Impact assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law

JUST /2015/JCOO/FWCIVI0103 FRAMEWORK CONTRACT ENTR/172/PP/2012FC LOT 2

Written by Dr Pierre Hausemer, Laura Todaro, Ambre Maucorps, Marius Dragulin, Iva Plasilova, Robbert Fisher, Lia Federici, Ander Díez Sáez, Simona Frazzani, Janne Sylvest, Jesper Villadsen.
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Directorate-General for JUSTICE AND CUSTOMERS
Directorate A – Civil Justice
Unit A.1 – Civil Justice Policy

E-mail: JUST-CIVIL-COOP@ec.europa.eu

Contact: *European Commission, B-1049 Brussels*

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GLOSSARY

- **Bankruptcy:** is a legal proceeding involving a person or business that is unable to repay outstanding debts. The bankruptcy process begins with a petition filed by the debtor or on behalf of creditors. All the assets of a debtor are measured and evaluated, where upon the assets are used to repay a portion of outstanding debt.
- **Cram-down:** is a bankruptcy term used to describe the judicial power to confirm or modify a plan against the wishes of certain classes of interest or claim holders.[1]
- **Creditors:** means the holder of the claims or interest towards the debtor. Claim means a right to payment or a right to an equitable remedy for a failure of performance if the breach gives rise to a right to payment.
- **Debtor:** means any natural or legal person in financial difficulties when there is a likelihood of insolvency.[2]
- **Discharge:** is a permanent order that releases the debtor from personal liability for certain specified types of debts, thereby releasing the debtor from any legal obligation to pay any discharged debts.
- **Early restructuring possibilities:** 'restructuring' means changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or in part, of the debtors' activity.[3]
- **Enterprise:** an enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity.[4]
    - **Individual entrepreneur:** or proprietor, is a type of business entity that is owned and run by one natural person and in which there is no legal distinction between the owner and the business. According to Eurostat classification sole traders and entrepreneurs operating on their own are recorded under the households' sector.[5]
    - **SMEs[6]:** the category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. A small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. A microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

[1] D. G. Epstein, Don't Go and Do Something Rash about Cram Down Interest Rates, 49 ALA. L. REV. 435, 438 (1998); D. R. Wong, Chapter 11 Bankruptcy and Cramdowns. Adopting a Contract Rate Approach, Northwestern University Law Review, 2012, Vol 106, No 4.

[2] COMMISSION RECOMMENDATION of 12.3.2014 on a new approach to business failure and insolvency

[3] COMMISSION RECOMMENDATION of 12.3.2014 on a new approach to business failure and insolvency

[4] COMMISSION RECOMMENDATION of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises

[5] http://ec.europa.eu/eurostat/statistics-explained/index.php/Sector_accounts

[6] COMMISSION RECOMMENDATION of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises C(2003) 1422)

  - **Large companies:** all the companies which employ more than 250 persons and which have an annual turnover exceeding EUR 50 million, and/or an annual balance sheet total exceeding EUR 43 million.
- **Insolvency proceedings:** means collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to institutions under national law and either specific to those institutions or generally applicable to any natural or legal person.[7]
  - **Formal insolvency proceedings:** are those provided by national laws.
  - **Informal insolvency proceedings**: when creditors negotiate informally with a debtor to achieve a restructuring by consensus. Creditors with sufficiently similar interests and incentives (such as banks) may also develop their own restructuring processes, for use where a debtor with exposure to multiple creditors of that class becomes distressed.[8]
- **Insolvency:** is the state of being unable to pay the money owed, by a person or company, on time. There are two forms: cash-flow insolvency and balance-sheet insolvency. Cash-flow insolvency is when a person or company has enough assets to pay what is owed, but does not have the appropriate form of payment (liquidity shortcoming). Balance-sheet insolvency is when a person or company does not have enough assets to pay all of their debts.
- **Liquidation-Winding up:** means insolvency proceedings involving releasing the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets.[9]
- **Moratorium:** refers to the legal process of preventing creditors from taking legal and other proceedings against the company or its assets during a formal restructuration procedure.
- **Rank of claims:** is the order of priority established by the national legislation for the repayment of creditors in the insolvency proceedings.
- **Restructuring:** means changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or in part, of the debtors' activity.[10]
- **Reorganisation:** 'reorganisation measures' shall mean measures which are intended to preserve or restore the financial situation of a credit institution or an investment firm as defined in Article 4(1), point (2) of Regulation (EU) No 575/2013 and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims;

[7] Article 2 (1) (4) DIRECTIVE 2014/59/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

[8] (J. Armour and S. Deakin (2001), "Norms in private insolvency: The 'London Approach' to the resolution of financial distress", Journal of Corporate Law Studies, pp. 21-51).

9 Article 2(c) Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings Official Journal L 160 , 30/06/2000 P. 0001 - 0018

10 Communication from the Commission of 12.3.2014 on a new approach to business failure and insolvency, COM(2014)1500 final

those measures include the application of the resolution tools and the exercise of resolution powers provided for in Directive 2014/59/EU.[11]

- **Second chance:** the possibility for bankrupt consumers and sole entrepreneurs to have a fresh start after the discharge of the debts.[12]
- **Self-employed:** self-employed persons are defined as persons who are the sole owners, or joint owners, of the unincorporated enterprises in which they work, excluding those unincorporated enterprises that are classified as quasi-corporations. Self-employed persons are classified here if they are not also in a paid employment which constitutes their principal activity: in that latter case they are classified under employees.[13]
- **Stay of individual enforcement actions:** means a court ordered suspension of the right to enforce a claim by a creditor against a debtor.[14]

11 DIRECTIVE 2001/24/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5.5.2001, p. 15) as amended by Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014

12 A new European approach to business failure and insolvency

13 Eurostat's Concepts and Definitions Database, http://ec.europa.eu/eurostat/documents/3859598/5826305/CA-15-96-001-EN.pdf/aeec2852-bed2-46d2-9534-5859d3c911d5

14 COMMISSION RECOMMENDATION of 12.3.2014 on a new approach to business failure and insolvency

1. Introduction

VVA Consulting in partnership with the Joint Institute for Innovation Policy (JIIP), the Danish Technological Institute (DTI) and together with Grimaldi Studio Legale carried out the Impact Assessment study on policy options for a new initiative on minimum standards in insolvency and restructuring law.

This document is the Final Report. It follows the structure of an Impact Assessment Report[15] and it gives account of the findings and conclusions of the study. In particular:

- The introductory section restates the study's objectives, scope and methodology.
- Section 2 illustrates the policy and economic context in which the Impact Assessment has been commissioned.
- Section 3 defines the problems and quantifies their impacts based on the findings emerging from the legal, policy and economic research carried out (Task 1).
- Section 4 provides a description of the policy options and sub options identified (Task 2).
- Section 5 offers a discussion about the policy options and sub options regarding costs, benefits and impacts (Task 3).
- Section 6 compares the options and identifies the most preferred option.
- The annex presents the results of the data collection carried out in a selection of Member States and supporting documents such as the questionnaires used in the study.

1.1 Study objectives

The **overall aim** of the study is to provide the Commission with different policy options on minimum standards in insolvency and restructuring law, to estimate their impact and to produce recommendations for a preferred option.

As per the Terms of reference the specific objectives of the study are:

1. **Define the existence and the magnitude of problems in the area of capital flows, economic growth and job creation associated with discrepancies in insolvency regimes**. In particular, the study should quantify the effects and the impacts of the barriers created by these discrepancies as per the following items:

    - the **additional costs** of national and EU cross-border insolvency proceedings compared to purely domestic insolvency proceedings;
    - the lost economic potential for the EU internal market resulting from the **inefficiency** of national insolvency frameworks;
    - the lost economic potential within the Member State (and consequently for the EU) resulting from the **lack of a "second chance"** for natural persons and entrepreneurs, who are prevented from contributing to the economy due to the harsh consequences of a (non-fraudulent) bankruptcy;

[15] http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm

  - the national and EU cross-border costs and impacts of **differences in substantive insolvency proceedings** of Member States in relation to the lost potential and foregone benefits of the EU internal market in terms of flows of capital, growth, job creation and consumer benefits.

2. **Identify policy options to address the problems identified**;

3. **Determine the economic and social impacts of the policy options**. In particular, the study should quantify the impact of the measures to remedy the identified barriers in relation to:
    - additional costs
    - lost potential of the EU internal market in terms of flow of capital, growth, job creation; and consumer benefits.

1.2 Study scope

In terms of **geographic scope**, the assignment covers the EU and its 28 Member States. Data collected at country level will be aggregated to provide **estimates for the whole EU** in relation to the identified problems and policy options.

The key features of insolvency law are presented for each of the 28 Member States through a legal country fiche, while a deeper investigation of the problems and the economic impacts of the inefficiency of insolvency law has been conducted in 10 countries: **Belgium, Czech Republic, France, Germany, Latvia, Luxembourg, Romania, Spain, Sweden** and the **United Kingdom.**

In addition, we analyse the **US** as a comparator for the definition of the problem and the formulation of the policy options (Task 2). The US system offers a streamlined restructuring plan at modest cost that allows the individual to keep possession of his assets, catch up on secured debt, and discharge unsecured debt at the end of the plan.

In terms of **time span** the study covers the last ten years: **from 2005 to 2015**. The most recent primary and secondary data were collected on several indicators to describe the inefficiency of national insolvency frameworks (i.e. timely repayments, amount of non-performing loans, recovery rate, firm births/deaths etc.) and the costs they engender (i.e. the costs of national and EU cross border proceedings). To account for the impact of the economic crisis on the single market in terms of flow of capital, growth, job creation and consumer benefits, data from the pre-crisis period is taken into consideration where relevant and available.

1.3 Analytical framework

This chapter provides a short summary of the proposed approach for implementing the assignment.

Since the study aims to provide policy options in preparation of a Commission proposal, the methodology draws on the standard Impact Assessment approach.[16] In practice, we have

[16] http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm

translated each of the specific objectives mentioned above into tasks and subtasks that ultimately correspond to the steps of an Impact Assessment, namely:

- Step 1: Analysing the problem and stakeholder consultation
- Step 2: Setting the objectives
- Step 3: Considering different policy options
- Step 4: Analysing the impacts
- Step 5: Comparing the options
- Step 6: Examining M&E Arrangements[17]

The section below illustrates the link between the steps of an Impact Assessment, and the tasks of this study. It also shows the causal chain from the current scenario to effects and impacts of the different policy options considered.

- **Problem definition – Task 1.** The current scenario is characterised by significant legal fragmentation at EU level. This may result in costs and economic losses for players operating in the EU market. At macroeconomic level, these costs and losses may hamper the full exploitation of the EU internal market, with negative consequences for the flow of capital and investment, growth, job creation and consumers.
- **Policy Options - Task 2.** The proposed policy options match each of the problems stemming from the current scenario with several alternative policy responses to mitigate costs and economic losses.
- **Effect of the Policy Options – Task 3.** The proposed policy options are then analysed to capture their effects. For example, this could include a reduction in the number of companies put into liquidation due to the adoption of more accessible and affordable preventive restructuring measures; or the extent to which deleveraging debt for household and firms has taken place contributing to the possibility of starting a new business or receiving new funding.
- **Impact of the Policy Options – Task 3.** Finally, these first order effects are aggregated to analyse the potential economic and social impacts in the EU. This level of analysis refers to the assessment of impacts on the overall economic and social welfare with particular relation to indicators that are proxies of prosperity and well-being, namely: tax collection, firm deaths/births, job creation, increase of cross border investment and consumption and reduction of the stigma associated with insolvency in some countries.

1.4 Methodology

This study is informed by different methods and tools: literature review, interviews, survey, case studies, cost-benefit and competitiveness proofing analyses.

The table below illustrates which methodologies and tools were used to tackle the assignment. Some of these methods were applied throughout the study and therefore repeated for each task.

Table 1: Study tasks and methodology

Study tasks	Methodology and tools

[17] In the context of this study the research team will report in annex 8.1 the data that are currently collected at Member States

Task 1: Problem Definition	Literature review Interviews at EU and MS level Legal analysis based on country fiches Policy and economic analyses based on country case studies
Task 2: Policy Options	Literature review Interviews at EU and MS level Legal analysis based on country fiches Policy and economic analyses based on country case studies Experts' elicitations gathered through interviews and workshop Stakeholders consultation
Task 3: Effects and Impacts of the Policy Options	Literature review Interviews at EU and MS level Legal analysis based on country fiches Elaboration of country case studies and policy and economic analysis Experts' elicitations gathered through interviews and workshop Stakeholder consultation Cost-benefit analysis and competitiveness proofing based on interview programme and EU 28 survey

1.4.1 Task 1 Define the problems and quantify their scale and impact

The objective of task 1 – as per the first step of an Impact assessment - is to verify the existence of the problem, identify who is affected, estimate its scale, causes and consequences, and assess its likelihood to persist in the absence of (further) EU policy intervention.

We based the completion of this task on extensive primary and secondary research to:

- define the key features of insolvency law in each MS and (legal analysis and country fiches);
- gather and analyse data on costs and losses due to difference, inefficiency and legal uncertainty in the area of insolvency, e.g. quantify the current baseline scenario (policy and economic analysis of case studies).

1.4.1.1 Legal Country fiche

To define the key features of insolvency law in each MS, the team of legal experts carried out a review of the relevant legislation on insolvency in each member state building on the results of the Study on Substantive Insolvency Law (School of Law University of Leeds).

The structure of the country fiche was directly linked to the policy options prepared by the Commission and this will facilitate the impact assessment.

Finally, the review of these cases contributed to the collection of additional information on costs of proceedings and recovery/survival rates in cross-border situations.

1.4.1.2 Case studies

The examination of the legal characteristics in each country helped to select ten case study countries. The case studies are an important part of this IA as they were used to retrieve more in-depth information to quantify the problem and its impacts.

The selection of the countries was based on the following criteria:

- **Characteristics of the legal framework** (e.g. out of court proceedings) to rescue viable companies, in particular:
  - Jurisdictions where viable companies could be rescued both in out- of court proceedings and insolvency proceedings;
  - Jurisdictions where viable companies could be rescued in formal insolvency proceedings;
  - Jurisdiction where viable companies cannot be easily rescued.
- **Availability of data** in relation to:
  - participation in proceedings;
  - costs of proceedings;
  - length of proceedings;
  - recovery rates;
  - survival of insolvent businesses.
- **EU geographical coverage**, in particular:
  - Northern Europe
  - Southern Europe
  - Central Europe
  - Western Europe
  - Eastern Europe

The selection of countries is summarised in the table below:

Table 2: Case study country selection

Criteria / Country	Jurisdictions where viable companies could be rescued both in out- of court proceedings and insolvency proceedings	Jurisdictions where viable companies could be rescued in formal insolvency proceedings	Jurisdiction where viable companies cannot be easily rescued	Data availability[†]	Geographical coverage
Belgium	X			*	Central Europe
Czech Republic		X		**	Eastern Europe

Criteria Country	Jurisdictions where viable companies could be rescued both in out- of court proceedings and insolvency proceedings	Jurisdictions where viable companies could be rescued in formal insolvency proceedings	Jurisdiction where viable companies cannot be easily rescued	Data availability†	Geographical coverage
France	X			*	Western Europe
Germany		X		**	Central Europe
Latvia			X	**	Northern Europe
Luxembourg			X	**	Western Europe
Romania			X	*	Eastern Europe
Spain		X		*	Southern Europe
Sweden		X		*	Northern Europe
United Kingdom	X			**	Northern Europe

† **= very satisfactory data availability
*= satisfactory data availability

The case studies were based on desk and field research and they focus on the following aspects:

1. Brief description of the insolvency framework in the country;
2. Statistics on participation in proceedings in the last 10 years;
3. Information on costs, benefits and wider impacts of the different insolvency practices, such as preventive restructuring measures and out of court preventive restructuring measures.

The field research was based on interviews with the following categories of stakeholders:
1. Creditor association representatives (bank institutions and financial institutions);
2. Large companies, SMEs and entrepreneur's representatives, especially associations for companies in financial distress;
3. Practitioners (both public and private, according to the proceedings in the country);
4. Consumer association representatives (especially associations to support consumers in financial distress);
5. Public authorities (ministries of justice and finance representatives);
6. Relevant experts in the field (when needed to fill in data gaps).

The table below summarises the results of the interview programme by country and per category of respondents.

Table 3: Case study interview results

Case study Interviews results		
Country	**Number of interviewees**	**Share**
		%
Belgium	5	12%
Czech Republic	3	6%
Germany	3	6%
Spain	6	15%
France	15[18]	35%
Luxembourg	4	9%
Latvia	2	5%
Romania	2	5%
Sweden	2	5%
United Kingdom	1	1%
TOTAL	41	100%
Type of stakeholder	**Number of interviewees**	**Share**
		%
Public authority	9	22%
Creditor	10	24%
Practitioner	9	22%
Debtor	2	5%
Consumer association[19]	0	0%
Other (experts)	11	27%
TOTAL	41	100%

The analysis of the legal country fiches and case studies is presented in section 3. The legal analysis and cases studies helped to disentangle the link between the legal framework and its social and economic implications, to the extent possible given that a large number of other external factors influence elements such as debt recovery rates.

1.4.1.3 Literature review and Interviews at EU level

The legal, policy and economic analyses were also based on extensive literature reviews at national, EU and international level and interviews at EU level. The literature review covered

18 Number of interviews in France is higher compare to the other countries as several respondents took part to one interview per each organisations.

19 Interview with consumer association was conducted at EU level, not by country.

publicly available EU-level information on insolvency law, relevant academic literature on the link between legal insolvency framework and economic performance.

Sources for relevant material included:

- Council of the European Union
- European Commission
- European Parliament
- Associations of finance sectors and consumers position and policy papers
- National statistics
- Ministry of finance and justice statistics

In addition to desk research, we performed interviews at EU level with several associations.

Interviews were carried out with representatives of the following groups:

- European Financial Inclusion Network
- Invest Europe
- European Trade Union Confederation
- Business Europe
- Federation of European Accountant
- Magistrats de l'Union européenne
- Association of Chartered Accountant
- European Banking Federation

1.4.2 Task 2 Identify and describe solutions to the problems identified

The objectives of task 2 correspond to steps 2 and 3 of an IA:

- Define the objectives and criteria against which the policy options should be identified
- Identify and screen the policy options with a view to select the most relevant ones for further examination

The research team elaborated, in cooperation with the Commission, a selection of policy options. Sections 4 and 5 present a discussion of the options from both legal and policy perspectives.

- ***Option 1: Maintaining the status quo (baseline scenario)***

This option leaves the baseline scenario unaltered and implies continuing to adopt the country-specific recommendations on insolvency within the annual European Semester exercise.

- ***Option 2: Setting up a fully harmonised preventive procedure and second chance regime***

This measure would fully harmonise (at least):

- one preventive procedure in Member States, regulating in detail the elements of the procedure, including for example the definition of insolvency, the majorities required for plan adoption, the treatment of shareholders in restructuring and protection on new financing.
- discharge period across the EU and setting out all the exceptions from the uniform discharge period, but would also probably require a harmonisation of the procedures themselves leading up to a discharge.

- ***Option 3: Introducing an alternative, optional EU restructuring and insolvency regime***

This measure proposes the establishment of a 29th restructuring regime at EU level, alongside national procedures, a European procedure to be chosen by the party initiating it (i.e. the debtor, or the creditors with the debtor's consent). This option would leave national laws untouched. Jurisdiction would be established by the Insolvency Regulation on the basis of the COMI principle, but the law applicable to the proceedings would be the European procedure rather than the law of the COMI state (to make this possible, a modification of the Insolvency Regulation would be necessary). This European procedure could be available in principle in both cross-border insolvency cases and in domestic cases.

- ***Option 4: Setting up a minimum harmonised legal framework in the area of restructuring and second chance for entrepreneurs and the possibility of a soft law instrument in the area of second chance for consumers***

This option would take forward the 2014 Recommendation, setting up binding minimum standards in the areas of:

  - a preventive restructuring framework for businesses in financial difficulty and
  - reducing discharge periods for entrepreneurs to no more than 3 years.

The preventive restructuring and second chance frameworks outlined in the 2014 Recommendation could be reinforced by additional substantive law elements (as listed in Task 2 of this report).

1.4.3 Task 3: Determine the costs and benefits, and impacts of the solutions identified

The objective of task 3 is to determine the costs, the benefits and the impacts of the identified solutions. This task describes and quantifies how and to what extent the policy options identified in Task 2 are able to mitigate the estimated economic loss and to reduce the barriers identified under Task 1.

These objectives correspond to steps 4 and 5 of an IA:

- Analyse impacts (cost-benefit analysis)
- Compare the options

1.4.3.1 Cost benefit analysis

The objective of the CBA was twofold:

- First, the CBA aimed at sizing the problem by evaluating the current costs borne by all debtors and creditors (of both domestic and cross-border businesses) involved in divergent insolvency frameworks and legislations across EU Member States;
- Second, it aimed at providing an estimate of the benefits (both direct benefits and wider impacts) deriving from each of the selected policy options for debtors, creditors, and the European economy as a whole, taking into account the national and/or international dimension of the procedure.

The rationale behind the CBA was the objective comparison between the baseline situation characterised by divergent regulatory frameworks for insolvency proceedings and the proposed policy options to address these inefficiencies.

Costs incurred as part of the baseline situation were assessed on the basis of a bottom-up approach, by evaluating first the costs at company level and then scaling up to the national and European levels.

Benefits of each policy option were calculated on the basis of

- savings (in direct and indirect proceeding-related costs)[20],
- higher recovery and survival rates, and
- increased investment and employment

achievable through the implementation of the policy options.

A sample of 6 Member States[21] (constituting a representative sample of the various regulatory frameworks currently in force in Europe) was analysed as part of this first step. The scaling-up process was then achieved by using suitable multiplication factors.

To the extent possible, the study team distinguished between domestic and cross-border insolvencies and assesses the potential impacts of each policy option on cross-border investments to depict not only the benefits of more efficient rules achievable at national level, but in particular the potential benefits of more harmonised rules and practises across Europe. In order to avoid double-counting the intra-EU cross-border cases, the study team investigated, in each Member State, the purely domestic insolvency cases (i.e. when both debtor(s) and creditor(s) are from the country under consideration) and the cross-border cases involving domestic debtor(s) (i.e. when the debtor(s) is(are) from the country under consideration while the creditor(s) is(are) from another EU country) separately.

The analytical steps are as follows:

1. carrying out a quantitative analysis of the costs incurred under the baseline situation (status quo),
2. estimating the foregone benefits caused by the lack of harmonisation in insolvency frameworks across the EU,
3. estimating the wider socio-economic impacts of each policy options in terms of e.g. jobs and investment.

In case some of the costs and benefits were not directly quantifiable and/or stakeholders were unable to provide any quantitative information, the study team endeavoured to identify **proxies** to approximate such costs and benefits. In these cases, assumptions are duly explained and justified.

Finally, it should be noted that costs and benefits were tackled separately for three different business categories - **individual entrepreneurs, SMEs and large companies** - in order to provide a tailored picture of the advantages and disadvantages of the policy options under consideration.

With regard to consumers, little information could be collected. However, one Consumer association stated that, as a result of their experience, it would be recommended to have a

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20 There are also savings in terms of 'avoided losses': avoided job losses (employment-related savings) and avoided company liquidations (business-related savings) are taken into consideration as part of the benefits generated by "higher recovery and survival rates", and avoided losses in financial terms (€) are taken into consideration as part of the benefits generated by "increased investment and employment".

21 The selection of countries was based on representativeness and data availability criteria. The 6 countries used in the evaluation of the costs incurred under the baseline scenario are: United Kingdom, Czech Republic, Luxemburg, France, Belgium and Latvia.

very simple procedure. This could lead to an efficient insolvency procedure and thus minimize the involvement of the courts. As consumers in particular tend to feel very vulnerable when in financial crisis, a simplified procedure could also reduce the level of perceived social cost and stigma associated with personal insolvencies. According to the same interviewee, this could also encourage people to engage in restructuring efforts or other forms of financial settlement with the creditors. Another Consumer Association stated that one of the most urgent issues to be tackled is the absence of specialized independent debt advice for consumers and the possibility of out-of-court debt settlement procedure in some countries.

1.4.3.2 Web survey

Through the web survey the research team collected quantitative data about the results and impacts that the adoption of specific policy options may imply.

Respondents from **the EU 28** were involved in the survey. The web survey questionnaire can be found in annex.

The survey involved the following types of stakeholders:

1. Creditor association representatives;
2. Bank and financial institutions;
3. Large companies, SMEs and entrepreneurs ;
4. Large companies, SMEs and entrepreneur's representatives (especially associations for companies in financial distress);
5. Practitioners (both public and private, according to the proceedings in the country);
6. Consumer association representatives;
7. Public authorities (ministries of justice and finance representatives).

The table below summarises the results of the web survey by country and per category of respondents.

Table 4: Survey results[22]

Share of answers received to the survey		
Country	**Responses**	**Share (%)**
Belgium	1	4.35%
Bulgaria	2	8.7%
France	2	8.7%
Germany	1	4.35%
Greece	2	8.7%
Ireland	3	13.04%
Italy	1	4.35%
Latvia	4	17.39%
Poland	1	4.35%
Romania	1	4.35%
Slovenia	1	4.35%
Spain	2	8.7%

[22] Survey results have to be taken cautiously due to the limited level of survey responsiveness. Targeted interviews with practitioners across the EU have been carried out to mitigate data gap.

Sweden	2	8.7%
TOTAL	23	100%
Type of stakeholder	**Responses**	**Share**
Public authority	8	34.78%
Creditor	3	13.04%
Practitioner	7	30.44%
Debtor	0	0.0%
Consumer association	1	4.35%
Other	4	17.39%
TOTAL	23	100.0%

Several obstacles had to be overcome in order to raise the number and level of detail of the inputs received during the consultation: the language barrier and the technicality of the legal concepts, the overall complexity of the topic (especially with regard to the multiple impacts that insolvencies have on the social and economic environments), the comprehensiveness of the study (in particular with regard to the number of provisions included in each policy option), and the difficulty for respondents to provide quantitative estimates on expected and/or hypothetical socio-economic impacts. Therefore, the number of responses is limited, but still covers a wide range of different countries and different types of stakeholders.

1.4.3.3 Interview programme

In parallel with the web survey, additional interviews were conducted with a focus on the costs, benefits and economic losses of the proposed interventions. While the research team initially proposed to carry out interviews only in the 10 case study countries (see table 2), the level of complexity of the topic and the low level of responsive to the survey led the team to target practitioners and experts on cross border insolvency cases from all over Europe. These responses were used to enrich and triangulate the results of the case study interviews and the online survey, and to assess the qualitative elements of the policy options and sub options. (The questionnaire can be found in annex).

The table below summarises the results of the additional interview programme by country and per category of respondents.

Table 5: Interview programme results[23]

Share of answers received to the interviews		
Country	**Responses**	**Share (%)**
Croatia	1	2.44%
Denmark	2	4.88%
Estonia	1	2.44%
Finland	2	4.88%
Greece	1	2.44%
Ireland	3	7.32%
Lithuania	2	4.88%

[23] The number of interviews has to be added to the first round of interviews carried out into the 10 selected case studies (a total of 65 interviews). During this second round of interviews specific attention has been dedicated to insolvency practitioners, as practitioners are best-placed to answer questions on such a technical topic.

Netherlands	1	2.44%
Poland	1	2.44%
Portugal	1	2.44%
Slovenia	1	2.44%
Slovakia	1	2.44%
Spain	1	2.44%
Sweden	2	4.88%
Germany	2	4.88%
Belgium	2	4.88%
Bulgaria	4	7.32%
France	2	4.88%
Czech Republic	3	7.32%
Luxembourg	3	7.32%
Romania	1	2.44%
Italy	5	12.20%
TOTAL	41	100%
Type of stakeholder	**Responses**	**Share**
Public authority	8	19.51%
Creditor	4	9.76%
Practitioner	21	51.22%
Debtor	0	0.0%
Consumer association	6	14.63%
Other	2	4.88%
TOTAL	41	100.0%

1.4.3.1 Competitiveness proofing

According to the Commission's competitiveness proofing tool, competitiveness consists of three aspects:

- Cost competitiveness (i.e. the extent to which a proposal affects competitiveness by raising costs for some companies but not for others)
- Innovation competitiveness (i.e. the extent to which a proposal affects the propensity of likelihood of success of innovation among some companies but not others)
- International competitiveness (i.e. the extent to which a proposal affects the ability of European companies to compete with non-European companies)

As part of the final report we analysed these three aspects of competitiveness. Cost competitiveness results will be based on the survey and cost-benefit analysis whereas more qualitative aspects related to the impact of the proposals on innovation will be tackled through interviews. The assessment of international competitiveness is based on a comparison between the impact of the proposals and regulatory frameworks elsewhere (e.g. US Chapter 11) and / or good practices. The resulting assessment is presented in a tabular form in section 5 of the study. An example of table is set out below with hypothetical data.

Table 6: Extract of a hypothetical competitiveness overview table

Aspect	Overall Impact (+ = positive impact; - = negative impact)	Narrative / notes
Option 1		
Cost	+	Positive impact for companies with high cross-border volumes Positive or no Impact for companies that operate only domestically in well-functioning jurisdictions
Innovation	++	Positive impact on start-ups in sectors with low capital intensity …
International	+	Positive impact for companies that compete in global markets (i.e. against non-EU imports)
Option 2		
Cost	+	…
Innovation	++	…
International	+	…

1.4.3.2 Comparing policy options

The final step of our study was the comparison of the policy options. We will compare the options in a table format and we will indicate which policy options is preferred and why, based on:

- Their direct and wider socio-economic impacts and the extent to which they would achieve the objectives (effectiveness);
- Their feasibility, in terms of the costs and benefits of their implementation (efficiency).

2. Political and economic context behind this study

Most European bankruptcy legislation was adopted almost one century ago, when the majority of companies were domestic manufacturers, largely dependent on "hard assets". Over the last three decades, market and business conditions have changed drastically, including the expansion of the use of secured credit, the growth of derivative products and the distressed debt market.

With regard to the largest companies, the debt and capital structures of most debtor companies are more complex, with multiple levels of secured and unsecured debt, often governed by equally complex inter-creditor agreements. In addition, companies' internal business structures (with affiliates and/or venture partners) and external business models are increasingly multinational.

As Commissioner Jourova recalled in a recent speech, today in Europe half of all businesses do not survive the first 5 years of their existence. In the EU, 200,000 firms go bankrupt every year resulting in direct job losses of 1.7 million annually. Around a quarter of these bankruptcies concern businesses that work cross-border.[24]

Moreover, with the crisis, another category of insolvency has raised its head: "personal bankruptcy". Millions of individuals and households, as a consequence of over-indebtedness and due to the crisis, were unable to pay their mortgages or loans and were stripped of properties and houses, with dramatic economic and social consequences.

In this context national insolvency procedures appear to be generally slow, complex, with high litigation costs, often associated with a stigma on the failed entrepreneur. In the EU, disparities between national insolvency laws can create obstacles, competitive advantages/disadvantages and difficulties for companies with cross-border activities or ownership within the EU. Those obstacles may hamper the realisation of the Single Market and the creation of the Capital Market Union.

In view of the above, practitioners and legislators have started to question the adequacy of national insolvency rules to resolve the problems posed by the 21st century economic environment, with small service companies with international clients and creditors and few hard assets to be relied upon on one side, and large corporations with complex structures and corporate governance and high leverage on the other side[25]. The economic crisis has exacerbated the use of insolvency liquidation proceedings and many Member States have started to revise their insolvency/bankruptcy laws. However, the lack of coordination in the reforms and the lack of action on the part of some Member States may frustrate their effectiveness.

To tackle the above issues, the **Commission presented a Recommendation for a new approach to business failure and insolvency**[26] to encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises and gives honest entrepreneurs a second chance. The Recommendation complements the recast of **Regulation No 1346/2000**, which covered cross-border insolvency. As recalled by the Commission, an effective insolvency law should be able to liquidate speedily and efficiently unviable firms and restructure viable ones to enable them to continue operating and to maximise value for creditors, shareholders, employees, tax authorities and other parties concerned.

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[24] Insolvency Law in Europe – Giving people and businesses a second chance, 23 April 2015, https://ec.europa.eu/commission/2014-2019/jourova/announcements/insolvency-law-europe-giving-people-and-businesses-second-chance_en

[25] American Bankruptcy Institute, Commission to Study the Reform of Chapter 11, 2012-2014, Final Report and Recommendations, December 2014, p.12.

[26] C (2014) 1500. http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf

More recently, **Regulation (EU) No 2015/848** has replaced Regulation (EC) No 1346/2000 on insolvency proceedings.[27] Its purpose is to provide rules to determine the proper jurisdiction for a debtor's insolvency proceedings; the applicable law to be used in those proceedings and mandatory recognition of those proceedings in other EU Member State.

Regulation (EU) No 2015/848 includes a number of changes to the existing regime of Regulation (EC) No 1346/2000:

- **Extension of scope.** The scope of the Recast Regulation has been extended to go further than the liquidation proceedings already covered by the previous EC Regulation 1346/2000. The new rules also cover preventive restructuring proceedings which provide for the reorganisation of a debtor at a stage where there is only a likelihood of insolvency; debtor in possession proceedings (which leave the debtor fully or partially in control of his assets and affair), as well as proceedings providing for a debt discharge or a debt adjustment of consumers and self-employed persons.
- **Codification of determination of centre of main interests (COMI)**. The concept of COMI has been more precisely defined as the "place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties". Therefore, the Recast Regulation confirms the principle elaborated over time by the Court of Justice of the European Union (case C-241/04 Eurofood; case C- 396/09 Interedil; case C-191/10 Rastelli). For the sake of greater legal certainty, the Regulation introduces rebuttable presumptions for the COMI. According to these, the COMI means, in the case of company or legal person, the location of the registered office, and in case of an individual running a business or professional activity, the principal place of business, whereas in case of any other individual it means the habitual residence. These presumptions do not apply if the location has changed within a certain period prior to the start of insolvency proceedings.
- **Secondary proceedings where a company has an establishment:** The Recast Regulation enhances chances of rescuing companies by avoiding the opening of secondary proceedings where interests of local creditors are otherwise guaranteed. There are two specific institutions for that purpose:
  - 1) Article 37 of the Regulation provides that the main proceeding's officeholder may give an undertaking to local creditors that, in respect of the assets located in a Member State where secondary proceedings could be opened, local distribution and priority rules will be respected. Where such an undertaking is supported by the qualified majority of the local creditors, the court seized of a request to open a secondary insolvency proceeding should be able to refuse that request;
  - 2) the court seized of a request to open secondary insolvency proceedings has the possibility to stay temporarily the opening of the secondary proceedings, where a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings. By this, one can preserve the efficiency of the stay granted in the main insolvency proceedings, provided that suitable measures are in place to protect the interests of local creditors.
- **Actions closely linked to insolvency.** The courts of the Member State within the territory of which insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them. Such actions should include avoidance actions against defendants in other Member States and actions concerning obligations that arise in the

[27] The Regulation will enter in force on 26 June 2017.

course of the insolvency proceedings, such as advance payment for costs of the proceedings.

