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SOLICITORS

BANKRUPTCY LAW IN THE
EUROPEAN UNION
AND FORUM SHOPPING
A REVIEW

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Bankruptcy law in the EU and forum shopping

Bankruptcy is a process where the assets of a person who owes money (a “debtor”) are realised and distributed among the people or entities to which he owes money (his “creditors”). Bankruptcy law governs the recovery of debts where the debtor is an individual rather than a company. A bankruptcy order has a significant impact on the ability of the debtor to borrow and trade.

The EC Insolvency Regulation¹ (the “Regulation”) came into force across the EU (with the exception of Denmark) on 31 May 2002 in an effort to harmonise individual and corporate insolvency proceedings throughout the EU. It determines pan European jurisdiction for the commencement of main and secondary insolvency proceedings in all EU member states except Denmark. While not intending to harmonise the substantive insolvency laws across the EU, it provides a framework within which the different insolvency regimes in EU member states can operate. It therefore does not create a single EU insolvency law; instead it allows for each individual EU member state to have its own insolvency proceedings while improving the efficiency and effectiveness of such proceedings.

FORUM SHOPPING

Forum shopping is a process where a plaintiff chooses among two or more courts in different countries that have the power to consider his case and he initiates legal proceedings in the country that is likely to consider the case more favourably.

One of the Regulation’s main objectives is to prevent forum shopping for insolvency jurisdiction. Recital 4 of the Regulation states that “it is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one member state to another, seeking to obtain a more favourable legal position (forum shopping).” This is primarily achieved by the fact that the Regulation provides that two sets of insolvency proceedings in different EU member states can be run in parallel depending on an individual’s assets and business interests and where they are located.

Centre of main interests

The Regulation applies to all debtors (natural persons, legal persons, traders or individuals). It contains choice of law and jurisdiction provisions and envisages two different types of insolvency proceedings:

1. Main proceedings.

These proceedings have universal scope and encompass all of the debtor's assets and affect all creditors, wherever located. Annex A of the Regulation lists these for each member state and it includes bankruptcy proceedings in Ireland². The liquidator in these proceedings may exercise his powers in other member states provided that secondary proceedings have not been opened (or commenced) there.

2. Territorial proceedings (including secondary proceedings)

These are winding up proceedings and may be opened in other EU member states where the debtor has an "establishment". They are insolvency proceedings which involve realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Annex B of the Regulation lists these for each member state. In Ireland the procedures listed include bankruptcy proceedings³. A liquidator in the main proceedings or a creditor may apply to have this type of proceeding opened. Secondary proceedings can only be winding up proceedings and therefore cannot consist of a rescue procedure such as company examinership under Irish law.

The Regulation provides that main proceedings may be opened in the country where the debtor which is insolvent has its centre of main interests (COMI). Once main proceedings have been opened in one member state, any proceedings opened in another member state must be secondary proceedings. COMI is not defined in the Regulation although it is the concept on which the Regulation hinges – in order for main proceedings to be opened in a member state the debtor must have its COMI there.

While not defined, the Regulation indicates that the COMI should correspond to:

1. The place where the debtor conducts the administration of his interests on a regular basis; and
2. Is therefore ascertainable by third parties.

Under the Regulation once proceedings are opened in one EU member state these proceedings must be recognised in all other EU member states.

Secondary winding up proceedings may be opened in other EU member states where the debtor has an "establishment" as set out above. This means "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods". This is likely to include a branch office of the debtor, or an established place of business, but not the mere presence of assets, such as a bank account. Secondary proceedings

are limited in scope to assets located in the member state where they are opened. In limited cases, such proceedings may be opened before the main proceedings in which case they are referred to as territorial proceedings, for example, if local creditors request it or where main proceedings cannot be opened under the law of the member state where the debtor has his COMI.

Article 3 of the Regulation states that the courts of the member state within the territory where the debtor's COMI is situated have jurisdiction to open insolvency proceedings. However, crucially, it goes on to say that "where the centre of a debtor's main interests is situated within the territory of a member state, the courts of another member state shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other member state. The effects of those proceedings shall be restricted to the assets of the debtor, situated in the territory of the latter member state." Therefore to the extent that an individual can move his COMI from Ireland to a more favourable jurisdiction (such as England and Wales) to have main insolvency proceedings commenced there, that individual's Irish assets could still be subject to secondary bankruptcy proceedings in Ireland if he still has an "establishment" (as defined above) there.

Article 5 of the Regulation states that the opening of insolvency proceedings shall not effect the rights *in rem* (in a thing) of creditors or third parties in respect of tangible or intangible, moveable or immovable assets belonging to the debtor which are situated within the territory of another member state at the time of the opening of proceedings.

COMI: case law

As the concept of a COMI is not defined it is necessary to look at what the courts have to say. In the 2006 case of *Susanne Staubitz – Schreiber*⁴ the European Court of Justice (ECJ) held that Article 3 of the Regulation must be interpreted to mean that the member state in which the debtor's COMI is situated has jurisdiction to open proceedings even if the debtor moves his COMI to another member state after lodging the request. ECJ decisions are binding in all EU member states. In this case a German resident applied to open insolvency proceedings in Germany after her business in Germany failed and then moved to Spain to work there. The German courts refused to open insolvency proceedings on the grounds that it had no jurisdiction to do so as at the time the court considered the application, the debtor's COMI was in Spain. The German court asked the ECJ if this was a correct interpretation of the Regulation. The ECJ held that a debtor's COMI should be assessed on the date that the application to open insolvency proceedings is filed and therefore the German courts retained jurisdiction to open main proceedings.

This interpretation is consistent with the Regulation's objectives as the prevention of forum shopping would not be achieved if the debtor could move his COMI to another member state between the time when his request to open insolvency proceedings was filed and the time when the judgment was delivered.

