loans and warrants to buyer enterprises, as well as fiscal incentives

As to framework conditions, buyers must show management capacity and good economic and financial situation. Sellers should suffer from effective or potential deterioration of the economic and financial situation.

### 6.3.2 Spanish bankruptcy reform: social field

The recent Spanish bankruptcy reform reflects great sensitivity about **worker-related issues**, considering workers as essential for the continuation of a business in crisis. A series of social measures is included in this new framework for businesses in crisis:

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<sup>15</sup> Flash Eurobarometer nº134 "Entrepreneurship" (12-23/11/2002), Report.

- The bankruptcy court may order the collective termination, suspension or amendment of labour contracts in which the employer is the debtor, under the procedure provided for in the new law which contains all the guarantees regarding labour:
  - ◆ Report by the labour authorities, compulsory and not binding, on the remedies proposed or the agreement reached; hearing of workers' representatives.
  - ◆ The agreement on the collective measures to be adopted will require the compliance of the majority of the members of the works council(s) or trades union representatives, if there are any and they represent the majority.
  - ◆ An appeal will be possible before the Social Division of the High Court of Justice of the relevant Autonomous Community against a court order regarding the collective amendment, termination or suspension of conditions of work.
- If the conditions of work are amended, during the bankruptcy proceedings the right of rescission of the contract with compensation of workers as recognised under labour legislation will not apply.
- The previous rule does not apply to geographical mobility, for which the law lays down limits to any change: individual working conditions can be altered within the limits of the province, within a maximum of 60 kilometers.
- The bankruptcy administrative authority may terminate or suspend, during the bankruptcy proceedings, the debtor's contracts with senior executives. In the case of termination of senior executive contracts, the bankruptcy court may reduce the compensation agreed in the contract.
- In the case of an arrangement, the bankruptcy law applies regarding the classification of pay claims.
- Rules for senior executives: during the bankruptcy proceedings, the bankruptcy administrative authority can suspend or terminate their contracts; in the case of termination, the courts may reduce compensation (rendering the agreement in the contract void) and can decide to delay payment of the claims until the adjudication of bankruptcy is final.
- Prior to the adoption of the decision to close the business totally or partially or to halt or suspend business activities totally or partially, the court will hear the workers' representatives.

Interest shall be payable on recognised pay claims, and the corresponding amounts will be considered as subordinate.

### 6.3.3 Two registers in the UK: individual insolvency register and BRO register

Currently, all bankrupts are entered onto the individual insolvency register on the making of the order and their entry remains until two years after they are discharged from the proceedings. The Enterprise Act 2002 introduces the civil regime of Bankruptcy Restrictions Orders (BRO), which can be made (for between 2 and 15 years) against those who are culpable and which will be recorded on a public register.

The UK is putting its **individual insolvency register** and **BRO register** in one place (ultimately online) but will make it clear that they are separate registers so that the public and the commercial community can differentiate between those who are culpable and those who are not. In addition, there can be no justification for keeping entries on the registers for two years after discharge from the proceedings and so in future bankrupts will be removed from the register three months after discharge.

## 7 POLICY CONCLUSIONS. RECOMMENDATIONS

### 7.1 *Early warning*

#### 7.1.1 Earlier recognition: role of external advice

Entrepreneurs sometimes have difficulty admitting that *their* business is in financial difficulty. External advice (accountants, authorities, banks, etc.) is crucial at this point. This **external advice** would assist the business to analyse the situation more objectively and should encourage appropriate action at an early stage.

No doubt, a legal **definition** of what ‘in difficulty’ means would be helpful to all parties. The definition could touch upon the cases where an enterprise is deemed to be ‘in difficulty’ or specify the technical information (read *accounting and financial data*) to be observed when assessing the status of an enterprise.

With regard to debtors that have reasonable **doubt** as to the question of whether or not they will be able to continue paying their debts, it should be strongly recommended that they consult an external advisor as soon as possible. A list of warning indicators could be a useful tool, too. Such information should be freely and widely available to entrepreneurs.

#### 7.1.2 Information: ways out

Advice at an **early** stage should also provide the debtor with sufficient information to allow for a clear understanding of the various options available to him.

**Informed** entrepreneurs would then be able to take the necessary steps at an earlier stage. National authorities should offer a system that allows entrepreneurs to seek advice, as well as implement programmes to promote reorganisation through a chamber of commerce, a trade register, or similar body. It would also be advisable to give entrepreneurs and businesses the possibility of obtaining information from the courts or other registers that allow them to identify and assist businesses in difficulty.

#### 7.1.3 Internal information tools. Registers

Accountancy and other **information tools** should be, apart from being a means of external control over the business, informative about the financial situation of the business itself. Legislation in this field should promote information that adds value to existing information. Furthermore, dealing with information tools should be ‘friendly’ so as not to overload entrepreneurs with new obligations.

Barriers to free access to information in public registers should be removed.

#### 7.1.4 Training courses

**Specific** training should be made available not only for new starters but also for external advisors who provide entrepreneurs with advice (auditors, accountants, consultants...). It is desirable that external advisors keep their knowledge in the field up-to-date and are regulated where necessary.

New starters may need guidelines on how to both set up and run a business. Training and development is necessary during the whole **life** of a business. These courses would be a means by which entrepreneurs can be encouraged to regularly assess the financial position of their business.

Training courses would be more attractive if there were some benefits attached to them.

## 7.2 *Legal system*

### 7.2.1 Crisis-managers

A solution could be to promote the intervention of crisis-managers, *mandataires ad hoc*<sup>16</sup>, or other similar qualified experts in businesses in distress. Their intervention would protect not only the interest of **creditors**, but also the rights of the **entrepreneur**. The law may determine who pays their fees. Operating under confidentiality could be an advantage as less stigma would be generated, but this should be balanced against the need for transparency.

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<sup>16</sup> Please see point 4.4.1.

### 7.2.2 Enterprises should be encouraged to take action in a timely manner.

Taking action in a timely manner may substantially increase the chances of rescuing an enterprise in financial difficulties. The law could therefore encourage debtors to **initiate** an insolvency procedure if it can reasonably foresee that it will no longer be able to pay its debts. Debtors who do so could benefit from incentives (less penalties, easier settlement ...) as a way of encouraging early action.

### 7.2.3 Simplification of existing proceedings

Insolvency proceedings can be very complex and external specialised advice is usually required to guide the enterprises towards and through the process. To make proceedings of this kind more successful and popular, they should be **simpler** and **faster**; fast action is required in order to safeguard the value of the enterprise's assets in liquidation procedures, too.

### 7.2.4 Access to restructuring procedures

Certain Member States could lower their thresholds for **entry** to restructuring proceedings. The condition of insolvency and a possibility of restructuring should be enough and could lead to more accessible proceedings. Predictability in insolvency legislation contributes to increased interest in settlement.

Nevertheless, restructuring is not always **feasible**. New enterprises are emerging while existing companies disappear from the market. Non-viable firms should be liquidated as quickly as possible and in an organised way, taking into consideration the interests of all creditors.

### 7.2.5 Costs

Simplifying rescue proceedings, would reduce their **cost**. Costs are sometimes an obstacle in initiating them.

### 7.2.6 Control of information to disclose

During the reorganisation process, a debtor has to provide a lot of information (e.g. rescue plan). Control of this information by a **neutral third party** appointed by the Court or approved by creditors and with expertise in the area could increase the confidence of creditors in their debtor. This neutral third party could be one of the 'third parties' referred to in the proceedings, so as not to increase the cost of these procedures.

### 7.2.7 Specialised insolvency sections of courts

All insolvency matters should be assigned to **specialised** insolvency sections of a restricted number of courts (and courts of appeal), rather than charging all courts and courts of appeal with issues relating to insolvency law. Judges specialised in insolvency issues should preside over the bankruptcy court.

### 7.2.8 Degree of protection against creditors during the procedures

Restructuring procedures can end up in a final agreement in which all creditors should be treated equally; the prevailing interests would be the continuance of employment for necessary staff and keeping a business afloat. Moreover, the same interest could justify suspending the execution of some actions and obligations for a certain period.

On the contrary, the distinction between secured and non-secured would be always relevant in **liquidation** procedures.

