

**STRENGTHENING
WORKERS' VOICES
IN CASES OF
INSOLVENCIES**





With the support of the European Commission

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MORE DEMOCRACY AT WORK
Strengthen Workers' Rights in Company Law

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INTRODUCTION

In November 2016, the European Commission published its “Proposal for a Directive on Preventive Restructuring frameworks, Second Chance and Measures to increase the Efficiency of Restructuring”. The rationale behind this policy thrust was to shift the emphasis of insolvency proceedings away from liquidation to pre-insolvency restructuring, giving viable enterprises a second chance in regaining going-concern status. Such a directive is particularly important to employees working in crisis-prone or insolvency-threatened companies. As such, it has been consistently evaluated by European trade unions with a number of proposals and statements – including this EU-funded “Strengthening workers’ Voice in Cases of Insolvencies” project.

The Commission’s policy move was long overdue. As this study shows, the national European insolvency law landscape has been patchy and incoherent at best. The divergences include, among others, the criteria to open an insolvency proceeding, the ranking of creditors, the valuation procedures as well as the role and level of participation of workers during insolvency proceedings. The negative effects of such divergent, and in many cases inadequate, insolvency regimes, are manifold – with workers usually paying the highest price. Across Europe, around 200.000 firms go bankrupt every year, leading to 1.7m job losses. Many of these bankruptcy cases are cross-border, affecting workers from a wide range of EU Member States.

In December 2018, after an agreement between the Commission, Parliament and Council was reached in the

trialogue negotiations, a final text was published, which unfortunately fell short of the expectations of ETUC and its affiliates. As it stands now, most of the rules refer to national legislation. Countries can therefore continue to compete on the lowest standards. The European Parliament incorporated some of ETUC’s key demands to strengthen workers’ interests, but the final trialogue text leaves Member States with a lot of freedom and room to maneuver. For example, they may choose to introduce a right for creditors or workers’ representatives to initiate a restructuring procedure, but the text does not contain a general right to do so. This could significantly weaken workers’ position across the continent.

A well-functioning European insolvency framework with a focus on preventive restructuring is not only essential to safeguard employment and workers’ interests, but also to support economic growth and cross-border investment. With this context in mind, it is important for the European Trade Union movement to analyse the impact the new EU directive may have on European workers’ rights as well as to clarify the scope for national implementation. At present, there is no available study on workers’ participatory rights in cases of insolvency. The existing scholarship has delved exclusively into the legal and administrative aspects of restructuring and insolvency processes; the issue of workers’ voices and rights during such processes has, regrettably, largely been left untouched. This report aims to fill this research gap. It does so by providing an up-to-date, European-wide comparative overview on the (1) insolvency-related legal provisions as well as; (2) workers’ participation rights in cases of insolvencies

of six European countries – namely Germany; Hungary; Portugal; Sweden; France and The Netherlands.

The study will be divided into two parts: first, a study on the country's legal framework and second, a summary on the three company case studies that were presented and discussed at the three project-related workshops in Berlin, Amsterdam and Paris in 2018/2019. The findings from the country studies are based on extensive desk-based research that aims at collecting information and complementary perspectives regarding insolvencies and workers' participation in times of crisis on company-level.

Each report follows a similar structure. First, a statistical overview covering the number of insolvencies in the country analysed is presented. This is followed by a couple of introductory chapters outlining the history and development of the country's insolvency legal framework. Subsequent sections delve into the process of insolvency proceedings, including – but not limited to – the following points:

- Requirements for insolvency proceedings (Reasons for Insolvency)
- Overview of the course of insolvency proceedings
- Actors and their rights and obligations (including, for example, the insolvency administrator, works councils/trade unions, creditors' committees, etc.)
- Application for the opening of insolvency proceedings
- Insolvency money regulations, if applicable.
- Characteristics of creditor/employee participation throughout the proceedings
- Rules concerning distribution of revenues
- Treatment of dismissals during insolvencies
- Rules regarding social plans, if existing.
- Degree of influence from workers' representatives during proceedings.

The country reports are accompanied by relevant company case studies (covering Germany, the Netherlands¹ and France)², revealing how these Member States have dealt with cases of insolvency in the past, as well as the degree to which employees, workers' representatives and other relevant stakeholders have been included in the process. Furthermore, such case studies allow us to get a glimpse of the extent to which culture plays a role in the development of insolvency procedures. Germany's Praktiker Case Study, will, additionally, identify the potential implications and opportunities the new EU pre-insolvency Directive would have had on the case.

In short, through its combined approach, this comparative study will provide valuable insights into the diverging insolvency-related legal provisions currently in place across the six selected countries, focusing on the different approaches they take in dealing with workers' rights, voices and concerns during cases of insolvency. Issues of labour law, participation rights, as well as the main challenges that Trade Unions, Works Councils and Employee Representatives are confronted with during financial crises and cases of insolvency will also be duly addressed.

In addition to these country studies and the specific case studies, a guideline for employee representatives will also be developed, which will serve as a practical aid in insolvencies, but also in the event of restructuring in preventive restructuring procedures, and at the same time formulate central demands by works councils and trade unions on their respective member states with regard to issues to be taken into account within the framework of the transposition of the directive into national law.

1 To be provided in the coming weeks.

2 Germany: Praktiker; Netherlands: Imtech N.V.; France: Chocolaterie de Bourgogne.

COUNTRY REPORT #1

GERMANY

By

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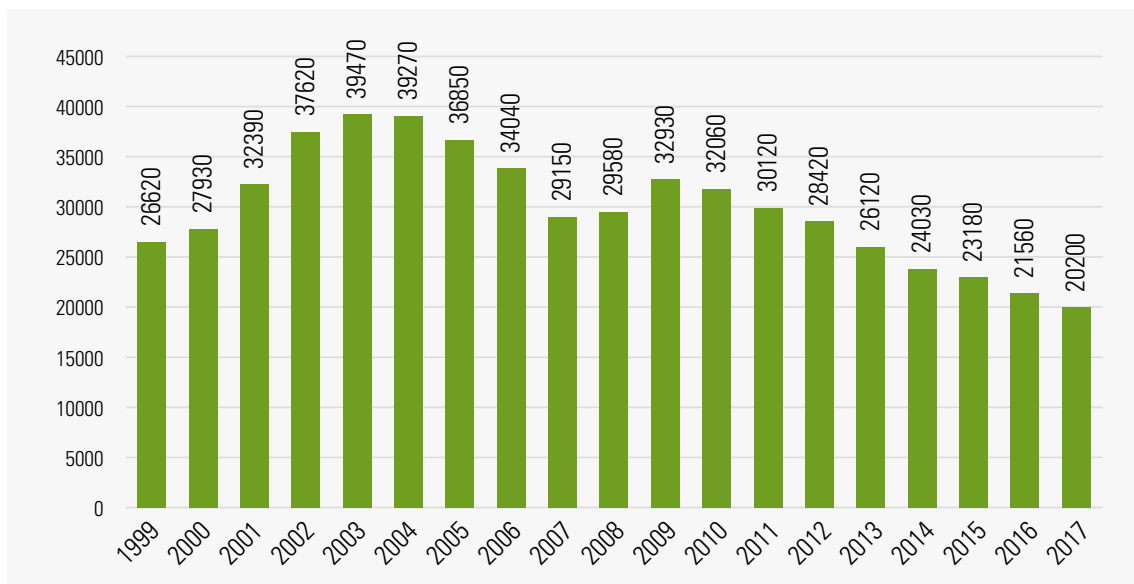
1. STATISTICAL OVERVIEW

In 2017, the number of insolvencies continued to fall sharply. Across Germany, the Federal Statistical Office registered around 116,000 insolvencies (2016: 122,590). This is the seventh year of declines in a row, and at the same time the lowest level since 2004. Corporate insolvencies went down from 21,560 to 20,200 (-6.3%). Compared to the all-time peak of 2003, when 39,470 corporate insolvencies were registered, the number of cases has almost halved. The lowest recorded number of corporate insolvencies was 23 years ago in 1994, with just 18,820 registered cases.

The decline in insolvency figures can be attributed to the favourable macroeconomic climate of the past few years. The financial burden on borrowing companies was much lower than in previous years due to low-cost financing (keyword: low interest rates) and debt rescheduling. Companies have also largely benefitted from a strong and sustained domestic demand.

Whilst the average loss per insolvency for private creditors in 2017 amounted to almost EUR 1 million, the losses for corporate insolvencies were estimated at 26.6 billion euros, slightly below the previous year's figure of 27.5 billion euros. For the insolvent companies this meant the threat – or in certain cases, loss – of around 198,000 jobs, compared with 221,000 in the previous year.

Fig. 1: Number of Corporate insolvencies in Germany from 1999 to 2017³



3 Source: Statista 2018

Fig. 2: Insolvencies in Germany⁴

YEAR	NO. OF INSOLVENCY PROCEEDINGS OPENED	INSOLVENCY PRO-CEEDINGS REJECT-ED – for Lack of As sets	SETTLEMEND PRO-CEEDINGS OPENED / DEBT SETTLEMENT PLAN ADOPTED	INSOLVENCIES	
				TOTAL	OF WHICH COMPANY INSOLVENCIES
2017	104 287	9 456	1889	115 632	20 093
2016	111 197	9 347	1970	122 514	21 518
2015	115 847	9 711	1880	127 438	23 101
2014	123 231	9 924	1716	134 871	24 085
2013	129 269	10 264	1799	141 332	25 995
2012	137 653	10 826	1819	150 298	28 297
2011	145 702	11 798	1918	159 418	30 099
2010	153 549	12 770	2139	168 458	31 998
2009	147 974	12 935	1998	162 907	32 687
2008	140 979	12 107	2116	155 202	29 291
2007	149 489	13 206	1902	164 597	29 160
2006	143 781	15 607	2042	161 430	34 137
2005	115 470	19 279	1805	136 554	36 843
2004	95 035	21 450	1789	118 274	39 213
2003	77 237	22 134	1352	100 723	39 320
2002	61 691	21 551	1186	84 428	37 579
2001	25 230	22 360	1736	49 326	32 278
2000	19 698	21 357	1204	42 259	28 235

In terms of industry affiliation, trade and service providers dominated insolvency activity in Germany in 2017, registering around 77.8% of the total number of insolvencies – a similar percentage to the past year. The trade and services group, however, experienced a slight decrease in absolute terms to -4.7 and -4.3 respectively.

The decline in insolvencies was above average in two specific sectors, namely the (1) manufacturing sector, with 1,490 cases (-13.9%); as well as (2) the construction sector with 3,010 cases (-11.7%). Out of 10,000 companies pertaining to this category, 62 insolvencies occurred.

Fig. 3: Insolvencies by Main Economic Sectors^{*5}

	TOTAL NUMBER	SHARE OF TOTAL INSOLVENCIES	% CHANGE COMPARED TO PREVIOUS YEAR
Manufacturing	1490 (1730)	7.4 (8.0)	-13.9
Construction	3010 (3410)	14.9 (15.8)	-11.7
Trade	4280 (4490)	21.2 (20.8)	-4.7
Services	11420 (11930)	56.6 (55.3)	-4.3

* Creditreform estimate; () = Previous Year Figures

4 Source: destatis Statistisches Bundesamt (German Federal Office of Statistics)

5 Source: Creditreform

Fig. 4: Development of Insolvencies by Main Economic Sectors, 2010 to 2017⁶

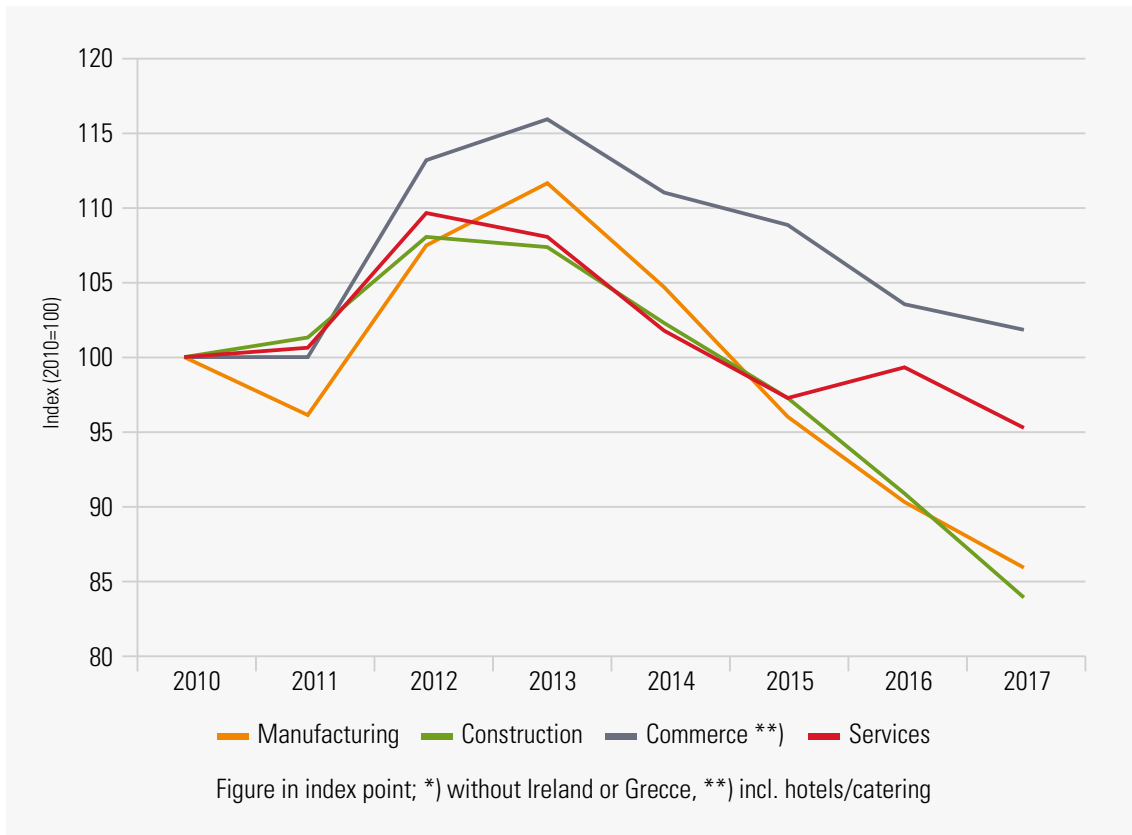
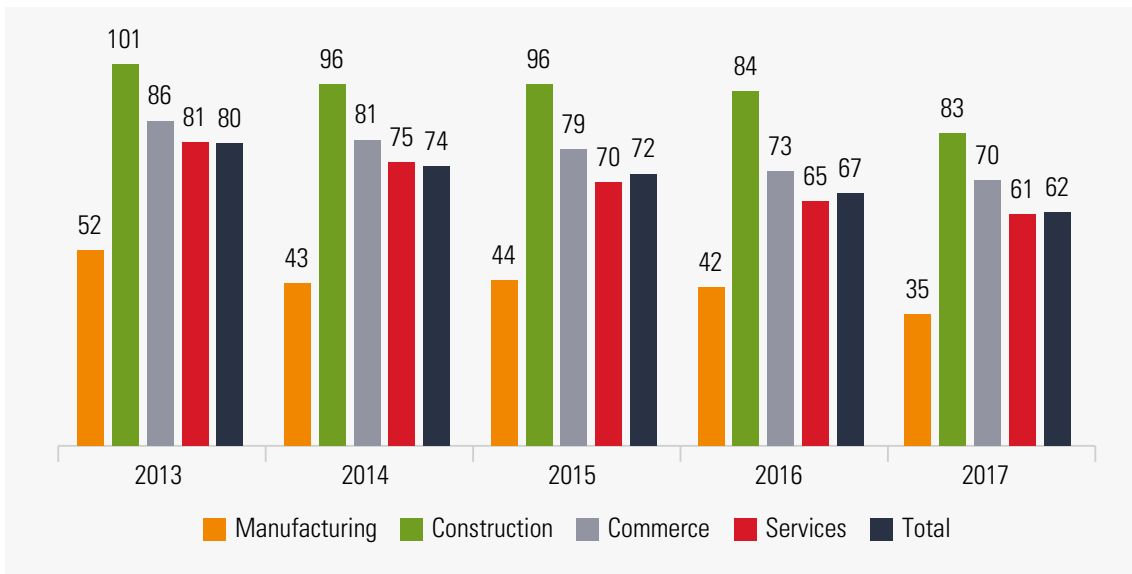


Fig. 5: Insolvency Ratios by Main Economic Sector⁷



6 Source: Creditreform

7 Source: Creditreform

Fig. 6: "Top Ten" Industries at Risk⁸

	INSOLVENCIES PER 10.000 COMPANIES
Demolition Works	598
Removal/Relocation Transportation	479
Gastronomy (esp. Beverage-related)	475
Postal, Courier and Express Delivery Services	460
Private Security Companies	425
Bars	408
Insulation against Cold, Heat, Sound and Vibration	408
General Cleaning of Buildings	391
Take-away Fast Food Establishments	389
Pubs	388

Though companies such as Air Berlin or SolarWorld received extensive media coverage, the trend towards smaller insolvencies was confirmed throughout 2017; 82.7% of all insolvent companies fall within the 1-5 employee range.

Fig. 7: Corporate Insolvencies by Number of Employees in 2017⁹

	PERCENTAGE OF INSOLVENCIES PER COMPANY SIZE
1-5 People	82.7 (81.9)
6-10 People	7.8 (8.0)
11-20 People	4.8 (5.0)
21-50 People	3.1 (3.3)
51-100 People	0.9 (1.1)
+ 100 People	0.7 (0.7)

2. INTRODUCTION

a) Legal developments leading to the Insolvency Code (InsO)¹⁰

The **origins of German insolvency law** can be traced back to the "Gemeine Recht" (Common Law) (reference work: Salgado de Somoza, *Labyrinthus creditorum*, 1665/1672) as well as the "Partikularrecht" (Particular Laws) of the 19th century. These acted as the legal foundation to the "Konkursordnung" (Bankruptcy Act) of 1877. This Act was a key component of the so-called "Reichsjustizgesetze" (Judiciary Laws of the Reich), and came into force on 1.10.1879. The Bankruptcy Act rationalised several existing insolvency-related Acts and laws, such as the Prussian Bankruptcy Act of 1855, the Bavarian Court of Procedure of 1807/38 as well as the Code of Commerce of 1807/38.

Throughout the 20th Century, the Bankruptcy Act underwent repeated amendments. Of special importance was the **Bankruptcy Loss Payment Act of 17 July 1974**, since it significantly strengthened the employees' position in bankruptcies.

8 Source: Creditreform

9 Source: Creditreform

10 The following explanations are taken from K. Schmidt, *Insolvenzordnung*, 19th ed. 2016, introduction, sections 1-4.

After the German reunification, a new organ called the German Enforcement Ordinance (GesO) came into force in the ex-GDR states, creating a provisional and heavily fragmented legal provision for insolvency court procedures which essentially mixed-and-matched elements from the Bankruptcy Act of 1877, the Rules of Settlement of 1935 and the GesO of 1990. This provisional arrangement would last until 1998.

The reforms to Insolvency law, a process that was not limited to Germany and that started in the 1970s, crystallised in the "Insolvenzordnung" of 1994 – **The Insolvency Code (abbreviated as InsO)** – which, despite its name, came only into force on 1 January 1999. As early as 1988/89, the Federal Ministry of Justice presented a to-part "Discussion Draft Law on the Reform of Insolvency Law", which was followed in 1989 by a draft bill.

b) Significant changes to the InsO before and since its entry into force¹¹

The **first amendments to the InsO** were already made prior to its entry into force on **1 January 1999**. Of particular importance were (1) § 1 KSchG & § 113 BetrVG, which were amended by the Employment Promotion Act of 13.9.1996; as well as (2) §§ 113, 120-122, 125-128, which underwent a number of extensive amendments – predominantly in their wording, i.e. "Konkursverwalter" (insolvency liquidators) – intended for the old West German federal states. Since its entry into force, the InsO has experienced several changes and amendments, which include but are limited to: (1) the simplification of the InsO of 2007; (2) the MoMiG; (3) the Restructuring Act as well as; (4) the ESUG. Other factors contributing to its repeated revisions include the introduction of international insolvency law.

3. REQUIREMENTS FOR INSOLVENCY PROCEEDINGS (GROUNDS FOR INSOLVENCY)¹²

In addition to **illiquidity** (§ 17¹³) and **over-indebtedness** (§ 19), the InsO contains the insolvency reason of **imminent illiquidity** (§ 18). The latter entitles the debtor – or the debtor company – to protect itself early enough under judicial insolvency proceedings, and, in this way, bring about orderly settlement and creditor satisfaction or restructuring. In principle, insolvency proceedings should only start when the applicant/claimant is in a state of **"Zahlungsunfähigkeit" (inability to pay, i.e. illiquidity)** (§ 17). Over-indebtedness is only considered a ground for insolvency for legal entities and partnerships (§ 19 para. 3) as well as "Nachlass" (inheritance estate) (§§ 320 sentence 1, 333 para. 1).

The main grounds for insolvency are legally defined under InsO. According to § 17, debtors are insolvent if they are not able to fulfil all due payment obligations. Insolvency is generally assumed the moment the debtor stops making payments. Likewise, the debtor enters a stage of imminent illiquidity if they are unlikely to be able to meet their existing payment obligations in a timely manner (§ 18 section 13). Over-indebtedness occurs when the debtor's assets can no longer cover all existing liabilities, unless under certain circumstances, the continuation of the company is seen as likely.

The grounds for insolvency are final. However, they are interchangeable in the course of the procedure. Indeed, the insolvency court is entitled to open insolvency proceedings for over-indebtedness even if the creditor has initially only filed for insolvency and vice versa. When it comes to a creditor's filing for insolvency, however, imminent illiquidity does not constitute a reason for insolvency proceedings to begin, since it is only a reason for insolvency in proceedings filed by the debtor. Own applications where "imminent illiquidity" has been stated as the main ground for insolvency proceedings to start may well be re-considered by the courts, which may open the case under over-indebtedness (§ 18 para. 13). The insolvency court must, however, extend its investigations to all admissible insolvency grounds. This is because many debtors or debtor companies that file for insolvency on the grounds of imminent illiquidity are often cases of over-indebtedness. In these cases, especially if there is an obligation to file an application,

11 The following explanations are taken from K. Schmidt, Insolvenzordnung, 19th ed. 2016, introduction in section 7 et seqq.

12 Cf. on the following Mock, in: Uhlenbruck, InsO, § 16 marginal 5 f.

13 The following paragraphs without legal designation refer all to the InsO.

the court must open the case on account of over-indebtedness so that the requirements of Sections §§ 26 (3) and (4), 92 (liability provisions for the delay in insolvency proceedings) are met.

4. INSOLVENCY PROCEEDING PROCESSES – A BRIEF OVERVIEW

Insolvency requires primarily a civil procedure. Accordingly, the initiation of a procedure requires a complaint (principle of application).

a) Insolvency Application (i.e. filing for insolvency)

Only the debtor (own application) or a creditor (external application) can be the claimant. The application must be based on a reason/ground for insolvency (see above). It must also be provided in writing.

b) Potential establishment of a preliminary creditors' committee

The provisional creditors' committee was included in the law for the first time by the ESUG. In practice, such committees existed well before the ESUG came into force, especially in large-scale proceedings. They had, however, no legal basis. A distinction is made between the compulsory, requested and optional creditors' committee. Only creditors or future creditors may be appointed as members, see §§ 21 para. 2 sentence 1 no. 1a, para. 1, 67 para. 2. Pursuant to § 67 para. 2, key representatives of the creditors shall include: (1) creditors entitled to separation; (2) insolvency creditors with the highest claims; (3) small creditors and an employee representative.

Should a work council exist, it is advisable to appoint the chairman of the works council as the committee chairman. Their tasks include:

- Support and supervision of the provisional insolvency administrator.
- Right to participate in the appointment of a temporary administrator.

c) Expert opinion phase

Upon receipt of the insolvency application, the insolvency court proceeds to examine the general admissibility of the application. If the admissibility requirements are met, the court must then decide whether or not insolvency procedures should start. The decision lies on two essential factors, namely: (1) the existence of a ground for insolvency as well as; (2) the guarantee that the costs of the procedure can be covered. Upon determination of a reason/ground for insolvency and of sufficient assets, insolvency proceedings will open. If not, the opening of insolvency procedures will be cancelled. Insolvency courts often employ experts to examine and determine whether the admissibility requirements are all in order. These submit a written appraisal to the insolvency court, which can influence the court's final decision.

d) Provisional (insolvency) administration

Aside from an expert's written appraisal, the court has also the option of ordering measures to secure the "Massverbindlichkeiten" (insolvency liabilities). In these cases, the court typically appoints a so-called provisional insolvency administrator. Such administrators must ensure that the operations of the debtor's company do not come to a halt until a decision on the opening of insolvency proceedings is met. Indeed, fully or partial closure of a company would have a significant impact on the rights of the debtor, since they would be deprived of the possibility of continuing operations at a time when a reason/ground for insolvency has not even yet been established.

If a general ban on disposal is imposed on the debtor, a so-called strong insolvency administrator comes into play. These have the administrative and disposition power over the debtor's assets. If, on the other hand, no general ban on disposal is conferred to the debtor, a so-called weak insolvency administrator comes into play, whose specific duties, rights and obligations are to be decided by the court.

e) Opening of insolvency proceedings

The insolvency court opens proceedings by way of a resolution. At the opening of an insolvency, the debtor's administrative and disposition powers are transferred to the insolvency administrator. Proceedings pending shall be suspended by operation of law. The insolvency administrator establishes assets liabilities from the time of the opening of insolvency.

f) Reporting date (creditors' meeting)

Should insolvency proceedings be opened, the date of the report (the so-called creditors' meeting report) is decisive. The creditors' meeting will be agreed on by the insolvency court. Creditors entitled to attend the meeting are: (1) all insolvency creditors; (2) the insolvency administrator; (3) the members of the creditors' committee as well as; (4) the debtor. These are expected to report to the insolvency administrator on the economic situation of the debtor, and to explain what the main reasons causing the company's financial strains are. Likewise, they must confirm whether there are prospects of retaining the debtor's company in whole or in part, and what possibilities exist for an insolvency plan. Based on the insolvency administrator's report, the creditors' meeting decides at the reporting date whether the debtor's company is to be closed or provisionally continued. It may also instruct the liquidator to draw up an insolvency plan and its objectives. In addition, the creditors' meeting must decide on all significant legal acts.

g) Examination date

On the examination date, the insolvency administrator provides the court with a chart/explanatory note regarding the claims filed. When as a creditor one does not hear from the insolvency administrator after a timely filing of a claim, the claim to the insolvency table is established, § 179 Paragraph 3 Sentence 3 InsO.

h) Settlement phase

During the settlement phase, the insolvency administrator implements the resolutions of the creditors' meeting, liquidates the existing assets and adjusts the "insolvency table". Depending on the size of the process and the specific circumstances, this phase can last from six months to several years.¹⁴

i) Final report and deadline

After all assets have been liquidated and all registered insolvency claims have been finally examined, the insolvency administrator submits a final report and the final accounts to the insolvency court.

If the Insolvency Court has no further questions, it shall schedule a closing meeting. In the case of smaller insolvency proceedings, this may also take place in writing. In the closing meeting, the insolvency administrator reports once again conclusively on the insolvency proceedings.

j) Distribution

After the closing date, the Insolvency Court approves the final distribution according to the distribution list submitted, provided no objections are raised. The distribution sequence required by law must be observed.

k) Repeal

Once the insolvency assets have been distributed, the court cancels the insolvency proceedings. In the case of insolvency proceedings concerning the assets of a GmbH or a GmbH & Co. KG, the insolvency proceedings have been concluded. The period of good conduct only follows in insolvency proceedings over the assets of natural persons.

l) Residual debt discharge, if applicable (only for natural persons)

¹⁴ Special cases apply here for "Massenunzulänglichkeit" – the so-called insolvency inadequacies. In this case, the proceedings shall be terminated by the liquidator after the costs of the proceedings and assets liabilities have been repaid.

5. THE ROLE OF CO-DETERMINATION AND WORKS COUNCILS IN INSOLVENCIES

The obligations between employer and works council under the Works Constitution Act are not affected by an insolvency. The works council remains completely unaltered by the opening of insolvency proceedings for as long as its term of office lasts. Likewise, new elections are also possible during insolvency proceedings, insofar as a works council-compatible business remains. The works council's rights of participation and co-determination are also not restricted by the opening of insolvency proceedings. Rather, they relate to workers' issues arising during insolvency.

During the insolvency proceedings, the employer remains a party under Works Constitution law. Nevertheless, they lose the authority to manage and dispose of all assets belonging to the insolvency estate upon the opening of insolvency proceedings (§ 80 para. 1 of the InsO). Thus, the insolvency administrator alone must exercise the rights and obligations of the employer under the Works Constitution. In doing so, the insolvency administrator is bound by the legal framework under Works Constitution law. However, if the insolvency court orders the debtor to manage the assets themselves (Eigenverwaltung), the debtor largely retains their position as employer.

The insolvency administrator must comply with and implement the existing work agreements, considering their termination option pursuant to § 77 (5) BetrVG in conjunction with § 120 (1) sentence 2 InsO (§ 77 (1) BetrVG). Insofar as the termination of a works agreement is possible, the after-effect of § 77 (1) BetrVG must be considered, whereby the InsO provides for a special notice period of three months for the termination of an onerous works agreement in § 120 (1) InsO – provided a longer period has been agreed. The administration must also adhere to the general principles for cooperation with the works council in accordance with Sections 74 et seq. of the German Stock Corporation Act. BetrVG. It must also observe the special participation and co-determination facts in social, personnel and economic affairs of §§ 87 ff., 92 ff., 106 ff. BetrVG. Therefore – aside from the special regulations under insolvency law for operational changes – the statutory or contractually agreed competence of the conciliation body, pursuant to § 76 BetrVG, will not be affected by the opening of insolvency proceedings.

According to § 21 II No. 1 InsO, the debtor employer shall only continue to exercise and fulfil their rights under Works Constitution law during the period between filing of an application and opening of procedures when the administrative and disposition authority is not passed onto a provisional administrator. If a ban on disposal is imposed on the debtor, the provisional insolvency administrator is entitled to initiate or take the necessary measures under the Works Constitution already in the opening proceedings (§ 22 I InsO to). Therefore, it is important for provisional insolvency managers to bear § 121 BetrVG in mind, especially if the duty to provide information to the Economic Committee and the Works Council pursuant to Sections 106, 111 BetrVG has not been properly fulfilled.

6. APPOINTMENT AND SELECTION OF THE INSOLVENCY ADMINISTRATOR

§ 56 para. 1 sentence 1 explains that a natural person – this may be an expert in business and independent from the creditors and the debtor – must be appointed as the insolvency administrator during the proceedings. Besides the creditors' meeting, the insolvency administrator is a key player in insolvency proceedings. Verifying its qualification is regulated under § 56, a complicated task that makes this appointment of the most complex procedural decisions of the court. A distinction must be made here between the pre-selection of the insolvency administrator and the subsequent appointment in the specific individual case. Ensuring equal access to the office of administrator requires a procedural design which enables the judge to conduct quick aptitude test for urgent cases.¹⁵ This is guaranteed by the pre-selection list which, after determining their fundamental suitability, gives applicants the opportunity to be

¹⁵ BVerfG NZI 2009, 641, 642 section 10.

appointed experts, trustees, administrators or insolvency administrators during future insolvency proceedings. The pre-selection list must be kept by the court.

7. “INSOLVENZGELD” (INSOLVENCY MONEY) AND PRE-FINANCING OF INSOLVENCY MONEY¹⁶

The starting point is usually the outstanding wages and salaries of employees for the month when the filing of the insolvency application has taken place. The insolvency money is a wage replacement payment from the Employment Agency. § 614 of the German Civil Code (BGB) obliges the employee to perform their work in advance on a regular basis without having any means of security at their disposal. The employer, on the other hand, pays the remuneration afterwards – once the work has been performed by the employee, i.e. at the end of the month. In order to protect employees' pay claims, the pay-as-you-go insurance (§§ 358 to 361 SGB III), financed by the employers as a whole, secures their outstanding pay and contribution claims in the event of employer insolvency. Although this protection was not originally created for the benefit of insolvent companies, it is a positive side effect that has emerged in practice, since insolvency money has created an effective means of creating liquidity. Employees are also prepared to continue working for up to three months if their wages and salaries are outstanding due to insolvency payments. In addition to providing security for employees, this also makes the restructuring of a company possible (insolvency money as a restructuring subsidy). Furthermore, it helps with the preservation of jobs and the protection of social insurance carriers from loss of contributions (§ 175 SGB III). All insolvency proceedings also serve the creditor's interest as reorganisation proceedings. The use of the insolvency money as a state instrument for restructuring is a Germany-specific peculiarity that does not constitute state aid contrary to European law.¹⁷ The fact that money flows into the insolvency proceedings from outside is unique in this respect. An undesirable side effect must, however, be pointed out: insolvent employer could theoretically use the insolvency money to delay insolvency proceedings.

According to § 165 Paragraph 3 of the Third Book of the Code of Social Law (SGB III), an “Insolvenzereignis” (Insolvency Event) is a prerequisite for the insolvency money claim of an employee employed in the Germany. Likewise, a loss of pay and a timely filing of an application are mandatory for an insolvency money claim (§ 324 Paragraph 3 Sentence 1 SGB III). In accordance with § 167 (1) of the Third Book of the Code of Social Law (SGB III), insolvency money is paid in the amount of the net remuneration. The claim to insolvency money exists for remuneration claims of the last three months of the employment relationship (insolvency money period) preceding the insolvency (§ 165 Paragraph 1 S. 2 SGB III). It is important to note that the day when insolvency procedures start is not regarded as part of the insolvency money period.

Practical problems, however, tend to arise. This is partly because the insolvency money can only be applied for by the employee after the “insolvency event” has occurred and is only paid out afterwards, especially since wages and salaries generally were already left unpaid before the filing of the insolvency application. According to § 337 III 2 SGB III, insolvency money is only paid retrospectively for the period for which it has been applied for. This means that the employees of an insolvent company would have to spend three months, if not longer, without due salary payments. Thus, the average employee would be in need of social assistance. Furthermore, regular payment of the insolvency money regularly comes too late to meet the pension interests of the employees. In addition to the demotivation of the workforce, the absence of remuneration entitles the employee to exercise a right of retention up to extraordinary (personal) termination (§ 626 BGB). Consequently, the debtor company would again run a deficit due to the lack of personnel and ultimately endanger a potential successful restructuring. The possibility of continuing operations stands or falls with the financing of the current wages of the workforce.

¹⁶ See also Hunold, NZI 2015, 785 ff.

¹⁷ A precondition for the receipt of the insolvency payment is that the employee is employed in Germany – in practice, however, employees abroad are regularly included.

The period between filing for insolvency and payment of the insolvency money can be bridged by pre-financing. Without pre-financing, the temporary administrator would be required to use up the last liquid assets. The pre-financing of pay claims serves, among other things, to persuade employees to continue working in the event of the employer's insolvency. It is also key in the preservation of jobs, thus increasing the chances of restructuring, or at the very least, the chances of opening insolvency proceedings. Pre-financing is carried out in such a way that the bank buys the employee's wage claim against the employer at the nominal value (debt purchase procedure). In return, the employee receives a payment (purchase price) corresponding to the net wage as insolvency money. After the "insolvency event" has occurred, the pre-financing bank completes the insolvency money claim accessory to the acquired remuneration claims in accordance with § 170 Paragraph 4 SGB III. According to the criteria of § 170 Paragraph 4 SGB III, two conditions must be fulfilled for the pre-financing of insolvency money: firstly, an effective assignment of the right to remuneration and second, the consent of the Employment Agency to the transfer and pledging to the third party. Once the insolvency event has occurred, approval is no longer required.

8. CREDITOR AND EMPLOYEE PARTICIPATION DURING INSOLVENCY PROCEEDINGS – CHARACTERISTICS¹⁸

One of InsO's main aims is to expand and strengthen creditor rights within insolvencies.¹⁹ Previous experience has shown that creditor participation is rather weak, especially since only major creditors attend creditor meetings.

Despite this, the legislative changes brought about by the introduction of InsO have incentivised creditors to exercise their rights during insolvency proceedings. This becomes particularly evident during the following processes: (1) the decision on the type of settlement to be taken by creditors at the reporting date in accordance with §§ 156, 157 InsO; (2) the decision on whether to grant the debtor self-management under trustee supervision and; (3) the adoption of an insolvency plan. Thanks to this, creditors are now forced to make much greater use of their participative rights than under previous laws.²⁰ Among other things, creditors now have the power to decide on the adoption of an insolvency plan if they consider this form of settlement to be more sensible and effective than the dismantling of the debtor's assets for the sole purpose of claim settlement. The extended scope of action granted to the debtor by the Insolvency Code (pursuant to §§ 286 ff. InsO) also leads to an increased need of information by the creditors, a need that can be best satisfied through "Gläubigerselbstverwaltung", the so-called creditor self-administration agencies. The question of the cost-benefit analysis of participation in the creditor self-administration agencies remains even after the insolvency regulations have come into force. However, even the reformed insolvency law does not necessarily offer a guarantee that the creditors' prospects of settlement will considerably improve. Settlement rates in corporate insolvency remain, at around 5%, rather poor. Participation continues to be supported by separated creditors such as "house banks" as well as other institutionalised creditors such as the tax authorities and the pension protection association, each of whom pursue their own interests. Incidentally, a participation of unsecured creditors is hardly noticeable.

The InsO differentiates between the **creditors' committee** regulated in §§ 67 to 73 InsO and the **creditors' meeting** regulated in §§ 74 to 79 InsO. The creditors' meeting is the basic organ of creditor self-administration. Essentially, the creditors' committee is the central supervisory body of creditors for insolvency proceedings and in its function, it resembles a supervisory board.²¹ The relationship between the creditors' committee and the insolvency administrator is characterised by the committee's duty to support and monitor the administrator in accordance with § 69 Paragraph 1 InsO. Paragraph § 21 (2) No. 1a InsO, § 69 InsO also applies to the provisional creditors' committee in the opening proceedings. The rights and obligations of the **creditor's committee** include the following:

18 See Pape/Uhlenbruck/Voigt-Salus, Insolvency Law, 2nd edition 2010, Chapter 16 section 1 ff.

19 Explanatory statement on RegE, BT-Drucks. 12/2443

20 All regulations concerning creditor participation can be found in §§ 67 to 79 InsO.

21 The purpose of this is to clarify the monitoring and support obligations of the Committee to the Administrator.

- pursuant to § 69 S. 2 InsO, they must be informed about the course of business, inspect books and business papers, have the monetary transactions and holdings checked,
- rights also include the participation in the appointment of the provisional insolvency administrator/special administrator (§ 57a Paragraph 2 InsO)
- the right to file an application to dismiss the administrator (§ 59 Paragraph 1 Sentence 2 InsO) as well as the organization of the creditors' meeting, to be convened in accordance with § 75 Paragraph 1 No. 2 InsO. Furthermore, the Committee's duties include the filing of an application to cancel the meeting when the prospect of a successful restructuring vanishes (§ 270b Paragraph 4 No. 2 in conjunction with No. 1 InsO)
- the right to information vis-à-vis the debtor (§ 97 Paragraph 1 InsO)
- the right of consent for legal acts of the administrator (§ 160 Paragraph 1 Sentence 1, Paragraph 2 InsO)
- the right to participate in the distribution of proceeds, the discontinuation or cancellation of proceedings, in the preparation and execution of the insolvency plan and in the self-administration.

The importance of the creditor's meeting has been further strengthened by the Insolvency Code. The fundamental decisions on the way the proceedings are to be handled are now also taken at the meeting. Section 157 of the InsO stipulates that there can no longer be any delay in entering into liquidation against the creditors' will. The debtor only has a chance of reorganisation if they convince the creditors that their reorganisation concept will bring about a better settlement than the liquidation of his assets.

The importance of creditor participation in insolvency proceedings is reflected in the final resolutions, which are subject to the decision of the meeting.

The **creditors' meeting** makes decisions on:²²

- the dismissal and re-election of the insolvency administrator (§ 57 InsO),
- the filing of an application to dismiss the insolvency administrator (§ 59 InsO),
 - this results in a strengthened position of the employees, since, pursuant to § 67 Paragraph 2 Sentence 2 InsO, they must be represented in the creditors' meeting and, in view of the unanimity requirement for the enforcement of an administrator, have a large influence on the proceedings.
- the establishment of a creditors' committee and, if necessary, its composition and powers (§ 68 Paragraph 1 InsO),
- the question of whether the insolvent company should be closed down or provisionally continued (§ 157 InsO),
- numerous measures if a creditors' committee has not been appointed (e.g. whether the company or a business is to be sold, § 160 Paragraph 2 No. 1 InsO).

The **creditors' meeting** may also, among other things:

- require the insolvency administrator to provide individual information and a report on the current state of affairs (§ 79 InsO),
- demand information from the debtor about all circumstances relating to the proceedings (§ 97 InsO),
- have all monetary transactions and stock of the administrator checked,
- apply for continued liquidation despite insolvency plan (§ 233 InsO)

²² A more detailed list of the task can be found on Hess, Großkommentar Insolvenzrecht, Volume I, §§ 1-112 InsO, 2nd ed. 2013, § 74 marginal 23 f.m.w.N.

9. WHAT RULES APPLY FOR REVENUE DISTRIBUTION? HOW ARE CREDITORS' CLAIMS AND RIGHTS CLASSIFIED? HOW ARE EMPLOYEE CLAIMS TREATED?

Insolvency proceedings serve to satisfy the creditors of a debtor jointly. This is usually done by liquidating the debtor's assets and distributing the proceeds (§ 1 sentence 1 InsO). The insolvency assets are distributed in various ways – in accordance with the legal quality of the creditor's claim:²³

a) Adjustment of assets liabilities

Assets liabilities are the **costs of insolvency proceedings** and **other liabilities** (§§ 53 ff. InsO). The administrator is obliged to pay all insolvency assets known to them **in advance** and in full. Only then will the claims of the insolvency creditors (§§ 38-46 InsO) be corrected. Insolvency liabilities are neither included in the insolvency table nor does the course of distribution (§§ 187-205 InsO) influence their correction.

If the existing assets cover the costs of the proceedings, but not the other assets, **the assets are then insufficient**, as § 208 InsO stipulates. If the liquidator reports this to the insolvency court, the settlement of the assets creditors is based on the ranking order of § 209 Paragraph 1 InsO. In principle, after the costs of the insolvency proceedings, the new assets liabilities must be adjusted before the old assets liabilities. If asserted claims of insolvency liabilities are not recognised by the administrator, the creditors can assert their claims in litigation.

b) Security Creditors Satisfaction

Creditors entitled to separation (§§ 49-51 InsO) are entitled to **preferential settlement** from the liquidation (**Verwertung**) of the assets belonging to the insolvency estate – which serve as security for them, breaching the principle of equal treatment. The creditor can register the claim for the default (with regard to the collateral) in the table and have it determined accordingly. However, they shall only receive pro rata satisfaction for the personal claim in the amount of the loss that remains after the security has been liquidated. If, conversely, excess proceeds can be achieved from the sale/liquidation of the object, they **shall flow into the body of creditors**. Hence, insolvency creditors may be satisfied/settled.

c) (Proportional) settlement of insolvency creditors

i. General

The distribution of insolvency assets within §§ 187 ff. of the InsO means that the liquidation proceeds are distributed to the insolvency creditors after the assets liabilities and claims of the "abgesonderungsberechtigte Gläubiger" (separated creditors) have been adjusted. In order to provide creditors with the liquidation proceeds as quickly as possible, the Insolvency Code in § 187 para. 2 provides for a so-called partial distribution. The final distribution determines the ratio through which all individual creditors are satisfied. If liquidation proceeds are still available for distribution after completion of the final distribution or even after cancellation of the insolvency proceedings, it may be distributed in accordance with Sections 203 et seq. of the German Stock Corporation Act under a so called "Nachtragsverteilung." (AktG).

²³ Please refer to Beck, in: Beck/Depré, Praxis der Insolvenz, 3rd ed. 2017, § 1 section 113 ff.

ii. *Distribution list*

In principle, only insolvency creditors (§ 38 InsO) participate in the distribution. The distribution is based on a **distribution list** drawn up by the insolvency administrator in accordance with § 188 InsO. This is ultimately the updated insolvency table. **It shall take into account all established claims**, such as (1) titled claims; (2) claim for which proof is furnished to the administrator within a cut-off period of two weeks after the public announcement (§ 188 S. 3 InsO) that a declaratory action has been filed or a pending lawsuit has been commenced, § 189 InsO; (3) claims for which collateral exists – these are only taken into account when the insolvency administrator has the authority to liquidate, or only when if it is clear that the proceeds from the liquidation of the collateral are not sufficient to redeem the claim.