There does not appear to be a minimum period that a person must spend in a member state before it becomes their COMI. It is a matter for the court to decide in each

case depending on the particular facts. For example, in *Shierson v Vlieland-Boddy*, an English 2005 decision, Vlieland-Boddy had lived and worked in England and then had moved to Spain where he became resident. He only returned to the UK to visit his children. The Court of Appeal held that he had moved his COMI from the UK to Spain on the date of the bankruptcy petition. The court held that the COMI is to be determined in light of the facts as they are at the relevant time for determination and this can include historical factors. The court also held that regard must be had for the need for the COMI to be ascertainable by third parties, especially creditors. The COMI must have some element of permanence but it does not have to remain fixed in one place and a debtor may seek to position his COMI for a self serving purpose. As the debtor's COMI was in Spain only secondary proceedings could be opened in the UK as the debtor had an establishment there. This judgment may, in some ways, prevent forum shopping because it allows for historical factors, such as where the debtor conducted his affairs prior to setting up a COMI in one member state, to be taken into account when assessing a debtor's present COMI. However, on the whole it seems that a person's COMI can be moved with relative ease in certain circumstances, as in this case the debtor had only lived in Spain for nine months.

In a later English case, *The Official Receiver v Eichler*⁶ the Official Receiver applied to annul a bankruptcy order made in England on the ground that the bankrupt's COMI was Germany. In this case Dr Eichler moved to England to work as a locum doctor. His wife remained in Germany and the only creditors in the bankruptcy proceedings were

in Germany. The Chief Registrar commented in the case that the general practice of the court was to accept at face value evidence sworn in support of a debtor's petition and only to make enquiries of a debtor if it appears there is no justification for invoking the bankruptcy jurisdiction. He accepted that, at the date of the petition, the debtor's COMI was in the UK on the basis that the debtor continued to work in the UK and his habitual residence and professional domicile was in the UK and referred to the *Susanne Staubitz – Schreiber* case. He had been working there for the greater part of six months prior to the petition. The Registrar noted that he was not aware of any minimum period which a person must spend in a member state before it becomes his COMI and made the bankruptcy order.

This decision reinforces two aspects of the *Shierson v Vlieland-Boddy* case in that nothing in the concept of COMI prevents a debtor's centre of main interest being changed and that the country in which the debts were incurred is irrelevant for the purpose of establishing the COMI.

As the COMI is not specifically defined in the Regulation it is possible that courts in different jurisdictions would come to different decisions. In *Re Eurofoods IFSC*⁶ the case concerned a company implicated by the collapse of the Parmalat group in Italy. The Irish courts had appointed a provisional liquidator to an IFSC company which was not recognised by an Italian court which appointed an extraordinary administrator subsequently. The ECJ held that proceedings were correctly opened in the Irish High Court and should have been recognised by the Italian court. While this case concerned corporate insolvency it does reinforce

the criterion that the COMI should be ascertainable by third parties. Grier comments that following this case it will be easier for an individual to move his COMI than it is for a large trading company.⁷

Mitchell has pointed out that as a result of the internet, the physical location of the debtor, its agents or goods may have little or no significant relationship with what might be the most appropriate insolvency jurisdiction.⁸ He also claims that English courts are more concerned with questions of management and finance whereas European courts concentrate more on physical presence and the place of registration. He points out that the Regulation does not contain any anti-avoidance provisions to give effect to the prevention of forum shopping and that it is in the interest of debtors to arrange their affairs in a manner that they can establish their COMI in a jurisdiction that is perceived to be more favourable. The Regulation therefore effectively promotes a race to jurisdiction⁹.

Case study

An Irish property developer JD who lives in Ireland with extensive property interests in Ireland and England is in financial difficulty. Under the EC Insolvency Regulation main bankruptcy proceedings may be opened in the country where he has his centre of main interests or COMI. Main proceedings have universal scope and encompass all of the debtor's assets and affect all creditors, wherever located.

COMI corresponds to:

1. The place where the debtor conducts the administration of his interests on a regular basis; and
2. Is therefore ascertainable by third parties.

If JD lives in Ireland it is likely that the main bankruptcy proceedings would be commenced in Ireland. However, if JD moved his COMI to England main bankruptcy proceedings could be commenced there. The advantage of this is that in England you can be discharged from bankruptcy within 12 months depending on the circumstances of the case.

Once bankruptcy proceedings have been started or opened in one EU member state, for example, England, any proceedings opened in another member state must be secondary proceedings. Secondary proceedings are winding up proceedings such as bankruptcy proceedings and may be opened in other EU member states where the debtor has an "establishment". This is "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods". Therefore, secondary bankruptcy proceedings against JD could also be commenced in Ireland as JD has property interests in Ireland. Secondary proceedings are limited in scope to assets located in the member state where they are opened therefore they can only relate to his property in Ireland. Therefore the fact that secondary proceeding could also be commenced in Ireland limits the advantage of JD moving his COMI to England.

Conclusion

It seems that a debtor is able to move his COMI from one member state to another, for example, from Ireland to England. This is provided a debtor conducts the administration of his interests from England on a regular basis, and importantly, as English courts have pointed out, that this fact is ascertainable by third parties. As a result of this, English bankruptcy law could apply to the debtor. However, it must be borne in mind that secondary proceedings may be opened in other member states where the person has an establishment. This could apply in the case of a person who moves to England, sets up residence there, pays tax there, administers their interests from there on a regular basis but who retains property and other interests in Ireland. While a debtor might be able to avail of the more lenient bankruptcy legislation in England, their Irish property would remain subject to Irish legislation and the various insolvency procedures. There may be little advantage to be gained for a person who has a large portfolio of assets in Ireland in moving their COMI to England or Wales.

In the next section of this report we have provided for an overview of bankruptcy in Ireland, England and other selected EU jurisdictions.

BANKRUPTCY LAWS IN DIFFERENT EU MEMBER STATES

A unique feature of bankruptcy law is that it seeks to provide a means whereby creditors can recover rateably or equally among themselves from the individual debtor. It also grants a measure of protection to the bankrupt and ensures that the bankrupt cannot be proceeded against to the benefit of one creditor and to the detriment of another.

In all EU member states, the courts have jurisdiction in personal insolvency or bankruptcy procedures. An insolvency practitioner takes over the running of a debtor's assets and the debtor loses control over his assets. All states have provisions governing the transfer of assets prior to bankruptcy and allow the insolvency practitioner to take steps to reverse such transactions and take back the assets into the distributable pool. In most states it is possible to enter into arrangements with creditors and obtain the sanction of the court for such arrangements. Some countries have set time limits for the conclusion of proceedings; others appear to be open-ended and dependent on the payment of creditors. Several countries, such as Spain, have penalty provisions to restrict a debtor where they have acted in a reckless manner towards creditors.