- **Registers of insolvency proceedings.** In order to enhance the establishment of a European judicial space the Recast Regulation establishes that by June 2019 a system of electronic interconnection of the so called "national insolvency registers" should be created. The national insolvency register shall be created by each Member State and be publicly accessible via the European e-justice portal.
- **Group Companies.** The Regulation creates a specific legal framework to deal with the insolvency of members of a group of companies. This includes provisions obliging the various insolvency practitioners and the courts involved in the insolvency of members of the same group of companies to cooperate and communicate with each other; limited rights of standing for an insolvency practitioner in the proceedings concerning another member of the same group; and a specific system for the coordination of the proceedings concerning the same enterprise group (so called "group coordination proceedings").

Regulation (EU) No 2015/848 leaves national insolvency laws untouched. Yet, discussions on harmonisation of national insolvency procedures are taking place. These have also been analysed in a Study commissioned by the European Parliament.[28] The Commission has agreed that national discrepancies between insolvency laws and restructuring frameworks increase costs and uncertainty in assessing the risks of investing in another Member State, fragment conditions for access to credit and result in very different recovery rates for creditors.

The **Commission Communication on 'A new Approach to Business Failure and Insolvency' of December 2012**[29] highlights certain areas where differences between domestic insolvency laws may hamper the establishment of an efficient internal market. Some Member States have a limited range of procedures meaning that businesses are only able to restructure at a relatively late stage, while in others restricting is possible at an earlier stage with out-of-court procedures and various degrees of formality. Not all European jurisdictions provide entrepreneurs a second chance with different discharge periods and conditions. Early restructuring of viable companies may lower costs and increase recovery rates.

The Commission Recommendation of 2014 on a new approach to business failure and insolvency intended to encourage coherence between national insolvency frameworks to reduce divergences and inefficiencies which hamper the early restructuring of viable companies in difficulties and the possibility of a second chance for honest entrepreneurs, lowering the costs of restructuring for both debtors and creditors. The Recommendation provided for minimum standards for preventive restructuring frameworks and discharge of debts of bankrupt entrepreneurs. However, not all Member States have implemented all recommendations.

The **Evaluation of the Recommendation**[30] reports that the Recommendation was useful for Member States that had previously started reforms in this area. At the same time, it was unable to spur coordinated EU-wide insolvency reforms leading to convergence, for instance, in the availability of preventive restructuring procedures or in the area of second chance. In detail, the number of preventive restructurings is still very small compared to the number of

[28] INSOL EUROPE, Harmonisation of Insolvency law at EU Level, 2010, PE 419.633
[29] COM(2012) 742. http://ec.europa.eu/justice/civil/files/insolvency-comm_en.pdf
[30] http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm

liquidations (tens of thousands per country) and there is still a large variation in relation to the number of years after which a second chance can be granted (from one to 10 years).
Insolvency laws and restructuring procedures are linked to the creation of the **Capital Market Union** (CMU). The CMU should create a single market for capital for all 28 Member States by removing barriers to cross-border investment within the EU and fostering stronger connections with global capital markets. The practical purpose of the CMU is to shift from reliance on bank finance to capital markets finance also for SMEs by facilitating access to capital market based financing and removing barriers to seek and obtain funding in another Member State. Insolvency laws are highly relevant in the risk assessment of a company or security. The development of the capital market in the US has been due, among other factors, to the existence of a uniform federal law, applied by the US Bankruptcy Courts, which are a unit of the federal district courts. In the same vein, reducing divergences in national insolvency laws of EU Member States could contribute to the emergence of pan-European equity and debt markets, by reducing uncertainty for investors needing to assess risks in different Member States.

The **Green Paper on the Capital Markets Union**[31] has identified barriers to the development of pan-European markets which include differences in national insolvency laws, lack of standardised processes, documentation and information on the credit worthiness of issuers. In the public consultation on the Green Paper on the Capital Markets Union stakeholders raised a large number of topics in relation to the Green Paper, from restructuring frameworks to second chance for entrepreneurs, regulation of qualifications, tasks and rights of insolvency at the EU level, liability of directors, introduction of a time cap on insolvency procedures, and establishment of an EU register with information on insolvency.

Pledges to reform insolvency law at EU level also came from the **Five Presidents' Report** completing Europe's Economic and Monetary Union.[32] The document explicitly says that the most important bottle necks preventing the integration of capital markets are in areas like insolvency law, company law, property rights and as regards the legal enforceability of cross-border claims. In this respect, **President Juncker** invited the European Parliament to launch a follow-up to the new **Internal Market Strategy**, including an initiative on business insolvency law and improved enforcement to simplify the life of consumers.[33]

[31] GREEN PAPER Building a Capital Markets Union, COM (2015)063 final.

[32] https://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en

[33] http://ec.europa.eu/priorities/publications/letter-commission-president-juncker-and-first-vice-president-timmermans-presidents_en

3. Problem Definition: Define the problems and quantify their scale and impact (Task 1)

In the aftermath of the financial crisis of 2007/09 significant issues have been raised as to the appropriateness of corporate rescue mechanisms in particular for addressing failures speedily.[34]

Substantial legislative revisions in insolvency and related laws have taken place in various Member States, in order to introduce procedures, which allow to preserve the business as a going concern through rationalisation and restructuring. The main model for the reforms was the US Chapter 11.

Despite these reforms, the current legislative framework for insolvency and restructuring proceedings in the EU and its Member States is characterised by:

- differences in the adoption/application of preventing, d restructuring, reorganisation, insolvency and bankruptcy procedures among Member States [35];
- limited efficiency in the application of restructuring, reorganisation, insolvency and bankruptcy proceedings in the Member States;
- differences in the application of second chance for honest entrepreneurs and discharge for consumers among Member States;
- limited efficiency in the application of second chance for honest entrepreneurs and discharge for consumers in the Member States.

These features of the European Insolvency Framework have led to several problems that are exacerbated in the context of cross border cases. In fact, the objective of any insolvency law is to redistribute the costs and the losses of insolvency by allocating to all the parties involved the debtors' assets. In cross border situation the pressure of competing interests involved into a restructuring/insolvency proceeding is aggravated by competing national interests, as each state involved has an interested in regulating an insolvency case that relates to its territory. In practice, there are cases in Europe where more than one law and jurisdictions have a competence to handle the cross-border insolvency in question and because of the diversity of the insolvency frameworks among EU countries several problems may arise in these circumstances. These problems include:

1. Excessive costs and lost opportunities generate by barriers to cross-border investment due to differences in Member States insolvency frameworks, in particular:
    - Costs of ex ante assessment of potential cross-border proceedings costs including legal advice costs, costs of translation and cost of communication;

    - Foregone benefits of unrealised cross border investment resulting from the fear of potential application of multiple incompatible substantive insolvency laws in cross border investments;

[34] R. Olivares-Carminal, Expedited Corporate Debt Restructuring in the EU, Oxford 2015, p. 5.

[35] See for instance: European Commission, 2014, *COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency*, Brussels.

2. Additional costs and foregone benefits for creditors and debtors related to liquidation of viable company resulting from differences and inefficiency in in Member States restructuring and insolvency frameworks, in particular:
    - Higher costs due to the coordination of restructuring proceedings in case of cross-border groups of companies;
    - Higher costs due to lengthy and inefficient insolvency proceedings.
    - Foregone benefits due to liquidation of a company instead of restructuring;
    - Relocation costs of debtors due to differences in insolvency regimes (with additional costs also for creditors);
    - Debtor forum shopping behaviour with additional costs for creditors;
    - Higher costs of credit due to uncertainty;
    - Losses due to low debt recovery rate;
    - Negative socio economic impacts due to job losses

3. Additional costs and lost opportunities for natural persons (entrepreneurs and consumers) related to inefficiencies in insolvency framework as a regard as fresh start, in particular:
    - Negative socio economic impacts due to lack of, or severity of, second chance provisions.

The sections that follow offer a detailed illustration of these problems and their quantification.

The box below recalls the stages and the outcomes of restructuring and/ or insolvency procedures and it helps the reader to place different substantive law elements at the appropriate point in time of the insolvency procedure.

Table 7: Stages of preventive measures and insolvency procedures

Before a company enters into serious financial difficulty, **preventive measures** can be used, such as training courses for entrepreneurs to learn how to save their company or support services offered by public agencies.[36]

Once a company is in financial difficulty, it can either try to be rescued or involuntarily go into liquidation. If the first option is favoured, there are **different steps towards its rescue**. The first is resorting to an **out-of-court settlement**[37], where negotiations between debtors and creditors are carried out. The second is a **hybrid procedure** in which **out-of-court and in-court elements are combined**, where contractual agreements are supported by the court[38]. The third is through an **in-court procedure**, which is used if the company is already declared insolvent or if the two previous steps did not lead to an agreement. These three procedures can either lead to the survival of the company, which will be **restructured** to ensure its viability, or to **liquidation**. If the latter occurs, the entrepreneur will not be allowed to start a new company until they are discharged from the liabilities associated with the liquidation of the insolvent company. When the entrepreneur is discharged, they can be entitled to a second chance, where they can start a new company.

The chart below illustrates the different courses an insolvency procedure can take.

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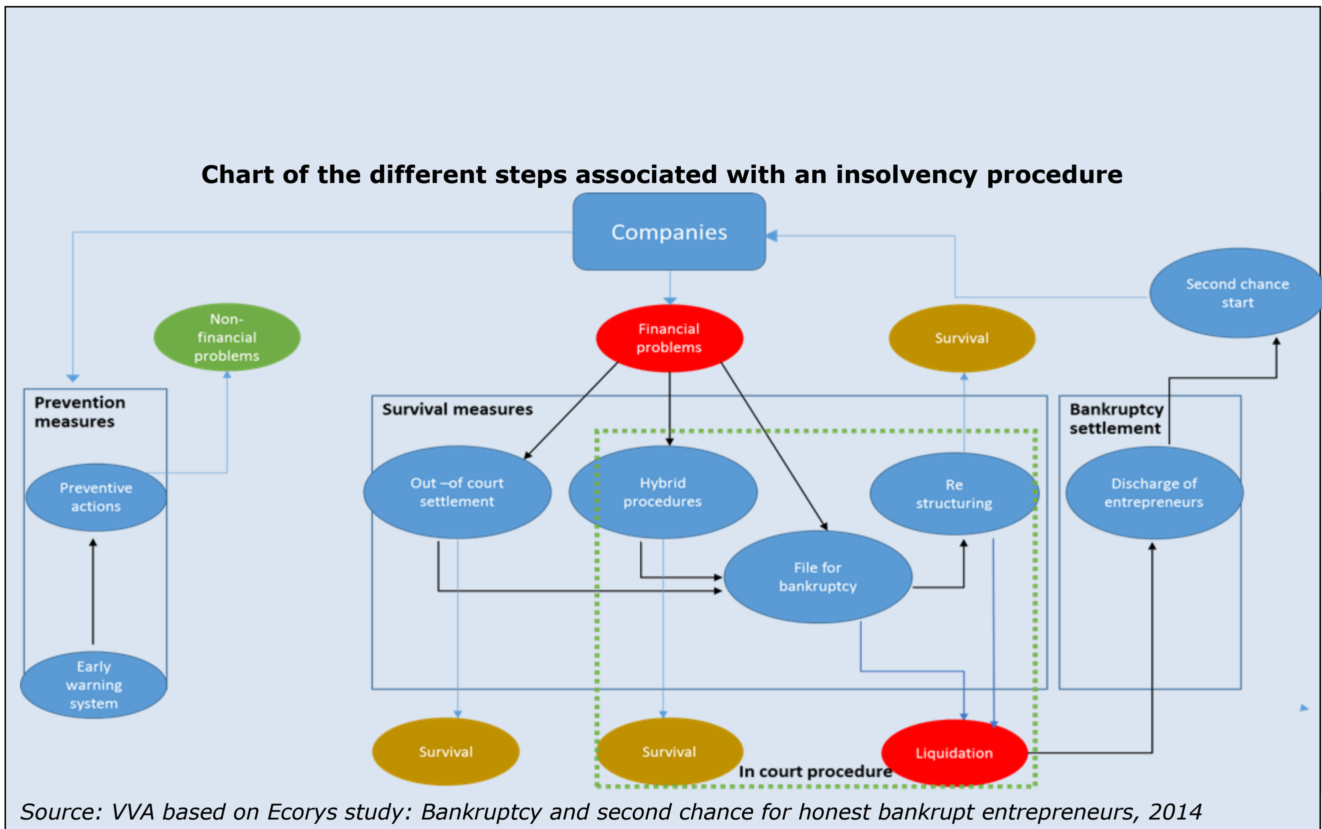
36 Ecorys, 2014, *Bankruptcy and second chance for honest bankrupt entrepreneurs*.
37 Fitchratings, 2014, *Comparing Major Bankruptcy and Insolvency Regimes*.
38 Garrido, J. M., 2012, *Out-of-Court Debt Restructuring, a World Bank Study*.



Source: VVA based on Ecorys study: Bankruptcy and second chance for honest bankrupt entrepreneurs, 2014

3.1 Excessive costs and lost opportunities generated by barriers to cross-border investment due to differences in Member States insolvency frameworks

According to the OECD[39], fragmentation in EU insolvency frameworks renders the assessment of the risk for foreign investors more difficult, which makes them **less inclined to invest in new companies**. Asymmetries in insolvency frameworks across countries may, for instance, interfere with decisions regarding cross border investment, as complexity and thus the costs of assessing risks of investments in different member states may be increased.

Preliminary findings from the interviews and online survey show that stakeholders have **different opinions on the perceived higher risk of insolvency for cross-border investments**.

- Out of 14 respondents, 9 stakeholders agreed that cross-border investments have a higher risk of insolvency, mainly due to the lack of background information on the conditions in which the investment is made. Legal uncertainty and discrepancies between foreign and domestic legal systems also add to this perception. Higher risks related to insolvency in cross-border investments may also require debtors to provide **additional guarantees and anticipated payments**.
- In contrast, 11 respondents did not share this perception - at least in the EU – because European legislation in the view of these respondents already helps to minimise cross-border investment risks. Some stakeholders also argued that the rights of all creditors are equal and depend not on the jurisdiction of origin but on the nature of the investment conditions.

Furthermore, there is anecdotal evidence that **hiring local professionals** prior to investing abroad was strongly recommended by one stakeholder (e.g. a German investor wishing to invest in Spain should seek the expertise of a Spanish legal expert in order to be fully informed of the Spanish economic and legal frameworks). While such action would result in ***ex ante* costs,** the interviews performed so far also indicated that these *ex ante* assessments of national insolvency regimes are not common within the EU, which would imply that they are not considered essential to the investment decision.

Insecurity in cross-border situations is also a factor of concern affecting the value added of firms trading across Member States. This relates the issue of debt overhang: without a coordination mechanism between all creditors that would force them to accept nominal losses, "*each individual creditor will prefer to hold out while other creditors cancel part of their claims*." (Borensztein, E., Yeyati, E., Panizza, U., 2006)[40]. This may be especially problematic in cross-border situations, where there are two or more insolvency frameworks and they diverge in their treatment of creditors. For instance, the size of the **retention tax** (that firms pay when they are giving out dividends, interest or other securities) is different between Member States depending on investor and product types, and its procedure (firms need to deduct this tax from their payments, remit it to local authorities, and – where countries have

[39] OECD, 2014, *Economic Review for the European Union*.

[40] Borensztein, E., Yeyati, E., Panizza, U. (2006). *Living with debt. How to Limit the Risks of Sovereign Finance. Economic and Social Progress in Latin America. 2007 Report*. Inter-American Development Bank, David Rockefeller Center for Latin American Studies Harvard University. Chapter 10, Box 10.1. Harvard University Press.

double taxation treaties – claim the excess tax they paid from one jurisdiction or the other) can create additional administrative burdens[41].

Financial globalisation creates the need for additional assessment in the case of business operating in multiple jurisdictions, as found by Thomas Philippon (2010)[42] for the banking and mortgage sectors. Its conclusions can also be applied to insolvency frameworks. A 2015 economic analysis of the European Commission reads[43] that "*when making investment decisions, investors look at their rights and expected losses in the event of financial difficulties.*" The cross-border difficulties caused by divergent insolvency frameworks are also acknowledged by INSOL EUROPE in a 2010 study[44].

Based on the results of the case studies, the information provided by key insolvency experts (both individuals and associations) during our consultation and complementary desk research, the difference in proceedings costs between purely domestic and cross-border insolvencies has been quantified. The estimates used in this cost assessment are based on a combination of qualitative and quantitative information (e.g. national statistics and data provided by interviewees based on their individual experience). Considering the difficulty in retrieving data to the detail of the size of the business and the cross-border nature of the proceedings on some Member States, several assumptions were made to compensate for identified data gaps and complete the quantification of costs. These assumptions are the following:

- If not available in national statistics, the average number of insolvencies per business, for individual entrepreneurs, SMEs and large companies, was estimated as the average value across the Member States for which such data was available.
- If not available in national statistics, the share of cross-border insolvencies for individual entrepreneurs, SMEs and large companies was assumed to be identical and equal to the share of cross-border insolvencies in the total number of insolvencies. If the share of cross-border insolvencies in the total number of insolvencies was not available, the average across all the Member States for which such data was available was used[45].
- Data on costs of insolvency proceedings were, in most cases, available in national statistics for SMEs and large companies only. Hence, average costs of insolvency proceedings for individual entrepreneurs, if not available, were estimated as identical to those of SMEs. When not available, average costs of insolvency proceedings for large companies were estimated as twice the costs for SMEs, based on the feedback provided by consulted stakeholders.
- Finally, when the difference in costs between purely domestic and cross-border insolvency proceedings was not available at Member State and/or business size level (in most cases, cross-border insolvency proceedings were acknowledged as costlier, though no precise figure could be provided), it was estimated as a 10% increase for cross-

41 Economic Analysis accompanying the Action Plan on Building a Capital Markets Union, SWD (2015) 183 final, 30.9.2015

42 Philippon, T. (2010). Debt Overhang and Recapitalization in Closed and Open Economies. Stern School of Business, New York University. Retrievable at: http://pages.stern.nyu.edu/~tphilipp/papers/PhilipponIMF.pdf

43 Economic Analysis accompanying the Action Plan on Building a Capital Markets Union, SWD (2015) 183 final, 30.9.2015

44 INSOL EUROPE (2010). Harmonisation of Insolvency Law at EU Level. European Parliament. Retrievable at: https://www.insol-europe.org/uploads/files/documents/INSOLVENCY_REPORT_TO_EP_FINAL_WEBSITE_VERSION.pdf

45 This average is 0.03% of cross-border insolvencies.

border proceedings on average, based on the results of the consultation carried our as part of this study[46].

All the above-mentioned assumptions are based on the inputs provided by key stakeholders in the insolvency sector received.

Proceedings cost have been estimated at national (for a sample of 6 Member States[47]) and EU level[48]. Two different methods were used to compute total proceedings costs at EU level:

- **Method 1** – Method 1 relies on the assumption that the number of formal insolvencies (both SMEs and large companies) per year in the EU is equal to 0.7%[49] of all active businesses. In addition, formal domestic insolvency proceedings of SMEs (resp. large companies) are estimated to account for 96%[50] (resp. 95%) of all formal insolvency proceedings. The number of active SMEs (incl. entrepreneurs) and large companies in the EU used in these calculations is 21,681,933 and 43,719, respectively[51].
- **Method 2** - Method 2 relies on the assumption that the number of formal insolvencies is proportionate to the number of businesses, with UK, CZ, LU, FR, BE and LU altogether reporting 76,327 SME insolvency proceedings (resp. 95 large company insolvency proceedings) and accounting for around 27.5% (resp. 29.5%) of all SMEs (resp. large companies) active in the EU.[52]

Results from the estimation are presented below:

Table 8: Total costs at EU level for domestic and cross-border insolvency proceedings: SMEs (incl. entrepreneurs)

[46] Insolvency practitioners, public authorities and creditors' and debtors' associations consulted as part of this study provided different figures on the difference between domestic proceeding costs and cross-border proceeding costs. Some assumed domestic and cross-border proceedings to be equally expensive for creditors and debtors, while other reported an increase in proceeding costs of between 10% and 50% for cross-border proceedings compared to domestic proceedings. One outlying data points indicates a 10-time increase for cross-border proceedings costs compared with domestic proceeding costs. A 10% difference between domestic and cross-border proceeding costs is therefore a representative estimate.

[47] The selection of countries was based on representativeness (in terms of legal frameworks in place) and data availability criteria. The 6 countries used in the evaluation of the costs incurred under the baseline scenario are: United Kingdom, Czech Republic, Luxemburg, France, Belgium and Latvia.

[48] Cost figures at national level have been scaled-up at EU level, using suitable multiplication factors based on insolvency statistics.

[49] This estimate is the 6-country-sample average based on the statistics on insolvency proceedings and active businesses collected for the case studies and from Eurostat. More specifically, the estimated ratio of insolvencies/business is 0.7190% for SMEs and 0.7186% for large companies.

[50] This estimate is the 6-country-sample average based on the statistics on insolvency proceedings collected for the case studies and from additional interviews. INSOL Europe estimates domestic proceedings to account for 75% of all insolvency proceedings. Our estimate is therefore conservative.

[51] Eurostat data, Structural Business Statistics, 2013, NACE_R2 (Total business economy; repair of computers, personal and household goods; except financial and insurance activities)

[52] Eurostat data, Structural Business Statistics, average 2011-2013

	Domestic proceedings		Cross-border proceedings	
	Number of formal insolvencies/year	**Total proceeding costs (€/year)**	**Number of formal insolvencies/year**	**Total proceeding costs (€/year)**
UK+CZ+LU +FR+BE+LV	76,327	319,436,885	2,907	24,080,618
EU28 (method 1)	145,703	609,783,071	6,071	50,289,651
EU28 (method 2)	277,553	1,161,589,814	10,767	89,190,235
EU28 (middle estimate)	211,628	885,686,443	8,419	69,740,187

Source: own calculations based on respondents' answers

Table 9: Total costs at EU level for domestic and cross-border insolvency proceedings: large companies

	Domestic proceedings		Cross-border proceedings	
	Number of formal insolvencies/year	**Total proceeding costs (€/year)**	**Number of formal insolvencies/year**	**Total proceeding costs (€/year)**
UK+CZ+LU +FR+BE+LV	95	2,931,011	5	224,617
EU28 (method 1)	291	8,969,861	15	687,402
EU28 (method 2)	322	9,934,585	17	763,698
EU28 (middle estimate)	307	9,471,793	16	718,774

Source: own calculations based on respondents' answers

First, it is important to note that these figures do not represent the additional costs of the cross-border dimension of insolvency proceedings, but the total costs incurred by all cross-border insolvency proceedings in the EU.

Second, while the two methods used yield very different results (since the total number of formal insolvency proceedings per year in the EU has been estimated as 152,000 with the first method and 289,000 with the second method) the Study Team believes the 'reality' to lie in between, around 220,000 total insolvency proceedings per year in the EU, close to the

European Commission figure of 200,000 firms going bankrupt each year in the EU[53]. With 220,000 insolvency proceedings every year, total proceedings costs in the EU would amount to:

- **€895 million for domestic proceedings**, and
- **€70 million for cross-border proceedings[54]**.

The **additional** cost of the cross-border dimension of insolvency procedures is estimated as follows:

Table 10: Difference between domestic and cross-border insolvency proceedings costs - SMEs

	Domestic proceedings	**Cross-border proceedings**	**Difference (cross-border vs. Domestic) (€/insolvency)**
	Average proceeding costs (€/insolvency)	**Average proceeding costs (€/insolvency)**	
EU28	4,185	8,284	+4,099 **An addition of 98% compared with purely domestic proceedings**

Source: own calculations based on respondents' answers

Table 11: Difference between domestic and cross-border insolvency proceedings costs - Large companies

	Domestic proceedings	**Cross-border proceedings**	**Difference (cross-border vs. domestic) (€/insolvency)**
	Average proceeding costs (€/insolvency)	**Average proceeding costs (€/insolvency)**	
EU28	30,853	44,923	+14,070 **An addition of 45% compared with domestic proceedings**

Source: own calculations based on respondents' answers

These estimates show that the burden related to the cross-border dimension of insolvencies in the EU is significant. These estimates (namely the +98% and +45% difference in proceeding costs) are calculated as EU averages[55].

[53] COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency, SWD(2014) 61 final, p.2

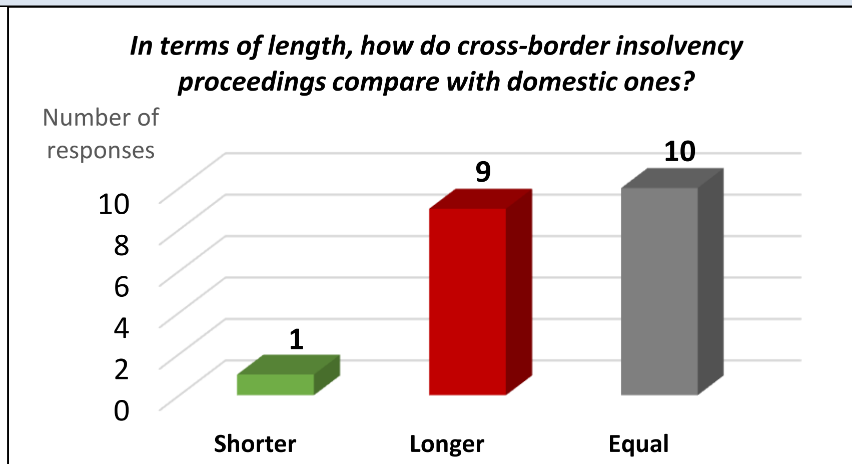
[54] The quantification of the costs of proceedings also applies to Problem 2 (following section).

[55] These estimates are much larger than the difference between domestic and cross-border proceedings as reported by experts at national level (in the range of10%). The reason for such a difference is that the estimates presented in this study are weighted averages, with each sample Member State weighted by the number of proceedings recorded in the country. In particular, the UK has very high proceeding costs (compared to the other sample countries) and accounts for 44% of all cross-border SME insolvencies in the EU of the sample but 'only' 20% of the domestic proceedings. Likewise, France has very low proceeding costs and accounts for 62% of all domestic SME insolvencies in

In addition, it is important to note that cross-border procedures are still a minority of insolvency cases (some countries such as Luxemburg or Romania report less than 1% cross-border insolvencies). In particular, a very large company declaring insolvency (with a significant debt) could have a huge impact on these estimates[56].

Moreover, findings from our consultation show that **almost half of the respondents reported longer proceedings for cross-border insolvencies than purely domestic insolvencies**:

Figure 1: Comparison of domestic and cross-border proceedings' length



Source: own calculations based on respondents' answers

Half of the respondents did not notice any difference in the length of cross-border insolvency proceedings compared with domestic insolvency proceedings, while only one respondent indicated that cross-border insolvency proceedings are actually shorter than domestic ones.

The average difference in length between cross-border and domestic proceedings (as indicated by the stakeholders who provided a quantitative estimate) is 55%. Much longer proceedings for cross-border insolvencies than for purely domestic insolvencies is another driver of costlier proceedings for both debtors and creditors. However, the increase in proceeding length is not proportional to the increase in costs, as costs are mainly driven by the need to hire additional legal experts.

Finally, evidence from our study indicates that

- costs resulting from the need to assess multiple insolvency regimes to calculate the recovery rate of a cross-border investment,
- costs of assessing the coordination between the applicable multiple insolvency regimes, and

the EU but for 'only' 50% of the cross-border insolvencies. Therefore, the estimated average cross-border proceeding costs is "skewed" towards high values for cross-border proceedings and low values for domestic proceedings. Using a small 6-country sample to perform this estimation limits the representativeness of the results, however the unavailability of data in terms of domestic vs. cross-border proceedings and average costs of proceedings was a major barrier for extending the sample while preserving accuracy.

[56] See for instance the impact of Lehman Brothers insolvency in the US.

- costs of assessing and devising an investment structure so that only one insolvency regime is applied can prove significant due to the complexity of this *ex ante* assessment. While links between investment and insolvency regimes are not straightforward, it has been shown that lack of action in the euro area on non-performing loan deleveraging results in lower real investment, which negatively affects the competitiveness of businesses in the euro area compared to the US, Japan and the UK.

In particular, the figure below indicates that real investment in the euro area has remained stable since 2009, while it has increased in other jurisdictions (such as the US, Japan and the UK).

Figure 2: Real investment in the euro area compared to other countries, 2008-2015

Source: Haver Analytics and IMF staff calculations

More significant are coordination costs in the form of legal costs as a consequence of the application of multiple insolvency frameworks in cases of insolvencies involving groups of companies that operate across several jurisdictions.

3.2 Additional costs and foregone benefits for creditors and debtors related to liquidation of viable company resulting from differences and inefficiency in in Member States restructuring and insolvency frameworks

Differences in substantive insolvency regimes across the Member States of the European Union may add complexity to restructuring, reorganisation and insolvency proceedings especially for groups of companies that operate cross border. In particular, **coordination costs** across multiple jurisdictions and in some cases economic losses as a result of failure to rescue the insolvent business may result. The main substantive law elements that lead to inconsistencies are:

- Differences in access to preventive restructuring proceedings;
- Differences in the involvement of judicial bodies across countries;
- Differences in the opening of insolvency proceedings;
- Differences in the rank of claims across jurisdictions.

In relation to **access to preventive restructuring procedures**, rules vary on a country by country basis. The negative consequence of these differences is that parallel restructuring proceedings in different Member States of cross-border groups of companies may be impossible or too costly.

For instance, in some countries restructuring proceedings can be activated outside formal insolvency and before the business is declared insolvent. In numerous insolvency systems, there is no clear dividing line between formal insolvency proceedings and preventive restructuring measures/processes. This may take the form of so-called "workouts", strengthened by contractual or statutory provisions ("**enhanced restructurings**") or different mechanisms that seek to combine the advantages of both formal and informal approaches to indebtedness problems ("**hybrid procedures**"). In this way, formality becomes a question of degree and the treatment of indebtedness problems can be represented by a continuum, with informal workouts at one extreme and formal insolvency proceedings at the other.

This continuum is defined by the level of involvement of judicial bodies in the process. The **UK** and **Belgium offer good examples of** informal proceedings that see very little or no involvement of courts and where proceedings can be activated without a formal declaration of insolvency of a company. On the opposite side of this continuum there are countries like **Austria** and **Germany** where reorganisation and restructuring always require a court opening of insolvency procedures since reorganisation and liquidation are both aspects of a single procedure. Other jurisdictions where restructuring is only possible once the debtor is insolvent are Bulgaria, Hungary, Denmark, Czech Republic, Slovakia, Slovenia Croatia and Lithuania.

Moreover, within jurisdictions that allow only for restructuring trough formal insolvency there are differences in the opening of the insolvency procedure that may generate problems in cross border situations. For instance, some EU Member States apply liquidity tests (the ability to pay debts as and when they fall due) others balance sheet tests (the surplus of assets over liabilities). Under **Polish law**, the balance sheet test only applies to certain categories of entities including companies and partnerships. Under **Spanish and French** laws, only the liquidity test applies. Under **Italian law** the liquidity test applies subject to some additional criteria. In **Germany** over indebtedness and imminent illiquidity can be a reason to file for bankruptcy. The majority of Member States adopt the general cessation of payments test and the balance sheet test in different combinations to establish a commencement standard. Other requirements may be added, such as for example, that the cessation of payments must reflect a difficult financial situation that is not temporary. In **Germany and Austria,** the debtor must also be over-indebted. Under **Danish** law, the debtor is insolvent when the debtor is unable to pay its creditors on the due date and the situation is not temporary. A similar test is adopted in **Estonia**.

The liquidity test seems to be the most commonly used test in the EU Member States and it is in line with the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law. However, differences exist in defining the level of indebtedness for

an insolvency or reorganization proceeding to be opened and in reconciling other entry criteria applied by Member States.[57]

Finally, if the bankruptcy takes places, differences in substantive laws elements related to the right of creditors may also raise concerns. As noted by scholars, bankruptcy reallocates value in a faltering firm: "*This restructuring is done according to statutory and agreed-to contractual priorities, so that lower-ranking claims are eliminated first and higher ranking ones are preserved to the extent possible*".[58] Insolvency law's core principle is that distribution conforms to predetermined statutory and contractual priorities, with creditors treated equally within each priority class (**pari passu**). Creditors cannot jump out of their class to obtain more value; they receive payment only after higher-ranking creditors are paid. Bankruptcy-specific rules prioritize favoured creditors, such as tax authorities and employees claiming unpaid back wages. The **French** bankruptcy code provides for a special priority for employees' salaries. As general rule, the creditors in one class must be all satisfied before the creditors of lower classes are paid.

A court cannot change the rank of a creditor's claim in a bankruptcy; as such ranking is determined by law. Under **Croatian** Bankruptcy law, the court is not allowed to change the rank of a creditor's claim, neither in bankruptcy nor in pre-bankruptcy proceedings. A notable exception is the **UK Insolvency Act** rule concerning the floating charges given after September 2013. When the charge is realized, the insolvency office holder must set aside a percentage of such realization for distribution to unsecured creditors who would otherwise have ranked in priority below the holder of the floating charge.

At the same time, the majority of jurisdictions afford some measure of priority to certain tax and other governmental claims. The majority of jurisdictions also provide that the costs of the insolvency process and the insolvency office holder's fees and expenses are paid out first. The provisions for dealing with employees' salaries during a restructuring or liquidation vary between member states. Generally, most countries have some form of protection in place for ensuring that there are funds available to pay (part of) outstanding salaries.

According to all the practitioners interviewed[59], the rank of creditors is one of the main issues in cross-border insolvency procedures. Indeed, foreign creditors may get a different (lower) level of protection than in their own country. This can affect also the investment decision itself (see Section 3.1).