The inclusion in the distribution list is not equivalent to their (proportional) satisfaction. Payouts are only made to creditors with established claims and to the extent that the available assets are sufficient. Claims subject to suspensive conditions as well as default claims not yet determined are retained for later distribution. However, these receivables are included in the calculation of the distribution quotas and are therefore taken into account within the meaning of § 188 S. 1 InsO.

iii. *Budget billing distribution*

According to § 187 Paragraph 2 of the Insolvency Act, the insolvency administrator **can** make as many **partial distributions** as there are sufficient cash funds in the insolvency estate/assets. If proposed by the insolvency administrator, the creditors' committee determines the fraction to be paid, otherwise the administrator alone, § 195 Paragraph 1 InsO.

iv. *Final distribution*

If the assets have been liquidated, the **final distribution** is made in accordance with § 196 Paragraph 1 InsO. It may only be carried out with the consent of the insolvency court, as this effectively brings the proceedings to a conclusion. Corresponding amounts are to be provided for receivables included in the distribution list but not yet disburseable. The final distribution finally determines which receivables are taken into account (also in subsequent supplementary distributions). At this stage of the proceedings, the insolvency administrator submits their final **statement of account** (income/expenditure statement) and a **final report** to the insolvency court. Finally, the Insolvency Court sets a **deadline** in accordance with § 197 (1) sentence 1 InsO. This serves a variety of purposes, namely: (1) to discuss the final account of the administrator; (2) to raise objections against the final register as well as; (3) to inform the creditors on the unusable assets of the insolvency estate, § 197 Paragraph 1 Sentence 2 InsO. After the closing date, the final distribution takes place with the administrator transferring the quota to the creditors.

v. *Supplementary distribution*

A "Nachtragsverteilungsverfahren" or **supplementary distribution procedure** (§§ 203 ff. InsO) may be considered if, after the final distribution and after the cancellation of the procedure, further free funds or other assets arise. This is the case when retained amounts become free for distribution (e.g. an insolvency creditor loses the declaratory proceedings), or amounts paid out of the assets flow back (e.g. after the occurrence of a condition subsequent). The supplementary distribution shall also be arranged if assets arising from the insolvency are subsequently determined. The distribution is made to the insolvency creditors in accordance with the final register, § 205 InsO.

vi. *Employee claims in insolvency*²⁴

If insolvency proceedings have been opened against the employer's assets, the classification of the respective claims (insolvency liability or simple insolvency claim) is of decisive importance. The key factor for the classification is the time allocation. Though the time at which the receivables arise is usually decisive, the time at which they fall due is irrelevant. In an employment relationship, therefore, the classification is determined by the time of the work performed (or owed).

24 See also Schelp, NZA 2010, 1095 ff.

(1) Period before insolvency application and opening of insolvency proceedings

Payment claims that arise in the period before insolvency application and opening of insolvency proceedings are always only simple insolvency claims according to § 38 InsO. They are processed in accordance with the procedures described above. The filing of the claim has some effects in terms of employment law. It suspends the statute of limitations, §204 Paragraph 1 No. 10 BGB. From the opening of insolvency proceedings, the assertion of claims for payment is no longer based on exclusion periods under collective bargaining agreements, but exclusively on the provisions of the InsO. This also applies to contractual exclusion periods. However, these claims may not have lapsed at the time of the opening of the proceedings, otherwise the insolvency administrator can contest them by invoking the exclusion period stipulated in the collective agreement. However, this "privilege" does not apply to subsequent insolvency liabilities. When it comes to insolvency claims, limitation and exclusion periods must be observed.

(2) Period after filing for insolvency and before opening of insolvency proceedings

The classification of employees' claims to remuneration from the date when the application for the opening of insolvency proceedings was filed must be considered in more detail. The decisive factor here is whether the court appoints a strong or a weak provisional insolvency administrator.

According to § 55 Paragraph 2 Sentence 2 InsO, claims for remuneration belong to the insolvency liabilities if the strong provisional insolvency administrator has accepted the employee's performance for the assets they manage. However, if the provisional insolvency administrator does not accept the work performance, i.e. they release the employee, the claims to default in acceptance of wages are only simple insolvency claims (§ 108 Paragraph 2 InsO).

§ 55 (2) sentence 2 InsO, on the other hand, is not applicable either directly or to the legal acts of a weak provisional insolvency administrator. The weak provisional insolvency administrator cannot therefore justify any claims on assets by accepting the work performance. The claims for payment acquired during this period are therefore simple insolvency claims in accordance with § 38 InsO.

(3) Period after the opening of insolvency proceedings

The legal situation is simpler if insolvency proceedings have been opened. Employee compensation claims arising after this date are assets liabilities, § 55 Paragraph 1 No. 2 InsO. As already explained, the due date is largely irrelevant. The decisive factor is whether the employee owed the work for the period after the opening of insolvency proceedings. It is not necessary for the insolvency administrator recall the work, which is why default in acceptance is sufficient. However, the employee's claims in the event of indemnification after the opening of insolvency proceedings regularly constitute subordinated assets in accordance with § 209 Paragraph 1 No. 3 InsO. Classification as an insolvency liabilities is of enormous importance for the employee: this gives them a considerably greater prospect of full realisation of claims, because their claims are satisfied from the insolvency assets/estate immediately after those entitled to separation and after payment of the costs of the insolvency proceedings.

10. TERMINATIONS DURING EMPLOYER INSOLVENCIES²⁵

As previously mentioned, the existence of the employment relationship will not change if insolvency proceedings are opened against an employer's assets. This results from § 108 Paragraph 1 Sentence 1 InsO. The impending opening of insolvency proceedings or the opening of insolvency proceedings themselves do not necessarily constitute a reason for termination, according to Act. Section 626 para. 1 BGB (German Civil Code). If the appointed insolvency administrator fires the employee, the KSchG remains applicable. As for the redundancy for operational reasons and social selection, § 125 InsO contains a provision that deviates in detail from § 1 (5) KSchG. Special features for ter-

²⁵ For the following explanations please refer to Hergenröder, in: MüKoBGB, 7th edition 2016, Appendix § 622, § 1 KSchG section 59 ff.

mination during insolvency proceedings also arise regarding the **notice period** from § 113 S. 1 InsO. Thereafter, the employment relationship may be terminated by the insolvency administrator irrespective of the agreed contract term. According to § 113 S. 2 InsO, **a maximum period of three months applies**, unless a shorter period is specified. If necessary, the insolvency administrator may terminate an employment relationship that has already been terminated in accordance with § 113 sentence 1 InsO (so-called "Nachkündigung").

On the other hand, a weak provisional insolvency administrator may only give notice of termination if this authority has been expressly assigned to them by the insolvency court in accordance with § 21 para. 2 no. 1 InsO in conjunction with § 22 para. 2 InsO.²⁶ A limited reservation of consent according to § 21 Abs. 2 Nr. 2 Alt. 2 InsO leaves the contractual employer the right to terminate the contract but binds this to the consent of the provisionally weak administrator. Even the strong provisional insolvency administrator cannot rely on § 113 InsO.

In the opinion of the FOPH, the ("release") declaration pursuant to § 35 (2) InsO should give the insolvency administrator the power of administration and disposal over the employment relationships existing at the moment back to the debtor and thus release the insolvency estate. The contractual employer is thus once again entitled to terminate the contract. This case law raises serious concerns.²⁷

11. SOCIAL PLAN IN INSOLVENCIES²⁸

According to the legal definition in Section 112 (1) sentence 2 BetrVG, the social plan is an agreement between the parties to the Works Constitution Act on the compensation or mitigation of the economic disadvantages suffered by employees as a result of the planned change of business (Section 111 BetrVG). The social plan has **the effect of a works agreement** pursuant to § 112 (1) sentence 3 BetrVG, i.e. it is mandatory pursuant to § 77 (4) BetrVG. According to court rulings, the social plan is a genuine works agreement within the meaning of the BetrVG. The social plan thus gives rise to direct legal claims against the insolvency administrator. In contrast to the reconciliation of interests, the ruling of the conciliation body replaces the agreement between the insolvency administrator and the works council; **the social plan is therefore enforceable**. This applies irrespective of whether a reconciliation of interests has been achieved between the parties to the operation.

The scope of the social plan to be drawn up after the procedure has been opened is regulated in § 123 InsO. 124 InsO contains provisions on the "preinsolvency" social plan, which was drawn up no earlier than three months before the opening of insolvency proceedings. Sections 123, 124 do not create an independent legal institution of an "insolvency social plan". Rather, the general provisions of §§ 111 ff. BetrVG. The company partners are limited in their regulatory power by the regulations in § 123 when drawing up a social plan in insolvency proceedings.

The existence of a planned operational change is a prerequisite for any social plan in accordance with § 112 Para. 1 S. 2 BetrVG. The opening of insolvency proceedings alone does not in itself constitute a change in business operations. A business change in insolvency will regularly take the form of a restriction or closure of the entire business or of some of its essential parts (§ 111 S. 3 No. 1 BetrVG).

§ 123 primarily regulates the limits of the volume of social compensation plans in the event of insolvency. In all other respects, i.e. procedure, closure and effect, general principles apply, which are not dealt with separately here. Discriminatory social plans are invalid pursuant to § 7 (2) AGG. In insolvency proceedings, § 121 must be observed. This can speed up the conciliation procedure. The resolution procedure under § 122 only applies to the reconciliation of interests. The social plan can therefore also be enforced by the works council in insolvency proceedings. The exception of Section 112a (2) sentence 1 BetrVG, according to which a social plan is not enforceable in the first four years

²⁶ Cf. § 21 Paragraph 2 No. 2 Old. 2 InsO in conjunction with § 22 (1) sentence 1 InsO

²⁷ Näher Hergenröder, DZWIR 2013, 251; cf. also Lindemann, ZInsO 2014, 695; Windel, RdA 2012, 366 each with w.w.N.

²⁸ Refer to Hamacher, in: Nerlich/Römermann, Insolvenzordnung, 33rd EL September 2017, promulgated before §§ 121 to 124 InsO marginal notes 55 f. and § 123 marginal notes 5 ff.

after the formation of a company, also applies in the context of insolvency. In all other respects, the arbitration board shall make a binding decision in the event of non-agreement. A social plan can still be enforced after the business change has been implemented.

The obligation to have a social plan approved by the creditors' committee in accordance with § 160 InsO only exists if the insolvency administrator agrees a social plan with the works council; a binding ruling by the conciliation body does not require approval. In this case, however, the insolvency administrator may be obliged to initiate resolution proceedings against an incorrect decision. According to § 164 InsO, a violation of the insolvency administrator's duty to obtain approval does not affect the effectiveness of the social plan. However, they may be liable for damages.

Insolvency administrators may act as assessors themselves under § 76 para. 2 BetrVG. They are not obliged to appoint creditors as assessors for the conciliation body. The interests of the creditors are sufficiently secured by the regulations in §§ 123, 124. In its decision within the framework of Section 112 para. 5 sentence 1 BetrVG, the conciliation body shall not focus on the economic justifiability for the company, but on the interests of the insolvency creditors. If, during the conciliation procedure it becomes clear that no more funds are available, the procedure must be terminated. If the insolvency administrator wishes to make several operational changes, the works council may obtain the drafting of several social plans. If several companies are affected by a uniform change of business, the general works council may be responsible.

12. WORKS COUNCIL PARTICIPATION IN INSOLVENCY PROCEEDINGS²⁹

The occurrence of insolvency as well as the opening of insolvency proceedings do not affect the validity of the BetrVG. Employees need collective protection, especially in the insolvency of a company. However, the guiding principle of the BetrVG is not limited to the fulfilment of protective functions, since it guarantees employee participation in the organization of the operational order directly affecting them. The involvement of employee representatives in the decision-making process and in decisions and measures taken by the employer is part of the principle of democratization. It also claims its validity in the event of insolvency. With the opening of insolvency proceedings, the insolvency administrator replaces the previous employer under Works Constitution law. Therefore, the insolvency administrator is legally obliged to fully observe the co-determination rights of the works council and to involve the employees in its decision-making process. This can delay decision-making and lead to less economic effectiveness. The advantage of this is that those concerned usually support it after hearing and including their arguments. Co-determination does not just mean interfering, rather, it means taking responsibility. The works council must ensure that the decisions and measures taken together are accepted by the workforce and that their implementation is facilitated and promoted to strengthen harmony among all parties. However, this presupposes that the insolvency administrator does not present the employee representatives with a *fait accompli*, but that their concepts are well-founded.

From the first day of taking office, the insolvency administrator must exercise all rights and obligations of the employer under the Works Constitution. They are bound to the principles of trusting cooperation in accordance with § 74 BetrVG and must hold the monthly meeting with the works council in accordance with § 74 Paragraph 1 BetrVG. They must continue to implement the existing works agreements and regulation agreements in accordance with § 77 Paragraph 1 BetrVG. They are responsible for the information and advice obligations pursuant to §§ 80, 81 and 90 BetrVG. The observance of co-determination rights according to §§ 87, 91 BetrVG is particularly important. If the insolvency administrator wishes to change the working hours, release part of the workforce, order short-time work, company leave or proceed with overtime, they must obtain the approval of the works council or, if necessary, have the conciliation body decide in cases relating to § 87 Para. 2 BetrVG.

²⁹ See Bertram, in: Gottwald, Insolvency Law Manual, 5th edition 2015, § 108 marginal 15 ff.

Of particular importance are the co-determination rights of the works council in personnel matters during insolvency proceedings, particularly regarding staff dismissals. Displacements iSv. § 95 exp. 3 BetrVG are subject to the code-termination with individual personnel measures in accordance with § 99 BetrVG. The work council must be informed about the transfer in advance and has a right of refusal of consent limited to the reasons mentioned in § 99 exp. 2 BetrVG. If the works council refuses its approval, the insolvency administrator can apply to an employment court to replace the approval in accordance with § 99 Paragraph 4 BetrVG. In the event of dismissals, the works council must be consulted beforehand in accordance with § 102 BetrVG. This also applies if a reconciliation of interests with a list of all names that have been agreed on.

In economic matters, the insolvency administrator must, above all, inform the Economic Committee regularly in accordance with Section 108 of the German Works Constitution Act (BetrVG) about economic matters, even if they are specific to insolvency, in a comprehensive and timely manner and advise it on the relevant matters. Special importance is to be attached to the participation and co-determination facts of the work council with planned changes of operation, even if these changes of operation are even necessary outflow of insolvency-legal decisions. Under the Works Constitution, it is irrelevant whether it concerns changes to operations, staff reductions or the closure of parts of operations in connection with insolvency.

If the insolvency administrator intends to change operations in accordance with § 111 BetrVG within the scope of insolvency proceedings, in particular to restrict or close down the entire operations or essential parts of operations, they must inform the works council of their plans in a timely and comprehensive manner and discuss the planned changes in operations with the works council. They must also try to reach a reconciliation of interests with the works council. In principle the insolvency manager remains bound to the regulations of §§ 111-113 BetrVG, i.e. they must not only draw up a reconciliation of interests and conclude a social plan, but they can also make claims for compensation of disadvantages according to § 113 BetrVG.

13. PREVENTIVE RESTRUCTURING PROCEDURES³⁰ IN GERMANY³¹

The introduction of a preventive restructuring procedure³² has been discussed intensively in Germany since 2009. The main factors contributing to the introduction of such a procedure were (1) the global banking and capital market crisis and; (2) the reform of the Bond Act in 2009. Both factors led to the introduction of new restructuring possibilities, such as the application of the majority principle outside bond issues.

The topic of “promotion of extrajudicial restructuring measures” was included in the coalition agreement of the 17th legislative period. When the law to further facilitate the restructuring of companies (ESUG) was announced in the Federal Law Gazette, it was clear that the legislator had initially dispensed with the introduction of a **preventive restructuring procedure**. Instead, the ESUG strengthened self-management (§ 270 a InsO), introduced the so-called protective shield procedure (§ 270 b InsO) and increased the functionality of “debt-to-equity swaps” through the possibility of including shareholder rights in the insolvency plan (§ 225 a InsO) and strengthened the practice of corporate restructuring within and outside insolvency. Five years after the introduction of the ESUG, an evaluation is now to be presented in order to identify its success to date and possible areas for improvement. A deeper reform towards a “pre-insolvency” restructuring process is pending to the implementation of the EU directive on preventive restructuring frameworks.

30 The Commission’s name is used here in draft Directive COM 723/2016. The term “pre-insolvency reorganisation proceedings” is also used synonymously in legal literature.

31 Cf. on this and in detail on the preinsolvency corporate restructuring of Schluck-Amend, ZRP 2017, 6 ff.

32 More in-depth info on Seagon, NZI Supplement 2017, 12 ff.; Naumann, NZI Supplement 2017, 35 ff.; Schmoll, Sanierung ohne Stakeholder?, in: «Eine Branche im Wandel – Sonderveröffentlichung Handelsblatt», 2018, p. 14 f.

14. IS THE EXISTING LEGISLATION MORE GEARED TOWARDS REORGANISATION AND CONTINUATION RATHER THAN DISMANTLING?³³

Insolvency proceedings in Germany must be regarded as an instrument of restructuring. Insolvency must thus not be seen as a shameful process – a “second chance” culture must emerge in Germany. The InsO has succeeded in creating completely new legal institutions for German insolvency. These, however, need to be refined in order to make better use of the opportunities for restructuring. These include insolvency plan proceedings (§§ 217 ff. InsO) and self-administration (§§ 270 ff. InsO). For decades, the question of whether and how the law could support the debtor in restructuring has been at the forefront of insolvency. One can hardly imagine a more blatant paradigm shift in German insolvency law. Whether a new or different insolvency culture has already found its way into German insolvency law through the instruments that this report has shed light on is still open to debate.

In short, German insolvency culture needs to change, and nowhere is this more needed than within the area of restructuring law, which must be looked at from a more positive rubric: the InsO and the ESUG have appropriate restructuring instruments in place that can bring about important and positive change in the realm of company restructuring. Further, there is a need for an awareness change by all relevant actors. Judges must be prepared to accept insolvency plans and self-administration as a possible alternative to dealing with the debtor’s insolvency. This also applies to creditors, who often reject self-management for purely selfish reasons. Changes are also needed in the administration, where the willingness to accompany insolvency proceedings as administrator or to initiate insolvency plan proceedings is not yet very strong. Finally, the debtor can also contribute to a healthier insolvency culture by filing for insolvency proceedings at an early stage, thus setting the course for restructuring in the right direction.



33 For a more detailed introduction to insolvency culture please refer to Vallender, NZI 2010, 838 ff.

COUNTRY REPORT #2

FRANCE

By

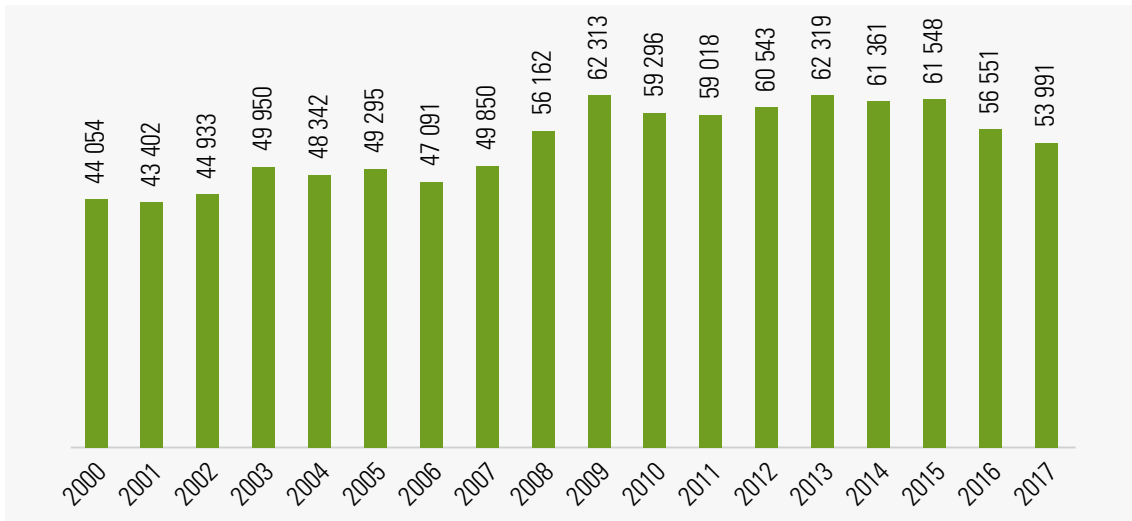
PHILIPPE MEUNIER, SYNDEX



1. STATISTICAL OVERVIEW

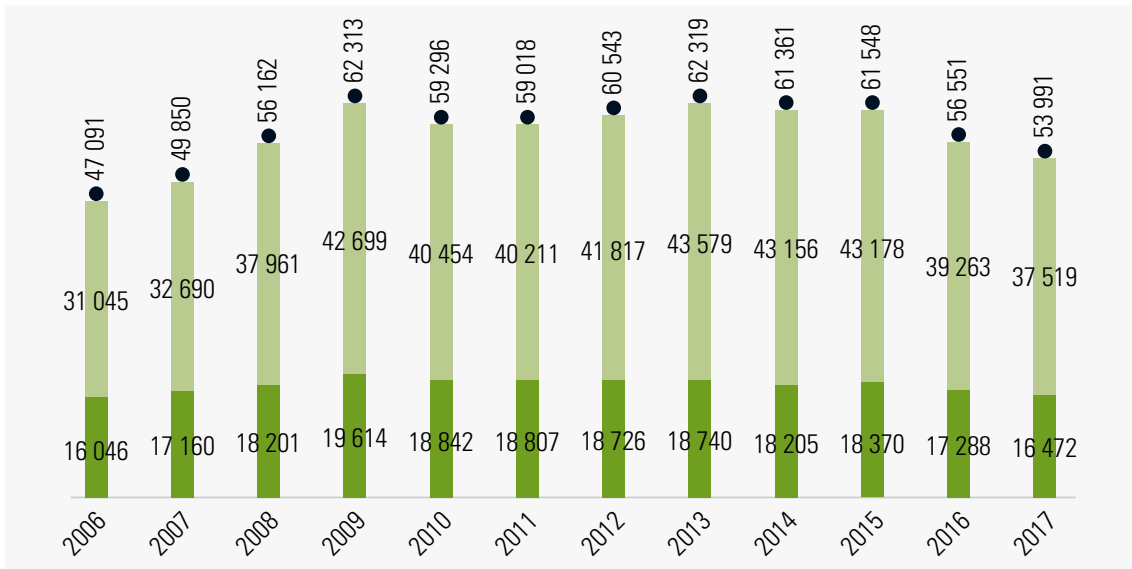
The statistical data presented in the graphs below are based on the annual studies conducted by Altares/Deloitte on the company in difficulty in France.

Fig. 8: Number of Insolvencies in France

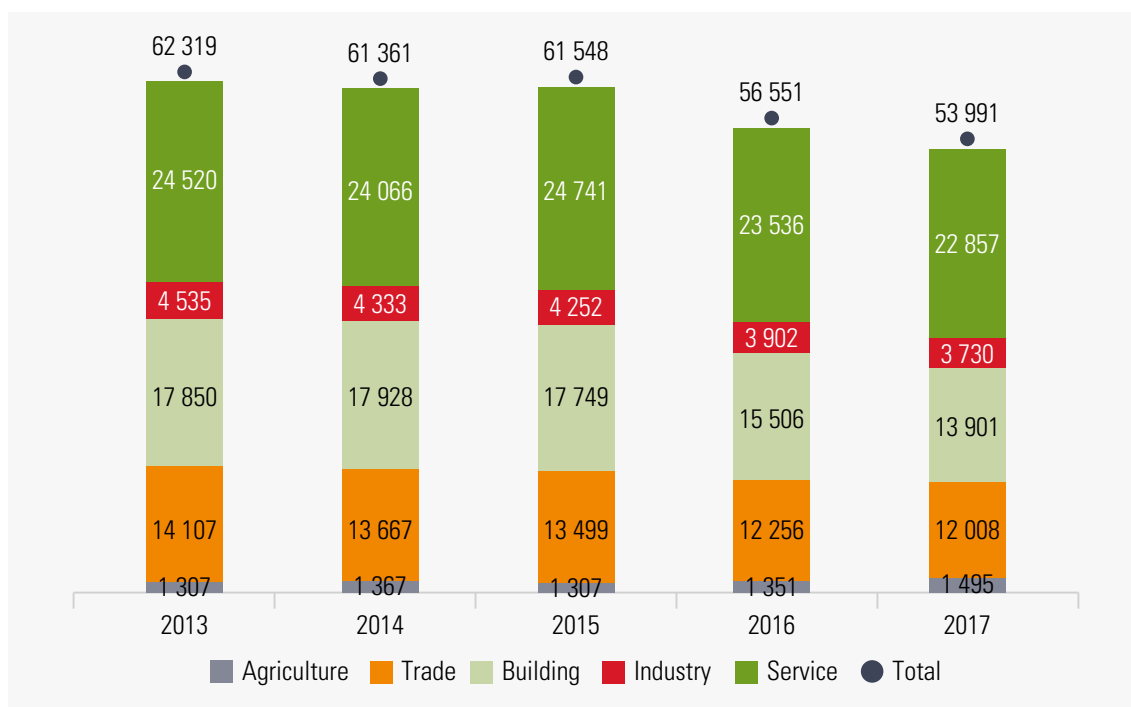


Over the recent period, they highlight a sharp increase in corporate insolvencies with the outbreak of the 2008 economic and financial crisis. The number of insolvency proceedings remains particularly high until 2015, before falling in 2016 and 2017, within a more favourable macroeconomic context. Over the last two years, the number of safeguard proceedings (pre-insolvency) has also declined, confirming the improvement in the economic situation.

Fig. 9: Number of Insolvencies (Receivership / Direct Liquidation)

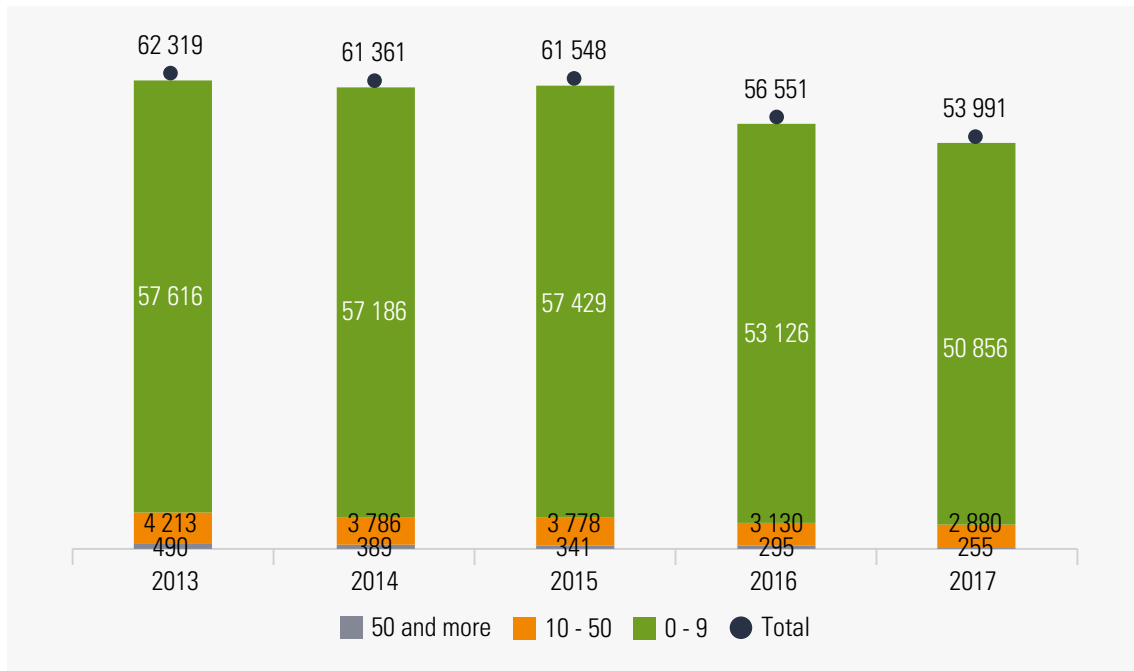


In 2017, direct judicial liquidations, which result in the dissolution of the company, are also declining, but still represent nearly 70% of insolvency proceedings. This still very important weighting reflects the late nature of many proceedings, despite the many tools available for dealing with pre-insolvency and insolvency.

Fig. 10: Number of Insolvencies by Main Economic Sectors

NUMBER OF INSOLVENCIES BY MAIN ECONOMIC SECTORS	2013	2014	2015	2016	2017
Agriculture	1 307	1 367	1 307	1 351	1 495
Trade	14 107	13 667	13 499	12 256	12 008
Building	17 850	17 928	17 749	15 506	13 901
Food and beverage industry	1 510	1 464	1 516	1 377	1 418
Non-Food Industry	3 025	2 869	2 736	2 525	2 312
Transportation	1 965	1 770	1 699	1 685	1 802
Financial activities	392	468	375	343	320
Business Services	7 566	7 261	7 178	7 057	6 446
Personal Services	2 678	2 524	2 637	2 336	2 247
Information and communication	1 594	1 453	1 399	1 391	1 384
Accommodation and food services	7 321	7 597	8 295	7 611	7 357
Other activities	3 004	2 993	3 158	3 113	3 301
TOTAL	62 319	61 361	61 548	56 551	53 991

In recent years, the largest concentration of business failures has been in the construction, services and trade sectors. The detailed analysis shows that collective proceedings largely concern very small companies with fewer than 10 employees. In 2017, the 53,991 insolvency situations still threaten 161,942 jobs (compared to almost 250,616 in 2013). The reduction in the number of insolvencies is particularly visible in the largest companies: “only” 77 companies with a turnover of more than €15 million declared themselves insolvent in 2017. This represents a reduction of almost a third compared to 2016.

Fig. 11: Insolvencies by Number of Employees

INSOLVENCIES BY NUMBER OF EMPLOYEES	2013	2014	2015	2016	2017
None or unknown	24 688	21 816	18 277	14 699	12 721
1-9	32 928	35 370	39 152	38 427	38 135
10-19	2 865	2 623	2 633	2 181	1 991
20-49	1 348	1 163	1 145	949	889
50-99	301	234	203	183	149
100 and more	189	155	138	112	106
TOTAL	62 319	61 361	61 548	56 551	53 991

2. INTRODUCTION

In France, the evolution of the law with regards to companies in difficulty over time highlights two major functions, often overlapping but sometimes contradictory: a “disciplinary” function and a “rescue” function.

a) The “disciplinary” function: excluding defaulting debtors and punishing defaulting debtors

In the 15th century, the main objective was to exclude defaulting operators who could jeopardise their partners, or even by a series of failures, the entire market. It is from this perspective that the statutes of commercial cities treated the merchant who went bankrupt with the greatest rigour: they were then considered criminals. The merchant had a bench at the meetings of fairs and their bench or stall was broken if they defaulted (origin of the term “bankruptcy”).

The 1673 Ordinance on Commerce (or Savary Code) aimed to safeguard commercial operations in France. It distinguished in particular fraudulent bankruptcies and involuntary bankruptcies and established a collective and equal settlement of debts. The first Commercial Code, drafted in 1807, was largely based on the Savary Code. It provided for severe penalties against the defaulting debtor, who was frequently subjected to forced sale of all their assets.

Several laws enacted in the first half of the 20th century aimed to moralise business by making it possible to condemn corporate officers and directors, who are the perpetrators of misconduct (decree-laws of 8 August 1935 and the law of 30 August 1947).

b) The “rescue” function: saving the debtor, the company and the creditor

The law of 4 March 1889 introduced, alongside bankruptcy, judicial liquidation, a procedure reserved for “unfortunate traders acting in good faith”. In this case, the debtor was assisted by a receiver and could have their business rescued by agreement.

But the law with regard to a company in difficulty really appeared in France with the law of 13 July 1967. This law confirmed the existence of 2 distinct procedures: judicial settlement and liquidation of property. Whatever the fault of the manager, it was now the economic criterion that determined how procedure would play out: judicial settlement if the prospect of an agreement appeared possible or liquidation of property if rescue appeared impossible.

This law was supplemented by 2 major reforms in the 1980s:

- the law of 1 March 1984 on the prevention of business difficulties.
- A new procedure was introduced: amicable settlement (now known as conciliation) to deal with the company's first experience of difficulties.
- The characterisation of difficulties was no longer the exclusive domain of the manager: in particular, the Works Council could exercise a right of economic alert and be assisted by an accountant.
- The laws of 25 January 1985 on the treatment of company difficulties.
- The 2 collective proceedings were renamed receivership and liquidation.
- The objective of judicial redress was to seek, as a matter of priority, “the protection of the company, the maintenance of the activity and jobs (...)”.
- Since then, many reforms have taken place. They are mainly aimed at strengthening conventional and/or upstream treatment of difficulties, while giving a greater priority to creditors in the proceedings.
- While French law still pursues the objective of saving the company in difficulty and its jobs through the courts, liberal economists criticise the interventionist vision of the legislator and the systematic involvement of the courts and judicial representatives, and stress the poor protection of creditors' interests.
- Today, nearly 8 procedures are applicable to French companies in difficulty:
 - in a pre-insolvency situation: ad hoc mandate (special mediation), conciliation (conciliation), accelerated safeguard, accelerated financial safeguard and safeguard;
 - in insolvency, receivership, liquidation or professional recovery situations.³⁴

3. DIFFICULTIES TRIGGERING INSOLVENCY PROCEEDINGS

The suspension of payments is a decisive factor in the fate of the company in difficulty in France. Indeed, it is the starting point for the two insolvency measures receivership and liquidation. According to Article L 631-1 of the French Commercial Code, suspension of payment represents the impossibility of meeting the liabilities due with the assets available.

- The current liability does not correspond to the totality of the debtor's liabilities, but only to the liabilities

³⁴ This procedure will not be covered in this document, as it concerns only individual entrepreneurs who do not have an employee.

that must be paid immediately or promptly. In this context, credit reserves (unused authorised bank overdraft, etc.) or moratoriums (CCSF³⁵ moratorium on tax and social security debts, etc.) may be deducted from current liabilities.

- Available assets include the company's cash and assets that are likely to generate cash almost immediately (quickly transferable inventories, receivables that are immediately collectible, etc.).
- The case law considers that a single debt is sufficient to characterise the state of cessation of payments, when it is due and the company cannot pay.

When a company suspends payment, the manager must make a declaration to the clerk of the Commercial Court or the High Court. This declaration must be filed within 45 days of the statement of suspension of payment. If this declaration is made knowingly after this period, the debtor may risk a being subjected to a ban on management.

4. THE PROCESS OF THE INSOLVENCY PROCEEDINGS

a) The opening of proceedings: a common general framework for receivership and liquidation

i. *Referral to the competent court*

The Commercial Court is competent for the opening of any collective proceedings concerning commercial and craft activities. The regional court has jurisdiction in other cases (in particular, for associations). As specified in point 6, the proceedings may be initiated either on the initiative of the company's representative or on the initiative of a third party (creditor or public prosecutor). Before initiating the proceedings, the employer must inform and consult the Social and Economic Committee in accordance with its competence on "the organisation, management and general running of the company".

ii. *The opening judgment*

Before reaching a verdict, the court may hear any person whose hearing it considers useful. It must hear the manager and employee representatives. If the company is in a state of suspension of payments, it will be placed:

- in **receivership**, if receivership of the company seems possible,
- in **liquidation**, if receivership is manifestly impossible.

In the opening judgment, the court appoints the procedural bodies, i.e.: a judge, an administrator and a judicial representative in the event of receivership or a liquidator in the event of liquidation (see point 5). In addition, the opening judgment has two major effects on the enforceability of the company's debts: the prohibition of payment of previous debts and the suspension of proceedings. Finally, the salaries and other indemnities not paid at the time of the opening of the proceedings are covered by the AGS (Association de Garantie des Salaires). As from the publication of the opening judgment, creditors have a period of 2 months to declare their claim (with the judicial representative in receivership or with the liquidator in liquidation).

b) The process of the receivership proceedings

The receivership proceedings have three objectives, which have a strong influence on how they proceed: the continuation of the company's activity, the maintenance of employment and the discharge of liabilities.

i. *The observation period*

The observation period is set for an initial maximum period of 6 months. It may be renewed once for 6 months and extended at the request of the Public Prosecutor's Office for a further 6 months. The proceedings can

35 CCSF: Commission des Chefs de Services Financiers. CCSF is the commission of financial managers and public services representatives that enables negotiations with fiscal and social creditors in an indirect way.

therefore last a maximum of 18 months. The company continues to operate normally, under the management of the manager, assisted by the receiver (who may, in rare cases, represent the manager). In theory, the company is prohibited from creating new expired liabilities.

The main objective of the observation period is to assess the company's chances of recovery. It is with this in mind that the receiver carries out an economic and social assessment, specifying in particular the origin, nature and extent of the difficulties. The observation period has three possible outcomes, which are the subject of a decision issued by the Court:

- conversion into liquidation (see point (c)), in the event of clearly insurmountable difficulties;
- the adoption of a recovery/continuation plan presented by the company manager;
- the adoption of a disposal plan following the submission of bids by potential buyers.

ii. The recovery/continuation plan

The recovery plan can be presented by the company manager. It must contain 3 important components:

- the presentation of the prospects for recovery, in particular with regard to the state of the market, and the available means of financing;
- the terms and conditions for settling liabilities;
- employment prospects, as well as the social conditions under which the activity is to continue (a recovery plan may provide for redundancies for economic reasons).
- The recovery plan adopted by the Court has a maximum duration of 10 years. A commissioner for the execution of the plan (usually the receiver) is appointed to ensure the proper execution of the plan.

iii. The disposal plan

If the company manager is unable to/does not wish to submit a recovery plan, the court may, at the request of the receiver, order the search for purchasers, with a view to a total or partial transfer of the company (the partial transfer concerns one or more complete and autonomous branches of activity).

In practice, interested buyers present their bids to the various parties involved in the proceedings before the Court's decision. Their offer covers all the elements (assets, contracts, workstations, etc.) necessary to maintain the activity and is the subject of a report drawn up by the receiver. If there is no continuation, the company which was initially placed in receivership and which carries the assets and jobs not included in the sale plan shall be subject to liquidation proceedings.

iv. The process of the liquidation proceedings

The liquidation proceedings have two objectives: the suspension of the company's activity and the realisation of its assets through a global or separate transfer of its assets. Liquidation is the "bad continuation" of collective proceedings such as safeguard or receivership, but it can also be ordered directly when the company's situation reaches an impasse.

The liquidator, appointed by the Court, shall endeavour to transfer the property by private auction or sale. The proceeds of the transfers are then distributed among the creditors in the order provided by law. They also dismiss the company's employees. In the judgement initiating the proceedings, the Court may decide on the immediate cessation of the activity or its temporary maintenance if the public interest and the interests of creditors so require, but also when the total or partial transfer of the undertaking is possible. The maximum period of activity is 3 months, renewable once at the request of the public prosecutor. In the event of a transfer or authorisation to continue the activity, a judicial administrator may be appointed by the Court at the request of the Public Prosecutor's Office.

5. THE PLAYERS IN THE PROCEEDINGS AND THEIR MAIN MISSIONS

Fig. 12: Players in the Proceedings and their Missions

PLAYERS	MAIN ROLES AND MISSIONS
Company manager (debtor)	Continues to manage the business (unless liquidated or otherwise ordered by the Court in receivership)
Court (commercial or high court)	Refers to the organs of the proceedings Decides on the nature of the proceedings, their evolution and outcome Authorises dismissals of the continuation or assignment plan
Judicial agent	Acts in the collective interest of creditors Receives and verifies the declarations of receivables, then prepares the statement of receivables Generally, becomes liquidator in the event of conversion from receivership to liquidation
Judicial administrator	Mandatorily designated in companies with a turnover of >€3 million or employing more than 20 employees Is entrusted by the court with a mission of supervision/assistance of/management of the company Establishes the economic and social balance sheet of the company and proposes to the Court a recovery plan, the transfer or liquidation
Employee representative ³⁶	Appointed by the Social and Economic Committee or, failing that, by the employees Verifies and/or participates in the preparation of the statement of wage claims
Employee representative institutions ³⁷	Are informed and consulted throughout the procedure, in particular in the context of planned redundancies Are heard by the Court at each stage of the proceedings
Liquidator	Organises the liquidation of the company Surrenders the company's assets, establishes the order of creditors and settles them according to their rank Dismisses employees
Expert in economic diagnosis (optional)	Can assist the receiver in establishing the economic and social diagnosis of the company

We draw the reader's attention to the difference between employee representatives and employee representative institutions (ESCs).

In summary, the employee representative defends the interests of employees as creditors. Employee representative institutions (ESCs) defend the interests of employees as economic and social actors, mainly by providing advice at the main stages of insolvency proceedings.

³⁶ See item 8.

³⁷ See item 12.

6. THE APPLICATION TO OPEN INSOLVENCY PROCEEDINGS

The proceedings for receivership or liquidation may be opened:

- at the debtor's request, by obligation, as soon as he/it is in suspension of payment, within 45 days;
- on summons by a creditor (at the Commercial Court or the Court of First Instance), which must include the evidence characterising the suspension of payments;
- by referral to the Public Prosecutor's Office (Public Prosecutor).

The possibility for the court to take ex officio proceedings to decide on receivership or liquidation was abolished in 2014. However, if the President of the Court of First Instance is informed of evidence showing the state of suspension of payments, they must inform the Public Prosecutor's Office, which may then request the opening of proceedings.

7. WAGE CLAIMS AND THE INTERVENTION OF AGS

When insolvency proceedings are opened, employees benefit from special guarantees concerning the treatment of their wage claims. These are various privileges³⁸ provided by law (preferential right on the company's property) and above all a guarantee of payment by an "insurance guarantee of wages".

The various privileges granted to employees (as creditors) are relatively effective, since they are, in most cases, in competition with legal fees, Treasury (tax administration) and URSSAF (social security contributions organisation) privileges. In practice, when the funds available in the company are insufficient, an insurance scheme (mandatory and covering the entire private sector in France) is guaranteed under certain conditions:

- remuneration due to employees and apprentices;
- compensation resulting from the termination of employment contracts (in particular, dismissals);
- profit-sharing and shareholding (as soon as the amounts due are due);
- accompanying measures resulting from a collective redundancy process called "employment protection plan" (PSE), provided that these measures contribute to a return to employment.
- This scheme is based on a principle of inter-professional solidarity between companies and is implemented by the "Association pour la gestion du régime d'assurance des créances des salariés" (AGS) in association with UNEDIC (unemployment public insurance organisation). In this context, an employee's compensation is possible even when their employer is not up to date with the payment of AGS contributions.

The beneficiaries of the guarantee are:

- employees of any private company, French or foreign, established in France;
- expatriate employees or employees seconded abroad;
- foreign employees employed in France.

³⁸ The notion of "privilege" used in the document is a legal notion and characterizes a claim that will be treated more favourably than ordinary (so-called «unsecured») claims.

Fig. 13: AGS guarantees in receivership

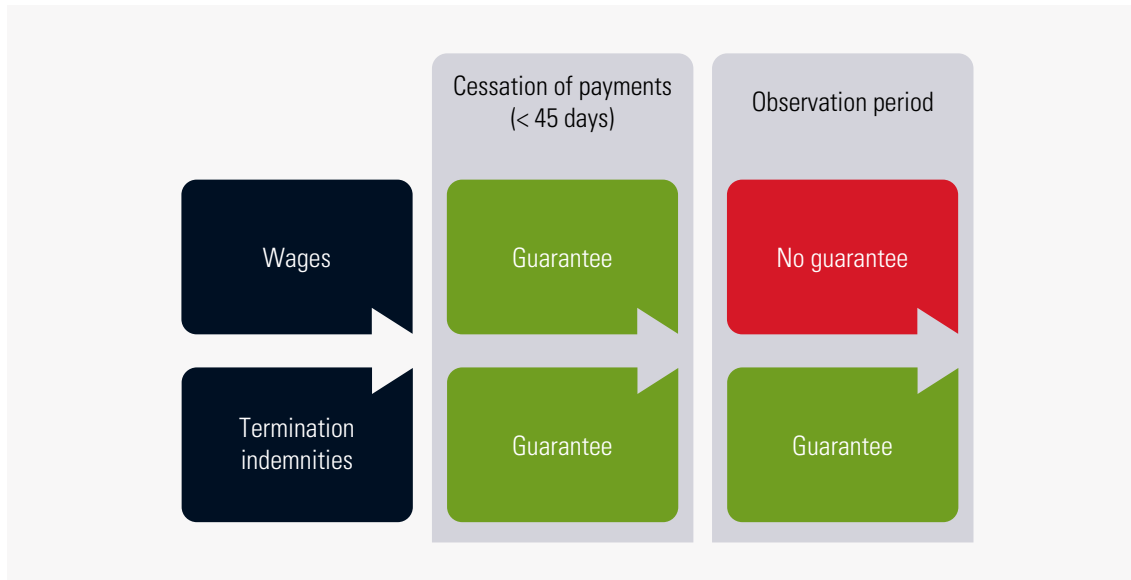
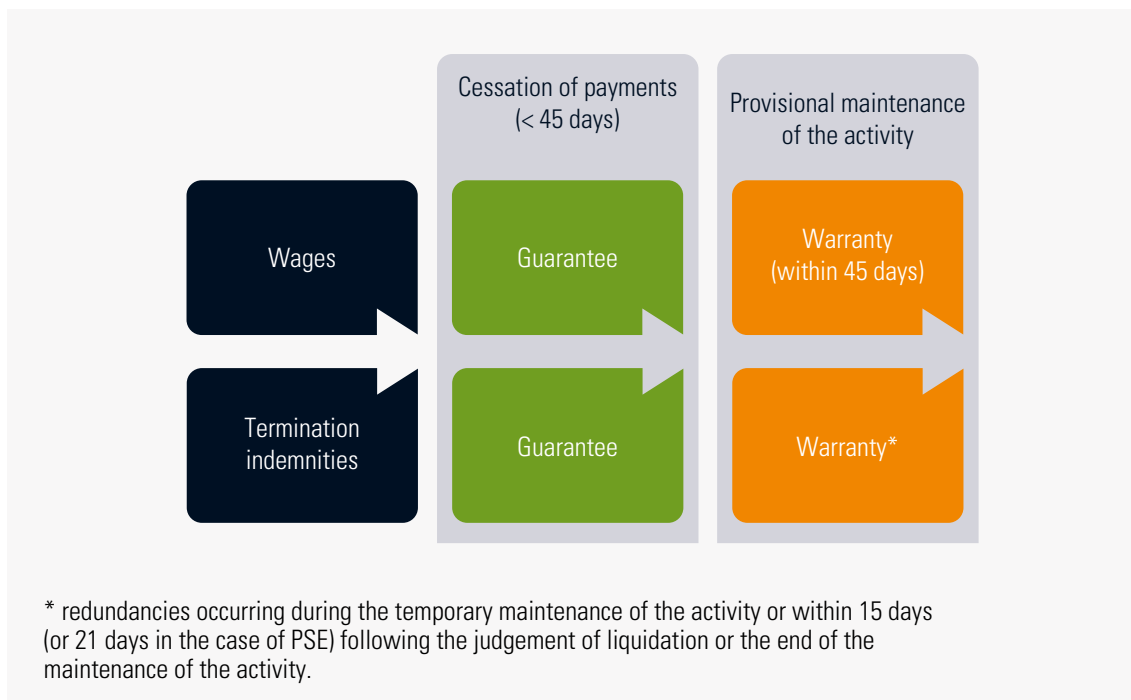


Fig. 14: AGS guarantees in judicial liquidation



As a reminder, the judicial representative (or liquidator) draws up the statement of wage claims, which is then checked by the employee representative and approved by the official receiver. Each employee is informed of the nature and amount of the claims accepted and possibly rejected. On this occasion, a reminder is also given of the foreclosure period (2 months), during which the employee may bring an action before the labour court to contest the statement of claims.