European Commission paper on bankruptcy

In a 2007 paper entitled *“Overcoming the stigma of business failure – for a second chance policy”*¹⁰ the European Commission reviewed the bankruptcy code across the EU. The paper puts forward the position that the legal systems of EU member states should be more favourable to business start-ups and should not stigmatise legitimate business failure as this stifles further entrepreneurial activity. Entrepreneurs learn from their mistakes and fresh starts should be facilitated. It states that a distinction should be drawn between fraudulent bankruptcies and non-fraudulent bankruptcies by legal systems. Legal proceedings should be simplified and made quicker; it recommends that proceedings should last a maximum of one year.

It also sets out a tabular comparison (page 23) of the 27 EU member states, based on a scoring system adopted by the European Commission, which gives countries scores for measures that have been adopted and measures that are proposed. The study shows that the UK tops the ranking for the amount of measures adopted, with a scoring of five out of ten, while Austria scores seven for adopted and proposed measures. Ireland pales in comparison scoring a meagre two points, which puts it on a par with Estonia and Malta. However, Ireland’s score is based on an incorrect assumption that there was an automatic discharge from bankruptcy after 12 years in Ireland, which there is not.¹¹

IRELAND

Irish bankruptcy law is antiquated and badly needs to be modernised¹². The bankruptcy procedure in Ireland is unwieldy, expensive and very heavily court controlled. The contrast with the various flexible and debtor friendly procedures available in England and Wales could not be starker. Many debtors there, as a result, can avoid the stigma of being made bankrupt especially when their debts are relatively low (see further below).

An inability to pay ones debts as they fall due is not a sufficient test for an adjudication of bankruptcy in Ireland. In order to be declared bankrupt, an individual must commit what is known as an “act of bankruptcy”. It has been defined as “an act or default, voluntary or involuntary, committed by a debtor which is either evidence of an intent to deprive creditors of their rights through fraudulent assignment or as an implication of insolvencies”¹³.

The Bankruptcy Act 1988 sets out eight “acts of bankruptcy”¹⁴. The most common instance that arises in practice is where the debtor fails to pay his creditors after receiving a bankruptcy summons. This is a notice in a prescribed form served on the debtor calling on the individual to pay the sum due within 14 days. A petition can be issued within three months of an act of bankruptcy by the debtor or where the debt is greater than €2,000 and must be served personally on the debtor. As with all debt recovery, the sum due should be a liquidated sum and the creditor should be entirely satisfied that the debtor cannot dispute the sum claimed. The best way of avoiding any

dispute in relation to the sum due is for the creditor to have already obtained a court judgment and the failure of the debtor to satisfy the judgment is then used by the creditor as the basis for the bankruptcy proceedings.

The practical result of successful bankruptcy proceedings is that the debtor's property is transferred to a trustee which in the vast majority of cases is the "Official Assignee", an office created by statute. The bankrupt loses his capacity to deal with that property and the creditors lose their right of independent remedy to recover their debts. The trustee or the Office of the Official Assignee then distributes the property among the creditors. Discharge from bankruptcy happens generally when:

1. All debts are paid; or
2. 12 years has elapsed, all of the bankrupt's property has been disposed of and the court is satisfied that the bankrupt has disclosed any property acquired since his bankruptcy and that it would be reasonable to discharge him.

There is therefore no right to automatic discharge. Anyone who is made a bankrupt remains a bankrupt, even after death, unless or until they are discharged by the High Court.

As with all debt recovery proceedings, the creditor should endeavour to ascertain whether or not the debtor has the resources from which the debt can be discharged. In other words a declaration of bankruptcy in itself means nothing if there are no funds or assets available. However, often the threat of bankruptcy will be sufficient to prompt the debtor to discharge the debt if they can.

Consequences of bankruptcy

When a debtor is adjudicated bankrupt:

1. All his assets and property vest automatically in the Official Assignee and he must co-operate fully with the Official Assignee's office in all matters relating to the bankruptcy. Essentials up to a value of €3,100 or more if the High Court allows are excluded.
2. His salary, income or pension is often attached in favour of the Official Assignee.
3. He cannot act as a director, auditor, manager, liquidator or receiver of a company or hold elected representative office, in local authorities, the Dáil or the Seanad.
4. He cannot obtain credit for over €650 without disclosing that he is bankrupt.
5. He must inform the Official Assignee about any property acquired after being adjudicated bankrupt as it transfers to the Official Assignee, if and when the Official Assignee claims it.
6. Certain payments or property transfers made to a creditor in preference to others in the six months prior to being declared bankrupt may be held to be invalid.

Alternatives to bankruptcy in Ireland

Irish legislation does not have a formal individual voluntary arrangement (IVA) process, unlike England and Wales (see further below). This is a flexible procedure that allows individuals to try and reach agreement with creditors under the supervision of an insolvency practitioner.

One alternative to bankruptcy available to a debtor in Ireland involves an arrangement with creditors under the control of the court but it is an unwieldy and expensive procedure, unlike the IVA system in England and Wales. Sections 87 ,to 109 of the Bankruptcy Act 1988 allow the debtor, who is unable to meet his commitments to his creditors, to petition the court setting out the reasons for his inability to pay his debts and requesting court protection from actions/processes (including bankruptcy proceedings).

An order for protection may be granted by the court, even if there is an execution order in the hands of a sheriff or county registrar. Once a protection order is granted, the debtor must call a preliminary meeting with his creditors to present a statement of his assets and liabilities and set out his proposed scheme of arrangement. The scheme could be, for example, to pay a dividend (normally a percentage of the amount owed) on his debts or to transfer property to the Official Assignee to be sold and the proceeds distributed among their creditors. It is important to note that for as long as the order for protection is in force the debtor cannot, without prior court sanction, pledge, part with or dispose of any property save in the ordinary course of trade or business.

If the correct procedure is followed the process culminates in a private sitting of the court at which the creditors vote on the proposed scheme. If three-fifths in number and value vote in favour of it (or any modification of it) it is deemed to be accepted by the creditors. Once approved by the court, the scheme is binding on the debtor and on all persons who were creditors at the date of the petition and who were notified of the private sitting. If the proposal is rejected, the court may adjudicate the debtor bankrupt.