## 7.3 *Fresh start*

### 7.3.1 Campaign promoting fresh start

There is an evident stigma affecting entrepreneurs in difficulty (specifically within the general community) and entrepreneurs previously bankrupt. There is thus a need to introduce a **campaign** in Europe showing the benefits of a fresh start and a new entrepreneurship. In Latin countries, the word '*faillite*' ('*fallimento*', '*quiebra*'...) holds a negative connotation.

### 7.3.2 Reducing stigmatising effects of bankruptcy: distinction between fraudulent and non-fraudulent debtors

A clear **distinction** should be made between measures applicable to non-fraudulent bankruptcies and measures applicable to the case of fraudulent bankruptcies. By creating such a distinction, the attitude of third parties towards the debtor could be improved. Then, non-fraudulent debtors would not be stigmatised through association with fraudulent ones.

### 7.3.3 Reducing stigmatising effects of bankruptcy: restrictions, disqualifications or prohibitions

Some legislators create stigmatising effects by imposing various automatic restrictions, disqualifications or prohibitions for debtors. These kinds of measure are often outdated and **unnecessary**, harming the image of an honest entrepreneur who failed due to, for example, an economic crisis or an illness. Inadequate measures and/or legislation usually have stigmatising effects.

### 7.3.4 Early discharge for non-fraudulent debtors

Early discharge from remaining debts is crucial to promote **fresh starts** and entrepreneurial activity. Since, up to a certain extent, it implies a *discretionary* treatment, discharge should be subject to certain **criteria** (e.g.- creditors agreement, where possible payment of part of the debts, examination of the debtor's conduct or co-operation with the officeholder and full disclosure of assets and liabilities). It could be excluded for some debts: those that the national legislation may consider<sup>17</sup>.

However, tougher and more restrictive legislation should be applied to fraudulent debtors.

## 7.4 *Stigma*

### 7.4.1 Publicity of the court's decision declaring the debtor 'excusable'

Where the relevant body or court declares that the debtor's bankruptcy was 'excusable', that information should be freely and publicly available. Even if the decision to open bankruptcy proceedings is deleted from, for example, the site on which it was previously displayed, traces will always remain (e.g. print-outs of the page). That is why it is important to **give publicity or notice** of the decision declaring the debtor's bankruptcy excusable and, thus, acknowledging him innocent of serious mismanagement.

### 7.4.2 General knowledge of bankruptcy / insolvency

The **general public** has limited awareness of insolvency and its consequences whereas the **business and financial communities** have a more in-depth knowledge of these concepts.

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<sup>17</sup> Measures should be in compliance with the Community State Aid rules.

Developing informational and education programmes on bankruptcy / insolvency could help reduce the stigma surrounding business failure. Media should be aware of the damage that misuse of information about bankruptcies can cause to the economy.

#### 7.4.3 Dealing with businesses in financial difficulties

We find that a business in financial difficulties usually encounters a resistance from its business partners, financiers, creditors (who typically require guarantees) and the general public (who prefer to buy from another company) in continuing to do business. However, continued support from business partners, financiers, creditors and consumers is essential if a company is to avoid bankruptcy<sup>18</sup>.

Thus, consideration of how to obtain the support of all the concerned parties is crucial. If bankruptcy occurs, their participation or the **consideration** of their interests in the proceedings should be ensured, because if they are not involved/informed then they are unlikely to provide support.

#### 7.4.4 Promotion of fresh start

The national authorities should promote the fresh start of previously failed businesses, by enabling and **empowering** them to begin new activities without being hindered by restrictions. Generally, failed entrepreneurs do **learn** from their mistakes and are more successful in the future. Some analyses<sup>19</sup> provide economic proof that entrepreneurial renewal leads to growth in terms of GDP (Gross Domestic Product), employment and productivity. Therefore, encouraging bankrupts to try again will contribute positively to economic development.

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<sup>18</sup> Measures should be in compliance with the Community State Aid rules

<sup>19</sup> E.g. the analysis by the Boston Consulting Group presented by Dr Mei-Pochtler in the Seminar organised by the European Commission, together with the Dutch Ministry of Economic Affairs in Noordwijk, the Netherlands (10 and 11 May 2001).



## ANNEX I: EXPERT GROUP

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**ANNEX II: DEGREE OF CURRENT IMPLEMENTATION OF POLICY SUGGESTIONS IN POINT 7. TABLE AND COMMENTS.**

	BE	DE	GR	ES	FR	IT	LU	NL	AT	PT	FIN	SV	UK	NO	CZ	HU	LT	LV	PL	RO
1. Availability of external advice at an early stage for earlier recognition of financial difficulties	Red	Red	White	Green	Green	Blue	White	Red	Green	White	Red	Red	Green	Red	Blue	Blue	Red	White	Blue	Blue
2. Offer systems to seek advice, as well as clear information regarding ways out.	Green	Green	White	Green	Green	Red	White	Green	Green	White	Green	Green	Blue	Blue	Green	Green	Blue	White	Blue	Red
3. Conceive accountancy and other information tools as informative, 'user-friendly', adding value to existing contents.	Red	Green	White	Green	Green	Red	White	Blue	Green	White	Blue	Red	Green	Red	Green	Green	Blue	White	Green	Red
4. Provide with training courses both for new starters and for entrepreneurs advisors	Green	Green	White	Blue	Green	Blue	White	Green	Green	White	Red	Green	Blue	White	Blue	Green	Blue	White	Green	Red
5. Promote the intervention of crisis-managers, preferably under confidentiality	Green	Green	White	Red	Green	Red	White	Blue	Blue	White	Red	Red	Green	Red	Blue	Red	Red	White	Red	Red
6. Encourage debtors who foresee that they will no longer be able to pay their debts to initiate an insolvency procedure	Blue	Green	White	Green	Red	Red	White	Blue	Blue	White	Blue	Blue	Green	Red	Red	Blue	Blue	White	Green	Green
7. Simplification of recovery proceedings	Red	Green	White	Green	Red	Red	White	Red	Green	White	Red	Green	Green	Green	Green	Red	Red	White	Green	Blue
8. Lower thresholds for entry to recovery proceedings, making them more accessible.	Green	Green	White	Green	Red	Red	White	Red	Blue	White	Blue	Blue	Green	Red	Green	Red	Red	White	Green	Blue
9. During the reorganisation process, control the information provided by the debtor via a neutral third party	Green	Green	White	Green	Green	Red	White	Green	Green	White	Green	Blue	Blue	Red	Green	Blue	Red	White	Green	Green
10. Specialised insolvency sections of Courts	Blue	Green	White	Green	Green	Green	White	Blue	Green	White	Red	Red	Green	Red	Red	Red	Red	White	Blue	Blue

	B	D	EL	E	F	I	L	NL	A	P	FIN	S	UK	N	CZ	HU	LT	LV	PL	RO
11. Distinguish between secured and non-secured creditors in liquidation procedures rather than in restructuring ones	Blue	Green		Green	Green	Red		Red	Green		Green	Green	Green	Red	Green	Green	Green		Green	Blue
12. Introduction of a campaign in Europe promoting fresh start and a new entrepreneurship				Green	Red	Blue		Blue	Green		Blue		Blue	Red	Green	Green	Red		Red	Red
13. Divide measures into two groups: those applicable to non-fraudulent bankruptcies and those that apply to fraudulent ones	Green	Red		Blue	Red	Blue		Blue	Blue		Blue	Red	Green	Red	Red	Green	Red		Blue	Green
14. Reduce unnecessary effects of bankruptcy: outdated and harmful restrictions, disqualifications and prohibitions	Green	Green		Blue	Green	Blue		Green	Blue		Green	Green	Green	Red	Red	Blue	Blue		Green	Green
15. Early discharge from remaining debts, subject to certain criteria	Green	Green		Blue	Red	Red		Blue	Green		Blue	Red	Green	Red	Red	Green	Blue		Green	Green
16. Publicity of the court's decision declaring the debtor 'excusable'	Green	Green		Red	Red	Red		Red	Red		Red	Red	Blue	Red	Green	Red	Blue		Red	Red
17. Develop informational and education programmes against stigma of business failure	Red	Green		Red	Blue	Red		Blue	Green		Blue	Red	Blue	Red	Blue	Green	Red		Red	Red
18. Take into special consideration the interests of actors of the business and financial communities who decide to boost a foundering business to continue doing business	Green	Green		Green	Green	Red		Green	Red		Blue	Red	Red	Red	Green	Green	Blue		Red	Green
19. Promotion of fresh start of previously failed entrepreneurs	Green	Green		Blue	Blue	Red		Blue	Blue		Blue	Red	Blue	Red	Red	Red	Red		Red	Red