If the wage claims cannot be paid from the company's cash flow, the AGS advances the funds to the judicial representative, who then makes the payments to the employees. The AGS that has made advances of receivables to

employees then becomes a creditor of the defaulting company. However, several limitations are placed on the AGS coverage, including:

- the principle of subsidiarity: AGS intervention is not automatic and results from a lack of funds available in the company;
- the ceiling on the sums advanced by the AGS, based on the length of the employee's employment contract. The ceiling in 2018 is between €53k and €80k (including social security contributions): it corresponds to a multiple (4, 5 or 6) of the monthly ceiling used to calculate unemployment insurance contributions revised each year.

It is important to stress that the lack of wage guarantees during the period of receivership is one of the main factors for conversion to liquidation, in order to avoid a cash impasse and thus "secure" the payment of wages.

Finally, the time required to pay receivables to employees is a major issue in most proceedings. Indeed, wage payment delays can put some employees in financial difficulty and further worsen an already tense social climate. In practice, the following deadlines are generally observed:

- 10 to 30 days for salaries and accessories;
- 1 to 3 months for other receivables, in particular termination indemnities.

8. THE RANKING OF CREDITORS AND IN PARTICULAR EMPLOYEES IN INSOLVENCY PROCEEDINGS

a) The ranking of creditors in insolvency proceedings

The opening judgement has several major consequences for creditors:

- It interrupts or prohibits any legal action seeking to sentence the debtor to pay a sum of money or to terminate a contract for failure to pay a sum of money;
- It prohibits the payment of any claim arising prior to the opening judgement;
- It determines the interest rate (loans of less than one year).
- The combination of these principles allows the company's liabilities to be frozen.

With the exception of employees, all creditors must declare their claims in order to assert their rights. After the judgement to open the proceedings, it is therefore necessary to send the judicial representative (or the liquidator in the event of liquidation) a statement of claim, within 2 months of the publication of the judgement to open the proceedings. In this context, the judicial representative has the power to act on behalf and in the collective interest of creditors: creditors can no longer act individually (unless they can prove separate damage). Nevertheless, in order to be able to control and supervise the procedure, any creditor may request to be appointed as a controller, without (in theory) representing their own interest. In practice, the company's major creditors often request to be appointed auditors in order to be asked to give their opinion on the recovery plan or the transfer plan.

When proceedings are opened, the risk may be very different depending on the creditor: some creditors have very limited rights, while others enjoy a privilege (see point 9). Receivables arising regularly after the opening judgement for the purposes of the proceedings or the observation period are deemed to be paid on their due date. Otherwise, they will enjoy procedural privilege.

At the end of the insolvency proceedings, in particular when a recovery plan is being considered, creditors are required to give an opinion. The law provides for several ways of expressing these opinions. The common law procedure (and the most frequent) consists of an individual written consultation by the judicial representative. The law also provides

for the establishment of creditor committees, which is mandatory in companies in receivership, which exceed one of the following two thresholds: 150 employees or €20 million excluding VAT annually excluding taxes (it is optional for other companies). In this context, two committees are created: a Credit Institutions Committee and a Major Suppliers Committee. Very schematically, this process opens a real negotiation and quite often makes it possible to impose discounts on recalcitrant creditors, via a 2/3 majority vote.

b) The ranking of employees as creditors in insolvency proceedings

Unlike other creditors, employees do not have to take the initiative to declare their claim. Within 10 days of the opening judgement, the company manager, assisted where necessary by the receiver, shall convene the employee representative institutions to appoint an employee representative. If no employee representative institution exists, it is the employees themselves who directly elect their representative. The main task of the employee representative is to check the statement of wage claims drawn up by the agent or liquidator. In the event of a problem, they may refer the matter to the administrator and, if necessary, to the official receiver. He also has the possibility of assisting or representing employees before the Labour Court in the event of a dispute relating to their claims. The employee representative is a "protected employee", like the employee representatives, and their protection ceases when all sums advanced by the AGS have been paid back to the company's employees. The AGS that paid the sums due to the employees is "subrogated" to the employees' rights, i.e. it is intended to become a creditor in place of the employees. Employees remain so called (super)privileged creditors on the only sums that have not been guaranteed by the AGS due to the cap.

9. THE CLASSIFICATION OF CLAIMS, IN PARTICULAR WAGE CLAIMS, IN INSOLVENCY PROCEEDINGS

Receivables are classified into broad categories, which determine their payment order. There are many privileges and exceptions that can affect the ranking of several claims. In the absence of exceptions (very many, such as the so-called "new money" privilege, in the case of a court-approved conciliation agreement), the settlement order for claims can be broadly defined as follows:

- the super-privilege of salaries (in particular, salaries for the last 2 months preceding the opening judgement);
- post-commencement claims (including amounts due to employees during the proceedings, in the event of liquidation and up to a maximum of 45 days);
- preferential claims, secured by a general lien on movable or immovable property;
- unsecured receivables, which do not benefit from any guarantee (in particular, from many suppliers).

As indicated in the previous 2 points, employees benefit from special guarantees regarding the treatment of their wage claims when insolvency proceedings are opened. These are various privileges provided for by law and above all a guarantee of payment by the AGS. In this context, the AGS, which has paid the sums due to the employees, is "subrogated" to the employees' rights, i.e. it becomes a creditor instead of the employees. In most insolvency proceedings, employees are quickly no longer creditors except for amounts not covered by the cap. On the other hand, frequent disputes are observed on whether or not certain claims are taken into account by the agent or liquidator and the SGAs. They give rise to industrial tribunal proceedings and unfortunately keep many employees in a situation of uncertainty regarding the effective settlement of some of their claims (e.g. hour meters).

10. THE CONTINUATION OF EMPLOYMENT CONTRACTS AND ECONOMIC REDUNDANCIES IN INSOLVENCY PROCEEDINGS

a) Insolvency proceedings do not terminate employment contracts, but may call into question the employer's managerial power

The initiation of insolvency proceedings does not result in the termination of employees' employment contracts, which continue after the opening judgement (even if, in the majority of cases of liquidation, the liquidator proceeds very quickly to dismiss employees in order to benefit from the AGS guarantee). In this context, the main provisions of the Labour Code continue to apply. Similarly, any trials pending before the Labour Court are neither interrupted nor suspended as a result of the opening of the collective proceedings. They continue, but in the presence of the judicial representative or liquidator. The opening of collective proceedings has consequences on the manager's management power, which may be deprived of all or part of their prerogatives for the benefit of the judicial administrator or liquidator in particular. As a general rule:

- in receivership, only acts of day-to-day management may be carried out by the manager without the intervention of the administrator and/or the official receiver. Thus, the dismissal of an employee must be decided jointly with the receiver and previously authorised by the official receiver or by a judgement rendered by the court;
- in liquidation, the manager is relieved of their powers to the benefit of the liquidator.

b) Economic dismissals in insolvency proceedings are subject to a special procedure, which combines conflicting interests with difficulty

In insolvency proceedings, economic dismissals are generally pronounced on three main occasions:

- in the period of observation of the receivership;
- Dismissals must be "urgent, inevitable and indispensable". In practice, they are often presented to give time to the construction of a continuation plan. They must be carefully analysed by employee representatives because, in addition to their social impact, they can impoverish the company's skills and make it more difficult to find subsequent buyers;
- as part of a continuation plan or a disposal plan;
- A continuation plan or a plan to sell the company/part of its business often involves economic redundancies, in particular insofar as the buyer tends to calibrate at least the employment aspect of the takeover, even if it means hiring quickly in the process;
- in the event of liquidation with cessation of activity (with the dismissal of all employees).
- The transposition of the common law into the specific insolvency situation is part of a derogation procedure, with in particular an accelerated timetable.
- But this transposition seems delicate and sometimes inappropriate because it involves articulating contradictory stakes/imperatives:
 - on the one hand: full and fair information of employee representatives and the development of serious accompanying measures to reduce the social consequences of redundancies;
 - on the other hand: the urgency to proceed with redundancies in view of the company's situation and the conditions of guarantee of the AGS and the limited financial room for manoeuvre.

c) The main common rules for redundancies in insolvency proceedings

The applicable rules may differ depending on the company's workforce and the number of redundancies planned. In particular, the dismissal of 10 or more employees over a period of 30 days in a company with 50 or more employees makes it compulsory to set up a collective redundancy called job protection plan (PSE), dealt with in point 11. However, several common rules can be identified.

First of all, prior notification of the administrative authority (Direccte – *Direction régionale des entreprises, de la concurrence, de la consommation, du travail et de l'emploi*) is mandatory before dismissal for economic reasons. In addition, dismissals are subject to deadlines, in particular for wage guarantees by the AGS. In this respect, the Labour Code specifies that insurance covers claims resulting from the termination of employment contracts:

- > during the observation period;
- > within one month of the judgement adopting the recovery or transfer plan;
- > within 15 days (or 21 days in the case of a PSE) of the liquidation judgement;
- > during the temporary maintenance of the activity authorised by the court liquidation judgement and within 15 days (or 21 days in the case of PSE) following the end of this maintenance of the activity.

Finally, information and consultation of employee representatives is mandatory when economic redundancies are considered. The specific insolvency situation raises many practical difficulties and often requires employees' representatives to work in anticipation and within tight deadlines. In theory, only one meeting is mandatory, even if, in practice, at least 3 or 4 meetings are organised. Especially since in the event of redundancies of at least 10 employees over 30 days, the CSE may be assisted by a chartered accountant regardless of the company's workforce. The time limit for the chartered accountant's intervention is not specified, whereas the legally defined consultation periods of the CSE (between 1 and 4 months) are very often inapplicable: the timetable of the dismissal procedure is therefore often the subject of discussion/negotiation between the different parties of the proceedings.

Similarly, practical difficulties arise in the linkage between consultation of workers' representatives, court decision and verification of administration in the specific context of a PSE. By way of illustration, to avoid an administrative decision being taken before the Court's judgement, the public administration recommends that consultation be separated for the draft economic redundancies (Book 1 of the Labour Code) and the reorganisation project (Book 2 of the Labour Code) and that the delivery of the CSE's opinions on Book 1 be postponed until after the Court's judgment adopting the transfer or recovery plan and authorising the redundancies. This largely undermines the principle of consultation prior to the decision.

11. THE RULES APPLICABLE TO SOCIAL PLANS

a) Collective redundancies of less than 10 employees

As mentioned in the previous section, these redundancies must be preceded by informing the employee representatives for their consultation on the project. This consultation is a prerequisite:

- > the order of the official receiver in the event of dismissals during the observation period;
- > the judgement rendered by the court, in particular in the context of a recovery plan or a disposal plan involving job cuts.

In addition, preliminary interviews must be organised (each employee is called) and dismissal notifications may be made 2 working days after these interviews.

b) Employment protection plans (PSE)

The PSE process is explained in the document so that the reader has a general understanding of it but it is not specific to insolvency proceedings. On the other hand, as mentioned in the following points, employees and their representatives face a double challenge: working in an emergency and in an often-tense financial context.

Criteria making the implementation of a PSE mandatory

The Labour Code requires the implementation of a job protection plan in the event of economic layoffs of at least 10

employees over the same 30-day period, provided that the company employs more than 50 employees. The employer, administrator or liquidator is responsible for developing and implementing the PSE. Compared to other procedures, the PSE is supposed to include measures to avoid or limit the number of redundancies and to facilitate the redeployment of staff whose redundancy cannot be avoided. It is considered as more “protective” for employees.

The two possible ways to implement a PSE and control the administration

There are two possible ways to conduct the PSE (at the choice of the employer, administrator or liquidator):

- the so-called “negotiated” approach, in which a majority agreement is sought with the representative trade union organisations in the company, with, in parallel, information-consultation of the employee representative institutions;
- The so-called “unilateral” route, in which the employer, administrator or liquidator presents a unilateral project which is the subject of information-consultation by the employee representative institutions.

These channels determine the procedures for control by the public administration (Direccte) of the regularity of the procedure and the PSE envisaged. The PSE must be validated in the event of a majority agreement or registered in the event of a document issued unilaterally by the employer. In practice, control appears to be clearly limited compared to a common law procedure:

- The time limits granted to the Direccte to render its decision are very limited: 8 days in the case of receivership and 4 days in the case of liquidation (from receipt of the request for validation or approval).

In any case, the Direccte does not verify the existence of a valid economic reason and, by way of derogation from ordinary law, it is not required to take into account, in its approval decision, the resources available to the home group.

The determination of employees likely to be dismissed

As in any collective dismissal procedure, it is the application of dismissal criteria by professional category that leads to the determination of the order of dismissals, i.e. the establishment of the list of persons likely to be dismissed. The professional category, a concept clarified by case law, is defined as “*all employees who perform functions of the same nature within the company involving common professional training*” and who are therefore deemed substitutable between them after a few weeks of adaptation training.

In this context, the criteria for dismissal take into account in particular: family responsibilities, seniority, the situation of employees who have social characteristics that make their professional reintegration particularly difficult, and professional qualities.

Accompanying measures

PSE accompanying measures are often more limited than in viable companies. This is why the 2013 Employment Security Act provides that the AGS guarantee may concern measures to accompany a PSE of a company in receivership or liquidation. A technical note from the Directorate-General for Labour specifies that these measures must contribute to “*supporting the return to employment and therefore the reintegration into the labour market of dismissed employees (...)*”. Thus, the following may be considered as accompanying measures: ancillary costs (accommodation, transport) linked to training measures, costs of job recognition or relocation or costs ancillary to the preparation of the project to create a new activity.

In addition, a public scheme, known as a professional security contract (CSP), may benefit the redundant employee, regardless of the size of the company placed in receivership or liquidation. This system aims to provide support to the dismissed employee in the form of individualised follow-up. The maximum duration of this scheme is 12 months and the employee receives the professional security allowance (ASP), the amount of which is equivalent to 75% of their reference salary.

12. THE CAPACITY OF STAFF REPRESENTATIVES TO ACT AND INFLUENCE IN INSOLVENCY PROCEEDINGS

a) The levers available to prevent difficulties (before insolvency proceedings)

Even if these levers are not strictly speaking part of the insolvency proceedings, but upstream, they seem crucial to us, insofar as they allow employee representative institutions to have precise information on the company's situation and thus to have a greater influence on the insolvency proceedings, if they were to be opened.

Competence of CSE (more than 50 employees) on the general running of the company

This competence allows the CSE to regularly request economic and financial information from the employer and to monitor the company's situation, particularly when the first difficulties arise. It is also in this context that the CSE is the recipient of the forward-looking³⁹ management documents. In addition, meetings with interlocutors likely to have information on the company's situation can be organised, in particular with the Commissioner for Productive Recovery of the Region.

The use of the chartered accountant on the analysis of the economic and financial situation

In the absence of a company agreement with different provisions, the CSE (more than 50 employees) may be assisted each year by the chartered accountant of its choice, in order to consult on the economic and financial situation. The chartered accountant thus appointed may ask the employer to provide him with information relevant to their work, in order to establish a diagnosis concerning the situation and prospects of the company. The accountant's fees are entirely at the company's expense.

The convening of the company's statutory auditors (CAC)

The Social and Economic Committee (CSE) may at any time (by majority vote) convene the auditors to receive their explanations on the company's financial situation. In the event of refusal to attend the meeting, the CACs are liable to a conviction for the offence of obstruction.

The alert issued by the CSE (more than 50 employees) for economic reasons

When it becomes aware of facts likely to affect the economic situation of the company in a way that gives cause for concern, the committee may request clarification from the employer, who is required to provide it with precise answers. In any event, the committee has a monopoly on the qualification of the matter for concern: the employer must answer its questions and cannot refute the characterisation of the facts.

If, despite the answers provided, the Committee is not satisfied because they remain insufficient or incomplete, or if the answers confirm the worrying nature of the situation, it may continue its investigations with the assistance of a chartered accountant. Once appointed, the expert assesses the company's situation, issues an opinion on the origin and extent of the difficulties, on the explanations given by the company manager and on the opportunity for the CSE to refer the matter to governing bodies. In the absence of a more advantageous agreement, the expertise is co-financed (20%) by the CSE.

b) The levers available in insolvency proceedings

The economic alert procedure is, in most cases, no longer possible when the cessation of payment is proven and the company is confronted with the opening of collective proceedings.

Before the proceedings are initiated, the committee may communicate to the president of the court or the public prosecutor any fact revealing the debtor's suspension of payment (Article L 631-6 of the French Commercial Code). This leverage can be activated when employee representatives are confronted with a shareholder who is clearly unable

39 In order to prevent difficulties, the preparation of provisional management documents is mandatory for commercial companies exceeding at least one of the following two thresholds: number of employees of 300 and/or net turnover of €18 million. In particular, they must present a situation of current and available assets and current liabilities.

to rectify the situation and/or who is organising their withdrawal. When confronted with insolvency proceedings, the Social and Economic Committee (CSE) can mainly rely on its advisory powers and on the fact that it is heard by the court at the main stages of the proceedings.

Thus, the committee is informed and consulted, in particular:

- > before the declaration of suspension of payments and the opening of the proceedings;
- > on the economic and social balance sheet drawn up by the receiver;
- > on the recovery plan presented by the debtor in receivership and on the proposals for the settlement of debts;
- > on offers to sell;
- > on plans for collective redundancies for economic reasons, during the observation period or at the end of the proceedings.

As soon as insolvency proceedings are opened, they are also required to appoint the employee representative, who will be responsible for verifying employee claims. The committee may also be heard by the official receiver to transmit information of such a nature as to give accurate information on the situation of the company.

In addition, the CSE, regardless of the size of the company, appoints representatives (different from employee representatives), who are heard when the court:

- > opens insolvency or liquidation proceedings;
- > converts the recovery proceedings into liquidation;
- > decides on the recovery plan;
- > intends to order the partial cessation of activity or judicial liquidation;
- > shall adopt one or more disposal plans.

No specific information is provided for trade union delegates. However, they may be invited to negotiate a majority agreement on economic redundancies as part of a PSE (see point 11).

13. MUTUAL AGREEMENT AND DIFFICULTY PREVENTION PROCEDURES

In France, there are nearly 5 procedures concerning companies in pre-insolvency situations.

The ad hoc mandate and conciliation are two so-called amicable procedures, in the sense that they aim to reach an agreement between the company and its main creditors.

The ad hoc mandate is open to companies that are not in a state of suspension of payment. It consists of asking the president of the court to appoint an agent, independent of the parties, whose mission is to assist the company manager in resolving the difficulties they encounters with their creditors. The procedure can be used to negotiate a debt restructuring in complete discretion: the procedure is confidential.

Conciliation is open to companies that have not been in a state of suspension of payments for more than 45 days and that are experiencing existing or foreseeable legal, economic or financial difficulties. It consists of asking the president of the court to appoint a conciliator in an equally confidential framework. The mission of this conciliator is to promote the conclusion of an amicable agreement between the debtor and their main creditors and partners, intended to put an end to the company's difficulties and ensure its sustainability: the agreement may be broader than in the ad hoc mandate by integrating new financing provided to the company. If an agreement is reached, it can either be noted by the court and remain confidential or be approved: its existence is then publicised. Approval is often required

by banks in return for financial contributions, in order to be able to benefit from the “new money” privilege in the event of the subsequent opening of collective proceedings. A law promulgated in 2016 excludes any information to employee representatives concerning the opening and development of conciliation proceedings or an ad hoc mandate, which is subject to a strict obligation of confidentiality. However, it is expressly provided that staff representatives are informed of the content of the agreement when approval is requested.

Safeguarding is a collective and voluntary judicial procedure created in 2005: only the debtor can initiate the procedure. It is open to a company which, without being in suspension of payment, proves that it is unable to overcome difficulties which are likely to lead to a state of suspension of payment. Broadly speaking, this procedure aims to anticipate difficulties in order to avoid receivership. It is intended to facilitate a possible recovery of the company in order to allow the continuation of the activity, the maintenance of employment and the discharge of liabilities. Safeguarding has many similarities to receivership, but is more anticipatory and gives the entrepreneur more scope for action: in particular, they remain in control of management, can freely sell their shares and cannot be required to sell his/ her company.

Overall, the positioning of institutions representing employees in need of protection is similar to that of receivership. More recently, the accelerated safeguard and its variant, the accelerated financial safeguard (which only concerns the company's financial creditors) have been created for companies undergoing conciliation, with a view to drawing up a safeguard plan within a few months at most in order to guarantee the continuation of their activity. These procedures are used in particular in the context of LBO debt restructurings.

14. IS THE CURRENT LEGISLATION MORE FOCUSED ON THE RECOVERY AND CONTINUATION OF COMPANIES THAN ON THEIR DISMANTLING?

Historically, French law has been built to contribute to the sustainability of the activity of companies in difficulty, sometimes through drastic restructuring, rather than organising their dismantling to pay off creditors.

As part of the analysis of a plan for the recovery or transfer of a company in collective proceedings, the court must render its decision considering three main criteria: the sustainability of the project presented, the social consequences of the project and the fate of the creditors. Very often, the strength of the project and its impact on employment take precedence over the treatment of creditors. Some economists also criticize French insolvency law for giving too much importance to the short-term survival of companies and for failing to protect creditors. On the other hand, studies, such as that of the OECD, underline that the French economy has few “zombie”⁴⁰ companies, which survive with low or negative profits, which seems to testify to the effectiveness of national law. But the major challenge is undoubtedly the development or strengthening of warning and anticipation mechanisms to deal even more quickly with companies' difficulties. With its recent reforms, France has many tools for early restructuring. Initial feedback suggests in particular that the evolution of safeguard companies is more favourable than that of companies in receivership. In this context, it seems to us that employees and their representatives are not the most poorly placed to play a monitoring role and thus participate in a collective process of anticipating the difficulties of companies.

⁴⁰ Zombie companies are defined by the OECD as companies that cannot cover their interest on debt with their operating income for more than three consecutive years.

COUNTRY REPORT #3:

HUNGARY

By

ILDIKÓ KRÉN, LEGAL CONSULTANT: DR. ZOLTÁN LIPTAI

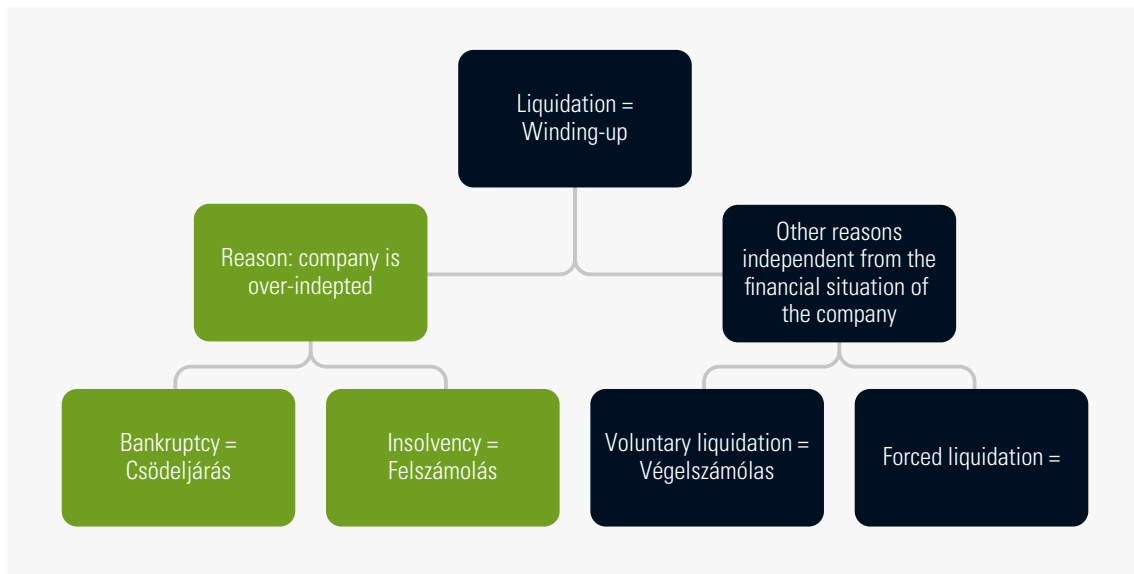


SOME WORDS ON THE CHALLENGES TO REPORT ON BANKRUPTCY AND INSOLVENCY PROCEDURES IN HUNGARY

Writing about the role of trade unions and works councils in cases of company liquidation in a country where labour rights are seriously under threat and widely reduced to a minimum (and mainly only guaranteed by European directives) is a challenge. However, the biggest challenge was, in fact, a very simple one. It was about wording. We used, for our research, articles and studies in English, German and Hungarian and resorted of course to the Hungarian Law in Hungarian language, sometimes comparing these to English or German translations, where available. This led to serious confusion because we soon realised, that each author, uses different phrases for each translation of a legal text. Moreover, journalists writing for public newspapers in the Hungarian language had also their own wording, which is in no way compatible to phrases used in the statistical description and not at all compatible to the relevant or binding legal phrases regulating insolvency procedure in Hungary. So at the end, we had English phrases like “winding-up a company”, “bankruptcy”, “insolvency”, “liquidation”, we had Hungarian ones: “végelszámolás”, “felszámolás”, “csődeljárás” and we had the German phrases, “Liquidierung”, “Insolvenz”, “Pleite”, “Abwicklung”, “Bankrott”. During our research it was challenging to understand the different translations and interpretations and allocated the wording of each text to the concept behind. So at one certain point we had to come to the decision of which phrase would be used (even this could be and might be a matter of discussion for the working group at ETUI).

Our report refers to the left part of the subject, however, especially in the statistical part, we cannot always make clear distinctions as statistical data uses another logical frame than the respective laws on bankruptcy and insolvency.

Fig. 15: Challenges to Report on Bankruptcy and Insolvency Procedures in Hungary

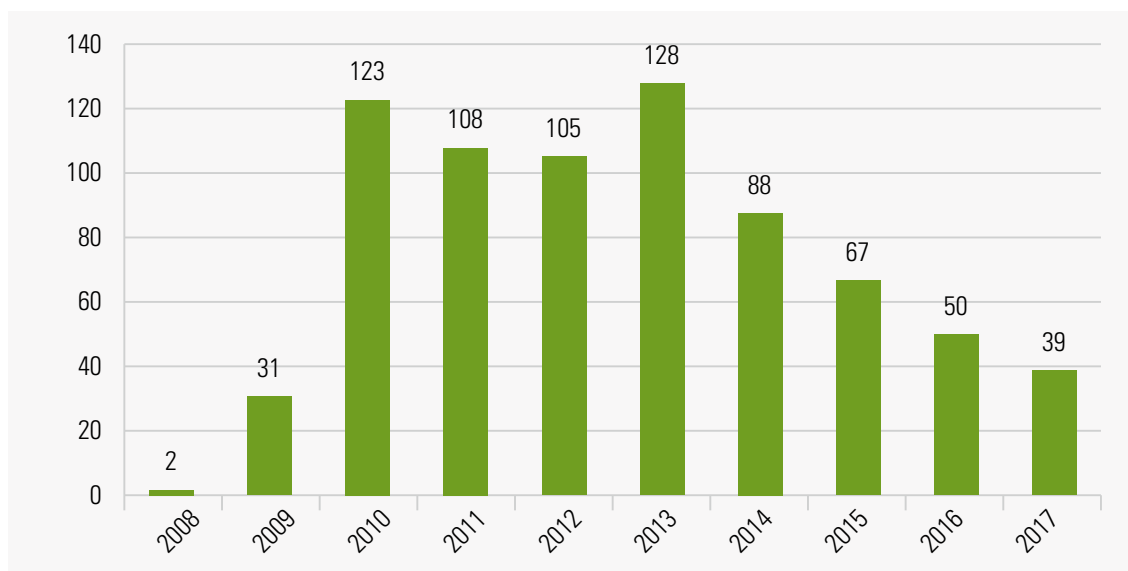


Thus, in our report, “liquidation” refers to every process when at the end it is highly likely that the given entity is not going to exist anymore (due to bankruptcy, voluntary or forced liquidation). It can also refer to existing entities that have gone through a timely process of restructuring and recovering. As for voluntary and forced liquidation other mechanisms and reasons might be relevant, though we do not deal with this in our report.

1. STATISTICAL OVERVIEW

According to the red/left part of the graphics, liquidation procedures are divided into two sub categories. One is related to difficulties to pay (bankruptcy and insolvency), whilst the other one is not necessarily connected to financial issues, rather to legal or private aspects. Within the statistical data the distinction was not made in any case.

Fig. 16: Number of Bankruptcies in Hungary 2008 to 2017



Bankruptcies⁴¹:

To begin with, bankruptcy procedures are not a common practice in Hungary. Today, the number of bankruptcy cases settled down far below 100 and are constantly decreasing. However, as a consequence of the financial crisis in 2008 and the amended bankruptcy law in 2009, the number of bankruptcies has strongly increased. But in 2017, there had been only 39 cases compared to about 50 in the previous year.⁴² Generally, the number of bankruptcies has never been significant. Despite the outbreak of the financial crisis and the 2009 law changes, the number only increased to over 100 cases annually in the following four years. After that, the figures constantly decreased. In 2017, there were only 39 cases processed, a number, which comes close to that of 2009. This reverse trend is not expected to change in 2018 nor in the coming years.

Insolvencies

According to Hungarian legislation beside bankruptcy, there are 2 categories allocated to the termination of a company: (1) voluntary liquidation of an enterprise (végelszámolás), initiated by the enterprise itself and; (2) forced liquidation (felszámolás).

Most of the liquidations or “winding-ups” fall highly likely into the category of voluntary liquidation, but the official statistics do not make a distinction between these categories. To achieve a better understanding on the statistics described it should be mentioned that the Hungarian economy is highly divided into an enormous number of micro

41 The following is mainly based on the following statistics: <https://www.ksh.hu/docs/eng/xftp/gyor/gaz/egaz1712.pdf>; <https://www.ksh.hu/docs/hun/xftp/gyor/gaz/gaz1712.pdf>; https://piacesprofit.hu/kkv_cegblog/kicsit-csokkent-a-csodok-es-felszamosolasok-szama/
Hungarian Central Statistical Office 2018: Statistical Reflections 1867/2017:

42 Hungarian Central Statistical Office 2018: Statistical Reflections 1867/2017: The number of registered business units, 2017, p. 4.

companies with 0-10 employees (changing year by year, but approximately 1.6 million), a surprisingly small number of small and medium sized enterprises employing 10-49 employees (around 35.000) and a very small number of large companies with more than 250 employees (around 950). Consequently, most of the liquidations do not affect a relevant number of employees. The following graphic relates the number of insolvencies to the employment categories:

Fig. 17: Number of liquidated companies by size



Other Liquidations

Concerning the figures of the top ten companies with the most voluntary and forced dissolutions⁴³ (compulsory strike-offs) no significant changes can be seen. In the last years, HORECA (Hotel, Restaurants, Catering and encompassing about 25.000 enterprises) has been the most vulnerable sector. Administration and services, whole-sale, constructing, automotive and motorbike, food, beverage and tobacco, wood processing and transportation and storage are quite stable on the list below. It is interesting that the chemical and pharmaceutical sector jumped to the top 10 rank in 2017 but was the 21st in 2016.

43 "Forced deletion" can be ordered by several reasons. The most often relevant is, if an enterprise does not apply for the law. Therefore "forced deletion" is not connected to financing problems.

Fig. 18: Most Vulnerable Industries⁴⁴

2017. Q1	2016. Q1	
1.	1.	HORECA
2.	7.	Administration and services
3.	5.	Whole sale (except auto-motor, vehicle)
4.	4.	Constructing
5.	6.	Auto-motor, motorbike
6.	3.	Food and beverage and tobacco
7.	9.	Transport and storage
8.	2.	Wood processing
9.	11.	Textile industry
10.	21.	Chemical substances, pharmaceutical products, fossil oil, coke industry

Among the top *less* vulnerable industries, the one with the best position is the human, health and social services, which is followed by public administration and defense, compulsory social security, education, IT branches, machineries and manufacturing. The rank is closed by agriculture, forestry and fishing for the last two years' first quarters.

Fig. 19: Less Vulnerable Industries⁴⁵

2017.Q1	2016.Q1	
1.	1.	Human, health and social services
2.	9.	Public administration and defense; compulsory social security
3.	2.	Education
4.	7.	Computer, electronic and optical products
5.	8.	Industrial machinery, equipment and repair
6.	3.	Professional, scientific and technical activities
7.	6.	Information and communication
8.	5.	Machinery
9.	4.	Other manufacturing activities
10.	10.	Agriculture, forestry and fishing

Liquidations during the global financial crisis

Compared to the development of bankruptcies, one can see a very similar development in insolvencies. According to the Hungarian Central Statistical Office (KSH), in 2009 there were 1,686,351 companies registered in Hungary of which 128,503 were new, and the number of ceased businesses was 82,372. The number of company closures was 17% higher (11,000 businesses) in 2009 compared to the previous year. Trade, transport and accommodation services (4,350 cases) and the construction sector (2,323 cases) were particularly affected by creditors initiating winding-up processes. In 2009, the number of medium and large enterprises wound up was 250%–300% higher than in 2008, and by the end of the year there were around 12,500 company liquidations. Liquidation proceedings were initiated primarily in micro-enterprises which constituted 85% of all procedures. Only in the education and healthcare sectors was the number of liquidations in 2009 about the same as in 2008. The real estate sector experienced the largest increase (66.1%) (KSH, 2009).

44 source: https://piacesprofit.hu/kkv_cegblog/kicsit-csokkent-a-csodok-es-felszamosok-szama/

45 source: https://piacesprofit.hu/kkv_cegblog/kicsit-csokkent-a-csodok-es-felszamosok-szama/

There was no slowdown in the first months of 2010: only in April was there a significant relief, the month of the election of the new parliament, but in May the rate of companies winding up rose again. An increasing number of owners are deciding to liquidate their company to escape winding-up procedures. In May 2010, 1,512 company owners initiated voluntary termination of their business; this is 245 (8.7%) more than in May 2009 (Index.hu, Megugrott a csődök száma májusban, 9 June 2010).

Concerning differences between regions, there was a significant increase in insolvencies among companies in the central and eastern regions of Hungary. Because the central region has a major impact on the Hungarian economy as a whole, the increase in announced insolvencies of 16% (in May 2010) made the average for the entire country worse. In the southern Great Plain and northern regions there was a 22%–23% increase in insolvency procedures initiated by company creditors compared with the same period last year. In the western regions, which saw a general slowdown in liquidations in the first quarter of 2010, there was a slower rate of increase; in the first four months of 2010 the rate was 0.7%, but this had risen to 10.9% by the end of May.

An analysis of the distribution of companies according to revenue reveals that, in 2009, most of the liquidity proceedings were carried out against micro-enterprises with yearly revenues of €71,330 (HUF 20 million as at 6 August 2010) and businesses with yearly revenues of between €71,330 and €1,069,960 (HUF 20–300 million).⁴⁶ The most stable sectors were education and healthcare.

Hungary's economy depends strongly on transnational companies, especially in the automotive, construction and steel industries. In a move towards rationalisation and cost efficiency, many of these companies have relocated production from Hungary to Asian and Middle Eastern countries. This has had a negative impact on Hungarian small and medium-sized enterprises (SMEs) supplying these sectors during and after global crisis.

Recent developments

As in previous years and by the end of 2017, most of the insolvency proceedings are initiated by the creditors. The sector affected mostly was 'wholesale and retail trade' (29%) and 'construction' (13%). The number of liquidations increased only in the area of health services by 5.6%, and decreased in the other sections of the economy – to the highest extent – by more than 20% in the areas of information, communication and education.⁴⁷

Most liquidation proceedings were initiated by the owners in the fields of 'scientific and technical activities' (20%), 'wholesale and retail trade' (16%) and 'other services' (10%). With the exception of arts, entertainment and other services, the number of liquidation proceedings increased in all economic sections, to the highest extent in the sections of accommodation services (39%) and industry (37%).

The above figures on liquidation are more interesting when one compares them to the newly registered enterprises. In 2017, the number of newly registered enterprises was 121 thousand, 7.4% higher than in 2016. The new registrations of both business partnerships and entrepreneurs increased: by 2.4% and 9.0%, respectively. Among entrepreneurs, the number of newly registered private entrepreneurs rose by an even higher 20%. The number of the new registrations of private limited liability companies, having significant weight among business partnerships – after the decline in 2015 – increased by 2.0% in 2017. The number of those registered as limited company increased by 9.4%, as well. The new registrations of limited partnerships decreased for many years before, but their number rose again by 16% in 2017.

⁴⁶ Here, we have to mention that in 2009 80% of the household sector and 70% of the small and medium sized companies had foreign currency credit. The crisis of the Hungarian forint made foreign currency credits too expensive for the people and this is still a big problem of the Hungarian economy.

⁴⁷ *ibid.*

Fig. 20: Number of Newly Registered Economic Organisations

Number of newly registered economic organisations and that of those under bankruptcy, liquidation, dissolution and forced liquidation proceedings, as well as the number of ceased economic organisations		
2016	2017	DENOMINATION
1 846 101	1 870 415	Number of registered business units at year-end
118 587	127 420	Number of new registrations of which
26 030	26 663	business partnerships
57 202	68 594	private entrepreneurs
7 517	6 469	Number of business partnerships subject to liquidation proceedings of which
6 855	5 953	private limited liability companies
70	65	limited companies
513	391	limited partnerships
7 532	9536	Number of business partnerships subject to dissolution proceedings of which
4 923	6 102	private limited liability companies
61	44	limited companies
2 228	3 040	limited partnerships
50 956	44 540	Total number of organisations subject to bankruptcy, liquidation, dissolution and forced deletion proceedings at year-end
110 918	103 923	Number of business deaths of which
46 292	37 689	business partnerships
39 574	42 929	private entrepreneurs

source: <https://www.ksh.hu/docs/eng/xftp/gyor/gaz/egaz1712.pdf>

Concerning business partnerships, the number of liquidation proceedings was 6.5 thousand in 2017, which is 85% of the liquidation proceedings of last year, so after the increase registered in 2012–2014, the decrease – which started in 2015 – continued after 2016 in 2017, as well. Private limited liability companies accounted for 92% of all proceedings, another 6.0% was launched among limited partnerships. The number of proceedings initiated in the course of the year decreased by 13% among private limited liability companies, by 36% among limited partnerships and by 8.1% among limited companies. In 2017, similarly to the previous years – based on the number of persons taking part in the business activity – small and micro enterprises accounted for 99% of the liquidations initiated by creditors, in the category of medium-sized enterprises 74, among large enterprises 13 proceedings were launched.

The number of owner-initiated dissolution proceedings was more than 9,500 in 2017. The number of proceedings initiated in 2011–2012 was outstandingly high, following this period – after the fall lasting for two years – it remained unchanged in 2015, then an increase was recorded in 2016 compared to the low base, and a further 27% rise was observed in 2017. Beside business partnerships, other nearly 2 thousand non-profit organisations chose this proceeding to terminate their activity.

In 2017, the number of liquidated organisations was 104 thousand, from this 99 thousand were enterprises and 4 thousand non-profit organisations. The number of closures decreased further, as it was 6.3% lower than in the pre-

vious year. While the number of liquidated business partnerships fell by 19%, that of entrepreneurs became 2.0% and within this, private entrepreneurs 8.5% higher compared to the level of the previous year. In all legal forms belonging to the category of business associations the number of business deaths decreased: among general partnerships by 31%, among limited partnerships by 27%, among private limited liability companies by 7% and among limited companies by 3%.

2. INTRODUCTION

The history of bankruptcy and insolvency regulations in Hungary had only not started since World War II but much earlier. The first regulation dates back to the 19. Century, as the first codified bankruptcy acts appeared in the 1870s. After 1946, when Hungary fell under the strong influence of the Soviet Union, the insolvency regulations were made to build up a state regulated economy: state owned enterprises reached high protection whereas private enterprises lost the protection status to ensure a smoother take over. After the uprisings in 1956, a carefully opening in principles for private entrepreneurship started with the New Economic Mechanism in 1968, as Hungary opened its economy for private enterprises. However, because of the Soviet pressure the development toward a more open economy was not undisturbed. In connection with this, some subordinate regulations had been implemented to ensure a certain protection for private creditors. However, protection of state-owned properties had high priority. Until 1986, the definitions of bankruptcy and involuntary liquidation were often used as synonym, as in any case an insolvent enterprise had always a legal successor. Clearer regulations were laid down as basic rules in the decrees VII 16/1986 and 11/1986, in which a clear order of the creditor's succession was introduced. However, there were no guarantees that every creditor's demand shall be satisfied. The sequence of claim satisfaction was highly influenced by political will and was not open to the public. However, these decrees laid the foundations for the first regulations after the 'silent revolution', introducing democracy and a market economy after 1988/89.

With Act VI of 1988 on Economic Associations, the last socialist government laid down the basic rules for the economic transformation process. Beyond other important "transformative regulations" on 01.01.1992, the first Hungarian insolvency law decided upon by a democratically elected government entered into force.⁴⁸ It was designed as a legal framework for transforming a planned economy and state subsidized enterprises into a market economy, which included mechanisms to shut down loss-making enterprises. The philosophy of that law was seen as in itself contradictory. On the one hand, it stated in the preamble that it aimed to protect the interests of the creditors. On the other it preferred restructuring and workplace protection. The regulation was limited to "economic entities" (Gazdálkodó szervezetek). Partnership businesses and micro enterprises were not included. However, in the Civic Code at that time the term "economic entities" covered also the latter two.⁴⁹ The introduction of first Hungarian insolvency law in 1992 was heatedly disputed, because it was seen in public as the "base for mass hara-kiri of the Hungarian Entrepreneurship", but experts understood it as the reinstatement clause of the socialist liquidation rules, as private insolvencies remained excluded. Only in 2008, standardization of terms throughout effected codes and regulation succeeded. From that time on, the following terms are clearly described and used consequently as such: Bankruptcy procedure (csődeljárás), insolvency procedure (felszámolási eljárás) and voluntary liquidation procedure (végelszámolás). In 1996, a law on bankruptcies for municipalities followed (1996/XXV). Preparing for EU accession meant the adoption of European regulations and its implementation into national law. Consequently, Hungary transformed the European Directive (EU 1346/2000/EK) into national law. In the following years, bankruptcy and insolvency practices soon made clear that additional reforms are needed. Law 2006/VI fulfilled those expectations by improving the protection of the creditors, to simplify and standardize the legal framework with the intention of speeding up the procedures, increasing the protection of the property of the entrepreneurs and, finally – but somehow contradictory, to better safeguarding jobs in cases of insolvency.

48 Act XLIX of 1991 on Settlement and Bankruptcy Proceedings (Insolvency Act)

49 Halmos, Károly, A csőd intézménye rövid története (A short history of bankruptcy, in: Közgazdasági Szemle, LIX: 212 (p 540 – 557)

One of the most important reforms took place in 2008 and came into force on 1st September 2009 (2009/LI). It was introduced as a reaction to the 2008 financial crisis and rewrote some important rules for bankruptcy and insolvency. It again put attention to the need of job security and took into consideration the economic stability of Hungary instead of the protection of creditors. All laws were amendments to former law 1991 XLIX, intending again to simplify and rationalize processes. It provided alternative forms of protection against bankruptcy for companies with economic difficulties rather than simply winding up the business, as the latter often ends up with the creditors losing assets and the national economy losing employment and income.

The newly introduced grace period of 90 days allowed for the reorganization of a company's operations and finances. Until the regulation was introduced, debtors could only initiate the liquidation procedure with the agreement of their creditors. Since that, they can ask for the grace period, which can be granted in a day. However, payments, wages, employees' charges, public utility fees, bank charges and value-added tax (VAT) must be paid during the grace period. To reduce these expenses and support employees, there is a legalized wage guarantee support (Law 1994, LXVI) which was modified and introduced in 2007. A new rule is that the court can terminate the bankruptcy proceedings if the debtor has paid all debts.

Although the amended bankruptcy law got simpler then, the response to its general bankruptcy rules suggests that company owners have not yet appreciated the new opportunities or that they are finding it difficult to deal with them. Between September 2009 and February 2010, only 42 companies used the new bankruptcy procedure. One reason for that is that owners/managers do not want their brand to be stigmatised and their bankruptcy to be recognised by the banks and public as prescribed by the law (HVG online, *Hiába van új csődtörvény, közel annyi a felszámolás*, 11 March 2010).

Looking back, one can see a clear tendency. From the 1990s to the last reforms in 2017, the role of the state and of the independent judiciary was pushed back and the significance of protecting the creditor's interests increased. In the latest and all previous 2017 regulations of the 1991/XLIX law concerning *bankruptcy*, the starting initiative lies always within the debtor (§ 6), usually the company's managing institution. The decision for that very procedure is made by a general meeting of the company. In 2009, the bankruptcy law was changed to try and find a solution to the challenges of the financial crisis. According to the previous law, the debtors obtained a payment moratorium only via a decision that had been made by the creditors with a qualified majority. Usually, the creditors did not provide for that majority. According to the new law, it provides for an immediate delay of payments and allows for 90 days reaching an agreement between the debtor and the creditors. The idea behind it was simply to reduce the number of liquidations as a consequence of that harsh bankruptcy law. As a result, the number of bankruptcy procedures strongly increased after 2009, but since 2013 it stabilized by a number of cases far below 100 per year. In 2017, it had been only 39 cases (for details see table 1 above).