A debtor who makes an offer to his creditors runs a risk, because the court may adjudicate him bankrupt if, for example, it appears that he does not wish to make a “bona fide” arrangement with his creditors; he fails to obey any court order affecting him; his offer is not accepted or reasonable; or he does not file the relevant court documents. In the case of partnerships, where two or more members of a partnership obtain court protection and make proposals to their creditors for the payment or compromise of their joint and several liabilities, the court can declare all the partners bankrupt if any of the proposals are not accepted. Therefore, it is essential to ensure that the procedure is followed correctly and full disclosure to the court is made.

Where a scheme has been implemented successfully, the court must, on the report of the Official Assignee and in the absence of fraud, give a certificate to the debtor that discharges the debtor from the claims of creditors who received notice of the arrangement. This certificate does not, however, release the debtor from debts owed to creditors who did not receive notice of the proceedings.

Other alternatives are arrangements outside the control of the court (voluntary arrangements) such as:

- A composition where a debtor cannot pay his creditors in full but approaches them to induce them to accept part payment in full settlement of their claims; or
- An agreement by a debtor to transfer property to a trustee for the benefit of the creditors generally so that his property may be wound up and distributed among them.

Law Reform Commission proposals

In September 2009, the Law Reform Commission (LRC) produced a consultation paper on Personal Debt Management and Debt Enforcement¹⁵ that has made provisional recommendations relating to the reform of bankruptcy law in Ireland. It notes the growth in private sector credit which from 2008 – 2009 was about €395 billion and also that the increase in personal indebtedness, expressed as a ratio of household debt to disposable income, has grown from 48% in 1995 to 176% in 2009. The LRC recommends that it is fundamental that the law distinguishes between debtors who cannot pay and those who refuse to pay.

Among the other recommendations in the area of bankruptcy is the creation of a new system of personal insolvency law and, in particular, the introduction of a non-court based system of debt settlement that would supplement (though not necessarily replace) the court-based scheme in the Bankruptcy Act 1988. The key principles of the new system would be: earned debt discharge (whereby the debtor

will obtain a discharge of debts only after completing a repayment plan under which as much of his obligations as is reasonably possible must be repaid); open access for honest and long-term insolvent debtors; legally binding debt settlement; preserving a reasonable standard of living for debtors; and a discharge period of reasonable length. Crucially, it also recommends a discharge period of less than 12 years. These are welcome developments and it is hoped that they will be implemented.

ENGLAND AND WALES

The two main insolvency procedures available to debtors in England and Wales are bankruptcy and individual voluntary arrangements (IVAs).

Since April 2009, individuals with low levels of non-business related debt may, alternatively, apply for one of four new procedures: a debt relief order; a county court administration order; an enforcement restriction order; or a debt repayment plan. There are no equivalents to these in Ireland.

Debt relief order

A debt relief order is for people who do not own their own home, have little surplus income and assets and less than £15,000 of debt. The order lasts for 12 months and prevents the creditors from taking any actions to recover their money without the permission of the court. If the debtor's circumstances have not changed after 12 months they are freed from the debts included in the order. They do not involve the courts but are run by the Insolvency

Service in partnership with skilled debt advisors. To qualify, a person must be unable to pay their debts, must not have a disposable income of more than £50 a month and be domiciled in England or Wales. A debtor cannot be involved in another formal insolvency procedure at the same time.

County court administration order

A debtor who has no business debts and income in excess of that required to meet his reasonable needs may apply for this order. The effect of it is to prevent any creditor from taking enforcement action against the debtor for a maximum of five years from the date of the order. In return, the debtor agrees to make agreed repayments of his debts and at the end of the administration period the debtor is released from liability for those debts.

Enforcement restriction order

Where a debtor can show that his financial circumstances have suffered a sudden and unforeseen deterioration and that there is a reasonable prospect of those circumstances continuing within a relatively short period, he may apply to the county court for an enforcement restriction order (ERO) to give him a break for up to one year from repaying his creditors until his finances improve. An ERO prevents a debtor's creditors from taking certain specified steps to recover the debtor's debts. When it expires the debtor is then liable to pay his debts in full.

Debt repayment plan

A debt repayment plan (DRP) allows a debtor to settle his outstanding debts by paying a proportion of the amount that he owes. Like a county court administration order only

debtors who have no business debts may use a DRP. Each DRP falls within a debt repayment scheme operated by an authorised operator. The debtor provides the scheme operator with a schedule of his debts and monthly income and asks the operator to arrange a DRP for him. The operator is responsible for getting the debtor's creditors to agree to the plan and supervises the debtor's compliance with it. Once a DRP comes into effect, no creditor can take an action to recover a debt or charge interest on a debt under the plan without court permission of the county court. Once the debtor makes the final payment under the plan, he is discharged from the debts that fall within it.

Bankruptcy proceedings

Bankruptcy in England and Wales can only apply to individuals (including sole traders and individual members of a partnership). Bankruptcy petitions may be presented to the court by the individual, by creditors who are owed £750 or more, or by the supervisor of an IVA, if the individual has not complied with the terms of the arrangement.

Like Ireland, bankruptcy is a court procedure and is commenced by the issue of a bankruptcy petition against a debtor who owes more than £750, is unable to pay the debt or has no reasonable prospect of being able to pay it. The debtor must be domiciled in England and Wales or normally live there, or within the previous three years before the issue of the petition and have had residential or business connections with England or Wales.

A debtor may also present a bankruptcy petition against himself on the ground that he cannot pay his debts. He must

submit a statement of his assets and liabilities in support of the petition. The process of a debtor's bankruptcy petition is usually fast and sometimes the bankruptcy order is made on the same day as the petition is issued. Bankruptcy petitions are usually presented at the High Court in London or at the county court near where the debtor trades or lives.

The court cannot make the debtor bankrupt if it is satisfied that either:

- The debtor is able to pay all his debts, or
- The petitioning creditor has unreasonably refused an offer from the debtor to secure the debt.