Coordination costs refer to the costs of coordinating (i.e. ensuring the coherent and efficient use of) different national insolvency regimes under a cross-border insolvency proceeding. As there is no consolidated proceeding for a group of companies with domestic and foreign subsidiaries, there is a need to involve lawyers, administrators and trustees in all the different countries where there are subsidiaries. In particular, higher costs

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[57] European Parliament, Harmonisation of insolvency law at EU level, 2010 http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empl/dv/empl_study_insolvencyproceedings_/empl_study_insolvencyproceedings_en.pdf

[58] Mark J. Roe and Frederick Tung, Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain, Boston University Working Paper 2013. http://www.bu.edu/law/workingpapers-archive/documents/mroe-ftung-03-20-2013_001.pdf

[59] Bart de Moor, partner at Strelia; Nico Dewaelheyns, associate professor at KU Leuven and Yves Lenders, partner at Lydian

arise when there is a need for coordinating formal procedures in some Member States and less formalised procedures in other Member States. An example of coordination issues resulting from the cross-border nature of an insolvent business is the case of La Seda de Barcelona (LSB), a multinational plastic packaging group. In 2013, LSB filed for voluntary insolvency, including its 7 European affiliates. The desynchronization of the insolvency processes of the various affiliates (in particular, secondary liquidation proceedings were initiated in different EU Member States) was deemed by the administrator to increase the complexity of the sale[60].

In the worst-case scenario, an insolvent multinational company is liquidated despite approved restructuring plans at subsidiary level. This results in foregone benefits for the debtor (who cannot carry out business activities as a restructuring procedure would allow him) and the creditor(s) (who is/are likely to recover less in case of liquidation). In addition, liquidation also entails a loss of asset value for the economy of the country[61].

For creditors, coordination costs relate mainly to legal fees for foreign lawyers[62]. Those costs can prove extremely high, up to double the costs that would have been incurred under a purely domestic proceeding according to one insolvency practitioner in Austria. In practice, the amount of coordination costs depends on whether it is primary and secondary proceedings. An interviewee from a Belgian bank indicated that coordination costs account for about **10% of the total proceeding costs**. Coordination costs are mainly driven by the need to hire expertise and legal representation abroad and it can therefore be assumed that **coordination costs are proportionate to the number of insolvency regimes involved**, with a 10% increase for every additional jurisdiction. Hence, for a multinational with several subsidiaries in different EU Member States going insolvent, proceedings costs can prove extremely high. Likewise, debtors might need legal representation abroad which incur potentially significant legal fees compared with purely domestic proceedings.

Not only differences in substantive frameworks but also differences in the efficiency of Member State insolvency framework can negatively affect companies and businesses that operate or intend to operate cross border. For instance, insolvency framework that are too formal and rigid may trigger **forum shopping behaviour** with additional costs[63] for creditors. **Business relocation** can also be a consequence of an inefficient restructuring and insolvency system, with additional burdens and costs for the business that decides to move to another jurisdiction where viable companies can more easily be rescued when facing a period of financial distress (see section 3.3.1). In addition, weak insolvency systems tend to have higher level of non-performing loans. High levels of non-performing loans have a significant negative impact on access and cost of credit as banks have reduced capacity of lending. As indicated by the IMF[64], "absent a pricing gap, timely disposals of NPLs—combined with structural reforms to reduce foreclosure times by strengthening debt enforcement and insolvency frameworks — can free up a large amount of **regulatory capital**

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60 Source: J. Vicente Estrada, INSIDE STORY – SEPTEMBER 2015 – SPAIN La Seda de Barcelona, available on INSOL EUROPE website

61 European Commission, 2011, *A Second Chance for Entrepreneurs, Prevention of Bankruptcy, Simplification of Bankruptcy Procedures and Support for a Fresh Start', Final Report of the Expert Group*

62 Losses due to lower recovery rates are part of the coordination costs (as defined in this study) and are analysed in the impact quantification of the policy options (see Chapter 5).

63 In particular, costs to retrieve assets from abroad, involving additional costs for foreign legal expertise. See section 3.2 above on coordination costs for more details.

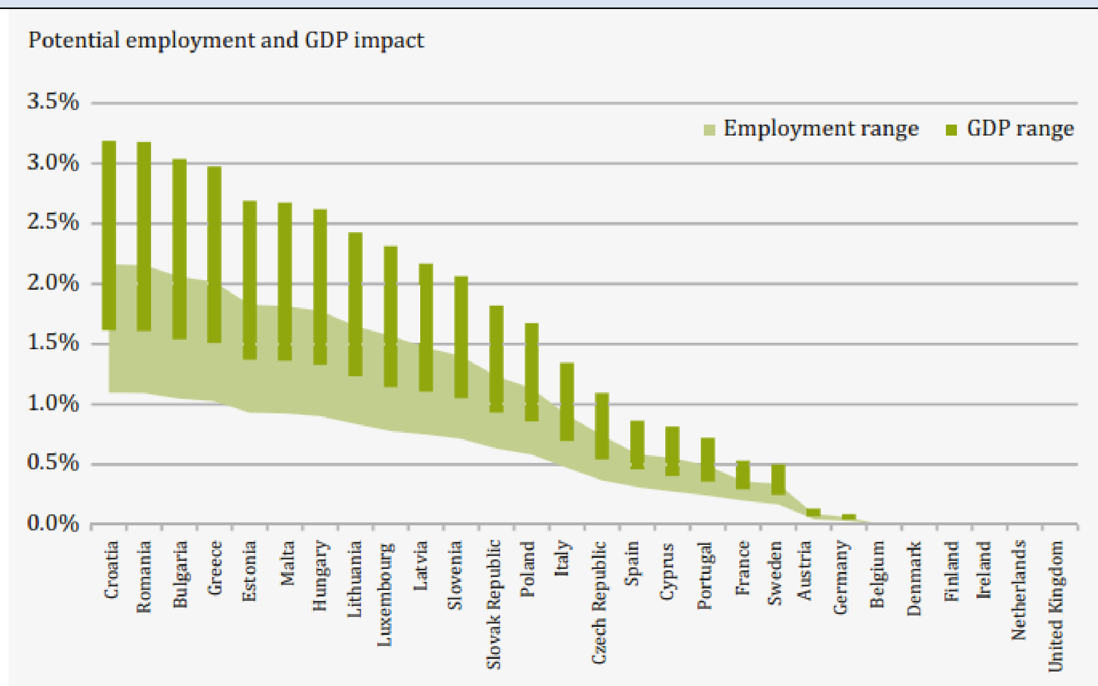
64 IMF, A Strategy for Resolving Europe's Problem Loans, TECHNICAL BACKGROUND NOTES, September 2015, https://www.imf.org/external/pubs/ft/sdn/2015/sdn1519tbn.pdf, p.14

and generate significant capacity for new lending". According to the IMF, this additional capacity is estimated at **0.1% of the total assets of banks in Europe**.

Ultimately, the problem of non-performing loans in particular and inefficient insolvency regimes as a whole prevents investment and consumption and thus economic growth. An econometric analysis based on a bond pricing model using data from a sample of 12 countries (10 EU Member States and 2 OECD countries) over the period 2004-2015 and developed by Frontier Economics and Weil for AFME[65] shows that **costs of credit** (and therefore investment) is positively correlated with the efficiency of insolvency regimes, as "low corporate bond yield spreads are associated with higher recovery rates, indicating that countries with robust insolvency regimes typically have lower borrowing costs through capital markets"[66].

Besides the direct effect of insolvency regimes on bond spreads, the study also analyses indirect effects channelled via credit ratings: "evidence from credit rating agencies suggests they take account of jurisdiction ranking assessments when rating individual bonds. These effects are relatively small, however, around 5% to 10% of the size of the direct effect. **Over the EU28, the total impact on annual GDP is between €41bn and €78bn** or between roughly 0.3% and 0.55% of EU28 GDP." In addition, **employment could increase by up to 2%**, depending on the Member State. More specifically, the potential impact on both GDP and employment at national level across the EU is estimated as follows:

Figure 3: Estimated impacts of insolvency reform on GDP and employment in the EU28



Source: Frontier Economics and Weil, for AFME, Potential economic gains from reforming insolvency law in Europe, February 2016, based on Datastream, World Bank, S&P and Moody's data

65 Frontier Economics and Weil, for AFME, Potential economic gains from reforming insolvency law in Europe, February 2016.

66 Ibid.

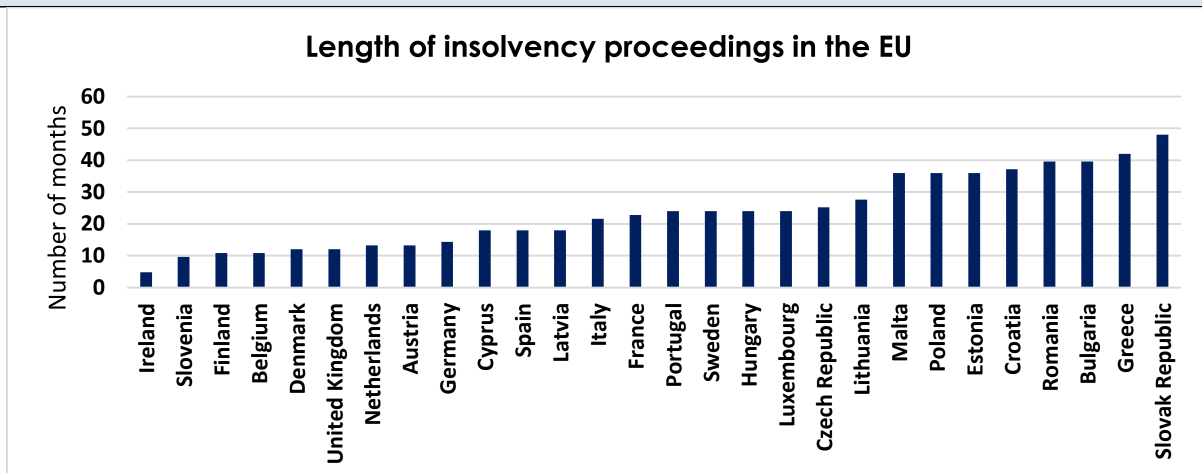
In particular, Member States such as Croatia, Romania, Bulgaria and Greece could benefit from significant GDP and jobs creation with specific insolvency reforms, up to 3% additional GDP and 2% additional employment. At EU level, this could translate into **600,000 to 1.2 million new jobs**.

The substantive elements of insolvency to be considered when assessing the efficiency of an insolvency framework include:

- the presence/ absence of preventive restructuring proceedings
- involvement of courts in restructuring and insolvency proceedings;
- debtor in possession, new financing and SMEs;
- specialisation of court and insolvency practitioners;
- discharge and second chance for entrepreneurs and consumers.

All these elements have an impact on the costs of insolvency proceedings. The current performance of EU Member States in terms of efficiency of insolvency regimes varies greatly from one country to another, as shown by the high variability of length of proceedings and recovery rates:

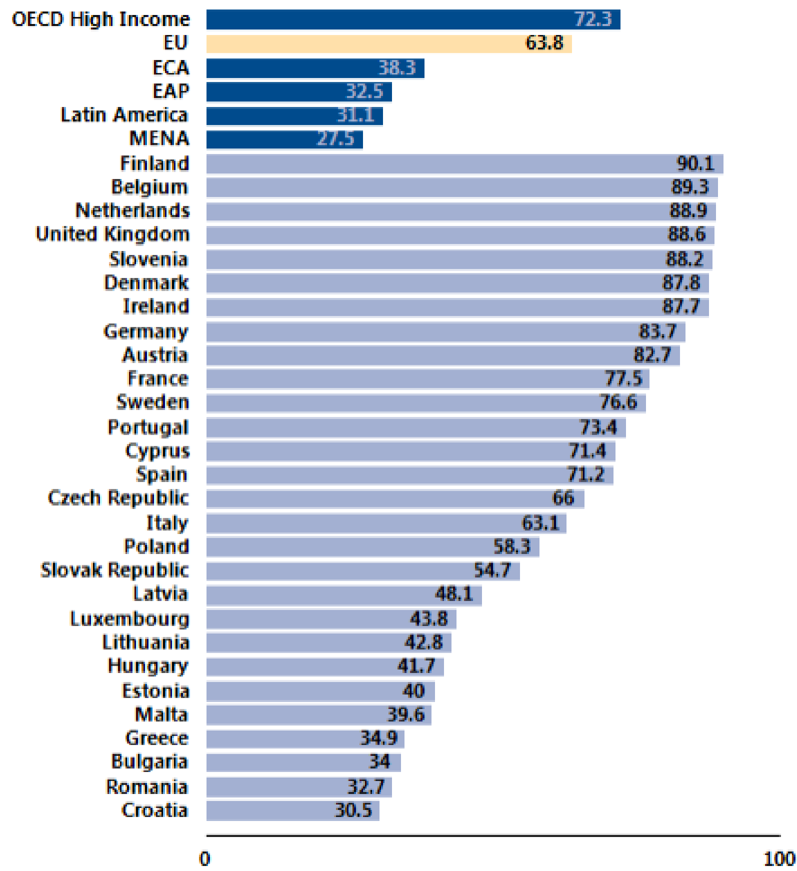
Figure 4: Length of insolvency proceedings in the EU



Source: World Bank, Doing Business report 2016

In Slovakia for instance, insolvency proceedings last on average ten times longer than in Ireland. Furthermore, the average length of insolvency proceedings exceeds 3 years in 8 EU Member States.

Figure 5: Recovery rates in Europe (cents on the dollar recovered by secured creditors)



Source: World Bank, Doing Business report 2016

Likewise, current recovery rates in Europe range from 30.5 cents on the dollar (in Croatia) to 90.1 cents on the dollar (in Finland), and half of the EU member States have an average recovery rate of less than 70%.

Finally, and in addition to the perceived higher risk of insolvency for a business set up abroad mentioned in the previous section, **costs and length of cross-border insolvency proceedings (compared with purely domestic proceedings) can further deter cross-border investment**.

3.2.1 The presence/ absence of preventive restructuring proceedings and involvement of court in restructuring and insolvency proceedings

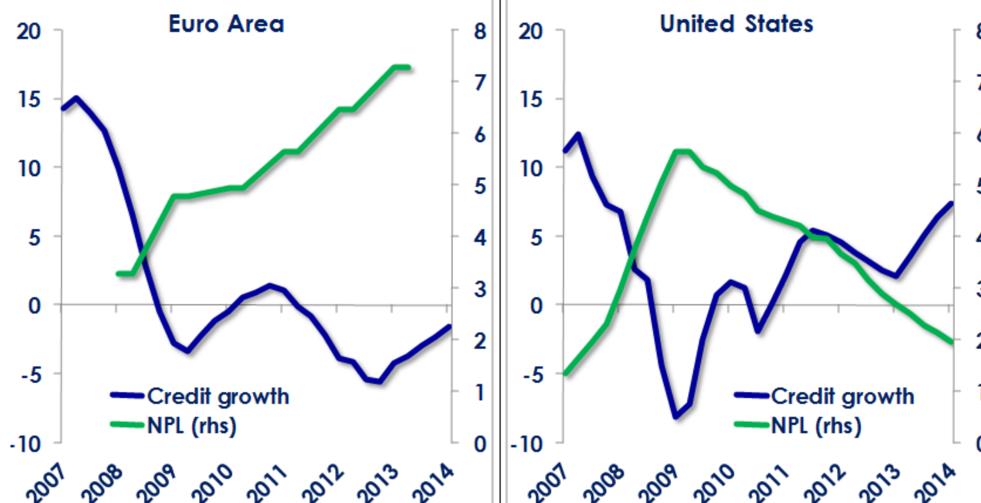
The presence of early restructuring proceedings can be considered as a strength of any insolvency framework. Restructuring can help preserve the business value of debtor enterprises and the interests of other stakeholders, to the benefit of creditors as a whole. The World Bank Principles and the UNCITRAL Legislative Guide have highlighted the importance of informal arrangements for restructuring as an integral part of an efficient creditor-debtor

regulatory system. In particular, out-of-court debt restructuring involves changing the composition and/or structure of assets and liabilities of debtors in financial difficulty, without resorting to a full judicial intervention, and with the objective of promoting efficiency, restoring growth, and minimizing the costs associated with the debtor's financial difficulties. In an out-of-court procedure, debtors and creditors negotiate to try and find a voluntary way to settle the payment of the debts, **with limited intervention of external advisers**. This method is especially useful for SMEs, which cannot afford the **high costs**[67] linked to the involvement of insolvency practitioners. Another advantage of this type of settlement is that there is very little publicity involved, which facilitates the recovery of the company, and therefore benefits the economy of the country in which it is located. Despite the benefits of out of court procedures only few countries in the EU apply such procedures.

From an economic perspective, the **lack of restructuring options at EU level** is the source of a number of problems brought to light in the European Commission's 2014 impact assessment, and which are indicated below[68].

The figure below highlights the difference between credit growth and the amount of non-performing loans in the US and the Euro area. This difference is mostly attributed to the fact that the **EU lacks effective non-performing loan deleveraging methods linked, *inter alia,* to insolvency procedures.**

Figure 6: Credit growth (left-hand scale, in % y-o-y) and non-performing loans (right-hand scale, in % of total loans) in the euro area compared to the US



Source: Haver Analytics ECB, FRED and IMF staff calculations

The success of Chapter 11 **of the US Bankruptcy Code** for corporate insolvencies can be seen in the considerable drop in their numbers since the start of the crisis, from 60,837 in 2009 to 33,212 in 2013. A similar drop also occurred in personal insolvencies: from 1,412,838 in 2009 to 1,038,720 in 2013. At EU level, in contrast, the number of insolvencies is growing:

[67] Insolvency practitioner fees vary widely from one country to another. In the UK alone, hourly rates range from an average £103 to £366 depending on the grade of staff (source: Review of Insolvency Practitioner Fees, Report to the Insolvency Service, Elaine Kempson, July 2013

[68] European Commission, 2014, *COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency*, Brussels.

there were 192,340 corporate insolvencies in 2013 (EU-15 plus Norway and Switzerland), 1.1 percentage point higher than the previous year, and higher than the 2009 value of 178,235.[69]

Furthermore, studies showed that **debt restructuring** helped revive the US economy after the financial crisis[70]. US bankruptcy laws and restructuring practices helped maintain the **competitiveness** of US companies and the country's **economic growth**. The success of US insolvency proceedings is attributed to the fact that through the economic crisis, insolvency practitioners gathered experience in dealing with complex cases. They are therefore able to offer better advice to creditors and debtors alike. Gilson's study also points out that Chapter 11 has become more efficient as it can provide companies with benefits such as access to finance, the ability to renegotiate leases and supply contracts as well as faster methods to sell assets to repay creditors. Furthermore, Chapter 11 encourages risk-taking as second chances to be given to entrepreneurs if they take reasonable risks that do not turn out as planned and lead to bankruptcy.

In sum, the positive impact of Chapter 11 on the US economy compared to European insolvency procedures has been put down to **favouring debt restructuring over a swift liquidation process**.

Additionally, the absence of a European standardisation of these tools can lead to **macroeconomic imbalances**, as companies may relocate to Member States with better restructuring options to try and save their business from bankruptcy. Therefore, dynamic and innovative companies, seeking to find a way to restructure, may not emerge or stay in countries which do not have early restructuring options, such as Bulgaria, Hungary or Lithuania. In turn, this may lead to slower economic development and greater regional and national inequalities.

Evidence collected on the actual implementation of out of court measures suggest a mixed picture regarding the application of these practices (see box 1 for a short overview of such practices in some EU Member States). For instance, one expert in Belgium contended that although the law provides several preventive options to companies in distress, in general the companies decide to take action when it is too late because of cultural reasons (mainly reputational concerns), as well as poor knowledge of the range of possibilities available. Those problems are more likely to occur in SMEs than in large companies.[71] In addition, the preventive measures are conceived for enterprises that are temporarily in distress, while often the problems are more structural. [72]

Box 1. Examples of out of court proceedings

The most notable example of a private work out and a pure out of court mechanism is the "**London Approach**", which is a set of guidelines elaborated by banks. It provides that, when a corporation is in trouble, banks should: maintain the credit facilities and not press for insolvency; banks work together to reach a solution; decisions' about the debtors' future are made on the basis of comprehensive information shared among all the parties and

[69] Creditreform Economic Research Unit, 2014, *Corporate Insolvencies in Europe*.

[70] Gilson, S. C., 2012, Coming Through in a Crisis: How Chapter 11 and the Debt Restructuring Industry are helping to Revive the U.S. Economy. Journal of Applied Corporate Finance, Vol. 24, Issue 4, pp. 23-35, 2012.

[71] Bart de Moor, partner at Strelia; Nico Dewaelheyns, associate professor at KULeuven and Yves Lenders, partner at Lydian

[72] Jonathan Lesceux, UCM

seniority of claims is recognized but there is an element of shared burden.

Belgium provides for fully out of court reorganisation proceedings under the Belgian Business Continuity Act 2009. Article 43 provides for an amicable settlement that may be registered at court. However, being a contractual agreement, it does not bind third parties and it does not grant a moratorium on enforcement actions. However, when an amicable settlement takes place under court supervision, the negotiation may benefit from a moratorium under the form of a payment deferral.

Similar out of court procedures include the **French** mandataire ad hoc and the conciliation proceedings, where the court appoints an insolvency practitioner/conciliator to assist the debtor in arranging and reaching a deal with all or part of its creditors, suppliers and possible new sponsors.

Both the French and the Belgian procedures are informal, confidential and purely contractual in nature. Commencement does not impose a stay of payments on the debtor nor a stay of proceedings on creditors. The mandataire/conciliator does not have the power to force the creditor to agree on restructuring.

The **UK Company Voluntary Arrangement (CVA)** is an agreement between a company, its shareholders and its unsecured creditors where the director (liquidator or administrator) proposes a reorganization plan which usually involves delayed reduced debt payments or capital restructuring. However, unlike the Belgian and French model, CVA requires the approval of the majority of creditors and shareholders. The result of the CVA is to bind all the unsecured creditors, but not the secured if they do not agree to be bound.

As a result, these measures do not seem particularly effective: they are just a first step to soften the path towards liquidation.[73] Preventive measures are also not really known by SMEs which usually take advantage of them only as a result of expert advice.[74] Nevertheless, restructuring in out of court procedures is shorter in length than formal procedures, because it is more informal and subject to negotiation. Estimates suggest that about 65% of all companies going through an out of court procedure are restructured successfully, but that there is a probability of having a better recovery rate in bilateral agreements between parties than in out of court procedures.[75] In France instead these measures are overall considered successful, according to the register of the Commercial Court of Paris, "In 60% of cases, the proceedings (ad hoc mandate and conciliation) have a successful outcome, and lead to the preservation of the company".[76] Similarly, French government services claim that the success of these pre-insolvency proceedings would be around 60 or even 70%.[77] In addition, according to one expert[78] only 30% of these cases lead to the opening of insolvency proceedings ("procédure collective") in the three years following the settlement agreement.[79]

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[73] Jonathan Lesceux, UCM

[74] Jonathan Lesceux, UCM

[75] Henri (Rik) Colman, Senior Expert Department Regularisation & Recovery - Credit Risk Management at ING Belgium

[76] Greffe du Tribunal de Commerce de Paris http://www.greffe-tc-paris.fr

[77] Source: F. Letier, Assistant director of A. Montebourg's office (Ministry of the "Redressement productif"), in Journée de la prévention (6th November 2012); See also CCIP (Paris) report on Prevention, 7 March 2013)

[78] Professor Françoise Pérochon, Faculté de Droit de Montpellier

[79] Source: F. Pérochon, in Droit & Patrimoine 2013, n° 223

Some creditors[80] consider the ad hoc mandate efficient, but they consider Conciliation even more efficient. Indeed, since the procedure has a maximum length established by law, there is more certainty that an agreement will be found in a reasonable period of time. The same creditors also specify that the success of conciliation or ad hoc mandate (e.g. if the company will not go through in court preventive procedure or insolvency proceedings later on), depends not only on financial restructuring but also on business/industrial restructuring as well as contingency factors related to the environment in which the company is operating. If the former is it not conducted properly, this does not negate the effectiveness of preventive out court procedures. According to the interviews conducted for this study, 30% of the conciliation cases and had hoc mandates go through a further proceeding for the reasons above but also due to excessive delay in recurring to these procedures in the first place. **The longer term survival rate of companies that go through those proceedings is estimated at around 15%.**[81]

Similarly, evidence from the UK demonstrates that the application of a flexible and effective restructuring and insolvency regime characterized by preventive and informal procedures to rescue and restructure viable companies has led to positive outcomes. In fact, an estimated total of 14,629 companies entered into insolvency in 2015, which was 10% lower than the total in 2014 and the lowest annual total since 1989 (when 10,456 companies entered insolvency). There has been a decreasing annual trend in company insolvency since 2011. The low number of formal insolvency procedures can be seen as a positive effect of provisions in British law that allow companies to pursue flexible, out of court procedures aimed at saving the business.

On the contrary, countries that foresee restructuring only when a companies is declared insolvent or those that do apply restructuring to a very limited extent exhibit higher risk of relocation, low recovery rate and very high level of bankruptcy.

Box 2. Examples of countries with limited early restructuring possibilities

Austria provides for restructuring with self-administration where the debtor remains in possession or reorganisation without self-administration. The third option is the winding-up bankruptcy procedure. In case of restructuring with self-administration, the debtor, in return for his independence, has to pay a 30 per cent quota. The debtor may switch to restructuring without self-administration (with the appointment of an administrator) in case his plan is not viable. Since this is a judicial procedure, equal treatment of unsecured creditors must be ensured and claims towards the estate must be satisfied.

In **Germany**, once the opening of an insolvency proceeding has been filed, it is possible to use the protective shield, that enables the debtor to prepare an insolvency plan during a period up to three months between filing the petition for the opening of the insolvency proceedings and the resulting court order. The court must order a stay on individual enforcement measures and grant the debtor the right to incur preferential debt for the period until the deadline expires. During the period covered by the protective shield, the debtor has the opportunity, but not the obligation, to present an insolvency plan, where it must be indicated how and to what extent claims against the estate will be satisfied.

80 Marie Le Roux de Bretagne, Christophe Dalmais and Paul Maignan, BNP

81 Marie Le Roux de Bretagne, Christophe Dalmais and Paul Maignan, BNP

In **Sweden**, the Reorganization of Business Act provides for statutory provisions regarding reorganization of business activities with the protection of the court. The procedure also includes a temporary stay of general enforcement measures. In **Finland**, the only alternative to fully private workouts is the judicial administration. The debtor remains in possession and he has to submit a plan to the court. Once the court approves the plan, it calls the creditors to vote on it (i.e. the court's ratification of the plan precedes creditors' approval). Once the voting thresholds are reached, the plan is confirmed.

Hungary has no preventive restructuring measure, and restructuring must take place within the bankruptcy procedure. The composition agreement under bankruptcy typically includes a reorganization plan aimed at restoring or preserving the debtor's solvency, a rescheduling and/or forbearance of debt, as well as a conversion of debt into equity and provision of security by the debtor. Once the majority of secured and unsecured creditors has voted the plan, the court approves it and the bankruptcy procedure is lifted.

A cross analysis among these countries reveals problem with the application of formal insolvency proceedings to rescue companies. In **Hungary** less than 1% of companies that use insolvency continue to operate as a going concern and nearly all bankruptcies end in liquidation. Out of 22,644 companies that went bankrupt in Hungary in 2012 (an exceptionally high number compared with other Member States), 226 firms were able to continue as going concerns. On the other hand, our **German** case study shows that despite the fact that still a small percentage of companies use the protective shield, 35% ended in regular non-rescue insolvencies (liquidation), and 65% ended in self-administration with a positive outcome. This brings the rescue percentage of companies under the protective shield proceedings up to 65%, however, these results are heavily influenced by the fact that the protective shield procedure usually is initiated with the aspiration of salvaging the company. These procedures are typically opened when a clear repayment plan has already been formulated[82], so the argument goes that these types of proceedings attract debtors who are still able to avoid insolvency, thus increasing the recovery rate.

Still, despite fact that the German insolvency framework is generally characterized by a very formal application and a unitary approach to corporate and personal insolvencies, the German Insolvency framework boasts one of the most effective insolvency practices of the world, with an average recovery rate in insolvency proceedings of nearly 80 cents on the dollar (one of the highest in the world, according to the Doing Business Report). Even though the German system is considered among the top insolvency frameworks in the world, we still observe cases in which it falls short of its intended goal. The top issues raised by practitioners and other experts, are all in some way related to the strict adherence to the unitary insolvency approach. **The critique of these actors mainly centers on the inability of the formal insolvency framework to operate outside of its rigorous entity-to-entity approach, and to adapt to the nature of global companies, who operate in groups or networks that transcend the borders of different national jurisdictions**.

According to one respondent, harmonisation of insolvency practices across EU Member States makes absolute sense when it comes to the time a natural person can be discharged of their debt. This issue induces **some forum shopping in Germany**, where some people move their **COMI** to the UK to take advantage of the 1-year discharge. No concrete quantitative

[82] Interview, Cristoph Wilcke

information has yet been made available to highlight the severity of this issue, but the option for debtors to speculate in arbitrage arrangements poses a threat to the security of creditors involved in these kinds of insolvency practices (which usually involves a large corporate debtor with sufficient resources to make forum shopping a viable strategy).

More generally, limited efficiency in insolvency regimes is a determining factor for **relocation of insolvent businesses**, seeking more favourable insolvency conditions in other Member States. For instance, the UK has attracted many companies threatened by bankruptcy and liquidation[83] with its allegedly debtor-friendly system. The high number of foreign businesses declaring bankruptcy in the UK was first noticed in 2006/07, the vast majority of those individuals being from Germany. The main rationale behind this relocation trend is the restrictive nature of the German insolvency legislation compared with the British one, with procedures lasting for at least 6 years[84]. However, while discharge of debt in the UK is automatic after 12 months, the bankruptcy procedure will not necessarily end once discharge is granted and the Trustee retains powers to reach the bankrupt's assets for the benefit of the creditors[85].

Insolvent business can relocate either to declare bankruptcy and avoid paying creditors (**insolvency tourism**), or to gain certain advantages that would allow them to survive ("**forum shopping**"). An example of forum shopping is the German car parts manufacturer Schefenacker (at that time, the world's largest producer of car mirrors), which moved its headquarters to Brighton in 2006 to avoid paying € 430 million to its creditors and to attempt to recover under friendlier insolvency rules[86]. Such a move cost the company an estimated € 40 million[87]. The company redressed and is now called "Samvardhana Motherson Reflectec"[88]. Similar moves were done by German companies Deutsche Nickel and Hans Brochier, described in the European Commission's impact assessment for its insolvency recommendation 1500/2013[89].

Relocation can create several problems in the wider economy. First of all, only bigger firms can afford the costs of relocating or looking for legally-advantageous solutions to their insolvency barriers. SMEs, which form 99% of EU firms and provide 65 million jobs (2/3 of all EU jobs) in 2003[90] are therefore disadvantaged. Second, creditors face additional costs[91] when they need to recover their claims in another jurisdiction (including legal representation costs). If the expected burden of retrieving their assets abroad is too high (for instance, one insolvency practitioner indicated that based on his experience, German creditors do not usually proceed with the insolvency procedure if the debt owed by the insolvent business in France is lower than €5,000), creditors might as well waive the debt recovery procedure, resulting in totally lost assets. Third, because of these potential additional costs, creditors cannot accurately price

83 http://www.penningtons.co.uk/news-publications/latest-news/where-are-you-heading-this-summer-bankruptcy-tourism-and-the-case-of-the-banana-king/

84 Bankruptcy Tourism in Britain, January 2015 http://www.kentinvictachamber.co.uk/bankruptcy-tourism-in-britain/

85 Grant Thornton, Bankruptcy Tourism, 2014

86 http://www.telegraph.co.uk/finance/2950351/German-bankruptcy-laws-drive-car-mirror-firm-to-UK.html

87 http://www.ft.com/cms/s/3/305fa1de-b113-11deb06b-00144feabdc0.html

88 http://smr-automotive.com/history.html

89 European Commission (2014). COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency. SWD (2014). Retrievable at: http://ec.europa.eu/justice/civil/files/swd_2014_61_en.pdf

90 http://siteresources.worldbank.org/CGCSRLP/Resources/SME_statistics.pdf

91 See, for example, the Vivacom case as described in: 'Scheme of Arrangement – jurisdiction and class composition in recent cases involving overseas companies', ILA Bulletin, no. 477.

the loan, as they do not know whether the debtor would move later on and increase debt recovery costs. Ultimately, this affects all debtors through increased interest rates on their loans.

Relocation mainly occurs when restructuring options in the home jurisdiction do not allow the firm to properly redress. These can also occur as a result of insolvency tourism, as is explained further down in this sub-section. The absence or weakness of restructuring options during any stage of the insolvency procedure may lead to a **loss of jobs**, as well as a **loss of tax revenue**. Furthermore, according to the European Commission's impact assessment, the resolution of **non-performing loans** is more problematic without restructuring proceedings.

The following paragraphs aim at estimating the costs of relocation for both debtors and creditors in Europe.

Relocation costs incurred by debtors at EU level:

Preliminary findings from the consultation with key stakeholders (insolvency practitioners, public authorities, etc.) indicate that relocation of insolvent businesses occurs very rarely in the EU. Nonetheless, the UK has been often mentioned as an attractive country for relocation due to the easier acceptance of restructuring and shorter payment plans in place. Interviewees reported that relocation is more common for larger companies, despite higher relocation costs. In the case of SMEs, relocation is usually not an option because of the anticipated legal complexity[92]. In addition, one practitioner mentioned that, although extremely rare, there are some companies registered in the UK (especially from Scotland) that declare insolvency e.g. in Belgium if they have operations there. However, this accounts for less than 1% of the companies.

Luxemburg has been mentioned as one of the countries where relocation to other European Member States happens more frequently. Consulted stakeholders stated that it is quite common among Luxemburgish companies to move to the UK due to its more favourable **pre-pack insolvency regime**[93] (better adapted procedures and higher chances of business survival), under which companies can be restructured. Such relocation is 'common' merely among large companies, being way too costly for SMEs and individual entrepreneurs. Likewise, an Irish public authority stated that before the discharge period was reduced from three to one year, it was not unusual to see insolvent Irish companies relocate to the UK[94]. However, it is no longer the case since the discharge period is now the same in both countries.

Preliminary findings from the consultation have allowed for an estimation of relocation costs incurred by debtors (insolvent businesses), based on the following assumptions:

- The number of relocating businesses across the EU is estimated at around 0.25% of the total number of insolvencies[95].

[92] In particular, the Study Team assumes that the lack of knowledge on foreign insolvency regimes and language barriers impede insolvent SMEs from relocating.

[93] "*Pre-pack insolvency is a kind of bankruptcy procedure, where a restructure plan is agreed in advance of a company declaring its insolvency. In the United Kingdom, pre-packs have become popular since the Enterprise Act 2002, which has made administration the dominant insolvency procedure".* Source: http://www.insolvencyhelpline.co.uk/prepack_administration/what_is_a_pre_pack_or_phoenix.php

[94] https://www.ft.com/content/1a29ba22-c681-11e1-963a-00144feabdc0

[95] This assumption is a rough average of the number of micro and small companies relocating (estimated as close to 0%) and large companies (probably higher than 0.5%).

