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A comparative analysis of corporate insolvency laws

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1. Introduction

1.1 Importance of the topic

The concept of bankruptcy dates back hundreds of years; however, the real importance of the topic was only realized during the 19th century. At that time, it was discovered by economists that the level of debt is not only a measure of financial hardships, but it also fulfils a relevant role in the economy. Soon thereafter it was understood that the handling of the overwhelming amount of debt is crucial within in the financial system. (Hahn, 2013)

Although throughout the last century the issue gained more and more attention, the peak was reached during the financial crisis of 2008. Owing to the various bankruptcy cases, such as the Lehman Brothers case, it became clear to the public that bankruptcy is a crucial component of an economic crisis. Since then increased attention has been devoted both in the literature and in practice to the topic of financial distress and bankruptcy, which implies the actuality and importance of the issue.

As a consequence, framing laws on bankruptcy also became essential worldwide. Besides the development of national bankruptcy laws, in the last couple of decades considerable attention was dedicated to the constitution of a common set of international bankruptcy laws. The first initiatives for such a system were launched in the 1960s, and these were followed in the next decades by various attempts to develop a system, however, most of them appeared to be rather unsuccessful. (Anyfantaki, 2017)

Considering this century, as the member states of the European Union (EU) have reached a high level of integration regarding economy and trade, the next logical step would be to create a common legal system as well, which would also include laws and regulations of insolvency cases. By harmonizing the regimes of the different countries, the internal market of the EU could be strengthened, common conditions could be set up for insolvency, regardless of where the company is located. (Eidenmüller, 2017) Even though today there is still no unified body of insolvency law procedures within the European Union, the establishment of such a system has always been considered as an important aim to achieve and thus various initiatives have been introduced recently. (Anyfantaki, 2017)

1.2 The objective of the paper

Due to the constantly growing literature on different bankruptcy systems and on the vision of a probable common bankruptcy system in the European Union, the aim and objective of this thesis is to give an overview on the current bankruptcy systems of businesses by focusing on two research questions. The first question examines the extent to which European bankruptcy systems in general differ from the bankruptcy system of the United

States of America. During the analysis, not solely a description of both systems will be provided, but a comparison of the systems will be also given, emphasizing the relationship between the regimes. Secondly, the paper also aims to investigate whether there is a tendency of heading towards a common and unified system of bankruptcy laws within the European Union. In addition, if we find evidence for that we also plan to determine the extent of the integration which has been reached so far. In order to find an appropriate answer to the latter research question, a recent and well-known case study will be closely examined.

1.3 Structure of the paper

We now provide an overview of the structure of the paper. After a brief introduction, the second section describes the theoretical background which is crucial for the further understanding of the topic. The third section provides a detailed description of the bankruptcy system of the United States. Here the main chapters of the U.S. Bankruptcy Code will be introduced, in particular Chapter 7 and Chapter 11 with all the relevant features of the processes. The next section will continue to deal with the States, however, will rather focus on the type and characteristics of out-of-court restructurings. In section five the bankruptcy system of Sweden will be examined, which will be compared to the U.S. samples. Section six will comprise of further description of the European insolvency systems. More specifically, this part will deal with the United Kingdom, Germany and France and to what extent are they similar to the U.S. Following, the next part aims to find an answer to the second research question, by introducing a well-known case study, which will be used to sketch the main ideas of the current regulations of insolvency in the EU. Additionally, an opinion will be given concerning the two research questions. Lastly, a conclusion will be given on the main findings of this master thesis.

