

BUSINESS INSOLVENCY:

Survey on the profession's involvement in insolvency proceedings per country

BACKGROUND:

On 12 March 2014, the European Commission (the Commission) adopted a Recommendation on a new approach to business failure and insolvency addressed to the Member States (the "Insolvency Recommendation"¹). As the Recommendation did not manage to bring the desired outcome at EU level² and as the initiative also fits into the CMU vehicle, the Commission issued a binding proposal on Business Insolvency (Directive) on 22 November 2016.

Following an orientation debate at the Board level (12 April and 22 June 2016) as well as a discussion with the Corporate Governance and Company Law (CGCL) working party (WP) (11 May 2016), Accountancy Europe has worked on a publication on the accountancy profession's contribution to insolvency proceedings: **EU Business insolvency. A contribution from the accountancy profession**. This publication is based on a survey completed by Accountancy Europe members.

At the latest discussion of the CGCL WP on 4 October 2016, members proposed to share information on the profession's involvement in insolvency proceedings per country. For this reason, Accountancy Europe has decided to proceed with the present summary of the Member Bodies' responses. For the moment, this publication is for internal use only, to be shared among Accountancy Europe members.

¹ Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency, http://ec.europa.eu/justice/civil/files/insolvency/01_insolvency_recommendation_en.pdf

² "The evaluation concluded that the Insolvency Recommendation has been partially taken up by some Member States, including by those receiving insolvency-related recommendations in the context of the European Semester exercise addressing macro-economic imbalances." *Inception Impact Assessment-Initiative on Business Insolvency* http://ec.europa.eu/justice/civil/files/insolvency/impact_assessment_en.pdf

Scope of the survey: 22 countries (21 EU Member States + one 3rd country) out of 29 completed the online survey³. 7 countries⁴ have not filled in the survey, out of which 2 have shared the following information with Accountancy Europe:

Croatia: the profession is not involved in insolvency. Insolvency practitioners have a separate licensing system and their role is available only for physical persons.

Bulgaria: the accountancy profession is currently not involved in the provision of business insolvency services. Insolvency services are reserved mainly for the legal profession. However, occasionally, the accountancy profession can be invited to prepare valuations of assets as part of business insolvency proceedings or as consultants on accounting and reporting matters.

MAIN PART⁵

Q2 Generally speaking, how would you describe the role of the accountancy profession in insolvency proceedings? Is this role well developed?

In several countries, such as the Netherlands, Slovakia and Sweden, the profession has embraced an advisory role to entrepreneurs.

In Germany, public auditors have the duty to make officers aware of a critical financial situation and to remind them of their obligations to evaluate whether the company is insolvent under German law. Ahead of insolvency proceedings, a German public auditor may play an advisory role but it is relatively rare for German public auditors to act as insolvency administrators.

In Austria and in Denmark, there is formally an option for a member of the accounting profession to become an insolvency administrator. Nevertheless, in practice, the function is almost always performed by lawyers.

In France, practitioners in insolvency proceedings are regulated and designated by the Trade Court (Tribunal de commerce). Only receivers (*mandataires de justice*) and administrators (*administrateurs judiciaires*) are authorized as insolvency practitioners. However, the Court is not prohibited to appoint a Chartered Accountant as a special purpose trustee (*mandataire ad hoc*) under a not-judicial procedure (*procedure amiable*). In that case, the Chartered Accountant must be properly covered by its professional liability insurance.

In Hungary, Lithuania, Poland, and Portugal, the profession's involvement is limited to auditing or accounting tasks e.g. preparing a liquidation balance sheet or -if the company is audited giving an opinion on the liquidation balance sheet.

In Cyprus, Czech Republic, Estonia, Greece, Ireland, Italy, Slovenia, Spain, and the United Kingdom, the accountancy profession has an important role in insolvency proceedings. In particular:

- In Cyprus, accountants can take up the role of receiver, administrator and liquidator.

³ Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Turkey, and UK.

⁴ Bulgaria, Croatia, Finland, Latvia, Luxembourg, Malta, and Romania.

⁵ Question 1 is not included as it only regards identification.