On the making of a bankruptcy order, the court passes its files to the Official Receiver. The debtor's beneficial interest in the assets and property that fall within his bankruptcy estate vest in his trustee in bankruptcy (either the Official Receiver or an insolvency practitioner) who realises the assets and distributes the proceeds among the creditors.

Since 1 April 2004 most bankrupts are freed or discharged from bankruptcy after a maximum of 12 months, although the trustee in bankruptcy may apply to the court for the discharge to be postponed. There is no automatic right to receive early discharge from bankruptcy. Restrictions after bankruptcy can last for two to 15 years.

IVAs

An IVA is an agreement between the debtor and his creditors. An IVA allows a debtor to settle debts by paying a proportion of the amount that he owes to his creditors

and to come to an arrangement with his creditors over the payment of his debts. If approved by a majority of creditors, an IVA binds the debtor's creditors to accept the terms of the IVA in settlement of the debts outstanding to them. An insolvency practitioner supervises the debtor's compliance with the IVA.

The Insolvency Service

Unlike Ireland, there is a statutory Insolvency Service with offices throughout England and Wales. Its role includes administering and investigating the affairs of bankrupts and establishing why they became insolvent; acting as trustee/liquidator where no private sector insolvency practitioner is appointed; acting as nominee and supervisor in fast-track IVAs; dealing with bankruptcy restriction orders and undertakings; authorising and regulating the insolvency profession; and providing information to the public on insolvency via its website, leaflets and its helpline. It also maintains an online individual insolvency register which has details of current bankruptcies and IVAs, a bankruptcy restrictions database and also makes available forms to apply for bankruptcy. In England and Wales only authorised individuals may act as insolvency practitioners and the Insolvency Service regulates this aspect of insolvency procedure.

The Insolvency Service is a very user friendly service. There is no comparable service in Ireland – something which is seriously lacking at a time when clear information is needed by many people.

AUSTRIA

Bankruptcy proceedings can be opened where the debtor is unable to pay and this is assumed if the debtor suspends payments. The initial aim of proceedings is the equal satisfaction of all creditors. Where a natural person is bankrupt special rules apply and there is the option of exemption from residual debt. Where natural persons do not operate a business the proceedings are described as debt settlement proceedings. Composition proceedings can also be opened and allow for the partial remission of debt where a majority of the creditors do resolve and the debtor pays at least 40% of the claims within two years.

To open proceedings a debtor is obliged to make an insolvency application within 60 days of the criteria existing for the opening of proceedings. When proceedings are opened the debtor loses his power to dispose of his assets. The Bankruptcy Court appoints a trustee who conducts the proceedings, decides whether composition proceedings are appropriate, administers and distributes the debtor's estate. A bankruptcy trustee is not mandatory where the bankrupt is a natural person not operating a business and, in such cases, the court carries out the trustee's functions. Once proceedings are opened they are recorded in public registers and pending legal disputes are interrupted.

Bankruptcy proceedings treat the creditors equally and there is no preferential treatment of employees or public authorities. However, wages due to employees and public charges that arise after the institution of bankruptcy proceedings, as well as the costs of the bankruptcy, are treated on a preferential basis.

Similar to other countries' bankruptcy codes, Austrian bankruptcy law allows detrimental acts prior to the opening of proceedings to be challenged on the grounds of intention of discriminate, squandering of assets or knowledge of inability to pay.

An honest debtor in bankruptcy (one not convicted of fraudulent bankruptcy) may apply for the opening of compulsory composition proceedings where they offer creditors 20% of the claims in bankruptcy payable within two years.¹⁶ A three quarters majority of creditors must approve the composition which must then be confirmed by the court. If no compulsory composition is achieved the debtor's assets are disposed of and the maximum permissible payment term is seven years.

Instead of a debtor applying for the opening of bankruptcy proceedings an application may be made for the opening of composition proceedings. The statutory minimum payment is 40% of the creditors' claims payable within two years of the acceptance of the composition.

Proceedings are closed once evidence of the final distribution has been provided to the bankruptcy court. The former debtor acquires full power of disposal over his assets and has unrestricted capacity to sue and be sued.

SPAIN

The bankruptcy procedure is known as “*concurso de acreedores*” (creditors’ meeting) and it applies to individuals and companies. Its main purpose is to satisfy the creditors’ claims as far as possible. A debtor is insolvent if he cannot meet his liabilities on a regular basis. The insolvency proceeding may be applied for by the debtor (voluntary proceedings) or his creditors (compulsory proceedings). If the application for insolvency proceedings has been made by the creditors, the judge grants a prior hearing to the debtor to allow him to contest the application.

If the application is not contested, the judge opens the insolvency proceeding. If it is contested, a hearing is held before the judge makes his decision. The judge competent to hear the case is the commercial court judge in whose jurisdiction the debtor’s (COMI) is located.

The judge directs the insolvency proceedings. He opens and closes the proceeding, ensures that the necessary formal procedures are carried out, supervises the actions taken by the administrators and resolves any disputes arising at any stage of the proceeding. In order to prevent any of the debtor’s assets being disposed of, the judge may either suspend the debtor’s power to administer and dispose of these assets and confer these powers on the administrators, or allow the debtor to continue to exercise these powers under the supervision of the administrators.

The administrators have to provide information to and cooperate with the judge while also representing the general interests of all the creditors and supervising the administration and disposal of the debtor’s assets. Once the insolvency order has been issued, the creditors have a month in which to lodge their claims in writing. The creditors’ meeting is then called in order to propose an arrangement to the creditors. A quorum of creditors representing at least half the unsecured creditors is required for the meeting to be validly convened.

An inventory of assets and a list of creditors are drawn up before the creditors’ meeting is held. An arrangement can be entered into between the debtor and his unsecured creditors – consisting of a reduction of not more than 50% and/or an extension of time of not more than five years.¹⁷

Usually the arrangement must be approved by at least half of the creditors and the court. The proceeding concludes once the arrangement has been implemented or the debtor’s assets and rights have been liquidated and the proceeds paid to creditors provided the insolvency has been classified.

The classification is based on the reasons for the insolvency. It may be classified as fortuitous or culpable (brought about or aggravated by willful misconduct or serious negligence on the part of the debtor). If an insolvency is found to be culpable, the debtor is disqualified from performing commercial acts and managing the assets of others. Only the insolvency administrators and the public prosecutor can propose the classification to the court. Once the insolvency

proceeding concludes, the administrators' accounts are presented so that they may be contested and, if necessary, approved by the court. Where the proceeding concludes because there are no realisable assets it may be re-opened if new assets come to light within five years of the conclusion of the proceedings.