Generally, since Hungary became a member of the European Union, the respective governments implemented European regulations into national law. However, Hungarian insolvency law was often changed because of internal reasons or needs and influenced by the interests and ideologies of the national government and obviously of the most influential interest groups. In 2007, a new law simplified the insolvency proceedings for many good reasons. One important change is, that since then, the insolvency administrator has to be appointed by random selection by a computer program rather than by a judge. It was intended to reduce bribery and favoritism. This is regular procedure even today, however in 2011 the Orbán government changed the insolvency regulations again. Particularly important, there now is an exceptional regulation concerning the so-called 'strategically important companies'. In all those cases, the respective government must decide which companies belong to that vague category by governmental decree and not via parliamentary law (Rödl, 7). If one of the respective companies suffers from bankruptcy or insolvency, the proceedings differ strongly from 'normal' processes. The government is able to decide on political reasons which insolvencies are 'normal' and which are of 'strategically outstanding importance'. The regulation was introduced on 27.07.2011 (Law 2011/ CXV⁵⁰) at short notice and in the context of the Malév crisis, in which the Hungarian airline ran extremely high deficits. Shortly before the insolvency process of the state-owned airline, the government decided that this should be a case of 'strategically outstanding importance'. However, the European Commission and the European

50 <https://mkogy.jogtar.hu/jogszabaly?docid=A1100115.TV>

Parliament intervened and strongly restricted the possible options of the Orbán-government in that very case (for details see Chapter. 15 below).

Generally, because private insolvencies were still weakly regulated, in 2015 the Hungarian parliament once again decided on a new law regulating those insolvencies via a more reasonable procedure (for details see below chp. 4). However, the most recent amendment took place on May 16, 2017, when the Hungarian Parliament passed again massive changes on bill XLIX/1991 (for details see below Chapter. 5 and onward).

3. REQUIREMENTS FOR INSOLVENCY PROCEEDINGS (GROUNDS FOR INSOLVENCY)

According to the recent legislation (§ 27 1991/XLIX) the court shall order the liquidation of the debtor by way of a ruling if it finds that the debtor is insolvent. The court shall adopt the ruling ordering liquidation within sixty days of receipt of the petition for the opening of liquidation proceedings. A ruling adopted for the opening of liquidation proceedings shall not be subject to judicial review. The time of the opening of liquidation proceedings is the date of publication of the final ruling ordering liquidation (Section 28). (2) . The court shall declare the debtor insolvent:

- a) upon the debtor's failure to settle or contest their previously uncontested and acknowledged contractual debts within twenty days of the due date, and failure to satisfy such debt upon receipt of the creditor's written payment notice, or
- b) upon the debtor's failure to settle their debt within the deadline specified in a final court decision or order for payment, or
- c) if the enforcement procedure against the debtor was unsuccessful, or
- d) if the debtor did not fulfill their payment obligation as stipulated in the composition agreement concluded in bankruptcy or liquidation proceedings, or
- e) if it has declared the previous bankruptcy proceedings terminated [Subsection (3) of Section 18, Subsection (10) of Section 18 or Section 21/B], or f) if the debtor liabilities in proceedings initiated by the debtor or by the receiver exceed the debtor's assets, or the debtor was unable and presumably will not be able to settle their debt (debts) on the date when they are due, and in proceedings opened by the receiver the members (shareholders) of the debtor economic operator fail to provide a statement of commitment – following due notice – to guarantee the funds necessary to cover such debts when due.
- f) former foreclosures were not effective and will not possible
- g) claims of the creditors exceed HUF 200 000 (700 Euro)⁵¹.

4. INSOLVENCY PROCEEDING PROCESSES – A BRIEF OVERVIEW

- a) Bankruptcy proceedings are commenced by a debtor aiming to reorganise the company operation and reach an arrangement with creditors. During the negotiations, the debtor receives a stay of payment for a limited time, and creditors may offer a discount. During the bankruptcy proceedings, an administrator supervises

51 To understand the purchase power of that amount – it is around 2/3 of an average monthly wage

most of the measures taken by the debtor. The proceedings are terminated after the parties reach an arrangement that is approved by the court. The main purpose is to avoid liquidation proceedings and stabilise the debtor's economic position, so the main advantage is that the creditors and the debtor can maintain their business relationship. The disadvantage of such proceedings is that the debtor may fail to fulfil the conditions of the arrangement, so the number of debts may increase.

- b) Whilst the first aims at reorganising the respective enterprise, insolvency aims at the dissolution of a company by sharing its assets among the creditors.
- c) Generally, insolvency proceedings are commenced by the courts, creditors, the receiver or the debtor. The proceedings are ordered by the court when the company is declared insolvent, i.e. when the debtor is no longer able to fulfil its debts. When the ruling ordering termination of a debtor becomes final, the court shall appoint the insolvency administrator without delay, and shall order to have the abstract of the ruling ordering liquidation and the ruling on the appointment of the insolvency administrator published on the Cégközlöny (Company Gazette) website, updated on a daily basis. The publication also contains a notice for the creditors to register their claims. During the insolvency proceeding, the insolvency administrator exercises all the rights instead of the employer. The proceedings aim to provide satisfaction, as laid down in the Insolvency Act, to the creditors of an insolvent debtor upon its liquidation without succession. The advantages of the proceeding are that the debtor cannot continue its loss-making activity, and the insolvency administrator attempts to purchase the debtor's assets in order to satisfy the creditors. However, it is still not provided that the property of the debtor will be enough to pay all of the creditors, and the proceeding can last for years.
- d) Insolvency proceedings can be commenced by the petitions of a debtor, creditor or receiver, or upon notification from the court of registry or the criminal court. If no composition is arranged, or if the arrangement fails to comply with the relevant regulations, the court shall dismiss the bankruptcy proceedings and consequently declare the debtor insolvent *ex officio* and open the insolvency proceedings.
- e) The holder of a claim that has already been seized by means of sequestration carried out in criminal proceedings to secure another claim, and – in consequence thereof – the debtor has paid to the bailiff's deposit account the amount claimed, may not submit a request for the liquidation of the debtor, and may not present any creditor's claim in insolvency proceedings.
- f) In proceedings requested by the debtor, the petition referred may be submitted with prior consent from the supreme body of the debtor economic operator exercising founders' (shareholders') rights. In sole proprietorships, the petition may be submitted by the owner at his or her own discretion. Employees and the trade unions defined in the Labour Code or the competent works' councils (shop stewards) shall be duly informed when the petition is filed.
- g) Initiating a *bankruptcy* proceeding the company has to take over the initiative and to inform the employees, the respective trade union(s) of the company, or – if applicable – the very work council. In addition, the managing director has to make a statement on all the financially significant changes in the company, a detailed list of all the debts, of all the creditors and of all bank accounts. They also have to inform all the banks of the company on the application. The creditors have to pay a 1% fee of their respective claims and be registered as a legitimate creditor in the whole proceeding. The minimum payment is 5.000 HUF and the maximum 100.00 HUF (about €16 and €333).
- h) Concerning the *insolvency* proceeding, the initiative lies within the courts (e.g. in all unsuccessful cases of bankruptcy), the debtors and the creditors. If the initiative is coming from a debtor, the company must vote to approve that very decision and then must engage an attorney to submit the application to the court. All the other duties mentioned above in the case of bankruptcy do also apply in the case of liquidation.
- i) Both procedures start officially with a resolution of the respective court responsible for the procedure and that have to be published in the Company Gazette (Cégközlöny). The courts have to decide within a time

span of 15 days. The date of the publication is also the starting date for the creditors to apply for their demands. In the case of bankruptcy, creditors have a time period of 30 days, while in the case of insolvency it is 40 days. Concerning bankruptcy, the next and perhaps most important step is a temporary moratorium that the court decides upon. It may encompass up to 120 days. However, in complicated cases that time limit may be expanded to a maximum of 365 days.

- j) Particular claims, such as salaries, taxes, banking fees, etc. are not included in the moratorium (§ 11). In an insolvency procedure, the liquidation of the company and the distribution of its assets are the most important issues the courts and the creditors have to deal with. The final step is that the court will make a binding decision on how the assets are distributed among the creditors.
- k) The insolvency administrator has to index all incoming claims, has to classify them and has to decide on their respective priorities. The property division rules are legal rules and are decided upon by Parliament. As a consequence, they change over time, but they try to meet the claims and interests of the various and often conflicting groups.

Interposition: Private Insolvency – a recently introduced concept

Adopted on 1 September 2015, the basis for private insolvency was introduced by the Hungarian parliament. It regulates the insolvency of private persons which are highly encumbered with debts. If a person has debts at least of an amount of 2 Mio. HUF or of a maximum of 60 Mio. HUF (€ 6.500 to € 195.000), then private insolvency comes in. The liabilities towards the debtor must exceed the total value of his assets. The maximum duration of that very insolvency procedure will take five years. However, there is a special feature of that law. It realizes the subsidiarity principle in so far as income and assets of those persons are taken into account which is part of the respective household. In addition, local authorities are obliged to authorize exceptional expenditures.

5. ACTORS AND THEIR RIGHTS AND DUTIES IN THE BANKRUPTCY AND INSOLVENCY PROCESSES

Compared to other European countries, in Hungary the liquidation procedures are highly juridified. Due to its historical tradition, Hungary primarily started its legislation on bankruptcy and insolvency in the socialist period. The main aim was not to dissolve any company, but to secure its survival in a socialist economy where the state and its economic actions played an important role (see chapter 2). However, after the breakdown of socialism, the context changed fundamentally and very quickly. Now it became highly relevant to have a variety of options on how to dissolve enterprises and how to secure the rights and obligations of the parties involved, mainly that of the creditors and of the workers. The provisions of the current bankruptcy and insolvency acts cover private as well as state-owned enterprises.

The debtors: The first step lies mainly within the debtor. Only these economic operators can become debtors, when they meet the requirements of the act. It is important that the definition of economic operator is different from the definition contained by the Hungarian Civil Code. According to Hungarian law creditors cannot commence the debtor's reorganization. Concerning bankruptcy, the debtor company has to initiate to whole procedure. Normally, that decision is made by a general meeting of the company where a majority decides on that very decision and a simple majority is sufficient. The same holds true for intended liquidation, but in addition the creditors are also allowed to start the liquidation procedure. Likewise, liquidation procedures may be started by a court if a bankruptcy procedure was unsuccessful.

In case of bankruptcy the debtor has to cooperate with the insolvency administrator and has to present a restructuring plan to the creditors. The debtor may ask the workers' representative for cooperation within the preparation of a restructuring or recovery plan.

The insolvency or bankruptcy administrator: In the cases of both bankruptcy and insolvency, the administrator will be appointed by the respective court. Two procedures are in practice. First, the respective court names an insolvency administrator which is determined by an electronic random process or, alternatively, by a transparent method which

considers the effective capacities of the law firm, its workload and its geographical location. However, the final decision lies within the proper court (§ 27 Law 1991/XLIX). There was an exception introduced in 2011, when the category of "strategically outstanding important enterprises" was launched. In that case the insolvency administrator shall be acting as a trustee appointed by the government by decree.

The creditors: The creditor's rights are well protected. First, they have a right to initiate an insolvency procedure. In that case, they have to describe the nature of the debts, the due date and the reasoning why the creditor believes that the debtor is insolvent (accace, 6). Secondly, the insolvency of a debtor will be initiated

- if the debtor will not or cannot pay their undisputed debts within 20 days after a maturity date;
- if the debtor will not or cannot pay their debts within a final verdict;
- if an enforcement procedure against the debtor was unsuccessful;
- if the bankruptcy procedure was unsuccessful or the debtor does not fulfill their liabilities;
- or if it becomes clear that in a voluntary liquidation procedure the assets of the company are not able to cover its liabilities.
- Creditors generally have the same rights during an insolvency proceeding and are entitled to the same rights as they would have during civil proceedings, with the exception of any rights that are incompatible with the insolvency proceedings. Moreover, all of the creditors are entitled to submit any objection to the court.

The main difference between secured and unsecured creditors is that the secured creditors' claims have priority over unsecured claims in liquidation proceedings. If the assets are insufficient to cover the cost of the creditors' claims secured by lien as well as all the other debts, the creditors linked to alimony and life-annuity payments, compensation benefits and restitutions shall be satisfied first, then other claims of private individuals not originating from economic activities (with the exception to bonds), and claims of small and micro companies, in that order, following the satisfaction of the costs and the guaranteed creditors.

In summary, the company's debts shall be satisfied from its assets that are subject to liquidation in the following order:

- liquidation fees;
- secured claims;
- alimony and life-annuity payments, compensation benefits, restitutions;
- other claims of private individuals, with the exception of bonds;
- debts owed to social security funds, taxes;
- other claims;
- default interests and late charges, penalties; and
- claims of people who have a closer relationship with the debtor company.

Regulations concerning the creditor's meetings, voting rules etc., or the initiation of creditor's committees are as follows: § 5 of Law 1991/XLIX describes the general right of the creditors. They must be informed within 8 days about the insolvency, they are authorized to control the activities of the insolvency administrator, they may create a committee, and they are allowed to appoint a speaker. The work and voting is detailed regulated in §§ 18 and 44, which underlines the importance and possible influence of the creditors.

Workers and their respective representatives: Since 2013, the new labour code 2012/I is in effect that reduces, among other things, the rights of the employees in cases of bankruptcies. There are only very few points where Law 1991/XLIX refers to the rights of workers' representation bodies. The Trade Union (neither on companies' level nor on national level) does not have a legal role to play in the whole process. The only exception is the case when there is a valid collective agreement in that given company. This remains valid during the whole process of bankruptcy and liq-

liquidation. In the whole process the Works Council have mainly some restricted information rights. No codetermination is foreseen.

- The elected works council has to be informed immediately when the bankruptcy or insolvency procedure start.
- The works council may be invited to cooperate in the recovery plan mentioned in § 5 (3)
- According to the Hungarian Labor Code, in cases of transfer of employment upon the transfer of enterprise the receiving employer is required to maintain the working conditions specified in the collective agreement covering the employment relationship existing at the time of transfer for a period of one year after the date of transfer. Besides this the receiving employer is obliged to maintain the workers' rights agreed by the transferring employer. This provision shall apply in cases of bankruptcy only; in insolvency procedures, this shall not apply.

Supervisory board: There are no special regulations within the law 1991/XLIX concerning the rights of workers representatives in the Supervisory board.

6. APPLICATIONS FOR THE OPENING OF PROCEEDINGS

Concerning bankruptcy proceedings, only the debtor is able to initiate bankruptcy proceedings – but they must be represented by a professional (bankruptcy) attorney (§7 (1)). The debtor is required to present a detailed account on how to write off the debts and how to reorganize the company to the bankruptcy administrator. This is followed by negotiations between the debtor and the creditors and which are overseen by the bankruptcy administrator. The Works Council may be allowed to take part in those negotiations but there is no regulation which makes their participation a legal duty. In the event that the creditors accept the proposal of the debtor, the company will survive and operate on a new basis. If the creditors disagree, two options are available. First, if the debtor will present a renewed plan for restructuring its company, the negotiations will continue and – if all works out well – the debtors will accept it. This all have to be done within the time span fixed in the moratorium. Secondly, if there is no agreement possible, the liquidation procedure will unavoidably follow.

The rulings for filing for insolvency are outlined clearly. As mentioned above, there are three actors which may initiate liquidation procedures. First, it may be the debtor company itself, which must be represented by an attorney to avoid injudicious procedures (§ 22). Secondly, it can also be creditors themselves, and thirdly, the courts, particularly the court in which the bankruptcy process was unsuccessful or the registry court. Some details have been provided in the subsequent sections.

The procedures of appointment and selection of the insolvency administrator are described in § 27 and their rights and roles in the whole insolvency procedure are described in detail in § 24a (7): they represent the interests of the creditors, supervise the economic activity of the debtors, overview the economic/financial situation and to some extent overtake employer's rights.

7. INSOLVENCY MONEY

During the liquidation proceedings, the wages of the workers must be paid continuously. However, and according to Law 1994/LXVI, if a company is not able to provide for regularly paid wages, the insolvency administrator can apply to the National Employment Fund. In that case this fund is legally obliged to pay for the cancelled wages. The national fund has to decide within 10 days and will pay the worker's wages up to six month or until the end of the respective insolvency proceeding. In addition, it has to support the workers to find new work places and to provide for interest-free loans for the insolvent enterprises to pay the wages of the workers.

8. CREDITOR AND EMPLOYEE PARTICIPATION DURING INSOLVENCY PROCEEDINGS – CHARACTERISTICS

After the start of bankruptcy or liquidation procedures, any creditor may apply for reimbursement of their respective claims. In addition, creditors may elect a select committee for the representation of their interests and to control the activities of the insolvency administrator and the insolvency administrator. Only one committee is allowed to represent the interests of the creditors. It is legitimate if it is able to represent one-third of the registered creditors and, at the same time, holds at least one-third of all claims of the creditors entitled to participate in the insolvency process. During a bankruptcy procedure, the committee is legitimate if it represents at least one-third of the voting rights and if these creditors control at least one-half of all the votes (Varga/Baranya 2016: 217). All strategies and interests are adopted via voting rules that comprise a simple majority and are made by an open ballot.

Only in cases of insolvency does a single creditor have the right to initiate an insolvency procedure.⁵² The fundamental idea behind those regulations seems to be that a creditor should be able to enforce its claims in all those cases where the debtor is not willing or unable to pay back his debts.⁵³

9. WHAT RULES APPLY FOR REVENUE DISTRIBUTION? HOW ARE CREDITORS' CLAIMS AND RIGHTS CLASSIFIED? HOW ARE EMPLOYEE CLAIMS TREATED?

The Hungarian law provides for clear and detailed regulations concerning the financial priorities of the groups engaged (§ 57 (1a) and (2)). The first claim to be satisfied are the wages of the workers, as they are seen as costs of a company's liquidation and not as claims of creditors; concerning the managers, only their basic salaries are guaranteed but they also enjoy highest priority. In general, there is detailed order of precedence which has to be followed by the respective courts and/or the insolvency administrator. The priorities of the respective claims are ordered along that list (see Varga/Baranyai 2016: 216; Rödl&Partner 2013: 18):

- Liquidation costs, most importantly including the wages of the workers (inclusive all additional cost agreed in the work contract or/and according the labour code and the basic salaries of the managers (§ 57 (1a) and (2); and Labor Code § 210);
- Claims secured;
- Claims as alimony and life-annuity payments, compensation benefits, restitution;
- Claims of private individuals not originating from economic activities;
- Claims of small and micro-companies; farmers, deposits at cooperative credit institutions;
- Debts owed to social security funds, taxes;
- Other claims;
- Default interests and late charges, as well as surcharges and penalty and similar debts;
- Claims, other than wages and other similar benefits.

52 This provision was used in the extremely important case of Malév. Here, a single creditor and not the state as the most important owner initiated the insolvency procedure. The strategic advantage has been that the case was not publicly known till the court's decision. This prevented protests and counter-actions and probably allowed for some positive side-effects for certain interest groups

53 This happens in Hungarian business quite often with the excuse, that one is not able to pay its debts because he itself is creditor of the supplier. There is also a special term for that business behavior called "körbe tartozás".

- In a bankruptcy procedure the claims are additionally prioritized as follows:
- All claims with regard to stay of payment; and
- Secured and unsecured claims notified within the time limit (Varga/Baranyai 2016: 216)
- As one can clearly see, during the insolvency proceedings the rights of the workers concerning their wages enjoy high priorities and are legally secured. However, wage is part of the company's assets and therefore employees are not seen as creditors. Rights of Trade Union concerning claiming for the payment of wages are legally not described. The employees have mainly individual rights described in the Labour and Civic Codes.

The employees will be requested by the insolvency administrator to ask for settling of their claims at the Labour Court. Each employee has proofed their claim individually. The calculation of the outstanding wage is regulated in the individual work contract and labour code 2012/I, Chapter 38 § 65-70 and § 77.

10. TERMINATIONS DURING EMPLOYER INSOLVENCIES

Dismissal rules and notice periods are regulated in the Labor Code and in individual work contracts. They are not directly part of the bankruptcy or liquidation procedures (2012 I) In general, during bankruptcy and insolvency proceedings the obligations of the collective agreements of a given company – if applicable – remain valid (§ 47 and 57). In the cases of bankruptcy and liquidation, fixed-term contracts can be terminated before their official expiration period (Labor Code § 66).

11. SOCIAL PLAN IN INSOLVENCIES

Social plans play only a minor role. As long as a collective agreement regulates details of social plans, they shall remain applicable. As collective agreements lost relevance in Hungary, it is highly unlikely that collective agreements have been playing a role in most of the cases of insolvencies and bankruptcies. Further on, if social plans are part of an internal agreement between a works council and a company, they will not be valid for the bankruptcy and insolvency proceedings.

Concerning environmental protection, the 106/1995 (IX.8.) Governmental Decree on the Requirements of the Environmental and Nature Protection during Liquidation and Bankruptcy Proceedings lays out the general rules. In general, the insolvency administrator (and not the debtor and/or the creditors) has to provide for all those costs. This means that all the costs for all necessary measures to deal with the environmental damages caused by the company under liquidation have to be taken over by the state budget. Neither the creditors nor the debtors have any financial responsibilities for the environmental damages they may have caused before the insolvency procedure starts.

12. INFLUENCES OF INDIVIDUAL WORKERS, THE WORKS COUNCILS AND/OR THE TRADE UNIONS

Generally speaking, the rights of the individual workers are legally protected and they do not represent a weak part in the bankruptcy and liquidation proceedings. Workers are able to enforce their respective wage claims. They are entitled to refer to a Labor Court to obtain their payments and its rulings are then brought to the insolvency administrator (Labor Code 2012/I). In most cases, the workers and the employees are then able to push through their demands. In insolvency cases which are inextricably linked with mass redundancies the Labor Code regulates important matters.

Section 38 regulates redundancies, Section 40 § 72 mass redundancies which must be negotiated with the works council, and section 4 deals with the payment of severance benefits in cases of insolvency.

Works councils have in general the right of information and consultation when it is an issue for labour relation or/and has an impact on the economic and social position of the workers. If the employer takes a decision with an impact on the work force and there is a registered trade union organization at shop floor level, the trade union is allowed to express its opinion and to represent the workers interests in economic, social and financial issues. These are general regulations which are laid down in Labour code 2012/1 § 272(They are thus generally applicable and thus also in cases of bankruptcy and insolvency.)

13. PREVENTIVE RESTRUCTURING PROCESSES IN HUNGARY

As already mentioned, the most important pre-insolvency mechanisms are bankruptcy procedures which generally aim at restructuring a company confronted with a deep crisis. The most interesting mechanism here is a moratorium for 120 days before the responsible court opens the formal bankruptcy procedure. In addition, on request of the bankruptcy administrator the court may extend that period. However, so-called 'privileged claims' are not included in the moratorium, such as salaries, taxes, banking fees, VAT, etc.

14. RESTRUCTURING OR DISMANTLING COMPANIES?

The balance between reorganizing and dismantling companies had changed during the time period under observation. While in the beginning and after the breakdown of socialism restructuring had a clear priority in the respective laws and in the legal practices, it changed at the turn of the century. Mainly the legislative amendments in 2012 signaled a clear turning point which was enhanced with the 2017 legislation. Now the creditor's interests were in the focus of the lawmakers and the respective Orbán governments. In addition, the government now used a new provision provided for in the insolvency law much more often. The government is able to declare a company in case of insolvency as one of 'strategically outstanding importance' and is then able to play a significant role in those insolvency procedures.

15. MISCELLANEOUS: ENTERPRISES OF 'STRATEGICALLY OUTSTANDING IMPORTANCE' AND THE MALÉV CASE

The category of an enterprise of 'strategically outstanding importance' was introduced with Law number 2011/CXV and amended Law 1991 XLIX and became effective at 04.08.2011. The introduction of that new chapter IV showed new priorities of the government for the so-called protection of Hungarian 'national interests' within the global economy. However, it was introduced to prevent the insolvency of the state-owned Hungarian Malév airline. In its official wordings, the new law should operate as a protective shield against European and global capital. The definition of companies with 'strategically outstanding importance' are defined in § 65 (3) of Law 1991 XLIX and reads as follows: Enterprises, which

- "a) *operate in the fields of national security, defense, law enforcement, military technology, energy security and energy supply, industrial safety, disaster management, nature conservation, environmental protection, public health, public utility service, infrastructure development, cultural heritage, publicity, communications, or when the enterprise is considered to be of national importance for the purpose of providing basic public services, essential foodstuffs, as well as domestic and foreign economic, employment policy, or as a priority to the public for the supply of district heating or other utilities;*

- b) *which implements or commits significant projects of national economic importance;*
- c) *which performs a national public task defined by law;*
- d) *which has a large amount of state aid for restructuring, credit guarantee, guarantee or export credit insurance or is liable for, or has committed, a concessionary obligation and, in that context, has a legal relationship with the State or public bodies (including state-owned enterprises), or*
- e) *which pursues activities of a strategic nature not mentioned in points (a) to (d), but which are of strategic importance for the national economy.”*

The most important aspects of these paragraphs are the following:

- The extraordinary temporary payment moratorium says that in case insolvency declared by the debtor, the court has to act within 1 day, publish insolvency, declare the moratorium and appoint a public (not private like in regular cases) insolvency administrator (§69).
- The insolvency administrator is appointed by Governmental decree and acts as its trustee (§66)
- Within the time of the extraordinary temporary payment moratorium public insolvency administrator over-takes de-facto the regime of the enterprise. Payments are allowed only with the signature of the insolvency administrator and any other operations done by the running enterprise are controlled. Further the claims of the creditors are bearing interests.
- In case of sale of the enterprise or parts thereof, the insolvency administrator may decide the non-public tendering procedure. In that case the insolvency administrator is not obliged to explain in public the reasons for their awarding one specific bidder – or not awarding another one (§70)
- This law has twofold benefits for Orbán’s national-conservative government, probably its economic stakeholders and old boy networks: it allows to declare by governmental decree any enterprise as outstanding important, keep bankruptcy and insolvency procedure non-transparent with less control of creditors, other stakeholders or public. With the argument to simplify procedures democratic control is undermined. In official wording the simplification of procedures allows to react quickly, when Hungarian interests are seen under threat. This happens – in the official versions of communication – when enterprises bearing symbolic values (so called “Hungaricums”) or representing the “Hungarian folk’s sovereignty” which may be threatened by an insolvency⁵⁴. Otherwise this category allows the Orbán government to sign so called strategic partnership agreements with multinational companies interested in the Hungarian economic or/and labour market. These so-called strategic agreements shall guarantee cooperation and mutual support in favour of Hungary and the welfare of the companies. In reality these agreements allow multinational companies to reach competitive advantages.

The case of Malév is a good example how the Hungarian government intervened in an insolvency procedure, declared an enterprise, the state-owned airline Malév, as one of ‘strategically outstanding importance’ and hereby clashed with European law.⁵⁵

Malév, a former state-owned Hungarian airline, went bankrupt and an insolvency procedure was opened. After the second nationalization of Malév and after a government initiative to heavily subsidize the airline, the EU Commission intervened. In 2010, the Hungarian Orbán-government (re)nationalised Malév by building up a state holding which holds nearly 95% of the airline company; the remaining 5% were held by Air Bridge, a private company. On 1 January 2012, the EU considered that this is not in line with European law.

In the meantime, a new plan for restructuring Malév was developed which – again – would have clashed with European law. Chinese and Hungarian investors, the Hungarian government, and some other investors tried to build up a new company as the holder of a new airline, the ‘New Malév’. The Hungarian state should hold about 35% of the

54 It might be interesting to analyse in details why and which companies get the status of being strategically important for the Hungarian economy, as it is highly discussed, which might be the reasons behind the labeling.

55 The following is based on reports in the Budapest Beacon from 26 February 2015 and Hungarian Spectrum from 1 February 2017.

shares and the new investment group about 75%. A detailed plan should be generated for 15 June 2011 and the new company should operate efficiently by 1 January 2012. However, strong warnings from Brussels emphasized that there can and should be no state ownership because it would violate European law. As a consequence, the talks between the European Commission and the Hungarian Orbán-government failed and an agreement with the potential investors was no longer possible. This story showed that all the attempts to reorganise Malév were never based on serious proposals which are able to meet the current European law – on which the Hungarian government had itself considerably decided upon in Brussels and the European institutions.

The EU proved that between 2007 and 2010 Malév had received about 38 Bill HUF as state subsidies to survive economically. From 2010 on, Malév operated as a state-owned airline, which was not in line with European laws. The EU Commission declared that the governmental subsidies are illegal. As a consequence, Malév should pay back all state subsidies received since 2003, which amounted to an estimated value of about 88 Bill. HUF (about € 290 Mill.). Repaying that would unavoidably mean the insolvency of Malév. In response to this, the Hungarian government declared by decree Malév as a 'company of strategically importance' which allowed for a particular procedure provided for in the insolvency law. This procedure was decided upon by the Orbán-government only a few days before.

These changes in the bankruptcy and insolvency law were made upon the recommendation of DLA Piper, a legal consulting company working for Malév. It proposed

- that the influence of the debtors in the insolvency procedure should be reduced; and
- that the government should unilaterally appoint an insolvency company respectively an insolvency administrator regardless of whether they are legally registered or not.
- The government only partially followed those proposals but undertook many changes in the insolvency law to increase the influence of the state and to reduce that of the creditors. On 9 January 2012, the EU considered that procedure as not in line with European law. A few days later, on 30 January 2012, five days before the final official deadline of the EU, the Hungarian government hastily declared the case as 'strategically outstanding important' (Decree 4/2012). The whole procedure was initiated by a friendly single (smaller) debtor and not by Malév as the main debtor. The reasons had been insightful: first, this procedure did not require a general assembly of Malév – was that very decision to be made. Secondly, it would have made the case public.

Nonetheless, the European Commission again declared all that as illegal and that Malév had to pay back all the subsidies it received during the last years. That simply signaled the financial breakdown and the end of Malév. On 14 February 2012, the Metropolitan Court of Budapest declared Malév insolvent. As a result of the bankruptcy, 2,060 of the 2,600 Malév employees had to be laid off. Furthermore, it also caused additional redundancies at Budapest Airport Ltd as well as within the suppliers.

COUNTRY REPORT #4:

THE NETHERLANDS

By

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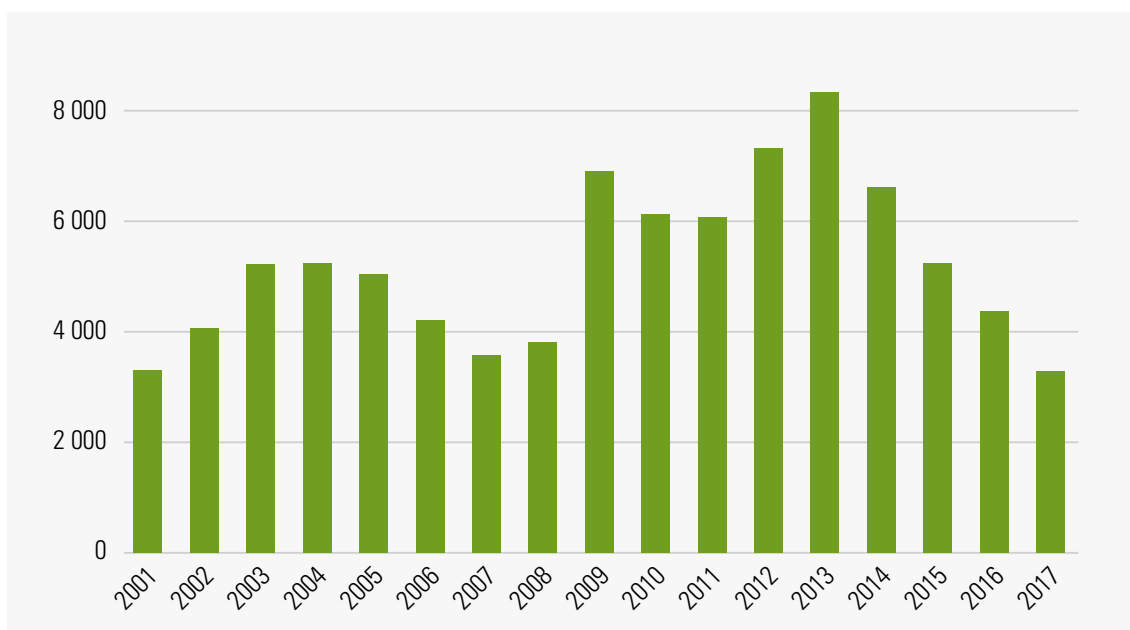


1. STATISTICAL OVERVIEW

Generic

The number of bankruptcies^{56,57} in 2017 was the lowest of this century. The trend is downward, although decreases and increases have followed each other in recent years. There was a peak in 2013, but then there is a downward trend again. This goes hand in hand with economic growth in the Netherlands.

Fig. 21: Number of Bankruptcies of Enterprises and Institutions 2001-2017 (source: CBS)



The number of bankruptcies has fallen in almost all sectors. Most bankruptcies of companies and institutions are reported annually in the trade sector: it concerns wholesale trade, retail trade and car trade. But here too, the number of bankruptcies is falling considerably. Furthermore, the number of bankruptcies in the industry has decreased sharply.

56 Bankruptcy judgements of courts relate to private individuals and companies/institutions. Important for this report are data relating to companies/institutes.

57 Statistics Netherlands (CBS) has data available on bankruptcies but not on suspension of payments.

Fig. 22: Declared Bankruptcies of Enterprises and Institutions by Industry 2009-2017 (source: CBS)

BEDRIFFSTAKKEN/BRANCHES (SBI 2008)	UITGESPROKEN FAILLISSEMENTEN								
	Bedrijven en instellingen								
	2009	2010	2011	2012	2013	2014	2015	2016	2017
	Aantal								
A-U Alle economische activiteiten	6942	6162	6117	7349	8376	6645	5271	4399	3291
A Landbouw, bosbouw en visserij	102	95	90	117	128	72	60	31	23
B Delfstoffenwinning	0	0	1	1	1	2	2	0	1
C Industrie	761	753	690	802	787	515	350	334	245
D Energievoorziening	6	4	7	17	12	6	8	7	6
E Waterbedrijven en afvalbeheer	18	20	25	18	20	23	22	20	10
F Bouwnijverheid	744	857	875	1209	1360	748	611	411	327
G Handel	1619	1360	1301	1532	1876	1415	1118	952	693
H Vervoer en opslag	330	325	283	379	362	269	202	206	160
I Horeca	226	242	292	292	330	293	229	208	185
J Informatie en communicatie	325	273	225	248	380	230	218	151	153
K Financiële dienstverlening	810	574	595	827	789	1035	945	758	487
L Verhuur en handel van onroerend goed	202	133	172	240	221	202	151	144	92
M Specialistische zakelijke	896	697	741	789	910	872	615	517	396
N Verhuur en overige zakelijke diensten	509	440	430	428	620	417	330	270	244
O Openbaar bestuur en overheidsdiensten	0	0	0	0	0	0	0	1	0
P Onderwijs	48	43	51	56	87	87	50	54	33
Q Gezondheids- en welzijnszorg	125	117	106	169	231	198	158	174	116
R Cultuur, sport en recreatie	106	134	112	113	123	97	108	74	56
S Overige dienstverlening	82	91	78	89	103	101	65	63	49
T Huishoudens	0	0	0	0	0	0	0	0	0
SBI-code onbekend	33	4	43	23	36	63	29	24	15

Bron: CBS

Bankruptcy and Employees

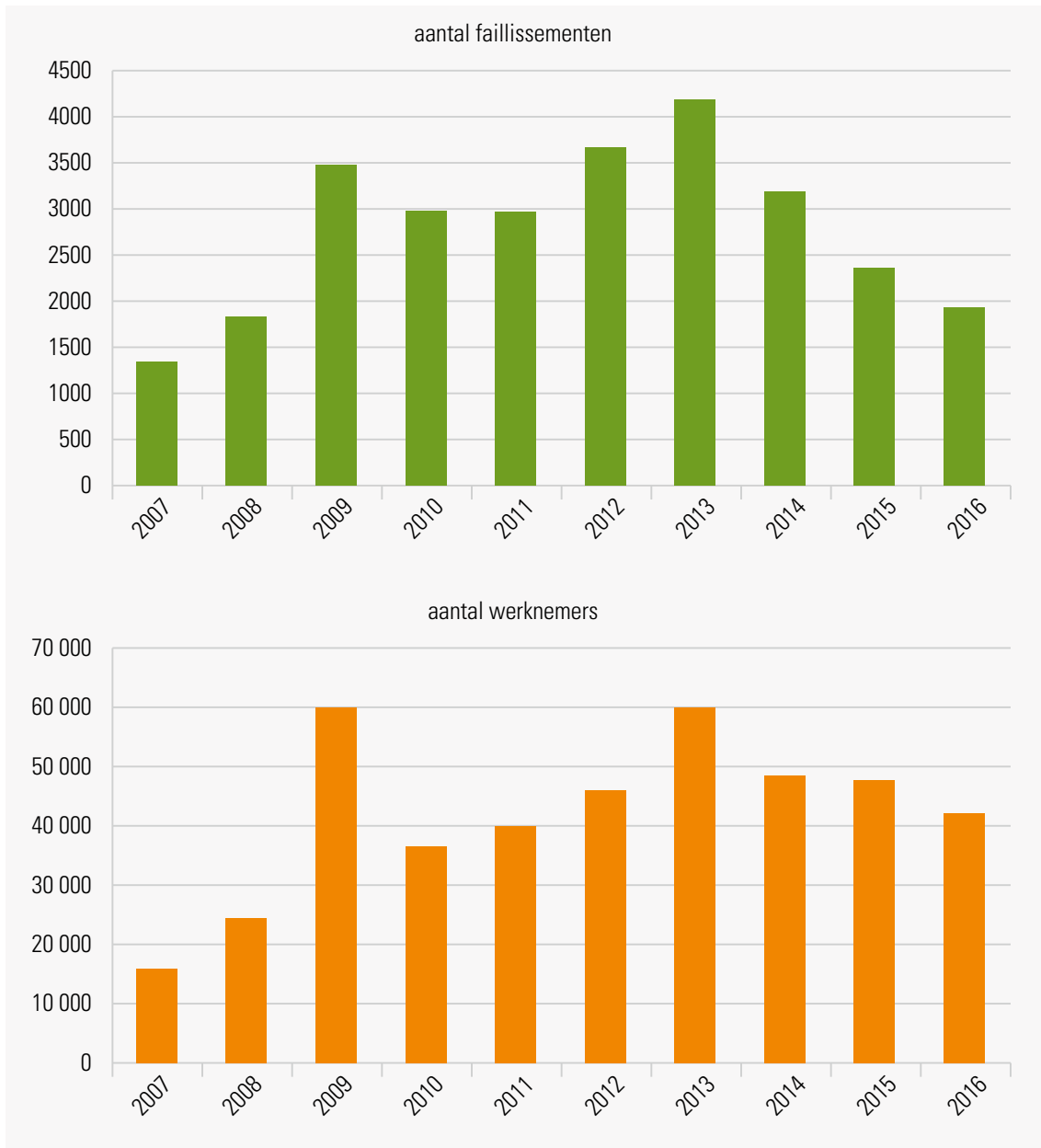
It is not easy to say that these companies and institutions also employ natural persons. This has to do with the CBS definition of business: this can also be a legal entity without personnel. An empty BV for example. The CBS also regards interconnected legal entities, or a group of companies, as one company because subsidiary legal entities cannot decide sufficiently independently. On balance, the Dutch courts declare more bankruptcies (because per legal entity) than the CBS shows in the statistics (because per company).

In the period 2007-2016, the courts declared 66,735 bankruptcies (i.e. of legal entities) involving 49,070 companies (i.e. with or without employees). Of these 66,735 bankruptcies, 27,930 involved employees.

Fig. 23: Number of Bankruptcies 2007 to 2016 Broken down by Legal Form and Employment Status (source: CBS)

Rechtsvorm gefailleerde	Aantal faillissementen	w.v met werknemers
Eenmanszaak	8395	2330
Maatschap	30	20
Vennootschap onder Firma	2515	985
Commanditaire Vennootschap	565	145
Besloten Vennootschap	52480	23715
Naamloze Vennootschap	145	50
Stichting, (Coöperatieve) Vereniging	1405	575
Buitenlandse Rechtsvorm	285	105
overig/onbekend	915	20
Totaal	66735	27930

Fig. 24: Numbers of Bankruptcies Involving Employees (above) + Total Number of Employees Involved in Bankruptcy (below) (source: CBS)



The number of bankruptcies and the number of employees are not evenly distributed across the different sectors of the economy. The top 10 sectors represent over 90% of the number of bankruptcies and employees (out of a total of 18 sectors). The number of employees in the care sector is striking, with more than 50 employees involved in an average bankruptcy. This is probably caused by many part-time workers.

Fig. 25: Top 10 Sectors with Largest Number of Employees Involved in Bankruptcy, 2007-2016 (source: CBS)

sector	aantal faillissementen	aantal werknemers
G Handel	6 430	81 500
C Industrie	3 430	56 700
F Bouwnijverheid	4 005	49 900
Q Gezondheids- en welzijnszorg	855	48 900
N Verhuur en overige zakelijke diensten	1 795	43 500
M Sepcialistische zakelijke diensten	3 340	33 900
H Vervoer en opslag	2 085	33 000
I Horeca	1 400	21 500
K Financiële dienstverlening	1 225	12 900
J Informatie en communicatie	1 160	12 700
Overig	2 205	27 700
Totaal	27 930	422 200

Restart after Bankruptcy

Some of the bankruptcies involve profitable business units that are sold by the receiver in the liquidation process and are continued by the buyer (restart). In that case, the dismissal protection legislation does not apply and the restarter is therefore free to choose which employees they hire. In 2017, the CBS, commissioned by the Ministries of Social Affairs and Employment SZW and Security and Justice V&J, investigated⁵⁸ the job consequences of a relaunch after bankruptcy for the employees who were employed by the company in liquidation; the question was whether and to what extent there was a risk that groups of employees or certain types of contracts would be selectively disadvantaged in a relaunch. Older, sick, pregnant and low-skilled workers are vulnerable groups on the labour market and it has been investigated, among other things, whether these groups are employed less frequently in the business start-up.

General

It has been observed that many employees remain active in their old sector. What is striking, however, is that many employees end up at a temporary employment or lending agency.

58 L. Hoekema, CBS, Restart after bankruptcy phase 1, 31 October 2017 and Caroline Bloemendal, CBS, Restart after bankruptcy phase II, 29 March 2018

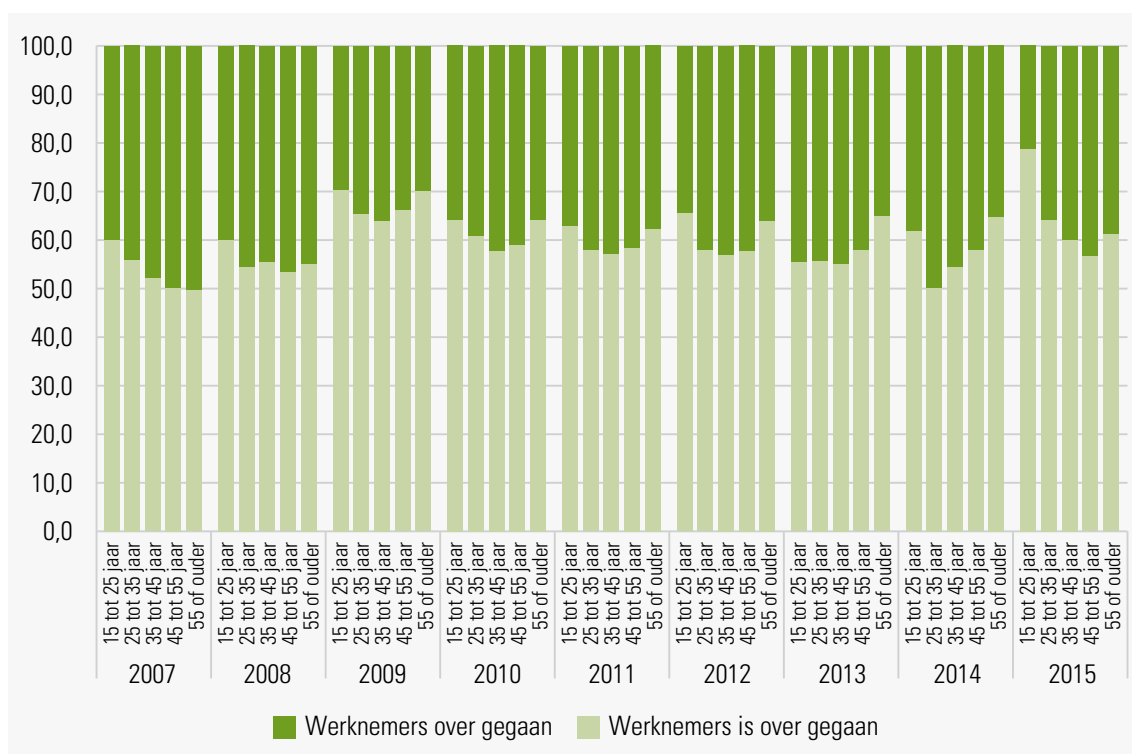
Fig. 26: Number of Bankrupt Companies, Broken down by Restart and Employees Included after Restart (source: Restart after bankruptcy, CBS)

JAAR	FAILLISSEMENTEN		BANEN		
	Totaal		Bij faillissementen	Bij doorstarters	
		w.o. doorgestart			w.o. meegenomen banen
2007	4 405	500	16 200	9 800	4 500
2008	4 555	700	24 600	14 500	6 500
2009	7 830	2 400	59 800	43 700	14 800
2010	7 020	2 200	36 700	22 300	8 800
2011	6 800	2 200	39 900	25 800	10 500
2012	8 285	2 900	46 300	29 200	11 700
2013	9 345	3 300	60 300	41 500	17 600
2014	7 545	2 600	48 700	35 400	15 400
2015	5 965	2 100	47 600	36 200	12 700
2016	4 980	400	42 300	30 600	16 300
totaal	66 735	19 300	422 200	289 000	119 100

Age

The group least likely to go to the company that has been started up is young people: 34% of 15 to 25 year olds decline this. Elderly people aged 55 or older are slightly more likely to go along with 36%. 35 to 45-year-olds are the most likely to go along with 42%.