- In the Czech Republic and Spain, in addition to offering an advisory or auditing role, the accountant may also act as an insolvency administrator.
- In Estonia, the profession's role is well developed. However, for accountants any awarded qualification is not legally regulated (not mandatory, only voluntary); the responsibility level may therefore vary.
- In Greece, accountants can be insolvency administrators or special liquidators.
- In Ireland, the accountancy body provides most of insolvency practitioners. Accountants undertake all forms of insolvency engagements/proceedings - liquidations, receiverships and "examinerships".
- In Italy, Chartered Accountants are the most involved in insolvency proceedings. They perform a wide range of roles.
- In the UK, some accountancy bodies are able to license insolvency practitioners (the Solicitors Regulatory Authority ceased to be an insolvency practitioner licensor from November 2015).

Q3 Is the accountancy profession legally competent at national level to deal with insolvency proceedings?

No	Yes
Belgium ⁶	Austria (in principle)
France	Czech Republic (licensed after examination)
Hungary	Cyprus
Lithuania	Denmark (in principle)
Netherlands	Germany
Poland	Greece
Portugal	Ireland
Slovakia	Italy
Sweden	Spain
Turkey	UK

Note: In the UK and Cyprus, some accountancy bodies are legally competent to license individual insolvency practitioners. Austria and Denmark are legally competent but they are de facto excluded from the market.

Q4 [If yes to 3] At which specific stage is the accountancy profession legally involved in insolvency proceedings? In preventive measures, restructuring plans? Both? Others?

For the Czech Republic, Germany, Greece, Ireland, Italy, and Spain, the accountancy profession can be legally involved both in preventive and restructuring plans.

In Cyprus, the profession is involved in all aspects of the insolvency proceedings, ranging from simple loan restructuring plans to complex company wind-ups, liquidations and administrations.

⁶ In Belgium, the Law on the Continuity of Enterprises (LCE) changed in 2013 and new legal assignments were allocated to accountancy professionals.

In Austria, the profession can, in principle, be involved in insolvency proceedings in all stages, including the restructuring plans.

In the UK, the license holders assist in preventative measures and restructuring, as well as in 'end of life' procedures for companies.

In France, the accountancy profession is not legally involved in insolvency proceedings, except for the preventive stage in which the statutory auditor participates to the early warning procedure. Even if statutory auditors are not legally competent to deal with insolvency proceedings, they may provide information on the entity to the Court or to the persons appointed by the Court. Under certain conditions, the professional secrecy of the auditor is waived towards insolvency practitioners, both in preventive measures and restructuring plans in order to provide economic and financial information.

In Belgium, new legal assignments have been allocated to the profession following the change of LCE law in 2013. This includes preventive roles in detection and information of companies in financial distress (companies that run the risk of becoming insolvent), as well as assignments in the application procedure to become a judicial reorganisation.

Q5 Are there other professions than the accountancy profession that play a role in insolvency proceedings?

For the great majority of countries - Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Italy, Netherlands, Portugal, Sweden, Spain, Slovakia, and - lawyers prevail in dealing with insolvency proceedings. In Ireland, the legal profession is primarily involved in insolvency proceedings in an advisory capacity.

In France, the court plays a key role in appointing a series of experts who are involved in insolvency proceedings⁷.

Other professions play a role as well;

- business consultants (Austria)
- tax advisors (Czech Republic, Germany)
- financial advisors (Greece)
- solicitors (Portugal, UK).

In Lithuania, insolvency practitioners are considered as part of a separate regulated profession. Cyprus has a dedicated government department (Insolvency Service).

⁷ The special commissioner (*mandataire ad hoc*), the mediator (*conciliateur*), the judge entrusted (*juge-commiss*), the supervisory judge (*juge-commissaire*), the court-appointed receiver (*mandataire judiciaire*), the court-appointed administrator (*administrateur judiciaire*), the court-appointed auctioneer (*commissaire-priseur*). Also: the bailiff (*huissier de justice*) to achieve inventory of assets, a lawyer (*avocat*) and a notary (*notaire*).

Q6 Does national law prevent the accountancy profession from executing certain services (e.g. act as insolvency administrator/receiver)?

In the Czech Republic, Ireland, Estonia, Spain, Turkey, Germany, Slovenia, Cyprus, and Greece⁸, the law does not prevent the accountancy profession from providing insolvency services.