FRANCE

There are two different systems for dealing with insolvency situations:

1. With regard to traders and small businesses, and all legal persons (with the exception of co-owners of a building) the proceedings are court ordered:
 - (i) safeguard proceedings;
 - (ii) judicial settlement; and
 - (iii) winding-up procedures.

Since 2005, individuals engaged in an independent profession can avail of these proceedings. The safeguard procedure can be commenced on the petition of the debtor who shows that he is unable to overcome his financial difficulties on his own and that it would lead to a cessation of payments (as current liabilities cannot meet with available assets). The other proceedings are governed by the Code de commerce (Commercial Code).

2. With regard to natural persons with non-professional debts (which include debts arising from a

company guarantee) the conditions for opening the proceedings are in good faith and the manifest impossibility of paying all the debts. The procedure is governed by the Code de la consommation (Consumer Code) and is as follows:

The debtor refers the matter to an administrative board, which draws up a list of all debts, after having obtained representations from the creditors, and can ask a court to suspend prosecutions. The board then proposes a plan to postpone or re-schedule the debt or that the payment of the debts be suspended. A creditor can appeal the plan to court if he is unhappy with it.

If it is impossible for the debtor to implement the plan, he may apply to the court for the opening of personal recovery proceedings: the creditors are listed and the assets are evaluated. The judge then orders the winding-up of the debtor's personal wealth and appoints a liquidator to distribute the assets among the creditors. If it is not possible to meet the debts of all the creditors, he declares the proceedings closed due to insufficient assets, which results in the erasing of the debtor's non-professional debts, with the exception of those paid by guarantee.

In principle, a debtor can start a new business and creditors can no longer pursue the debtor following the judgment closing the winding-up. However, this is not the case if the court imposes a prohibition to manage a business or a personal bankruptcy measure which lasts a minimum of five years if the debtor has acted in a way which is damaging to creditors or a creditor proves fraud. This is in contrast

to Ireland, where any person adjudged bankrupt cannot act as a director, auditor, manager, liquidator or receiver of a company until discharged from bankruptcy. Another contrast with Ireland is that it appears that debts can easily be erased where there are insufficient assets.

ITALY

In principle, individual bankruptcy, as in bankruptcy of a natural person who is not an entrepreneur, does not exist in Italy. However, a natural person can be declared bankrupt if a member of a partnership is in financial difficulty. Italian bankruptcy law¹⁸ sets out several procedures that apply to a company or a sole trader which is deemed to be unable to meet all its debts. Two of these are concerned with bankruptcy:

1. Bankruptcy: This is initiated when a company or a sole trader is deemed to be insolvent and a judgment of insolvency is issued by a court.
2. Composition with creditors¹⁹: This is a method where the debtor settles his debts with his creditors.

There are also three pre-insolvency procedures that are aimed at avoiding the company or sole trader from being declared bankrupt:

1. Deed of arrangement²⁰ between the debtor and its creditors.
2. Certified plans²¹ which are certified by a professional

and issued by the debtor who is facing difficulties in paying his debts in a short time period.

3. Restructuring plans²² which are filed in court by the debtor, in agreement with at least 60% of the creditors.

The creditors, the public prosecutor or the debtor himself may take an action to have the debtor declared bankrupt, provided that the latter is an entrepreneur whose turnover, assets or debts reach the levels set out in article 1 of Italian bankruptcy law. Only debtors may request one of those arrangements with their creditors which apply outside and before bankruptcy.

The participants in bankruptcy proceedings are the court, the court-appointed receiver, the insolvency practitioner and creditors' committee. In the composition with creditors and deed of arrangement procedures, an assignor - a company or an individual who undertakes the burden of restoring the company - could be appointed. The assignor presents a business plan as a consequence.

The court rules on applications for bankruptcy and may approve applications for arrangements with creditors. The court also administers the bankruptcy proceedings.

The court appointed receiver supervises the proceedings. The insolvency practitioner is responsible for liquidating the assets. The creditors' committee supervises and approves the insolvency practitioner's work, giving its opinion in the cases stipulated by law or at the request of the court or the

court appointed receiver.

Liquidation of the assets is governed by the liquidation plan prepared by the insolvency practitioner. Special powers of control on the insolvency practitioner are given to the receiver and the creditors' committee. Single assets could be sold by the insolvency practitioner whenever it is deemed that selling the company or a pool of assets would be less gainful.

Once declared bankrupt, the debtor is not allowed to pay individual creditors and must hand over his assets to the insolvency practitioner. Nevertheless, certain assets and rights are excluded from the proceedings, such as personal assets, those aimed at the satisfaction of familial and/or personal needs, and those rights without a proper economic value.

Debtors must inform the insolvency practitioner of any change of residence or domicile and, if summoned, must appear before the court appointed receiver, the insolvency practitioner or the creditors' committee to provide all the information required.

The proceedings may be closed where the debts have been settled in full, the assets have been distributed among the creditors in accordance with the priority of their claims or, where creditors' claims have not been satisfied, if it has been established that the continuation of the bankruptcy proceedings will not result in unsecured claims being met.

The consequences of the bankruptcy declaration for the bankrupt are:

- a. The loss of the right to administer and dispose of assets.
- b. The loss of the right to bring legal proceedings in disputes relating to the assets involved in the bankruptcy proceedings.
- c. After consulting the insolvency practitioner and the creditors' committee, the guardianship court may grant the bankrupt maintenance support for himself or his family.

The bankrupt is not automatically prevented from embarking on commercial activities after the bankruptcy, unless he has been convicted of an offence in connection with the bankruptcy and has been banned from running a company as a result. This is much more favourable than bankruptcy in Ireland, where any person adjudged bankrupt cannot act as a director, auditor, manager, liquidator or receiver of a company until discharged from bankruptcy.

It is notable that in Italy there is no comparable bankruptcy process for individuals who are not sole traders or partners in a business partnership unlike Ireland, England and Wales.