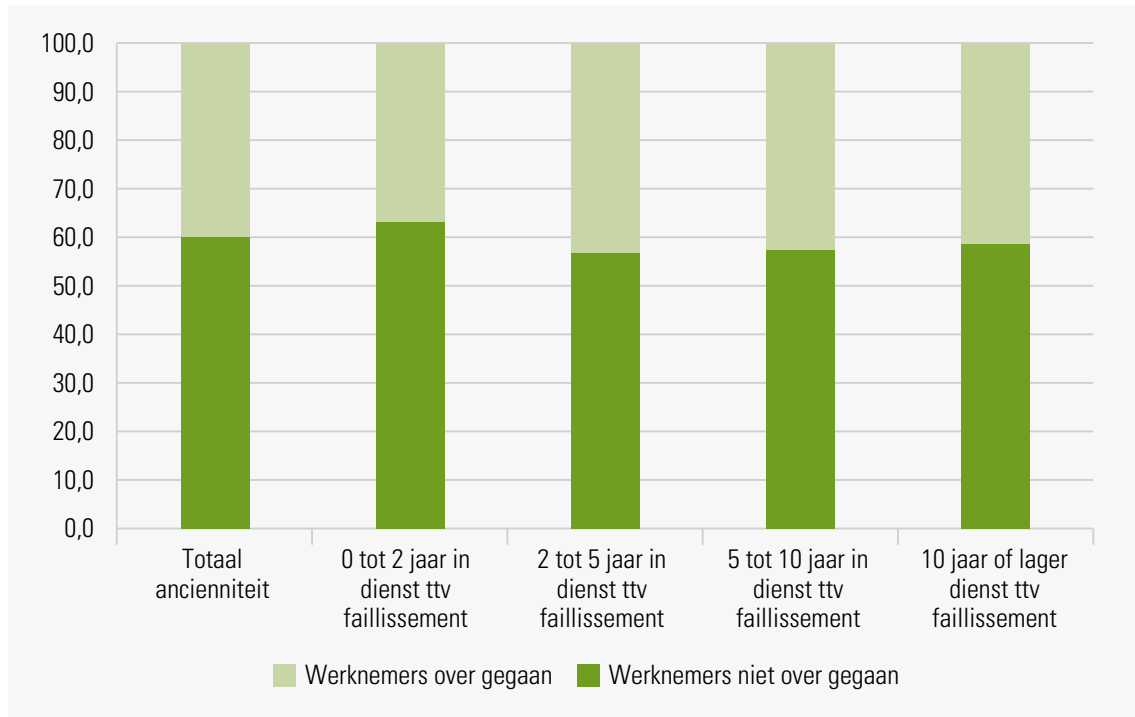
Fig. 27: Percentage of Personnel Taken over and not Taken over among Business Start-Ups, by Age Group (source: Restart after bankruptcy, CBS)



Seniority and Form of Contract

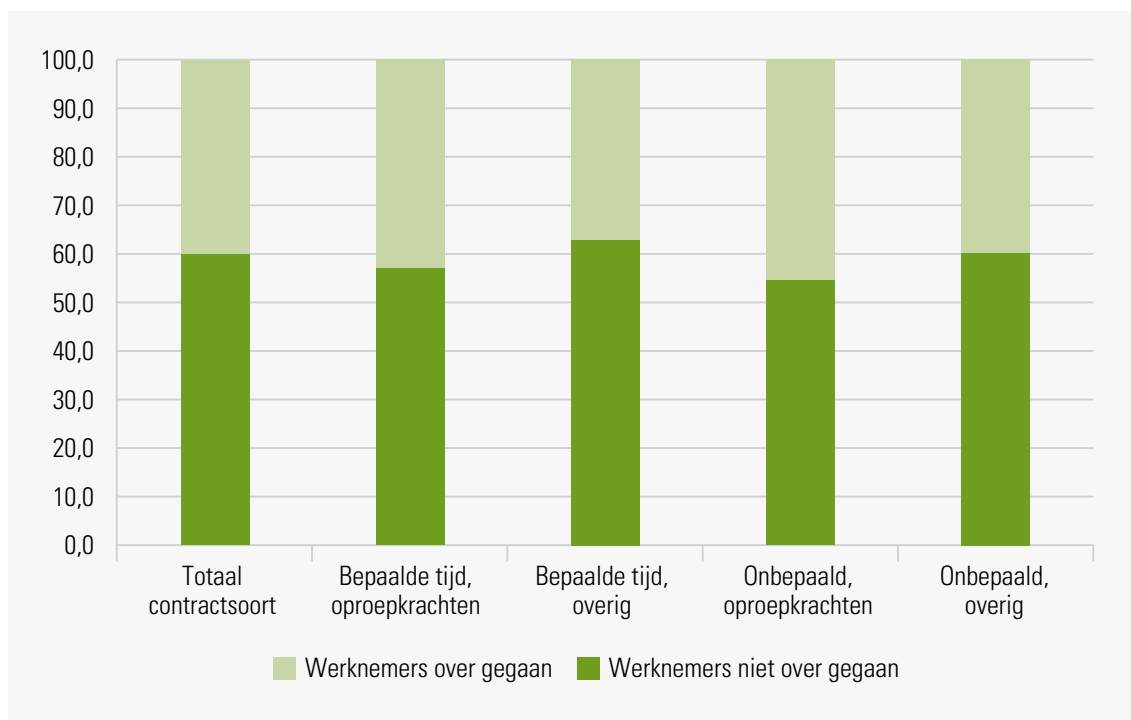
The group of employees who were employed for the shortest period of time is the least likely to go to the company that has been restarted. 36% of workers made redundant who had been in service for less than 2 years last, compared to 41% of workers who had been in service for more than 10 years. Employees who have been in service for between two and ten years are slightly more likely to go to the company that has been started up (about 42%).

Fig. 28: Percentage of Staff Taken Over and Not Taken Over Among Business Start-Ups, by Length of Service (source: Restart after bankruptcy, CBS)



Employees with an open-ended contract are slightly more likely to go to the transferred company than employees with a fixed-term contract. The percentage of call workers who go to the restarted company is slightly higher than that of other employees.

Fig. 29: Percentage of Personnel Taken Over and Not Taken Over among Business Start-Ups, by Type of Contract (Source: Restart After Bankruptcy, CBS)



Pregnant, Sick and Low-Skilled Workers

Only a very small proportion of the female workers who lost their jobs because of bankruptcy dismissal were pregnant at the time of dismissal. Pregnant workers are transferred to the business started up slightly less often than workers who are not pregnant, but because of the small numbers, few conclusions can be drawn.

Unfortunately, there are no data available for sick employees. Low-skilled workers are slightly less likely to be included in a go-around than middle and high-skilled workers; the difference is marginal.

2. INTRODUCTION

When companies are insolvent ('are in a situation of having ceased to pay', art. 1 of the Insolvency Act), the Dutch Bankruptcy Act offers two possibilities:

- > the **'suspension of payments'** procedure, in particular for insolvency due to liquidity problems. This procedure provides a financial breathing space to consider restructuring.
- > the **bankruptcy procedure**, in particular for solvency problems. The entire company will then be liquidated for the benefit of all creditors.

The Bankruptcy Act (Fw) dates from 1893. Creditors are central to this law: it is about their interests. Moreover, employees are also creditors in the bankruptcy of their company, but the procedure does not focus on maintaining employment; the law does not provide for reorganisation measures.

Although there have been several important changes over time, the basis of the law has remained the same. Bankruptcy law has been in a state of flux since the beginning of this century. A major change took place in 2005 to increase the effectiveness of the procedures. Since 2012, amendments to the law on 3 pillars have been under review: fraud, reorganisation and modernisation. The fraud pillar has now entered into force and the 'Modernisation

of the Bankruptcy Procedure' Act was adopted by the Senate on 26 June 2018; the expected entry into force is 1 January 2019. The reorganisation pillar is particularly important for this report and will be explained in more detail at the end of this country report.

In addition to the Fw, Dutch law contains more rules relating to insolvency: joint and several liability for directors and supervisory directors for a shortage of assets (Section 2:138, Book 2 of the Dutch Civil Code, if any) and articles in criminal law relating to offences in the context of prejudice to creditors' means of redress.

3. BANKRUPTCY OF AN ENTERPRISE

A bankruptcy procedure starts with the filing for bankruptcy by the company (the debtor) itself, or one or more creditors, or by the Public Prosecution Service (OM) at the court. The request must be submitted by a lawyer (art. 5 Fw). When the Public Prosecution Service files for bankruptcy, there must be reasons of public interest, such as the misappropriation of assets and liabilities. The debtor may be a natural person who conducts a business in the form of a sole proprietorship, general partnership or partnership. In the case of a legal entity such as a BV, NV or foundation, the legal entity will be declared bankrupt and not the owner/director.

Requirements and Judgement

The court pronounces the declaration of bankruptcy as '**summary**' (art. 6 paragraph 3 of the Insolvency Act) of the existence of facts or circumstances showing that the '**debtor is in the condition that he has ceased to pay**' and, if a creditor makes the request, of their right of claim. Summary' means that the civil law of evidence does not apply and that a short, simple investigation is sufficient. The company must leave several creditors unpaid (plurality of creditors) and at least one claim must be payable, otherwise there is no question of 'being in the situation'. During the investigation the court may, at the request of the applicant, have the estate sealed by a notary to prevent embezzlement.

In the judgment, the court appoints a **liquidator and a supervisory judge** and the judgment is entered in the Central Insolvency Register⁵⁹ and published in the Government Gazette (Section 14 of the Insolvency Act). The liquidator acts in place of the company declared bankrupt, manages the liquidation of the bankrupt estate and looks after the interests of the creditors. Usually the receiver is a lawyer but the law does not prescribe this. In the event of major bankruptcies, several receivers may be appointed. The supervisory judge is always a member of the court. The company has the right to appeal for 8 days (art. 8 Fw). If the company has not appeared in the proceedings, it can lodge an objection within 14 days.

Size and Impact

The bankruptcy comprises **the entire assets** of the company at the time of the declaration of bankruptcy, including what is acquired during the bankruptcy (Section 20 of the FW). This concerns assets such as goods and receivables, but also permits, trademarks, trade names and goodwill. Goods of third parties, such as goods delivered under retention of title, are not subject to bankruptcy.

As a result of the bankruptcy, the debtor immediately loses control and management of the assets (Section 23 of the Insolvency Act). Agreements concluded by the debtor on the day of the bankruptcy or thereafter do not bind the estate. The liquidator is therefore not obliged to comply with such agreements, even if the agreements were concluded with bona fide third parties. The liquidator may, on the basis of the bankruptcy petition (Section 42 of the **Insolvency Act**), annul legal acts of the company prior to the date of bankruptcy if the company knew or could have known that creditors would be prejudiced as a result.

Pledges and mortgagees do not have to take any notice of the bankruptcy; they are so-called separatists (Section

59 <https://insolventies.rechtspraak.nl/#!/search/index>

57 of the Insolvency Act) and can settle their claims outside the trustee. The legal starting point is ready execution by public sale (Article 3:251 of the Dutch Civil Code) but private sale is possible so that a higher sales revenue is realized. If the enforcement proceeds are insufficient, the remaining amount may be submitted to the liquidator as an unsecured claim.

Previous precautionary or enforceable attachments lapse (Article 33 of the Insolvency Act).

Role of the Curator

The liquidator starts taking stock immediately after the judgement is given. They obviously need time to form an opinion about the estate and to describe the benefits (art. 94 Fw). For this purpose, a **cooling off period** (art. 63a of the Insolvency Act) can be announced by the supervisory judge for a maximum of 4 months. During this period, third parties may not exercise their rights, unless they have an authorisation from the supervisory judge. The Tax and Customs Administration may, however, levy a so-called **soil seizure** on assets in the estate, but these cannot be recovered during the cooling off period (Section 63c of the Insolvency Act).

The description of the estate, which shows the assets of the estate, is the preparation of the **statement of income and debts** to be drawn up (art. 96 Fw). With regards to debts, the supervisory judge determines the date on which the claims must be submitted to the liquidator at the latest and the date on which the creditors' meeting (creditors' meeting, see also 3.5) will be held (section 108 of the Insolvency Act). The trustee writes to all known creditors (Section 109 of the Insolvency Act) with a request to report their claims to the trustee. The liquidator tests the claims in advance and lists the claims they approve on a **list of provisionally admitted claims**; unapproved claims are placed on a separate list of contested claims (Section 112 of the Insolvency Act). The creditors' rights are definitively established at the **creditors' meeting of creditors**: only creditors who have been verified and recognised are entitled to share in the benefits of the estate.

The order of final division of the estate is as follows:

1. Estate debts (including salary of the receiver, rent and employee salaries after the bankruptcy date)
2. Preferential claims (including state taxes, social security contributions and pre-bankruptcy employee salaries)
3. Competitive creditors
4. Subordinated creditors
5. Shareholder(s) if it concerns an NV or a BV or the bankrupt himself

Simplified Settlement

If, after taking stock, the trustee is of the opinion that the available benefits are insufficient to pay the unsecured claims, the supervisory judge may decide that **no creditors' meeting** will be held (137a Fw). This is followed by the so-called simplified settlement of the bankruptcy: the estate is tallied, the receiver draws up a distribution list that the supervisory judge must approve and proceeds to make the established distributions to the creditors. If there are insufficient benefits to be able to pay out an amount to others than the estate creditors, the bankruptcy will be **terminated for lack of benefits**. If (part of) the preferential creditors can also be paid, the bankruptcy ends with the establishment of the final distribution list.

Creditors' Committee and Creditors' Meeting

In order to promote the interests of all creditors, a creditors' committee (art. 74 et seq. of the Insolvency Act) can be set up: in this way the creditors can exert influence in the course of the bankruptcy. This happens in bankruptcies where the receiver has established that there are sufficient available benefits. Although **employees** can sit on this committee, this rarely happens in practice. The committee can advise the trustee and has information rights; the trustee is obliged to provide the requested information. The trustee may convene meetings with the committee as often as they deem necessary. The appointment of a definitive committee takes place at the verification meeting.

Creditors' meetings (including the creditors' meeting) are chaired by the supervisory judge and the liquidator is always present (art. 80 et seq. of the Insolvency Act). Decisions at these meetings are taken by an absolute majority of votes, which means that more than half of the votes cast must have been in favour.

The Bankrupt Company

In addition to terminating the rental agreements of buildings, the receiver will also terminate the **employment agreements** with the employees employed by the bankrupt company, subject to a notice period of up to 6 weeks (Section 40 of the FW). The transition fee is not due (Art. 7:673c paragraph 1 BW).

Overdue wages prior to the declaration of bankruptcy are privileged (Section 3:288 of the Dutch Civil Code) and after the declaration of bankruptcy of the estate debt. Employees can apply to the UWV on the basis of the **wage guarantee scheme** in the Unemployment Act (art. 61, possibly WW). The UWV takes over the employer's obligation to pay wages, subrogates in employee rights and thus becomes a privileged creditor. This means that the employee is in fact no longer a party to the bankruptcy, although the UWV **does not** take over **indefinitely**: only a maximum of 13 weeks, calculated from the date of termination and a maximum of 6 weeks during the notice period. Moreover, this is one and a half times the maximum daily wage⁶⁰, which means that employees in the higher salary categories do not receive their full monthly salary. The UWV also pays the unpaid holiday allowance and pension over a maximum of 1 year. Any remaining amount will therefore be retained by the employee himself as a preferential claim.

The trustee is authorised to continue the **company**. They will do this in particular when the relaunch of (part of) the company seems realistic. It is very important for the selling price that the company then remains active. If there is no creditors' committee, they need an authorisation from the supervisory judge (art. 98 Fw). Continuation must be in the interests of the estate. The continuation costs, including the salaries of employees, are the estate' debt.

Reporting and Supervisory Judge

Every 3 months the liquidator publishes a report on the state of the estate (art. 73a of the Insolvency Act). The role of the supervisory judge is to supervise the process of managing and liquidating the bankrupt estate and the actions of the liquidator (art. 64 et seq. of the Insolvency Act). The examining magistrate may also summon and hear witnesses.

The Homologation Agreement

In any bankruptcy, creditors may be offered an arrangement by the bankrupt company (138 ev Fw). In practice, this only happens when the estate has sufficient benefits. The agreement usually consists of an offer of partial payment against final discharge. The trustee and the creditors' committee (if any) will give a written advice on the offered agreement. A simple majority of the total number of creditors with admitted claims present at the meeting is required to adopt the agreement. Subsequently, the agreement must be homologated (established) by the court (art. 150 of the FW). The court may refuse to grant approval if it considers it appropriate. The law gives some examples, such as insufficient guarantees that the agreement will be honoured or if the benefits exceed the total amount of the agreement (art. 153 Fw). Once the homologation has become final (i.e. once the appeal period has expired), the bankruptcy ends. The trustee announces this in the Government Gazette (art. 161 Fw).

No Agreement

If no agreement is offered or reached, the estate will be **'in a state of insolvency'** (art. 173 of the **Insolvency Act**) as of the verification meeting. The liquidator or a creditor can also propose that the business be continued; continuation often brings more benefits to the estate than a direct realisation of all assets. The creditors take the final decision (art. 173a of the Insolvency Act). If continuation is rejected, the liquidator proceeds to liquidate the estate (art. 175 Fw). Whenever there is sufficient money, the liquidator draws up a distribution list, which the supervisory judge must approve and after which distribution to the creditors takes place (art. 179 et seq. of the Insolvency Act). The general

⁶⁰ Maximum daily wage as of 1 July 2018 fixed at € 211.42 or € 4,598.28 per month; art. 17 Social Insurance Funding Act

costs of bankruptcy (the debts of the estate) are apportioned in proportion to the proceeds of each part of the estate, so that the extent of a creditor's claim is irrelevant (Section 182 of the Insolvency Act). If the income is insufficient to pay all estate debts, the execution and liquidation costs are first paid, including the receiver's salary. After the **final distribution list**, the bankruptcy is dissolved and the creditors regain their rights to their claims insofar as these have remained unsatisfied (Section 195 of the Insolvency Act).

Duration and lifting / ending

The duration of a bankruptcy varies depending on the complexity from several months to several years. As indicated above, bankruptcy can end in the following ways:

- removal due to lack of benefits
- termination due to homologation of the offered agreement
- abolition due to the binding nature of the final distribution list

4. SURSEANCE (SUSPENSION) OF PAYMENT OF AN ENTERPRISE

If a company is unable to meet its obligations in the short term because of a lack of liquid assets, then use of the 'suspension of payments' procedure can be made, i.e. the court grants the company debtor a moratorium. This is in fact a restructuring procedure where a debtor is given a **breathing space** to restructure their debts and income. For example, the company may still be solvent and its liquidity may improve, for example by selling business units and preventing bankruptcy. By offering an agreement to creditors and approving it, the business-debtor can emerge from the financial valley.

Requirements and Delivery

Surseance can only be applied for by the company itself (art. 214 Fw) and not by creditors as is the case in bankruptcy. This is possible if the debtor **'anticipates that he will not be able to continue paying his due debts'**. An attorney at law must submit the petition, accompanied by a statement of income and debts as referred to in Section 96 of the Insolvency Act – this in contrast to a petition for bankruptcy, where the receiver draws it up at a later stage. The company can also already attach a draft agreement to the application; something that also differs from the bankruptcy procedure. The judge grants **a provisional suspension of payments** immediately, with the appointment of an **administrator** (a supervisory judge is not necessary) and determines a date of the hearing on which the debtor, administrator and creditors will be heard in order to pronounce a definitive suspension of payments (art. 215 of the Insolvency Act). This happens, unless (in short) creditors are against final granting (art. 218 Fw).

The final decision provides that creditors do not have to be paid for a certain period of time, **not exceeding one and a half years** (Article 223 of the Insolvency Act); this period may be extended several times. During this period, the company can put its house in order and negotiate a payment arrangement or an agreement with its creditors.

In practice, there is hardly any difference between the criteria set for bankruptcy and a suspension of payments. The court does not assess the content of the situation, so that a company can apply for both, regardless of the exact situation. If the final suspension of payments is rejected, the court can declare the company bankrupt in the same decision ex officio, i.e. without a request to that effect having been submitted (Article 218 paragraph 5 of the Insolvency Act).

The Sequel

The company continues to manage and dispose of the estate, albeit the cooperation, authorisation or assistance of the administrator is always required (Section 228 of the FW). The administrator does not replace the company debtor, which is the case with the receiver in bankruptcy. If necessary, as in the case of bankruptcy, a cooling off period can be requested for a maximum of 4 months (art. 241a of the Insolvency Act).

The court can already appoint an expert at the provisional granting of the suspension of payments, who will start an investigation into the state of the estate and issue a report thereon (art. 226 of the Fw). The administrator reports every 3 months in any case (art. 227 Fw).

Creditors cannot claim payment during the suspension of payments; attachments lapse unless it concerns priority claims (art. 230 Fw); this concerns, for example, goods with retention of title. The cooperation of the administrator is required for the continuation of pending legal proceedings (Section 231 of the FW). Payment of claims can only be made to all creditors jointly, in proportion to their claims (Section 233 of the Insolvency Act).

Employees can also invoke the UWV **wage guarantee scheme in the event** of suspension of payments (see above, 3.6). Employment contracts can be terminated with the applicable notice period; the notice prohibitions must also be observed (art. 239 Fw). To that extent, the dismissal legislation remains applicable. The transition fee is not due (Section 7:673c, subsection 1, of the Dutch Civil Code). Salaries and premiums are from the date of suspension of estate debt.

The Suspension of Payments Agreement

The nature of the arrangement (Section 252 of the Insolvency Act) differs from the arrangement in bankruptcy: bankruptcy is about the prevention of liquidation, suspension of payments is about the reorganisation of the financial position. Formal verification of claims is not necessary in the event of suspension of payments.

The **administrator** collects all claims (art. 257 et seq. of the Insolvency Act), tests them and lists them on the **provisional list**. A meeting follows on the agreement (section 265 of the FW) with the administrator, debtor and creditors at the court, after which the agreement is confirmed by a simple majority of the published creditors, representing at least 50% of the claims (section 268 of the FW). Subsequently, **homologation must take** place by the court (269b ev Fw). The moratorium then comes to an end.

No Agreement and Termination of Suspension of Payments

If no agreement is reached, the court can declare the debtor bankrupt by judgment (art. 277 Fw). If no bankruptcy is declared, the suspension of payments procedure ends.

The moratorium can also be revoked at the request of the administrator or creditor(s) and the declaration of bankruptcy can be pronounced by the same decision (art. 242 Fw). The company itself can also request withdrawal, namely when it is again able to resume its payments (Section 247 of the Insolvency Act).

Almost all suspensions of payment end up in bankruptcy; the suspension of payments procedure is not very popular because most companies refuse to do business with a company in suspension of payments. Banks have often stipulated in loan contracts that loans become payable on demand. Separatists, such as the pledgee and mortgagee, do not have to worry about a moratorium. In suspension of payments the restrictions on dismissal under labour law do not apply, in the event of bankruptcy. For a **restart** it is therefore often necessary to go bankrupt first, so that the number of employees can be reduced. This often results in companies only applying for a suspension of payments when the situation is very serious and the bankruptcy is already unavoidable. As a result, the company will usually still be declared bankrupt. In practice, therefore, a suspension of payments is the gateway to bankruptcy.

5. SURSEANCE AND BANKRUPTCY: ROLE OF TRADE UNIONS AND EMPLOYEE PARTICIPATION

Employee representatives (trade unions, works councils) play almost no role in companies in cases of financial difficulties⁶¹. There are virtually no statutory provisions that trade unions and Works Councils can invoke.

61 Mrs I. Zaal, 19-07-2013, Lecture on the occasion of the fourteenth National Labour Right Dinner.

The Role of the Trade Unions

The period prior to a moratorium or bankruptcy, trade unions have no formal legal position. Of course, they are often aware of the poor financial situation of a company, because in previous years there have been reorganisations in which a social plan between the company and the trade unions has been concluded. They may have been informed informally by the Works Council and/or trade union members.

During Bankruptcy and Suspension of Payments

Pursuant to Section 3 of the **Collective Redundancy (Notification of Collective Redundancies) Act** (WVCO), an employer must notify trade unions and the Employee Insurance Administration Institute (UWV) if they wish to terminate employment contracts for 20 or more employees within a period of 3 months. They must also consult the trade unions on collective redundancies. The WVCO also applies if the collective redundancies are the result of a moratorium or bankruptcy. It follows from the *Landsbanki* judgment⁶² of 3 March 2011 of the European Court of Justice that in the event of bankruptcy, the obligations under the WVCO rest with the trustee. In practice, the trustees do not or hardly comply with these obligations because it is not in the interests of the creditors. The trade unions also seem to have little need for this because preventing or reducing redundancies, which they strive for under the WVCO, is not actually an issue in bankruptcy⁶³. In fact, trade unions are not involved in bankruptcy. During the suspension of payments procedure, all dismissal provisions remain in force and trade unions could play their part, but reorganisation, collective dismissals, relaunch, etc. do not actually occur during the suspension of payments procedure.

In the Event of a Relaunch in Bankruptcy

Trade unions are also excluded. There is no legal basis for trade unions to be involved by the trustee.

A relaunch, also known as 'prepack' or 'flash failure', has become popular in a number of courts in recent years. It is a cheap alternative to a reorganisation or takeover because the right of dismissal does not apply and the transferee has no obligation to take over personnel; the **'transfer of undertaking'** legislation (Article 7:662e of the Civil Code and Directive 2001/23⁶⁴). At the request of the company, the court appoints a "prospective receiver" who, with the approval of a **"prospective bankruptcy judge"**, prior to the bankruptcy participates in the preparation of a relaunch, with fewer employees. This restart takes place immediately after the declaration of bankruptcy. The workers are dismissed by the liquidator and the workers selected by the restart receive an offer to join the restart.

One of the first companies that went bankrupt artificially in this way was the shrimp company **Heiploeg** (2014). The company made an immediate restart, in which the receiver had been involved behind the scenes long before the bankruptcy. Trade unions FNV and CNV brought this before the courts, claiming that there was in fact a transfer of undertaking and associated regulations, which could have prevented 90 redundancies. On 17 July 2018, the Arnhem-Leeuwarden Court of Appeal dismissed⁶⁵ the trade unions' claim on appeal on the grounds that the trade unions had failed to meet their obligations:

The bankruptcy proceedings were indeed initiated with a view to the liquidation of the assets of Heiploeg-old. The fact that contacts had already been made with interested parties prior to the bankruptcy about a sale as a going concern and that negotiations were subsequently conducted with one party does not alter this. ...

... the intended liquidators (and also the intended supervisory judge) did not formally have any powers in the period before the bankruptcy was declared. This changed on 28 January 2014, when the bankruptcy was

62 <https://eur-lex.europa.eu/legal-content/NL/ALL/?uri=CELEX%3A62010CJ0235>

63 The Act on the notification of collective redundancies in the event of bankruptcy: its objective has been missed? <http://arno.uvt.nl/show.cgi?fid=144453>

64 Directive 2001/23 codifies Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, as amended by Council Directive 98/50/EC of 29 June 1998.

65 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARL:2018:6539>

declared. At that time, as evidenced by the above-mentioned statement of receivers and bankruptcy reports, there was as yet no agreement on the sale of the assets. Negotiations continued and it was not until the night of 28 to 29 January 2014 that agreement was finally reached. At that time, the trustees were the only persons authorised to act on behalf of Heiploeg-old. Moreover, in order to conclude the agreement with Parlevliet en Van der Plas B.V., they needed the permission of the now also appointed supervisory judge. The latter has also granted this permission.'

The ruling on appeal in the Heiploeg case took place after the ruling of the European Court of Justice on 22 June 2017 in the flash failure of the childcare organisation **Estro-Smallsteps**⁶⁶. The Estro Group, at the time the largest childcare organisation in the Netherlands with 380 branches and 3,600 employees, had drawn up a plan to start a new company (Smallsteps) immediately after the bankruptcy by starting with fewer locations and fewer employees. At Estro's request, the court appointed a proposed liquidator. On 4 July 2014, the company filed for suspension of payments, on 5 July 2014, this petition was converted into a bankruptcy petition, Estro was declared bankrupt and on the same day, the receiver and Smallsteps signed the pre-pack, which included the takeover of some 250 branches and the offer of an employment contract with Smallsteps to 2,600 employees. The other workers were dismissed by the liquidator.

The FNV trade union then initiated proceedings, stating that Article 5(1) of Directive 2001/23 does not apply, that there is in fact a transfer of undertaking and that, on the basis of the relevant regulations, all employees have automatically transferred to Smallsteps. The court decides to refer the case to the European Court of Justice, which will adopt and determine the case:

.... a pre-pack such as that at issue in the main proceedings is intended to prepare, in the smallest detail, for the transfer of the undertaking in order to enable a rapid relaunch of the viable parts of the undertaking following its declaration of bankruptcy ...

.... such a transaction does not ultimately aim at the liquidation of the undertaking, so that its economic and social purpose cannot explain or justify depriving its employees of the rights conferred on them by Directive 2001/23 in the event of a total or partial transfer of the undertaking concerned...

To that extent, that transaction is not carried out under the supervision of the court, but, ... by the management of the company, which negotiates and takes the decisions preparing the sale of the bankrupt company.

It follows from the foregoing that a pre-pack such as that at issue in the main proceedings does not satisfy all the conditions laid down in Article 5(1) of Directive 2001/23.

Important elements of this judgment, which can be seen in the Heiploeg case, are:

1. that such a **transfer of undertaking is not aimed at the liquidation of the undertaking** with the aim of maximising the payment to all creditors, and
2. that the intended trustee and the intended supervisory judge, although appointed by the court, do not formally have any authority and therefore **there is no question of government supervision**.

In the Smallsteps case, the trade union thus comes to the longest end and finally reaches a settlement with Smallsteps, which includes a social plan⁶⁷ for the dismissed workers: they will receive severance pay calculated in accordance with the cantonal court formula (factor 1)⁶⁸ as of 1 July 2014 and employees who were FNV members on 1-10-2017 will also receive €500 net (€1049 gross) as compensation for 3 years membership fees.

66 <https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=ecli:ECLI:EU:C:2017:489>

67 <https://www.regelingfnvsmallsteps.nl/>

68 Termination payment = AxBxC, where A stands for number of weighted years of service, B for gross monthly remuneration and C for a factor to be determined.

Whether there was a pre-pack construction was also assessed by coffin maker **Bogra**. On 10 July 2018, the Amsterdam Court of Appeal ruled⁶⁹ in this flash bankruptcy that, in view of the Smallsteps criteria, this was not the case.

This recent case law is of great importance for the progress of legislative proposals that are before the reorganisation pillar, more about this below.

Role of the Works Council

A proposed decision by a company (the debtor) to apply for a suspension of payments or bankruptcy is **not subject to the obligation to give an opinion** in accordance with article 25 paragraph 1 of the Works Councils Act (WOR).

In its judgment⁷⁰ of 6 June 2001 (YVC IJsselwerf BV), the Supreme Court stated that a decision to apply for a **moratorium** is not subject to the obligation to give an opinion because it does not aim to make a significant change in the organisation of the company or in the distribution of powers within the company (Section 25(1)(e) of the WOR) and the moratorium, if granted, does not affect the organisation of the company. The appointment of an administrator does not alter the internal distribution of powers, but limits the powers of those who may carry out acts of management and disposal. This line drawn by the Supreme Court will be extended to a decision to file for bankruptcy, which is therefore also not subject to an advisory duty.

A bankruptcy is also not regarded as a decision to terminate the company's activities (Section 25(1)(c) of the WOR) and is therefore not subject to an advisory duty on that ground either, because it does not necessarily have to lead to the company's closure. However, the Works Council or trade unions may lodge an objection to the declaration of bankruptcy on the grounds of Section 10, subsection 1 of the Insolvency Act. In practice, this rarely or never happens.

During bankruptcy, the WOR and therefore the Works Council's right to advice will continue to apply. In the **DA case**⁷¹, the Supreme Court ruled on 2 June 2017 that during the bankruptcy the receiver is the **entrepreneur and director within the** meaning of the WOR and must therefore ensure that the WOR is complied with. This also applies to the right to advice, which is at issue in the DA case because of a **decision by the receiver to restart the** company. However, according to the Supreme Court, if the actions of the liquidator are aimed at liquidating the assets, the interests of employees must give way to those of the creditors and the right to advice does not apply. It may also be that the procedural provisions of the WOR are not always compatible with bankruptcy law; the receiver and the Works Council will then have to behave reasonably and fairly towards each other.

As mentioned earlier, employees (and therefore Works Council members) can participate in the creditors' committee, but in practice this does not happen. The SER has published a detailed flow chart⁷² on the rights of the BR before, during and after insolvency.

6. LEGISLATIVE PROPOSALS ON CONTINUITY OF ENTERPRISES I, II AND III; THE REORGANISATION PILLAR

Changes to the FW are in the pipeline from the so-called 2012 reorganisation pillar. This pillar has been implemented in the draft laws 'Continuity of Enterprises I, II and III' (WCO I, II, III for short) and is the result of new reorganisation methods: the pre-pack (draft I) and the private coercive agreement (draft II). The legislative proposals date back to 2013 but are still partly under discussion, among other things because of the previously discussed ruling on FNV/Smallsteps. The draft III should include the participation of employees in bankruptcy.

69 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2018:2339>

70 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2001:AB2177>

71 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2017:982>

72 https://www.ser.nl/nl/~/-/media/files/internet/theme/or/insolvency_procedures.ashx

Design I: Pre-Pack

This amendment has since been adopted and published in the Dutch Bulletin of Acts and Decrees on 7 September 2018.⁷³ It is expected to enter into force on 1 January 2019. The procedure for a pre-pack/flash-failure that is already used in some Dutch courts is thus laid down in the Fw. A possible future bankruptcy of a company can thus be prepared in a silent phase in order to minimise the damage suffered by creditors and employees and to increase the chances of a restart or sale of profitable parts of the company at the highest possible price. Unfortunately, the amendment of the law does not contain any provisions that strengthen the position of trade unions, employee participation bodies and/or employees.

Draft II: Private Coercive Agreement

This amendment is still in the preparatory phase and has therefore not yet passed the Lower and Upper Houses. The proposal allows for the restructuring of problematic debts prior to possible bankruptcy on the basis of an agreement between the company and its creditors and shareholders. If the agreement is supported by the majority of creditors and shareholders, creditors and shareholders who oppose it on unreasonable grounds may be forced to cooperate by a generally binding declaration of the agreement by the court.

At present, a company has two options for restructuring its debts: the **extrajudicial agreement** or the approval agreement in a bankruptcy situation. For an out-of-court agreement there are no legal rules other than the rules of contract law⁷⁴, which makes it in practice little or no interesting instrument. Due to a legal framework, which governs this amendment proposal, a private agreement will become more fashionable.

Draft III: Co-Determination

The third amendment should include measures to improve the ability of the liquidator to deal effectively with the bankruptcy in order to minimise the damage caused to all parties involved in the bankruptcy. This bill is still in preparation. In the eighth progress letter⁷⁵ from the Minister of Security and Justice to the Lower House of Parliament dated 23 February 2017 concerning the Fw review programme, the **position of employees in bankruptcy and suspension of payments** is discussed in detail and it is stated that this theme will be included in the further preparation process.

The ninth progress letter⁷⁶ (28 September 2017) is a further indication:

To involve the position of the employee, and in particular the subject of employee participation, in the bankruptcy law review programme. In June 2017, consultations were held with stakeholders on the interpretation of the bill; representatives of employers and employees, among others, were invited to this meeting. The results of these consultations will be taken into account in the preparatory process for the bill.

The last (tenth) progress letter⁷⁷ dates from 11 September 2018; this is the first time that the proposal for a directive of this project⁷⁸ is mentioned, with the remark that the position of employees could be taken into account in the **implementation of the directive**, if it is adopted by the European Parliament in early 2019. It therefore appears that draft III is awaiting the introduction of the Directive.

73 <https://zoek.officielebekendmakingen.nl/behandeldossier/34218/stb-2018-299?resultIndex=0&sorttype=1&sortorder=4>

74 Payroll judgment, Supreme Court 12 August 2005 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2005:AT7799>

75 <https://zoek.officielebekendmakingen.nl/kst-33695-14.html>

76 <https://zoek.officielebekendmakingen.nl/dossier/33695/kst-33695-15?resultIndex=3&sorttype=1&sortorder=4>

77 <https://zoek.officielebekendmakingen.nl/dossier/33695/kst-33695-17?resultIndex=0&sorttype=1&sortorder=4>

78 Directive on preventive restructuring schemes, a second chance and measures to improve the efficiency of restructuring, insolvency and discharge procedures, and amending Directive 2012/30/EU (COM (2016) 723)

COUNTRY REPORT #5:

PORTUGAL

By

**RAQUEL REGO, RESEARCH FELLOW, INSTITUTO DE CIÊNCIAS SOCIAIS
DA UNIVERSIDADE DE LISBOA**



1. STATISTICAL OVERVIEW

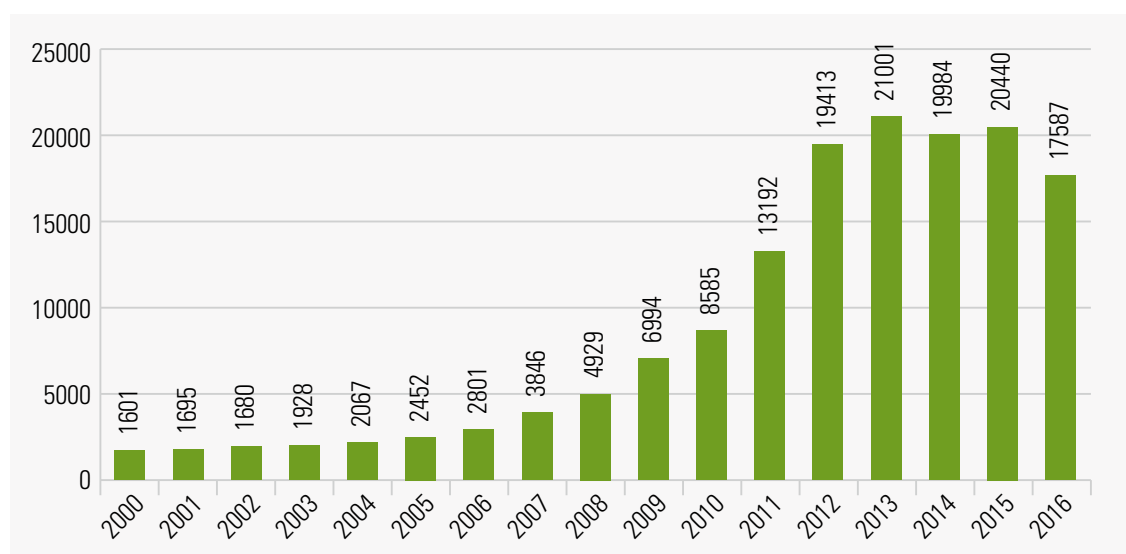
Statistical data available in Portugal on a company or entrepreneur who gets into financial difficulties or is unable to pay its debts is organised by the department of justice policy, this is the Direção-Geral da Política de Justiça (<http://www.dgpj.mj.pt/sections/estatisticas-da-justica>) belonging to the Ministry of Justice. Note that insolvency and bankruptcy have distinct meanings, in that insolvency cases may still be recovered, whilst bankruptcy cases are terminated.

Figure 30 presents aggregated data of annual finished cases, not allowing the distinction between bankruptcies and recovering cases. In any case, it allows to clearly see that the number of cases started to increase significantly in 2011. In 2016, bankruptcy cases had not yet fallen to 2011 levels.

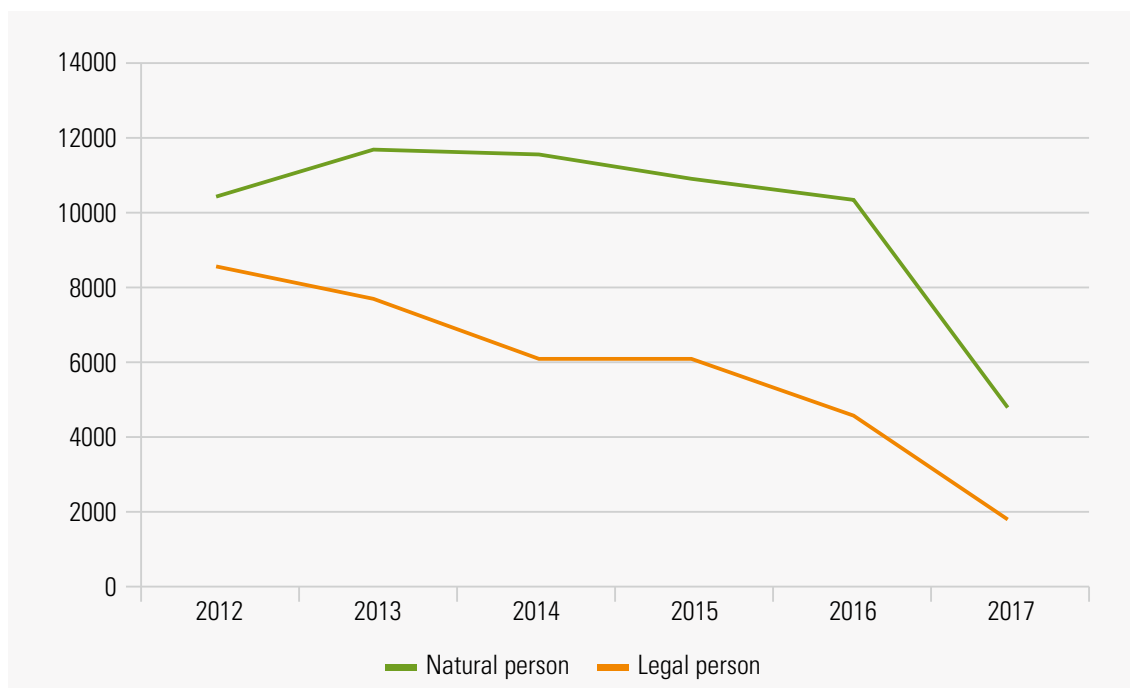
Figure 31 contains data expressly requested for this report to the department of justice policy. It gives us the distribution of insolvencies and bankruptcy cases per type of person (natural or legal) from 2012 to 2017 (October 2017). The Figures show how 'natural persons' are more affected by bankruptcy throughout the 2012-17 period and that 'legal persons' were ostensibly less affected by the crisis and that both groups start to come closer only by 2017. In fact, during 2011 and 2014, a Memorandum of Understanding (MoU) signed between the Portuguese government and a troika composed by the IMF, the ECB and the EC was implemented in this Southern European country. The MoU implemented several austerity measures as a trade-off for the bailout.

Likewise, Figure 32 contains data expressly requested for this report to the department of justice policy. It shows the legal person cases distributed per economic sector for the same period (2012-2017). Through this data we can conclude that the top three sectors most affected by bankruptcy are: (1) retail trade; (2) construction and; (3) manufacturing. Cases have reduced significantly in 2017, but one must have in mind that the available date spans only to October 2017. More recent public statistics are available, but the data is provided by trimester and from 2007 up to the first trimester of 2018. In fact, the department of justice policy publishes data providing different documents and distinguishing between the entry, terminated and pending cases.⁷⁹ Figure 33 presents data published by the European Restructuring Monitor (ERM) from Eurofound (2007-2017) on the number of jobs in risk due to bankruptcy and closure. The data is known for having two important limitations: on the one hand, it is based on an announcement and not on effective cases; on the other hand, it is collected in newspapers, thus not being exhaustive; furthermore, it only considers cases involving at least 100 jobs. Still, it allows us to see that there was an increase of bankruptcy threats in Portugal since the beginning of the crisis in 2007 up to the moment of the bailout in 2011.

Fig. 30: Insolvency, Bankruptcy, Company Recovery and Special Revitalization Proceedings Terminated in the Courts of First Instance (2000-2016) Source: Direção-Geral da Política de Justiça (2018)



79 The most recent document can be accessed here: http://www.dgpj.mj.pt/sections/noticias/estatisticas-da-justica2783/downloadFile/attachedFile_f0/Insolvencias_trimestral_20180724.pdf?nocache=1532704192.73

Fig. 31: Insolvency and Bankruptcy Cases per Type of Person (2012-2017)⁸⁰

Note: 2017: only until 31.10.2017

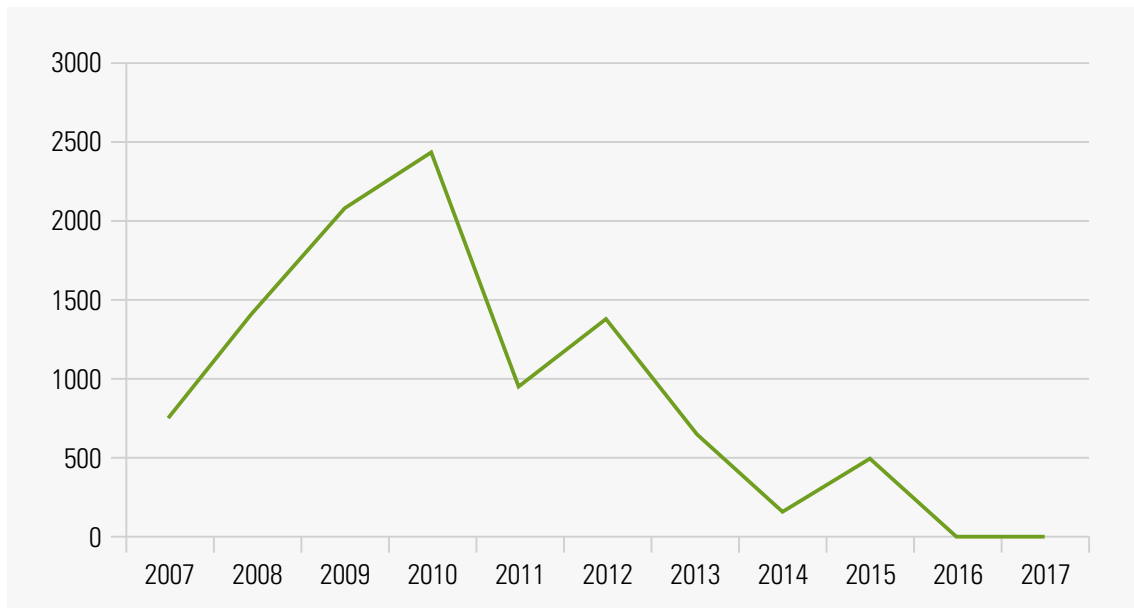
Fig. 32: Insolvency and Bankruptcy Cases of Legal Persons by Economic Sector (2012-2017)⁸¹

	2012	2013	2014	2015	2016	2017*
Manufacturing	1612	1235	963	1020	765	352
Construction	2144	1732	1411	1217	810	278
Retail trade and vehicle repair	2240	1987	1575	1548	1192	451
HO-RE-CA	485	527	427	444	381	154
Others	2086	2165	1734	1795	1463	581
Total	8567	7646	6110	6024	4611	1822

* 2017: only until 31.10.2017

80 Source: Direção-Geral da Política de Justiça (2018)

81 Source: Direção-Geral da Política de Justiça (2018)

Fig. 33: Number of Jobs at Risk Due to Bankruptcy and Closure (2007-2017)⁸²

2. INTRODUCTION

a) A brief history of legislation and regulations

Introduction

In Portugal, company restructuring is heavily stigmatised. The two main problems associated with restructuring and insolvencies in particular seem to be for many actors, on the one hand, companies facing the situation late, and, on the other hand, the prospect that the problems drag on in the tribunals.

