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EXCLUSIVE SURVEY

Insolvency law In the main European countries

A survey made by the experts of Taj law firm, a member of Deloitte Touche Tohmatsu Limited

Taj insolvency experts made a focus on **7 European countries** in order to compare **France to United Kingdom, Spain, Italy, Germany, Netherlands and Belgium.**

Leader of the Insolvency Group, composed of law firms (Affiliated or non-affiliated to Deloitte) from 19 European countries, Taj has made an exclusive survey on the different insolvency laws among European countries.

This study is about determining what the priorities of each law are in those seven countries and analyzing the issues below:

- *Does the law encourage pre-insolvency procedures? In an economic crisis situation, are the heads of insolvent companies more sanctioned or not?*
- *Is France more rigorous than its neighbors? Are the French reforms on the same line than the European members?*
- *Is France more focused on maintaining the economic activity and the employment or on repaying the creditors?*
- *What are the latest legal reforms on the subject and are there some reforms that could be done at a European level?*

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I. What are the priorities of European insolvency law? (according to the Insolvency Group)

France	• In case of **pre-insolvency procedure:** the conciliator (appointed by the president of the court - most of the time a receiver) 's duty is to promote the conclusion of an amicable agreement between the debtor and its main creditors as well as, if applicable, its usual contracting partners, which is intended to put an end to the business's difficulties. He may also make any proposals for the (i) safeguarding of the business, (ii) the continuation of the economic activity and (iii) the maintenance of employment. • In case of **Safeguard or Judicial Administration procedure**: 1. Reorganization of the company in order to pursue the economic activity 2. Saving the employment 3. Repayment of the creditors • In case of **Judicial Liquidation**: terminating the activity and selling the assets (as a whole or separately)
Belgium	• In case of **pre-insolvency procedure:** 1. facilitating the reorganization of the business in order to allow the continuation of the economic activity and the settlement of liabilities 2. maintaining the employment • In case of an **insolvency procedure:** selling all the assets and paying the creditors
Germany	**1.** Collective satisfaction of the creditors either by liquidation of the debtor's assets and distribution of the proceeds, or by reorganization of the debtor's company **2.** Reorganization and continuation of the debtor's company **3.** Preservation of employment The German Insolvency Code has just been amended and the expressive goal of the amendments is the facilitation of the reorganization of insolvent companies and therewith the preservation of the employment.
Spain	• Maintenaning the company's activity and avoiding liquidation • Providing for special protection to workers • Reimbursing the creditors • Providing for higher legal certainty to the Bankruptcy procedures
Netherlands	**1.** In case of **Suspension of payment:** reorganization of the company **2.** In case of B**ankruptcy:** liquidation of all assets for the benefit of the creditors and regulation of social interests such as the employment **3.** In case of **Debt restructuring natural persons:** starting whit a "clean sheet"

Italy	**1.** Reorganization of the company in order to pursue the economic activity, preserving the production and the occupational levels **2.** Repayment of the creditors **3.** Simplification and acceleration of the existing insolvency procedures
United Kingdom	**1.** Rescuing a company as a going concern **2.** Achieving a better result for the company's creditors as a whole than would be likely if the company were wound up **3.** Realizing property in order to make a distribution to one or more secured or preferential creditors.

Focus

The **main priority** of each country's law is to reorganize the company in order **to pursue the economic activity**, and by that, **maintain the employment**. In UK, the Enterprise Act 2002 ("Insolvency: A Second Chance) has adopted these priorities through a development of Administration. Germany was the last exception (satisfaction of creditors was the overall priority). But the reform of March 2012 confirms the global trend in Europe.

The social aspect of insolvency procedures is very present in all the European legislations.

The **repayment of the creditors** remains an important priority as well for many countries.

➔ **Since the major reform of 1985, France**'s top priority remains the preservation of the activity and therefore the employment.

II. What is the repartition percentage between pre-insolvency and insolvency procedures in each national law ?

	Pre-insolvency	Insolvency
France	*The pre-insolvency procedures are confidential under French law but according to a Deloitte study:* **3,443 pre insolvency procedures have been opened in the past 5 years (around 688 per year).** The use of pre-insolvency procedures clearly decreased during the past two years (-27%)	**59,614 insolvency procedures in 2011**, comparable to 2010
Belgium	**1,336 pre-insolvency procedures in 2011**	**10,528 insolvency procedures in 2011**
Italy	**965 petitions for a pre insolvency procedures in 2011,** Decrease of 6% with respect to year 2010	**12,094 bankruptcy procedures in 2011** Increase of 7,4% with respect to year 2010
Spain	*No official records to determine the repartition percentage between pre-insolvency and insolvency procedures.* The **pre insolvency procedure** called "refinancing agreement", is **often the first option** under an insolvency scenario	
Netherlands	No official records available. *There is no pre-insolvency procedure in Dutch law.* However, the procedure called **"suspension of payment" functions in daily practice as a pre-insolvency procedure (in 80% of the cases) and almost all of them become bankruptcy procedures**.	
Germany	**No distinction between pre-insolvency and insolvency** procedures under German Insolvency law **30,099 petitions for business insolvency procedures in 2011**, but only 74% have been opened (22,393)	
UK	• **England and Wales**: 18,044 Company insolvencies [16 871 company liquidation (increase of 5.1%) and 1,173 receiverships, administrations and company voluntary arrangements] • **Scotland**: 1,237 company liquidations • **Northern Ireland**: 355 company liquidations	