In the UK, Lithuania and Portugal, proper licensing or certification is required.

In other countries such as France or Slovakia, the law creates obstacles for professional accountants to act as insolvency administrators. In Austria and the Netherlands, theoretically, the law does not prevent the profession from providing this type of services, but in practice, only lawyers are active in this area.

In Belgium, despite the new legal assignments allocated to accountancy professionals by the LCE law 2013, lawyers remain the only competent profession acting as bankruptcy curators. The same conditions apply for Sweden.

Q7 Does national law require any certification to conduct these legal services (in terms of education, experience or examination)? If yes, which type of requirements? If not, do you think it should be required in the future?

In Austria, Denmark, Greece, Germany, Slovenia, and Turkey, there is no legal requirement to become an insolvency administrator.

In most countries, a combination of education (mandatory degree in all the countries listed below), experience/training, and examination (all countries listed below) are prerequisites to provide these services.

Specific requirements per country are as follows:

- Lithuania: work experience as an administrator assistant for two years
- Poland: three years' experience in management
- France: three years' specific training
- Czech Republic: three years of professional experience in a field related to the duties of licensed insolvency practitioners – i.e. law, economics, tax advisory, accounting, auditing and corporate governance. The expert must have a liability insurance agreement concluded.
- Portugal: mandatory continuous professional education
- Spain: five years of experience in the insolvency field
- Italy: eighteen months of training
- Cyprus, Slovakia, and UK: there is a need to have a specific number of: (i) years of post-qualification experience (ii) cases handled by the practitioner (iii) years of expertise in the insolvency field.

⁸ For Greece: In specific cases there are provisions that let only lawyers to act as insolvency administrators, such as bankruptcies. In addition, this is going to change according to the expected changes in the Bankruptcy Code (Law 3588/2007 as amended).

Some additional requirements may exist, such as knowing the local language (Poland and Lithuania) or having a clean criminal record (Poland and Czech Republic). Good reputation of the professional is also a criterion in Lithuania.

In Belgium, only lawyers (introduced in a list established by the assembly of the Commercial Court of the jurisdiction which pronounces the bankruptcy) may be appointed as bankruptcy curators. They have to be included in the roll of an order of the Belgian Bar and must obtain (i) special training and (ii) guarantees of competence in the field of liquidation procedures.

In Ireland, the Companies Act 2014 governs those qualified to act as liquidators. Insolvency practitioners -defined in specific categories- have to be authorised to act as liquidators by their respective bodies. An additional requirement is to hold professional indemnity insurance.

Q8 Outside the legal competence, what is the role of the accountancy profession in insolvency proceedings and/or for companies in financial distress (Companies that run the risk of becoming insolvent)? Is this role well developed?

Overall, the role of the profession is very diverse from country to country. For some countries, such as the Netherlands and Slovenia, the profession has acquired an advisory role.

In other countries, accountants and auditors are expected to warn in case of financial distress and, in some cases, initiate the insolvency proceedings or report to the relevant authorities. In particular:

- Following the recent changes in the Belgian legislation (2013), accountancy professionals have the obligation to extensively inform their clients as soon as they have indications that the company could get in financial distress. If the management fails to take any action, the accountants has the possibility to inform the President of the Commercial Court.
- In France, a company which encounters financial distress or going concern issues can ask its statutory auditor or its Chartered Accountant for assistance to understand the company's obligations. The company may also ask its statutory auditor to review or analyse financial information to obtain assurance.
- In Germany, the auditor has to remind the client to evaluate if the company is insolvent, and if it turns out to be the case, the auditor has to initiate the insolvency proceedings.
- In Hungary and in Turkey, the accountant can warn the management about foreseen financial distress or insolvency but are not expected to take any follow-up action.
- In the UK, the profession is expected to be proactive in providing an appropriate advice when a client in financial distress is identified and signpost the client to a place where it might secure assistance.

In other cases, the profession is asked to assist insolvency practitioners. In particular:

- In Denmark and Sweden, the accountancy profession is asked to support insolvency experts (insolvency administrators or lawyers) during insolvency proceedings. In the Czech Republic, the profession can also be asked to assist by submitting requests for opening bankruptcy proceedings, lodge claims in bankruptcy proceedings, evaluate claims, prepare or audit the financial statements (the last point only applies, if accountancy expert is certified auditor).