THE NETHERLANDS

There are three court supervised bankruptcy procedures in the Netherlands:

1. Bankruptcy proceedings which has the objective of realising the debtor's assets and distributing them. The debtor, a creditor or the Public Ministry for public interest reasons can apply for the debtor's bankruptcy.
2. Moratorium proceedings which have the double objective of realising the debtor's assets and restructuring the debt. Only the debtor can apply for such proceedings, creditors may not. Moratorium proceedings are only available to legal entities.
3. Debt restructuring proceedings which have the double objective of realising the debtor's assets and restructuring the debt. Only the debtor himself can apply for such proceedings, creditors may not. These proceedings are only available to natural persons.

As soon as the court has opened insolvency proceedings, it appoints both a supervisory judge and a receiver (in bankruptcy) or administrator (in moratorium). The administrator and receiver supervise the debtor and manage and realise the assets.

Once the debtor is admitted to the bankruptcy or to debt restructuring proceedings he loses authority to manage

or deal with his assets. Once the debtor is admitted to moratorium proceedings, he can only deal with his assets acting jointly with the administrator.

Most bankruptcies are completed within 18 months. Moratorium proceedings take a maximum of 18 months with a facility for extension. In practice, moratorium proceedings usually end within a couple of weeks or months and turn into a bankruptcy. As a rule debt restructuring takes three years but can take up to five years.

The essential difference between bankruptcy and moratorium/debt restructuring is that after completion of a bankruptcy the claims not paid survive and therefore creditors can still chase a debtor for payment. A bankruptcy ends by agreement, or by simplified completion (removal in the case of a lack of income) or by a distribution to the creditors following verification of their claims.

The fact that someone is bankrupt or has been involved in moratorium or debt restructuring, remains registered for some time with the Bureau for Credit Registration. There are no legal obstacles however to restarting an enterprise, although incorporating a legal entity can be restrained or prevented by the Dutch Ministry of Justice. Again this is much more favourable than bankruptcy in Ireland, where any person adjudged bankrupt cannot act as a director, auditor, manager, liquidator or receiver of a company until discharged from bankruptcy. Bankruptcy in the Netherlands is also considerably quicker than in Ireland.

GERMANY

The equivalent insolvency proceedings in Germany to bankruptcy are consumer insolvency proceedings. In consumer insolvency proceedings, the debtor is an individual and his estate is distributed among his creditors. The proceedings encompass all of the debtor's assets at the time the proceedings are initiated and any additional assets acquired during the course of the proceedings. Subsequent to the termination of these insolvency proceedings, creditors may assert their remaining claims against the debtor without restriction. If the debtor then settles with his creditors to the best of his ability for the following six years, he will be discharged from his remaining obligations.

The consumer insolvency proceedings involve three steps: settlement of debts; the judicial settlement plan proceedings and the insolvency proceedings with the subsequent discharge proceedings. Application to open proceedings is made by the debtor or a creditor and will be rejected where the debtor's assets are insufficient to cover the costs of the proceedings.

1. Before the consumer debtor can file an insolvency request, he first has to try and agree a settlement with his creditors.
2. If this fails, the debtor can file a request to open insolvency proceedings and submit a settlement plan and records of his assets and his income, his creditors and his debts. The courts can accept a "zero-plan" where debtors have no income and

no assets and which provide no payments will be made to creditors. If the zero plan is accepted the debtor either in the settlement plan proceedings or, at the latest, after the six years of the discharge proceedings can be freed of their debts even if they cannot pay anything to their creditors. If the court decides in favour of the settlement plan, it serves the plan on all named creditors.

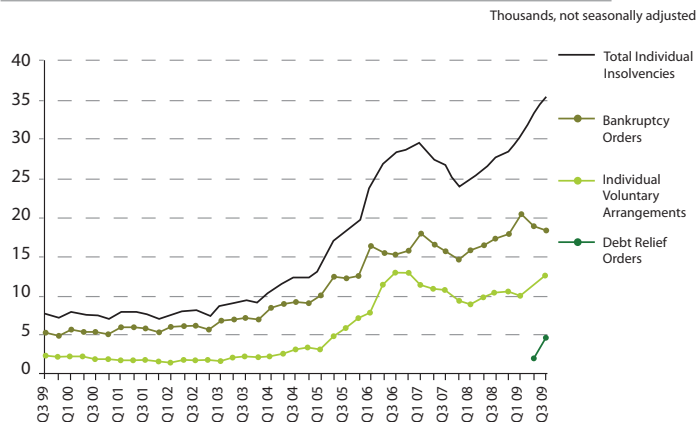
3. If the majority of the creditors object to the plan, insolvency proceedings will be opened. The court appoints a trustee who liquidates the estate of the debtor and distributes the proceeds among the creditors. Debts which have not been paid after the conclusion of proceedings are waived, allowing the debtor a fresh start. After that a period of five to six years starts during which the debtor has to transfer all his attachable wage claims to a trustee who distributes the income among the creditors annually.

After six years the court decides on whether to discharge the debtor from bankruptcy. Therefore, on request of a creditor the discharge will be refused if the debtor, for example, is convicted of a bankruptcy crime within three years before the opening of the proceedings. The discharge frees the debtor from most debts. This can be compared to Ireland where it can take up to 12 years to be discharged from bankruptcy.

Appendix 1: Statistics

Individual insolvency statistics (England and Wales)

Figure 2. Individual Insolvencies in England & Wales



Source: Insolvency Service

Total of individual insolvencies for Q2 2009 onwards include Debt Relief Orders, which came into force on 6 April 2009

	Total Individual Insolvencies	Bankruptcies	IVAs	DROs
2007: Q1	30,075	16,842	13,233	
Q2	26,956	16,258	10,698	
Q3	26,072	15,833	10,239	
Q4	24,846	15,659	9,188	
2008: Q1	25,264	15,651	9,614	
Q2	24,553	15,297	9,256	
Q3	27,087	17,341	9,746	
Q4	29,444	19,100	10,344	
2009: Q1	29,774	19,062	10,713	
Q2 ²⁴	33,073	18,870	12,225	1,978
Q3	35,242	18,347	12,390	4,505