Focus

A comparison is complicated according to the different laws and the different kind of figures provided. However:

1. It can be observed that the trend for bankruptcy / insolvency procedures is on the increase.
2. Even if governments try to give a chance to pre-insolvency procedures (or the equivalent), there is still much more insolvency procedures. The fact that the pre-insolvency procedures are not so numerous is an illustration that governments are not reaching their top priority: to encourage the pursuit of the business activity.
3. There are still countries with no specific pre-insolvency procedures (as for Netherlands).

➔ French figures (between 50,000 and 60,000 new insolvency cases per year) are interesting as they are significantly higher than in Germany, UK or even Italy. This is probably due to legislation and Courts (very active), tax and social charges and recurrent undercapitalization of French Companies. Or is it because of the economic context that is more complicated in France for companies? Nevertheless, French bankruptcy law is regularly amended (new tools available) and French public authorities are actively involved in the reorganization of underperforming companies (the goal is to save the employment).

III. Do the sanctions against directors of insolvent companies evolve towards greater relaxation or towards stronger penalties?

➢ Strong sanctions against directors

- **An evolution towards tougher sanctions can be observed** among several European countries. **France** just voted the "PETROPLUS law" and **Spanish** law sets that directors have, under certain circumstances, to pay the company's debt. In **Belgium**, a recent evolution made that directors (de jure or de facto managers) can be, under certain circumstances, held responsible for paying the company's debt. The **Netherlands** have also strengthened the criminal penalties towards directors, however they are hardly ever applied and the directors more often face liability under civil law.

- Even though the **legislation has not been recently changed, bankruptcy courts are becoming stricter** regarding liability of directors, de facto manager and shareholders, that is notably the case in **Germany**. In **Italy**, the reform of the bankruptcy law did not introduce any amendment of the sanctions against directors, but criminal sanctions were already provided by the law. And the **United Kingdom**, passed The Companies Directors Disqualification Act 1986 provides the Court with punitive measures when it becomes apparent that a director has acted inappropriately in order to ensure that the business risks of companies and individuals do not come at the expense of the creditors and the customers.

➢ Sanctions remain more civil than criminal

To get to a criminal sanction, laws stand that the director must have obviously acted inappropriately. Otherwise, civil sanctions are more often applied. In **Belgium**, fraud must have occurred. The sanctions are more financial than criminal, directors must be obliged to pay the debts of the company, but jail sanctions are not so current.

➢ Focus on French law

In July 2005 and in December 2008, French bankruptcy law went under a large reform to notably soften the sanctions against directors in Judicial Administration and in Judicial Liquidation (especially the financial sanctions which entail a condemnation to pay off the totality or part of company debts in case of mismanagement).

But conversely, the fresh new reform called "PETROPLUS law" demonstrates a return to tougher sanctions against directors.

FOCUS

How to sanction more effectively (foreign) groups abandoning their French subsidiary? French bankruptcy law has recently stepped up applicable sanctions

French bankruptcy law has been recently amended by Law no. 2012-346 of March 12, 2012 relating to protective measures ("*Mesures conservatoires*") applicable to Protection procedures ("*Sauvegarde")*, Judicial Administration ("*Redressement Judicaire*") and Judicial Liquidation ("*Liquidation Judiciaire*") procedures.

This new reform is applicable since March 13 to all procedures opened at that date and not only to new procedures to be opened as from that date.

The subject of PETROPLUS law is to extend to Judicial Administration procedures the possibility already existing for the Court in a Judicial Liquidation to order urgent protective measures (like seizure, pledge or mortgage) on assets owned by the *de jure or de facto* managers sued by the receiver for mismanagement leading to the company's suspension of payments (new hybrid sanction).

The goal of such protective measures is to prevent the managers concerned from trying to safeguard their assets before the French court has issued a decision.

Such protective measures are also available if a receiver or a liquidator sues a legal entity (usually a parent company belonging to the same group) or an individual to extend the bankruptcy procedure opened on one legal entity to another entity or individual.