For the following countries, there is no particular competence other than the legal one:

- Poland, Portugal, Slovakia and Spain

Others:

In Austria, accountants can play a role in preparing the restructuring plan of the company.

In Cyprus, accountants acting as insolvency practitioners assist companies in restructuring their loans. They also prepare the relevant plans in order to negotiate with the creditors or banks.

In Estonia, the profession's role depends on the size of the company. Accountants can have an executive role in liaison with management or reorganisation advisers and trustees in bankruptcy making the decisions.

In Greece, Ireland, and Italy, the profession is the primary provider of services relating to insolvency proceedings.

Q9 Do companies in financial distress easily approach the accountancy profession for advice?

In almost all countries, entrepreneurs approach the profession for help, especially regarding preventive measures.

In Belgium and Slovakia, companies have a tendency to wait until it is too late before they contact an accountant. In the Netherlands, entrepreneurs are only asking for advice when they already are clients of the profession. In Estonia, the profession may not be interested in providing services if there is uncertainty that the client will be able to pay. In Spain and Hungary, entrepreneurs do not easily approach the profession.

Q10 Is the statutory auditor required to take action should the entrepreneur show signs of becoming insolvent? What type of actions?

In most of the countries, the statutory auditor has to comply with the relevant international standards of auditing (ISA 570 or equivalent).

For some cases, countries have adopted national requirements which are based on these international standards. Indicatively, in Germany the statutory auditor has to comply with German auditing standards based on ISA 570 – IDW PS 270. Similarly, in France, ISA 570 standard was transposed into national auditing standards.

In some cases, additional actions should be taken forward by the statutory auditor in case of insolvency signs. In particular:

- In Austria, the statutory auditor is legally obliged to send an early warning letter to the management or the supervisory board of the company.
- In Belgium, the statutory auditor has the possibility to inform the President of the Commercial Court in writing if they consider that the management has not responded in an appropriate manner to their notification.
- In Cyprus, the statutory auditor has to make specific reference in the management letter to the directors of the company.

- In France, the statutory auditor has an obligation to launch an early warning procedure as soon as he/she is aware of facts that might impair the going concern. A process is escalated from the management then to the Board of Directors and finally to the shareholders. The Trade Court is informed by the statutory auditor that the procedure has been launched and receives at the final stage a copy of the report issued to the shareholders.
- In Greece, the auditor is obliged to add a reference in legal issues section of his report for the cases where the total Equity of the company results to figures lower than 10 % of Share Capital.
- In Hungary, there is a local law requirement for the statutory auditor to report to the owners/shareholders in case of significant decrease in the company's net assets, and in cases where net equity falls below registered capital.
- In Italy, in case of no or inadequate response by the Board of Directors, the statutory auditor can call a meeting with the shareholders of the company. Moreover, if no adequate response is taken, in case of serious irregularities, the statutory auditor is entitled to undertake legal action against the Board of Directors.

Q11 Is the statutory auditor liable in your country should a company become insolvent?

The profession is liable when it comes to the proceedings in relation to ISA 570 (or equivalent) and corresponding legislation. For specific countries, the statutory auditor can be held liable for additional factors in relation to insolvency. In particular:

- In Belgium, the auditor can be held liable for not informing the President of the Commercial Court.
- In Cyprus, the profession's state body supervising accountants and auditors (ICPAC) can take regulatory action against the auditor if he/she fails to prove that he/she has followed all the procedures properly.
- In France, the auditor can be liable for failing to initiate an early warning procedure or for having issued a non-qualified audit opinion although going concern was at stake.

In Germany, insolvency administrators sometimes try to hold statutory auditors liable, if they have not identified grounds for initiating insolvency proceedings. Nevertheless, there is no clear judicial judgement in this context.

Q12 What are the most important barriers preventing companies from having a 2nd chance in your country?

In Czech Republic, Portugal, Estonia, Hungary, and the UK, insolvency is usually solved by triggering the liquidation process bringing the distressed company to an end. In other words, there is limited use of reorganisation.