## Ranks:

(1) <i>YES / Full implementation</i>	
(2) <i>NO / No implementation</i>	
(3) <i>Partial implementation</i>	

## COMMENTS:

### 1. *Belgium*

- *Recommendation 1.* Commercial inspection services in Courts can draw attention to financial difficulties. Nevertheless, intervention of an external advisor is not compulsory.
- *Recommendation 2.* Information is available in Courts and the Administration, either orally or via free brochures. However, no *ad hoc* information services exist.
- *Recommendation 4.* Basic management knowledge is required to start up a business. Lacking it, training courses are organised.
- *Recommendation 5.* Courts' attitude is 'proactive'. Financial incentives help enterprises cope with the costs of experts' intervention.
- *Recommendation 6.* Judicial environment has to be improved.
- *Recommendation 7.* A project envisages simplification of recovery proceedings (for the benefit of SMEs, mainly).
- *Recommendation 10.* Judges specialisation is *de facto* and not *de jure*.
- *Recommendation 11.* Such a distinction is clear in liquidation procedures and relative in recovery ones.
- *Recommendation 12.* To be desired at European level.
- *Recommendation 17.* To be desired.
- *Recommendation 18.* Even though transfer to new entrepreneurs with fresh money is encouraged, difficulties are encountered.

### 2. *Germany*

- *Recommendations 2 and 5.* Round Tables of the state-owned Kfw-Mittelstandsbank.
- *Recommendation 3.* [www.aus-fehlern-lernen.info](http://www.aus-fehlern-lernen.info)
- *Recommendation 19.* 'Culture of a second chance' is an important issue in the initiative entitled 'pro mittelstand' which started in January 2003. To encourage a fresh start, social security of self-employed will be improved by having better protection against seizure in the case of insolvency. Public measures are aimed at raising awareness among banks, business partners, venture capitalists, business consultants and other actors.

### 3. *Spain*\*

- *Recommendation 1.* Following a recent reform (Royal Decree 180/2003 of 14 February) affecting the Law on the auditing of accounts (Law 19/88 of 12 July), auditing has become compulsory for a greater number of entities.
- *Recommendation 2.* Auditing standard requires that auditing reports analyse, among others, factors related to the going concern principle. Solutions or ways out have to be included, too.
- *Recommendation 3.* Articles 1 and 2 Law on the auditing of accounts (Law 19/88 of 12 July): concept and effects on third parties.

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\* Answers in the table and comments are based on the reforms introduced by the Law 7/2003 of 1 April (Official Gazette of 2 April), into force from 2 June 2003 and the Law « Orgánica » 5/2003 of 27 May

- *Recommendation 4.* Aside specific qualifications for certain activities and the condition of honorability in some cases, no compulsory training exists for start-ups (article 4 of the Commerce Code). However, there is a wide range of training courses for new entrepreneurs (e.g.- via Chambers of Commerce), in line with SME support policies.
- *Recommendation 6.* Possibility confirmed by article 2.3, which now includes the concept on ‘imminent insolvency’.
- *Recommendation 8.* The reform will boost agreement between creditors and debtors. To be highlighted, ‘*la propuesta de convenio anticipada*’ (proposal of early agreement). When supported by a relevant number of creditors, proceedings will last a maximum of 72 days.
- *Recommendation 9.* In this point we have to take into account the intervention of the ‘*administración concursal*’ (administration in insolvency proceedings), in charge of writing the report and of functions relevant to the continuity of the activities of the enterprise.
- *Recommendation 10.* Introduced *de jure* by Law ‘*Orgánica*’ 5/2003
- *Recommendation 11.* Except in the case of acceptance of the agreement the debtor with other creditors, secured creditors will not be affected by such agreement (‘*convenio de quita o espera*’). In liquidations, secured creditors will be paid from the sale of assets covered by a guarantee. Any remaining monies would be used to pay non-secured creditors.
- *Recommendation 12.* The Ministry of Economy and the Ministry of Education are developing some initiatives to promote entrepreneurship from school: new materials for teaching, support guides, etc.
- *Recommendation 13.* The distinction does not exist as such. Nevertheless, for example, the debtor’s behaviour is taken into account to apply some benefits (e.g.-early agreement under article 105) or to determine the origin or worsening of a situation of insolvency.
- *Recommendation 14.* Unnecessary effects of bankruptcy will be reduced (*D.A 1ª* and *D.T 1ª*, to be analysed together with articles 176 to 180).
- *Recommendation 15.* In Spain, there is no automatic discharge for pending debts. If assets in a liquidation are not enough to pay off debts, remaining credits would be paid only if new assets were discovered. Debtor and creditors can agree to reduce debts partially (‘*convenio con quita*’).
- *Recommendation 16.* There is no court decision declaring a debtor ‘excusable’, but only of ‘fraudulent’ in some cases.
- *Recommendation 18.* According to new regulations, all creditors, specially workers and financing entities, have to intervene in the examination and evaluation of possible ways out, either conventional or via liquidation, for a business or a part of it.
- *Recommendation 19.* In case of non-fraudulent insolvency, formal rehabilitation (via Courts) will no longer be necessary to start a new business.

#### **4. France**

- *Recommendation 1.* By an auditor, or a conciliator.
- *Recommendation 2.* Arbitration and mediation centres run by chambers of commerce.
- *Recommendation 3.* Incentives to estimated accounting.
- *Recommendation 4.* Chambers of commerce.
- *Recommendation 5.* Ad hoc trustees and conciliators (amicable settlement) appointed by the judge.
- *Recommendation 6.* Current law provides for opening proceedings upon insolvency, not before.
- *Recommendation 7.* Simple proceedings without any administrator for small enterprises.
- *Recommendation 8.* The same criteria are available for voluntary and involuntary proceedings.
- *Recommendation 9.* By an administrator and by the court.
- *Recommendation 10.* Commercial courts and specialised chambers by courts of appeal.
- *Recommendation 11.* In liquidation proceedings, secured creditors are allowed to begin individual enforcement actions upon lodging their claims.
- *Recommendation 12.* Since 1985, fresh start is one of the unofficial aims of liquidation proceedings, as a kind of rescue for individual entrepreneurs.
- *Recommendation 13.* Penalties and financial measures against fraudulent debtors. Discharge refused in case of fraud.
- *Recommendation 14.* Penalty levels have been reduced since the last reforms of 1985 and 1994.

- *Recommendation 15.* At the end of liquidation proceedings, when assets are not sufficient to pay creditors, except in case of fraud or second liquidation proceedings.
- *Recommendation 16.* Legal publication, with collective information about discharge granted to the debtor.
- *Recommendation 18.* The legal system favours rescue, with few penalties, reorganisation plans, discharge to the debtor, in the case of a transfer plan or of liquidation.

## **5. Italy**

- *Recommendation 1, 2, 6, 7, 8, 12, 13, 14 and 19.* See point 4.4.4 of this report (project of reform).

## **6. The Netherlands**

- *Recommendation 1.* A system based on monitoring and external intervention is not regarded as desirable.
- *Recommendation 5.* Only on entrepreneur's initiative and only if no bankruptcy proceedings have yet been started.
- *Recommendation 6.* Public is being told that early bankruptcy minimises damage, changes in legal framework to promote early action are on the way.
- *Recommendation 7.* New legislation is being prepared.
- *Recommendation 8.* Aim is to raise the threshold to keep out the hopeless cases that give the recovery procedure a bad reputation.
- *Recommendation 10.* Specialisation exists within a job-rotation system for judges; aim is now to slow down the rotation and make some other changes in the organisation to get and retain more expertise.
- *Recommendation 11.* Difference secured/ unsecured exists throughout the entire insolvency domain; aim is to drop existing distinction between preferential and common creditors (both unsecured) in restructuring.
- *Recommendation 13.* Difference exists theoretically, implementation needs to be strengthened, some new measures are under consideration.
- *Recommendation 14.* Hardly any exist, beside the residual debt.
- *Recommendation 16.* Notion of 'excusability' is not a common consideration here.
- *Recommendation 18.* If action is undertaken within proceedings the new creditor becomes 'super-preferential'.
- *Recommendations 12, 15, 17 and 19.* Work in progress.