Some context traits help to understand this panorama: most employers have low qualifications and lead small companies, counting mainly with external accountants and lawyers to advise them; the national industrial relations system is still very conflictual and most of the time, workers' representatives focus their action on the need of wage growth. Furthermore, the national market has undergone important developmental pressures since the EU entry in 1986 and today the economy, part of the Eurozone, is very dependent on public policies, which are still distant from most companies' realities. Therefore, the prevailing paradigm is one of managing change instead of anticipating it (Rego, 2014).

Legislation

The Portuguese Labour Code compilation dates back to 2003 and has undergone numerous changes since then. Right in 2004, it produced the Code of Insolvency and Company Recovery (CICR)⁸³, which became autonomous from the Civil Code for the first time through the Decree-law 53/2004. Since then, the CICR has been changed 12 times, as Table A shows. Despite these changes along the years, its paradigm is still in force.

⁸² Source: Based on ERM-Eurofound (2018)

⁸³ English summary: <https://dre.pt/web/guest/home/-/dre/107596684/details/maximized?res=en>

The CICR has two main shortcomings: first, companies⁸⁴ usually ask for help in extremis and second, standard tribunal processes take too long to conclude these processes. Thus, the CICR intends to overcome these problems, namely giving creditors the power to decide how they will succeed to have guarantees from the debtor and the process and removing these companies' processes from the standard tribunals. As the legislation says, in number 6 from the preamble, creditors have primacy: "Therefore, it is not worth mentioning that the new Code gives priority to the liquidation of the assets of the insolvent. The primacy that actually exists, it is not too strong to reiterate it; it is the will of the creditors..." (*Não valerá, portanto, afirmar que no novo Código é dada primazia à liquidação do património do insolvente. A primazia que efectivamente existe, não é demais reiterá-lo, é a da vontade dos credores...*).⁸⁵ These two Codes, the Labour Code and the CICR, are the main sources of the legal framework for this report.

During the period of implementation of the MoU (2011-2014) and more recently, additional legislation aimed at companies in difficulties has been passed. At the time of the MoU, for instance, while the value of the compensation for redundant workers was reduced (prevailing over collective agreements)⁸⁶, two compulsory funds were created to assure workers with new contracts receive at least part of their compensation in case of redundancy. This legislation references can be found in Figure 34 and 35.

Fig. 34: Portuguese Legislation on Insolvencies

YEAR	CONTENT	REFERENCE
2018	Law 8/2018 – establishes the extra judicial system of company recovery	https://dre.pt/web/guest/legislacao-consolidada/-/lc/114798978/201803020000/exportPdf/normal/1/cacheLevelPage?_LegislacaoConsolidada_WAR_dre-frontofficeportlet_rp=indice
2017	Law 114/2017 – approves the national budget	https://dre.pt/application/conteudo/114425586
2017	Decree-law 79/2017 – changes the Code of insolvency and the company recovery	https://dre.pt/application/conteudo/107596684
2015	Decree-law 26/2015 – improves the system of company recovery	https://dre.pt/web/guest/legislacao-consolidada/-/lc/107981188/201808231242/exportPdf/normal/1/cacheLevelPage?_LegislacaoConsolidada_WAR_dre-frontofficeportlet_rp=indice
2012	Law 66-B/2012 – approves the national budget	https://dre.pt/application/conteudo/632448
2012	Law 16/2012 – simplifies the process and introduces the PER	https://dre.pt/application/conteudo/552804
2009	Decree-law 185/2009 – simplifies the process and transposes the European Directive 2006/46/CE	https://dre.pt/application/conteudo/493506
2008	Decree-law 116/2008 – simplifies the process	https://dre.pt/application/conteudo/456492
2007	Decree-law 282/2007 – changes de Code of insolvency and company recovery	https://dre.pt/application/conteudo/637385
2006	Decree-law 76-A/2006 – new regime of company dissolution	https://dre.pt/web/guest/legislacao-consolidada/-/lc/72988787/201211230000/exportPdf/normal/1/cacheLevelPage?_LegislacaoConsolidada_WAR_dre-frontofficeportlet_rp=indice
2004	Law 32/2004 – establishes the insolvency administrator	https://dre.pt/application/conteudo/507439
2004	Decree-law 200/2004 – changes the Code of insolvency and company recovery	https://dre.pt/application/conteudo/480702

84 Although the term company is widely used throughout this report, the CICR covers other types of collective persons, like voluntary associations with no legal status. Also specific conditions are foreseen for instance for debtors who are individual persons or leaders of small companies (articles 249-266 of the CICR).

85 Author's own translation – Source: https://dre.pt/web/guest/legislacao-consolidada/-/lc/114798979/201809051605/exportPdf/normal/1/cacheLevelPage?_LegislacaoConsolidada_WAR_dre-frontofficeportlet_rp=indice.

86 Cf. Law 69/2013 (http://cite.gov.pt/asstscite/downloads/legislacao/Lei_69_2013.pdf). Two years ago, Law 53/2011 changed the compensation amounts for new contracts (http://cite.gov.pt/asstscite/downloads/legislacao/Lei_53_2011.pdf).

2004	Decree-law 53/2004 – approves the Code of insolvency and company recovery	https://dre.pt/web/guest/legislacao-consolidada/-/lc/74450480/201612281137/exportPdf/normal/1/cacheLevelPage?LegislacaoConsolidada_WAR_dre-frontofficeportlet_rp=indice
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Fig. 35: Other Related Legislation⁸⁷

YEAR	CONTENT	REFERENCE
2018	Law 14/2018 – Amends the legal regime applicable to the transfer of a business or establishment and enhances the rights of employees	https://dre.pt/application/conteudo/114886221
2013	Law 69/2013 – Value of compensation due to termination of employment contract	https://dre.pt/application/conteudo/499541
2012	Law 23/2012 – Several changes to the Labour code, including requirements for temporary layoff (Articles 298-307)	https://dre.pt/application/conteudo/178501
2011	Law 53/2011 – New system of redundancy payment in various forms of termination of employment contract (for new contracts)	https://dre.pt/application/conteudo/668541

Extra judicial Mechanisms

At the same time, not only an urgent character was given to the insolvency cases in tribunal, but successive extra judicial mechanisms were launched to try and expedite cases with companies in difficulties, the first being created in the late 1990s. These mechanisms are compiled in Figure 36.

The Extrajudicial Conciliation Procedure (PEC)⁸⁸ was launched in 1998. It had a restricted framework where creditors were called in order to find a solution together with the company. The PEC impact was not considered as important as expected and was replaced in 2012 by the Business Recovery System through Extrajudicial Enforcement (SIREVE)⁸⁹.

When compared to the PEC, SIREVE reduced the deadlines for completing the process, which went down from 9 to 4 months. It also provided debtor and creditor protection during the negotiation process stage and digitalised the process. However, SIREVE had a limited implementation, considering that only 406 companies applied for assistance in 2014, covering mainly micro and small companies from the north of the country. SIREVE was in force until 2018, when a new system came out, the Extrajudicial Regime of Business Recovery (RERE)⁹⁰.

The RERE introduces several changes: it enlarges the target, involving collective persons and not only individual businesspeople; it introduces more flexibility into the process, namely allowing a more reduced number of creditors to participate and the possibility of passage into a Special Recovery Process (PER)⁹¹; it provides guarantees of the maintenance of essential services, and eliminates mediation from IAPMEI⁹².

Note that in 2012, the PER was also launched and is still in force. The PER is an alternative instrument to bankruptcy, a non-confidential process that requires the participation of all the creditors, and usually covers large companies.

87 This compilation is not exhaustive and is the result of authors' understanding of its pertinence for the report.

88 Procedimento Extrajudicial de Conciliação.

89 Sistema de Recuperação de Empresas por Via Extrajudicial.

90 Regime Extrajudicial de Recuperação de Empresas.

91 Processo Especial de Revitalização.

92 The Agency of Competitiveness and Innovation (Agência para a Competitividade e Inovação) – IAPMEI – <https://www.iapmei.pt> – is a public agency which mission comprises the centralisation of company recovery information – <https://www.iapmei.pt/PRODUTOS-E-SERVICOS/Revitalizacao-Transmissao/Revitalizacao-Empresarial/PER-Processo-Especial-de-Revitalizacao.aspx>.

The PER targets companies unable to pay their contributions and lacking the cash or credit necessary.⁹³ With the PER, companies in difficulties see their productive capacity and jobs protected since credit collection gets suspended during the negotiation process, which opens up the scope for recovery.

Fig. 36: Extra Judicial Mechanisms for Companies in Difficulties

1998	PEC
2012	SIREVE and PER
2018	RERE (and PER)

Institutional framework

Since the 1990s, after a period of reprivatization of companies that had been nationalised following the Revolution of 1974, successive Portuguese governments have created institutional mechanisms and agencies to deal with companies experiencing financial difficulties. These initiatives, which seem prolific, tend to change with each Government, and have thus a narrow diffusion. Some of these characteristics of public policies obviously do not facilitate companies in difficulties to get help. Therefore, the potential effect of some governmental measures undertaken within the scope of restructuring still proves limited as, in practice, companies are still in very difficult situations by the time they seek help. In this subsection we present the main institutional programs of the last decades.

In 1996, the Portuguese government, with the Socialist Party in power, laid out a structure to help companies in difficult situations given their worries over the increasing impact of bankruptcies on unemployment. In fact, about ten years after joining the European Economic Community, the Minister of Economy established the GACRE (a Support Office for the Coordination of Business Recovery)⁹⁴ endowed with the mission of implementing the 'Mateus Plan', a set of measures that took the minister's name. This plan intended to, on the one hand, waive debts to the social security and tax services, and, on the other hand, to issue state guarantees.

Some years later, in 1998, the same government set up the SIRME (Integrated System of Incentives for Business Modernization and Revitalisation)⁹⁵. The SIRME was regulated to provide support to mergers and acquisitions involving firms facing financial difficulties. This support came as loans and guarantees.

In 2001, still under the auspices of the same government, a new Minister of Economy, set up a new structure, the AUDITRE (Audit Union for Business Restructuring)⁹⁶, based on the same principles but with a larger budget. Later, this structure got abolished within the scope of reform intending to shrink state governance mechanisms.

In 2005⁹⁷, a new institutional mechanism was enacted by the Socialist Party Government, the AGIIRE (Integrated Intervention Office for Business Restructuring).⁹⁸ The AGIIRE was designed to support companies and workers undergoing restructuring. The structure stemmed from the Ministry of Economy, which was in close association with other ministries. The assistance provided was mainly in terms of public and private funding. Under the AGIIRE's activities, the NIRP (Rapid and Customized Intervention Cores)⁹⁹ was designed to provide support to companies undertaking restructuring, insolvency or bankruptcy. These structures were supposed to be run by officials from state entities such as the social security agency or the vocational training and employment institute.¹⁰⁰ However, the NIRP never actually came into force.¹⁰¹ Several funds were also established in this period.

93 <https://www.iapmei.pt/PRODUTOS-E-SERVICOS/Revitalizacao-Transmissao/Revitalizacao-Empresarial/PER-Processo-Especial-de-Revitalizacao.aspx> (accessed 08.08.2018).

94 Gabinete de Apoio para a Coordenação da Recuperação de Empresas.

95 Sistema de Incentivos à Revitalização e Modernização Empresarial – through the Despacho no. 8514/98, dated 21 May 1998.

96 Unidade de Auditoria para a Reestruturação Empresarial

97 Decreto Regulamentar no. 5/2005, dated 12 July 2005.

98 Gabinete de Intervenção Integrada para a Reestruturação Empresarial

99 Núcleos de Intervenção Rápida e Personalizada

100 Source: Cf. article 8 from de Regulatory decree 5/2005 – Source: <https://dre.pt/application/file/a/236808>.

101 According to the representative of the Portuguese Association of Insolvency Administrators, there are no known activity of the NIRPs.

Later, in 2012, the government, a right-wing coalition at that time, operating under the directives of the MoU, launched REVITALIZAR.¹⁰² This program intends to help companies in difficult situations, especially through the revision of legislation and already existing institutional mechanisms. Furthermore, for the first time, REVITALIZAR was endowed with European Union co-funding with the funds managed by private agencies. REVITALIZAR deploys two main tools: the SIREVE (Corporate Recovery System by Via Extrajudicial) and the PER (Special Recovery Process).¹⁰³

The most recent change dates from 2018.¹⁰⁴ A new formulation of the recovery mechanisms for companies is provided by the Capitalizar program (<http://capitalizar.pt>). Capitalizar revises the existing program and integrates the following goals, among others:

- Adding more requirements for recovery as most cases were in effect already bankrupt
- Setting out a list of experts to provide technical support
- Separating collective and individual companies
- Empowering the already existing function of administrator judicial (judicial administrator)
- Launching the business recovery mediator
- Replacing SIREVE with a new out-of-court recovery mechanism, the RERE.

The following table summarizes the programs that regulated or intended to regulate restructuring cases in the last 20 years in Portugal. In fact, some of these mechanisms never came into force and some are just the replacement of previous ones. It is important to point out that they did not address workers' protection, even if the staff map was required in some procedures.

Fig. 37: Institutional Framework to Help Companies in Difficulties (1996-2018)

YEAR	NAME	MAIN MEASURES
2018	CAPITALIZAR program	Revision of legislation and institutional mechanisms
2012	REVITALIZAR program	Revision of legislation and institutional mechanisms
2005	AGIIRE – Integrated Intervention Office for Business Restructuring	Funding
	NIRP – Rapid and Customized Intervention Cores	Technical support
2001	AUDITRE – Audit Union for Business Restructuring	Technical support
1998	SIRME – Integrated System of Incentives for Business Modernization and Revitalisation	Loans and guarantees
1996	GACRE – Support Office for the Coordination of Business Recovery	Waive debts to the social security and tax services, to issue state guarantees

102 Resolução do Conselho de Ministros no. 11/2012, dated 3 February 2012

103 Processo Especial de Revitalização. REVITALIZAR also spans onto other initiatives, such as FINTRANS, a program for transferring companies – though it does not seem to be active.

104 Other changes may have been made but there were no conditions to collect objective data on them. According to an official from the IAPMEI, the national agency for competition and innovation, with whom we spoke in June, an early warning tool for companies facing difficulties was launched in 2015 but did not have much impact. Thus, it is now undergoing reformulation and is due for implementation by the end of 2018.

3. REQUIREMENTS FOR INSOLVENCY PROCEEDINGS (REASONS FOR INSOLVENCY)

According to Code of Insolvency and Company Recovery (CICR), an insolvency occurs when it is not possible to comply past or imminent obligations. Thus, the insolvency signs are:

- > non-payment of fiscal labour duties, social protection duties, rents, etcetera – the most common;
- > insufficiency of attachable assets;
- > non-compliance with an insolvency or payment plan.¹⁰⁵

Also, with the CICR, there is a distinction between insolvency and bankruptcy, the first assuming economic recovery can happen while the latter discards that possibility immediately.

4. BRIEF OVERVIEW OF THE COURSE OF INSOLVENCY PROCEEDINGS

The process of insolvency main stages is:

- a. The debtor reports insolvency up to 30 days of the knowledge or the prediction of the non-compliance to the nearest tribunal; non-compliance with this deadline represents a grave fault.
- b. The judge declares insolvency up to 3 days after, which may be contested by the debtor and eventually followed by the presentation of an insolvency, recovery or payment plan¹⁰⁶ by the debtor; if there is an insolvency plan, opinions are collected and the creditors meeting is called to discuss and approve it; the insolvency plan is then homologated by the judge;
- c. Assets are transferred to the insolvency administrator, who has to sell them as quickly as possible and within one year, unless the creditors are against it – if the process takes more than one year and there are no exceptional reasons for that, the insolvency administrator may be dismissed.
- d. Assembly of creditors will take place afterwards between the 45th and the 75th day.
- e. Creditors decide or not on an insolvency plan.
- f. Payments are made – in any case, the individual debtor may still need up to 5 years to pay from their revenues, a process that may be directed by a distinct insolvency administrator; after that payment the debtor is exonerated and may make a 'fresh start'.
- g. The case is concluded when (1) the proportional distribution is done; (2) the insolvency plan, if there is one, is homologated; (3) the debtor asks for the proceedings to stop, considering they are no longer in insolvency or all the creditors agree or finally (5) when the insolvency administrator finds there is not enough assets to pay costs and pay debts

105 Cf. section 19 from the preamble of the CICR – Source: https://dre.pt/web/guest/legislacao-consolidada/-/lc/114798979/201809051605/exportPdf/normal/1/cacheLevelPage?_LegislacaoConsolidada_WAR_drefrontofficeportlet_rp=indice

106 Since the creation of the CICR in the 2000s, an insolvency plan is foreseen. The judge is limited to control its legality, the plan being determined by the creditors, and if presented by the debtor must be consented by the creditors. This plan does not signify that the company will be active, the absence of an insolvency plan does not signify the company's extinction. Furthermore, in case of individual persons or small companies, a payment plan can be presented by the debtor, avoiding many disadvantages of such a process. Recently a Special Process of Payment Agreement was created through Decree-law 79/2017, addressing the possibility of the debtor as far as the debtor is not a company may negotiate with creditors a payment agreement – Source: <https://dre.pt/application/conteudo/107596684>

5. MAIN ACTORS AND THEIR RIGHTS AND OBLIGATIONS

Insolvency administrator

The Code of Insolvency and Company Recovery (CICR) merged two actors in one: the judicial manager (*gestor judicial*) and the judicial liquidator (*liquidatário judicial*) were replaced by the insolvency administrator.¹⁰⁷ Since 2004, the insolvency processes are managed by the insolvency administrator (*administrador de insolvência*). This practitioner/expert/specialist will assume the administration of the assets after the judge's declaration of insolvency, unless the debtor presents an insolvency plan which foresees their administration with all creditors' consent. The insolvency administrator may present an insolvency plan within 'a reasonable time' after being in charge by the creditors meeting. The insolvency plan is made with the participation of the debtor, the creditors and workers representatives and the insolvency administrator must accept the creditors meeting when the proposal is not of its own initiative. They decide, for instance, if undergoing business shall be finished or cancelled, unless the insolvency situation is clear on the incapacity of accomplishment. The insolvency administrator is chosen by the judge from an official list. The insolvency administrator statute is regulated by Law 22/2013 which foresees, in its article 3, that the insolvency administrator must be graduated and have adequate professional experience, must succeed in a specific trainee period and correspondent examination, and must have no conflict of interests.¹⁰⁸ The creditors may indicate the insolvency administrator against what the judge has decided.

Works council/trade union

Workers representatives are by law and in general consulted and informed of the companies' situation, cf. the Labour Code. Furthermore, when an insolvency plan is submitted, the judge informs the workers' representatives (work council, etcetera), as well as the other actors to issue an opinion within 10 days (Article 208 of the CICR). Note that when the debtor has no conditions, a workers' benefit can be taken from the insolvency mass to pay workers a food allowance, that nevertheless must be withdrawn from the respective credits.

Creditors' meeting

In the CICR, despite the primacy of creditors, insolvency must be first declared by a judge, whatever the following developments are. The creditors, as owners of the company, decide then on (i) closing the company or restructuring it, keeping its activity; (ii) who leads the company – this may be the debtor or another person.

The composition of the creditors meeting, which must be led by the judge, provides the possibility of having up to three workers' representatives, from the work council or named by the workers.

Creditors representing at least 1/5 of the estimated or verified credits may propose an insolvency plan – thus workers may be concerned. They have in any case to approve the insolvency plan if it is proposed by others, the insolvency plan then being homologated by the judge. Creditors enjoy of equal treatment in principle, unless a creditor concedes that others may have more favourable treatment. This must be put to the vote. Creditors may accept or not that some assets may be used to pay debts. The creditors meeting is called by the judge at least 20 days in advance to discuss and vote the insolvency plan. Opinions of other actors must also be made available ten days in advance, together with the insolvency plan. For the creditors meeting to approve the insolvency plan, they must count with at least 1/3 of the creditors. Approval is made when there is more than 50% of votes in favour. The creditors meeting may change the plan without requiring the approval of those that are not present. In case the judge does not name a committee of creditors, the creditors meeting may do it. The creditors meeting may elect two additional representatives of the committee of creditors if there is a majority of votes. The creditors may determine if there is a committee of creditors and in that case how it is composed.

107 Cf. section 8 of the Preamble of the CICR – Source: https://dre.pt/web/guest/legislacao-consolidada/-/lc/114798979/201809051605/exportPdf/normal/1/cacheLevelPage?_LegislacaoConsolidada_WAR_drefrontofficeportlet_rp=indice

108 The list of current insolvency administrators is available here: <http://www.citius.mj.pt/portal/article.aspx?ArticleId=1755>

Committee of creditors

The judge names the committee with 3 or 5 members, the leadership being usually assigned to the largest creditor and the other elements being representative of the different types of creditors. But if the judge considers the insolvency mass to be too small, the process simple and the number of creditors limited, the judge may not name a committee. At least one of the representatives of the creditors is a workers' representative when workers are also creditors. This representative is indicated by the work council or by workers themselves. The main function of the committee is to cooperate and inspect the insolvency administrator work.

Debtor

The debtor is supposed to ask for the insolvency declaration to a nearby tribunal and may do it presenting or not an insolvency or recovery plan.¹⁰⁹ When the debtor is not the author of the insolvency plan, the debtor may ask the judge to not homologate the plan if their opposition was already announced and if there are plausible reasons presented, especially when the plan is less favourable than the inexistence of a plan, or that the plan is favouring a creditor. This can also be asked by a creditor or a partner. Furthermore, the debtor has a duty of cooperation. The workers and services providers of the last 2 years are also covered by this principle.

Note that there are, on the one side, worries towards the prevention of fraud cases, and, on the other side, concerns towards the possibility of debtors being given a second opportunity. Indeed, the insolvency reporting incident is a step that intends to control if the debtor or the administrators are somehow guilty of the situation, considering their behaviour in the last three years. The assets of the debtor are arrested as well as other assets that could belong to the debtor if there was no bad management. The malicious and neglected insolvency, and the favoring of certain creditors is an aggravated crime if it represents the loss of creditors of labour nature (plus 1/3 of the penalty). At the same time, the CICR foresees the possibility to exonerate the remaining liability in the forthcoming five years namely from the debtor resources, so the debtor may make a fresh start at the end of that period.

Mediator of company recovery

Recently, the program CAPITALIZAR has launched a new actor, the mediator of company recovery. In 2018, Law 6/2018 settles the mediator function, which implies specific qualifications and the existence of an official list of mediators. According to the Law 6/2018¹¹⁰, the mediator must be graduated and have adequate professional experience; must succeed in a specific trainee period provided by an entity certified by the General Directorate of Justice Policy and have no conflict of interests.¹¹¹ The aim of this function is to provide support to the company in difficulties helping with negotiations with creditors in view of finding an extra-judicial solution. IAPMEI, the public agency on competitiveness and innovation, names a mediator up to 5 days after receiving the demand. According to point 5 of article 22 of Law 6/2018¹¹², the mediator is paid by the company unless the agreement between the debtor and the creditors determines otherwise.

7. APPLICATION FOR THE OPENING OF INSOLVENCY PROCEEDINGS

Who can file for insolvency?

According to the CICR, the debtor shall file the declaration of insolvency within 30 days after the knowledge of the situation or after the date the debtor was supposed to know the situation. Only individual persons who do not own a

109 A recovery plan is the name the insolvency plan must use in case it intends to promote the company recovery.

110 Source: <https://dre.pt/application/file/a/114749044>

111 Statutory auditors and insolvency administrators may be mediators under specific conditions of no conflict of interests.

112 Source: <https://dre.pt/home/-/dre/114749189/details/maximized>

company are not obliged to present insolvency. When the debtor owns a company, it is assumed that the insolvency situation is known at the end of up to 3 months of non-compliance. Articles 19 and 20 determine who can also take the initiative to present the insolvency if the debtor is not a capable natural person, which include: (1) the social organ or the administrators, (2) other people responsible for the debtor's debts; (3) a creditor or; (4) the Public Ministry:¹¹³

“ Artigo 19.º

A quem compete o pedido

Não sendo o devedor uma pessoa singular capaz, a iniciativa da apresentação à insolvência cabe ao órgão social incumbido da sua administração, ou, se não for o caso, a qualquer um dos seus administradores.

Artigo 20.º

Outros legitimados

1 – A declaração de insolvência de um devedor pode ser requerida por quem for legalmente responsável pelas suas dívidas, por qualquer credor, ainda que condicional e qualquer que seja a natureza do seu crédito, ou ainda pelo Ministério Público, em representação das entidades cujos interesses lhe estão legalmente confiados, verificando-se algum dos seguintes factos:...»

Appointment and selection of the insolvency administrator

The selection of the insolvency administration is a judge's responsibility. The judge may consider the suggestions provided by the debtor, the creditors committee – if there is one – or the creditors, but it is ultimately up to the judge to decide. The judge can only refuse to name the person chosen by the creditors if they consider the person incapable to carry out the tasks, or if the person is not trustful, i.e. is being overpaid following a decision of the creditors or is not in the official list. These cases do not fall within the exception criteria (these concern large companies with a considerable insolvency mass, or when the case is too complex or the sector very specific). The list of insolvency administrators and their statute is regulated by a specific law. Taking into account the process complexity or the need of a particular skill/knowledge, the judge may name a second insolvency administrator.

8. INSOLVENCY MONEY REGULATIONS

- > Pre-financing
- > What and when does the Employment/Administration Agency pay?

The MoU (2011-2014), signed between the Portuguese government and the troika, was responsible for the set up of two institutional mechanisms to assist companies in difficulties. For the first time, pre-financing mechanisms were created: the FCT (the Labour Compensation Fund)¹¹⁴ and the FGCT (Labour Compensation Guarantee Fund).¹¹⁵ These funds are financed by employers through monthly contributions. They are compulsory and applied to contracts beginning after October 2013. These funds are managed by distinct and tripartite councils. According to Law 70/2013, dated 30 August 2013, contracts with some public services and very short contracts are not covered. The compensation fund is foreseen for redundancies – cf. article 366 of the Labour Code. The FCT structure features individual capitalization in order to guarantee payment of up to half of the compensation payable on termination of employment. In turn, the FGCT displays a mutual structure, aiming at ensuring the amounts necessary to covering half the amount of compensation payable on contract termination minus the amount already paid out by the employer to the worker. Furthermore, the FGCT implies information provided by the employer which must be sent in 4 days and the FGCT is then obliged to pay the worker within a maximum of 20 days.¹¹⁶

113 Source: <https://dre.pt/web/guest/legislacao-consolidada/-/lc/107610176/201712211555/73442126/diploma/indice/2>

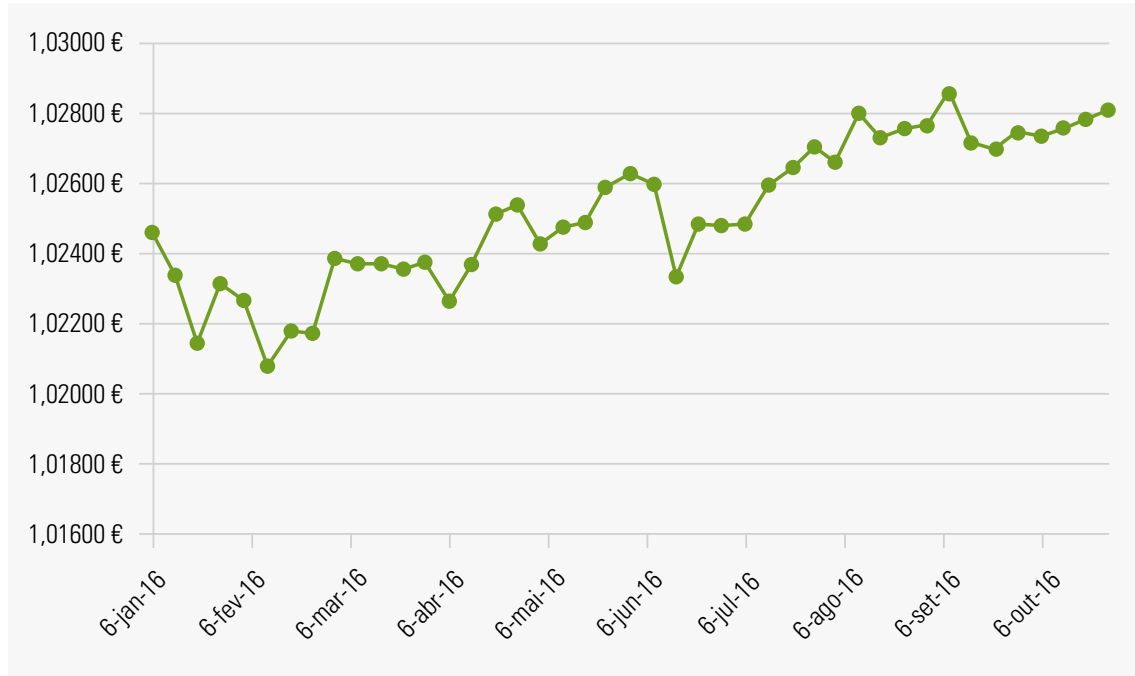
114 Fundo de Compensação do Trabalho.

115 Fundo de Garantia de Compensação de Trabalho.

116 <https://dre.pt/application/conteudo/499547> (accessed 09.08.2018).

The impact of these funds is not known, but the activity plan for 2017 presents data on the evolution of the contributions for the year 2016 – cf. Figure 38. In that year, the FCT counted on 165.407 employers' contributions corresponding to 1.043.873 workers and managed about 92.507.082€.

Fig. 38: Accumulation of the Labour Compensation Fund values (2016)



Source: FCT- Proposta Plano de Atividades e Orçamento – Exercício de 2017¹¹⁷

9. WHAT RULES APPLY TO THE DISTRIBUTION OF REVENUES? HOW ARE CREDITORS' CLAIMS AND RIGHTS CLASSIFIED? HOW ARE EMPLOYEE CLAIMS TREATED?

The graduation of credits is done after the payment of debts.

The graduation of credits is done following the order:

- > secured loans, meaning that they have guarantees, such as mortgages;
- > privileged credits
- > common
- > subordinated.

The employee's claims arising out of a labour contract, or of its violation or termination shall enjoy the following privileges: a) Privilege of general furniture; b) Special real estate privilege on the immovable property of the employer in which the employee exercises the activity.

117 <http://www.fundoscompensacao.pt/documents/14324547/15035956/PL+ACT+2017+e+PARECER+FU.pdf/4dcbd568-58d3-4205-86be-bd59999808cb> (accessed 08.08.2018)

In this sense, workers' payments have priority over other creditors such as suppliers or banks and with the exception of creditors for legal expenses. They also enjoy the special privilege of real estate credit, in relation to the real estate in which they operate.

The entitlement to the food allowance is due if workers have no other means of subsistence beyond the income from the insolvent company; it will be withdrawn from the insolvent estate.

According to the Labour Code¹¹⁸, when the worker payment cannot be made by the employer because of insolvency or financial difficulties, it is assured by the Labour Compensation Fund. The credit is over one year after the termination of the contract. The worker requirement of a compensation for extra work, violation of holiday entitlement, etcetera, with more than 5 years of delay must be proved with a suitable document.

Workers can apply for unemployment benefits if they have registered at least 12 months of paid employment with Social Security two years prior to becoming unemployed; the unemployment benefit varies depending on the age of the beneficiary and the number of registered worked months with Social Security pay records.

In sum, workers have the following rights:

- Workers have priority over other creditors (cf. point 4 article 47).¹¹⁹
- Entitlement to a food allowance.
- The Labour Compensation Fund can be triggered.
- Workers can apply for unemployment benefits.

10. TERMINATIONS DURING EMPLOYER INSOLVENCIES

There are no specific references to dismissals in the Code of Insolvency and Company Recovery (CICR) or to labour relations. The CICR determines that the effects of insolvency on work contracts and labour relations are regulated by the Labour Code. Thus, we can consider here the legal framework applied to insolvency in particular but, being aware of the uncertainty associated with situation preceding the insolvency, we assume other situations could also be considered. Therefore, we highlight some of them below.

118 Articles 333-337.

119 Artigo 47.º

Conceito de credores da insolvência e classes de créditos sobre a insolvência

1 – Declarada a insolvência, todos os titulares de créditos de natureza patrimonial sobre o insolvente, ou garantidos por bens integrantes da massa insolvente, cujo fundamento seja anterior à data dessa declaração, são considerados credores da insolvência, qualquer que seja a sua nacionalidade e domicílio.

2 – Os créditos referidos no número anterior, bem como os que lhes sejam equiparados, e as dívidas que lhes correspondem, são neste Código denominados, respectivamente, créditos sobre a insolvência e dívidas da insolvência.

3 – São equiparados aos titulares de créditos sobre a insolvência à data da declaração da insolvência aqueles que mostrem tê-los adquirido no decorrer do processo.

4 – Para efeitos deste Código, os créditos sobre a insolvência são:

a) «Garantidos» e «privilegiados» os créditos que beneficiem, respectivamente, de garantias reais, incluindo os privilégios creditórios especiais, e de privilégios creditórios gerais sobre bens integrantes da massa insolvente, até ao montante correspondente ao valor dos bens objecto das garantias ou dos privilégios gerais, tendo em conta as eventuais onerações prevalecentes;

b) «Subordinados» os créditos enumerados no artigo seguinte, excepto quando beneficiem de privilégios creditórios, gerais ou especiais, ou de hipotecas legais, que não se extingam por efeito da declaração de insolvência;

c) «Comuns» os demais créditos. Source:

<https://dre.pt/web/guest/legislacao-consolidada/-/lc/107610176/201712211555/73442126/diploma/indice/3>

A – Insolvency¹²⁰ (article 347 and 363) – various periods of notice and following the procedure of a collective redundancy: from 15 days for workers with a contract of less than one year to 75 days for workers with a contract of more than 10 years

B – Death of the employer, extinction or closure of the company (article 346 and 363) – various periods of notice and following the procedure of a collective redundancy: from 15 days for workers with a contract of less than one year to 75 days for workers with a contract of more than 10 years

C – Company crisis¹²¹ (articles 298-316) – 15 days

D – Transmission of company¹²² (article 285, Law 14/2018) – 10 days before the meeting with the workers' representatives to agree on the transmission conditions

E – Collective redundancy¹²³ (articles 359-366) – various periods of notice: from 15 days for workers with a contract of less than one year and to 75 days for workers with a contract of more than 10 years

F – Punctual non-payment¹²⁴ (articles 325-327; Law 105/2009) – no specific deadline.

11. SOCIAL PLAN IN INSOLVENCIES

There are no social plans foreseen in the Portuguese legislation. Nevertheless, social actors and mass media sometimes use the expression and in practice, some procedures can be considered a social plan. In any case, there is no planning in advance to deal with restructuring cases and thus no usual procedures.

120 According to the Labour Code, in its article 347 (partially changed in 2012 namely to aggravate the penalty and revise the compensation amounts), the employer's insolvency declaration does not terminate the work contract, and the administrator shall continue to fully meet the obligations towards workers while the establishment is not finally closed. Before the definitive closure of the establishment, the administrator may terminate the employment contract of a worker whose collaboration is not indispensable to the operation of the company.

121 According to the Labour Code, the employer may temporarily reduce the normal work or suspend employment contracts, for market reasons, structural or technological changes, disasters or other occurrences severely affecting the normal activity of the company, provided that such action is indispensable to ensure the viability of the company and the maintenance of work positions. However it also foresees that the conditions for that can also cover the final closure of the company. Workers must be informed in not less than 15 days. Meanwhile the employer cannot withdraw money, pay to the partners, creditors who do not hold a guarantee or privilege with preference in relation to workers' claims, unless such payments are intended to enable the activity of the company, etcetera.

122 Legislation on the transmission of company foresees the information of workers representatives as well as the right of workers to oppose the transmission of the work contract together with the company and the transmission of the workers representative structure (article 286 and 287 of the Labour Code). Furthermore, in 2018, legislation protecting workers under the scope of a business transfer was launched. Law 14/2018 changes legislation from 2009, settling the legal regime applicable to the transfer of a business or establishment and reinforces the rights of workers. This new framework assures, for instance, that workers may (1) maintain their rights (retribution, seniority, social benefits, etc.) whether settled by contract or acquired; (2) have time to organize their representation before the transfer and; (3) may refuse any transfer.

123 The Portuguese Labour Code defines collective or mass redundancy as a redundancy implemented by an employer for one or more reasons that cannot be ascribed to the employee. Mass redundancies are processes which span over a period of 90 days: small firms make at least 2 workers redundant, and medium and large companies make at least 5 workers redundant. Upon being informed of the looming redundancy, the worker has the right to 2 days of work per week until redundancy becomes effective. These hours can be used freely by the worker, who is only required to inform the employer of his intention to use this time with at least three days notice. This time entitlement enables workers to seek new jobs.

124 Law 105/2009 foresees (article 25th) the existence of the unemployment benefit in the event of suspension of employment contract by the employee on the basis of non punctual payment by the employer, as well as by the suspension of company activity for 15 days due to employers' reasons or in case of company crisis. The amount cannot be more than one unemployment benefit for three monthly payments.

12. WORKS COUNCIL PARTICIPATION IN INSOLVENCY PROCEEDINGS

Following the legal framework, there are in principle opportunities for the works councils/trade unions to influence the proceedings. First, because there is an information obligation and the right to issue an opinion, namely on (1) the insolvency plan and on the report produced by the insolvency administrator with the assessment of the accountable situation; (2) an opinion on the recovery of the company (3) a list of creditors and; (4) an inventory in attachment. Second, the creditors meeting and the committee of creditors (when there is one) count with representatives of workers even if there are no debts with the workers. However, in practice, we believe that the influence is not very effective.

13. IS THE CURRENT LEGISLATION MORE FOCUSED ON REORGANISATION AND CONTINUATION THAN ON DISMANTLING?

The spirit of the Code of Insolvency and Company Recovery (CICR), launched in 2004, and according to its preamble, is not necessary to recover the company. This reference makes us consider that until that period, expectations were addressed to company recovery and that the legislator intended to change that, namely giving creditors the primacy on the decision. At the same time, several mechanisms for company recovery have been launched and improved since the 1990s by the Government. Furthermore, the CICR also foresees the recovery possibility in different articles.

COUNTRY REPORT #6:

SWEDEN

By

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1. STATISTICAL OVERVIEW

If a company or entrepreneur gets into financial difficulties or is unable to pay its debts, specific procedures are available in each country to address the situation. Swedish insolvency law knows three main forms of insolvency – bankruptcy¹²⁵, business reorganization and debt restructuring for both private individuals and entrepreneurs. The insolvency legislation includes provisions;

- > in the Bankruptcy Act (Konkurslagen).¹²⁶
- > in the Business Reorganization Act (Företagsrekonstruktionslagen).¹²⁷
- > in the Debt Reconstruction Act (Skuldsaneringslagen)¹²⁸ and the Debt Restructuring Act for entrepreneurs (Lagen om skuldsanering för företagare).¹²⁹

Closely linked to insolvency law are the rules 1) on priority rights¹³⁰, 2) the rules on recovery of debts¹³¹ and 3) the rules on government wage guarantee¹³². There are no formal, legislative proceedings for pre-insolvency restructuring/reorganization. However, such arrangements can be made on a voluntary basis between the creditors and the debtor.¹³³

The number of insolvencies (bankruptcies) for all kinds of companies from 2000 to 2017 were;

Fig. 39: Number of Insolvencies in Sweden from 2000 to 2017¹³⁴

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
6733	7433	7930	8237	7649	6784	6160	5791	6298	7638	7274	6958
2012	2013	2014	2015	2016	2017						
7471	7701	7158	6433	6019	6394						

The large number of bankruptcies in Sweden usually involves small companies. Only a few percent of bankruptcies concern companies with more than 20 employees. It is not surprising considering how the business community is in Sweden. The number of companies in 2017 amounted to 1,119,813. Three quarters of these were “one-person companies” (73.2%), 23.1% were so-called micro companies (0-9 employees) and 3% small businesses with less than 50 employees.¹³⁵ By 2017, the most affected sectors of bankruptcies were; 1) trade and repair of vehicles; 2) construction; 3) businesses aiming at legal, financial, science and technology activities; 4) hotel and restaurant businesses.¹³⁶

In Sweden there is a tendency to steer viable companies in financial difficulties towards liquidation rather than towards early reorganization. Although the law on business reorganization has been in force for more than twenty years, the procedure is not used to a large extent. At the time when the law came into force (in 1996), it was esti-

125 It should be noted that bankruptcy (konkurs) in Swedish law refers solely to a procedure whereby a bankrupt company is wound up, and not to its reconstruction.

126 SFS 1987:672.

127 SFS 1996:764.

128 SFS 2016:675.

129 SFS 2016:676.

130 Priority Rights Act (Förmånsrättslag) SFS 1970: 979.

131 Enforcement Code (Utsökningsbalk) SFS 1981: 774.

132 Wage Guarantee Act (Lönegarantilag) SFS 1992: 497.

133 In the following when I refer to the trustee, the creditor or the debtor, I write “he”. The trustee can of course be a “she” which is also true for the creditor and the debtor. The latter can also be a company.

134 Tillväxtnalys, statistik över konkurser, 2018-08-21.

135 <https://www.ekonomifakta.se/Fakta/Foretagande/Naringslivet/Antal-foretag-i-Sverige/2017-12-11>.

136 <http://statistikportalen.tillvaxtnalys.se/Pages/ShowReport.aspx?ReportID=6&StatisticalAreaID=5>

mated that the number of business reorganizations annually would amount to around 500. Sweden is at this moment far from this goal. During the years 2011-2014, an average of 200 reorganizations per year took place. So far, there are few companies that get a second chance to avoid bankruptcy through reorganization. If one compares the number of bankruptcies to reorganization, the latter only amounts to a few percent.¹³⁷

2. INTRODUCTION

A complete body of bankruptcy legislation was not enacted in Sweden until 1773.¹³⁸ Bankruptcy laws of a more systematic nature were later adopted in 1818, 1862 and finally in 1921.¹³⁹ This last-mentioned act remained in force until the current bankruptcy act was passed in 1987.

In the early 1990s, Sweden suffered from both a financial crisis and problems connected with the fact that the Swedish households had increased their debt level significantly. Due to this fact, many companies and individuals experienced problems with repaying their loans or fulfilling their obligations. In view of the aforementioned problems, the first Act on Debt Restructuring was introduced in 1994¹⁴⁰ but also the Business Reconstruction Act was adapted in 1996. Major changes in the Debt Restructuring Act were later adopted in 2007¹⁴¹, 2011¹⁴² and finally in 2016.

3. REASONS FOR INSOLVENCY

The reasons for companies having financial problems and thus having to initiate insolvency proceedings have been discussed in the doctrine.¹⁴³ It can be noted that the causes are several. First, financial problems have arisen because a central counterparty to the debtor – either a customer or a supplier – has been declared bankrupt. Thus, it has been difficult for the debtor to recover its claim. A related situation is that a company, which is the parent company of another company, has had financial difficulties. When the parent company cannot fulfil its obligations, the subsidiaries also have problems.

Second, the economic problems arose because, despite the changes in market conditions, the company did not change its cost structure, organization, production and/or marketing. The management has either been too slow or has not initiated sufficiently powerful changes to meet these challenges, even though the demand for the company's products and services has reduced or is not demanded at all. This inability or this obstacle to quickly change the direction of the company has in many cases led to a difficult economic situation.

Third, the economic problems have arisen because of disputed claims between two or more parties that have caused costly processes. Fourth, the economic problems have arisen because taxes and fees have not been paid on time for various reasons. Here, the legal research has pointed to the fact that the design of the tax law legislation can force the debtor into bankruptcy.¹⁴⁴ Fifth, the financial problems have arisen because employees have committed crimes like

137 See Persson, A. H. & Karlsson-Tuula, M., *Företagsrekonstruktion – i teori och praktik*, 3ed., 2017, p. 23, SOU 2016:72 Part 2, p. 139-144.

138 K.M:ts Förklaring, vad vid Fallissementer samt Cessions-och konkurstvister hädanefter bör iakttagas. Se Tuula, M., *Rekonstruktion av företag inom insolvenslagstiftningens ramar*, 2nd ed., 2001, p. 210-211.

139 SFS 1921:225.

140 SFS 1994:334.

141 SFS 2006:548.

142 SFS 2011:472.

143 See Persson, A. H. & Karlsson-Tuula, M., *Företagsrekonstruktion i teori och praktik*, 3rd ed., 2017, p. 84 and the following pages, SOU 2016:72 p. 90 and the following pages, Tuula, M., *Rekonstruktion av företag inom insolvenslagstiftningens ramar*, 2nd ed., 2001, p. 44-45, SIND 1985:7 p. 177 and the following pages, Gratzner, K., *Konkursens orsaker, Konkursinstitutets betydelse i svensk ekonomi*, 1999, p. 134 and the following pages.