In France a reform in national law from 2014 allows (after investigation) individual entrepreneurs without employees to cancel their debts and relaunch an activity. However, situation differs when looking at company level. 2nd chance is restricted mainly because entrepreneurs fail to involve the relevant authorities at an early enough stage (Prevention department of the Trade Court). Banks' reluctance to reach settlements with social and tax authorities also work as an impediment to providing a 2nd chance.

In Austria, Belgium, Germany, Lithuania, and Poland, bad reputation and "stigma" of failure following entrepreneurs after insolvency prevent provision of 2nd chance.

Also, in Austria, Denmark, and Germany, some of the foreseen insolvency requirements are hardly ever used.

Insolvency proceedings can be very long (Czech Republic, Denmark), and costly (Cyprus, Spain and Turkey). In Ireland, the costs of i) restructuring ii) "examinership" proceedings as well as iii) the availability of financing are the most important barriers to a 2nd chance.

In Greece, the only barrier to get a 2nd chance is the recent changes in legislation, i.e. in specific cases, such as bankruptcies, there are provisions that let only lawyers to act as insolvency administrators.

In the Netherlands and Slovenia, there is no major barrier to have a 2nd chance. Nevertheless, in Slovenia, the profession has noticed cases of debtors' abuse in insolvency proceedings.

Q13 Do you think the accountancy profession could have a more prominent role to play in helping honest entrepreneurs get a 2nd chance after becoming insolvent?

In Lithuania, France, and Hungary, the accountancy profession could have a stronger presence in setting up new businesses and more generally in playing a preventive role regarding insolvency.

In the UK and Ireland, the profession already has a fundamental role in helping entrepreneurs getting a second chance.

In Austria, the Czech Republic, the Netherlands, and Spain, there is a keen interest for the profession to be more involved in restructuring matters. For the Czech Republic, the profession can be more proactive in proposing and preparing a reorganisation plan.

In the Netherlands the profession might sometimes be unwilling to take up these type of services should the financial resources not be sufficient.

In Germany and Denmark, the profession is equipped with the right skills (e.g. in finance, economics and business administration) to help entrepreneurs get a 2nd chance. Nevertheless, competition from other professions specialised in this area is high, particularly the legal profession.

In Belgium, further incentives could be useful to encourage entrepreneurs to make use of professional advice, for example, via grants to pay for professional advice when developing a solid business plan.

In Austria, the profession could have a more prominent role in assisting entrepreneurs. Reorganisation of 'prior-to-insolvency' proceedings is hardly used in practice.

Q14 Do you think the accountancy profession should be more involved in cross-border insolvency proceedings in the future⁹?

In Lithuania, Greece, Estonia, Turkey, Italy, Slovakia, Belgium, Hungary, the Netherlands, France, Spain and the Czech Republic, the profession should be more involved in cross-border insolvency proceedings in the future.

For Cyprus, France, and Germany, there is a need to simplify national laws and to harmonise how it works at EU level.

For Austria and Germany, it should be noted that small accountancy firms do not have the same opportunities when it comes to cross-border issues.

Q15 Do you have any suggestion on how the accountancy profession could contribute further to company's restructuring before and/or after insolvency proceedings?

In Austria, Estonia, France, Lithuania, Hungary, and Italy, the accountancy profession could contribute further in the early stages of preventive measures.

For the UK as well, the profession could contribute further in the early preventive measures by advising on how to avoid insolvency and on the responsibilities of directors for instance. Providing guidance through the restructuring could also be a good contribution.

For the Czech Republic, the profession could, for instance, define detailed procedures to provide clients with practical solutions of reorganisation – with a consideration of the legal and accounting point of view.

For Belgium, it is important to raise awareness on the importance of the profession's advice when developing a solid business plan for start-ups. The accountancy profession could also have a more prominent role to play in helping honest entrepreneurs getting a 2nd chance.

For Germany, establishing early restructuring at national level in order to strengthen the auditors' role is strategic.

For Denmark, it would be instrumental to implement a certification system similar to the one in the UK. Together with legislative amendments, it will ensure that courts assign specific tasks to accountants.

For the Netherlands, a mandatory engagement of accountants could help companies facing financial distress. This would help achieve more successful relaunches and preventing bankruptcy.

⁹ Denmark, Poland, Portugal, Slovenia, and Sweden, did not express an opinion.