- Insolvent businesses relocating to another Member State to declare insolvency are assumed to be merely large companies, although some medium companies are also believed to relocate.
- Relocation costs for one single business consist of travel, office moving and office renting costs. Renting costs are based on the average cost of office rental in London (since the UK is deemed to be the main destination for relocation in the EU).

Results of the estimation are presented in the table below:

Table 12: Estimation of relocation costs incurred by debtors in the EU

Number of relocating businesses in the EU	Relocation costs/business			Total relocation costs for debtors
	Travel	Moving	Renting	
~0.26% x Total number of formal insolvencies (middle estimate)	€100	€250	€8,740	**€5 million**

Source: own calculations based on respondents' answers

These costs relate to physical relocation costs only and do not include subsequent coordination costs.

Relocation costs incurred by creditors at EU level:

Relocation also implies additional costs for creditors to recover their assets from abroad. These costs are mainly related to the change of applicable national insolvency framework. One Finish practitioner says that there have been multiple cases of companies migrating to the UK, due to the effectiveness of its pre-pack insolvency scheme. Similarly, an Austrian practitioner identified some cases of companies migrating to the UK. relocation also has economic impacts on creditors because if requirements for restructuring are lower, then creditors might recover less. Additionally, relocation can imply costs for hiring foreign lawyers and translation. One Belgian creditor stated that **debt recovery costs are 10% higher when the debtor relocated to another MS**.

Preliminary findings from the consultation have allowed for an estimation of relocation costs incurred by creditors (insolvent businesses), based on the following assumptions:

- The number of relocating businesses across the EU is estimated at around 0.3% of the total number of insolvencies[96].
- Insolvent businesses relocating to another Member State to declare insolvency are assumed to be merely large companies, although some medium companies are also believed to relocate.
- Additional debt recovery costs for creditors are assumed to amount to some 10% of the proceeding costs in the case of domestic proceeding when the debtor relocated to another member state. This estimate is based on the feedback received during our consultation.

Results of the estimation are presented in the table below:

[96] This assumption is a rough average of the number of micro and small companies relocating (estimated as close to 0%) and large companies (probably higher than 0.5%).

Table 13: Estimation of relocation costs incurred by creditors in the EU

Number of relocating businesses in the EU	Relocation impacts/creditor	Total relocation costs[97]
~0.26% x Total number of formal insolvencies (middle estimate)	~10% of domestic proceeding costs for large companies in the UK (= €8,750)	**€ 4.8 million**

Source: own calculations based on respondents' answers

These costs relate to physical relocation costs only and do not include subsequent coordination costs.

Hence, total relocation costs for both debtors and creditors amount to an estimated **€ 10 mln** per year in Europe. Of course, this figure is a rough estimate which does not account for particular cases (e.g. a large multinational bank declaring insolvency abroad after relocation).

The **Latvian** Insolvency legislation has been reviewed many times in the last 20 years, due to the need to respond to the various economic crises that hit the country. The last reform of corporate insolvency was enacted in 2010 with the purpose to speed up insolvency proceedings with strictly set terms, simplification of procedures, optional creditors' meetings, electronic communication between an administrator and other parties. The main restructuring tool is the legal protection proceeding (LPP) which may be prepared under court control or, in case of expedited reorganization, as an out of court proceeding. One of the conditions for admission to the LPP is the positive outcome of the so-called Best Interest Test, which must ensure that under the proposed plan, the creditors who did not approve the LPP will recover the same amount they would receive in case of insolvency proceedings.

The Doing Business Report estimates the total recovery rate for secured creditors in OECD high-income countries at about 71.9 cents on the dollar. In comparison, the Latvian rate is estimated at 48.2 cents on the dollar by the same report.[98] A study undertaken by Deloitte and the Foreign Investors Council in Latvia has pointed out that the average recovery rate for Latvian companies entering insolvency proceedings has increased from an average of 36% in the years 2008-2014, to 46% in the last two years, suggesting an increase in the effectiveness of the insolvency framework with the modernization of the law.

Under **Bulgarian** law, debtors do not have access to a preventive restructuring framework that would facilitate the rescue of companies outside formal insolvency proceedings. Bulgarian insolvency law only provides possibilities for restructuring after insolvency proceedings have been opened. As reported by the Commission in 2016, the current Bulgarian insolvency framework has several weaknesses, notably the long time to process insolvency cases and the low recovery rate. In addition, there is a tendency for procedures to end in the liquidation rather than restructuring[99]. Pre-packaged sales are not allowed and the restructuring plan may only cover existing claims, but may not provide for new financing. At the same time, Bulgarian law does not provide for any discharge periods for entrepreneurs, as suggested in the 2014 Commission recommendation.

[97] Total relocation costs (at EU level, per year) for creditors facing a relocation of the insolvent business within the EU, assuming one non-domestic EU creditor per relocating business willing to pursue the insolvency proceeding.

[98] World Bank (2015) Doing Business, Latvia

[99] COMMISSION STAFF WORKING DOCUMENT Country Report Bulgaria 2016 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances, 26.2.2016. http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_bulgaria_en.pdf

In **Romania,** out of court settlements, preliminary conciliation, mediation and composition agreements are available but de facto not used. Judicial reorganization is just one possible phase of insolvency proceedings. However certain limits imposed by the legislation, such as that the plan shall be confirmed by the insolvency judge provided that receivables shall be fully repaid within 30 days from the confirmation and the fact that secured creditors may enforce their rights during the procedure, make reorganization difficult in practice. As reported by the European Commission in 2016[100], Romania's business environment is negatively affected by the absence of a rescue culture in the case of corporate insolvency. There is still a high stigma to bankruptcy and an almost exclusive focus on liquidation instead of reorganisation and rescue. The proceedings are among the longest tin Europe.

Our findings confirm the European Semester observation: formal proceedings are lengthy and rarely successful. The high percentage of insolvency procedure failures (94-96% of cases end up in bankruptcy) is a reason why some, like Romania's National Agency for Fiscal Administration (the equivalent to USA's IRS) doubt the purpose of the insolvency regime as a whole, and question whether it would not be easier to directly move to bankruptcy procedures. Insolvency practitioners, however, point out[iii] that a large percentage of firms ending up in bankruptcy arrive there through simplified insolvency procedures, where there is no access to restructuring. These are very often cases of "ghost firms" (with no address, no administrator, no activity for years) or debtors with no real chance of being rescued. Practitioners also point out that many debtors, before going bankrupt, had long lost their assets through foreclosure. Thus, bankruptcy is simply a way to remove such useless economic actors from the market. Such cases constitute over ¾ of all bankruptcy cases which explains the 94-96% failure rate of the insolvency regime.

On the other hand, it is estimated that 6% of insolvency cases hold about 99% of debts, due to the overwhelming number of such "ghost firms". This 6% of firms have about 200,000 employees, which are protected from creditors by the court through the insolvency regime. Plus, many indirect jobs depend on such firms. For instance, there is the famous insolvency case of Oltchim (a large chemical manufacturer 54.8% owned by the state with 2,000 employees) which entered[101] into insolvency procedures in January 2013 (it took one year for the court to approve the insolvency request).[102] It is estimated that 15,000 indirect jobs depend on its functioning, and thus the insolvency procedure is useful here (the reorganisation plan predicts a sale of assets solution for at least EUR 307 million).

The **Luxembourg** government filed a new bill of law (Bill No. 6539) on the protection of undertakings and the modernisation of insolvency law. The Bill intends in particular to modernise the Commercial Code and to set new rules to identify financially distressed undertakings more efficiently. The current options - the reprieve from payment procedure - which allows a debtor to restructure its debt with the consent of a majority of its creditors outside of insolvency proceedings and the composition agreement are rarely used. Controlled management, a procedure that allows the court to order the protection of debtors, requires court approval upon certain requirements, including the fact that the controlled management

[100] COMMISSION STAFF WORKING DOCUMENT Country Report Romania 2016 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances, 26.2.2016 http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_romania_en.pdf

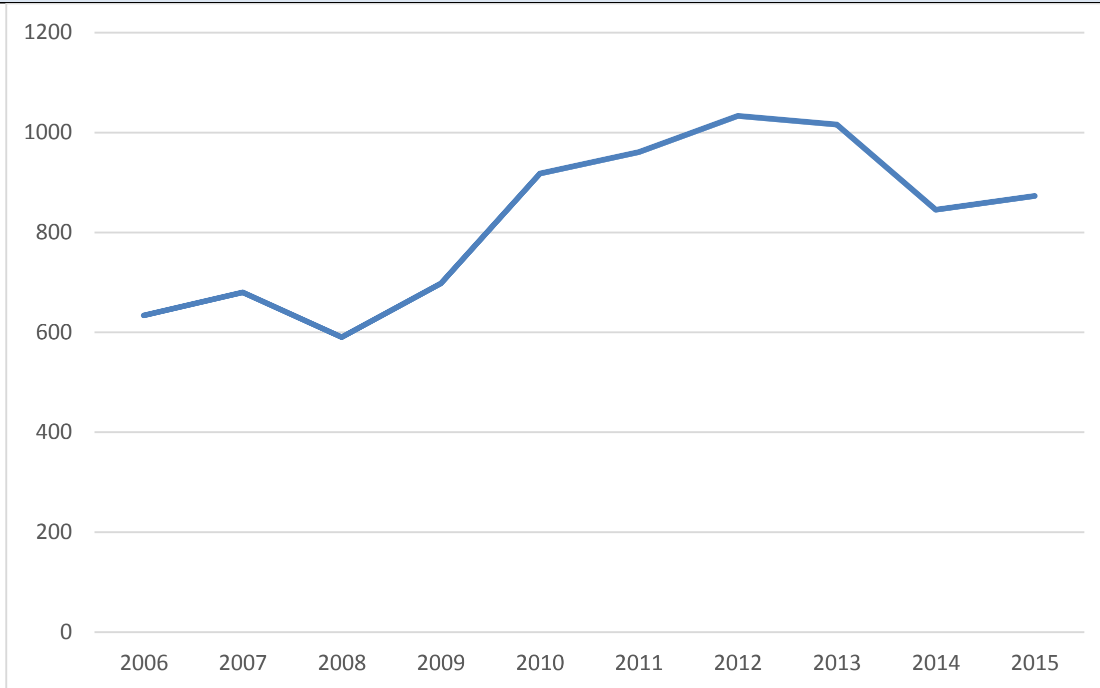
[101] http://www.piperea.ro/interviu/este-o-idee-foarte-nociva-sa-se-renunte-la-legislatia-insolventei/

[102] http://www.rovigo.ro/files/evenimente_fisiere/137_1_file356.pdf

must allow the recovery of the business. In the **Espiritu Santu** bankruptcy, the admission to controlled management of Luxembourgish companies of the Portuguese banking group was initially accepted by the Court and later refused after an expert valuation of the companies' financial standing.

In light of the absence of preventing restructuring procedures, companies are left more exposed during the crisis. The figure below shows corporate bankruptcies in Luxembourg between 2006 and 2015 (i.e. before and after the crisis).

Figure 7: Corporate bankruptcies in Luxembourg 2006-2015



Source: Creditreform

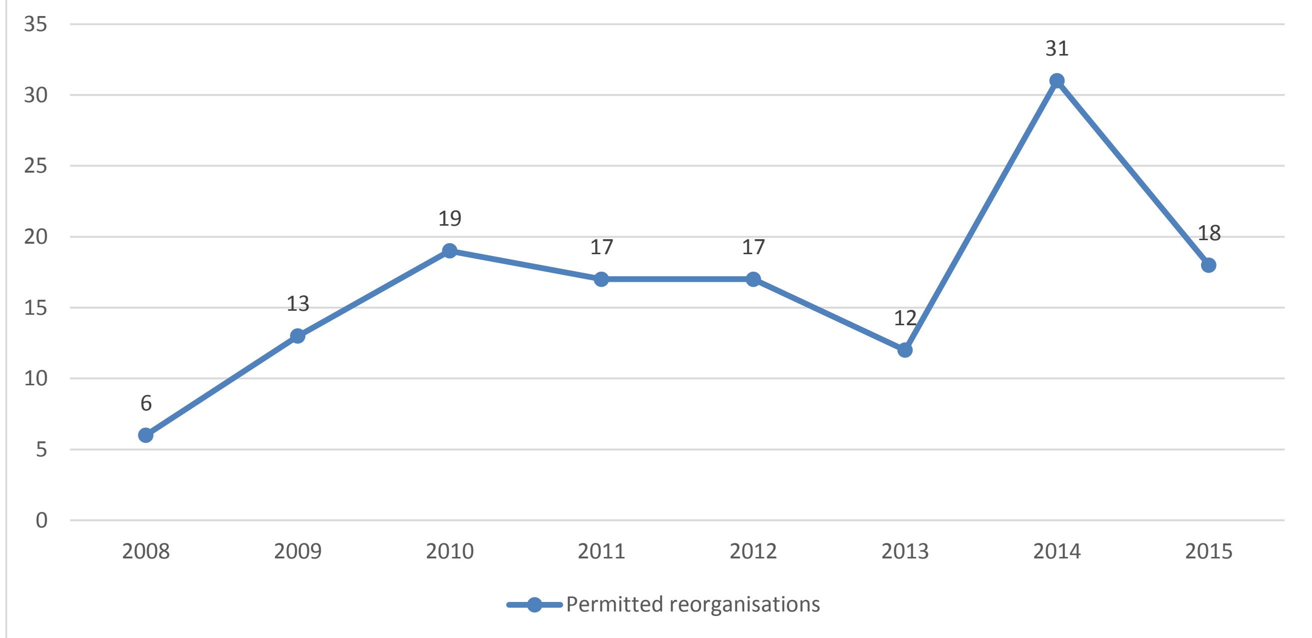
The number of bankruptcies in Luxembourg increased considerably between 2008, where it was at its lowest, (590 procedures) and 2012, where it reached a peak at 1,033 filed bankruptcy procedures. The sharpest increase in bankruptcies was recorded between 2009 and 2010, where 220 additional procedures were observed. This can largely be attributed to the aftermath of the crisis. On the other hand, the number of bankruptcies decreased year-on-year between 2012 and 2014, with a drop of 171 procedures between 2013 and 2014. As no new procedures were introduced during that time in Luxembourg in terms of insolvency law or aid schemes, this decrease suggests a recovery from the consequences of the crisis for Luxembourgish companies. However, there were 28 more bankruptcies in 2015 compared to 2014, which can signify that unsolved issues still remain in this respect.

Other countries allow reorganisation only within formal in-court insolvency procedure. However, statistics from the case studies confirm that SMEs cannot afford to access a restructuring plan because of its costs and that in most cases they end up bankrupt as a result.

For example, in **Czech Republic** reorganisation has not been used very often, mainly because the creditors' consent is needed for this procedure. On average there are about 14 to 18 cases per year with a spike in 2014 (31) when lower limits for reorganisation were imposed.[103]

[103] Before, under the Insolvency Law a company applying for reorganisation had to have a turnover of at least 100 million CZK in the year before filing for insolvency and had to have at least 100 employees. With the implementation of the new amendment to the Insolvency Law in power from 1/1/2014 the terms were reduced to 50 million CZK in turnover and 50 employees respectively. Also, with this amendment companies now have to fulfil only one of these conditions.

Figure 8: Permitted reorganisations 2008 – 2015 in the Czech Republic



Source: Creditreform

Between the years 2008 and 2015 there were only 133 reorganisations permitted by the courts (no clear statistics exist on the total number of submitted reorganisation proposals). From these very few reorganisation cases are/were concluded. In many of them the procedure is changed by the court to bankruptcy proceedings after a while when it becomes clear that the company does not have enough stability to complete the reorganisation successfully as it is a very demanding process. In 2015, from the 18 permitted reorganisations 4 were changed to liquidation during the year and one company has fulfilled its reorganisation plan in November 2015.[104] So far in the first quarter of 2016, 4 reorganisations have been permitted.[105]

One of the reasons why there are so few numbers of companies filing for reorganisation is because many of them file for insolvency "too late" and do not have the capital needed for reorganisation because it was already spent trying to rescue the company from insolvency in the first place.[106] According to Schönfeld and Smrčka (2012a) key economic relationships and habits and their set-up within the Czech economic environment are another reason for the lack of filings for reorganisation proceedings. Similarly, in **Germany**, the International Insolvency Review[107], a yearly report published by Law Business Research, further validates that 90 percent of regular insolvency cases involving companies end as liquidation proceedings compared with only 5 percent which end with in-court restructuring plans.

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[104] Creditreform (2016a). Tisková informace "Vývoj insolvencí v České republice v roce 2015". January 2016. http://www.creditreform.cz/fileadmin/user_upload/CR-International/local_documents/cz/Presseartikel/Vyvoj_insolvenci_v_Ceske_republice_v_roce_2015.pdf

[105] Creditreform (2016b) Tisková informace "Vývoj insolvencí v České republice za první čtvrtletí 2016". April 2016. http://www.creditreform.cz/fileadmin/user_upload/CR-International/local_documents/cz/documents/Vyvoj_insolvenci_v_Ceske_republice_za_prvni_ctvrtleti_2016.pdf

[106] S Schönfeld, J. and L. Smrčka (2012a). Důvody diskvalifikace sanačního principu v insolvenční praxi. Sborník z mezinárodní vědecké conference "Transakční náklady českých ekonomických subjektů v insolvenčním řízení, možnosti jejich snižování a zlepšení statistiky insolvenčních řízení". Vysoká škola ekonomická v Praze, Nakladatelství Oeconomica – 2012. May 2012. pp. 64 – 75.

[107] Bernstein, Donald (2015) p. 165

Overall, the low number of SMEs surviving insolvency procedure hinders the economic development of the country in which they are based.

Experts have observed that **inefficiency in bankruptcy laws** may have led to cross-border forum shopping for an optimal jurisdiction.[108] A company in distress may like to move its COMI in order to benefit from the availability of different insolvency laws. Whether to move the company's COMI depends on a number of factors such as: the jurisdiction of the company before and after migration, the technique of migration, shareholders' structure, the financial state of the company, and of course the views of creditors on the proposed move. This assessment requires resources that very often are not available to SMEs.[109] In practice, the possibility to migrate the company to a different and more favourable jurisdiction may be an option, but this may end up being costlier and inefficient than using the debtor's own jurisdiction. Findings stemming from our research confirm that relocation can only be faced by large company. Involvement of court in restructuring and insolvency proceedings;

In this scenario **hybrid proceedings** seem to provide better results in terms of reorganisations, than in formal reorganisation. Hybrid procedures are, essentially, private restructurings complemented by minor judicial or public interventions and incorporating some elements of formal insolvency proceedings. Hybrid procedures preserve most of the advantages of out-of-court restructurings and incorporate some of the advantages of formal insolvency proceedings. They lack the confidentiality and flexibility of the pure out-of-court procedure but in general, they include the moratorium and they are able to bind also the secured creditors when the required majorities are reached.

In practice in the case of hybrid procedures, the contractual agreement between the debtor and the creditors is **supported by the intervention of a court**[110]. According to a study carried out by Ecorys[111], hybrid procedures are characterised by a period during which creditors do not enforce claims so as to allow the debtor to establish their **restructuring plan**. Unlike in an out-of-court settlement, this plan is approved by the court. Furthermore, another advantage of a hybrid procedure is that it is overall faster than an in-court procedure.

Overall, the economic function of these hybrid procedures is to reduce the risk that a minority creditor could stop the restructuring process, without the need to incur the costs associated with formal insolvency proceedings.

The European Commission's impact assessment carried out in 2014[112] highlights the fact that an inefficient hybrid insolvency proceeding results in reduced entrepreneurship and economic dynamism, because it leads to in-court procedures which are costlier for debtors due to the intervention of third parties. Indeed, these proceedings are a way of reassuring entrepreneurs that solutions can be found in the case of insolvency, and thus their presence encourages entrepreneurial activity.

There are several examples from the EU Member States.

[108] http://journals.sas.ac.uk/amicus/article/view/1226
[109] http://journals.sas.ac.uk/amicus/article/view/1226
[110] Garrido, J. M., 2012, *Out-of-Court Debt Restructuring, a World Bank Study*.
[111] Ecorys, 2014, *Bankruptcy and second chance forhonest bankrupt entrepreneurs*.
[112] European Commission, 2014, *COMMISSION RECOMMENDATION of 12.3.2014 on a new approach to business failure and insolvency*, Brussels.

The **Greek non judicial rehabilitation procedure** allows debtors to reach an agreement with the majority of their creditors and to submit this agreement to the court for ratification without having to submit a court application for the commencement of negotiations. The same rehabilitation procedure may also take a judicial route, with the debtor filing a petition to the court for commencement. Since there is no big difference between the judicial and non-judicial procedure (the latter will in any case require the vote of the majority of creditors and court ratifications), the non-judicial is preferred due to the possibility of avoiding any publicity associated with a formal opening.

Portugal introduced, in 2012, the SIREVE, which is an out of court procedure directed to obtain a settlement between the debtor and his creditors, under the supervision of an entity (IAPMEI- Institute for Assistance to Small and Medium-sized Companies and Innovation) belonging to the Ministry of the Economy.[113] **Interestingly, the initial part of the procedure is made on-line, on the cost-free platform created by the IAPMEI**. The company also has to conduct a diagnosis of its financial status through the platform. Fifteen days after the application, the IAPMEI, having reviewed the application may decide:

- to refuse the application (if the company does not comply with the minimum legal requirements);
- to ask for additional documents or
- to accept it.

The SIREVE procedure shall not last more than three months and a stay of enforcement is granted during the period. However, creditors that inform the IAPMEI that they do not intend to participate in the settlement can continue their enforcement procedures.

The Spanish refinancing collective agreement homologated by the court (**Spanish Scheme**), has the purpose to return the business to viability by significantly increasing available funds or amending the terms of an existing financing agreement by extending the maturity or refinancing prior obligations. Once the various thresholds of creditors' approval are reached, the debtor can apply to the Commercial Court requesting that the effects of the refinancing agreement may be imposed on dissenting financial creditors. The Spanish Scheme has been tested in the **Celsa Case**: the ruling of the Barcelona Court clarified some aspects concerning the percentage of creditors, the role and the rights of secured creditors under a syndicate loan, as well as the parameters to define when the compromise of creditors' rights is a "*disproportionate economic sacrifice*". The scheme has also been recently used in the restructuring of the energy group **Abengoa.** The plan, voted by creditors with a three quarter majority included an agreement with financial creditors, a haircut on the existing financial creditors backed by debt for equity swap and new finance. The current shareholdings have been diluted in favour of the creditors and the management removed. The Spanish scheme has led to some unintended effects: almost all debtors (around 95%) try this insolvency alternative before filing for insolvency. As a result, most of these proceedings do not end successfully, as companies that should go into liquidation try the alternative first. There are no national statistics with regard to this pre-insolvency proceeding and, consequently, there is no official information.[114]

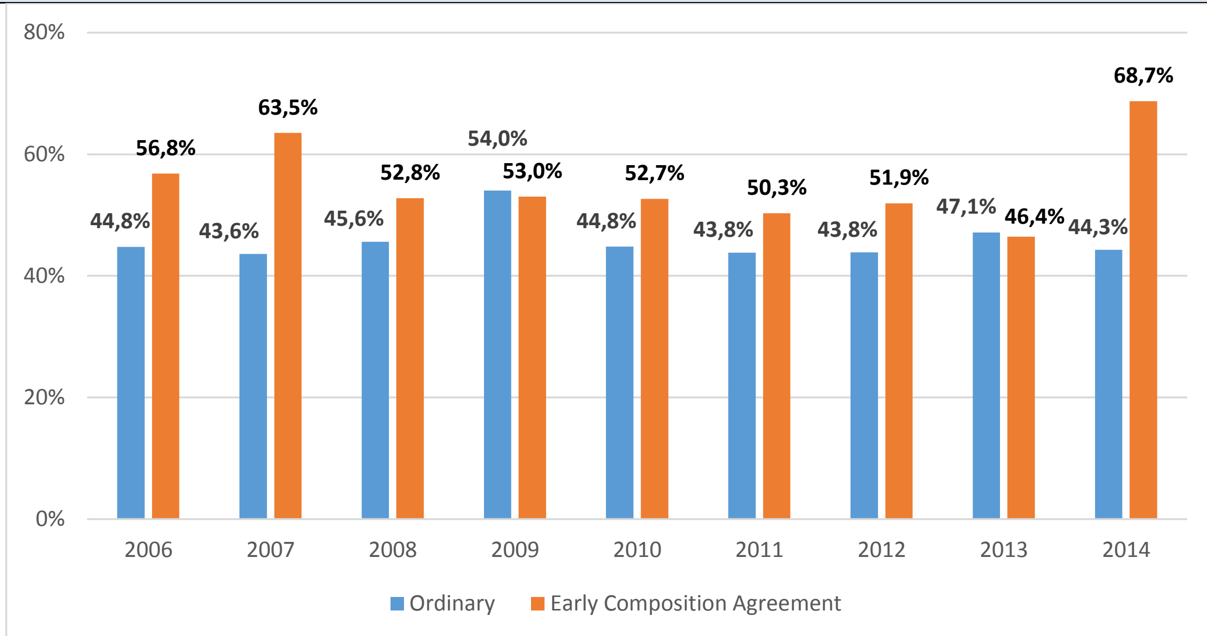
[113] Although it is under the supervision of the IAPMEI, the procedure is not reserved only to SMEs.

[114] INSOL Europe, (2014). Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices. Annex 1 List of National Experts. European Commission.

Despite the example of the Spanish scheme above, overall general statistics demonstrates that less formal procedures are not applied very often. For instance, out of all the agreements reached in 2014, only 9.7% were made in an early composition agreement. Since 2010, a smaller number of agreements has been made (with exception of 2013) compared with 2006, 2007 and 2009 where the rates were 22.4%, 25.4% and 21.8 respectively.[115] Most agreements are made as part of ordinary insolvency proceedings and this is the case even more in the last years which might suggest that the latest changes in the law did not succeed in promoting less formal proceedings, or that debtors are using alternatives, such as the homologation refinancing agreement. This is despite the fact that the median value of recovery rates in the early composition agreements in 2014 was 68.7% of the nominal present value of the debt, whereas in the ordinary composition agreement it was only 44.3%. Additionally, recovery rates in early composition agreements are always (with exception of 2009 and 2013) higher than in the ordinary composition agreement (see figure below).

[115] *Own elaboration with the data provided by Colegio de Registradores de la Propiedad, Bienes Muebles y Mercantiles de España*

Figure 9: Comparison of median recovery rates in Spain between ordinary composition agreements and early composition agreements



Source: Own elaboration using the data provided by Colegio de Registradores de la Propiedad, Bienes Muebles y Mercantiles de España; * The recovery rates refer to the recovery expectatives of the nominal present value for the normal creditors and under the supposition of full payment of what is agreed

3.2.2 Debtor in possession, new financing and SMEs

To ensure continuity of the business once the reorganization (and, to a lesser extent, liquidation, where the business is to be sold as a going concern) is triggered, several EU countries provide for either:

- protection from avoidance rules or
- special provisions granting priority to new finance furnished at this stage.[116]

These two provisions allow on the one hand an incentive for debtors to use the procedure early and allow him/ her to carry on his/her day to day operations; on the other hand, they eventually protect new financing over pre-existing debt.

In this respect, and in reference with the first issue, several countries grant protections to new finance from claw-backs, provided that certain conditions are met. This is the case of **France**, where new financing cannot be challenged if the lender supplied funds and it was in relation to a settlement that had been approved by the court; of **Greece and Italy**, where no new financing arrangements can be attacked subsequently by an insolvency practitioner provided that the new financing occurred during the execution of a restructuring plan and of **Germany**, where any transaction involving new financing is deemed not to have been entered into with the intention of harming creditors –and thus, not potentially subject to avoidance actions- if it has been carried out with a serious intention to restructure). By contrast in Member States such as **Estonia, Czech Republic, Hungary, Luxembourg, Malta, Netherlands Slovakia and UK** those avoidance rules that are generally applicable will continue to apply to new

116 A combination of points (*i*) and (*ii*) is still present in several jurisdictions as well.

financing. The absence or weakness of protection of new financing diminishes the prospects of viability of the company and also of recovery rates.[117]

When it comes to the second issue, Member States such as **France, Germany, Greece, Lithuania, and Austria** rank new finance ahead of existing unsecured creditors. Other States, such as **Italy** and **Portugal**, go further since priority is granted not only over unsecured creditors but also over certain types of preferential debt (the new finance thus enjoys a super-priority status). There are exceptions to this trend, such as the **United Kingdom**, where there are no special provisions granting priority to new finance in the event of either restructuring or a formal insolvency procedure.

As observed by AFME, harmonisation in this area may increase chances for business to restructure successfully and also promote the development of a European Debtor in possession financial market based on alternative forms of financing: hedge funds or private equity funds. Besides harmonisation for the priority status of new financing, DIP financing providers should also be granted some form of immunity against criminal liability.

Moreover, a study conducted by the European Commission found that the existence of a debtor in possession contributes to higher rates of self-employment, thus having a positive effect on freedom to conduct business and right to engage in work, as well as attenuating the negative effects on output of corporate deleveraging as firms seek to reduce their debt-to-asset ratios.[118]

Regarding personal insolvency findings from our case studies suggested that in almost all countries no new funding is provided. Nevertheless, in some countries such as **Luxembourg** individuals facing personal insolvencies or over-indebtedness are able to seek help through one of the three over-indebtedness information and consulting services (services d'information et de conseil en matière de surendettement (SICS)) in the country: Inter-Actions, Developpement & Action Sociale[119], Ligue Medico-Sociale[120] Commission de médiation en matière de surendettement (Commission for the mediation of over indebtedness matters) at the Ministry of Family and Integration.

To the extent that ordinary insolvency procedures might be expensive and disproportionate for small and medium size businesses, some countries provide for special provisions specifically tailored for SMEs, aimed at encouraging their rescue (even though the extent to which a company might be considered to be "small" or "large" is entirely a matter of policy and it does vary across countries).

EU Member States that specifically address this issue include Czech Republic, Greece, Spain, Slovenia, Slovakia, Ireland, Luxembourg, Germany and Romania. Evidence on the benefit of these practices on the number of company rescued companies are limited. For instance, there is a special provision for family ventures in Romania, stating that these can go through a simplified insolvency procedure. The same rule applies for physical persons offering professional services, either registered in the commerce registry or not. However, the impact

117 AFME study, p. 18 and 19.

118 European Commission, Directorate-General for Economic and Financial Affairs, The Economic Impact of Rescue and Recovery Frameworks, Ref. Ares(2015)3579794 - 31/08/2015

119 http://www.dettes-net.lu/role-du-sics

120 http://www.ligue.lu/service-dinformation-et-de-conseil-en-matiere-de-surendettement/

of this provision is reportedly rather limited. Likewise, the Chamber of Commerce in Luxemburg had an initiative for SMEs called "Vaccin anti-crise", to help SMEs in financial difficulty. However, they found that SMEs often came for help when it was too late, and they already filled the conditions for insolvency. As a result, they could not save companies through this procedure.

- **Czech Republic** which provides for a streamlined liquidation proceeding for small business debtors;
- **Greece** where a simplified procedure, known as accelerated insolvency, applies to bankrupt estates that are valued at less than EUR 100,000 and contain no immovable property;
- **Spain** which provides for speedy insolvency procedure for those debtors that have less than fifty creditors and assets amounting to less than EUR 5 million);
- **Slovenia and Slovakia** where a special restructuring procedure for SMEs exist; and
- **Ireland** where, in reference to rescue procedures, special proceedings are provided for small companies willing to enter into Examinership. Small companies are indeed enabled to apply to the Circuit Court - a court of limited, local jurisdiction - rather than the High Court for accessing this procedure. This measure is aimed at reducing the legal costs associated with an application for examinership.
- **Luxembourg** has special measures to ensure faster and cheaper bankruptcy proceedings for SMEs, such as the provision of SME credit guarantees. This allows for a facilitated insolvency process for these companies. The Chambre de Commerce has a service named the Vaccin Anti-Crise[121] aimed at helping SMEs facing financial difficulties which is currently under reform. As part of this service, companies are assigned a financial consultant for a reduced price to give them guidance. However, the cost of the consultant (4,000 EUR per week, up to 20,000 EUR for five weeks) remains too expensive for SMEs, as they often approached the service too late, when they filled all the conditions to file for bankruptcy. The aim of the reformed approach is to use the Vaccin Anti-Crise service as a prevention measure and not as a way to solve existing financial issues. However, the reform can only be implemented once insolvency law reform is adopted in Luxembourg. The service is currently not being used by companies. No applications were filed in 2015 and only one has been commissioned in 2016 so far.

Other than **Germany**'s special bond scheme for SMEs (which has been somewhat criticized by various insolvency practitioners) there are no special provisions in German Insolvency law or practice for SMEs. One explanation is perhaps that SMEs constitute almost the entire range of corporate insolvency filings in the country. So insolvency proceedings may be considered to be geared towards SMEs in any case.

There are no special rules for SMEs in **Romanian corporate insolvency law**, except for **family ventures**, which could go directly through a simplified insolvency procedure. The same rule applies for physical persons offering professional services, either registered in the commerce registry or not.

121 http://www.vaccinanticrise.lu/

3.2.3 Specialisation of courts and insolvency practitioners

The administrative and professional personnel involved in insolvency proceedings also play a role in the efficiency of the framework, especially in cross border situations. Specialisation of courts and the regulation of the profession seem to provide a relatively high degree of certainty to issuers, creditors, and other stakeholders with respect to the application and outcome of an insolvency proceeding.[122]

For instance, the **French** government has made the assessment that certain small commercial courts were regularly finding themselves confronted with cases of great complexity, only because the company in difficulty had its head office in the jurisdiction of these courts. It therefore announced the establishment of specialised commercial courts (TCS) which will process the most complex insolvency proceedings. With the Decree No. 2016-217 of 26 February 2016[123] the list of the first 19 courts has been published. The courts will not be competent for all insolvencies but they should deal with larger insolvencies, according to the provided thresholds[124]. In **United Kingdom**, insolvency practitioners under the Insolvency Act 1986 are the only persons that may be appointed in relation to insolvency proceedings. They are experts with specific training and they must pass an exam at the Joint Insolvency Examination Board (JIEB). Form 1986 there is a direct access to the profession through the exam (therefore it is not necessary to be a lawyer) and usually they have a background in accountancy. The **French** administrators/conciliator have a similar formation and similar route to enter the profession.