144 See SOU 2016:72 Part I p. 132 and the following pages and Part 2, p. 72 and the following pages.

confiscation, stealing etc. from the debtor. Sixth, the financial problems have arisen because the debtor has been too dependent on a certain number of customers. When one of these customers no longer wants to cooperate with the debtor for one reason or another, the situation may become very precarious. The debtor has difficulty finding new customers, which causes profitability problems. Seventh, the financial problems have arisen because the debtor has had too strong an expansion, which has not been market-adapted. Other similar reasons are also too large investments in a short period of time or too large start-up costs.

For the eighth reason, the economic problems have arisen because the stock has been too large. This factor seems to be a major problem for many companies. It is usually stated by the debtor that the payment difficulties arose as a direct consequence of the company being deemed to be obliged to have a large stock. The ninth reason relates to economic problems that have arisen as a result of the general economic downturn in the industry. For the tenth reason, the financial problems have arisen because the debtor has had difficulty in terminating durable contracts. The debtor has, for example, not been able to cancel an expensive lease, and this has resulted in liquidity problems. For the eleventh reason, the financial problems have arisen because the debtor has chosen incorrect funding for its operations. For the twelfth reason, the economic problems have arisen because external events of force majeure character arose. A typical reason for a farmer would be that the harvest was destroyed or that the animals became seriously ill. In terms of agriculture, a major problem for many seems to be to get the costs in relation to the income in balance. Other common events, which may be attributed to this category, are illnesses, personal problems and accidents involving key persons in the company.

To summarize; poor profitability, customer credit losses and incompetent management are the main causes of bankruptcy.

4. OVERVIEW OF THE COURSE OF INSOLVENCY PROCEEDINGS

Bankruptcy proceedings¹⁴⁵

Bankruptcy proceedings are governed by the Bankruptcy Act (1987: 672), KonKL, and Bankruptcy Ordinance (1987: 916). The law is general and can apply to both natural and legal persons.¹⁴⁶ As part of a bankruptcy procedure, it is possible to conclude a settlement (ackord). In such a settlement the creditors abstain from a portion of their claim. Settlement in bankruptcy is a very rare phenomenon in Swedish law.

During a bankruptcy, the debtor's assets are disposed of for the benefit of the creditors by the bankruptcy estate, which is regarded as an independent entity. The debtor is placed under compulsory administration, which is handled by one or more bankruptcy trustees appointed by the court. Usually, a lawyer is appointed as a trustee. The administration of the estate, however, comes under the supervision of a regulator (Tillsynsmyndigheten, TSM), which is a government agency. TSM is part of the Enforcement Agency (Kronofogdemyndigheten). TSM oversees that the administration of the bankruptcy estate is conducted in an appropriate manner and that the liquidation of the bankruptcy estate is not unnecessarily delayed.

The court's role (court of the first instance is called tingsrätten) is modest in bankruptcy. It has only to consider whether the debtor is insolvent and thus can be declared bankrupt. Therefore, the court's role is more of a controlling nature. It has virtually no discretion in matters arising from bankruptcy proceedings.

Safe-guarding interest of employees in bankruptcy

The main purpose of bankruptcy is to safeguard the debtor's assets in order to give the creditors the largest possible

145 This part is based on Persson, A. H., & Karlsson Tuula, M., National report of Sweden, in Commencement of insolvency proceedings (ed. Faber, D. & Vermunt, N. & Kilborn, J. & Richter, T.) 2012, p. 659 and the following pages, especially p. 663-664.

146 Compare also lag (2015: 1016) om resolution, where one can find provisions for a special procedure for reconstruction or settlement of inter alia credit institutions and securities companies.

distribution. There are also so-called secondary objectives; i.e. in dealing with bankruptcy, the bankruptcy trustee should take into account interests other than the creditor's. The bankruptcy trustee should take into account the employees and the general common interest in promoting long-term employment.¹⁴⁷ It is the trustee who decides whether any further operation of the debtor's business will continue for a short period of time or if all the assets should be sold immediately. If there is a sale, the accrued funds are distributed equally in relation to the size of the creditors' debt claims according to a certain order. All creditors should be treated equally, in keeping with the so-called equal treatment principle, which is, however, modified by the rules of priority.

Reorganisation¹⁴⁸

Reorganisation is regulated by the Business Reorganisation Act (1996: 764) and the Business Reorganisation Ordinance (1996: 783). The Act can only be applied to natural and legal persons – with some exceptions – who are professionals in any activity of an economic nature; i.e. are regarded as entrepreneurs. The term 'entrepreneur' should be interpreted broadly. The Act is a framework, and as such does not go into detail on how a reconstruction must proceed. It merely defines the outer limits of such a procedure.

Reorganisation is a voluntary process by which a business with cash flow problems can, following a decision by the court, be allowed a special procedure, termed reorganisation, to reconstruct its activities. The purpose of the reorganisation is to create legal conditions for the reorganisation of viable businesses that get into payment difficulties. The companies should be given a general moratorium during which reconstruction work can go on and enforcement may not take place.

Company reorganisation constitutes an alternative to bankruptcy proceedings. Therefore, creditors are temporarily impeded from applying for bankruptcy against the debtor during a reorganisation case.¹⁴⁹ If a creditor files a bankruptcy petition during the procedure, the bankruptcy proceedings will, if the debtor so requests, be stayed pending the completion of the reorganisation. Even if the debtor objects to the creditor's bankruptcy filing, however, this application can lead immediately to bankruptcy if the court believes that the creditor would otherwise be put in danger.

When a court reaches a decision on a reorganisation procedure, it will also appoint an administrator (rekonstruktör).¹⁵⁰ Just as in bankruptcy, the appointee is usually a lawyer, and it is important that the proposed administrator should enjoy the confidence of the creditors. The administrator must, jointly with the debtor, try to establish a rescue plan, showing how the purpose of reconstruction will be achieved.¹⁵¹ A reconstruction can be done on the substance and/or its financial implications. Reorganisation in substance refers to changes made in the operation of the debtor's business itself. These can include the debtor company changing its products, marketing or anything else in order to regain profitability. Financial restructuring refers to a settlement of the debts incurred before the application. The settlement can be made voluntarily with the creditors or be enforced by the court against the creditors' will.¹⁵² The claims are reduced by a defined percentage relative to the size of each debt claim, but must be given at least a 25 per cent dividend unless there are special reasons for a lower percentage. The statutory dividend is payable within one year after the court has confirmed the settlement.

The plan must be submitted to the creditors, which do not explicitly have to accept it.¹⁵³ The court cannot take any decision on the substance of the plan. However, the plan must be submitted to the court. The law does not contain any specific instructions on what a reorganisation plan must contain. During the reorganisation the debtor retains physical control over their assets but has a duty of obedience towards the administrator.¹⁵⁴ The reorganisation is terminated upon application by the debtor, the creditors or the administrator.

147 Chapter 7, Section 8 of the Bankruptcy Act.

148 This part is based on Persson, A. H., & Karlsson Tuula, M., National report of Sweden, in Commencement of insolvency proceedings (ed. Faber, D. & Vermunt, N. & Kilborn, J. & Richter, T.) 2012, p. 659 and the following pages, especially p. 664-665.

149 Chapter 2, Section 10a of the Bankruptcy Act.

150 Chapter 2, Section 10 of the Business Reorganisation Act.

151 Chapter 2, Section 12 of the Business Reorganisation Act.

152 Chapter 2, Section 12 of the Business Reorganisation Act.

153 See Hellners, T. & Mellqvist, M., *Lagen om företagsrekonstruktion*, 2 ed. 2013, p. 88.

154 Chapter 2, Section 15 of the Business Reorganisation Act.

Debt Reconstruction Acts

The Debt Restructuring Acts provides special procedures aimed at helping severely indebted individuals and entrepreneurs. It is the Enforcement Agency that alone administers cases seeking debt restructuring accruing to the two mentioned acts.¹⁵⁵ The Agency may grant debt relief in spite of one or more creditors opposing the proposal/application from the debtor. The Agency also handles cases for review of decisions on debt restructuring. The Enforcement Agency's decision can be appealed in the court of first instance (tingsrätten). Debt restructuring has approximately the same format according to the two laws but with some differences. One difference is that the entrepreneur must be able to pay some of their debts to the creditors.¹⁵⁶ The proceeding is shorter regarding entrepreneurs (3 years) than for debtors in general (5 years).¹⁵⁷ The conditions of obtaining debt reconstruction for entrepreneurs are also stricter than for ordinary debt restructuring.¹⁵⁸

5. PARTICIPANTS IN THE PROCEEDINGS AND THEIR RIGHTS AND OBLIGATIONS

Trustees in bankruptcy

Swedish law employs trustees in bankruptcy (konkursförvaltare), who manage bankruptcies, and administrators (rekonstruktörer), who are appointed while a business reorganisation is in progress. As mentioned earlier, if a bankruptcy order is made, the court must appoint a trustee in bankruptcy immediately as the debtor loses control over their assets when the bankruptcy decision is made.¹⁵⁹ Thus, the trustee will manage the bankruptcy estate and the debtor is prohibited from entering into any obligations that can be asserted against the bankruptcy estate.

A trustee in bankruptcy must have the special insight and experience that the assignment demands and in all other respects be suitable for the assignment.¹⁶⁰ Heavy demands are made concerning the trustee's qualifications, and so only a small number of specialists can be eligible for bankruptcy trusteeships. In addition to general knowledge of the law, a trustee in bankruptcy must have insights into business economics and management, knowledge of bookkeeping and accounting and knowledge of and familiarity with questions of commercial law. A person employed by a court of law is debarred from serving as a trustee in bankruptcy, so too is a person who is prejudiced; i.e. has a relationship to the debtor, a creditor or any other party that is calculated to impair confidence in their impartiality where the bankruptcy is concerned. Before a trustee in bankruptcy is appointed, the supervisory authority must be consulted

It is the duty of a trustee in bankruptcy to safeguard the creditors' common rights and best interests and to take all measures conducive to an advantageous winding up/liquidation of the estate.¹⁶¹ A trustee's duties can be divided into a material and a formal part. The material part comprises the trustee's duties of carrying out special investigations during the procedure, for example if the business is to be continued, or again, the possibilities of reopening certain transactions; i.e. whether transactions have occurred which have been detrimental to one or more creditors.¹⁶² The formal part refers to the trustee's task of compiling an estate inventory and a report. The report must state the measures taken in the course of the procedure during every six-monthly period. A trustee's report and a distribution scheme must also be presented. When the bankruptcy procedure is ended, an account must be rendered to the supervisory authority, by reason of its surveillance to ensure that the bankruptcy is appropriately managed.

155 Section 4 of the Debt Reconstruction Act (2016: 675) and Section 4 of the Debt Restructuring Act for entrepreneurs (2016: 676).

156 Section 9 of the Debt Restructuring Act for entrepreneurs.

157 Section 36 of the Debt Restructuring Act for entrepreneurs compared with Section 34 of the Debt Reconstruction Act.

158 Compare Persson, A. H & Henrikson, A-S., Regulation of instant loans and other credits in Swedish Law, *Juridica International*, 2014, p. 69-70.

159 Chapter 2, Section 24 and Chapter 7, Section 2 and Chapter 3, Section 1 of the Bankruptcy Act.

160 Chapter 7, Section 1 of the Bankruptcy Act.

161 Chapter 7, Section 8 of the Bankruptcy Act.

162 On the subject of recovery, see Lennander, G., Återvinning, 4 ed., 2013, Palmér, E. & Savin, P., *Konkurslagen. En kommentar*, Zeteo 2018-07-01., Renman, H., Återvinning enligt 4 kap. konkurslagen. En process- och insolvensrättslig manual, 2 ed., 2013.

A trustee in bankruptcy is duty bound to furnish the court, the creditors, inspectors¹⁶³, the debtor and the supervisory authority with information concerning the estate and its management.¹⁶⁴ In addition, on issues of major importance the trustee must consult the supervisory authority and creditors specially affected, unless impeded from doing so.¹⁶⁵ On such issues the trustee must also consult the debtor where appropriate.

Administrators in reorganisation

When a reorganisation procedure is decided on by a court, the court, as stated above, must appoint an administrator.¹⁶⁶ The administrator's most important task is to assess the commercial feasibility of continuing operations. The administrator therefore needs a knowledge of both general and insolvency law and insights into business economics and management. They must be able to investigate the possibilities of bringing about a settlement (private or public composition) with the creditors and must investigate the underlying causes of the payment difficulties. The administrator may need to change the debtor firm's organisation, production and speciality and improve its marketing. The role of the administrator can vary a good deal, depending on the nature of the debtor's problems, but the administrator must consult the debtor continuously. The outcome must be presented to the creditors in a reorganisation plan.¹⁶⁷

A reorganisation does not deprive the debtor of control over their assets, but it does oblige the debtor to furnish all information concerning their financial circumstances material to the reorganisation of the business.¹⁶⁸ Thus the debtor has a comprehensive duty of information towards the administrator concerning their financial circumstances. Added to this, the debtor must comply with the advice and instructions that the administrator gives them. Thus, the debtor has a duty of obedience towards the administrator where the running of the business is concerned, and they must obtain the administrator's consent before paying any debts accruing before the business reorganisation order was made.¹⁶⁹ The administrator may, however, consent if there are special reasons for doing so.

Creditors in bankruptcy and reorganization¹⁷⁰

One of a bankruptcy trustee's main tasks in connection with a bankruptcy is to draw up a distribution proposal.¹⁷¹ Priority between creditors are decided on the basis of the Right of Priority Act.¹⁷² (see more below under section 7). It is the insolvency administrator who is primarily responsible for verifying claims which are submitted by the creditors. The creditors are under no obligation to lodge proof of claim: it is sufficient that they present their claims to the trustee in bankruptcy. If, however, the trustee finds that distribution to non-preferential creditors is possible, they must apply to the court for special claims proceedings to take place.¹⁷³

For bankruptcies without a lodging of proofs procedure, which are the most common, it is up to the trustee to investigate the origin of the bankruptcy claims. The creditors are not forced to notify their demands within a certain period of time. A claim may thus be recognised despite the fact that it has only emerged at a late stage in the procedure, e.g., when the trustee has drawn up a distribution proposal. If the trustee has not received any information about a certain claim, the creditor may lodge their claim by, for instance, simply calling the administrator.¹⁷⁴ If the trustee finds that the claim is undisputed, they will include it in their distribution proposal. A claimant may lose their payment claim

163 If a creditor demands it, an inspector can be appointed by the court to supervise the handling of the estate on behalf of the creditor. Chapter 7, Section 30 of the Bankruptcy Act.

164 Chapter 7, Section 9 of the Bankruptcy Act.

165 Chapter 7, Section 10 of the Bankruptcy Act.

166 Chapter 2, Section 10 of the Business Reorganisation Act.

167 Chapter 2, Section 12 (1) of the Business Reorganisation Act.

168 Chapter 2, Section 14 of the Business Reorganisation Act.

169 Chapter 2, Section 15 of the Business Reorganisation Act.

170 The following is based on Persson, A. H. & Karlsson-Tuula, M., National Report for Sweden, Ranking and Priority of Creditors (ed. Faber, D. & Vermunt, N. & Kilborn, J. & Richter, T. and Tirado, I.) 2016, p. 541 and the following pages. See also Heuman, L., Specialprocess, 7ed. 2014 p. 267-268.

171 See Chapter 11, Section 4 of the Bankruptcy Act.

172 See SFS 1970: 979.

173 Chapter 9, Section 1 of the Bankruptcy Act.

174 Chapter 11, Section 4 of the Bankruptcy Act.

right if they are not included in the distribution proposal and if they fail to object to the proposal after it has been confirmed by the court within a three-week deadline.¹⁷⁵ Disputes are resolved primarily in writing and in discussions between the creditor and the trustee. However, the latter decides the matter by either including or not including the claim in question in their distribution proposal. If the creditor is unsatisfied with the result, the issue must be tried and determined in court.

With regards to bankruptcies with a lodging of proofs procedure, the bankruptcy claims are established carefully and based on dependable supporting documentation according to a more formal procedure, Chapter 9 of the Bankruptcy Act. The creditors are obliged to notify their claims in writing within a certain period of time. If they fail to do so, they lose the right to distribution. The right to a lodging of proofs out of time procedure, however, constitutes an exception to this rule.¹⁷⁶

Claim proceedings are not the same for bankruptcy as in a business reorganisation procedure. On the other hand, contentious claims are specially treated in a public composition.¹⁷⁷ A debtor or creditor wishing to raise an objection to a claim included in the composition must do so in a written communication to the administrator. The administrator can also object to a claim, in which case they must promptly inform the creditor concerned to this effect. If an objection has been raised, the court or the administrator must endeavour to bring about a settlement. Failing this, the issue must be tried and determined by the court.¹⁷⁸

Creditors' committee and creditors meetings

Creditors' committees are not appointed in bankruptcy proceedings, nor is there any meeting of creditors. In a reorganisation procedure the creditors must be informed that a meeting of creditors is to take place before the court. At this meeting a committee of creditors must be appointed if any creditor so requests. The committee must comprise of two or three members representing different categories of creditor interest – the credit providers, the state and the suppliers. A fourth employees' representative can be appointed if the debtor has more than 25 employees. In special cases, however, a creditor committee can be limited to a single creditor. The committee has the task of safeguarding the interests of all creditors and must assist the administrator with information; e.g. concerning the particular line of business in which the debtor is active. The committee can also give the administrator other advice necessary for the accomplishment of the reorganisation procedure. In practice, however, it is only in exceptional cases that any creditor committees have been appointed in connection with business reorganisation.

Employees

Provisions concerning an employee's entitlement to wages in connection with bankruptcy are found in Chapter 5, Section 2 of the Bankruptcy Act and Section 12 of the Priority Rights Act. The aforementioned rules give the employee, subject to certain specified conditions, an enforceable claim in the bankruptcy and (in reorganization) for wages or other compensation arising from the employment. The right of priority extends to claims which relate to the period prior to the granting of the application for bankruptcy to the court and within one month thereafter. The right of priority also extends to claims regarding severance pay relating to a period not exceeding the notice of termination period, calculated in accordance with section 11 of the Employment Protection Act (SFS 1982: 80). Severance pay with respect to periods during which the employee neither performs work on behalf of the debtor in bankruptcy, nor on behalf of any other person, nor operates their own business, is subject to the right of priority only if the employee can show that they have registered themselves with the public employment office as an applicant for employment. If an employee continues with their duties under their contract of service, the bankruptcy estate will be liable for their claim to wages or other remuneration for work done more than one month after the making of the bankruptcy order.¹⁷⁹ The right of priority also extends to holiday pay and

175 Chapter 11 Section 6 of the Bankruptcy Act.

176 Chapter 9, Section 20-22 of the Bankruptcy Act.

177 Chapter 3 of the Business Reorganisation Act.

178 Chapter 3, Section 20 of the Business Reorganisation Act.

179 See Chapter 5, Section 18 of the Bankruptcy Act. Concerning the bankruptcy estate's assumption of employer status, see; e.g., NJA 1979 p. 253 and cases from the Swedish Labour Court AD 1982: 143, AD 1982: 150 and AD 1997: 19.

holiday remuneration which have accrued prior to the filing of the petition for bankruptcy, to the extent that they have accrued during the current and immediately preceding year of earnings.

There is no special rule for employment contracts in bankruptcy. General rules of labour legislation apply. Therefore, the trustee can terminate an employment contract if there are reasonable grounds for dismissal due to redundancy (see further down under section 9).

As mentioned above, general preferential rights follow with wage claims and other types of claims associated with wages, Sections 12-13 Priority Rights Act. The claim for salary with general priority is, however, limited both in time and as regards the amount. The claim for salary with general priority is also associated with the wage guarantee rules in the Wage Guarantee Act (1992: 497). Regarding paid guarantee amounts, the State takes on the rights of the employer against the insolvent debtor or the debtor in a company reorganisation. The State does not, however, take on the rights of the employer according to Sections 12-13 Priority Rights Act, Section 28 Wage Guarantee Act.¹⁸⁰ The right of recourse of the State is thus non-prioritised according to the main rule, see Section 18 of the Priority Rights Act. If the State pays a wage guarantee, the main rule is that that part is regarded as non-prioritised according to Section 28 in the Wage Guarantee Act.

There are several provisions aimed at securing the right of employees to payment, the basic principle being that a worker who has not received their wages is entitled to strike (lay down their tools), declaring that they will not resume work again until they have received his accrued wages (right of lien). A measure of this kind does not mean that the employee is deemed to resign their employment, and, accordingly, the employee is not bound to observe the agreed period of notice.¹⁸¹ At the same time, of course, the employee is at liberty to resign their employment, subject to the agreed period of notice. The employee need not give any reason for such notice. Most employees have a relatively short period of notice, namely one month.

The Business Reorganisation Act does not make the debtor (employer) liable for the employee's wages after a certain length of time. The basic principal is that during the reorganization procedure the debtor must pay for employees' work. Since, however, the employee's wage claim does not qualify as a super-preferential right under Section 10 of the Priority Rights Act and does not constitute a claim on the estate in a subsequent bankruptcy, the employee has far less protection during a business reorganisation than in connection with a bankruptcy.¹⁸² However, it should be added that the regular provisions concerning management of the debtor's agreements during business reorganisation do not apply to employment/contracts of service.¹⁸³

Trade unions¹⁸⁴

According to Section 11 of the Employment (Co-Termination of the Workplace) Act (1976: 580), the trustee must – prior to taking a decision regarding a material change in the debtor business activities – on behalf of the bankruptcy estate on their own initiative, negotiate with the employee organization to which the debtor is bound by a collective agreement. The foregoing shall also apply before the trustee decides upon more significant changes to the working conditions or employment terms and conditions for employees who belong to the debtor's organization. Where special cause exists, the trustee may take and implement a decision before they have fulfilled their duty to negotiate. A major change is defined, inter alia, as a closure of the debtors business, transfer of the debtors business or operating impairment in the debtors business with repercussions on employment.

If the debtor is not bound by collective agreements, the trustee is obliged to negotiate with all affected employee organizations in matters relating to termination of employment due to redundancy or such transfer of the business, Section 13 of the Employment (Co-Termination of the Workplace) Act (1976: 580).

180 Compare NJA 2012 p. 876.

181 See AD 1942: 56.

182 See SOU 2010:2 p. 371.

183 Chapter 2, Section 20 of the Business Reorganisation Act.

184 The following is based on Danhard, E. Konkursarbetsrätt. Om arbetsrätt och lönefordringar i konkurs och företagsrekonstruktion, 6 ed., 2018, p. 50.

There is a negotiating obligation with the union organizations, even though trustees do not consider themselves to have an option for the debtor's business. The subject of the negotiations is how to discontinue the business, namely through the transfer of the business as a going concern or other alternatives. The obligation to negotiate always includes who will take over the debtor's business. It should be noted that the previously applicable collective agreement – if any – continues to apply after the bankruptcy, whether or not the bankruptcy estate enters into the employment contract as an employer. The collective agreement applies as long as there is any relationship left for which the collective agreement contains rules.

As mentioned above, the trustee is obliged, within certain limits, to pay particular attention to the option that which will most likely promote long-term employment, provided that this can be done without any significant adverse effect on the rights of the creditors.¹⁸⁵ The obligation to negotiate applies to ongoing issues during the whole period of the bankruptcy. Negotiations must be taken before the bankruptcy trustee commits themselves to a particular solution, whether this proves through a formal decision or by taking concrete measures. However, the negotiation does not need to have been done before the contracts of the employees are terminated.

In the case of reorganization, regular labor rules apply with the following exceptions. The debtor, i.e. the employer, does not have to pay any debts incurred prior to the court decision to initiate a reorganization procedure.¹⁸⁶ Due to the reorganization and the impairments which will have repercussions on employments, the obligation to negotiation with the trade unions is required.¹⁸⁷

In addition, if the reorganization will affect more than five employees, there is usually an obligation to alert the employment services in advance. In the event of reorganization of the debtor's business, redundancy may arise. Such a redundancy may, in accordance with section 7 of the Employment Protection Act (1982:80), constitute a valid reason for termination of employment by the employer. However, a termination presupposes that it is not possible to offer employees another position within the debtors business. In the case of dismissals due to redundancy, the employer must comply with the order of priority in section 22 of the Employment Protection Act or with rules in collective agreements. In the event of transfer of the debtors business from the debtor to another employer, the rights and obligations which are based on the employment agreement and the employment relationship which apply at the time of transfer shall also be transferred to the new employer.¹⁸⁸ If there is a transfer of the business, employees will automatically be transferred to the acquirer. The employment agreement and the employment relationship may not be transferred to a new employer where the employee objects thereto.

6. APPLICATION FOR THE OPENING OF INSOLVENCY PROCEEDINGS

Who can file for bankruptcy?

In order for a bankruptcy proceeding to be possible, either the debtor themselves or a creditor must petition the court for the debtor to be declared bankrupt. If the debtor is a corporate entity, ordinary rules in terms of eligibility to represent the debtor apply. Signatory power for a legal person does not automatically also entail the right for the authorised signatory to decide on the measures to be applied to the legal person concerned. Decision-making is instead dependent on the representative's position as a director or managing director of the company. Prior approval of the shareholders is not required.

In order for bankruptcy proceedings to be possible, the debtor must be insolvent. A debtor is insolvent when they are unable to settle their debts as they fall due for payment, assuming the inability to be more than temporary.¹⁸⁹ Assess-

185 See Chapter 7, Section 8 (2) of the Bankruptcy Act.

186 Chapter 2, Section 15 of the Reorganization Act.

187 Compare above Sections 11 and 13 of the Employment (Co-Termination of the Workplace) Act (1976: 580).

188 See Section 6b and Section 7 (3) of the Employment Protection Act.

189 Chapter 1, Section 2 of the Bankruptcy Act.

ment of insolvency must include an overall assessment of the debtor's assets. An assessment must also be made of the debtor's possibilities of disposing of assets in order to settle their debts in time. The debtor's capacity for settling their debts in time is decided with reference to as yet unaccrued liabilities, such as deferred taxes and charges or an impending claim in damages. The debtor's possibility of earning money or the debtor's capacity for obtaining new credits is also of importance in this connection. Even a debtor whose assets exceed their liabilities will be deemed insolvent if the assets are tied up and consequently cannot be realised as the debts fall due for payment. Temporary illiquidity, however, does not result in the debtor being deemed insolvent. An insolvency assessment should be made on the merits of each individual case and is a forecast of how the situation will develop in future. It should be particularly considered whether the debtor's activity is of a seasonal nature. In cases of longer payment incapacity, the creditors' interest should come first.

Regardless of whether it is the debtor themselves, or a creditor, who petitions for bankruptcy, the debtor's declaration of insolvency must be taken at face value, failing special reasons to the contrary.¹⁹⁰ If the debtor contests the creditor's petition, the creditor must substantiate the debtor's insolvency. In this connection there are three rules of presumption in the creditor's favour.¹⁹¹ Firstly, there is a presumption of insolvency if, within six months before the bankruptcy petition was filed, distraint of the debtor's assets has been attempted but has failed owing to the debtor not having sufficient assets to cover the amount distrainable. Secondly, insolvency is presumed if the debtor has announced a suspension of payments. The suspension of payments has presumptive effect if the debtor has made an express declaration to a wider circle of creditors, a 'factual' suspension of payments. Thirdly, insolvency is presumed in the event of the debtor having been called upon by a creditor to pay off a clear debt that has fallen due for payment but failing to do so within a week, whereupon the creditor has filed bankruptcy proceedings against the debtor within three weeks thereafter and the debt then remains unpaid. In order for this last-mentioned rule of presumption to be applicable, it is necessary¹⁹² for the debtor to be obliged, or to have been obliged, less than one year before the filing of bankruptcy proceedings, to maintain financial records.¹⁹³ The creditor's demand must include information to the effect that bankruptcy proceedings may come to be filed, and the debtor must be served with the demand.

In addition to the requirement of the creditor having to substantiate the debtor's insolvency in order for the application to be granted he must also establish that he has a claim on the debtor that entitles him to file bankruptcy proceedings against the debtor.¹⁹⁴ A creditor is deemed to have substantiated their authority if they can invoke the confirmation of a claim by a court of law or by the Enforcement Authority under the Payment Orders and Enforcement Assistance Act (1990: 746). The court must also accept the confirmation of a claim by a valid arbitration decision. This, however, is subject to the decision being enforceable under the Enforcement Code and on a court not having ruled otherwise after the arbitration ruling has been appealed. In cases other than those that have now been mentioned, the creditor must substantiate his authority to file bankruptcy proceedings against the debtor.

A creditor cannot have a debtor declared bankrupt if the creditor's claim is fully collateralised by the debtor's property or some comparable security.¹⁹⁵ If the collateral does not provide full coverage, it is possible for an under-secured creditor to have the debtor declared bankrupt. Nor can the creditor's bankruptcy petition be granted by a court if their claim has not fallen due for payment or if a third party pays the debt or furnishes adequate security for the creditor's claim. It should be added that a bankruptcy estate can be declared bankrupt.¹⁹⁶ Non-petition clauses can be binding. According to NJA 1974 p. 445, a creditor was not entitled to petition for bankruptcy due to an agreement with the debtor.

The material assessment by the court in connection with bankruptcy consists in establishing whether the debtor is insolvent.¹⁹⁷ If the petition for bankruptcy is filed by the debtor, it must be tried by the court immediately.¹⁹⁸ If, how-

190 Chapter 2, Section 7 of the Bankruptcy Act

191 Chapter 2, Section 8-9 of the Bankruptcy Act.

192 Chapter 2, Section 9 of the Bankruptcy Act.

193 See the Bookkeeping Act (Bokföringslagen, SFS 1999: 1078).

194 Chapter 2, Section 6 of the Bankruptcy Act.

195 Chapter 2, Section 10 of the Bankruptcy Act.

196 Compare NJA 1993 p. 641 and NJA 2003 p. 3.

197 Chapter 1, Section 2 of the Bankruptcy Act.

198 Chapter 1, Section 2 and Chapter 2, Section 14 of the Bankruptcy Act.

ever, there are special reasons for so doing, the court must set a time for a special hearing, which must then take place within two weeks of application being received by the court. If a bankruptcy application is filed by a creditor, the court must set a time for a hearing. This, as in the former case, must take place within two weeks. When a bankruptcy order is to be made, the court must immediately fix a time for a hearing at which the debtor in court has to take an 'estate inventory oath'; i.e. confirm the estate inventory by oath and under penal liability. Thus, the debtor has to certify that the particulars of the estate inventory concerning assets, liabilities and accounting records, with any additions or alterations made, are correct and that nothing has to their knowledge been added or excluded. Assets abroad are also to be included in the inventory. If the debtor is a legal person and there is more than one proxy, not all proxies need to take the oath. It is the trustee in bankruptcy who decides by whom the estate inventory oath is to be taken.

How can one file for reorganisation?

The Business Reorganisation Act lays down four distinct prerequisites for the commencement of a business reorganisation. First, the debtor must be illiquid or that there must be an imminent risk of illiquidity occurring.¹⁹⁹ Illiquidity means the debtor being unable to settle their debts as they fall due for payment, but this is a matter of temporary payment incapacity.

Second, the debtor must be a trader²⁰⁰, which includes all natural and legal persons professionally carrying on some form of activity of an economic nature. A trader who has carried on business but is no longer active does not, however, come within the scope of the Act. The size of the business, what kind of business or the form of association in which an activity is carried on is of no consequence. A trader may therefore be a trading limited company, a partnership, or an incorporated partnership or association. A trader may also be a natural person running a one-man business.

Third, an application must have a certain content when submitted to the court for adjudication. An application for business reorganisation must be in writing and must be submitted to the court constituting the debtor's general forum for civil disputes. A business reorganisation application can be made at the debtor's own request, or, with the debtor's consent, by a creditor. If it is the debtor personally who applies for business reorganisation, the application must include a brief account of the debtor's financial position and the causes of their payment difficulties.²⁰¹ If the debtor is a limited company, it is also appropriate for a control balance sheet to be included.²⁰² In addition, a list of creditors must be appended to the application, together with an account of how the debtor envisages the business being carried on in the future. An account must also be given, showing how a settlement can be reached with the creditors. Finally, the application must include a nominated administrator and particulars of his suitability for the task, which can be shown by the creditors having declared their confidence in the administrator who is to be appointed. If a creditor applies for a certain debtor to be made a subject of business reorganisation, the application must state the creditor's payment claim on the debtor.²⁰³ An application of this kind must also include particulars of the debtor's payment difficulties and nomination of an administrator. The creditor must show that they themselves or some other creditor has been adversely affected by the debtor's payment difficulties. An application by a creditor may only be granted if the debtor consents to it.²⁰⁴

Fourth, the court must undertake both a formal and a material examination of the application. In doing so it must judge whether there is a presumption of the procedure furthering the purpose of the business reorganisation; i.e. whether the debtor's business can be continued and made profitable again. A business reorganisation order may not be made if there is no prospect of the reorganisation succeeding. It is important above all to the creditors that a procedure should not be inaugurated without justification. The court must examine the debtor's application imme-

199 Chapter 2, Section 6 of the Business Reorganisation Act.

200 Chapter 1, Section 1 of the Business Reorganisation Act.

201 Chapter 2, Section 3 of the Business Reorganisation Act.

202 See Hellners, T. & Mellqvist, M., *Lagen om företagsrekonstruktion. En kommentar*, 2nd, 2013 p. 56-57. See also the requirements in Chapter 25, Section 14 of the Companies Act (Aktieföretagslagen (2005: 551)).

203 Chapter 2, Section 4 of the Business Reorganisation Act.

204 Chapter 2, Section 6 of the Business Reorganisation Act.

diately.²⁰⁵ On application being filed by a creditor, the court must set a time for a meeting at which the application will be examined. According to the main rule, the meeting must take place within 14 days of the application being received by the court.²⁰⁶

7. RANKING OF CREDITORS IN INSOLVENCY

As already mentioned, the ranking of claims in a bankruptcy is regulated in the Priority Rights Act (1970: 979), (Förmånsrättslagen, hereinafter PRA).²⁰⁷ The aim of the PRA is only to regulate in which order claims shall be paid during distraint²⁰⁸ and in bankruptcy. (The PRA is also important in reorganisation of companies).

One creditor can gain priority over others by asserting right of repossession²⁰⁹, set-off or priority (preferential) right. Other creditors may have claims – bankruptcy claims – which are either preferential or non-preferential; i.e. with or without priority. The Priority Rights Act lays down that creditors are equally entitled to payment in connection with distress or bankruptcy. Certain creditors, however, have a priority right to payment. Priority rights can be of two kinds, either general or special. A special priority right applies in connection with distress and bankruptcy and refers to certain property, Section 2 PRA. A general priority right applies in connection with bankruptcy only and refers to all property.²¹⁰ The priority right endures even if the claim has been assigned or is exercised through distress or otherwise passes to a third party.²¹¹

Creditors acquiring a special priority right have often secured their claim by means of a lien, which by definition carries a special priority right.²¹² A special priority right in real estate follows a mortgage on the property.²¹³ A special priority right in movable property pertaining to a business activity also accompanies a floating charge.²¹⁴ Floating charges enable an entrepreneur to encumber his property without needing to observe customary rules on pledging.²¹⁵

A special priority right takes precedence over a general priority right.²¹⁶ The ranking between different types of preferential rights is determined by the main rule in Section 9 PRA. Thus, special priority rights rank according to the sequence of sections in the Act and according to the numbering given in ss. 3a-7. The relationship between specific preferential rights in one and the same section is determined by the numbering in the section. Derogations from these rules are provided in Section 9 second and third paragraphs PRA. In addition, distress confers a special priority right to the property distrained.²¹⁷

A general priority right can accompany a certain type of claim.²¹⁸ A general priority right accompanies, for example the expense incurred by the creditor in having the debtor declared bankrupt.²¹⁹ A general priority right also accompanies

205 Chapter 2, Section 7 of the Business Reorganisation Act.

206 Chapter 2, Section 8 of the Business Reorganisation Act.

207 For a general view of Swedish insolvency law see Persson, A. H. & Karlsson-Tuula, M., National Report for Sweden, in *Commencement of Insolvency Proceedings* (ed. Faber, D. & Vermunt, N. & Kilborn, J. and Richter, T.) 2012, p. 659-705.

208 See the Enforcement Code (1981: 774).

209 If, for example, the creditor has sold a commodity by instalment purchase and with a retention of title, the creditor's title is not significantly affected by the bankruptcy. If the debtor is declared bankrupt the creditor can assert his right of repossession and recover his property, Compare Chapter 3, Section 3 of the Bankruptcy Act.

210 Section 2 of the Priority Rights Act.

211 Section 3 of the Priority Rights Act.

212 Section 4 (3) of the Priority Rights Act.

213 Section 6 (2) of the Priority Rights Act.

214 Section 5 of the Priority Rights Act.

215 The rules are set forth in the Limited Floating Charges Act, Lag (2008:990) om företagshypotek.

216 Section 15 of the Priority Rights Act.

217 Section 8 of the Priority Rights Act.

218 See Sections 10-14 of the Priority Rights Act.

219 See Section 10 (1) of the Priority Rights Act.

an employee's claim to wages etc. The state, however, will as a rule cover an employee's claim on an employer who has been declared bankrupt (state wage guarantee).²²⁰ The State shall be subrogated to the employee's right against the bankruptcy debtor or the corporate reorganization debtor with respect to guarantee amounts which have been paid. However, the State shall not be subrogated to the employee's right under Section 12 or 13 of the Rights of Priority Act. In cases of business reorganisation, the debtor firm is liable to reimburse the state for the wage guarantee disbursed during the reconstruction, assuming the latter to be successful.

As already mentioned, general preferential rights can only be claimed during a bankruptcy but are not limited to any specific property. Claims with general preferential rights according to the same section, enjoy the same rights, Section 14. A claim cannot be preferential unless it is stipulated as such in the law. This means that an agreement stipulating that a claim shall be preferential has no effect.

A creditor who has not secured his claim with a security conferring priority right has non-preferential status. Tax claims in general and claims for social security contributions are non-preferential. This also applies to foreign tax claims, or at least tax claims that originate in countries within the EU.²²¹ A creditor's claim can also be subordinated,²²² in which case they are only entitled to payment for his claim if creditors with non-preferential claims have received payment.²²³

To summarize: a provision on equal payment means that every creditor receives payment in relation to the claim, Section 1 and 18 PRA. Creditors, who may have preferential rights, have claims against the debtor arising prior to the commencement of the insolvency proceeding. Before any distribution can be made, property belonging to someone other than the debtor in bankruptcy must be separated, i.e. creditors with claims that are associated with the right to separation and repossession. In addition, there are also bankruptcy expenses as well as other debts incurred by the bankruptcy estate, e.g., administrative claims.

In Swedish law there are also non-enforceable claims, in other words claims that cannot be claimed from the estate or in the bankruptcy but which can be claimed from the debtor in bankruptcy.

Administrative claims (e.g. the trustee's remuneration and claims on the bankruptcy estate) have to be settled first. After these two have been settled, creditors with special priority rights and those with general priority rights come up for consideration. What then remains passes to the non-preferential or alternatively the subordinated creditors.

8. THE WAGE GUARANTEE RULES

The wage guarantee rules²²⁴ apply to both bankruptcy and business reorganisation. The rules are much the same for both procedures. In the case of bankruptcy, it is the trustee in bankruptcy who decides whether a wage guarantee is to be disbursed, Section 11 and 16 §§ of the Wage Guarantee Act. In business reorganisation this decision is made by the administrator, 16 §. The difference between bankruptcy and business reconstruction here is that in the latter case a wage guarantee means the reorganised debtor being allowed a respite where wage costs are concerned. In other words, the wage guarantee is repayable to the State once the procedure has been completed. Disbursement is affected by the county administrative board in the county where the bankruptcy/reorganisation is handled, 22 § of the Wage Guarantee Act.

In order for a wage guarantee to be payable, the wage claim must have fallen due for payment, Section 23 of the Wage Guarantee Act. In the case of bankruptcy payment is made under the guarantee for such a claim for pay or other remuneration and for pension that has a priority right under Section 12 or 13 of the Rights of Priority Act. In the case

220 See the Wage Guarantee Act, Lag (1992:497) om statlig lönegaranti, which is also applicable in connection with business reorganisation.

221 Compare Articles 45 and 53 in the EU Insolvency Regulation (Recast 2015).

222 Section 18 of the Priority Rights Act.

223 Section 19 of the Priority Rights Act.

224 See the Wage Guarantee Act (Lönegarantilag 1992:497).

of a reorganization, payment is made under the guarantee for claims for pay or other remuneration and for pension that would have a priority right under Section 12 or 13 of the Rights of Priority Act provided the employer would instead have been put into bankruptcy, Section 7 of the Wage Guarantee Act. Payment under the guarantee is also made for claim for pay during the period of notice of termination for a period after one month from the bankruptcy decision. The same applies in the case of a decision for reorganization, to the extent that the employee during the period of notice of termination has neither performed nor ought to have performed work on behalf of the employer, 7a of the Wage Guarantee Act.

Thus, all employees are entitled to wage guarantee compensation for claims up to and including the first month following the bankruptcy and a business reorganisation order. During the first month following a reorganization order, the administrator and the debtor must complete the necessary deliberations concerning the business; e.g. investigating whether job cuts are necessary. In addition, they must together decide how continuing operations are to be organised. After this, just as with bankruptcy, the wage guarantee compensation will not be disbursed if work has been done for the 'reorganisation debtor'; i.e. the employer. For each employee the wage guarantee is payable at a rate of up to four times the social price base amount under Chapter 2, Sections 6 and 7 of the Social Insurance Code.²²⁵ The amount is 182 000 SEK in 2018. The maximum amount is calculated on salary before tax. Social security shall not be taken into account, Section 9. A claim to wages or other remuneration is settled out of the guarantee for a total standing of up to eight months, Section 9.

In both bankruptcy and business reorganisation, unreasonable wage claims by an employee can be made subject to reduction, which is to say that a claim to wages, fees or pension cannot be asserted in so far as it manifestly exceeds what can be considered reasonable, having regard to actually work input, the profitability of the business and circumstances generally.²²⁶ The same applies to persons having a close connection with the debtor.

A person with a claim covered by the guarantee is entitled to compensation for expenditure in getting the employer declared bankrupt and for expenses in the event of the bankruptcy being written off. If a wage guarantee claim is assigned to a third party, then in principle, with certain exceptions, the right to payment lapses. No compensation is payable under the guarantee if an employer has been declared bankrupt previously.

9. LABOUR LAW IN INSOLVENCY

The employment contracts do not automatically terminate when the debtor company becomes bankrupt. Neither is the employment contracts automatically transferred to the bankruptcy estate from the debtor company, cf. sections 6 and 7 of the Employment Protection Act. However, employees are entitled to terminate their employment in connection with the employer's bankruptcy. The bankruptcy estate can through the trustee terminate employment as there is a reasonable ground for dismissal due to redundancy, Section 7 the Employment protection Act. Normally, the trustee terminates all employment contracts in connection with the bankruptcy. Employees are still considered employees of the bankruptcy debtor even though they perform work for the bankruptcy estate following instructions from the trustee. In order for the bankruptcy estate to enter as a party to the employment contract, an agreement is required between the bankruptcy estate and the employees. If the employees receive full payment through the wage guarantee, they are obliged to perform the work the trustee provides for the previously agreed salary.

According to Chapter 2, Section 1 and 11 of the Social Insurance Act (2000: 980), the County Administrative Board, as payer of wage guarantee, shall also pay social security contributions. However, the State cannot receive dividends for these fees paid in the debtor's bankruptcy. The same applies to company reorganization.²²⁷ The reason is that the

225 See SFS 2010:110.

226 Chapter 5, Section 2 of the Bankruptcy Act.

227 See NJA 1998 p. 834. The following is based on Danhard, E. Konkursarbetsrätt. Om arbetsrätt och lönefordringar i konkurs och företagsrekonstruktion, 6 ed., 2018, p. 349, 372 and 511.

State enters into the employee's right towards the debtor. However, an employee has no right to receive social security contributions from the employer and there is no rule that corresponds to Section 28 of the Wage Guarantee Act in respect of social security to secure the States' claim for recourse.²²⁸

228 Section 28 states that the State shall be subrogated to the employee's right against the bankruptcy debtor or the corporate reorganization debtor with respect to guarantee amounts which have been paid. However, the State shall not be subrogated to the employee's right under Section 12 or 13 of the Rights of Priority Act.

CASE STUDY #1:

GERMANY

By

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THE INSOLVENCY OF THE GROUP PRAKTIKER BAU- UND HEIMWERKER GMBH

The subject of the following text is the insolvency of **Praktiker**, a former “Do It Yourself” building supply store company with business activities in Germany and across Europe.

The Praktiker Companies

The Praktiker Group had a typical corporate network, which was divided for the business in Germany and abroad. In total the group “Praktiker Bau- und Heimwerker GmbH” employed more than 19,000 people in around 430 stores across ten European countries.

Causes of insolvency

Various causes led the Praktiker Group into the crisis and ultimately into insolvency. The initial problem can be found in the Praktiker Group’s unfunded and unbridled expansion strategy, which was accompanied by the unsolved challenge that the acquired companies did not really match and grow together. Praktiker stores set up a strong discount strategy (offering very often 20% sales rebates for periods of less than a year). This strategy failed in the long term (as clients did not buy products until the next 20% sales actions started) and caused far-reaching legal problems.

Furthermore, an investment backlog, especially regarding IT-based merchandise management systems and the infrastructure of the sales areas, reduced the competitiveness of Praktiker. The ongoing change of consultants and management representatives as well as changes in the employer’s supervisory board were further indications of impending insolvency. Moreover, the company management did not focus on the development of a sustainable long-term strategy including the works councils and the employees. The focus was laid on the financial market and not on the operating business – keyword: credit-financed growth. Increasing problems within the supply chain were a further driver towards the financial crisis and collapse.