## **7. Austria**

- *Recommendation 1.* The auditor has to report to the entrepreneur if the business is in danger of bankruptcy or the balance sheet indicates financial difficulties.
- *Recommendation 2.* Public support and advice is available. For further information please contact department I/6 of the '*Bundesministerium für Wirtschaft und Arbeit*'.
- *Recommendation 3.* See answer to question 1. Entrepreneurs are liable for not reorganizing their business, if the period of payment of debts exceeds 15 years and the quota of equity is less than 8% (the period of payment of debts and the quota of equity are defined by law) and within 2 years a bankruptcy proceeding is opened. The liability is limited to €100.000 per individual responsible manager.
- *Recommendation 4.* Contact details for further information: department I/6 of the '*Bundesministerium für Wirtschaft und Arbeit*'.
- *Recommendation 5.* See 4.4.1
- *Recommendation 6.* The insolvency court may refuse the confirmation of the reorganisation plan, if the debtor did not apply for the opening of the proceeding in time and does not offer to pay to his creditors a minimum account of 30% of the unsecured debts instead of 20%.
- *Recommendation 8.* The application must contain information about how the reorganisation shall be achieved and how the funds necessary to pay the quotas offered to the creditors shall be raised.
- *Recommendation 12.* For further information please contact department I/6 of the '*Bundesministerium für Wirtschaft und Arbeit*'. With a view to reducing the stigma associated with honest failures, the 2000 Penal Code Amendment substantially relaxed the concept of bankruptcy through negligence. Henceforth, only gross negligent damage to creditors' interests will be punishable. Another substantial second chance measure came in the form of the abolition of bankruptcy as grounds for exclusion from business activities under the 2002 Trades Law Amendment (only cases in which insufficient assets preclude proceedings and criminal bankruptcy will

continue to constitute grounds for exclusion). Honest failures will therefore no longer be prevented from engaging in business.

- *Recommendation 13.* The reorganisation plan will be rejected if, becoming illiquid, the debtor is convicted by the criminal court because of fraudulent bankruptcy.
- *Recommendation 14.* See below.
- *Recommendation 15 and 18.* Early discharge if consent of the majority of the creditors; after 7 years, without consent.
- *Recommendation 17.* Contact details for further information: department I/6 of the 'Bundesministerium für Wirtschaft und Arbeit'.

## **8. Finland**

- *Recommendations 2, 6, 17 and 19.* For T&E Centres, please see point 3.4.2. One of the aims of the Entrepreneurship Project of the Ministry of Trade and Industry was to reduce unnecessary closures of enterprises (e.g.- developing business know-how, training and business financing). A working group in the Ministry of Trade and Industry seeks to find new ways to help entrepreneurs recognise and solve financial difficulties, as well as to promote fresh start of previously failed entrepreneurs. This project is implemented in co-operation with some administrative sectors, creditors and organisations of entrepreneurs.

- *Recommendation 8.* Amended Act on the Adjustment of Debts (since 1.1.2003).
- *Recommendation 9.* The Court appoints the Administrator who looks after creditors' interests.
- *Recommendation 13.* According the Act on the Adjustment of Debts if the debtor has been fraudulent, it normally prevents the discharge. According the Reorganisation of Enterprises Act the fraud may be an obstacle to initiating the proceedings.
- *Recommendation 14.* Only during the bankruptcy proceedings. According to the proposition in the new Bankruptcy Act the duration of these disqualifications and prohibitions would be maximum 4 months.
- *Recommendation 15.* The discharge is not automatic but the Court may grant debt adjustment. In debt adjustment a payment schedule is confirmed corresponding to the debtor's ability to pay. The duration of the payment schedule is normally five years.

## **9. Sweden**

- *Recommendation 12.* General entrepreneurship promotion programme.
- *Recommendation 17.* Stigma is not regarded as an important problem.

## **10. United Kingdom**

- *Recommendation 1.* Helped by Enterprise Act provisions coming into force in September 2003.
- *Recommendation 4.* Advisors have substantial training.
- *Recommendation 7.* Improved by providing out-of-court route in Enterprise Act coming into force in September 2003.
- *Recommendation 11.* Enterprise Act provisions coming into force in September 2003.
- *Recommendation 13, 14, 15.* Enterprise Act provisions coming into force in April 2004.
- *Recommendation 12 and 17.* More co-ordination is needed.

## **11. Norway**

- *Recommendation 4.* Not organised by the Government.
- *Recommendation 7.* In 2002/2003.

## **12. Czech Republic**

- *Recommendation 4.* There are very few training courses, but there is an increasing trend.
- *Recommendation 5.* Seldom. At present, especially in big companies.
- *Recommendation 7.* New law amendments are being prepared.

### **13. Hungary**

- *Recommendation 1.* A network of local enterprise agencies has been set up to provide advice, information and training for entrepreneurs. The activity of the 20 local agencies is financed through the PHARE programme. From 2004, new programmes will be started.
- *Recommendation 6.* Liquidation proceedings are instituted in the event of insolvency of the debtor, and also at the debtor's request. If the debtor is granted a moratorium, he may not file for bankruptcy again within two years from the date of the court's receipt of the first petition.
- *Recommendation 9.* The bankruptcy trustee has the power to review the debtor's financial position, which may entail inspection of the debtor's books, cash, securities holdings and inventories of goods, contracts and bank accounts, requesting information from the directors of the economic organisation.
- *Recommendation 10.* Specialised judges at the courts acting in bankruptcy or liquidation proceedings.
- *Recommendation 12.* A program called 'EU delivered to you' launched by the Ministry of Economy and Transport aims to cover all the regions of Hungary providing information about the EU for entrepreneurs in order to prepare them for Hungary's accession.
- *Recommendation 14.* For a period of three years after the establishment of insolvency (liquidation order) of business association by final judgment, a person who acted as an executive officer at the business association to be liquidated for one year or more during the period of two years prior to the date of the final judgment ordering such liquidation may not be an executive officer of another business association, unless he was specially appointed as an executive officer for the purpose of avoiding the liquidation. No other restriction to restart.
- *Recommendation 15.* In case of bankruptcy proceedings a composition agreement may be concluded with the consent of certain creditors. In case of liquidation proceedings following a period of 40 days subsequent to the publication of the liquidation order, the creditors and the debtor may at any time conclude a composition agreement before the final liquidation balance-sheet is submitted.
- *Recommendation 16.* The court must act within 15 days ordering the termination of a bankruptcy proceeding, or a moratorium published in the Company Gazette (*Cégközlöny*).
- *Recommendation 17.* Entrepreneurial skills are being taught in primary education (more emphasised from September 2003).
- *Recommendation 18.* A gradual credit scheme has been developed to meet special needs of the different business actors.
- *Recommendation 19.* Through the micro credit programme fresh start of entrepreneurs is supported.