3.3 Additional costs and lost opportunities for natural persons (entrepreneurs and consumers) related to inefficiencies in insolvency framework as a regard as fresh start,

[122] AFME study

[123] Décret n° 2016-217 du 26 février 2016 fixant la liste et le ressort des tribunaux de commerce spécialisés , JORF n°0050 du 28 février 2016.

[124] The specially designated Commercial courts will recognise cases where the debtor carries out a commercial or trade activity:

1. The safeguard procedures, receivership and liquidation as outlined in Book VI will apply to situations where the debtor is:
   (a) A business in which the number of employees is equal to or greater than 250 and whose net turnover is at least EUR 20 million;
   (b) A company whose net turnover is at least EUR 40 million;
   (c) A company that holds or controls another company, as defined in Articles L. 233-1 and L. 233-3 of the Commercial Code, insofar as the number of employees of all the companies taken together is equal to or greater than 250 and the combined net turnover amount of all the companies is at least EUR 20 million; or (d) A company that holds or controls another company, as defined in Articles L. 233-1 and L. 233-3, insofar as the net turnover of all the companies taken together is at least EUR 40 million.
2. The procedures for the establishment of the international jurisdiction of the court are to be determined pursuant to the application of European Union acts relating to insolvency proceedings.
3. The procedures for the establishment of the international jurisdiction of the court are to result from the jurisdiction of the debtor's main centre of interests.
4. The conciliation procedure as provided for by Title I of Book VI, may be utilised on direct appeal by the debtor, at the request of the public prosecutor or by a decision of the president of the commercial court, or where the debtor is a company or a set of companies fulfilling the conditions as outlined in point 1 subsection (a) – (d).

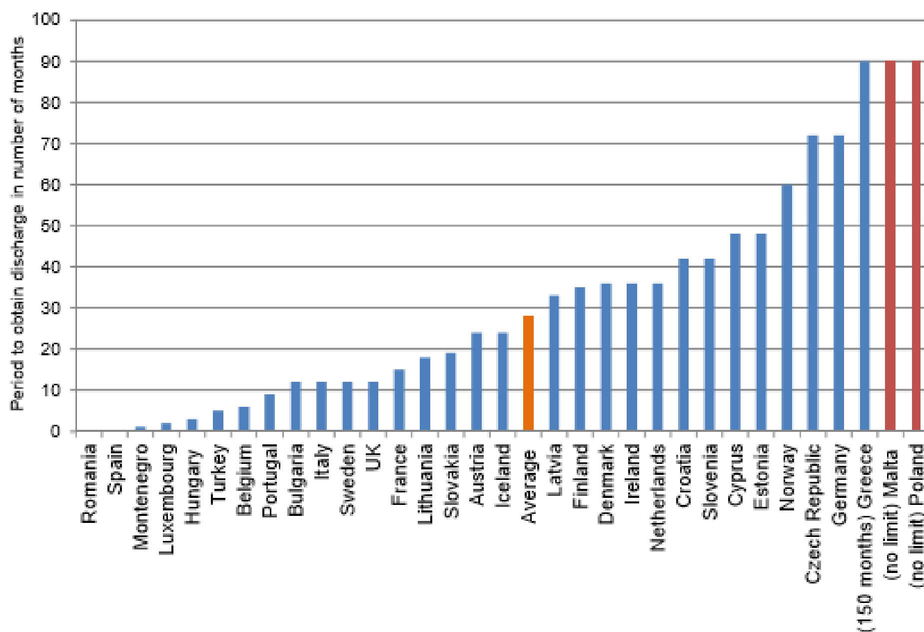
The competent specialised commercial court for the purposes of (c) and (d) of points 1 and 4 of this article, is the jurisdiction of the company that holds or controls another company within the meaning of Articles L. 233- 1 and L. 233-3.

In the application of point 2 of this Article, the competent specialised commercial court is the one with the jurisdiction in the debtor's main centre of interests. For corporate entities, the centre of principal interests is deemed, until the contrary is proved, to be the registered office.

3.3.1 Discharge of debt

Inefficiencies in insolvency frameworks are also shown in the variability of discharge periods across Europe. The following graph from the study *Bankruptcy and Second Chance for Honest Entrepreneurs*[125] shows the period of time (in months) to obtain full discharge in the 28 EU Member States, Iceland, Norway, Montenegro, Turkey and Serbia. The average time to obtain discharge after liquidation is 28 months. In 8 countries (Romania, Spain, Montenegro, Luxembourg, Hungary, Turkey, Belgium and Portugal), it takes less than 10 months to obtain full discharge, with Romania and Spain having an immediate discharge period. In contrast, the discharge period takes more than 70 months in countries such as Czech Republic, Germany and Greece.

Figure 10: Period of time to obtain full discharge



Source: Ecorys, Bankruptcy and Second Chance for Honest Entrepreneurs, 2014

The study "Bankruptcy Law and Entrepreneurship" (Armour and Cumming, 2008) investigates the relationship between personal bankruptcy laws and entrepreneurship using data on self-employment (i.e. the proportion of the population self-employed) over 16 years (1990-2005) and 15 countries in Europe and North America (Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Spain, Sweden, UK and USA). The authors empirically test the hypothesis that, all other things being equal, a more forgiving personal bankruptcy law will tend to stimulate entrepreneurship. To this aim, they use 5 variables (discharge available, the time to discharge, exemptions, disabilities and composition) to measure the scale of 'severity' of personal bankruptcy laws as well as EUROSTAT measures of self-employment as their dependent variable. Their findings show that personal **bankruptcy law has a statistically and economically significant effect on self-employment rates**. In fact, their findings highlight the importance of one primary variable in driving the levels of self-employment per population: the time to discharge in bankruptcy. For instance, they find that **a move from the least generous (Italy) to the most generous (USA) regime,**

[125] Ecorys, Bankruptcy and second chance for honest bankrupt entrepreneurs, Final report for the European Commission, DG Enterprise & Industry Rotterdam, 31 October 2014

accounting for a difference of 38 years on their measure, would be associated with an overall increase in the average rate of self-employment by around 3.9%. In practice, the reduction in the discharge time from bankruptcy which took place in the Netherlands (in 1997) and in Germany (in 2001) is consistent with an increase of 4.3% and 4.5% in the average rate of self-employment, respectively.

In the case of company, the general EU approach towards discharge following the closure of a bankruptcy procedure is quite uniform, since almost no European insolvency legislation provides for this option. Thus legal entities, which are not liquidated and dissolved as an outcome of bankruptcy, are deemed to remain liable for all the debts and liabilities that have not been fulfilled during the insolvency procedure. **Ireland** is an exception to this general framework, as an Irish company is officially discharged from bankruptcy after 3 years following closure of the procedure. The scenario is different under debt settlement procedures (either out of court or in court), since, notwithstanding creditors entering into the debtor's plan on purpose or because they are bound to do so by others creditors, the natural outcome of the procedure is creditors being prevented from enforcing their previous claims against the debtor. Of course, to the extent that the debt settlement procedure does not provide for any binding mechanism towards dissenting creditors, debt discharge only applies to those creditors who have deliberately accepted the plan.

In practice, after liquidation, it is possible for the company director or individual entrepreneur to be discharged of their responsibilities towards their debts, and also to gain access to a second chance. However, at EU level, **strong discrepancies exist in terms of the length of the discharge period**. For instance, the length in the UK is 3 years on average, while it is of 12 years in Ireland. According to the European Commission's impact assessment[126], from an economic perspective, **the longer the discharge period, the more negatively it affects the Member State's economy**. Indeed, long periods give a pessimistic view of the entrepreneur's ability to create a viable business, thus creating a disincentive to entrepreneurship. This phenomenon leads to lower employment and innovation. On the other hand, **shorter discharge periods are linked to higher entrepreneurship** as the consequences of failing are not as significant, which in turn leads to a higher self-employment rate. In addition, studies have shown that people who ran a company which failed had a greater chance of succeeding the second time than first time entrepreneurs[127].

At EU level, especially in cross-border situations, the discrepancies regarding the length of the discharge period may also lead to **forum shopping**. Indeed, debtors will be more inclined to move their business to Member States with shorter discharge periods, such as France or the UK, causing an important loss of assets for creditors. Their creditors would consequently have to pay legal and administrative fees to enforce their claim in another Member State. This phenomenon can occur due to the fact that the 2002 EU insolvency framework[128] sets no minimum time length before a foreign national residing in England or Wales can file for bankruptcy. The media reported several incidents of "Britain as insolvency brothel", including the case of Greece's Wind Hellas (Greece's third-largest telecom company) declared its global

[126] European Commission, 2014, *COMMISSION RECOMMENDATION of 12.3.2014 on a new approach to business failure and insolvency*, Brussels.

[127] European Commission, 2014, *COMMISSION RECOMMENDATION of 12.3.2014 on a new approach to business failure and insolvency*, Brussels. The same idea in DG GROW report on European SMEs

128 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

headquarters its one-man, one-desk, one-computer London office and thus avoided paying its creditors GBP 1.3 billion in 2010[129].

3.3.2 Second Chance

Second chance is the fact of allowing a new entrepreneurial activity to be undertaken by a person who had previously been in charge of a company which went bankrupt. A second chance is **given to honest entrepreneurs at the end of the discharge period**. The idea is that these entrepreneurs are then able to use their experience to create a **faster growing more successful business**, with a lower fear of failure[130]. Furthermore, according to a study carried out in 2006, **GDP growth** is positively correlated with a favourable attitude towards second chances[131].

With respect to **sole entrepreneurs**, in the vast majority of Member States (**such as Belgium, Czech Republic, Cyprus, Croatia, Italy, Estonia, France, Greece, Ireland, Estonia, Luxembourg, Romania, Portugal, Slovenia, Spain and UK**) it is now possible to enjoy discharge (even though not always automatic) from debt as part of bankruptcy procedures. Differences exist however with reference to the time lines for discharge, since some countries provide for discharge within 3 years (such as Cyprus, Ireland, Poland and UK) while in others discharge might take place after 3 years (such as Belgium, Estonia, Luxembourg, Malta, Portugal, Romania, Slovakia and Spain). In other Member States, the lack of debt relief following the closure of a bankruptcy proceeding still remains (e.g. Austria, Denmark, Bulgaria, Finland, Hungary, Lithuania, Latvia, the Netherlands, Slovenia).

Sweden does not have special measures to promote a second chance for honest bankrupt entrepreneurs. While the issue has received some political attention and some background work has been carried out to prepare for the possibility of new legislation in this area, nothing concrete is on the table yet. There are a number of support measures for start-ups in general, which do not "discriminate" against entrepreneurs with previous bankruptcies (Ecorys 2012 and interviews). With a very strict approach to discharge, there does not seem to be a strong impetus in Sweden towards legal provisions for second chance.

In reference to consumer over-indebtedness, there is a trend in the European Union towards the implementation of legal procedures to help consumers recover, thus allowing a fresh start and a second chance. From a general perspective, these special procedures for consumers might be identified as bankruptcy (where debtors' assets are sold and the proceeds are distributed between creditors, according to a pre-ordered list); debt settlement procedures (where debtors are required to commit to regular payments to satisfy creditors either in full or in part, according to a payment plan and under court supervision) and informal arrangements. Both consumer bankruptcy and consumer debt settlement procedures share the common outcome of full discharge from liabilities at some point in the future. The difference essentially lies in how quickly discharge will be achieved. While some countries only provide as special debt settlement procedure for consumers (**Belgium, Greece, Luxembourg**), others only offer bankruptcy (**Lithuania and Slovenia**). In addition, there are countries that do not address the problem of consumer over-indebtedness at all (**Bulgaria and Croatia**). Finally, it is worth stressing that there is no general and unique definition of consumer over-indebtedness across

129 http://www.thesundaytimes.co.uk/sto/business/Companies/article22775.ece

130 European Commission, 2014, COMMISSION RECOMMENDATION of 12.3.2014 on a new approach to business failure and insolvency, Brussels.

131 Burchell and Hughes, 2006, The Stigma of Failure: an international comparison of failure tolerance and second chancing.

Member States although some countries (such as **France, Slovenia and Italy**) define it as a situation where consumer assets are insufficient to cover their liabilities.

Unlike for corporate insolvencies, there are **no international best practices or guidelines** to maximise the efficiency of **personal insolvency procedures**, thus hindering progress towards European level approximation of these proceedings in the Member States[132].

According to the IMF[133], there are three aspects that personal insolvency law in Member States should take into account so as to be economically efficient, especially in cross-border situations.

1. Risks must be distributed fairly and evenly between all parties.
2. A discharge of individuals from the liabilities associated with the financial issues which caused the insolvency needs to be put in place, as these individuals will then be able to contribute to the economy of the country they live in.
3. The discharge period should be fixed between 3 and 5 years depending on the severity of the situation and the length of the insolvency procedure, and be as equal as possible across all Member States to avoid **bankruptcy tourism**. Indeed, many current discrepancies in insolvency laws between Member States cause individuals to declare personal bankruptcies in other countries. For instance, many German and Irish nationals decide to declare bankruptcy in the UK, as discharge in this Member State is automatic after 12 months[134].This phenomenon can also be avoided if cross-border cooperation is allowed and if foreign proceedings are recognised.

[i] http://www.piperea.ro/interviu/este-o-idee-foarte-nociva-sa-se-renunte-la-legislatia-insolventei/
[ii] http://www.rovigo.ro/files/evenimente_fisiere/137_1_file356.pdf

[132] IMF, 2013, Dealing with private debt distress in the wake of the financial crisis.
[133] IMF, 2013, Dealing with private debt distress in the wake of the financial crisis.
[134] Hoffmann, T., 2012, The Phenomenon of "Consumer Insolvency Tourism" and its Challenges to European Legislation

3.4 Summary table of the costs of the baseline scenario at EU level

The table below summarises the discussion in this section by providing an overview of the total costs incurred by debtors and creditors, foregone benefits and wider impacts under the baseline scenario:

Table 14: Total costs, foregone benefits and wider impacts under the baseline scenario

	Impact type	Total impact
Actual costs	Insolvency proceedings' costs for SMEs	• € 886 million (domestic) • € 70 million (cross-border) Note: The cost of formal insolvency procedures is reportedly higher than in early restructuring procedures
	Insolvency proceedings' costs for large companies	• € 9.5 million (domestic) • € 0.7 million (cross-border) Note: The cost of formal insolvency procedures is higher than in early restructuring procedures
	Speed of resolution	Long procedures with time continuing to vary significantly across MS and on a case by case basis
	Recovery rates for creditors	Significantly lower, especially for SMEs, also due to high cost of formal insolvency procedures (see above) and large variation across MS (currently ranging between 30% and 90% for secured creditors, depending on the Member State)[135]
	Business survival	Significantly lower with a higher number of insolvencies than would be the case under a more effective restructuring option and large variation across MS (5 to 40% additional businesses could be saved with appropriate reforms)[136]
	Coordination costs	Additional legal fees for foreign lawyers in case of cross-border insolvencies, proportionate to the number of regimes involved
	Relocation costs	Significant relocation costs for debtors and potentially negative impacts for creditors, estimated at close to **€ 10 mln** in total per year in the EU
	Higher costs of credit for foreign investments	Higher risk of insolvency for cross-border investment results in additional guarantees and anticipated payments
F o	Insolvency proceedings'	Savings in proceedings costs achievable with appropriate

[135] Source: World Bank, Doing Business report 2016
[136] Source: own consultation (interviews with expert stakeholders)

	Impact type	Total impact
	costs	policy option(s)
	Length of proceedings	Reduction in the length of proceedings achievable with appropriate policy option(s)
	Number of active businesses	Higher number of businesses could be saved with appropriate policy option(s)
	Investment and access to credit	Higher level of investment and access to credit achievable with appropriate policy option(s)
Wider impacts	Non-performing loans	Higher due to lack of effective deleveraging mechanism
	Competitiveness and growth	Lower, including due to lower investment rates and destruction of asset value (in particular non-physical assets)
	Employment	Loss of jobs due to avoidable bankruptcies
	Tax revenue	Loss of tax revenue due to avoidable bankruptcies and destruction of asset value
	Consumption	Lower level of consumption driven by job losses
	Innovation	Low levels of investment limit innovation capacity
	Social impact	Long discharge periods and absence of second chance provisions for honest entrepreneurs undermine entrepreneurship and economic dynamism. Besides, formal court proceedings (in particular longer proceedings) for personal insolvencies increase stigma.

4. Policy Options: Identify and describe solution to the problems identified (Task 2)

The objective of Task 2 is to identify and describe solution to the problems identified. These objectives correspond to steps 2 and 3 of an IA:

- Setting the objectives
- Considering different policy options

The section below identifies the policy options potentially able to address the problems examined above.

4.1 Option 1: Maintaining the status quo (baseline scenario)

Maintaining the status quo may imply continuing to adopt the country-specific recommendations on insolvency within the annual European Semester exercise. The legislation of the majority of Member States is slowly converging towards an approximation of their rules, adopting new restructuring tools modelled upon the US Chapter 11 or the UK Scheme. Moreover, the Commission Recommendation may also inspire some changes, however deep differences remain which lead to fragmentation.

4.2 Option 2: Setting up a fully harmonised preventive procedure and second chance regime

This measure would fully harmonise at least one preventive procedure in Member States, regulating in detail the elements of the procedure, including for example the definition of insolvency, the majorities required for plan adoption, the treatment of shareholders in restructuring and protection on new financing. This would facilitate the restructuring of groups of companies and would ensure the legal certainty that investors would otherwise need to 'buy' at high costs. It would considerably level the playing field, and thus reduce the risk assessment costs for investors and laying the ground for a truly integrated Capital Markets Union. For such harmonisation to work efficiently, it would probably require also a harmonisation of key formal insolvency aspects, such as the ranking of claims and avoidance actions in the event of the insolvency of the debtor. As for discharge periods, such a solution could imply providing for a uniform discharge period across the EU and setting out all the exceptions from the uniform discharge period, but would also probably require a harmonisation of the procedures themselves leading up to a discharge.

4.3 Option 3: Introducing an alternative, optional EU restrucruting and insolvency regime

A 29th restructuring regime would establish, alongside national procedures, a European procedure to be chosen by the party initiating it (i.e. the debtor, or the creditors with the debtor's consent). Several responses to the Green Paper consultation on a Capital Market Union pointed to the desirability of such a regime[137]. As opposed to Option 2, this option would leave national laws untouched. Jurisdiction would be established by the

[137] Green Paper consultation on a Capital Market Union

Insolvency Regulation on the basis of the COMI principle, but the law applicable to the proceedings would be the European procedure rather than the law of the COMI state (to make this possible, a modification of the Insolvency Regulation would be necessary). This European procedure could be available in principle in both cross-border insolvency cases and in domestic cases.

4.4 Option 4: Setting up a minimum harmonised legal framework in the area of restructuring and second chance for entrepreneurs and the possibility of a soft law instrument in the area of second chance for consumers

This option consists of high level principles accompanied where appropriate by targeted rules, aiming at laying down the groundwork for further convergence of national laws taking best practices as a starting point are. This option would take forward the 2014 Recommendation, setting up binding minimum standards in the areas of:

- a preventive restructuring framework for businesses in financial difficulty and
- reducing discharge periods for entrepreneurs to no more than 3 years.

In detail, the preventive restructuring and second chance frameworks outlined in the 2014 Recommendation could be reinforced by focusing on the improvement of the efficiency of specific elements:

- Early restructuring possibilities
- Moratorium
- Debtor in possession
- Plan approval by a majority of creditors
- New financing
- Court proceedings
- Discharge periods for entrepreneurs
- Discharge periods for consumers

In practice, this option could be reinforced by additional substantive law elements (sub options) listed in the table below.

Table 15: Sub options of options 4[138]

Sub-options on building blocks of the proposed framework				**Objective**
EFFECTIVE RESTRUCTURING FRAMEWORK				
Early restructuring	**Sub-option 1** The procedure must be available when a viable debtor is in financial difficulties and there is a likelihood of insolvency	**Sub-option 2** Sub-option 1 + give over-indebted but viable debtors clarity that they can enter preventive restructuring	**Sub-option 3** Sub-option 2 + Early warning tools + model restructuring plan	Adoption of early restructuring possibilities
Moratorium	**Sub-option 1** Moratorium affects individual enforcement actions and suspends formal insolvency proceedings.	**Sub-option 2** S/o 1 + suspension of application of early termination clauses for essential supplies.	**Sub-option 3** Sub-option 2 + moratorium of a short, limited duration - no longer than 4 months + possibility of lifting the stay.	Improve changes of negotiations by allowing debtor a 'breathing space'
Debtor in possession	**Sub-option 1** Debtor remains in possession, but Member States may enable courts to appoint a mediator and /or a supervisor	**Sub-option 2** Debtor remains in possession but a supervisor is always appointed		Facilitation of continuation of debtor's business while restructuring (Debtor in possession)
Plan approval by a majority of creditors	**Sub- option 1** The plan is adopted if the required	**Sub-option 2** S/o 1 + The plan can also be adopted if the required	**Sub-option 3** S/o 2 + Include shareholders	Disallow minority creditors and shareholders to jeopardise restructuring efforts

[138] The table below illustrates the European Commission's second draft impact assessment report on July 15th proposed policy options) that formed the basis of the policy options analysed in this study.

	majority in every class is in favour of the plan, provided that the minority creditors are not unfairly prejudiced; all classes of creditors can be affected by the plan, vote and be bound by it, including secured creditors	majority in at least one class of creditors is in favour of the plan, provided that dissenting classes are not unfairly prejudiced (inter-class cram-down)	as class(es) of their own	
New financing	**Sub-option 1** Exempting new financing contained in the restructuring plan as well as interim finance necessary for the operation of the business during negotiations from avoidance actions. Member States may also provide for super-priority status to new financing, ranking it at least above any unsecured	**Sub-option 2** Sub-option 1 + Non-related party transaction entered into before insolvency, but in connection with a restructuring plan adopted by creditors shall be exempted from avoidance actions (safe harbour provisions)	**Sub-option 3** Sub-option 2 + co-obligors' and guarantors' releases under the plan	Increase chances of success of the restructuring plan

	creditors.			
Court proceedings	**Sub-option 1**: A flexible framework, which allows for a more limited involvement of courts + use of modern technology for cross-border restructurings	**Sub-option 2** Sub-option 1 + raising professionalism of IPs	**Sub-option 3** Sub-option 2 + specialisation of courts	Reducing costs and length of court procedures
DISCHARGE PERIODS FOR ENTREPRENEURS				**Objective**
Discharge periods for entrepreneurs	**Sub-option 1** Discharge of debts for entrepreneurs within 1 year from start of liquidation proceedings, with limited exceptions.	**Sub-option 2** Discharge of debts for entrepreneurs within 3 years from when liquidation proceedings are open or the repayment plan starts being implemented, with limited exceptions.	**Sub-option 3** Sub-option 1 + possibility to consolidate all personal debts of the entrepreneur in one procedure, be they business or non-business in nature	Reduce incentives to relocate to friendlier jurisdictions
DISCHARGE PERIODS FOR CONSUMERS				**Objective**
Discharge periods for consumers	**Sub-option 1** Discharge of debts for consumers within 1 year from start of liquidation proceedings, with limited exceptions.		**Sub-option 2** Discharge of debts for consumers within 3 years from when liquidation proceedings are open or the repayment plan starts being implemented, with limited exceptions.	Reduce incentives to relocate to friendlier jurisdictions

5. Impact analysis: determine the costs and benefits, and impacts of the solutions identified (Task 3)

The objective of task 3 is to determine the costs, the benefits and the wider impacts of the identified solutions. This task describes and quantifies how and to what extent the policy options identified under Task 2 mitigate the estimated costs, economic loss and or reduce the barriers identified under Task 1.

These objectives correspond to steps 4 and 5 of an IA:

- Analyse impacts
- Compare the options

In detail, for each of the policy options selected, the research team has identified the related impact. Based on the Impact Assessment guidelines we have singled out those impacts that are likely to be significant; and assess them quantitatively wherever possible. Where quantification is not possible, we have assessed the impacts qualitatively.

5.1 Option 1: Maintaining the status quo (baseline scenario)

If no further action is taken, the solutions between MS laws will continue to diverge. The Commission Recommendation may still inspire some other Member States to reform their laws, but it would not achieve a level playing field in terms of restructuring opportunities. As said, the legislation of the majority of Member States is slowly converging towards an approximation of their rules, adopting new restructuring tools modelled upon the US Chapter 11 or the UK Scheme. However, deep differences still remain which lead to fragmentation.

Furthermore, in those areas which were not covered by the Recommendation (e.g. the treatment of shareholders or the provision of interim financing), there will be little guidance to Member States on what could be common best practices. The benchmarking exercise undertaken by DG FISMA may with time shed some light on what systems work well, but there are likely to be competing models offered by Member States where restructurings work reasonable well, but no clear understanding of the overarching principles. This would most likely lead to an entrenchment of a few regulatory models rather than a EU-wide convergence at the level of principles.

One of the problems emerging from the 2016 Commission working documents is that, in certain Member States, such as Romania or Greece, provisions and tools to rescue viable enterprises in financial difficulties exist but the lack of a "rescuing culture" led them to insolvency nonetheless. The same conclusion has been reached for Poland[139].

The problems linked to the existing baseline scenario such as: additional costs of assessing risk of insolvency when investing cross-border due to differences in Member States insolvency frameworks, additional costs of cross-border restructurings resulting from differences in Member States insolvency frameworks, higher costs of credit due to uncertainty; losses due to low debt recovery rate and negative socio economic impacts

139 R. Carminal-Olivares, id. P. 559.

due to job losses as a consequence, are likely to persist and exacerbate considering continuing divergence in reform efforts across Member States. The full range of cost, the losses and the impact of the baseline scenario are analysed in section 3.5.

5.1.1 Competitiveness assessment

According to the Commission's competitiveness proofing tool, competitiveness consists of three aspects:

- Cost competitiveness (i.e. the extent to which a proposal affects competitiveness by raising costs for some companies but not for others);
- Innovation competitiveness (i.e. the extent to which a proposal affects the propensity of likelihood of success of innovation among some companies but not others);
- International competitiveness (i.e. the extent to which a proposal affects the ability of European companies to compete with non-European companies).

In this chapter of the study we apply the tool to the policy options identified.

Table 16: Competitiveness impact of option 1

Aspect	Impact	Explanation
Cost	-	This option does not address the perceived additional risks associated with investing cross-border and hence will result in greater costs for companies that rely on cross-border investments. In addition, this option negatively affects investors and companies that are undergoing insolvency or restructuring due to the lack of efficiency of some national frameworks (e.g. those that do not offer informal restructuring possibilities) The above impacts on cost competitiveness are particularly acute for SMEs which do not have the resources available to relocate or to market themselves to potential cross-border investors.
Innovation	-	By failing to address the added risks associated with cross-border investment, this option reduces investment opportunities which has a disproportionate impact on new and innovative companies. With fewer sources of funding, this reduces the potential for European companies to bring innovation to market. In addition, a strict second chance regime in some countries means that entrepreneurs in these countries will be disadvantaged compared with entrepreneurs in countries with more forgiving bankruptcy laws. This leads to overall lower innovation across the EU, and accentuates differences in the innovation potential between Member States.
International	--	With higher costs and risks and lower innovation potential than in other regions of the world (e.g. US), this option does not take advantage of the potential of the Single Market and it puts European companies at a disadvantage compared with similar enterprises in competing regions

5.2 Option 2: Setting up a fully harmonised preventive procedure and second chance regime

This measure would fully harmonise at least one preventive procedure in Member States, regulating in detail the elements of the procedure. The adoption and application of this options option may fully solve the problem generated from the differences and the inefficiency of the current EU frameworks for insolvency.

Length of proceedings (domestic and cross-border) are expected to decrease under policy option 2. 4 out of 7 interviewees (3 practitioners, one public authority) expected a decrease in the length of proceedings**,** 3 of them providing a quantitative estimate of such expected decrease in the range of 3 to 25 months. In addition, 2 out of 5 survey respondents (one creditor, one practitioner) foresaw a decrease by 1 to 10% in the length of domestic proceedings, while the remaining 2 (one creditor, one public authority), did not predict any impact. One practitioner suggested the policy option would not affect length of domestic proceedings for large companies, but increase those of SMEs' by 40-70% and decrease consumers' by over 100%. In contrast, 3 out of 4 surveyed stakeholders (one creditor, one practitioner, one public authority) predicted decreases for cross-border cases of between 6-40%. With an average 10% decrease in the length of insolvency proceedings (low scenario), and assuming that proceedings costs would decrease in the same proportion (meaning that proceedings costs are exactly proportionate to the length), proceeding costs savings would amount to **€ 48.7 mln at EU level**. With an average 30% decrease in the length of insolvency proceedings (high scenario), proceeding costs savings would amount to **€ 146 mln at EU level**.

The impact on domestic recovery rates is inconclusive, but foreign recovery rates are expected to increase. Mixed answers were received regarding the impact of Option 2 on recovery rates on both domestic and foreign assets. Out of the 10 interview respondents, 4 practitioners expected an increase of 15-35% (20% on average) in the recovery rates of domestic assets and 1 of them stated that an increase would incur the earlier the restructuring starts. The other 5 respondents (one public authority and four practitioners) expected either a decrease of 10%, no impact at all, and one practitioner said it was impossible to estimate. A majority of interview respondents (3 practitioners out of 4) predicted the impact to be more important on the recovery rates of foreign assets. As explained in Section 3.3, increased recovery rates would generate a decrease in bond spread, therefore **lowering borrowing costs** and **facilitating access to credit**.

Domestic survival rates are expected to increase, while the effect on cross-border survival is unclear. 8 stakeholders expressed their opinion in interviews and 2 in the survey regarding survival rates, while only 2 estimated effects on job retained through interviews. 5 respondents, all practitioners, expected an increase by 5 to 25% of domestic firms saved as a result of the implementation of Policy Option 2**.** In the survey, one public authority estimated the impact of policy option 2 on cross-border survival rates to be null, while another public authority estimated it at a 6-10% increase.

Investments are expected to increase under policy option 2. 7 out of 8 interview respondents (one public authority and six practitioners) foresaw the impact of Policy Option 2 on the level of investments to be positive, in the range of 1 to 35% more investment. By assuming that cross-border investment would increase in those same proportions, intra-EU inward FDI stocks[140] would increase to reach at least[141] €**3,262 billion to €4,360 billion**.

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140 FDI stocks represent the stock of investment at a given point in time (in this case, end of year). In particular, Inward Direct Investment (IDI) represents the investment made by a non-resident direct investor in the host economy. Our estimates refer to the sum, for all EU Member States, of the investment made in a given EU Member State by all the other EU Member States: the total intra-EU inward FDI stocks.

Access to credit is expected to increase under policy option 2, with a majority of 5 out of 8 interviewees (all practitioners) predicting an increase of 20-45%, while the other 3 either expected a decrease by 10% (one public authority and one practitioner) or did not foresee any measurable impact (one practitioner).

Overall the assessment of the potential impact of Policy Option 2 if it could be successfully implemented is positive. Policy Option 2 was the preferred option for 5 out of the 41 respondents to the interviews carried out. Furthermore, answers from the survey rank Option 2 at an average of 2 in terms of cheapest (1) to the most expensive (5) option and at an average of 2 from the most (1) to the least (5) beneficial.

Nevertheless, 4 out of 5 respondents considered Option 2 to be difficult to implement. This is in line with the idea that this Option must be discarded as being too ambitious in light of the great diversity in Member States' legal systems and the lack of any pre-existing agreement on the basic principles underpinning restructuring frameworks.

In practice the option would best achieve all the objectives set for the current initiative, but there are serious reservations as to whether full harmonization would be attainable. Because of its very nature, insolvency law is linked with many other laws and systems such as land, employment and contract laws and the court systems of each country. This poses a significant challenge to the feasibility of this option. For example, because of the widely differing structures and roles that the courts play in insolvency proceedings, it will not be possible to harmonize the court's supervision of office holders.

Table 17: Summary of the impact of policy option 2

Cost of proceedings	Decrease as a result of shorter proceedings
Average length of proceedings	Decrease, especially for cross-border cases
Recovery rates of assets	Higher impact on the recovery of foreign assets than domestic assets
Firms saved	Positive impact
Investments	Positive impact
Access to credit	Mixed evidence
Ranking (average): **Cheapest (1) to most (5) expensive** **Most (1) to least (5) beneficial**	 2 3

141 These figures do not represent the total intra-EU inward FDI, but the intra-EU inward FDI for 17 OECD countries also members of the EU for which data was available. The calculation is therefore missing 11 EU Member States. However, the 17 countries used for these calculations account for a very large share of the intra-EU FDI, so that these figures are only slightly under-estimating the impacts on total intra-EU FDI.

5.2.1 Competitiveness assessment

Following the same template as for Option 1, the table below shows the competitiveness impacts of Option 2.

Table 18: Competitiveness impact of option 2

Aspect	Impact	Explanation
Cost	Mixed	Overall, this option would lead to a reduction in proceedings costs. However, while the option comprehensively addresses the shortcomings of the status quo, it does so at a significant cost for companies that are now located in favourable jurisdictions (indeed, if the proposals end up being a compromise between Member States, this might lead to an inferior outcome for companies in the most favourable jurisdictions today). In addition, any benefits (including overall proceedings cost savings) would only materialise in the long term, since this option would likely take a long time to agree and be implemented.
Innovation	Mixed	At present insolvency and restructuring regimes across Europe differ significantly. Any EU wide harmonised would likely be a compromise between Member states and as a result it might be perceived as a step back for some Member States and a step forward for others. From a competitiveness perspective this would mean that companies in some countries would likely see a negative impact on their innovation competitiveness with the opposite being the case in other countries.
International	++	From an international point of view, this option would lead to a single framework across all of the Single Market which would be able to compete in terms of efficiency and effectiveness with the frameworks in other parts of the world. The main drawback of this option is that it would be difficult to implement in practice and it would take a long time, which would mean that any benefits would only accrue to companies in take longer term with the status quo (option 1) remaining in force until such time.

5.3 Option 3: Introducing an alternative, optional EU restructuring and insolvency regime

The 29th restructuring and insolvency regime represents a European solution which could be chosen by the initiating party, such as the debtor or creditor with the debtor's agreement. The 29th regime would be established together with national procedures and thus, leave the national laws intact. Moreover, the jurisdiction would be recognised by

the Insolvency Regulation based on the COMI principle. However, the law applicable to the proceedings would be the European procedure and not of the COMI state.

While the European procedure could supposedly be accessible in both cross-border and domestic cases, this option seems particularly suitable for companies that operate in cross border situations.