Irish individual insolvency statistics²⁵

	On Hand 01/01	New Cases	Disposed of	On Hand 31/12
2008 Bankruptcies	462	8	20	450
2007 Bankruptcies	470	4	12	462
2006 Bankruptcies	474	9	13	470
2008 Arrangements	24	1	0	25
2007 Arrangements	23	1	0	24
2006 Arrangements	23	1	1	23

European Communities (Personal Insolvency) Regulations 2002

	On Hand 01/01	Entered during 2008	Entries on 31/12/2008
2008 Applications	15	8	23

Appendix 2

Table: Current Situation in Member States

	Information/ education	Overall strategy	Publicity when non-fraudulent Court decision	Reduced restrictions, etc	Better legal treatment for honest bankrupts	Short discharge period and/or debt relief	Streamlined proceedings	Stimulate support	Foster links	Discussion within financial sector	Total Y + (Y)
Belgium	N	N	(Y)	(Y)	Y	(Y)	N	N	N	N	4
Bulgaria	N	N	N	N	N	N	N	N	N	N	0
Czech Republic	N	N	N	N	N	N	(Y)	N	N	N	1
Denmark	N	N	N	Y	(Y)	Y	(Y)	N	N	N	4
Germany	(Y)	N	N	Y	Y	(Y)	N	N	N	N	4
Estonia	N	N	N	N	N	(Y)	(Y)	N	N	N	2
Ireland	N	N	N	N	N	Y	Y	N	N	N	2
Greece	N	N	N	Y	(Y)	(Y)	Y	N	N	N	4
Spain	N	N	N	N	Y	Y	Y	N	N	N	3
France	N	N	N	N	(Y)	N	Y	N	(Y)	N	3
Italy	N	N	N	Y	Y	(Y)	(Y)	N	N	N	4
Cyprus	N	N	(Y)	(Y)	N	(Y)	(Y)	N	N	N	4
Latvia	N	N	N	N	N	N	(Y)	N	N	N	1
Lithuania	N	N	N	Y	(Y)	Y	(Y)	N	N	N	4
Luxembourg	N	N	N	N	N	N	N	Y	N	N	1


	Information/ education	Overall strategy	Publicity when non-fraudulent Court decision	Reduced restrictions, etc	Better legal treatment for honest bankrupts	Short discharge period and/or debt relief	Streamlined proceedings	Stimulate support	Foster links	Discussion within financial sector	Total Y + (Y)
Hungary	N	N	N	N	N	N	N	N	N	N	0
Malta	N	N	N	(Y)	(Y)	N	N	N	N	N	2
Netherlands	(Y)	N	N	N	(Y)	(Y)	N	N	N	(Y)	4
Austria	N	(Y)	N	(Y)	(Y)	(Y)	Y	(Y)	(Y)	N	7
Poland	N	N	N	N	(Y)	(Y)	Y	N	N	N	3
Portugal	N	N	N	N	N	N	N	N	N	N	0
Romania	N	N	N	(Y)	(Y)	N	Y	N	N	N	3
Slovenia	N	N	N	N	N	(Y)	N	N	N	N	1
Slovakia	N	N	N	N	N	N	N	N	N	N	0
Finland	N	N	N	Y	N	(Y)	Y	Y	N	N	4
Sweden	N	N	N	N	Y	(Y)	Y	N	N	N	3
United Kingdom	N	N	Y	Y	Y	Y	Y	N	N	N	5
Total Y + (Y)	2	1	3	12	15	17	17	3	2	1	
United States	N	N	N	Y	(Y)	Y	Y	N	N	N	4

Y= Measures exist (Y)= Measures planned/available partially N= No measures exist

Source: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions:- Overcoming the stigma of business failure – for a second chance policy. Implementing the Lisbon Partnership for Growth and Jobs

Notes

- 1 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [OJ L160/1 30.6.2000].
- 2 The other procedures listed in Annex A are: compulsory winding up by the court; the administration in bankruptcy of the estate of persons dying insolvent; winding-up in bankruptcy of partnerships; creditors' voluntary winding up (with confirmation of a court); arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution; and company examinership.
- 3 The other procedures listed in Annex B are: compulsory winding up; the administration in bankruptcy of the estate of persons dying insolvent; winding-up in bankruptcy of partnerships; creditors' voluntary winding up (with confirmation of a court); and arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution.
- 4 C-1/04.
- 5 [2007] BPIR 1636.
- 6 [2004] 4 IR 370 (HC and SC) and [2006] Ch 508 (ECJ) and [2006] IESC 41 for final SC decision.
- 7 Grier, "Eurofood IFCS Ltd – An end to forum shopping?" (2006) CLP 161.
- 8 Mitchell, "Establishing jurisdiction in insolvency cases" [2006] 155 NLJ 1819.
- 9 Ibid.
- 10 COM (2007) 584 final (5.10.2007).
- 11 Holohan, "Major bankruptcy law shake up in the offing", (2009) 41 The Parchment 26 – 27.
- 12 The bankruptcy procedure in Ireland is governed by the Bankruptcy Act 1988 (as amended) and complimented by the Rules of the Superior Courts. Bankruptcy proceedings may only be brought in the High Court. The European Communities (Personal Insolvency) Regulations 2002 facilitate the operation of the EC Insolvency Regulation (Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings) insofar as they concern personal insolvency.
- 13 Bankruptcy Law Committee Report (Budd Report) 1962.
- 14 Section 7.
- 15 LRC CP56-2009 published on 22 September 2009. The Report will be published next year. See www.lawreform.ie.

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- 16 This term may be extended to 5 years in the case of natural persons who do not operate a business but the statutory minimum payable must be at least 30%.
 - 17 Notwithstanding these limits the judge can extend these limits if the company in bankruptcy is relevant for the economy and this is provided in the viability plan filed by the company (jointly with the arrangement).
 - 18 Royal Decree no. 267/1942.
 - 19 “Concordato fallimentare”.
 - 20 “Concordato preventivo”.
 - 21 “Piani attestati di risanamento”.
 - 22 “Accordi di ristrutturazione dei debiti”.
 - 23 Debt Relief Orders were introduced in April 2009 and most of the recipients of these orders would have fallen under the bankruptcy figures up to this.
 - 24 Not seasonally adjusted.
 - 25 Courts Service reports 2006 - 2008.

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