### **14. Lithuania**

- *Recommendation 2.* Various manuals or corpora of corporate laws have been published and are very popular. All legislation can be found in [www.lrs.lt](http://www.lrs.lt).
- *Recommendation 4.* Certain institutions organise training courses on insolvency issues. Special training courses on insolvency are held by the National Association of Business Administrators but most are orientated towards administrators. Representatives of other institutions may attend these seminars.
- *Recommendation 6.* The law on enterprise bankruptcy lays down conditions for initiating bankruptcy proceedings: the enterprise is insolvent and has not paid its employees for more than three months; the enterprise has made a public announcement or in any other manner notified its creditor(s) of its inability to effect settlement with them and/or that it intends not to discharge its liabilities. In the case of restructuring the proceedings can be initiated if the enterprise has temporary financial difficulties.
- *Recommendation 7 and 8.* All recoveries both in bankruptcy and restructuring cases are suspended starting with the decision to initiate proceedings, but the enterprise has the right to recover its debts from debtors.
- *Recommendation 9.* The laws do not regulate this possibility but the question is under discussion.
- *Recommendation 10.* General competence judges from regional courts investigating civil cases also investigate insolvency cases, in accordance with the statutory order.
- *Recommendation 11.* Both in restructuring and bankruptcy cases, the claims of secured creditors (secured by pledge and/or mortgage charge) are paid first of all from the proceeds obtained from the sale of the pledged assets of the enterprise, or by transferring the pledged assets. After this follows the sequence of other creditors. Claims of the creditors of each successive sequence shall be met after full payment of the claims of the creditors of the preceding sequence. If assets are insufficient to satisfy all the claims of one sequence in full, those claims are paid in proportion to the amount due to each creditor.

- *Recommendation 12.* Planned by 2004.
- *Recommendation 15.* This point must be considered in the restructuring plan.
- *Recommendation 16.* Publication and dissemination of all steps of both insolvency procedures are in the “Official gazette”. This includes the end of the process if it is concluded by a composition with creditors.
- *Recommendation 17.* There is no separate programme. General statistical data about insolvent enterprises are published.
- *Recommendation 19.* The corporate law does not prevent entrepreneurs from establishing a new company.

### **15. Poland**

- *Recommendation 1.* See point 3.4.1.
- *Recommendation 2.* As above, lack of system referring only to insolvency.
- *Recommendation 4.* There exist many training programmes financed from PHARE Fund, referring to entrepreneurship in general.
- *Recommendation 5.* Only in the public sector is there an obligation to use crisis-managers in some situations.
- *Recommendation 6.* By depriving of the right to conduct economic activity.
- *Recommendation 8.* A reduction in court costs is planned.
- *Recommendation 9.* Court supervisor and - upon the court’s decision - Auditor. Both are appointed by the Court.
- *Recommendation 10.* Only in Courts in bigger cities.
- *Recommendation 13.* In the extent of discharging of remaining debts.
- *Recommendation 15.* However, the criteria are very difficult to meet.
- *Recommendation 19.* There is a general government programme for entrepreneurship, but it does not link to previously failed entrepreneurs.

### **16. Romania**

- *Recommendation 1.* Only in the case of banks, insurance companies and investments companies. Warning and “advice” provided by the regulatory authorities.
- *Recommendation 6.* Debtors who foresee the imminence of their default can file for bankruptcy. However, in order to prevent debtors’ abuses (such as using the bankruptcy petition to generate the automatic stay of the creditors’ individual enforcement actions), the law holds the debtors or the directors personally liable for filing early bankruptcy petitions in bad faith.
- *Recommendation 8.* Law allows ‘cram-downs’(restructuring plans to be confirmed without the consent of all the holders of claims or interests against the debtor’s estate), subject to certain conditions.
- *Recommendation 9.* During the restructuring period, the court administrator (the party charged with supervising debtor’s activity) is bound to submit a quarterly report thereon to the bankruptcy judge and the meeting of creditors’.
- *Recommendation 10.* There is only one specialised insolvency section within the Bucharest Tribunal. The Draft of the New Code on the Judiciary establishes specialised commercial tribunals to have jurisdiction over the bankruptcy cases (from January 2006).
- *Recommendation 11.* The automatic stay triggered by the commencement of the bankruptcy proceedings, preventing individual enforcement actions, applies to both secured and unsecured creditors. Secured creditors who have perfected their secured claims may seek and obtain relief from the stay under certain circumstances to enforce their claims against their collateral (e.g. when the value of the secured claim is not protected due to diminishing asset/property value). In case of liquidation, the secured creditors hold a priority as for discharge of their claims against the proceeds of the collateral.
- *Recommendation 13.* Debtors who were subject to an insolvency proceeding within the 5 years prior to the commencement of a new case or debtors who were held criminally liable for bankruptcy, bankruptcy-related or other crimes do not qualify for submitting a restructuring plan. Moreover, individuals who are held criminally responsible for bankruptcy, bankruptcy related or other crimes are disqualified from holding office in companies or doing business as sole traders until their complete personal rehabilitation.
- *Recommendation 14.* Disqualifications, restrictions and prohibitions only apply where criminal liability is held against the debtor or the directors of the companies.

- *Recommendation 15.* Similar to the US Bankruptcy Code, the Romanian law provides for a complete discharge of debt, subject to limited exceptions confined primarily to criminal liability issues. The discharge also represents a permanent statutory injunction barring the creditors from taking further actions to collect any part of the discharged debt. Similar to the effects entailed by the Finnish Act on the Adjustment of the Debts of a Private Individual in the case before the *ECHR*, submitted by the Finnish Government, the discharge is not applicable, under Romanian law, to personal guarantors of the debtor or persons who are jointly and severally responsible for the discharge of debtor's duties.
- *Recommendation 17.* A cornerstone for the consolidation of a positive reaction against bankruptcy stigma is the media awareness campaign. Particularly the tabloids may have a disastrous effect on businesses if information is used under inappropriate circumstances.
- *Recommendation 18.* The lenders and the business partners who continue providing credit or doing business with an insolvent debtor after the commencement of the proceedings are afforded a priority claim for such loans in the event that the debtor enters the liquidation phase.
- *Recommendation 19.* A super priority in terms of providing the post-bankruptcy lenders with adequate protection also needs to be envisaged for encouraging the lending of working capital to distressed companies during the observation and restructuring period. (see the US Bankruptcy Code).



**ANNEX III: THE ATTITUDE TOWARD RISK, FLASH EUROBAROMETER 134, ENTREPRENEURSHIP, NOVEMBER 2002\***

Giving a second chance to those who failed is seen almost as natural on both sides of the Atlantic. Opinions in the US and Europe seem more mitigated about ordering from someone who has failed in the past. However, a majority of respondents (more so in the US) would order goods from a person even if that person failed in the past.

On the other hand, previous failure appears to compromise any personal investments for a majority of respondents, both in the US and the European Union.

On this side of the Atlantic the risk of failure is seen as a major hindrance to the development of the entrepreneurial spirit.

	Giving a second chance		Less inclined to order		Never invest any money		Not setting up a business if risk of failure	
	2001	2002	2001	2002	2001	2002	2001	2002
<i>EU 15</i>	82%	84%	46%	45%	53%	51%	43%	46%
<i>USA</i>	83%	83%	41%	40%	48%	51%	26%	25%
<i>Belgium</i>	79%	87%	49%	51%	58%	55%	54%	50%
<i>Denmark</i>	72%	73%	50%	46%	56%	53%	47%	39%
<i>Germany</i>	78%	81%	39%	39%	51%	48%	51%	57%
<i>Greece</i>	88%	90%	48%	43%	54%	63%	46%	48%
<i>Spain</i>	91%	91%	40%	44%	43%	42%	41%	42%
<i>France</i>	87%	89%	42%	45%	44%	41%	33%	42%
<i>Ireland</i>	90%	92%	42%	50%	51%	51%	28%	27%
<i>Italy</i>	73%	76%	54%	46%	64%	61%	48%	44%
<i>Luxembourg</i>	82%	81%	48%	44%	53%	53%	55%	51%
<i>The Netherlands</i>	83%	82%	48%	51%	49%	57%	51%	46%
<i>Austria</i>	68%	71%	42%	43%	55%	57%	53%	55%
<i>Portugal</i>	83%	82%	47%	53%	47%	49%	53%	53%
<i>Finland</i>	84%	89%	47%	40%	52%	53%	40%	44%
<i>Sweden</i>	89%	91%	63%	64%	66%	70%	51%	55%
<i>United Kingdom</i>	84%	84%	53%	47%	55%	54%	30%	34%

\* [http://europa.eu.int/comm/enterprise/enterprise\\_policy/survey/eurobarometer83.htm](http://europa.eu.int/comm/enterprise/enterprise_policy/survey/eurobarometer83.htm)