As for Policy Option 2, there are very few and diverging opinions provided by consulted stakeholders with regard to the impact of Policy Option 3 on **proceeding costs**. 3 out of 9 respondents expected proceeding costs to be reduced by 10-30% if Option 3 were to be implemented, resulting in an estimated **€ 48.7 mln to € 146 mln in proceeding cost savings**. On the other hand, 3 respondents suggested that proceeding costs may rise by 10-100%, while 3 respondents could not quantify the change.

14 stakeholders commented on the impact of Option 3 on the lengths of proceedings: 9 through interviews and 5 through the online survey. In the interviews, 4 out of 9 stakeholders foresaw a **decrease in the lengths of proceedings**, 2 provided a quantitative estimate of such expected decrease in the range of 3 to 5 months. 3 out of 9 interviewed stakeholders foresaw an **increase** in the length of proceedings, ranging between 10 and 24 months. In addition, 2 out of 4 respondents to the survey predicted a decrease in the average length of proceedings by 1 to 5% for domestic cases, while 1 stakeholder expected no impact at all and 1 an increase for large companies, SMEs, consumers and individual entrepreneurs. In contrast, 3 out of the 4 respondents foresaw a decrease in the length of proceedings for cross-border cases by 10 to 40%, with 1 practitioner even predicting a decrease by 40-70% for large companies.

Mixed answers were once again received regarding the impact of option 3 on **recovery rates** for both domestic and foreign assets. Out of the 9 respondents, 3 foresaw a decrease in the recovery rates of domestic assets, while 3 expected an increase between 6 and 30% and another 3 did not predict any impact. However, as in Option 2, a majority of respondents expected the **impact to be more important on the recovery rates of foreign assets.** Hence, Option 3 is also expected to indirectly generate **lower borrowing costs and easier access to credit.**

As in Option 2, the response rate was particularly low regarding the impact of Option 3 on the survival rate and the percentage of jobs retained, with only 2 stakeholders expressing their opinion. Concerning the percentage of firms saved after an insolvency procedure, 4 out of the 5 respondents foresaw an **increase by 10-25% in the number of firms saved** as a result of option 3. Besides, 4 out of 5 respondents also foresaw an **increase by 1 to 30% in the level of investment** if Option 3 were to be implemented. Using the same methodology as for Option 2, this would result in an increase in cross-border investment reaching at least[142] €**3,262 billion to €4,200 billion** for intra-EU inward FDI stocks. In addition, 3 out of 5 respondents expected an **increase by 10 to 45% in access to credit.**

[142] The calculation is not based of the total intra-EU FDI, but on the intra-FDI for 18 OECD countries also members of the EU. The calculation is missing 10 EU member states, however, the 18 countries included make up for the highest share of the intra-EU FDI stock.

Policy Option 3 was the preferred option for 4 out of the 31 respondents to the interviews carried out. Answers from the survey rank Option 3 at an average of 4 in terms of cheapest (1) to most expensive (5) and at an average of 3 in terms of most (1) to the least (5) beneficial. Overall, 4 out of 6 stakeholders referred to Option 3 as feasible but difficult to implement, whereas 2 respondents considered this Option to be impossible to implement. This means that even though one more respondent expressed a preference for Option 3 in comparison to Option 2, it received slightly inferior scores in the rankings and for the perceived feasibility of its implementation. **Indeed, it is likely that a number of Member States would be reluctant to accept Option 3 in particular in the case of purely domestic procedures** (as experienced with other European civil procedures[143]). Or the same reason, a 29th regime for discharge procedures is not likely to be a realistic option.

Table 19: Summary of the impact of Policy Option 3

Cost of proceedings	Mixed evidence
Average length of proceedings	Mixed evidence
Recovery rates of assets	Higher impact on the recovery of foreign assets than domestic assets
Firms saved	Positive impact
Investments	Positive impact
Access to credit	Positive impact
Feasibility of implementation	Feasible but difficult
Ranking (average): **Cheapest (1) to most (5) expensive** **Most (1) to least (5) beneficial**	 4 3

5.3.1 Competitiveness assessment

Following the same template as for Option 1 and 2, the table below shows the competitiveness impacts of Option 3.

Table 20: Competitiveness impact of option 3

Aspect	Impact	Explanation
Cost	-	Unlike option 2, this option would not lead to a material reduction in costs of proceedings for companies. In addition, while it addresses the shortcomings of the status quo, the option does not provide regulatory certainty to investors or companies regarding which regime applies in case of restructuring.
Innovation	+	This option leaves both national and an EU regime in place thus reducing the negative impact on innovation competitiveness on countries with a favourable jurisdiction. At the same time, it is not clear how often such a 29th

143 See for example the European Account Preservation Order, the European Small Claims Procedure, the European Enforcement Order.

Aspect	Impact	Explanation
		regime would be used in practice, which could limit its effectiveness. In addition, the system would likely take a long time to implement and its existence might lead to regulatory uncertainty for entrepreneurs and investors in countries with favourable jurisdictions because – at the time of the investment - it would not be clear which regime would apply in case of difficulties.
International	+	From an international point of view, this option would give investor and companies access to a single framework across all of the Single Market which would be able to compete in terms of efficiency and effectiveness with the frameworks in other parts of the world. The main drawback of a 29th regime is that it would not be clear at the time of the investment which restructuring regime would apply (the 29th regime or one of the national regimes). In addition, the creation and implementation of such a regime would take a long time, which in turn would mean that any benefits would only accrue to companies in the longer term.

5.4 Option 4: Setting up a minimum harmonised legal framework in the area of restructuring and second chance for entrepreneurs and the possibility of a soft law instrument in the area of second chance for consumers.

As indicated in the findings of the legal analysis, not all the Member States provide for early restructuring measures outside the formal insolvency proceedings as autonomous legal proceedings. Private arrangements and fully out of court procedures with no supervision from the court are always possible but they do not bring the effects required by the 2014 Recommendation, in particular the moratorium and the possibility to bind dissenting creditors. The Belgian amicable settlement and the French mandataire ad hoc do not have moratorium effects and they do not bind dissenting creditors. In order to obtain a moratorium, the debtor has to file the application for amicable settlement before the court and the court must accept it. Similarly, the UK CVA, in order to bind secured and unsecured creditors and benefit from moratorium, must be combined with other tools (CSA and administration).
In order to provide harmonisation without being too disruptive to the existing legislative system, the directive should take into consideration existing national options as well as a framework that is compatible with all legal systems. However, in order to accommodate all the legislative framework, the minimum harmonisation would introduce few changes since the majority of Member States would retain the current procedures with few amendments and therefore the impact would not be significant.

The sections below discuss, from a legal perspective, the impact of the different sub-options of Option 4 before section 5.4.9 proceeds with an overall assessment of the option.

5.4.1 Early restructuring

One of the most complex issues is to determine the moment when the situation of distress may bring the business close to insolvency. Restructuring is often delayed by difficulties in valuing transactions because of economic instability and unreliable corporate data.144 Difficulties of determining at the very outset whether the debtor should be liquidated rather than reorganized have led certain Member States, such as **Austria**, **Germany**, **Romania**, to introduce "unitary" proceedings. Under the "unitary" approach, there is an initial period, usually referred to as an "observation period" during which no presumption is made as to whether the business will be eventually reorganized or liquidated.

In case of a minimum harmonisation tool, the Member States would be allowed to retain the current tests, which would not provide clarification. On the other side, a maximum harmonisation directive opting for a single test would be difficult to implement, and some corrections should be allowed.

In order to define the commencement of the procedure, the use of a single test, in particular the balance sheet test, may be too difficult since it relies on information under the control of the debtor. A practical limitation of the balance sheet test is that it is rarely possible for other parties to ascertain the true state of the debtor's financial affairs and reviews of the documents may be time consuming. The cessation of payments and the deterioration of the financial condition of the business in a way that is not temporary, provide more flexible tools. This requires that the debtor has generally ceased making payments and will not have sufficient cash flow to service its existing obligations as they fall due in the ordinary course of business. Indicators of a debtor's general cessation of payments may include its failure to pay rent, taxes, salaries, employee benefits, trade accounts payable and other essential business costs. As such, this test puts the defining factors within the reach of creditors.

The cessation of payment test may be combined with the prospective illiquidity where the debtor will be unable to meet its future obligations as they fall due. Certain factual circumstances should also be taken into consideration, such as that the debtor has a long-term obligation to make a bond payment that it knows it will not be able to make or that it is the defendant in a mass tort claim that it knows it cannot successfully defend and where it will be unable to pay the associated damages[145]

Article 27 of Directive 2014/59/EU, in defining the elements that trigger early intervention measures, includes various elements including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures.

As a general remark, the element triggering the early restructuring should be within the reach of the creditors. The cessation of payments may be the test which best responds

144 http://www.imf.org/External/Pubs/FT/issues/issues31/

145 UNCITRAL, Legislative Guide on Insolvency Law, 2004, p.

to this need. In order to not render the test too rigid, the liquidity test should also be taken into consideration.

In order to avoid reckless actions from creditors, the cessation of payment test may be combined with the possibility for the debtor to rebut the presumption of insolvency proving that the inability to pay is temporary or that the credit in question was subject to a dispute.

The opening of an early restructuring could be combined with the option that, in case the creditors file for the application of the measure, an observation period will be granted by the court or by the administrative authority in charge of the supervision of the restructuring procedure, in order to give the debtor, the opportunity to submit justifications and evidence that the situation is only temporary.

Description	**Sub-option 1** Restructuring framework available when viable debtor is facing a 'likelihood' of insolvency.	**Sub-option 2** S/o 1 + over-indebted but viable debtors must have a clear possibility to enter preventive restructuring	**Sub-option 3** S/o 2 + early warning tools (advice and/or alert systems) + model restructuring plan

Sub-option 1 provides a restructuring framework available when the debtor is facing the "likelihood of insolvency". The "likelihood" implies that there must be a rational basis for the conclusion that the company may not be able to pay its debt within a certain period (such as within the next six months). As clarified by Deloitte *"This conclusion amounts to an educated prediction, based on the current financial position of the company, and considering all relevant factors that may impact the company's liquidity in the foreseeable future"*[146]. The likelihood of insolvency contains an element of prediction but also a large flexibility (in both directions) and the possibility that the debtor is close to insolvency is one of the triggers for creditors to force negotiation or enforce their actions. This leaves all the national "tests" available to creditors and debtors to start a restructuring plan. The liquidity test, in general, is the one largely applicable.

Sub-option 2 includes sub-option 1 plus the access to restructuring plans in case of over-indebtedness of the debtor. There is no a standard definition of over-indebtedness used in the EU and, accordingly, no set of standardised, and harmonised, statistics on it. With regard to the firm, it is closer to the balance sheet test and refers to highly leveraged companies, which are borrowing large amounts of funds (both in terms of banks funds and debt placement) in order to continue their activity. In general, a company is over-indebted whenever the company's total liabilities exceed its total assets. Sub-option 2 is very flexible because it covers all the possible tests and allows the entrance in the preventive restructuring under various situations.

Sub-option 3 covers all the previous approaches and adds the possibility to anticipate somehow the restructuring, using primarily private workouts, through early warning

[146] The Companies Act When is a company financially distressed, and what does it mean?

systems. Early warning requires some proactive attitude from the debtor who must start to seek advice at the first signs of difficulties. The early warning/advice system should combine both an internal monitoring as well as some third party (independent) advice in order to prepare the restructuring.

Survey results show that sub-option 3 would **decrease procedural costs especially for SMEs** and individual entrepreneurs in domestic but in particular in cross-border cases. In addition, respondents indicated that **recovery rates and survival rates will increase** with more preventive measures, in particular in cross-border cases, though percentages vary. Overall, sub-option 3 proved to increase effectiveness the most in the survey.

Three Italian stakeholders also agree with sub-option 3 as being the best, with one stating that the use of the early warning tool and the model restructuring plan should not be mandatory. Sub-option 3 may avoid the application of a too stringent test, such as the liquidity test, which in various Member States triggers the filing for insolvency. The only issue may concern the use of "alert systems/early warning" and seeking for advice, which requires a sort of proactive approach from the debtor.

In interviews, stakeholders particularly emphasised the **practicality of implementing sub-option 3** – Luxembourg and Switzerland are already working towards implementing it. However, a Dutch practitioner indicated that early restructuring tools under sub-option 3 appear to be too bureaucratic and might not work in practice, opting instead for sub-option 2.

In Member States where there is not a "restructuring culture", this may be perceived as giving a negative signal to creditors, especially secured ones, which could rush before the court and seek to enforce their security before the restructuring plans triggers the moratorium and the stay of the enforcement actions. However, an important work should be done by the debtor itself. Internal monitoring systems, assessment process and the use of systems to better monitor and anticipate financial risk in their supply/producing chains.

One German practitioner fully agreed that early restructuring is important, suggesting it should be included as a minimum standard and that such preventive measures can save substantial proceedings costs in the case of large firms. A Spanish creditor also agreed with sub-option 3 as being the best, while a Swedish public authority stated that, in the case of consumers, faster procedures would reduce their social costs and the stigma associated with personal insolvencies, thus encouraging them more to restructure.

Conclusion: **Sub-option 3 seems to be preferable because the costs may be lowered and it may bring more legal certainty. Interviewees noted that the earlier firms can trigger the procedure, the better.** Even though some interviewees stated that all sub-options would lower procedure costs and increase firm survival rates, sub-option 3 is more flexible since it provides a larger number of tools and it might cover all the situations defined by the different national legislative framework where the debtor is in financial difficulties but it can still be restructured with a restructuring plan.

5.4.2 Moratorium

Moratorium/Stay of enforcement proceedings is essential to negotiate and implement the reorganisation. The legal analysis in various Member States shows that a moratorium is not provided for out-of-court procedures, since private workouts are merely contractual agreements between the parties. Moratorium would be granted under a court supervised procedure at the filing of the application to negotiate and for a period following the implementation of the plan to allow for orderly restructuring.

Under both minimum and maximum harmonisation, the moratorium during the implementation of the plan should grant secured creditors the option to ask for a lifting of the stay under certain specific circumstances.

The introduction of a moratorium using a hybrid procedure would not be an issue in either a maximum or minimum harmonisation directive, since under court supervised procedures, the moratorium is a tool provided by all the Member States. In case of maximum harmonisation, the directive should also indicate under which conditions the secured creditors may ask for a lifting of the stay.

Description	**Sub-option 1:** Moratorium which suspends individual enforcement actions and the duty to file for formal insolvency proceedings.	**Sub-option 2:** S/o 1 + suspends right of essential suppliers to avail themselves of early termination clauses.	**Sub-option 3:** S/o 2 + moratorium of a short, limited duration - no longer than 4 months and giving creditors right to ask for lifting the stay.

Sub-option 1 provides for the moratorium of enforcement actions upon the filing for formal insolvency proceedings. The filing of the formal insolvency proceedings grants the court supervisions and it triggers the period for the restructuring plan. This sub-option is already present across Member States where the filing for insolvency suspends in any case the enforcement actions.

Sub-option 2 includes the stay of the commercial creditors, in order to avoid the automatic termination and automatic set-off, and ensure the continuity of the business.

Sub-option 3 covers all the previous options, but the moratorium would provide the fixed short duration of the moratorium. Under this option, certain secured creditors may obtain by the court the lifting of the stay and proceed with the enforcement action. This would grant a better protection to certain secured creditors, (such as those secured by a pledge over one of the debtor's assets who may, under certain conditions, be granted full ownership of the said asset in payment of its debt in the event of liquidation proceedings; or creditors who retains segregate assets).

In terms of reducing risk assessment costs for investors, more harmonisation would lead to more streamlined risk assessments, and thus more investment. Of the three sub-options, sub-option 3 essentially harmonises all elements of the moratorium. A shorter period of stay can also contribute to making a procedure more effective, giving further incentives to finalise negotiations in less time. Depending on the complexity of the case, however, Member State should have the option of extending the length of stay. A lengthy stay might raise the chances of the debtor being able to repay its creditors, but it can also be misused. An option to lift the moratorium on creditors' request would mitigate the risk of it being misused, thus balancing creditors' property rights with society's interest in saving viable businesses.

Conclusion: Sub-option 3 is preferable because it tries to accommodate the interests of all the parties involved and it does not have adverse effects on the

availability and cost of credit. A short moratorium with the possibility to lift the stay is more consistent with the majority of the provisions for insolvency proceedings across the EU and would fit into the legal system better. A four-month length of moratorium provide a reasonable time to prepare a restructuring plan, especially if the debtor and the creditors have started negotiations before the filing and they are proposing a pre-packaged plan. German and Luxembourgish practitioners interviewed suggested moratoriums should be as short as possible (under four months with extension), to allow **decisions to go faster and thus increase survival rates.** A Spanish creditor also agrees, suggesting that such an option would be good for creditors. The three Italian stakeholders interviewed opt for an automatic general moratorium on recovery actions and formal proceedings.
The court supervision, triggered by the formal insolvency filing, would ensure that also in case of pre-packaged restructuring plan, the rights of all the creditors are taken into account. **These economic benefits may outnumber the negative impacts of the changes required to the Member States.** Indeed, a Norwegian practitioner agrees that sub-option 3 is the best, after taking into account all costs and benefits. A Luxembourgish practitioner suggested that sub-option 3 is preferable if a supervisor is in place to assess whether the recovery is possible.

5.4.3 Debtor in possession

This provision ensures the continuity of the business once the reorganization (and, to a lesser extent, liquidation, where the business is to be sold as a going concern) is triggered. It has to be said that the debtor in possession is one of the most conflicting issue in restructuring. The majority of the examined Member States provides for the debtor in possession under restructuring plans with the appointment of a trustee or supervisor who reports to the court, such as the German protective shield.

However, in the recent Abengoa restructuring plan, the creditors' agreement was found only after the old board of directors and the company's property accepted to step down from management and to dilute the ownership in favour of the creditors. Whereas the debtor in possession could ensure the continuity of the business and reduce the transition costs to appoint a new administrator, on the other side, creditors may be reluctant to agree to restructuring when the same management remains in place.

Description	**Sub-option 1** Courts may appoint, on request by the debtor, the creditors or any interested party (e.g. a regulator) a mediator and /or a supervisor.	**Sub-option 2** Debtor remains in possession but a mediator and/or a supervisor is always appointed

Sub-option 1 provides for a solution already in place in the majority of the Member States, where the courts appoint a third independent subject in charge of monitoring the implementation of the restructuring plan. This tool provides for the flexibility to ask for a supervisor but it is a case-by case decision. This sub-option fits better with the pre-arranged (without voting before the filing) and the pre-packaged reorganisation plans (where the vote took place before the filing), whereas the debtor and creditors agrees on the restructuring plan before the filing to the court.

Sub-option 2 provides for the debtor in possession always under the supervision of a subject appointed by the court. This is a solution which could provide more security to creditors but also involves certain transitional costs that must be incurred by the appointed practitioner (thus by the estate and the creditors) in order to become familiar with the debtor's business, culture and industry. These transitional costs are compounded by the fact that a trustee will hire new professional to assist him in the restructuring.

Stakeholders interviewed from Germany, the Netherlands, Switzerland, Luxembourg, Italy, Spain and Sweden were of the opinion that a supervisor should be present, as this would **ensure higher recovery and survival rates**. One stakeholder noted that without a supervisor, recovery rates would drop dramatically. Some stakeholders (i.e. public authority in France, practitioner in Germany) state that rules need to be flexible as to allow Member States the space needed to adapt them to their local standards. A Luxembourgish practitioner stated that if a supervisor is imposed, short-term costs will be higher since people will not be immediately familiar with the new law, and certain procedures have to be set in place. However, according to them, sub-option 2 will reduce costs by reducing the length of procedures in the long term.

Risk assessment costs decrease if a professional is appointed to mediate or supervise, but this may be more difficult in cross-border cases, as different jurisdictions appoint different mediators/supervisors. Nevertheless, the presence of a supervisor, as advocated by interviewees, can increase confidence in the procedure and might help increase the recovery rate for creditors. Even though procedural costs increase if a mediator/supervisor is in place, the benefits can outweigh the costs in the long term, as described by one interviewee.

Conclusion: Sub-option 1 is preferable as allows for a reduction of the costs of procedures. The benefit of this sub option a more visible for small company and it provides a safety net for debtors in need of assistance and for allegedly abuse of the procedure.

5.4.4 Plan approval by a majority of creditors

The possibility to impose the reorganisation plan on dissenting creditors is one of the most complex issues across Member States. All the Member States, under the different procedures, both hybrid and judicial, provide for the possibility to impose a restructuring plan on dissenting creditors when the required majorities are reached and the court has approved the plan.

Two elements are required in order to impose a dissenting plan:

- The approval of all the creditors according to certain pre-defined voting procedures;
- The court confirmation of the approved plan.

However, there is a big distinction between how the creditors and claim holders are called to approve the plan and which majority should be reached for approval. The majority of Member States require a plan to be approved by the majority of creditors of a class where the majority is based upon a percentage or a proportion of value of claims

or a number of creditors or both. These majority rules, although complex, protect the collective interest, thus avoiding that a few creditors with large claims impose the plan upon the others or, conversely, prevent the restructuring.

A large bulk of litigation under the common law systems relates to the constitution of the relevant classes. In other Member States, the dissenting creditors may obtain the rejection of the plan by the court when it imposes an excessive burden upon the dissenting creditors. However, the definition of "excessive burden" and "disproportionate sacrifice" requires interpretation from the courts and may lead to divergent interpretation.

The rights of shareholders should also be taken into consideration, in particular if case a reorganisation plan includes a debt to equity swap, where they should be entitled to vote on the plan.

Maximum harmonisation should include a division in classes or rules to allocate claims, as well as the quorum to be reached in each class entitled to vote. The minimum harmonisation tool would allow Member States to retain the current voting procedures with certain amendments. A maximum harmonisation approach could also include rules for classes' distribution and voting thresholds, with a few possible corrections, to avoid more stringent rules which may render approval of the plan difficult or low thresholds which would allow a minority to block the plan.

Any EU maximum harmonisation of the classes or of voting rights would have an effect on the new security taken over movable or immovable properties after implementation of the EU Directive and on every contractual arrangement concerning company financing. Whereas the new security would not grant to the creditor any preferred status, or the secured creditor may be forced to stay in a plan, different inter-creditor arrangements would be adopted. These would include, for example, protection of the senior secured creditors in a reorganisation plan as well as new form of subordination that would be compatible with the recovery under a EU reorganisation plan. Any major impact of the maximum harmonisation rules on the creditors would be reflected in the price of the credit. Companies would not be able to raise capital at the same price than before the new Directive. Instead, in case of minimum harmonisation, the Member States would be able to retain the current procedures.

The possibility provided in some Member States that the creditors receive under the plan at least the "*value that they would receive in the absence of such plan*" would remove the risk of the litigation for disproportionate sacrifice or excessive burden. Moreover, there should be the possibility to have limited rescue plans involving only specific creditors, as indicated in the 2014 Study.[147]

Any option would need to be implemented by the Member States and to be coherent with existing legislation. However, recent national reforms seem to take the direction that the survival of viable business should have priority over creditors' rights and burden sharing is necessary to avoid the costlier option of liquidation, with consequent loss of employment, erosion of the tax base and other social security costs.

Description	**Sub-option 1** The plan is adopted if the required majority in every class is in	**Sub- option 2** S/o 1 + MS may also provide that the plan can be adopted if the	**Sub-option 3** S/o 2 + principle that shareholders should not be able to block

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

	favour of the plan, provided that the minority creditors are not unfairly prejudiced; all classes of creditors can be affected by the plan, vote and be bound by it, including secured creditors	required majority in at least one class of creditors is in favour of the plan, provided that dissenting classes are not unfairly prejudiced (inter-class cram-down)	the plan if their interests are protected (e.g. by including shareholders as class(es) of their own)

Sub-option 1 requires the definition of the classes where the creditors must be allocated: the EU instrument should find a minimum common denominator across the EU or at least to indicate the applicable rules for the determination of the classes. The rules should be flexible in order to accommodate the different national provisions and possible contractual arrangements for the taken security. As clarified by the University of Leeds Study, various Member States do not provide for classes of creditors for the purposes of voting in relation to bankruptcy/liquidation proceedings. All creditors vote together. The EU instrument should define the main classes (preferential, secured, unsecured and subordinated) leaving the possibility to adjust them, in consideration of their or the homogeneity of their economic interests (for example, including the new Spanish definition of holder of financial debts). This sub-option would better guarantee al the creditors, but it could create deadlock situations where one or more of the classes would dissent and could not be compromised. Some consideration on the voting rules should be indicated.

Sub option 2 allows the Member States to retain the possibility to approve the plan with the approval of only one class and the inter-class cram down, provided that the dissenting creditors are not unfairly prejudiced. This solution would lower the threshold for the approval but increases litigation, since the courts use different test in order to define the "unfairly prejudice". Some indications of the test that should be applied could be included in the proposal.

Sub-option 3 builds on sub-option 2 and aims at further preventing the shareholders from blocking the plan if their financial interests are protected. This would remove the possibility that the shareholders are effectively expropriated. In general, shareholders should be called to vote in a debt for equity swap, but they should not be allowed to block the restructuring when they are "out of money". Hence, the number of adopted restructuring plans and therefore saved businesses is expected to be higher under such provisions. In addition, the employees' rights to information and consultation would be safeguarded.

Stakeholders interviewed argued for different sub-options. A practitioner from Germany, a public authority in Switzerland and an industry association in Italy favour sub-option 4.2, while a practitioner from the Italy, an industry association in Italy and a creditor in Spain favour sub-option 4.1. However, a practitioner from the Netherlands stated that sub-option 4.1 does not work in practice. Nevertheless, a Danish creditor suggested that creditors with collateral should have their rights secured, and that accepting

restructuring plans on the basis of a majority in only a single class of creditors would be detrimental. In the survey, a French practitioner favoured sub-option 4.3.

As it is the case with the length of stay (moratorium), investors tend to assess risks faster if procedures are harmonised, in this case concerning the adoption of the plan. Certain sub-options allow for a quick adoption of the plan (i.e. sub-option 2), while others insert certain safeguards for shareholders (i.e. sub-options 1 and 3). Safeguards could also lower creditors' risk, as it allows them to better protect their position, even though procedures can be lengthier. Procedures can be more effective the more they allow the creditors with the largest claims to approve the plan. This would prevent the plan's adoption to be blocked or obstructed by creditors with a limited involvement in the assets. A thorough assessment, however, must be made with regards to shareholders' rights.

Conclusion: The results of the interviews and online consultation are mixed, though stakeholders acknowledged the importance of 'preventing minority creditors from halting a debt-settlement agreement or debt cancellation process'.

5.4.5 New financing

To ensure continuity of the business once the reorganization (and, to a lesser extent, liquidation, where the business is to be sold as a going concern) is triggered, special provisions should be dedicated to new financing.[148]

Description	**Sub-option 1**	**Sub-option 2**	**Sub-option 3**
	Exempting new financing contained in the restructuring plan from avoidance actions. Member States may also provide for super-priority status to new financing, ranking it at least above unsecured creditors.	S/o 1 + Non-related party transaction entered into before insolvency, but in connection with a restructuring plan adopted by creditors shall be exempted from avoidance actions (safe harbour provisions)	S/o 2 **+** limited co-obligors' and guarantors' releases under the plan

Sub-option 1 would include the non-applicability of avoidance actions to the new finance obtained for restructuring, and the possible super priority of the new financing. "Super-priority" status over the claims of other creditors, meaning that the lender will likely have first claim to the assets of the insolvent company in the event that the restructuring is unsuccessful and the company is forced into liquidation. Super priority is also recommended in order to facilitate the achievement of the rescue objectives of the debtor company by ensuring that there are funds to meet the essential day to day monetary needs of the debtor company. However, the new financing is usually accompanied by high collateralisation. In the Abengoa restructuring, the new financing

[148] A combination of points (*i*) and (*ii*) is still present in several jurisdictions as well.

was accompanied by a debt for equity swap in favour of the new creditors which would receive a control over the 50% of the company.

Sub-option 2 extends the protection not only to new financing but also to the non-related party transaction entered into before insolvency, but in connection with a restructuring plan adopted by creditors. In addition, cross-border insolvency proceedings could be less costly thanks to increased harmonisation of protection provisions. Finally, this sub-option could also encourage more creditors to continue providing credit to the debtor during restructuring negotiations, enabling the debtor to pursue his/her business.

Sub-option 3 would also include the limited co-obligors' and guarantors' releases under the plan. This may be useful to strengthen the chances of restructuring of a business in difficulty, however, it may affect property rights since the creditors may not be able to enforce the security or collateral. In the La Seda case, the restructuring was made very difficult by the need to obtain the waiver from the lenders under the senior facility agreement (SFA) and Payment in Kind (PIK) loans.

Risk assessment, as indicated previously, becomes easier the more elements are harmonized. All sub-options propose the harmonization of certain elements, but sub-option 3 limits certain releases under the plan, whose impact might be difficult for creditors to assess. In addition, faster procedures might be triggered by an increase in new financing, as this would speed up the debtor's recovery. The most efficient, in this respect, appears to be sub-option 3, as it would incentivize entrepreneurs to file early for restructuring so as to benefit from the provisions of the plan.

Interviewees were split on this matter. Three of them from Switzerland, Italy and Spain favoured sub-option 1, while an industry association in Luxembourg suggested that sub-option 2 might bring cheaper and faster court procedures. Two Italian stakeholders opted, instead, for sub-option 3, while many others could not state their opinion on the matter.

Conclusion: Sub-option 3 incentivises restructuring and increases the chance for the plan to be successful. Moreover, this sub option does not affect the rights of existing creditors. At the same time, this option may lead to a rise in the cost of credit.

5.4.6 Court proceedings

Courts should only be involved when acts are intended to have legal effects on parties or to prevent abuses. In this way costs can be reduced, as well as the length of the proceedings.

Description	**Sub-option 1:** A flexible framework, which allows for a more limited involvement of courts, for example where	**Sub-option 2:** Sub-option 1 + training to practitioners	**Sub-option 3** Sub-option 2 + training to courts

	third parties may be affected such as when a moratorium is requested or a plan needs to be confirmed by a court in order to bind dissenting creditors + use of modern technology such as electronic voting		

Sub-option 1 would leave open to the Member States the possibility to apply to the court for confirmation, in order to bind dissenting creditors. In general, all the Member States provide for a court evaluation that under a plan approval, the creditors who have the right compromised are not treated "unfairly". The test varies a lot across the Member States. It also provides for the use of modern technologies such as electronic votes, which may reduce costs in case of cross-border creditors. It should also include the possibility to file electronic petition before the court with the provisions of electronic court files. Consulted practitioners indicated that communication costs could amount to up to 30% of the total proceeding costs in the case of very complex insolvency cases. Therefore, using IT systems more widely would increase the effectiveness of the proceeding, generating time savings and therefore costs savings.

Sub-option 2 also include training to insolvency practitioners. This option would ensure more judicial and legal efficiency, uniformity and better case management, including faster decisions.

Sub-option 3 further includes training to make courts more specialised. This would in particular reduce forum shopping. However, this may also lead to judicial isolation and some "legal capture". The creation of specialised insolvency practitioner would be less complicated but both the options, courts and practitioners should be accompanied by clear rules on the costs of the procedure and uses of tools that would reduce them.

Interviewees largely agree that sub-option 3 would be the best suited to reduce costs and make procedures more efficient. A practitioner in Germany noted that small, local and general courts are responsible for dealing with local insolvency procedures. Oftentimes, these courts do not have the appropriate experience or training to handle such cases, especially if the firms involved are large. They suggest limited court involvement and a specialisation of judges.

Limited court involvement is favoured by all interviewees, especially by creditors, who believe this would increase the flexibility of insolvency procedures and improve recovery rates. The same opinion is shared by a Swiss public authority, who believes, like the German practitioner, that trainings for practitioners would be difficult to implement and would not bring value added. Two Italian stakeholders are also in favour of professionalising courts, while one Spanish creditor believes trainings should firstly be provided to practitioners. Finally, an Italian industry association favours the use of IT

skills in cross border situations, an opinion also shared by a Czech practitioner, who advocates for the simplification of the process of registering claims in cross-border cases.

In addition, making general information and statistics on court proceedings available to the public could further increase the willingness of creditors to invest in domestic and in particular cross-border businesses, since risks and costs related to insolvency proceedings would be better understood and assessed. Although the release of information on the process and outcomes of insolvency proceedings at European level was not specifically discussed during the consultation process, it is likely to reduce proceeding costs and foster investment, as it would allow all stakeholders involved in the proceeding to make better-informed decisions.

Conclusion: Sub-option 3 is the preferred option by interviewed stakeholders, since it balances both the need to reduce costs in order to make the procedure more affordable, and at the same time the need to safeguard the procedural right of the parties by keeping a limited involvement of the courts.

5.4.7 Discharge periods for entrepreneurs

Discharge for entrepreneurs is not provided by all Member States. In the majority, upon certain conditions, sole entrepreneurs may have a right to discharge under the conditions of discharge for individual persons. The benefit of discharge is that it allows the honest entrepreneurs to have a second chance once if he has complied with a series of requirements. Member States that provide for discharge include a requirement to comply with a plan or some action which proves the willingness to repay, at least in part, the creditors. It must also be noted that certain Member States exclude certain debts from discharge but also provide that, once the debtor has returned solvent, they may be asked to repay part of their past debts. Moreover, under certain jurisdictions, the discharge will remain in the credit history of the bankrupt person, which will increase the cost of new borrowing.
Minimum harmonisation will allow Member States to introduce more stringent requirements for discharge. This would allow the mechanism to be better aligned with national rules and the objectives of national legislation (more creditor-friendly or more debtor-friendly) but it would not prevent forum shopping, i.e. the possibility to move residence or place of business to jurisdictions which provide better treatment of debtors.

Description	**Sub-option 1**	**Sub-option 2**	**Sub-option 3**
	Discharge of debts for entrepreneurs with no assets and no income and low levels of debt within 1 year from start of liquidation proceedings, with limited exceptions (e.g.	Discharge of debts for entrepreneurs within 3 years from when liquidation proceedings are open or the repayment plan starts being implemented, with limited exceptions	Sub-option 1 + possibility to consolidate all personal debts of the entrepreneur - be they business or non-business in nature - in one procedure.

	fraud, bad faith, gross negligence).	(e.g. fraud, bad faith, but also homestead exemption).	

Sub-option 1 would allow the discharge of the entrepreneurs in case of no assets and no income. In case of no assets, and low debt the proposed option would require 1 year. The second option provides that the discharge is subordinate to a repayment plan. Finally, sub-option 3 provides the possibility to consolidate business and personal debt in one procedure. This option would be more flexible in the sense that the majority of the Member States provides for discharge only for individuals or for individual companies, where there is not separation between the legal entity and the ownership. In this way, personal debt signed for the business purpose by the individual entrepreneur would benefit of discharge. In order to give equal protection to the creditors, the discharge should not be automatic but should be requested and granted by the court with the possibility for the creditors to challenge it.