Moreover, PETROPLUS law has given two new powers to the bankruptcy judge: when a protective measure has been ordered, the bankruptcy judge can also authorize (i) the sale of the assets seized under the protective measure and (ii) the use of the purchase price to cover "labor and environmental expenses related to the bankrupt company".

In this situation, owners sued may never recover their assets seized under protective measures even if they are later on declared not guilty!

➔ By this new reform, **French authorities obviously want to sanction with more efficiency groups** (Foreign groups are specially targeted) which are suspected to bad behavior when sacrificing a French subsidiary.

IV.What are the main tendencies of law's current reforms?

➢ The main reforms of each country aim to promote the maintenance of the activity

Belgium has introduced a new pre-insolvency procedure, the 'Law on the Continuity of Enterprises' of 2009.

In **Germany**, the creditors have now the capacity to nominate an insolvency administrator. This new disposition helps to act before it is too late and a new pre-insolvency reorganization procedure has been established which will only be open for debtors in a state of threatening illiquidity or over-indebtedness but not for debtors that have already entered into a state of actual illiquidity.

Spanish last reforms have focused on the following matters: establishment of refinancing agreement (alternative to bankruptcy procedures), streamlining and simplification of bankruptcy procedures, improvement of the publicity registration system, strengthening of the possibility of structural modifications during the Bankruptcy Procedure, strengthening of bankruptcy procedures for corporate groups and modification of the insolvency administrators' status.

Italy has introduced new pre-insolvency procedures to avoid the declaration of bankruptcy, the aims of these procedures are:

- Recovery and reorganization of the Company instead of liquidation
- Preservation of the going concern
- Promotion out of court negotiation between debtor and creditors

The United Kingdom has created the restructuring moratorium which is envisaged that an extended "breathing space" will allow a company to formulate a strategy that will allow them to return to financial wellbeing.

➔ All these reforms encourage pre-insolvency procedures and try to buy time for the companies to maintain their activity.

Focus on French current reforms

➔ **Early treatment of the difficulties:**

A new bankruptcy procedure called “Sauvegarde Financière Accélérée – SFA” (Financial and speeded-up Protection) was created in October 2010 by a law based on the US Pre-packaged restructuring Plan for distress LBO.

The SFA consists in **optimizing and extending a pre insolvency procedure** (“Conciliation”), blocked by the refusal of the minority of financial creditors to subscribe to a solution ensuring a restructuration of the financial debt of the underperforming company. The target is always **an early treatment** of the difficulties without waiting for the default in payment.

➔ **Conversion of claim into equity**

Reorganization Plan [best final outcome for Sauvegarde (Protection) or Redressement Judiciaire (Judicial Administration) proceeding] has been optimized. Now, beside discount and payment terms, creditors can choose or be imposed a conversion of their claim into equity.

➔ **Greater severity against directors with the** PETROPLUS law

V. What are the main subjects which would justify a reform of the EC regulation on insolvency procedures?

The Insolvency Group has determined the three themes below as the principal reforms of the EC regulation needed today.

1. An extension of EC Regulation to:

a. Pre-insolvency court supervised procedures

b. Corporate (multi-national) groups: UK and Netherlands request a clear and appropriate definition of the COMI (Center Of Main Interest) in order to avoid forum shopping.

2. Creation of a European Register for the exchange of information

France, Belgium, Italy and UK request a better coordination, co-operation and communication between national courts, bankruptcy judges, practitioners (receivers and liquidators) and creditors involved in pan-european insolvency procedures.

3. An harmonization of European Procedural Law

- ➔ Spain pointed out the need to provide for (i) alternative ways to seek the balance between the viability of the company and judicial guarantees required for creditors and (ii) procedural simplification.
- ➔ Italy pointed out the need to harmonize civil and criminal sanctions on a EU basis
- ➔ Germany pointed out the need to harmonize the treatment of licensee in insolvency procedures within the member states and therefore subject to the EC regulation. In Germany, the expertise of US and Japanese insolvency law and professional is used as an example
- ➔ Globally, European countries'concern is also to ensure a higher legal security to the insolvency procedures.

Conclusion

- This survey leads to the conclusion that in times of economic and financial crisis, the insolvency laws tend to help the companies, especially in order to maintain economic activity and employment. At the same time the sanctions against the director are getting stronger in Europe. The judges are looking for setting examples.

- The question of the convergence of European countries insolvency laws is always at stake. As the company law is far from being common to all members, the route is still long. Still, some reforms are needed and could be useful today in order to make the insolvency procedures more effective.

- France mainly focuses on the maintenance of the employment. Unemployment is a major political and social concern that leads the legislators to strengthen the protection of the employees and to emphasize sanctions in order to prevent directors from inappropriate behavior with the Petroplus Law for example.