## ANNEX IV: ACCESS TO RESCUE PROCEDURES

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### CONDITIONS\*

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#### Austria

- |                                  |   |
|----------------------------------|---|
| <i>Ordinary reorganisation</i>   | • illiquidity, impending illiquidity or overindebtedness  |
|                                  | • 40 % of the unsecured debts must be paid within 2 years |
| <i>Compulsory reorganisation</i> | • illiquidity, impending illiquidity or over indebtedness |
|                                  | • 20 % of the unsecured debts must be paid within 2 years |
|                                  | • in the course of bankruptcy proceedings                 |
| <i>Out-of-court proceedings</i>  | • Agreement of creditors                                  |

#### Belgium

- Temporary inability to pay debts
- Continuity of the trader is threatened by problems that may lead to cessation of payments

#### Denmark

- |                                |                                       |
|--------------------------------|---------------------------------------|
| <i>Suspension of payments</i>  | • Inability to fulfil its obligations |
| <i>Compulsory composition</i>  | • No particular conditions            |
| <i>Out-of-court proceeding</i> | • Agreement of creditors              |

#### Finland

- |                                     |                               |
|-------------------------------------|-------------------------------|
| <i>Restructuring of enterprises</i> | • Financial difficulties      |
|                                     | • Indebtedness                |
|                                     | • Viability of the enterprise |
| <i>Out-of-court proceedings</i>     | • Agreement of creditors      |

#### France

- |   |                         |
|---|-------------------------|
| <i>Independent preliminary bankruptcy</i> | • No default of payment |
| <i>Amicable settlement procedure</i>      | • No default of payment |

#### Germany

- |  |   |
|--|---|
| <i>Reorganisation based on insolvency plan</i> | • No default of payment                   |
|  | • In the course of bankruptcy proceedings |
| <i>Out-of-court proceedings</i>                | • No default of payment                   |
- 

\* Source: study 'Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy', European Commission, 2003. Full text: [http://europa.eu.int/comm/enterprise/entrepreneurship/support\\_measures/failure\\_bankruptcy/bankruptcy.htm](http://europa.eu.int/comm/enterprise/entrepreneurship/support_measures/failure_bankruptcy/bankruptcy.htm)

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### **Greece**

- Suspension or discontinuation of operations
- Cessation of payments
- Bankrupt trader or trader under administration of the creditors or under provisional order of liquidation
- Total of debts five times more than the sum of their share capital and the reserves
- Inability to pay debts

### **Ireland**

*Examinership*

- Inability to pay debts
- No winding-up resolution
- Reasonable prospect of survival

*Scheme of arrangement*

### **Italy**

*Controlled administration procedure*

- no bankruptcy or composition in the previous five years
- no bankruptcy offence or other specified crimes
- possibility to rescue the trader
- difficulties to meet its obligations
- no bankruptcy or composition in the previous five years

*Preventive creditors' settlement procedure*

- no bankruptcy offence or other specified crimes
- trader must offer guarantees to pay all secured debts and 40 % of unsecured debts
- trader offers to sell its assets

### **Luxembourg**

*Reprieve from payment*

- Temporary cessation of payments because of extraordinary circumstances
- Sufficient assets to satisfy all creditors
- Strong potential of survival

*Controlled management*

- Loss of creditworthiness
- Difficulties to meet its obligations
- No bankruptcy decision

### **The Netherlands**

*Suspension of payments*

*Out-of-court proceedings*

- Anticipation of inability to pay due and payable debt
- Agreement of the creditors

### **Portugal**

- Difficult economic situation or insolvency
  - Economic viability and financial possibility to recover
-

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### Sweden

- Reorganisation* · Inability to pay debts as they fall due or anticipation of such inability
- Composition* · Inability to pay debts as they fall due or anticipation of such inability
- Reasonable prospect of survival
- In the course of bankruptcy proceedings

### Spain

- Temporary financial distress

### UK

- Receivership* · No particular conditions
- Administration* · Inability to pay debts as they fall due or anticipation of such inability
- The survival of the company, or an arrangement or composition, or a better realisation than in a winding-up, may be expected
- Company voluntary arrangement* · No particular conditions

### USA

- Chapter 11* · If filed by the debtor: no requirement
  - If filed by creditors: proof that debtor is not paying debts as they become due
  - Out-of-court proceedings* · Called a “workout” – consensual agreement between debtor and major creditors
-



**ANNEX V: RESTRICTIONS, DISQUALIFICATIONS AND PROHIBITIONS. LIABILITY FOR REMAINING DEBTS AND DISCHARGE\* .**

POSSIBLE PROHIBITION CARRYING OUT COMMERCIAL ACTIVITIES AND CONDITIONS THEREFORE

<i>Austria</i>	Prohibition from engaging in an independent trade or business (with exemptions)
<i>Belgium</i>	Prohibition from carrying out certain professions (auditor) or mandate (management of insurance company) under certain conditions (fraud...)
<i>Denmark</i>	Business prohibitions (if illegal removal of company's assets)
<i>Finland</i>	Possible business prohibitions
<i>France</i>	Prohibition to practise certain activities (in case of fraudulent bankruptcy)
<i>Germany</i>	Prohibition to practise for 5 years for directors who committed criminal offences.
<i>Greece</i>	Individual bankrupts are excluded from any commercial or industrial profession, and from certain functions (civil servant, lawyer...)
<i>Ireland</i>	Restriction from being appointed director of a company or incorporating a new company for a term of five years (unless proof of good conduct)
<i>Italy</i>	Prohibition to practise out certain professions (lawyer, stockbroker) or exercise certain charges (trustee, director..)
<i>Luxembourg</i>	Under certain conditions (gross and indisputable mistake that led to bankruptcy), prohibition from performing business activity
<i>The Netherlands</i>	Prohibition unless "declaration of non-objection" obtained from the Ministry of Justice
<i>Portugal</i>	Prohibition from carrying out any business, unless judge provides that they may and if no criminal proceedings
<i>Spain</i>	Prohibition from engaging in any business, unless rehabilitated.
<i>Sweden</i>	Prohibition from carrying out a business if in public interest and if severe negligence
<i>UK</i>	Prohibition from being a director, receiver or incorporating a company under certain conditions (if criminal offence, wrongful trading...)
<i>USA</i>	None, except where directors are criminally prosecuted

\* Source: study 'Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy', European Commission, 2003. Full text: [http://europa.eu.int/comm/enterprise/entrepreneurship/support\\_measures/failure\\_bankruptcy/bankruptcy.htm](http://europa.eu.int/comm/enterprise/entrepreneurship/support_measures/failure_bankruptcy/bankruptcy.htm)