With regards to discharge, some interviewees from Germany and Switzerland prefer sub-option 2, which is close to the German system, as they believe that one year may not be enough for liquidation, but that a timeframe has to be set. Setting a timeframe by law would also be helpful in Luxembourg, where practitioners stated that a EU initiative would create incentives for the national level to make its insolvency framework more efficient. However, two Italian and one Spanish stakeholders opted for sub-option 3, while one Italian industry association opted for sub-option 1.

Conclusion: Sub-option 3 is preferable since equally protect the rights of the creditor and the rights of the debtor, while having a positive effect on the levels of entrepreneurship.

5.4.8 Discharge periods for consumers

Discharge and second chance provisions for consumer are available in some Member States, upon completion of repayment recovery plans. They are the result of a debt restructuring and composition with creditors tailored to the individual person and their assets. In general, they require the creditors' agreement and supervision from courts or a trustee. In the majority of Member States, they include also a moratorium on enforcement actions and the exclusion of certain debts from discharge. Discharge and second chance are the result of compliance with the recovery plan, which has an average length of 3 years. During implementation of the plan the debtor has limited ability to borrow money and the effects of discharge may remain in the credit history of the debtor for a certain time.

Like for any recovery procedure, the discharge of individual consumer is the result of a compromise between debtors and creditors, where creditors have to accept to recover only part of their funds. However, the certainty of the procedure, its speed which allows to avoid long court procedure and costly enforcement actions, will in general provide benefits both to creditors and to the debtor.

In the UK and in other Member States, various offices are available for free advice to consumers to inform them of the opportunity to renegotiate their debts or prepare a recovery plan.

Under a maximum harmonisation tool, the second chance for consumer should include a procedure that would grant discharge. Minimum harmonisation would allow Member States that already have introduced the provisions to retain their national procedures if compliant with the provisions of the directive while other Member States should be encouraged to adopt a minimum second chance provision.

Description	Sub-option 1 Discharge of debts for consumers within 1 year from start of liquidation proceedings, with limited exceptions (e.g. fraud or bad faith).	Sub-option 2 Discharge of debts for consumers within 3 years from when liquidation proceedings are open or the repayment plan starts being implemented, with exceptions (e.g. fraud or bad faith, but also those benefiting from a homestead exemption).

Both sub-options would need to be accompanied by measures directed to consumer to obtain (free) assistance in order to prepare a repayment plan or obtain discharge. Moreover, some sort of supervision should be in place to grant to assist the debtor and monitor the repayment. It must also be clarified that certain debts, such as spousal and child support or income taxes, cannot be discharged according to the majority of the Member States, and the EU instrument should allow retaining certain exemptions.

In particular, a longer discharge period (Sub-option 2) reduces the risk of moral hazard. On the other hand, too long discharge periods would impact heavily on consumers, undermining their welfare. Hence, a 3-year discharge period appears as a compromise between loosened and burdensome repayment rules.

Representatives of consumer associations stated in interviews that the most important issues for personal insolvencies are the presence of specialised independent debt advice (practitioners), and the possibility of out-of-court debt settlement procedures. A Swedish public authority also states that an efficient insolvency procedure for consumers must be simple, and thus with the least court involvement possible. Consumers tend to feel vulnerable when they are in financial distress, and reducing the length of procedures would make them more likely to restructure their debt and work with creditors to repay it.

Conclusion: sub-option 2 is preferred because overall it would regard a larger group of citizens. It would also provide a better balancing between the need to provide debtors with a second chance and the need to encourage repayment of debts. Indirectly this could also create a better perception of second chance provisions and thus encourage the reduction of long discharge periods in some Member States.

5.4.9 Economic impacts of Option 4

Preliminary findings from our consultation show that overall Policy Option 4 has been indicated as "preferred option" by 19 out of 41 respondents to the interview. This includes respondents who picked any of its sub-options as their preferred option.

For this assessment the sub-options were combined to allow stakeholders to have a full picture of Option 4, distinguishing between different levels of intervention.

In detail, the European Commission's policy options contain 22 different sub-options in eight different fields. In order to convert these into easy-to-read and easy-to-present options to stakeholders, and extract the relevant impacts that they might have, the research team converted them into three policy options, including one with three sub-options. This allows respondents to compare three potential legislative proposals and assess their overall potential impacts on specific economic variables.
In the European Commission's eight fields of sub-options presented above, two of them feature two sub-options, while the six others feature three sub-options each. The fields with two sub-options each are: "Facilitation of continuation of debtor's business while restructuring (Debtor in possession)" and "Reduce incentives to relocate to friendlier jurisdictions". When assigning these two fields to the three newly-created potential legislative proposals, the following approach has been taken:

- "**Facilitation of continuation of debtor's business while restructuring (Debtor in possession)**": This field was split into three options (versus the two initial ones), namely: "NO supervisor/ mediator", "mediator/ supervisor COULD be set" and "supervisor ALWAYS set". By default, all three options allow the debtor to remain in possession, therefore this was not indicated. The variable is the appointment of a supervisor/mediator, which in the European Commission's initial policy options, could or could not be appointed. Methodologically, such a two-dimensional question can be converted into three dimensions by allowing for a "middle ground" between the two categorical options (i.e. "mediator/supervisor could be set"). This retains the European Commission's original meaning ("Member States may enable courts to appoint a mediator and /or a supervisor"), since the policy proposals A1 and A2 allow Member States, without imposing, to appoint a mediator/supervisor. Policy proposal A3, on the other hand, forces such an appointment, in line with the European Commission's original meaning ("Debtor remains in possession but a supervisor is always appointed").
- "**Reduce incentives to relocate to friendlier jurisdictions**": This field was also converted from a two-dimensional to a three-dimensional option so as to delineate the three policy proposals. In addition, the provisions for entrepreneurs and consumers have been merged, since the first two sub-options pertaining to entrepreneurs are virtually the same as for the only two sub-options pertaining to consumers. The difference is the addition of sub-option three for entrepreneurs, which is complementing sub-option one. The research team has thus grouped these two fields into a single field with three sub-options: "Most debtors discharged 1 year after starting liquidation", "Most debtors discharged 3 years

after starting liquidation or repayment plan" and "A1 + possible debt consolidation in one procedure (only firms)".

In addition, in order to increase the response rate of both survey and interviews, as well as to facilitate non-native English stakeholders' understanding of the policy proposals, the text has been shortened and rendered easy-to read. Interviewers were informed in detail about each of the sub-options, and they could provide adequate explanations to stakeholders when they could not understand their meanings. In addition, the survey gave stakeholders an email address to forward their queries about the policy options, and a few respondents did so.
Having taken these steps, the three policy proposals have been presented to stakeholders in the following manner:

Table 21: Grouping substantive elements in Option 4 into three sub-options for assessment

	Sub-option 4.1	**Sub-option 4.2**	**Sub-option 4.3**
Early restructuring	Available when debtor in difficulty & at risk of insolvency	4.1 + *allow over-indebted debtors to enter preventive restructuring*	4.2 + *Early warning tools and a model restructuring plan*
Allowing debtor a 'breathing space'	Automatic general moratorium (on recovery actions and formal proceedings)	Moratorium at debtor's request + *ipso facto & early termination clauses.*	4.2, but short-term (<4 months) moratorium
Debtor in possession	NO supervisor/ mediator	mediator/ supervisor COULD be set	Mediator / supervisor ALWAYS set
Prevent minority creditors/ shareholders to harm restructuring efforts	Restructuring plan adopted with majority in all creditor classes.	*Restructuring plan adopted with majority in min one creditor class. (inter-class cram-down)*	4.2 + *shareholders included as class(es) of their own*
Higher success rate of restructuring plan	Avoidance actions are irrelevant for financing within plan. *Finance for working capital allowed during negotiations. Possible super-priority status for new financing.*	*4.1 + safe harbour provisions for transactions made before insolvency and relevant to plan*	*4.2 + co-obligors' and guarantors' releases under the plan*
Cheaper and faster court procedures	Limited court involvement + use of IT in cross-border situations	*4.1 + training to practitioners*	4.2 + *training of courts*

Less incentives to relocate (firms & *consumers*)	Most debtors discharged 1 year after starting liquidation	Most debtors discharged 3 years after starting liquidation or repayment plan	*4.1 + possible debt consolidation in one procedure (only firms)*

This methodology allowed interviewers to ask questions about the impact of each policy proposal, using a concise 9x5 matrix such as the one below. The same matrix has been used to collect insights using the survey. The advantage of such a matrix is that it is able to condense responses in an easy-to-read table, rather than separating them into nine separate questions.

Table 22: Example of two-dimensional matrix used during interviews to measure stakeholders' perception of the impact of each policy proposal.[149]

	A1	A2	A3	B	C
Domestic recovery (%)	~ … %	~ … %	~ … %	~ … %	~ … %
Cross-border recovery (%)	~ … %	~ … %	~ … %	~ … %	~ … %
Length of proceedings (months)	~ … months	~ … months	~ … months	~ … months	~ … months
Cost of proceedings	~ … %	~ … %	~ … %	~ … %	~ … %
Firms saved (%)	~ … %	~ … %	~ … %	~ … %	~ … %
Jobs created					
Investments	~ … %	~ … %	~ … %	~ … %	~ … %
Firm access to credit	~ … %	~ … %	~ … %	~ … %	~ … %
Consumer access to credit	~ … %	~ … %	~ … %	~ … %	~ … %

One practitioner from Czech Republic mentioned that the breakdown of option 4 into different sub-options (4.1, 4.2 and 4.3) is not truly relevant, as the most important aspect of the proposed policy is to simplify the process of registering claims, for example by using one universal language which will lower costs in cross-border cases. Two stakeholders, one practitioner and one creditor, expressed their preferred option as being a combination between the three sub-options 4.1, 4.2 and 4.3. Similarly, a public authority opted for early restructuring from sub-option 4.3, combined with debtor in possession and cheaper and faster court procedures from sub-option 4.2.

5.4.9.1 Option 4.1

Survey respondents differed as to the benefits of this option: 2 out of 5 respondents ranked it as the least beneficial, while 2 others ranked it as the most beneficial. On the other hand, 4.1 was deemed to be the cheapest option by 6 out of 6 survey respondents. Finally, 4 out of 6 respondents referred to 4.1 as being practicable, with one stakeholder considering its implementation as tricky and another one as impossible.

[149] Note that policy proposals B and C refer to the two options excluded from the European Commission's impact assessment analysis.

Due to a low number of responses and diverging comments, it was difficult to determine the **expected impact of Policy Option 4.1 on proceeding costs**. 3 out of 8 interviewees considered that 4.1 would lower proceeding costs, 2 out of 8 considered that it would have a positive impact, while 2 respondents believe that 4.1 would not have any impact at all. Quantitative figures differed between stakeholders: 2 respondents quantified the cost reduction as -25% and -50%, while two others quantified it as +10% and +20%. In addition, one interviewee described it as the cheapest option. In particular, a 10% cost reduction would amount to some €90 million per year for domestic proceedings and €7 million per year for cross-border proceedings in the EU, while a 50% cost reduction would generate almost €450 million and €35 million in cost savings for domestic and cross-border proceedings, respectively.

Policy Option 4.1 is expected to increase the length of proceedings by 3 to 24 months according to 5 out of 10 interviewees, but **decrease the length of cross-border proceedings by up to 100%** according to 5 survey respondents. In the survey, 2 out of 7 respondents indicated no impact in the length of domestic procedures, with an additional one stating that there would be no impact on large firms, but a 100% decrease for SMEs and consumers. 2 respondents opted for an increase, and 2 others for a decrease in domestic length. With regards to cross-border length of procedures, 4 out of 6 respondents pointed to a decrease of between 40 and 100%, while two suggested an increase of up to 100%.

With regard to the **impact on recovery rate for domestic assets**, the overall opinion (8 out of 10 interviewees) is that Option 4. 1 would have a **positive impact**. Consulted stakeholders estimated the increase in recovery rates to range from 5 to 50%, therefore leading to **lower borrowing costs** and **facilitated access to investment**. On the other hand, one interviewee claimed that this sub-option would decrease domestic recovery rates by 50%, while one other interviewee suggested no impact. In the survey, 2 respondents suggested an increase in domestic recovery rates, while 3 suggested a decrease. The **impact on foreign recovery rates is inconclusive**: 4 out of 7 interviewees expected A1 to have a positive impact on the recovery rate of foreign assets, with an increase of 10 to 30%. In contrast, 4 out of 4 survey respondents pointed out that A1 could have a negative impact by decreasing the recovery rate by 6 to 70%.

The **impact on survival rates is inconclusive**, with 3 out of 5 interviewees claiming increases between 10 and 30%, but 4 survey respondents suggesting no impact for domestic survival, and 2 the same for cross-border. One survey respondent suggested a very small (1-5%) increase in domestic survival rates.

In terms of **jobs retained (%),** the response rate was particularly low, with 1 out of 2 interviewees stating that the policy can bring a 10% increase in jobs retained and one practitioner considering it as not having any impact.

The **impact on investment is likely to be positive**, with 2 out of 4 interviewees estimating it to **increase by 10% to 15%,** and 2 others foreseeing no impact at all. **%**. Using the same methodology as for Option 2, this would result in an increase in

cross-border investment reaching at least[150] €**3,553 billion to €3,714** billion for intra-EU inward FDI stocks.

Access to credit is also likely to increase: 3 out of 5 interviewees suggested an increase of 10-50%, while one public authority said it would decrease by 5% for firms. Another interviewee estimated no impact.

Table 23 Summary of the impact of policy option 4.1

Cost of proceedings	Mixed evidence
Average length of proceedings	Increase for domestic procedures, and decrease for cross-border procedures
Recovery rates of assets	Increase for domestic procedures, mixed evidence for cross-border procedures
Firms saved	Mixed evidence
Investments	Likely increase
Access to credit	Likely increase
Feasibility of implementation	Practicable
Ranking (average): **Cheapest (1) to most (5) expensive** **Most (1) to least (5) beneficial**	 1 3

5.4.9.2 Option 4.2

4 respondents considered the sub-policy to be practicable, whereas one large company regarded it as impossible to implement. Nevertheless, some interviewees recognised the benefits of certain provisions of sub-option 2, such as the debtor-in-possession clauses and earlier restructuring possibilities. 4 out of 5 interviewees specified that Policy Option 4.2 would **increase the costs of proceedings**, while one foresaw a reduction. Combined, interviewees indicated that on average, total cost of proceedings would increase by about 10%.

The **length of proceedings is likely to increase under Option 4.2**. 4 out of 7 interviewees predict an increase of between 3 and 24 months, while 6 out of 7 survey respondents foresee increases of between 10 to 40% for domestic (up to 100% for large companies) procedures and 2 out of 5 find potential increases in cross-border procedure lengths of up to 70%. 3 out of 7 interviewees predicted decreases of 3-12 months, while one survey respondent predicted a decrease between 40-70% for domestic procedures, and 3 out of 5 estimate decreases of 10 to 70% in cross-border cases. The impact on cross-border length of proceedings is therefore inconclusive.

The **impact on recovery rate for domestic assets is likely to be positive.** 7 out of 8 interviewees note a positive impact of between 7 and 35%, while one estimated a zero impact. In the survey, 2 out of 6 respondents found an increase of 10-70%, and 2 foresaw a small decrease of 1-20%. Two survey respondents estimated the impact on

[150] The calculation is not based of the total intra-EU FDI, but on the intra-FDI for 18 OECD countries also members of the EU. The calculation is missing 10 EU member states, however, the 18 countries included make up for the highest share of the intra-EU FDI stock.

domestic recovery rates to be zero. **Recovery rates for foreign procedures are also likely to increase**, with 5 out of 6 interviewees noting an increase of 5-40%, while one predicted no impact. 2 out of 4 survey respondents estimated a small decrease between 1 and 20%, while one suggested an increase of 10-20%. The remaining respondent predicted no impact.

The **impact on the survival rate is likely to be positive**: all 5 respondents foresaw increases of between 5 and 40% in the number of firms saved, and 2 out of 5 survey respondents estimated increases of 6-40%. 3 survey respondents predicted no impact, and 2 out of 4 foresaw increases in cross-border survival rates of 6-40%. One survey respondent suggested no impact, while another suggested a small decrease of up to 5% in the cross-border survival rate.

The **impact on jobs retained is likely to be positive**: 2 out of 2 interviewees estimated an increase in jobs retained of around 20%.

Investment is also likely to increase under sub-option 4.2, with 2 out of 3 interviewees suggesting increases of 10-20% and another one foreseeing zero impact. Using the same methodology as for Option 2, this would result in an increase in cross-border investment reaching at least[151] **€3,553 billion to €3,876 billion** for intra-EU inward FDI stocks.

Lastly, **access to credit is likely to be positive**: 3 out of 4 interviewees considered that sub-option 4.2 can lead to an increase of 5% to 145%, with one public authority claiming that it can decrease by 5% for firms.

Table 24: Summary of the impact of policy option 4.2

Cost of proceedings	Increase
Average length of proceedings	Increase for domestic procedures, mixed evidence for cross-border procedures
Recovery rates of assets	Increase for domestic and cross-border procedures
Firms saved	Increase
Investments	Likely to increase
Access to credit	Likely to increase
Feasibility of implementation	Practicable
Ranking (average): **Cheapest (1) to most (5) expensive** **Most (1) to least (5) beneficial**	 3 3

5.4.9.3 Option 4.3

5 out of 5 survey respondents regarded option 4.3 as being "practicable".

[151] The calculation is not based of the total intra-EU FDI, but on the intra-FDI for 18 OECD countries also members of the EU. The calculation is missing 10 EU member states, however, the 18 countries included make up for the highest share of the intra-EU FDI stock.

Under policy option 4.3, **costs of insolvency proceedings are expected to increase**. 4 out of 5 interviewees estimated increases of 5-30%, while one public authority estimated no impact. This increase by 5 to 30% in proceeding costs would result in an **additional € 24 mln to € 146 mln at EU level**.

The impact on length of procedures is unclear. During interviews, 4 stakeholders suggested a decrease of between 3 and 12 months, while 4 estimated an increase of between 6 and 24 months. Out of 7 survey participants, 4 suggested an increase in the length of domestic procedures by 10-70%, while 2 estimated a decrease between 10 and 100%. One respondent suggested that the increase would concern large companies (20-40% increase), while SMEs, individual entrepreneurs and consumers would see their length of domestic procedure decreasing by over 100%. Regarding cross-border procedures, 3 out of 5 survey respondents said that length of proceedings would increase by 1-100%, while two suggested that the length would decrease by 10-70%.

Recovery rates, both domestic and foreign are expected to increase, according to interviewees. 7 out of 8 interviewees estimated an increase between 9 and 35% in the domestic rate, while one suggested a slight decrease by 5%. 5 out of 6 interviewees also said foreign recovery rates would increase by 10-50%, while one suggested a 5% decrease. In the survey, 3 out of 6 respondents suggested an increase by 10-40% in the domestic rate, while only one foresaw a decrease by 10-20%. Regarding the cross-border rate, 2 out of 4 suggested an increase, while the other 2 suggested no impact.

The **survival rate is estimated to increase** by between 10-40%, according to all 5 interviewees who expressed their opinion on this matter. 2 out of 5 survey respondents suggested an increase in the domestic survival rate by 10-70%. Two respondents suggested policy option 4.3 would have no impact on domestic rates, while one estimated it would decrease domestic survival rate by 6-10%. 2 out of 4 survey respondents suggested the foreign survival rate would also increase by 10-70%.

Investments are expected to increase under policy option 4.3, with 3 out of 5 interviewees suggesting increases by 15-30%. One interviewee suggested no impact, while another one estimated a decrease in investments of 10%. Using the same methodology as for Option 2, this would result in an increase in cross-border investment reaching at least[152] €**3,714 billion to €4,199** billion for intra-EU inward FDI stocks.

Access to credit is also expected to increase, with 2 interviewees out of 3 estimating increases between 5 and 30% and one suggesting a decrease of 20%.

Table 25: Summary of the impact of policy option 4.3

Cost of proceedings	Increase
Average length of proceedings	Mixed evidence
Recovery rates of assets	Increase

[152] The calculation is not based of the total intra-EU FDI, but on the intra-FDI for 18 OECD countries also members of the EU. The calculation is missing 10 EU member states, however, the 18 countries included make up for the highest share of the intra-EU FDI stock.

Firms saved	Increase
Investments	Likely to increase
Access to credit	Likely to increase
Feasibility of implementation	Practicable
Ranking (average): **Cheapest (1) to most (5) expensive** **Most (1) to least (5) beneficial**	 4 2

In conclusion, stakeholders in the survey and interviews seem to suggest that sub-options 4.1 and 4.3 are both viable, with a slight preference in the survey towards sub-option 4.1. Sub-option 4.1 was favoured by 4 interviewees (all practitioners), sub-option 4.2 by 2 interviewees (one public authority, one industry association), while sub-option 4.3 was favoured by 4 interviewees (three practitioners and one consumer association). In addition, 9 interviewees opted for policy option 4, identifying certain elements of preference within each sub-option, but not being able to clearly state which sub-option they would prefer.

5.4.10 Competitiveness assessment

Following the same template as for Option 1, 2 and 3, the table below shows the competitiveness impacts of Option 4. The assessment is done at the level of the option as a whole, not considering all the different sub-options.

Table 26: Competitiveness impact of option 4

Aspect	Impact	Explanation
Cost	+	Unlike option 2, this option would not lead to a material reduction in costs of proceedings for companies. However, this option addresses some of the shortcomings of the status quo, and compared with option 3 it provides greater regulatory certainty for investors or companies regarding the applicable regime in case of restructuring. However, this option does not eliminate differences across jurisdictions and hence does not fully reduce the additional costs associated with fragmentation across the Single Market or with efficiency differentials across countries. Nevertheless, on the whole this option is likely to lead to an improvement in many jurisdictions without leaving any country in an inferior position to the status quo.
Innovation	+	This option does not lead to a negative impact on innovation competitiveness in countries with a favourable jurisdiction under the status quo and it provides a "floor" of minimum requirements below which no jurisdiction in the Single Market can fall. This option would be relatively quicker to implement than Options 2 or 3 thus leading to earlier materialisation of benefits. On the whole this option is likely to lead to an improvement

Aspect	Impact	Explanation
		in many jurisdictions without leaving any country in an inferior position to the status quo.
International	+	From an international point of view, this option does not provide a single framework across all of the Single Market and it will lead to continued fragmentation across the Single Market. Nevertheless, by providing a set of minimum requirements this option would be an improvement over the status quo in terms of comparison with competing regions and it would reduce regulatory certainty for investors and companies alike.

6. The preferred policy option

This section builds on the results of the analysis of the socio-economic impacts of the different policy options detailed in the previous section. More specifically, we compare the different options on the basis of:

- Their direct and wider socio-economic impacts and the extent to which they would achieve the objectives (effectiveness);
- Their feasibility, in terms of the costs and benefits of their implementation(efficiency);

and draw some conclusions on the most fit-for-purpose policy option.

The table below summarises the impacts of the different policy options on the socio-economic environment, including on competitiveness.

Table 27: Comparison of policy options

	Option 1	Option 2	Option 3	Option 4.1	Option 4.2	Option 4.3
Cost of proceedings	No change	Decrease (savings around €50 mln/year)	Mixed	Mixed	Increase	Increase (up to 30%)
Average length of proceedings	No change	Decrease, especially for cross-border cases by around 10%	Mixed	Increase for domestic procedures and decrease for cross-border procedures	Increase (up to 40% increase for domestic proceedings)	Mixed
Recovery rates of assets	No change	Higher impact on the recovery of foreign assets than domestic assets	Higher impact on the recovery of foreign assets than domestic assets	Increase for domestic procedures and mixed for cross-border procedures	Increase (up to 35%)	Increase (up to 40-50%)
Firms saved	No change	Positive impact (up to 25% more domestic business survival)	Positive impact (up to 25% more business survival)	Mixed	Positive impact (up to 40% more business survival)	Positive impact (up to 40% more business survival)
Investments	No change	Positive impact (up	Positive impact (up	Likely to be positive	Likely to be positive	Likely to be positive

		to 35% more investment)	to 30% more investment)			
Access to credit	No change	Mixed	Positive impact (up to 45% more investment)	Likely to be positive	Likely to be positive	Likely to be positive
Cheapest (1) to most (5) expensive **Most (1) to least (5) beneficial**	N/A	2 3	4 3	1 3	3 3	4 2
Cost competitiveness	-	Mixed	-	+		
Innovation competitiveness	-	Mixed	+	+		
International competitiveness	--	++	+	+		

The comparison of the impacts of the different policy options summarised in the table above indicates that Policy Option 2 would be the most beneficial in terms of effectiveness and efficiency. However, this option is deemed to be difficult to implement considering the large diversity in Member States' legal systems and the lack of any pre-existing agreement on the basic principles underpinning restructuring frameworks.

While Options 4.2 and 4.3 are expected to increase the length and the costs of insolvency proceedings, their expected impacts on recovery rates, business survival, investment and access to credit are considered to be both positive and significant. In addition, the impact on cost, innovation and international competitiveness is also expected to be positive. Finally, these options are believed to be easier to implement (in particular Option 4.2) than Option 2.

Therefore, the "preferred option" is most likely to be a combination of both Option 4.2 and Option 4.3 to optimize the impacts on effectiveness and efficiency. The following paragraphs aim at assessing the impacts of such a combination, including the provisions highlighted in yellow and in bold in the table below:

Table 28: Comparison of provisions of sub options 4.2 and 4.3

	Sub-option 4.1	**Sub-option 4.2**	**Sub-option 4.3**
Early restructuring	Available when debtor in difficulty & at risk of insolvency	4.1 + *allow over-indebted debtors to enter preventive restructuring*	***4.2 + Early warning tools and a model restructuring plan***

Allowing debtor a 'breathing space'	Automatic general moratorium (on recovery actions and formal proceedings)	Moratorium at debtor's request + *ipso facto & early termination clauses.*	**4.2, but short-term (<4 months) moratorium**
Debtor in possession	NO supervisor/ mediator	**Mediator/ supervisor COULD be set**	Mediator / supervisor ALWAYS set
Prevent minority creditors/ shareholders to harm restructuring efforts	*Restructuring plan adopted with majority in all creditor classes.*	*Restructuring plan adopted with majority in min one creditor class. (inter-class cram-down)*	**4.2 + *shareholders included as class(es) of their own***
Higher success rate of restructuring plan	Avoidance actions are irrelevant for financing within plan. *Finance for working capital allowed during negotiations. Possible super-priority status for new financing.*	***4.1 + safe harbour provisions for transactions made before insolvency and relevant to plan***	*4.2 + co-obligors' and guarantors' releases under the plan*
Cheaper and faster court procedures	Limited court involvement + use of IT in cross-border situations	*4.1 + training to practitioners*	**4.2 + *training of courts***
Less incentives to relocate (firms & consumers)	Most debtors discharged 1 year after starting liquidation	Most debtors discharged 3 years after starting liquidation or repayment plan	***4.1 + possible debt consolidation in one procedure (only firms)***

The possibility to evaluate the potential impacts of the above combination of provisions is limited, as it does not correspond to any of the policy options addressed in the consultation. The research team has therefore analysed this new combination of provisions based on qualitative data retrieved from stakeholder interactions, where these focused on the particular provisions. This implies the use of small sample of stakeholders, hence findings have to be taken cautiously as their representativeness is not extensive.

Early restructuring

Overall, eight interview respondents stated that policy option 3 would be the best in case of restructuring. An additional seven agreed with all policy options in this provision, without detailing. In interviews, stakeholders particularly emphasised the **practicality of implementing sub-option 3** – Luxembourg and Switzerland are already working towards implementing it. One German practitioner suggested that such preventive measures can **save substantial proceedings costs** in the case of large firms. A Spanish creditor also agreed with sub-option 3 as being the most suitable option. A Swedish public authority stated that, in the case of consumers, faster procedures would **reduce their social costs and the stigma** associated with personal insolvencies, thus encouraging them more to restructure. Finally, a Dutch practitioner noted that early restructuring tools provided under all sub-options seem too bureaucratic and would not work.

Even though seven interviewees stated that all sub-options would lower procedure costs and increase firm survival rates, sub-option 3 is seen as the most flexible since it provides a larger number of tools and might cover all the situations defined by the different national legislative frameworks where the debtor is in financial difficulties while the insolvent business can still be rescued with a restructuring plan.

Three Italian stakeholders also agree with sub-option 3 as being the most suitable, with one stating that the use of the early-warning tool and the model restructuring plan should not be mandatory. Sub-option 3 may avoid the application of a too stringent test, such as the liquidity test which in various Member States triggers the filing for insolvency. The only issue may concern the use of "alert systems/early warning" and seeking for advice, which requires a sort of proactive approach from the debtor.

Cost of proceedings	Decrease in domestic and cross-border cases
Average length of proceedings	Decrease
Recovery rates of assets	Increase
Firms saved	Increase
Investments	-
Access to credit	-
Feasibility of implementation	Most feasible
Social impact: reduced stigma	Positive
Ranking (average): Cheapest (1) to most (5) expensive Most (1) to least (5) beneficial	 n/a n/a

Moratorium

For this provision, only seven respondents expressed a particular opinion regarding this provision, while the others judged the three policy options as packages. Out of the seven, four opted for sub-option 3, while three suggested that sub-option 1 would be best. German and Luxembourgish practitioners interviewed suggested moratoria should be as short as possible (under four months with extension), to allow for **faster decisions and thus increase survival rates.** A Spanish creditor also agrees, suggesting that such an option would be beneficial for creditors. The three Italian stakeholders interviewed opted for an automatic general moratorium on recovery actions and formal proceedings.

Cost of proceedings	Decrease
Average length of proceedings	Decrease
Recovery rates of assets	-
Firms saved	Increase
Investments	-
Access to credit	-
Feasibility of implementation	Feasible
Social impact: reduced stigma	-
Ranking (average):	

Cheapest (1) to most (5) expensive Most (1) to least (5) beneficial	n/a n/a

Debtor in possession

A total of 11 stakeholders provided specific comments regarding the debtor in possession provision. A majority of nine supported sub-option 2, while one industry association suggested there should be no mediator and a German practitioner suggested a mediator should always be set.

Stakeholders interviewed from Germany, the Netherlands, Switzerland, Luxembourg, Italy, Spain and Sweden were of the opinion that a supervisor should be present, as this would **ensure higher recovery and survival rates**. One stakeholder noted that without a supervisor, recovery rates would drop dramatically. Some stakeholders (in France and Germany) state that rules need to be flexible as to allow Member States the space needed to adapt them to their local standards. In addition, a Luxemburgish practitioner stated that if a supervisor is imposed, short-term costs will be higher since people will not be immediately familiar with the new law, and certain procedures have to be set in place. However, according to them, sub-option 3 will reduce costs by reducing the length of procedures in the long term.

Risk assessment costs may decrease if a professional is appointed to mediate or supervise, but this may be more difficult in cross-border cases, as different jurisdictions appoint different mediators/supervisors. Nevertheless, the presence of a supervisor, as advocated by interviewees, can increase confidence in the procedure and might help increase the recovery rate for creditors. Even though procedural costs increase if a mediator/supervisor is in place, the benefits can outweigh the costs in the long term, as described by one interviewee.

Cost of proceedings	Mixed evidence (increase in short-term, decrease in long-term)
Average length of proceedings	Decrease (long-term)
Recovery rates of assets	Increase
Firms saved	-
Investments	Increase (due to increased recovery rates)
Access to credit	-
Feasibility of implementation	Most feasible as it allows MS to be flexible
Social impact: reduced stigma	Positive
Ranking (average): Cheapest (1) to most (5) expensive Most (1) to least (5) beneficial	 n/a n/a

Plan approval by a majority of creditors

Eight interviewees expressed qualitative opinions on this specific provision, of which three (a practitioner from Germany, a public authority in Switzerland and an industry association in Italy) opted for sub-option 4.2. Three (a practitioner from Italy, an industry association in Italy and a creditor in Spain) suggested sub-option 4.1, while a Dutch practitioner suggested that sub-option 1 would not work in practice. A Danish

creditor suggested that creditors with collateral should have their rights secured, and that accepting restructuring plans on the basis of a majority in only a single class of creditors would be detrimental.
As it is the case with the length of stay (moratorium), investors tend to assess risks faster if procedures are harmonised, in this case concerning the adoption of the plan. Certain sub-options allow for a quick adoption of the plan (i.e. sub-option 2), while others insert certain safeguards for shareholders (i.e. sub-options 1 and 3). Safeguards could also lower creditors' risk, as it allows them to better protect their position, even though procedures can be lengthier. Procedures can be more effective as they allow the creditors with the largest claims to approve the plan. This would prevent the plan's adoption to be blocked or obstructed by creditors with a limited involvement in the assets. A thorough assessment, however, must be made with regards to shareholders' rights.

Cost of proceedings	-
Average length of proceedings	-
Recovery rates of assets	-
Firms saved	-
Investments	-
Access to credit	-
Feasibility of implementation	More feasible than sub-option 1
Social impact: reduced stigma	-
Ranking (average): Cheapest (1) to most (5) expensive Most (1) to least (5) beneficial	 n/a n/a

New financing

Interviewees' responses were split on this matter. Out of a total of six stakeholders that provided opinions on this provision, three of them from Switzerland, Italy and Spain favoured sub-option 4.1, while an industry association in Luxembourg suggested that sub-option 4.2 might allow for cheaper and faster court procedures. Two Italian stakeholders opted, instead, for sub-option 4.3, while many others could not state their opinion on the matter.

Cost of proceedings	Decrease
Average length of proceedings	Decrease
Recovery rates of assets	-
Firms saved	-
Investments	-
Access to credit	-
Feasibility of implementation	-
Social impact: reduced stigma	-
Ranking (average): Cheapest (1) to most (5) expensive Most (1) to least (5) beneficial	 n/a n/a

Court proceedings

Eight stakeholders expressed their opinion on the type of court involvement. All of them supported a more limited court involvement. Two of them (a Danish creditor and a Swedish consumer association) could not give a precise indication on their preferred sub-option. The two stakeholders believe this would increase the flexibility of insolvency procedures and improve recovery rates.

Three interviewees (one German insolvency practitioner and two Italian stakeholders) opted for sub-option 4.3, while two (one Swiss public authority and one Italian industry association) selected sub-option 4.1. Only one interviewee, namely a Spanish creditor, selected sub-option 4.2. The Swiss public authority believes, like the German practitioner, that trainings for practitioners would be difficult to implement and would not bring value added. Instead, the German practitioner argued that in Germany small courts are often in charge of large insolvency cases, since large firms are located in their jurisdiction. Due to their lack of experience with such proceedings, the process if often lengthy and costly.