2. Bankruptcy in a theoretical context

2.1 Theoretical background

The expression “financial distress” is used to describe a situation when the firm is facing financial difficulties, thus the company does not have enough cash and liquid assets to meet its debt payments. As a consequence, a corrective action is needed in order to solve the company’s financial issues. According to Ross et al. various events can be considered as a sign of financial distress; some of them are dividend reductions, plant closings, losses, CEO resignations etc. All of these can be regarded as an “early warning” for a firm, referring to difficulties the entity is currently facing. (Ross, Westerfield, & Jaffe, 2010)

If not handled correctly, firms in financial distress become insolvent. Insolvency refers to the situation when the face value of the firm's liabilities exceeds the market value of the company's assets. This state, however, still could be changed by trying to cut costs, selling their assets and values, borrowing money or even by taking a chance to renegotiate the company's debt. (Fay, 2012) The concept of insolvency is often used interchangeably to the term bankruptcy; however, the terms do not mean the same. Bankruptcy refers to the status when the insolvency of the firm has been claimed by the court of law and also orders have been given in order to solve the situation. Hence, insolvency indicates a state of the business, while bankruptcy is rather a legal scheme or court order, in which the status of insolvency is determined. (Surbhi, 2014) This means that an entity might be insolvent without being declared to be bankrupt, while all the bankrupted firms are insolvent. (Fay, 2012) Bankruptcy is also considered to be the last stage of the insolvency status, which could be solved in various ways, for instance by winding up the assets. (Surbhi, 2014)

Two options, liquidation and reorganization, are offered for firms if they are unable to settle the required payments. (Stephen A. Ross, Randolph W. Westerfield, Bradford D. Jordan, 2010) A liquidation is used if there is barely any chance of rehabilitation or if it is unreasonable to make further investments in the entity. (Altman & Hotchkiss, 2006) In case of a liquidation, the firm terminates to exist as a going concern, by selling off all its assets. (Ross, Westerfield, & Jordan, 2010) However, during a reorganization process the firm continues to exist as going concern by trying to restructure the company's business with the aim to manage its obligations as soon as possible. (Ross, Westerfield, & Jordan, 2010) This option is chosen if it is assumed that the continuation of business could end up with a more valuable and healthy company, than if it would have been liquidated by selling its assets. (Altman & Hotchkiss, 2006) The choice of option is dependent on the circumstances and conditions; hence the opportunity is implemented in which the firm is worth more. (Ross, Westerfield, & Jordan, 2010)

2.2 Basic opportunities of solving distress

A company that defaults on its financial obligations needs to look for a suitable solution to settle the issues as soon as possible. Firms can either choose to finish their operations, hence to liquidate the company, or to restructure the business. The liquidation procedure is a formal bankruptcy process, called Chapter 7 in the United States. Regarding restructuring, the entities might have two options to choose from: either to decide for a formal bankruptcy reorganization under Chapter 11 (U.S.) or to make a private workout. Private workout is a type of voluntary arrangement with the aim of restructuring a firm's debt. (Ross, Westerfield, & Jaffe, Corporate Finance, 2010) By this method, a firm can decide to avoid the

legal process of bankruptcy, which can be lengthy and expensive. Additionally, it is often everyone's best interest to find a "workout" that avoids the legal process. (Ross, Westerfield, & Jordan, 2010) If the option of private workout is not possible, the formal bankruptcy process is usually required. (Ross, Westerfield, & Jaffe, Corporate Finance, 2010)

The figure below illustrates how large public firms might solve the issue of financial distress. According to Ross et al., 49 percent of the entities rather decide not to restructure; these firms might decide for an immediate liquidation. Among those which initiate the process of restructuring, approximately half of the companies try to settle their situation via private workouts, while the rest decides for the option of formal bankruptcy restructuring (Chapter 11). Within the formal process, the vast majority of large public companies (about 83 percent) are able to reorganize and continue business operations, 10 percent is finally liquidated, and the rest of the companies merge with another firm. (Ross, Westerfield, & Jaffe, 2010)