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## LIABILITY FOR THE REMAINING DEBTS AND POSSIBILITY OF DISCHARGE

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<i>Austria</i>	<ul style="list-style-type: none"> <li>- Directors liable if committed a fault (e.g. did not file for judicial insolvency on time)</li> <li>- Discharge if reorganisation or in the course of private bankruptcies (non-traders)</li> </ul>
<i>Belgium</i>	<ul style="list-style-type: none"> <li>- Directors liable if committed a serious fault that led to bankruptcy or if did not declare bankruptcy on time</li> <li>- Discharge if excusability is granted by the court (in case of innocent bankruptcy)</li> </ul>
<i>Denmark</i>	<ul style="list-style-type: none"> <li>- Directors liable after bankruptcy/winding-up procedure but not after compulsory composition</li> <li>- Discharge in case of release after 5 or 20 years or in case of debt rescheduling</li> </ul>
<i>Finland</i>	<ul style="list-style-type: none"> <li>- Directors liable if did not file for bankruptcy on time or did not convene shareholders on time</li> <li>- Discussion on discharge</li> </ul>
<i>France</i>	<ul style="list-style-type: none"> <li>- Directors liable in case of mismanagement</li> <li>- Yes, unless specific offences committed</li> </ul>
<i>Germany</i>	<ul style="list-style-type: none"> <li>- Directors liable if failed to petition for bankruptcy on time</li> <li>- Discharge under customer insolvency procedure</li> </ul>
<i>Greece</i>	<ul style="list-style-type: none"> <li>- Directors liability if committed tort or did not notify creditors of cessation of payments</li> <li>- Discharge for individual bankrupts after 10 years or in case of judicial composition</li> </ul>
<i>Ireland</i>	<ul style="list-style-type: none"> <li>- Directors liable if fraudulent/reckless trading, misfeasance proceedings...</li> <li>- Discharge: possible</li> </ul>
<i>Italy</i>	<ul style="list-style-type: none"> <li>- Directors liable if do not respect their duty to protect the company's creditors</li> <li>- Discharge for individual bankrupts if good behaviour or creditors' settlement</li> </ul>
<i>Luxembourg</i>	<ul style="list-style-type: none"> <li>- Directors liable for misconduct in management or fault that led to company's bankruptcy</li> <li>- Discharge if composition after bankruptcy or rehabilitation</li> </ul>
<i>The Netherlands</i>	<ul style="list-style-type: none"> <li>- Directors liable if their failure contributed to bankruptcy</li> <li>- Discharge if scheme of arrangement reached with creditors</li> </ul>
<i>Portugal</i>	<ul style="list-style-type: none"> <li>- Directors liable if significantly contributed to the company's bankruptcy</li> <li>- Discharge</li> </ul>
<i>Spain</i>	<ul style="list-style-type: none"> <li>- Directors liable if did not file for bankruptcy on time</li> <li>- Discharge if rehabilitation is granted (in case of non-fraudulent bankruptcy)</li> </ul>
<i>Sweden</i>	<ul style="list-style-type: none"> <li>- Directors liable if deliberately or negligently caused damage to company</li> <li>- Discharge</li> </ul>
<i>UK</i>	<ul style="list-style-type: none"> <li>- Directors liable if misfeasance, fraudulent / wrongful trading</li> <li>- Discharge if non-fraudulent insolvency</li> </ul>
<i>USA</i>	<ul style="list-style-type: none"> <li>- Individual debtor discharged from debt, except certain debts (e.g. alimony, taxes, damages for fraud ...)</li> <li>- Corporate debtor discharged from debts</li> </ul>

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## ANNEX VI: GOOD PRACTICE CASES IN THE BROCHURE “HELPING BUSINESSES OVERCOME FINANCIAL DIFFICULTIES”<sup>20</sup>

### 1) Legislation to foster restructuring, bankruptcy and a fresh start

Policy area	Issue
Legislative reform	In order better to meet the needs of today’s economic life, Belgium changed its insolvency legislation in 1997 with a view to fostering the restructuring of businesses temporarily in crisis and to promoting fresh starts after bankruptcy

The law of 17 July 1997 on legal settlement covers the situation of healthy and profitable companies facing temporary financial difficulties endangering their existence. The law of 8 August 1997 on bankruptcy aims at liquidating non-viable companies as quickly as possible. Three years after the new legislation was introduced, evaluation showed that certain elements needed further attention.

The attitude towards failure needed to be improved. Courts were hesitant to determine that a bankrupt is ‘excusable’. Therefore, the government now has introduced new legislation granting the right to be excused in bankruptcy.

Entrepreneurs are not aware of the new legal possibilities. The government has disseminated information among the public and has taken action to raise awareness among intermediaries.

The current settlement procedure is expensive, and at present only companies of a certain size can afford to use the procedure. Measures are being taken to reduce the costs of the procedures by introducing a simplified procedure. Legal settlement cases generally get negative publicity, which could jeopardise the chances of rescuing the business. The simplified procedure mentioned above would be confidential.

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<sup>20</sup> Full text and contact details of these good practice cases can be found in the brochure « Helping businesses overcome financial difficulties », European Communities, 2002. NB-39-01-926-\*\*-C.

It is available on-line in all Community languages:

[http://europa.eu.int/comm/enterprise/entrepreneurship/support\\_measures/reports\\_studies.htm](http://europa.eu.int/comm/enterprise/entrepreneurship/support_measures/reports_studies.htm)

Other brochures addressing business support measures on the same website:

- “Helping businesses start-up”, European Communities, 2000. CT-25-99-980-\*\*-C
- “Helping businesses grow”, European Communities, 2002. NB-39-01-934-\*\*-C
- “Helping the transfer of businesses”, European Communities, 2003. NB-47-02-979-\*\*-C

## 2) Balancing the interests of creditors, the business and its employees in the event of insolvency

Policy area	Issue
Legislative reform	The new German legislation plays a key role in enabling viable businesses to continue to exist. This legislation intends not only to help creditors regain their money, but also to take account of the needs of the business and of those with an interest in its survival, such as unsecured creditors, employees and the owner.

In January 1999, in Germany, new insolvency rules came into force, which reformed and combined the previous conciliation and bankruptcy laws into a uniform insolvency procedure.

The main objectives of the new law are to maintain operative business units and to facilitate restructuring through an insolvency plan. The new system allows keeping the option to either liquidate or restructure after a petition for insolvency.

Under the new law, the trustee is obliged to continue the insolvent business, which increases its chances of survival after a petition for insolvency is made. Therefore, the trustee is granted certain rights, e.g. the right to terminate or continue contracts on the basis of economic prospects..

The new law no longer provides for privileges, except for redundancy payments for employees.

Regarding voting on the insolvency plan, groups of creditors are formed ... In each group, the vote is based on the amount of the individual debt and the number of parties involved, and a single majority is required for approving the plan. These provisions ensure that individual creditors cannot block a restructuring plan.

## 3) How to provide expert advice on saving a business about to go bankrupt

Policy area	Issue
Support for businesses facing financial difficulties	Retired entrepreneurs, managers and experts, e.g. lawyers and accountants, provide financial review and strategic advice to SMEs on a voluntary basis.

The Ondernemersklankbord offers advice to small and medium-sized businesses. It is an organisation of retired entrepreneurs, general managers with entrepreneurial experience and experts providing assistance on a voluntary basis. It was set up in 1979, funded by the Dutch business community and supported by the Ministry of Economic Affairs. Some 90 % of the businesses that seek the advice of the Ondernemersklankbord have less than 10 employees.

Each year, 2 500 entrepreneurs seek the advice of the foundation. Business failure is an important part of the advice activities of the Ondernemersklankbord.

The Ondernemersklankbord concluded a formal agreement with the district court of Utrecht in 1997 with the aim of facilitating the rescue of viable businesses. When a judge considers that a company could be saved, he can adjourn the bankruptcy proceedings and refer the case to the Ondernemersklankbord for a review. Experience has shown that 8 of the 10 cases handled every year by the Ondernemersklankbord result in a successful rescue.

#### 4) Getting creditors to support a business rescue instead of liquidation

Policy area	Issue
Support for businesses facing financial difficulties	Austria applies an efficient framework for restructuring both in terms of speed and predictability, in which creditors play a key role. SMEs, which are typically unsecured creditors, can draw upon the assistance of specialised organisations if one of their debtors becomes insolvent.

Austrian insolvency law obliges receivers to attempt to restructure the business rather than liquidate it. Almost 40 % of all bankruptcy proceedings ultimately lead to restructuring.

In Austria, creditors are regarded as the key to any rescue process. According to the law on restructuring, the decision on restructuring is made by the creditors. The court's involvement in the process is purely functional. The only formal requirements involved in the procedure are summoning the parties and voting in court. The procedure is fast (three to six months) and predictable owing to the small number of parties involved. It is also cost-efficient: since highly experienced practitioners handle the cases, there is little need to employ expert witnesses or external assistance.

As long ago as the 19th century, two legally recognised Gläubigerschutzverbände (creditor associations) were created to protect the interests of typically unsecured creditors (SMEs). More recently, a third organisation has been set up to protect the interests of employees.

#### 5) Shaping efficient restructuring plans on the basis of common principles

Policy area	Issue
Support for businesses facing financial difficulties	INSOL International is a worldwide federation of insolvency specialists. This organisation has designed a set of principles on how to handle out-of-court workouts. These can be regarded as statements of best practice for all multicreditor workouts.

INSOL International brought together bankers experienced in insolvency and restructuring in order to draw up a set of principles on a global approach to multi-creditor workouts assisted by experts from some 150 organisations worldwide.

A set of principles was designed to be applied internationally and to form the platform for future restructuring, subject, however, to local laws and practice. ...