Though it was one external and unforeseeable factor that sealed Praktiker’s fate: weather. The long and cold winter of 2013 was a key factor behind Praktiker’s insolvency. Given the absence of a normal spring season, most customers did not purchase gardening/spring-oriented products, prompting the crash of the company’s cash flow system.

All these aspects ultimately led to Praktiker filing for insolvency on 10th July 2013 and Max Bahr DIY stores filing for insolvency on 25th July 2013.

Insolvency proceedings (2013-today)

Praktiker’s insolvency proceedings can be divided into different phases. Phase I is the insolvency filing procedure dated 11th July 2013. The second phase is the preliminary insolvency proceedings covering the period from 11th July to 30th September 2013. Phase III describes the insolvency proceedings from 1st October 2013.

- > **Phase I:** Insolvency filing (Insolvenzanmeldung) and provisional insolvency proceedings
- > **Phase II:** Continuation of operations and sales efforts
- > **Phase III:** Closure of stores, shut down of operational activities and job transfer solutions

Possibilities for the works council to exert influence

The works council had many opportunities to exert influence. The employee representatives on the Supervisory Board were provided with early information on the seriousness of the situation and contributed to the simultaneous information of the Group Works Council and the economic committees. The works council had the opportunity to create transparency for all co-determination bodies inside the Group. The participation of employee representatives in the provisional creditors’ committee made it possible to be assertive for employee interests. The proposal and selection of the provisional insolvency practitioner by the vote of the works council was in line with the German law on

insolvency and as well as subject to co-determination. The regular, trustful and direct communication of the workers reps. with the insolvency practitioner can be described as positive factor dealing with the whole procedure of the insolvency from the employees' perspective. The insolvency practitioner gave green light to establish direct contact with potential investors in order to convince them of a takeover. Thus, the works council was enabled in this difficult situation to make full use of the possibilities offered by the German Works Constitution Act.

This case indicates that works councils in Germany can obtain support from trade union related experts having experiences of dealing with insolvencies from the workforce perspective. They can assist the workers reps. with important information relating to the insolvency proceedings and the possibilities of transferring the business. In addition to all these aspects, the works council also has a lot of possibilities for exerting influence in different phases as described.

The role of trade unions during the procedures

The responsible trade union ver.di also had different opportunities to exert influence in the insolvency proceedings. Ver.di was the responsible collective bargaining partner of the Praktiker Group and thus involved in the talks and negotiations to secure the business operations. As a result of different company acquisitions over the last years, different collective bargaining systems in the group exist. In the run-up to insolvency, collective restructuring agreements were concluded jointly. In many group companies there was a high degree of union membership, ver.di organised communication between the group companies and kept this structure of communication during the insolvency procedures. A group works council existed as well as several general works councils and over 300 local works councils. In addition, ver.di was represented on the creditors' committee of the Praktiker AG.

Potential Effects of the new Directive on the Case – Aspects from the Employee's Point of View

In the following paragraphs, employee-relevant aspects of the new Directive "*Preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30*" are tried to be transferred fictionally into the case study. This approach can be seen as a "*what... if scenario*", trying to detect whether the new directive would have had an impact on the Praktiker case from the past.

The approach of **Article 3** in the directive (*demanding relevant and up-to-date information about the availability of early warning tools and access to information*) matches our case study. Why? The workers reps. in the advisory board were provided with relevant information. But independently from this new legal pillar, at the end of the day, their impact on management and the strategic company decisions were too weak. Furthermore, the upcoming early warning signals on the Praktiker crisis were not deemed serious by most of the board and management. A binding Article 3 would not have had an impact on the results of that described case – as decisions from management were poor and ill-advised.

The approach of **Article 8** (*content of restructuring plans*) demands that member states shall require restructuring plans [...] to contain at least the following information: [...] the position of workers [...] And the modalities of information and consultation of the workers' representatives in accordance with Union and national law; [...]. The approach matches the case. The legal content would have been covered, but as a matter of fact the restructuring plans were set up much too late in order to save business and jobs. Praktiker had set up various restructuring plans, all of which did not take effects in time. The employees were included, even in the creditors' committee – this means in practice a stronger integration of employee interests than the Directive provides for. But in the end, it did not help to save Praktiker's business operations.

The content of **Article 9** (*Adoption of restructuring plans*) means that EU Member States may also make workers' claims be treated in a separate class of their own. What can be identified by that case is that the existing regulations in Germany already provide instruments for a separate class of employee interests, e.g. entitlement to a three-month insolvency benefit. But the legal content of Article 9 would not have improved the situation of Praktiker staff. As the article does not provide clear regulations for employees' rights to be privileged and secured.

The approach of **Article 12a** (*Workers*) means that Member States shall ensure that workers' rights under individual

and collective national and Union labour law are not affected by a preventive restructuring procedure. This legal pillar is totally covered in the case study: The rights on co-determination, information, consultation and especially having access to external experts, working in close cooperation with the union, were secured in that German case from the very first beginning.

CASE STUDY #2:

FRANCE

By

PHILIPPE MEUNIER, SYNDEX



THE INSOLVENCY OF CHOCOLATERIE DE BOURGOGNE

Presentation of the company

CB-CHOCOLATERIE DE BOURGOGNE is active in the manufacture of chocolate, chocolate products and cereal bars for the mass distribution and industry. The company has 185 employees and generated sales of €76.5 million during the financial year ended December 2016, with an operating loss of €19.7 million. The factory, located in Dijon, covers 61,000 m² and has a production capacity of 63,500 tonnes per year. The company has 8 production lines in operation.

The company's difficulties are old and structural

It passes through the hands of several major industrial groups, such as Nestlé and Barry Callebaut, before leaving their fold and thus losing significant volumes of activity. In recent times, the company has therefore been faced with commercial development challenges to feed the industrial tool, as markets with former shareholders are disappearing.

The measures taken by management put the company at risk

The company is facing a first receivership in 2014. It was taken over in 2015 by several shareholders: investment funds and the cocoa industry.

In 2016, the recovery plan failed: a shareholder withdrew from the project, financing did not cover the needs related to the activity and investments, the company once again aroused the mistrust of its supplier and customer partners, etc. From this year 2016, the question of the state of cessation of payments begins to arise. Shareholders then organize their withdrawal to reduce their financial risks while transferring it to financial partners and public authorities.

As part of this strategy, they will use several tools to anticipate business difficulties, including the following examples:

- Negotiation of debt deferral and tax and social security exemptions;
- The sale of a production line to one of the subsidiaries of investment funds
 - however, this subsidiary only pays part of the sale price, even though it is particularly attractive;
- The increase in capital of new shareholders (local industries), for small sums compared to overall refinancing
 - with a modest investment compared to the company's needs, these new shareholders take more than a third of the capital and are destined in the long term to become the majority (via the subscription of convertible bonds).
- Amicable negotiation with certain suppliers in the context of a conciliation procedure.

This procedure is opaque because employee representatives do not have access to it.

The shareholders leave the new local shareholders, the bank and the public authorities in the front line. In addition, the financing provided by the public authorities and by a bank is subject to specific guarantees that contain a major risk: the dismantling of the industrial tool because creditors will be able to sell the lines placed as guarantees, if the company does not repay its debts.

Worse still, shareholders waste precious time in the search for a real recovery solution, because the attention of the company and its advisors is focused for many months on legal and financial engineering and not on the construction of an industrial and commercial plan.

This is not to putting into question the importance of preventive procedures for dealing with business difficulties: the earlier the difficulties are dealt with, the greater the chances for a company's recovery. But the case of the Chocolate Factory of Bourgogne highlights a risk of instrumentalization / misuse of these procedures.

This underlines the importance of the tools and players of a collective procedure: for example, a judicial administrator, reports on the situation of the company and analyses the real intentions of the stakeholders. The same is true for workers representatives whose point of view it hardly heard in amicable procedures.

Actions of employee representatives prior to insolvency

The employees asked to meet with the shareholders in the first 6 months in relation to the failure of the recovery plan, which was refused. They benefited from the ordinary periodic information-consultation process via their Works Council and the support of a chartered accountant as provided by law. The expert confirmed the seriousness of the situation and questioned the credibility of management's recovery plans. They then contacted the public authorities to raise their awareness. The company's statutory auditor also informed the employee representatives of the seriousness of the economic difficulties and the Works Council launched an "alert procedure" that strengthens its role when the "continuity of operations" is at risk.

Once again, management played for time until the conciliation was approved by the Commercial Court, which did not consider the arguments of the employee representatives presented during the hearing. Only three months after the hearing, the recapitalization agreement signed between the company and investors failed, the company was placed in receivership. In addition, the trade unions had to negotiate back to the wall an unfavourable company agreement on the organisation of work in order to safeguard jobs and make the company more attractive in the search for a new buyer.

Actions of employee representatives during the insolvency process

When the company Chocolaterie de Bourgogne is in receivership, this procedure comes too late, the factory is practically at a standstill, a large part of the staff is partially unemployed, and stocks are zero.

Even more serious, it is not clear that the company is able to ensure the payment of wages for the first month of the proceedings and, even if the court will authorise new liabilities, it is therefore urgent to find a buyer in only a few weeks. The observation period preceding either the reorganisation or liquidation is shortened in view of the critical cash flow situation. The weakness of the buyer's project finally retained by the Court is also the consequence of the urgency with which he was forced to work.

In this context, employee representatives appoint an accountant to assist them and are heard at each stage by the Commercial Court. Behind the scenes of the judiciary, they inform workers of developments and ensure that the social climate does not deteriorate in order to maintain activity. They look for and meet candidate buyers in the absence of management and the receiver, they analyse the projects and their impact on employment. They will then be able to partially support the takeover project finally adopted by the judges, with which they are working to ensure that as many jobs as possible are taken over. The employee representative institutions will also negotiate in advance an agreement on economic redundancies and measures to support a part of the staff in finding a new job.

Concluding inventory of fixtures from the point of view of employee representatives

POSITIVE POINTS	NEGATIVE POINTS
<ul style="list-style-type: none"> ➤ The plant resumes its operations with a few former customers, although its medium-term sustainability has yet to be confirmed; ➤ Capacities and tools provided for by French legislation to understand and act; ➤ Recognition of the legitimacy of workers representatives in insolvency situations, whether by workers or by commercial courts; ➤ A very formative and emancipating experience for workers who find themselves struggling for the survival of their own company; 	<ul style="list-style-type: none"> ➤ The difficulty for workers representatives in being truly heard and influencing the decisions of public authorities and shareholders; ➤ A form of mistrust towards workers representatives on the ability to bring out proposals of collective interest; ➤ In particular, a lack of attention to operational issues and the "reality" of the company's situation; ➤ An instrumentalization of procedures for the early problem solving of difficulties for the benefit of shareholders but to the detriment of the sustainability of activities and jobs; ➤ The feeling of being threaten by layoffs when the relaunching of activities occurs

Employees in France have a number of rights that allow them to act at different stages of the proceedings, but more in the judicial process than in anticipation. This reflects the characteristics of the “French-style” social model, whose culture should evolve to encourage the action of workers representatives further upstream through social dialogue and the recognition of their expertise in the field.

CASE STUDY #3:

THE NETHERLANDS

By

ANDRÉ VAN DEIJK, GTP MEDEZEGGENSCHAP



THE INSOLVENCY OF IMTECH

Management overview

Imtech was a Netherlands-based internationally-operating technical provider of ICT, electrical and mechanical technical solutions. Imtech had 29000 employees in 35 countries and 4 main areas of operation. Imtech went bankrupt in 2015 due to a problem in working capital and a loss of trust of their shareholders. Although the loss of trust was triggered by fraud in the German and Polish subsidiaries, the real underlying causes were the principles upon which Imtech was managed. Simply put: Imtech grew fast by buying companies and was run on a strictly financial basis in a decentralized way with a view on shareholder value and insufficient integration of activities. This was already described as “a recipe for disaster” in Dutch management literature. The downfall of Imtech lasted several years in which insufficient action was taken to save the company. Much energy went into upholding the façade of control and performance, which was broken down by a number of reports showing the contrary. Only at the last moment a chief restructuring officer was appointed. Despite the possibilities that Dutch law offers, the works councils were not able to be of influence.²²⁹

Why this case?

There are three aspects that make this case attractive for this project:

1. The first is the international character. As both German and Dutch companies are involved (and indeed companies in other countries) the case offers the possibility of making a comparison between existing rules and regulations regarding insolvency. As such the case is offered to the participants in the workshops and the final conference and as a matter for further study.
2. The second aspect is the aspect of prevention and preventative restructuring, an intricate part of the proposed directive. Would Imtech have benefitted from such a restructuring? Imtech was brought down by its banks who sold off several divisions. The question this case wants to rise is if a preventative restructuring would have been a realistic alternative.
3. The third aspect is that, given that both in Germany and Holland the possibilities for works councils to influence matters are considered to be well developed, the question arises why they have not been more influential. Not to put any blame on them (far from it) but to stimulate a discussion on the instruments that are available to them and their use in terms of prevention of insolvency and signaling unwanted ways of managing the company and the lack of proper governance.

A disadvantage is that the case has not finished yet. Only recently the management was fined for disinformation of the shareholders; there was a formal complaints procedure, where several court cases have been activated against Imtech's accountants, its former management and against the supervisory board and its members. The trustees still have not finished their task and finalized their reports.

History of Imtech

- > **1860:** establishment of the 1st company
- > **1872:** merger with other founding company, the company becomes an important company in mechanical engineering
- > **1895:** electrical engineering is added to the activities
- > **1960:** merger with Internatio, the remnant of a former Dutch colonial (East Indies) trading company

229 Documentary Video's on Imtech worthwhile watching
https://www.youtube.com/watch?v=G_gHWL0tNrc
<https://www.youtube.com/watch?v=IPEMuLURtgo>

- > **1990:** Internatio acquires the German climate control company Rudolf Otto Meyer (ROM)
- > **1993:** establishment of Imtech by the carve out of the 35 technical companies of what was known as the Internatio-Müller conglomerate
- > Through the **2000's** Imtech rapidly expands by acquisitions and organic growth
- > 2012: Imtech is at its peak. The company employs 29000 people in 35 countries through 500 subsidiaries in Europe and 100 subsidiaries outside of Europe

Downfall of the company

- > **August 26th 2014:** new claim emission for EUR 600 million
- > **July 28th 2015:** bad results for the 1H 2015. Imtech needs another EUR 75 million and appoints a chief restructuring officer (external)
- > **August 4th 2015:** the banks want additional securities for Imtech Germany as part of their demands for supplying the extra EUR 75 million
- > **August 6th 2015:** Imtech Germany files for bankruptcy
- > **August 10th 2015:** Imtech communicates that talks about the extra financing produced no results
- > **August 11th 2015:** Imtech files for "suspension of payments" ("surseance van betaling" US: chapter 11)

In 2012 ABN Amro issues a report "Imtech: working through its capital" posing questions about Imtech's financials, specifically its working capital. Due to this critical report Imtech in early 2013 revealed significant fraud in the Polish and German operations. The building of a theme park in Poland lacked financing which was catered for by Imtech itself when it provided a guarantee for a bank loan to the project's developer. Subsequently, a promissory note from the developer for 147 million Euros was booked as cash. In Germany 30 million Euros disappeared through malversations involving family members of the CEO.

As a result, Imtech had to write off substantial amounts (EUR 300 million). Imtech was a favorite on the stock markets but due to these developments the stock price imploded. Specifically, because Imtech gave the impression that their operations were not under control as more fraud was revealed.

A claim emission, guaranteed by four banks, for the amount of EUR 600 million in compensation for the earlier write-offs did not give enough room for recovery as in 2015 another EUR 75 million were needed to provide work capital for the German entity. The banks refused a further loan and wanted more securities. By August 2015 Imtech was insolvent and large parts were sold off to clear its debts.

Reasons for insolvency

The Imtech case is complicated. For this case study we have been looking for concise reports on the case. Below you will find the lessons learned as stated by the Dutch website www.cmweb.nl, a magazine for financial issues. For those who like more detail we enclose the case as described by students from the Rotterdam School of Management.

Lesson 1 – Balance growth and internal control

Imtech's growth strategy was dominant in relation to internal control. The report to the shareholders shows that the internal control was insufficient given the nature and complexity of Imtech's business activities. The Board was more focused on a subsequent acquisition than on integrating the acquired organizations into the risk management and control system. Supervisory directors and internal audit departments in particular should be alert to this. The latter department was lacking at Imtech, which meant that an essential line of defense was lacking at the stock exchange fund.

Lesson 2 – Ensure a balanced board of directors

Imtech's Board of Management consisted of two gentlemen aged over sixty. As a result, the board was limited both quantitatively and in terms of diversity. Bad news were not accepted, signals were ignored, the supervisory directors were not or not timely informed and meetings of the management board were often not recorded in the minutes. More extensive and diverse governance could have led to more counterweight, better balance and better performance. In a way, this also applies to the period when the board was expanded to four members, but the diversity remained limited.

Lesson 3 – Ensure a critical supervisory board

Imtech's Supervisory Board is accused of inadequate supervision. They were not critical enough to the board by accepting that the internal control would be sufficient and that an internal audit function was not necessary. Insufficient action was taken on signals from analysts, publications by journalists and reports by KPMG, the company's accountant. The Remuneration Committee also missed an opportunity by focusing the remuneration of the Management Board too unilaterally on exclusively financial and growth objectives. What was noted with regard to the diversity of the management board also applies to the supervisory directors, the diversity was limited with one woman and five gentlemen who were all fifty years or older in 2011. A more critical attitude on the part of the supervisory directors could have prevented many of the problems or led to more timely intervention.

Lesson 4 – Do not restrict objectives to growth and finance

Imtech's strategic plan was mainly focused on growth, both in business and finance. What is remarkable about this plan is that there were no internal objectives, such as operational excellence or strengthening risk management. The plan was reflected in the performance-related pay of the Management Board, which for the long term was based on the share price and for the short-term 50 percent on EBITDA growth, 30 percent on revenue growth and the remaining 20 percent on personal targets. As a result, disproportionately large risks were taken to achieve the objectives. This also explains the many unprofitable projects Imtech had in its portfolio and the pressure on operating companies to report growth. Non-financial targets could have led to counterbalance and more balanced choices.

Lesson 5 – Pay attention to the cash flow

Imtech's management was, probably partly because of the performance fee based on this, mainly focused on profit and turnover. Less attention was paid to working capital, especially until analysts started asking critical questions about it. By making cash flow an integral part of the control mechanism, problems can be identified at an early stage. After all, there is a risk that losses in the work in progress (OHV) position are hidden and that the OHV is valued too optimistically, especially for organisations that work on a project basis.

Lesson 6 – Do not underestimate the integrity environment

It has become clear that Imtech's board did not have the right tone. There was no room for bad news and insiders speak of a strongly hierarchical fear culture, with top managers instructing subsidiaries to manipulate the figures. The inappropriate pressure exerted on ABN AMRO analyst is another bad example. However, a good integrity climate encompasses more, with Imtech also noticing many aspects such as sanctionability, feasibility and discussability.

Lesson 7 – Prevent complex financing

Imtech had a complex debt structure with approximately 45 financiers, 800 bank accounts and 9 cash pools. The financiers consisted of a syndicate of 11 banks, approximately 30 local banks at the country offices and 20 investors. This creates major problems when covenants are breached because the interests between these financiers will diverge, which can break up negotiations on refinancing. The new management of Imtech and its advisors therefore spent a lot of time realising a refinancing.

Lesson 8 – Be careful with earn-out constructions

Imtech used earn-out constructions in its acquisitions. This means that part of the purchase price is made dependent on the future profits of the purchased business. The benefits of this seem obvious; Imtech only has to pay if previously agreed objectives are achieved. However, because the management remained stuck with an acquisition and managed Imtech decentrally, they had the opportunity to maximise earn-out by applying earnings management. The decentralised business model meant that Imtech had little control over this, as the acquired company remained largely independent. Earn out schemes combined with a decentralized business model can be a deadly combination.

Lesson 9 – Beware of article 403

Imtech has issued so-called Article 403 statements for its group companies, which means that the holding company has assumed joint and several liabilities for the debts arising from legal acts of group companies. The advantage of Article 403 is that group companies do not have to publish their annual accounts independently. This is both a cost advantage because there is no need to prepare separate financial statements and a strategic advantage because there is no need to provide insight into the figures of the group companies. However, in the event of financial difficulties for group members, this article turns against the parent member because it is liable for the debts. The administrators and later trustees of Imtech could not prevent the bankruptcy of the whole of Imtech, partly because of this. Without the liability claim, it might have been possible to restart the holding company with a number of healthy group companies.

Lesson 10 – Be realistic and benchmarking

Finally, benchmarking could have taught the supervisory directors, shareholders and financiers of Imtech that something could not be right. It is unlikely that a concern can perform significantly better than comparable organizations for many years. In that respect, many people wanted to believe in Imtech's fairy tale.

These lessons make it clear that the combination of rapid growth, the fixation on financial results, extensive financial obligations and the lack of internal control and proper governance are telltale signs of an accident that is bound to happen. Similar lessons were already learned in the case of Ahold in 2003 and earlier in the early '80's with a company called OGEM, that succumbed under the pressure of high loans and deteriorating interest rates.

Preventative restructuring

The new directive stresses the necessity of the possibility of a restructuring in order to prevent insolvency. In the case of Imtech the main debtors were the banks that have been extremely involved in the decision process regarding the selling of parts of Imtech, already before insolvency occurred. A number of companies were sold before the actual insolvency occurred for an amount of 400 million Euros. Imtech seems to be a case where preventative restructuring and repairing the lack of control and proper governance might have made a difference were it not that the creditors i.e. the banks were not concentrated on the continuation of the enterprise but on their own interests.

In the meantime, it is clear that the Imtech case is extremely complicated. Several court cases have started, by shareholders and by the trustees. These cases revolve around the liability of the former management, the supervisory board and the accountant who all are alleged to have failed their duties, leading to misinformation of parties and the insolvency of the company.

Trade unions' and works councils' role

First of all, it is clear that neither works councils nor trade unions have a prominent role in the procedures around insolvency in the Netherlands as they are now. We refer to the country study that is part of this project.

Second, as was also clear from the interview with one of the works council members in this project and the documents we received, the works councils were aware of the seriousness of the situation, but that awareness came too late. They received requests for advice on making shares in Imtech companies available as guarantees for the banks, but those were issued just days before Imtech's insolvency became fact.

As is clear from the Imtech case preventative restructuring is an important instrument that should be used and that could have been used. In addition, we would like to stress that in our view there are possibilities to strengthen the workers voice preventing the insolvency of their company through a better use of existing instruments. Works councils need more and better support with regards to governance, internal control mechanisms, the financial state of the company, the appointment of directors and supervisors and more in general on strategic issues such as M&A. The lessons learned in the Imtech case give an example of a few of these aspects:

1. Strategy of the company, target setting and controlling its execution (article 31, article 24, article 25)
2. Division of responsibilities within the company
3. The appointment of directors (article 30)
4. The appointment of members of the Supervisory Board and the exchange between works councils and that board (structuurregeling)
5. Adequate financial information and the knowledge to interpret the information that is supplied, including the assessment of financial constructions at acquisitions (article 31, article 25, article 22)
6. Company culture and the lack of room for workers to ask critical questions (the core of works council activity)

The complex companies of today ask a lot of workers in terms of knowledge and experience. Even though the instruments are there to become knowledgeable it is evident that workers' voices need to be strengthened in terms of exercising control over key decisions that create insolvency risks and the way they are dealt with.

Works councils did receive requests for advice e.g. on selling the Imtech Marine division but they had to render their advice that same evening under the thread of being responsible for the loss of jobs in case they would not agree to the sale of their company. They should have been involved much earlier.

MAIN TAKEAWAYS/ FINDINGS

The following section provides a brief synthesis of the insolvency provisions of the six surveyed national systems, focusing mostly on the history, the course of the procedures as well as the participative rights – or lack thereof – of employee representatives. This comparative approach sheds light on the lack of consistency between the six Member States, reinforcing the urgency of procedural harmonization as well as an increased role of workers' participation within the process.

GERMANY

1. The number of insolvency cases in Germany has been **declining steeply since 2010**, mainly due to the country's favourable macroeconomic landscape.
2. Though much media attention has been given to high-profile cases such as Air Berlin or Solar World, insolvencies in Germany are still largely a **small-enterprise phenomenon**; in 2017, around 83% of all registered insolvencies occurred within companies with fewer than 5 employees.
3. The origins of the German insolvency law can be traced back to the *Gemeine Recht* (Common Law) as well as the *Partikularrecht* (Particular Laws) of the 19th century. The current form, commonly known as the **Insolvency Code or InsO**, came into force in 1999 but has experienced major amendments since (MoMIG, ESUG, etc.)
4. The InsO contemplates **illiquidity, over-indebtedness and imminent illiquidity** as the **three main grounds for insolvency**. In principle, proceeding shall only start when the claimant is in a state of *Zahlungsunfähigkeit* or inability to pay, i.e. illiquidity.
5. The existence of a **creditors' committee** in the insolvency proceedings is a uniquely German trait. Such a provision was included in the law for the first time by the ESUG. In practice, they existed long before the law's entry into force, but they had no legal basis. Only creditors or future creditors may be appointed as members.
6. Before a ground for insolvency has been established, the court typically appoints a so-called **provisional insolvency administrator**. Their role is to secure the *Massverbindlichkeiten* (insolvency liabilities) by ensuring that the operations of the insolvent company do not come to a halt until a decision on the opening of insolvency proceedings is met. Indeed, fully or partial closure of a company would have significant impact on the rights of the debtor, since they would be deprived of the possibility of continuing operations at a time when a reason for insolvency has not even yet been established.
7. Once proceedings start, the debtors' administrative and disposition powers are automatically transferred to the **official insolvency administrator** – this may be a legal practitioner or business expert, who must be independent from both the debtor and the creditor. Their role is fundamental in the course of the insolvency proceedings. Apart from overseeing the whole process and attending all relevant creditors' meetings, insolvency administrators are tasked with the **drafting of a report** detailing the financial situation of the debtor and their company. Based on this report, creditors decide whether the debtors' company is to be closed or provisionally continued, and whether an insolvency plan is feasible or necessary.
8. If an employer is insolvent and employees have received their wages or salaries only in part or not at all, the Employment Agency settles the outstanding payments with the employees concerned through **Insolvenzgeld (Insolvency Money)**. An entitlement to insolvency money exists in case of insolvency within the past three months (period of insolvency payments) of the employment relationship. The use of the insolvency money as a state instrument for restructuring is a Germany-specific peculiarity that does not constitute state aid contrary to European law.
9. The impending opening of insolvency proceedings – or the opening of insolvency proceedings themselves – do not constitute a reason for **employment termination**. The provisions under the Dismissal Protection Act or *Kündigungsschutzgesetz* continue to apply and must be respected.

10. The **role of works councils** is particularly important during insolvency procedures. Insolvency administrators are required to hold monthly meetings with work councils' members and keep them updated of any potential change in the operations or structure of the company. Likewise, should the insolvency administrator wish to make any important changes to the company (e.g. change working hours, release part of the workforce, order short-time work) they must obtain the previous approval of the works council.
11. The introduction of a preventive restructuring procedure has been discussed intensively in Germany since 2009. However, the latest amendments to the Insolvency Code have been more geared towards self-management and the use of debt restructuring measures such as debt-for-equity swaps.

FRANCE

1. While French law still pursues the objective of saving the company in difficulty and its jobs through the courts, liberal economists criticize the interventionist vision of the legislator and the systematic involvement of the courts and judicial representatives and stress the poor protection of creditors' interests. However, in 2017, the 53,991 insolvency situations impacted 161,942 jobs.
2. Today, nearly 8 procedures are applicable to French companies facing difficulties:
 - in a **pre-insolvency** situation: ad hoc mandate (special mediation), conciliation (conciliation), accelerated safeguard, accelerated financial safeguard and safeguard; there are very few pre-insolvency initiatives in reality: only the manager can launch this process and the company must still be solvent.
 - in **insolvency proceedings leading to receivership, liquidation** or professional recovery situations. Insolvency procedures can be initiated by the insolvent debtor, the creditors or public prosecutor.
3. After the opening judgement of the insolvency proceedings, the receivership proceedings start with an **"observation period"** of 6 to 18 months. The manager is assisted by a **receiver**. The manager can present a recovery plan that contains information and employment prospects. It may announce redundancies for economic reasons.
4. Should the plan fail to help redress the economic situation, a **disposal plan** may be ordered by the Court: the receiver will search purchasers for a full or partial transfer of the company. If a recovery is impossible, the court will designate a **liquidator** to terminate the company and make the employees redundant.
5. The workers are represented by the usual body for workers' representation, the **Economic and Social Committee** and can try to influence the proceedings with the adoption of opinions. In case of liquidation, workers are also represented by the **"Employee Representative"** whose role is to verify that the remunerations and compensations rates are correct, and to denounce underestimations towards the liquidator or Official receiver. They can support or represent workers during labour Court proceedings.
6. The **lack of wage guarantees during the period of receivership** is one of the main reasons for conversion into liquidation, to secure this payment.
7. Workers are **preferential right creditors**. In case of liquidation, the AGS (a mandatory insurance scheme for wages) may pay the wages and compensations under certain pre-conditions and ceilings. AGS then take workers' rank as creditor towards the company.
8. Collective dismissals are subject to **conflicting interests**:
 - During the period of the receivership: dismissals must be carefully analysed by workers' representatives because, in addition to their social consequences, they may **impoverish the company's workforce skills** and make it difficult to identify subsequent buyers.

- **In practice, the workers' representatives right to be involved in the proceedings, and particularly in finding alternatives to job losses is frequently undermined by the urgency** to proceed with redundancies to redress a financial situation and to meet the AGS pre-conditions for wage guarantees.
- 9. The Economic and Social Committee is informed and consulted at most of the stages of the process and can benefit from an independent chartered accountants' advice. It may also be heard by the official receiver on the company situation. It cannot be involved in conciliation procedures that are confidential by law, staff representatives are only informed of the content of the agreement when Court approval is required.
- 10. No specific information is provided to trade union delegates. However, they may negotiate an agreement in case of collective redundancies.

HUNGARY

1. **Insolvency procedures** are not a common practice in Hungary. Despite experiencing an upsurge from the year 2010, the number of yearly insolvencies remains far below 100; in 2017, a meagre 39 insolvency procedures were recorded.
2. Despite their infrequency, insolvency procedures in Hungary have a long history; the **first codified bankruptcy act** was developed as early as in 1870.
3. Hungary is a **creditor-friendly jurisdiction** with a strong focus on liquidation. There are two main types of liquidation procedures in Hungary: (1) **voluntary liquidation** (*végelszámolás*), which may be initiated by the company itself if its assets cover its liabilities. If this is not the case, i.e. the company is insolvent, it may be subject to a (2) **forced liquidation** (*felszámolás*).
4. **Voluntary liquidation** aims to restructure the company's debts so it may continue its operation – provided it manages to make an arrangement with its creditors – whereas **forced liquidation** inevitably leads to the liquidation of the company; the procedure merely focuses on the distribution of the assets of the company.
5. Courts shall adopt the ruling ordering liquidation **within sixty days** of receipt of the petition for the opening of liquidation proceedings. A ruling adopted for the opening of liquidation proceedings shall not be subject to judicial review.
6. As is the case in Germany, the **insolvency administrator** plays an important role throughout the insolvency procedures: they represent the interests of the creditors, supervise the economic activity of the debtors, overview the economic/financial situation and to some extent overt protect employer's rights.
7. The insolvency administrator is always selected by the courts, usually through a **random electronic process**. There was an exception introduced in 2011, however, when the category of "strategically outstanding important enterprises" was devised. In such cases, the insolvency administrator is appointed by the government by decree.
8. During the proceedings, **workers' wages must be paid in full**. When a company is not able to do so, the insolvency administrator may apply to the National Employment Fund. The fund is under the obligation to cover all workers' wages for up to six months. In addition, it must provide the workers with job search-related advice and assistance.

9. **Terminations** during insolvency procedures are regulated by the Hungarian Labour Code. In general, the obligations of the collective agreements of a given company remain valid during insolvency procedures. However, fixed-term contracts can be terminated before their official end date.
10. **Social plans** play only a very minor role during insolvency procedures in Hungary.
11. If the employer takes a decision with an impact on the workforce, **trade unions and work councils** can express their opinion and represent the workers' interests in economic, social and financial issues.
12. There are no provisions for **preventive restructuring processes in Hungary**. There is, however, a country-specific mechanism: a moratorium of 120 days before the responsible court formally opens liquidation procedures.

THE NETHERLANDS

1. The number of insolvency cases in the Netherlands has been **declining steeply for years**, mainly due to the country's favourable macroeconomic landscape. In 2017, the Netherlands registered the lowest number of insolvencies of the century.
2. Between 2007 and 2016, Dutch courts declared a total of **49,070 companies insolvent**, affecting **27,930 employees** (some companies were empty shells with personnel.)
3. Some of the insolvencies registered in the Netherlands involve viable, profitable business units that are sold by the administrator during the liquidation procedures and are continued by a buyer. This is usually known as a **"restart process"**. In such cases, dismissal protection legislation does not apply; the company buyer/restarter is free to choose their employees.
4. The **Dutch Insolvency Act (Fw) dates from 1893**. Creditors are central to the law. Interestingly, employees are considered creditors, but the procedure does not focus on maintaining employment; the law does not provide for reorganisation measures.
5. When a company is insolvent, the Dutch Bankruptcy Act offers two possibilities: first, the **suspension of payments** procedure, for insolvency due to liquidity problems. This procedure provides a financial "breathing space" to consider whether a restructuring concept may bring about positive outcomes. Second, the **bankruptcy/insolvency procedure**, for solvency problems. In this scenario, the entire company will be liquidated for the benefit of the creditors.
6. Dutch insolvency law has undergone a couple of major revisions, the last being in 2012 and focusing on three main "pillars", namely **fraud, reorganisation and modernisation**.
7. **Filing for insolvency** may be done by the company itself (i.e. the debtor), one or more creditors, or the Public Prosecution Service (OM). The request must be submitted by a lawyer, pursuant to Art. 5 Fw. When the Public Prosecution Service files for bankruptcy, there must be reasons of public interest, such as the misappropriation of assets and liabilities.
8. Once proceedings start, the court appoints a **liquidator** and a **supervisory judge**. The former, often a lawyer, is tasked with the managing of the liquidation estate. They must always look after the rights of the creditors. In the event of major insolvencies, more than one liquidator may be appointed. The latter, on the other hand, is always a member of the court, and is tasked with the supervision of the insolvency liquidator and trustee.

9. Pursuant to Art. 74 et seq. of the Insolvency Act, a **creditor's committee** can be set up in the course of the proceedings. This provides creditors with a platform where they can exert influence on the process. Although employees may sit on this committee, it rarely happens in practice. The committee can advise the trustee and has information rights; the trustee is obliged to provide the requested information. The trustee may convene meetings with the committee as often as he deems necessary. The appointment of a definitive committee takes place at the verification meeting.
10. **Employee representatives** (e.g. trade unions and works councils) play almost no role in the course of insolvency proceedings. There are virtually no statutory provisions that trade unions and Works Councils can invoke.
11. However, when it comes to **suspension of payments during insolvencies**, pursuant to Section 3 of the Collective Redundancy (Notification of Collective Redundancies) Act (WMCO), an employer **must** notify trade unions and the Employee Insurance Administration Institute (UWV) if they wish to terminate employment contracts for 20 or more employees within a period of 3 months. They must also consult the trade unions on collective redundancies.
12. Changes to the Fw are in the pipeline since the introduction of the 2012 "reorganisation pillar" – as described in point 6. This pillar has been implemented in the draft laws 'Continuity of Enterprises I, II and III' (WCO I, II, III for short) and is the result of new reorganisation methods: the **pre-pack** (draft I) and the **private coercive agreement** (draft II). The legislative proposals date back to 2013 but are still partly under discussion, partly because of the previously discussed ruling on the FNV/Smallsteps cases. Draft III should include legal provisions on the **participation of employees during insolvencies**.

PORTUGAL

1. In Portugal, **company restructuring is heavily stigmatised**. Business owners, consequently, tend to delay the process. When considering that court rulings and judicial processes in the country are long and overly-bureaucratic, the chances of successful restructuring are usually low.
2. The situation is made worse by the fact that most employers have low qualifications and lead micro companies, turning mainly to external accountants and lawyers for advice. Furthermore, national industrial relations are extremely conflictual and generally, workers' representatives and trade unions focus all their attention on the need for wage growth – there is **hardly any discourse on the need for appropriate restructuring/insolvency provisions**. As Riego aptly puts it, "in Portugal, the prevailing paradigm is one of managing change instead of anticipating it."
3. The current Portuguese insolvency code was passed in 2003 and is known as the **Code of Insolvency and Company Recovery (CICR)**. The CICR has undergone twelve revisions, the latest one taking place in 2018.
4. Apart from CICR, several **extra judicial mechanisms** with the aim of speeding up insolvency processes exist in Portugal. These include the **Extrajudicial Conciliation Procedure (PEC)**, launched in 1998; the **Business Recovery System through Extrajudicial Enforcement (SIREVE)**, launched in 2012 and finally; the **Extra Judicial Regime of Business Recovery (RERE)**, which replaced SIREVE in 2018.
5. Successive Portuguese governments have tried to strengthen the CICR and its associated extra judicial mechanisms through a set of **strategic institutional measures/support programmes**. Of particular relevance are the REVITALIZAR (2012) and CAPITALIZAR (2018) programmes.

6. According to the CICR, an insolvency occurs when it is **not possible to comply past or imminent obligations**. Insolvency indicators are therefore officially defined as: (1) the non-payment of fiscal labour duties, social protection duties, rents, etc; (2) insufficiency of attachable assets and finally; (3) the non-compliance with an insolvency or payment plan.
7. The CICR distinguishes between **insolvency** and **bankruptcy**, the first assuming economic recovery is a feasible prospect whereas the latter discards that possibility altogether.
8. The **debtor usually initiates** insolvency procedures. They are expected to report insolvency up to 30 days of the knowledge or the prediction of their inability to pay to the nearest tribunal – non-compliance with this deadline is a serious offence.
9. In the course of the insolvency procedures, assets are transferred to the **insolvency administrator**, who must sell them as quickly as possible and within one year, unless the creditors express their disagreement. Should the process take more than one year for no exceptional reasons, the insolvency administrator may be dismissed.
10. Creditors meet at some point between the 45th and the 75th day of the insolvency procedures. The aim of this **creditor meeting** is to decide on a potential insolvency/recovery plan.
11. **Workers' representatives** have an important role during the proceedings, being consulted and informed of the companies' situation and potential next steps. When an insolvency plan is submitted, the judge informs the workers' representatives as well as the other actors, who, according to Article 208 of the CICR, are required to issue an expert opinion within 10 days.
12. The MoU (2011-2014), signed between the Portuguese government and the troika, was responsible for the set-up of two institutional mechanisms to assist companies in difficulties. For the first time, **pre-financing mechanisms were created**: the **FCT (the Labour Compensation Fund)** and the **FGCT (Labour Compensation Guarantee Fund)**.
13. There are no specific references to **dismissals** in the Code of Insolvency and Company Recovery (CICR) or to labour relations. The CICR determines that the effects of insolvency on work contracts and labour relations are regulated by the Labour Code.
14. There are no **social plans** foreseen in Portuguese legislation.

SWEDEN

1. Swedish law does not possess a coherent body of legal rules concerning insolvency. The country distinguishes between three main forms of insolvency; (1) bankruptcy; (2) business reorganization and; (3) debt restructuring, each operating somewhat independently.
2. Consequently, the **following three legal provisions** exist:
 - a. The Konkurslagen (Bankruptcy Act)
 - b. The Företagsrekonstruktionslagen (Business Reorganization Act)
 - c. The Skuldsaneringslagen (Debt Reconstruction Act)
3. The laws, are however, somewhat scattered, and not integrated into a single code.

4. **Insolvency-related legislation has a long history in Sweden:** a complete set of bankruptcy laws were enacted as early as 1773, with revisions and amendments taking place in 1818, 1862 and finally in 1921. The current set of insolvency/bankruptcy legal provisions was passed in 1987.
5. In Sweden there is a tendency to steer viable companies in financial difficulties towards **liquidation rather than towards early reorganization**. Although legal provisions on business reorganization have been in force for more than twenty years, the procedures are rare, forcing many companies into liquidation.
6. For bankruptcy proceedings to be possible, either the debtor themselves or a creditor must **petition the court** for the debtor to be declared insolvent.
7. A **debtor is considered legally insolvent** when they are unable to settle their debts as they are due for payment, assuming this inability to be more than temporary.
8. Swedish law employs **trustees** (*konkursförvaltare*), who manage bankruptcies, and **administrators** (*rekonstruktören*), who are appointed whilst a business reorganisation is in progress.
9. **Trustees** are appointed by the court, and their duty is to safeguard the creditors' common rights and best interests as well as to take all measures conducive to an advantageous winding up/liquidation of the insolvency estate.
10. Prior to taking a decision regarding a material change in the debtor's business, trustees are required to negotiate with the **employee organization/trade union** to which the debtor is bound by a **collective agreement**. If the debtor is not bound by collective agreements, the trustee is obliged to negotiate with all affected employee organizations in matters relating to termination of employment due to redundancy or such transfer of the business.
11. On the other hand, the **administrator's** task is to assess the commercial feasibility of continuing operations. They must assess the possibilities of bringing about a settlement (private or public composition) with the creditors and must dig into the underlying causes of the payment difficulties. Furthermore, they are tasked with the drafting of a restructuring plan, which is shared with all creditors during the creditors' meeting.
12. During a bankruptcy, the debtor's assets are disposed of for the benefit of the creditors by the **bankruptcy estate, which is regarded as an independent entity**. The debtor is placed under compulsory administration, which is handled by the trustees appointed by the court. The administration of the estate, however, comes under the supervision of a **regulator** (Tillsynsmyndigheten, TSM), which is generally a government agency.
13. The **employment contracts** do not automatically terminate when the debtor company becomes bankrupt. Neither are the employment contracts automatically transferred to the bankruptcy estate from the debtor company. However, employees are entitled to terminate their employment in connection with the employer's bankruptcy. The bankruptcy estate can through the trustee terminate employment as there is a reasonable ground for dismissal due to redundancy.



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MORE DEMOCRACY AT WORK
Strengthen Workers' Rights in Company Law

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CONCLUDING REMARKS

This project fits seamlessly into the ETUC project series “Democracy at Work – the Need to Strengthen Workers’ Involvement”. The ETUC calls for a directive to introduce a new and integrated architecture for employee participation. Building on the existing EU acquis, the Directive should set high standards for information and consultation and introduce ambitious minimum standards on employee participation as an additional source of influence for workers. This should also apply to the area of insolvency law.

This Insolvency-Project has shed light on the many divergences Europe’s national legal systems exhibit when dealing with insolvency cases, highlighting the urgent need for a coherent, structured and cross-border European insolvency framework.

It has shown how such divergences include, among others, the criteria to open an insolvency procedure, the ranking of creditors, the provision of social plan – or lack thereof – as well as the role and level of participation of workers during insolvency procedures. Such divergencies, and in many cases legal inadequacies, contribute to the loss of thousands of jobs every year. Many of these bankruptcy cases are cross-border, affecting workers from a wide range of EU Member States.

The first section of this study – the **country Reports** – has provided a fabric of concepts and facts relating to the insolvency procedures of Germany, France, Hungary, the Netherlands, Portugal, the and Sweden. Each of the member state surveyed takes radically different approaches when dealing with insolvencies: Sweden, Hungary and Portugal are, for example, extremely **cred-**

itor-friendly jurisdictions, with a tendency to steer viable companies in financial difficulties towards liquidation rather than towards early reorganization. France pursues a more debtor-friendly insolvency law; the German Insolvency Code, on the other hand, is mainly committed to the interests of creditors, though the ESUG of 2012 has taken the first steps towards a more debtor-friendly insolvency law.

The six Member States show exceedingly diverging levels of insolvency-related **legal provisions**. Hungary, despite its creditor-friendly status, has a relatively coherent insolvency legal code dating back to the mid-19th century. In Sweden, on the other hand, insolvency laws are not integrated into a single code, with Bankruptcy, Business Reorganization and Debt Reconstruction acting as largely independent Acts with fully separate rules and processes.

Likewise, the rights of **employee representatives** in insolvency procedures vary greatly from country to country. In Germany, the co-determination, information and consultation rights of Trade Union and Works Councils members are secured in the InsO – the country’s Insolvency Code. Employee representatives must approve any important change undertaken by the insolvency administrator in the course of the proceedings, such as changes in work hours, dismissals, etc. In neighboring Holland, conversely, employee representatives play almost no role in the course of insolvency proceedings. There are virtually no statutory provisions that trade unions and Works Councils can invoke.

The Case Studies, especially Germany’s Praktiker case, have shown the potential effects the new EU Directive

would have had on the proceedings, highlighting the lack of clear regulations concerning the protection of employees' rights and privileges in company crisis situations, especially when it comes to outstanding salaries and basic rights.

Treating workers' wages as all other outstanding claims is highly problematic – steps must be taken to ensure that workers receive their wages as well as other payments or awards in full and without delay. Workers must retain their preferential creditor status, and despite assurances by the Commission, this status is currently jeopardised by the proposals for refinancing. Cross-class cram downs have the potential to unfairly impact on workers and in particular the application of collective agreements. This indicates that challenges still remain and possible consequences have to be elaborated and discussed during the stages of the project. The law should attempt to save businesses and jobs. This needs to be the subject of full information, consultation and agreement with the workers and their representatives. Workers representatives are best placed to distinguish genuine economic difficulties from « tactical insolvencies » and their support for any new organisation arrangements is a key element for a new and sustainable future.

When transposing the Directive into the respective national laws of the Member States, particular care must be taken to ensure that the legislator makes sure that the qualification of workers' and trade union representatives in this area is carried out by default. Similarly, the assistance of external experts in this complex field should, of course, be regularly available free of charge.



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