Cost of proceedings	Decrease (due to simplicity)
Average length of proceedings	Decrease (due to simplicity)
Recovery rates of assets	Increase
Firms saved	-
Investments	Increase (due to positive effect on cross-border claims registering)
Access to credit	-
Feasibility of implementation	-
Social impact: reduced stigma	-
Ranking (average): Cheapest (1) to most (5) expensive Most (1) to least (5) beneficial	 n/a n/a

Discharge period entrepreneurs

Six stakeholders expressed their view on this provision, with three (one Italian practitioner, another Italian stakeholder and a Spanish creditor) favouring sub-option 4.3. Two others (German and Swiss practitioners) preferred sub-option 2, which is close to the German system, as they believe that one year may not be enough for liquidation, but that a timeframe has to be set. Setting a timeframe by law would also be helpful in Luxembourg, where practitioners stated that a EU initiative would create incentives for the national level to make its insolvency framework more efficient. Finally, only one Italian industry association opted for sub-option 1.

Cost of proceedings	-
Average length of proceedings	Decrease (as a timeframe has to be set)
Recovery rates of assets	Increase (as one year is not enough for liquidation)
Firms saved	-
Investments	-
Access to credit	-
Feasibility of implementation	-

Social impact: reduced stigma	-
Ranking (average): Cheapest (1) to most (5) expensive Most (1) to least (5) beneficial	 n/a n/a

Discharge period consumers

One consumer association and one public authority participated in the interviews, and provided their views on consumer discharge periods. They stated that the most important issues for personal insolvencies are the presence of specialised independent debt advice (practitioners), and the possibility of out-of-court debt settlement procedures. A Swedish public authority also stated that an efficient insolvency procedure for consumers must be simple, and thus with the least court involvement possible. Consumers tend to feel vulnerable when they are in financial distress, and reducing the length of procedures would make them more likely to restructure their debt and work with creditors to repay it.

Cost of proceedings	-
Average length of proceedings	-
Recovery rates of assets	-
Firms saved	-
Investments	-
Access to credit	-
Feasibility of implementation	-
Social impact: reduced stigma	-
Ranking (average): Cheapest (1) to most (5) expensive Most (1) to least (5) beneficial	 n/a n/a

Overall assessment

Based on the qualitative input provided by the stakeholders, and illustrated in the tables above, estimation can be given with respect to the potential impacts that the selected policy provisions might have. It is important to underline, however, that this is based on a small sample of interviews, and that the policy provisions were not taken together as a combination, but assessed individually. The table below provides an overall assessment of these provisions.

Overall assessment (sum of all tables)

Cost of proceedings	Mixed evidence
Average length of proceedings	Mixed evidence
Recovery rates of assets	Increase
Firms saved	Likely to increase
Investments	Likely to increase
Access to credit	Mixed evidence
Feasibility of implementation	Likely to be feasible
Social impact: reduced stigma	Likely to be positive
Ranking (average): Cheapest (1) to most (5) expensive Most (1) to least (5) beneficial	 n/a n/a

7. Annex

7.1 Member State Data Collection

Country	Data available
Denmark	Data provided for Denmark cover the period 2011-2015 and include: • the number of preventive restructuring proceedings initiated for District Courts (finalised cases) and the Maritime and Commercial Court; • the outcome of the proceedings for District Courts (i.e. cases where "Reconstruction succeeded" and "Other outcomes: case rejected, company closed, bankruptcy, case withdrawn etc."); • the length of proceedings at District Courts. The data summarises the average length of proceeding (in months). Data for 2011 are not available; • the number of ordinary/formal insolvency proceedings and their outcome. The data distinguishes between District Courts (i.e. Instituted cases, Finalised cases, Successful proceeding, Cases rejected, Company closed down/possible bankruptcy procedure and Withdrawn and other outcomes) and Maritime and Commercial Court (Instituted cases); No data are available for the size of debtors involved.
France	Data for France cover the period 2011-2015 (2015 statistics are provisional) and include: • the number of preventive restructuring proceedings initiated; • the size of the debtors involved (it excludes figures on the size of the company for the procedures of ad hoc mandate and conciliation); • the outcome of the proceedings; • the length of the proceedings; • the number of ordinary/formal insolvency proceedings and their outcome.
Ireland	Data for Ireland are not available.
Italy	Data for Italy cover the period 2013-2015 and include: • the number of preventive restructuring proceedings initiated; • the outcome of the proceedings; • the length of the proceedings (data available for 2014-2015); • the number of ordinary/formal insolvency proceedings and their outcome. No data are available for the size of debtors involved.
Lithuania	Data for Lithuania cover the period 2011-2015 and include: • the number of preventive restructuring proceedings initiated;

<table>
<tr><td></td><td>the size of the debtors involved;
the outcome of the proceedings (data not disaggregated by year);
the length of the proceedings;
the number of ordinary/formal insolvency proceedings and their outcome.</td></tr>
<tr><td>Luxembourg</td><td>Data for Luxembourg are only available for 2015 for the number of ordinary/formal insolvency proceedings and their outcome.</td></tr>
<tr><td>Netherlands</td><td>Data for the Netherlands include:
the number of preventive restructuring proceedings initiated (2011-2015);
the number of ordinary/formal insolvency proceedings and their outcome (2010-2015).
No data are available for the size of the debtors involved, the outcome of the proceedings, or the length of the proceedings.</td></tr>
<tr><td>Slovakia</td><td>Data for Slovakia are not available.</td></tr>
<tr><td>Spain</td><td>Data for Spain cover the period 2012-2015 and include:
the number of preventive restructuring proceedings initiated;
the size of the debtors involved;
the length of the proceedings (limited data);
the number of ordinary/formal insolvency proceedings and their outcome.
Data on the outcome of the proceedings are not available.</td></tr>
<tr><td>Portugal</td><td>Data for Portugal cover the period 2012-2015 and include:
the number of preventive restructuring proceedings initiated;
the size of the debtors involved;
the outcome of the proceedings;
the length of the proceedings;
the number of ordinary/formal insolvency proceedings and their outcome (Data available between 2011 and 2015).</td></tr>
</table>

Data tables provided by Member State

7.1.1.1 Denmark

The number of preventive restructuring proceedings instituted at the District Courts (finalised cases):

2011	2012	2013	2014	2015
78	150	143	71	78

Maritime and Commercial Court[153]

2011	**2012**	**2013**	**2014**	**2015**
15	81	37	21	24

a) the size of debtors involved:

n/a

b) the outcome of the proceedings:

District Courts

Reconstruction succeeded				
2011	2012	2013	2014	2015
1	3	0	1	2

Other outcome (case rejected, company closed, bankruptcy, case withdrawn etc.)				
2011	2012	2013	2014	2015
77	147	143	70	76

c) the length of proceedings:

District Courts:

Average length of proceeding (in months)				
2011	2012	2013	2014	2015
n/a	4.7	5.0	5.0	4.3

d) the number of ordinary/formal insolvency proceedings and their outcome:

District Courts:

Instituted cases				
2011	2012	2013	2014	2015
135	147	118	60	95

Finalised cases				
2011	2012	2013	2014	2015
78	150	143	71	78

Successful proceeding				
2011	2012	2013	2014	2015
1	3	0	1	2

Cases rejected

[153] The Maritime and Commercial Court handles petitions and applications for insolvency proceedings in the areas within the jurisdiction of the City Court of Copenhagen, the Court in Frederiksberg and the Courts in Glostrup and Lyngby.

2011	2012	2013	2014	2015
11	7	3	0	0

Company closed down/possible bankruptcy procedure				
2011	2012	2013	2014	2015
52	130	118	56	64

Withdrawn and other outcomes				
2011	2012	2013	2014	2015
12	9	22	13	11

Maritime and Commercial Court:

Instituted cases				
2011	2012	2013	2014	2015
60	59	29	24	19

7.1.1.2 France

a) the number of preventive restructuring proceedings initiated:

	2011	2012	2013	2014	2015
Procédures de sauvegarde ouvertes en France	1419	1516	1664	1620	1533
Désignation de mandataire ad'hoc	1242	1692	1820	1748	1895
Ouvertures de conciliation	713	771	997	984	1123

Depuis la création de la sauvegarde financière accélérée en 2010, seules quelques procédures de ce type ont été ouvertes.
La création de la sauvegarde accélérée est trop récente pour que nous disposions de statistiques à son égard.

b) the size of debtors involved

Nous ne disposons pas de chiffres relatifs à la taille de l'entreprise pour les procédures de mandat ad'hoc et de conciliation.

Effectifs de l'entreprise en *sauvegarde*	2011	2012	2013	2014	2015
0 salarié ou inconnu	427	404	468	445	**720**
1 ou 2 salariés	213	251	236	312	
3 à 5 salariés	194	233	254	227	**210**
6 à 9 salariés	185	199	220	194	**193**
10 à 19 salariés	170	191	196	201	**204**
20 à 49 salariés	132	158	165	177	**141**
55 à 99 salariés	61	45	50	34	**40**
100 salariés et plus	37	35	44	30	**25**
Total France	1419	1516	1633	1620	**1533**

c) the outcome of the proceedings

- Issues du mandat ad'hoc

La procédure de mandat ad'hoc est une procédure confidentielle ; il n'est donc pas en l'état possible de disposer de statistiques concernant l'issues de ces procédures.

- Issues ***connues*** des procédures de conciliation clôturées (**ces chiffres ne concernent que 36% en moyenne du nombre de procédures de conciliation ouvertes**) :

	2011		2012		2013		2014		2015	
	nombre	%	nombre	%	nombre	%	nombre	%	nombre	%
Accord des parties	**168**	**63.6 %**	**190**	**65.7 %**	**235**	**64.6 %**	**200**	**62.3 %**	**242**	**62.5 %**
Constate l'accord des parties	***97***	***36.7 %***	***107***	***37%***	***137***	***37.6 %***	***127***	***39.6 %***	***148***	***38.2 %***
Homologue l'accord des parties	***71***	***26.9 %***	***83***	***28.7 %***	***98***	***26.9 %***	***73***	***22.7 %***	***94***	***24.3 %***
Absence d'accord des parties	**96**	**36.4 %**	**99**	**34.3 %**	**129**	**35.4 %**	**121**	**37.7 %**	**145**	**37.5 %**
Décision mettant fin à	***66***	***25%***	***62***	***21.5 %***	***99***	***27.2 %***	***102***	***31.8 %***	***111***	***28.7 %***

la procédure										
Fin de la procédure de plein droit	***30***	***11.4 %***	***36***	***12.5 %***	***29***	***8%***	***19***	***5.9%***	***32***	***8.3%***
Refus de constater l'accord des parties	***0***		***0***	***0***	***1***	***0.3%***	***0***	***0***	***0***	
Rejette la demande d'homologation des parties	***0***		***1***	***0.3%***	***0***		***0***		***2***	***0.5%***

	2011-2015	
	nombre	%
Accord des parties	**1035**	**63.7%**
Constate l'accord des parties	***616***	***37.9%***
Homologue l'accord des parties	***419***	***25.8%***
Absence d'accord des parties	**590**	**36.3%**
Décision mettant fin à la procédure	***440***	***27.1%***
Fin de la procédure de plein droit	***146***	***9%***
Refus de constater l'accord des parties	***1***	***01%***
Rejette la demande d'homologation des parties	***3***	***0.2%***

- Issues des procédures de sauvegardes ouvertes :

	2011		2012		2013		2014		2015	
	nombre	%	nombre	%	Nombre	%	Nombre	%	Nombre	%
Plan de sauvegarde	**540**	**46.8 %**	**669**	**51.5 %**	**744**	**54.2 %**	**707**	**61.2 %**	**152**	**41.1 %**
Plan de redressement après conversion	**48**	**4.2 %**	**51**	**3.9 %**	**37**	**2.7 %**	**17**	**1.5 %**	**5**	**1.4 %**
Conversion en liquidation judiciaire	**523**	**45.4 %**	**535**	**41.2 %**	**524**	**38.2 %**	**401**	**34.7 %**	**195**	**52.7 %**
Clôture de la procédure de sauvegarde	**42**	**3.6 %**	**44**	**3.4 %**	**67**	**4.9 %**	**31**	**2.7 %**	**18**	**4.9 %**
Clôture : absence ou rejet du plan	**5**	**0.4 %**	**6**	**0.5 %**	**7**	**0.5 %**	**1**	**0.1 %**	**1**	**0.3 %**
Clôture : disparition des difficultés	**37**	**3.2 %**	**38**	**2.9 %**	**60**	**4.4 %**	**30**	**2.6 %**	**16**	**4.3 %**

d) the length of proceedings

	2011	2012	2013	2014	2015
Durée de traitement de la demande de désignation d'un mandataire ad'hoc	**19 jours**	**19 jours**	**18.2 jours**	**18 jours**	**21.2 jours**
Durée de la procédure de conciliation	**3.6 mois**	**3.3 mois**	**3 mois**	**2.8 mois**	**2.2 mois**
Durée de la procédure de sauvegarde	**11.5 mois**	**11.6 mois**	**11.9 mois**	**11.4 mois**	**7.8 mois**

e) the number of ordinary/formal insolvency proceedings and their outcome

		2011	2012	2013	2014	**2015**
1	Sauvegardes	1419	1516	1664	1620	**1533**
2	Redressements judiciaires	18807	18726	18740	18092	**18370**
3	Liquidations judiciaires	40211	41817	43579	42874	**43178**
	Sous-total des procédures avec cessation des paiements (2+3)	59018	60543	61468	60966	**61548**
	Total des procédures collectives (1+2+3) :	60437	62059	63101	62586	**63081**

- Issue des procédures de redressement judiciaire :

	Année d'ouverture				
(en %)	2011	2012	2013	2014	**2015**

*Nombre de procédures de redressement judiciaire ouvertes**	***16 689***	***16 416***	***16 242***	***15 555***	***16 021***
Ensemble des procédures ouvertes avec solution	**15992**	**15900**	**15741**	**14703**	**10034**
Part des procédures avec solution (%)	**95,8**	**96,9**	**96,9**	**94,5**	**62,6**

Plan de redressement (%)	**24,8**	**25,6**	**27,5**	**26,8**	**8,7**
Conversions en liquidation judiciaire (%)	**74,4**	**73,7**	**71,9**	**72,4**	**90,9**
Clôtures de la procédure de redressement (%)	**0,8**	**0,8**	**0,6**	**0,7**	**0,5**

Durée depuis l'ouverture (en mois)	**21,9**	**19,0**	**15,3**	**11,1**	**6,1**
Plan de redressement	16,7	16,7	15,9	14,9	12,4
Conversions en liquidation judiciaire	23,7	19,8	15,0	9,6	5,4
Clôtures de la procédure de sauvegarde	14,0	14,3	14,4	13,3	8,1

7.1.1.3 Ireland

n/a

7.1.1.4 Italy

7.a) Preventive restructuring proceedings initiated (Concordati preventivi)	2013	2014	2015
Total number of proceedings initiated	4.710	3.608	3.029

7.c) Type of outcome		2013	2014	2015
(A)	Failure to approve the restructuring agreement and other definitions of no-admissibility	67,7%	67,1%	67,6%
(B)	Change into insolvency proceedings (Trasformazione in procedura fallimentare)	15,8%	16,1%	14,7%
(C)	Completion of provisions within the restructuring agreement	13,2%	14,4%	15,6%
(D)	Other type of definitions	3,4%	2,4%	2,1%
		100,0%	100,0%	100,0%

7.d) Lenght of proceedings

		2014	2015
(A-B-C-D)	Average lenght of proceedings in days	387	489
(C1)	Avg lenght of proceedings after completion of all provisions within the restructuring agreement*	2.540	2.962
(C2)	Avg lenght of proceedings after approval of restructuring agreement only	324	318
(A-B-D)	Avg lenght of all other proceedings	252	278

(*) Please note that lenght of category C depends on the timing of provisions included by the firms into their restructuring plan.

SOURCE: Italian Ministry of Justice - Department of Statistics

7.e) Insolvency proceedings initiated (Procedure fallimentari)	2013	2014	2015
Total number of proceedings initiated	13.872	15.340	14.472

7.c) Type of outcome	2013	2014	2015
Closing of the procedure for final distribution accomplished (EX ART. 118, n.3, L.F.)	39,7%	39,3%	44,6%
Closing of the procedure for final distribution accomplished (EX ART. 118, n.4, L.F.)	47,1%	45,2%	49,7%
Earlier closing of the procedure (EX ART. 118, n.2, L.F.)	1,1%	0,8%	0,8%
Revocation of the insolvency for acceptance of opposition	1,8%	1,7%	2,0%
Other type of definitions	10,3%	13,0%	2,9%
	100,0%	100,0%	100,0%

7.d) Lenght of proceedings

	2014	2015
Average lenght of proceedings in days	2.894	2.762

7.1.1.5 Lithuania

a) the number of preventive restructuring proceedings initiated:

i. Procedure no. 1: Restructuring proceedings:

	2011	2012	2013	2014	2015	**Total**
Number of restructuring proceedings	58	44	48	31	39	**220**

ii. Simplified restructuring proceedings – 0.

iii. Composition with the creditors in the course of bankruptcy procedure:

	2011	2012	2013	2014	2015	**Total**
Number of composition with creditors	4	5	14	11	11	**45**
Number of terminated bankruptcy proceedings*	5	7	9	11	8	**40**

*Termination of bankruptcy proceedings when creditors cancel their claims or the debtor settles all claims.

b) the size of debtors involved:

i. Procedure no. 1: Restructuring proceedings:

The average size of creditors' claims per debtor (thousands of Euros):

	2011	2012	2013	2014	2015
Avg. size of creditors' claims	3421,5	2473,0	2991,6	1649,8	921,9

The average size of assets per debtor (thousands of Euros):

	2011	2012	2013	2014	2015
Avg. size of assets	4232,3	2706,7	3849,4	2196,9	1490,7

The average number of employees per debtor:

	2011	2012	2013	2014	2015
Avg. number of employees	17	32	45	22	23

iii. Composition with the creditors in the course of bankruptcy procedure:

The average size of creditors' claims per debtor (thousands of Euros):

	2011	2012	2013	2014	2015

Composition with creditors	3173,9	257,9	1819,9	149,8	895,4
Terminated bankruptcy proceedings	1736,1	133,9	1773,3	172,5	582,8

The average size of assets per debtor (thousands of Euros):

	2011	2012	2013	2014	2015
Composition with creditors	2579,2	194,6	728,8	17,6	761,9
Terminated bankruptcy proceedings	1443,2	97,3	966,1	154,2	495,7

The average number of employees per debtor:

	2011	2012	2013	2014	2015
Composition with creditors	14	8	4	4	1
Terminated bankruptcy proceedings	7	4	3	5	1

c) the outcome of the proceedings:

i. Procedure no. 1: Restructuring proceedings:

During the last 5 years 220 restructuring proceedings were initiated, 197 restructuring proceedings were finished (thereof 14 cases were successfully finished, 183 proceedings were terminated or abolished).

iii. Composition with the creditors in the course of bankruptcy procedure:

During the last 5 years 45 compositions with creditors were confirmed, in 40 cases bankruptcy proceedings were terminated on the grounds of cancelling creditors' claims or the debtor's settling the claims.

d) the length of proceedings:

i. Procedure no. 1: Restructuring proceedings (avg. length in years):

	2011	2012	2013	2014	2015
Closed proceedings*	0	0	4,1	3,5	4,7
Terminated proceedings	0,9	1,2	2,2	2,5	2,4

*Restructuring proceedings is closed when the restructuring plan is successfully implemented (i.e. successful restructuring).

iii. Composition with the creditors in the course of bankruptcy procedure (the average length of bankruptcy proceedings until composition with creditors was reached or the bankruptcy proceedings were terminated):

	2011	2012	2013	2014	2015
Composition with creditors	1,2	0,8	1,6	0,6	1,2

Terminated bankruptcy proceedings	1,9	0,6	1,3	1,1	1,0

e) the number of ordinary/formal insolvency proceedings and their outcome:

	2011	2012	2013	2014	2015	**Total**
Number of initiated bankruptcy proceedings	1274	1401	1553	1685	1985	**7898**
Number of closed bankruptcy proceedings*	972	1350	1406	1551	1817	**7096**
Number of terminated bankruptcy proceedings	9	12	23	22	19	**85**
Number of abolished bankruptcy proceedings	23	20	20	33	17	**113**

* Bankruptcy proceedings is closed when an enterprise is liquidated and its registration in the Register of Legal Persons is cancelled.

7.1.1.6 Luxembourg

The number of ordinary/formal insolvency proceedings and their outcome:

2015
915

7.1.1.7 Netherlands

- The number of preventive restructuring proceedings initiated: The number of cases in which suspension of payment ('surseance van betaling') was granted in the years 2011 to 2015, is, according to our information, as follows:

2011	2012	2013	2014	2015
511	520	555	388	369

Under Dutch law, there are currently no other preventive restructuring proceedings. In 2015, a legislative proposal introducing a procedure to prevent unnecessary losses caused by bankruptcy and to remove undesired obstacles to the restart of the business of a bankrupt company, has been submitted to parliament. A second legislative proposal, introducing new legislation on compulsory composition for restructuring of debts outside of bankruptcy, is being prepared.

- The number of ordinary/formal insolvency proceedings and their outcome:

	2010	2011	2012	2013	2014	2015

new bankruptcy proceedings opened (total)	9,491	9,531	11,348	12,449	9,669	7,338
natural persons	2,344	2,648	3,003	3,018	2,048	1,332
natural persons being sole proprietor	985	766	997	1,055	976	735
companies and legal entities	6,162	6,117	7,349	8,376	6,645	5,271

7.1.1.8 Slovakia

n/a

7.1.1.9 Spain

a) el número de procedimientos de reestructuración preventiva iniciados;

i. Procedimiento extrajudicial de acuerdo de refinanciación.

No se disponen de datos

ii. Procedimiento de homologación de acuerdos de refinanciación.

Solo se dispone de datos[154] de 2015.

Se formularon 217 solicitudes de homologación.

iii. Propuesta anticipada de convenio[155]

	2012	2013	2014	2015
Propuesta anticipada de convenio	134	113	16	19

iv. Procedimiento de acuerdo extrajudicial de pagos.

No se disponen de datos completos. En los disponibles[156], figuran

	2013	2014	2015
Negociación acuerdos extrajudicial	3	423	669

v. Procedimiento de negociación pública para la consecución de acuerdos de refinanciación colectivos, acuerdos de refinanciación homologados y propuestas anticipadas de convenio

Solo se dispone de datos[157] de 2015.

Se presentaron 4151 comunicaciones de negociación.

b) el tamaño de los deudores afectados;

No se dispone de datos completos. De los estudios estadísticos sobre los acuerdos de refinanciación homologados[158], los datos son los siguientes

[154] Fuente Consejo General del Poder Judicial

[155] Fuente Instituto Nacional de Estadística

[156] Los disponibles son los derivados del Colegio de Registradores de la Propiedad y Mercantiles. Limitados a las personas naturales empresarios y personas jurídicas inscribibles en el Registro Mercantil.

[157] Fuente Consejo General del Poder Judicial

[158] Fuente Registro de Economistas Forenses, sobre una muestra de 27 acuerdos de 2014 y 79 de 2015.

Homologados. Volumen empresas		2014	2015
Microempresas		7,40740741	1,26582278
Pequeñas		7,40740741	8,86075949
Medianas		55,5555556	56,9620253
Grandes		14,8148148	10,1265823
Desconocido		14,8148148	22,7848101

c) el resultado de los procedimientos;

No se dispone de datos

d) la duración de los procedimientos;

i. Procedimiento extrajudicial de acuerdo de refinanciación.

No se dispone de datos

ii. Procedimiento de homologación de acuerdos de refinanciación.

2,6 meses para las terminadas en 2015[159].

iii. Propuesta anticipada de convenio

No se dispone de datos específicos, fuera de los de duración del procedimiento ordinario de insolvencia (concurso)

iv. Procedimiento de acuerdo extrajudicial de pagos.

No se dispone de datos

v. Procedimiento de negociación pública para la consecución de acuerdos de refinanciación colectivos, acuerdos de refinanciación homologados y propuestas anticipadas de convenio

No se dispone de datos específicos, aunque por ley su duración nunca es superior a cuatro meses.

e) el número de procedimientos concursales y su resultado.

Se dispone de los datos[160] completos siguientes desde 2012

	2012	2013	2014	2015
Solicitudes	10290	10949	8132	6288
Declarados	7541	8199	5842	4394
Declarados y concluidos 176bis.4	752	895	1006	1074
Con fase de convenio	1690	1613	1488	1099
En Liquidación	5530	6112	4991	4092

De manera complementaria, se dispone de una aproximación estadística[161] sobre el resultado de los procedimientos de insolvencia hasta 2014

	2010	2011	2012	2013	2014
liquidación directa	69,47	65,15	74,95	85,37	81,52
liquidación tras fase convenio	23,81	24,9	17,2	5,3	6,79

[159] Fuente Consejo General del Poder Judicial

[160] Fuente Consejo General del Poder Judicial

[161] Fuente, Estadística concursal elaborada por el Colegio de Registradores de la Propiedad y Mercantiles

liquidación tras convenio	0,94	2,8	2,8	3,38	4,16
Convenio	5,79	7,13	5,05	5,95	7,53

7.1.1.10 Portugal

a) the number of preventive restructuring proceedings initiated:

SIREVE

Since 2012 until 30th June 2015

No. of requests submitted – 504

No. of requests accepted – 434

PER	2015	2014	2013	2012
Initiated	3.121	3.487	1.778	497
Ended	3.089	3.071	1.280	81
Pending	1.362	1.330	914	416

b) the size of debtors involved:

SIREVE

Micro-companies: 237

SME – 258

Large Companies - 9

For these purposes, micro companies are those with less than ten employees and an annual turnover or a total annual balance sheet of EUR 2 million; small and medium-sized enterprises are those with less than 250 employees and an annual turnover or total annual balance sheet under EUR 43 million and large companies are the remaining ones.

PER	2015		2014		2013		2012	
Type of debtors	**No.**	**%**	**No.**	**%**	**No.**	**%**	**No.**	**%**
Undertakings	1.158	42%	1.007	62%	790	75%	50	77%
Individuals	1.385	50%	519	23%	196	19%	12	18%
Other	218	8%	95	6%	69	7%	3	5%
Total	**2.761**	100%	**1.621**	100%	**1.035**	100%	**65**	100%

c) the outcome of the proceedings:

SIREVE

52% of the proceedings ended with an agreement between the debtor and the creditors involved

48% of the proceedings did not reached an agreement

PER	2015	2014	2013	2012
Outcome	**No.**	**No.**	**No.**	**No.**
Confirmation of the recovery plan	1.208	391	508	27
No approval of the plan	1.003	264	298	14
Refusal of confirmation of the plan	267	87	138	..
Non-admission decision	260	63	91	15
Declining of jurisdiction by the Court	22	5	11	6
Declaration of bankrupcy	..	3	8	..
Total	**2.761**	**1.621**	**1055**	**65**

d) the length of proceedings:

SIREVE (2015): 7.1 months

PER (2015): 5 months

e) the number of ordinary/formal insolvency proceedings and their outcome:

Year	Initiated proceedings	Ended Proceedings	Pending proceedings
2015	17.235	18.206	3.556
2014	23.270	22.682	4.527
2013	20.130	20.425	3.939
2012	20.738	20.002	4.234
2011	14.386	13.511	3.498

Insolvency proceedings	2015	2014	2013	2012	2011
Outcome	**No.**	**No.**	**No.**	**No.**	**No.**
Declaration of bankrupcy	14.612	15.276	16.334	15.233	9.975
Dismissal	828	808	702	697	599
Withdrawal of proceedings	837	846	1.201	1.329	1.114
Non-admission decision	637	725	952	1.260	892
Decision non declaratory of bankrupcy	373	413	512	564	413
Judgment of expediency	184	193	205	225	159
No need to give judgment (due to the lack by parties to instigate any further procedures)	53	70	15	..	..
Refusal of confirmation by the court of the recovery plan	..	3	3	..	..
Interruption of proceedings	..	..	17	30	26
Confirmation of resctrucutring measure	3	..	..	..	4
Other	23	21	4.	4	3
Total	17.550	18.356	19.945	19.344	13.186

7.2 Survey Questionnaire

Please refer to separate PDF file (to be sent)

7.3 Programme interview guideline

Procedures and outcome

Note: Domestic procedures refer to insolvency procedures where both debtor(s) and creditor(s) are from the same European country; cross-border procedures refer to insolvency procedures where the debtor is from the 'domestic' country while the creditor(s) is/are from another European country.

1. Please complete the below table with an estimate of **total procedural costs** for creditors and debtors (please specify the currency).

Type of procedure	**Estimated costs for creditors**	***% direct costs***[162]	***% indirect costs***[163]	**Estimated costs for debtors**	***% direct costs***	***% indirect costs***
Domestic		... %	... %		... %	... %
Cross-border		... %	... %		... %	... %

2. Do you think that investors perceive a higher risk of insolvency in cross-border investments compared with purely domestic investments?
If yes, **how higher (in %)** is the cost of credit for people investing **abroad** (in another EU country) compared with the cost of credit for people investing in the domestic country (where the credit is granted)?

3. How long does a typical insolvency procedure last on average (in months)?

	Domestic procedure	**Cross-border procedure**
Length of formal procedure	... months	... months

4. Please indicate the (estimated) **recovery rate** of assets (i.e. % of assets recovered) in the different scenarios below.

	Domestic assets	**Foreign assets**
Formal procedures	... %	... %
Informal procedures	... %	... %

5. Please indicate the (estimated) **survival rate** of firms (i.e. % of companies surviving insolvencies) in the different scenarios below.

	Domestic procedures	**Cross-border procedures**
Formal procedures	... %	... %
Out-of-court insolvency procedures	... %	... %

6. Based on your experience, how significant (in % of proceeding costs) are **coordination costs** (costs for ensuring the coherent and efficient use of different national insolvency regimes when a cross-border business enters insolvency) for:
- debtors?
- creditors?

7. Based on your experience, how significant are **relocation costs** for:
- debtors (physical costs of moving the headquarters of the insolvent company to an another EU country)?

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[162] **Direct costs** are the costs involved in running the procedure, the fees paid to professionals and experts employed in selling the assets of the bankrupt firm and agreeing an appropriate distribution of the proceeds.

[163] **Indirect costs** encompass everything else, including costs due to delays of the proceedings which impact negatively on the goodwill.

- creditors (costs related to the change of applicable national insolvency framework)?

Overview of policy options

This section aims at assessing which policy option is most suitable to address the issues caused by current discrepancies in EU insolvency regimes. Three options are described below, with the first one (option A) having three sub-options.

Option A – Minimum standards for restructuring and second chance for firms, (optional second chance standards for consumers). Three sub-options available as listed below. The discharge options could be available to consumers. Optional elements are in italics.

	Sub-option A1	Sub-option A2	Sub-option A3
Early restructuring	Available when debtor in difficulty & at risk of insolvency	A1 + *allow over-indebted debtors to enter preventive restructuring*	A2 + *Early warning tools and a model restructuring plan*
Allowing debtor a 'breathing space'	Automatic general moratorium (on recovery actions and formal proceedings)	Moratorium at debtor's request + *ipso facto & early termination clauses.*	A2, but short-term (<4 months) moratorium
Debtor in possession	NO supervisor/ mediator	mediator/ supervisor COULD be set	supervisor ALWAYS set
Prevent minority creditors/ shareholders to harm restructuring efforts	Restructuring plan adopted with majority in all creditor classes.	*Restructuring plan adopted with majority in min one creditor class. (inter-class cram-down)*	A2 + *shareholders included as class(es) of their own*
Higher success rate of restructuring plan	Avoidance actions are irrelevant for financing within plan. *Finance for working capital allowed during negotiations. Possible super-priority status for new financing.*	*A1 + safe harbour provisions for transactions made before insolvency and relevant to plan*	*A2 + co-obligors' and guarantors' releases under the plan*
Cheaper and faster court procedures	Limited court involvement + use of IT in cross-border situations	A1 + *training to practitioners*	A2 + *training of courts*
Less incentives to relocate (firms & *consumers*)	Most debtors discharged 1 year after starting liquidation	Most debtors discharged 3 years after starting liquidation or repayment plan	*A1 + possible debt consolidation in one procedure (only firms)*

Option B - **Fully harmonised preventive procedure** in EU countries, regulating it in detail (e.g. majorities required, treatment of shareholders, provision of new financing). It could include a uniform discharge period across the EU, with exceptions.

Option C - **A 29th insolvency regime** established, alongside national insolvency procedures. Parties initiating an insolvency procedure (most often debtors) can select the European insolvency regime to apply to their procedure. The option leaves national laws untouched.

7. Please fill out the table below with your best estimate on how each option/sub-option would, in your view, impact insolvency proceedings and the broader economy of your country.
How would each option affect the following aspects as compared to the current situation in your country (please indicate '+' or '-' followed by the corresponding figure to indicate an increase or decrease compared with the baseline situation)?

	A1	A2	A3	B	C
Domestic recovery (%)	~ … %	~ … %	~ … %	~ … %	~ … %
Cross-border recovery (%)	~ … %	~ … %	~ … %	~ … %	~ … %
Length of proceedings (months)	~ … months	~ … months	~ … months	~ … months	~ … months
Cost of proceedings	~ … %	~ … %	~ … %	~ … %	~ … %
Firms saved (%)	~ … %	~ … %	~ … %	~ … %	~ … %
Jobs retained	+ / -	+ / -	+ / -	+ / -	+ / -
Investments	~ … %	~ … %	~ … %	~ … %	~ … %
Access to credit	~ … %	~ … %	~ … %	~ … %	~ … %

7.4 Programme interview guideline – Practitioners

Coordination costs: Costs of coordinating (i.e. ensuring the coherent and efficient use of) different national insolvency regimes when a cross-border business enters insolvency.
→ Based on your experience, how do such coordination costs materialise in practise for creditors, on the one hand, and debtors, on the other hand?

Relocation costs: Physical costs of moving the headquarters of the insolvent company (incurred by debtor/s) and costs related to the change of applicable national insolvency framework (incurred by creditor/s).
→ What are the factors leading debtors to relocate to another Member State for filing for insolvency?
→ What are the consequences of such relocation for creditors (e.g. in terms of unrecovered assets)?

Communication costs: Costs borne by both creditors and debtors for using means of communication to interact between themselves and with the court during the procedure (e.g. mail, official documents, court summonings, online, meetings, etc.)
→ In your opinion, to what extent could the use of modern technologies reduce such communication costs for creditors and debtors?

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