Predictable and widely accepted restructuring rules have the following advantages:

- the reduction of time and costs that would otherwise be spent by the parties in fundamental but non-productive discussions of the rules they will play by;
- the reduction of distrust, uncertainty and suspicion between creditor groups, particularly in international matters where creditors may be unaccustomed to local laws and customs, encouraging greater cooperation and lessening the risk of economic damage.

The principles were formally launched in the autumn of 2000.

## 6) Support for businesses in crisis: Rescue or a fresh start

Policy area	Issue
Support for businesses facing financial difficulties Promoting a fresh start after failure	The Crisme project aims to improve the success rate of young businesses and to reduce the stigma of failure. The project initially started at regional level in Germany and has been extended to six other countries within the European Union.

Crisme (Crisis intervention in small enterprises) is a transnational project funded under the European Regional Development Fund (ERDF) and involving seven countries. Its purpose is to help small companies in financial distress. The project aims to improve the survival of start-ups and to reduce the stigma of failure. Crisme also intends to establish better chances for a second start, which can be promoted through the development of instruments and advice-offers for business closedowns. It intends to develop and implement consultancy mechanisms in regional support structures in the partner regions..

The project started in 1999 and will run until the end of 2001. The project is inspired by a German pilot project that started in 1998 to deal with crisis intervention in small businesses.

Under the Crisme programme, this initiative is now extended and adapted to specific circumstances in other European regions. To this end, the initiators of the German pilot project share their experience with the other partners.

Analysis carried out under the project pointed to lack of skills and qualifications as a major reason for business failure. It also showed that entrepreneurs generally ask for advice too late. In order to attempt a rescue, the role of the banks was identified as crucial and fresh finance was considered a prerequisite for a successful rescue. The project considers that qualified and comprehensive advice is necessary for small businesses in crisis. This can not only reduce the failure rate of businesses but also positively influence the desire to become an entrepreneur.

## 7) Entrepreneurs join forces to improve the position of failed entrepreneurs

Policy area	Issue
Promoting a fresh start after failure	Re-cr��er is an association of entrepreneurs with the aim of supporting entrepreneurs, improving legislation and changing attitudes towards bankruptcy.

The association Re-cr  er was created in 1999 with the backing of the French Chamber of Commerce and Industry and the French Association of Bankers. Re-cr  er aims to gather entrepreneurs, both those having experienced a failure and those considering becoming entrepreneurs, in order to exchange experience, provide mutual support and draw attention to the risks involved in business, in particular for the benefit of starters. The association also aims to reflect on legislative reforms in this area and to change attitudes towards a fresh start after failure....

Re-cr  er sets out to boost the confidence to those who have suffered or are still suffering the consequences of business failure, and its members give advice on business risks to young starters and re-starters...

Members can ask for the support of experts in various areas such as lawyers and financial consultants.

Furthermore, the association organises debates, assists young people who are starting new businesses and keeps contacts with the government and other authorities in order to improve the position of companies in financial distress and entrepreneurs who intend to restart after failure.

## **8) Obtaining finance for a new business after a bankruptcy**

Policy area	Issue
Promoting a fresh start after failure	The ING Bank will support a fresh start for those who have failed once but nevertheless are still promising entrepreneurs.

Frequent reasons for failure are a lack of experience among starting entrepreneurs on issues such as competitors, credit risk assessment, and assessment of business partners and buyers. The insufficient preparation is probably caused by underestimating the requirements for starting and running a business. A potential restarter might have a better chance of success because he or she has had real-life business experience.

Regarding the existing stigma of failure, the ING bank considers that banks should be more prepared to finance restarters, especially since they would need fresh money.

Insolvency law should allow a quicker discharge of debts and insolvency trustees should focus more on reorganisation if a company is viable. Action should be taken to improve attitudes towards bankruptcy. Restarters with good entrepreneurial potential could increase net growth in the economy!

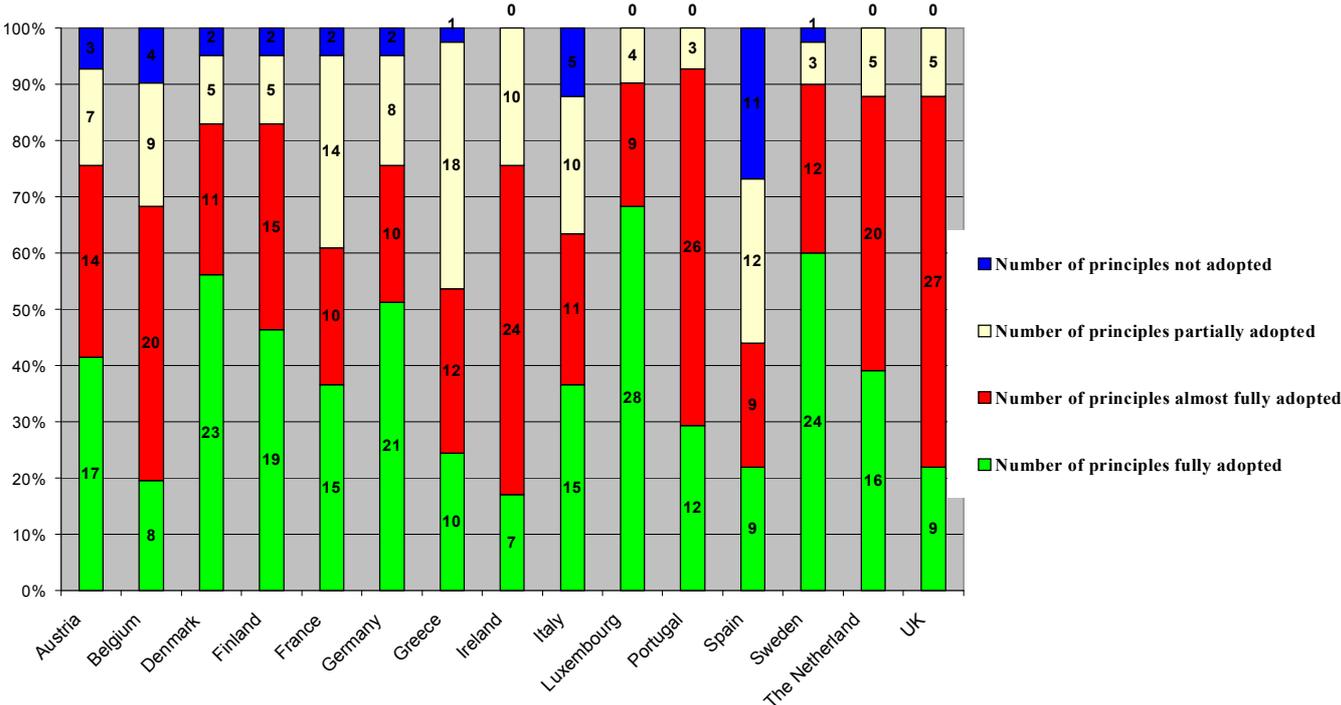
The bank concludes that:

- the number of successful start-ups should be increased;
- a non-viable business should be closed down in time;
- stigma should be addressed on different levels;
- restarters could increase the net growth of Dutch firms by 40 %.



**ANNEX VII: THE WORLD BANK PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS, APRIL 2001**

**Degree of implementation per country 2002**



The principles in *Principles and guidelines for Effective Insolvency and Creditor Rights Systems* are the product of a broad international collaboration and draw on common themes and policy choices of those initiatives and on the views of staff, insolvency experts and participants in regional workshops sponsored by the World Bank and its partner organisations. The consultative process on the *Principles and guidelines* involved more than 70 international experts as members of the World Bank’s task force and working groups, and with regional participation by more than 700 public and private sector specialists from approximately 75 mostly developing countries.

The *Principles and guidelines* build on a simple premise that sustainable market development relies on access to affordable credit and capital investment. The principles themselves build on this premise by articulating core elements and features of the systems that underpin credit access and enable parties to enforce their rights and manage the downside risk of credit and investment relationships.

The key elements of the principles include:

- Role of enforcement systems
- Legal framework for creditor rights
- Legal framework for secured lending
- Legal framework for corporate insolvency
- Framework for informal corporate workouts
- Implementation of the insolvency system

The entire report can be accessed on The World Bank’s web site: [www.worldbank.org/gild](http://www.worldbank.org/gild)