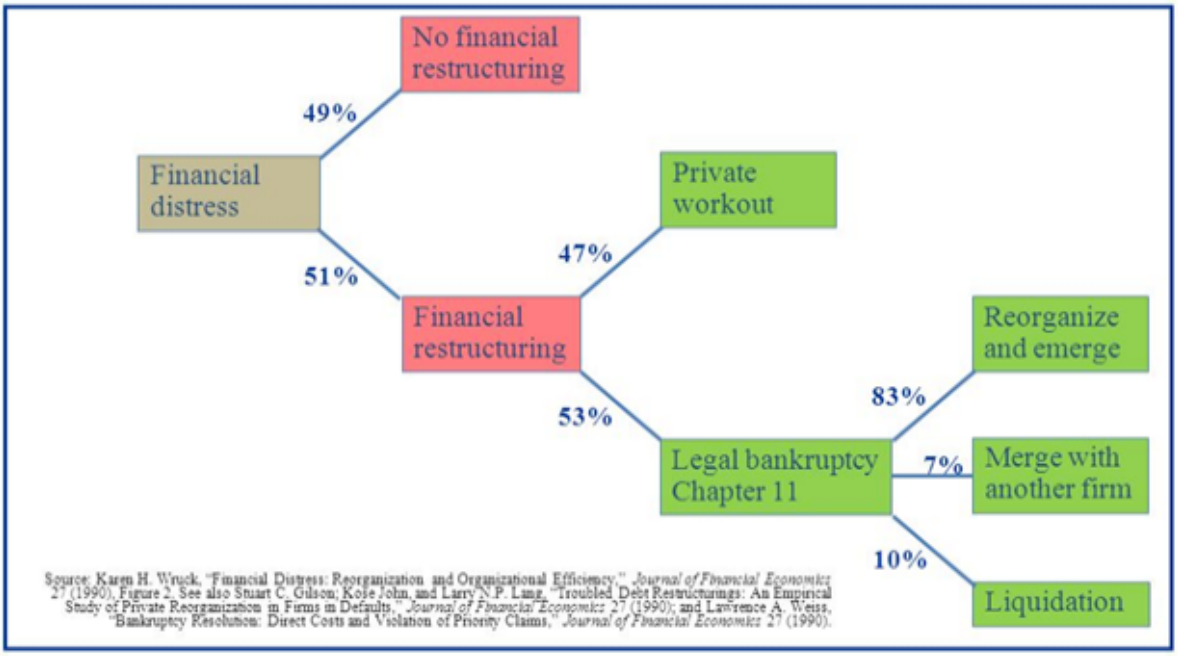

Figure 1: What happens after financial distress (Ross, Westerfield, & Jaffe, 2010)

3. The U.S. Bankruptcy Law System

The following chapter will provide a detailed description of the bankruptcy system and procedures of the United States. The section will not only include the examination of the basic chapters of the U.S. Bankruptcy Code but will also demonstrate some criticism and interpret some recommendations concerning the chapters.

In the United States the formal bankruptcy procedures are regulated by the Bankruptcy Acts of 1978 and 2005 with the aim to "provide a collective procedure for the resolution of impaired contractual claims held against the firm. " (Senbet & Seward, 1995, p. 925) As a result of entering into a bankruptcy procedure, bankruptcy law will take precedence over the commercial code, consequently the claimants' responsibilities and obligations and therefore all the incentives as well might change. Thus, it is crucial to be aware of different provisions of the Bankruptcy Code, as it might have significant effects and consequences. (Senbet & Seward, 1995)

In general, companies either file for liquidation (Chapter 7) or for reorganization (Chapter 11) by one of the regional bankruptcy courts. The type of filings can be distinguished depending on the initiator of the procedure. If the management filed, then it is called a voluntary procedure, while in case of the creditors, it is known as an involuntary bankruptcy filing. (Senbet & Seward, 1995) In general, most Chapter 11 processes are voluntary, they are filed by the management. Involuntary bankruptcy filings are rather type Chapter 7 than Chapter 11 petitions (Brouwer, 2006), however, the possibility of conversion exists between the chapters. (Hotchkiss, John, Mooradian, & Thorburn, 2008) In the United States the management can retain control during the reorganization process, thus it can be a triggering factor for the management to file for a reorganization voluntarily. The assignment of an independent trustee (and the removal of the management) can be harmful for the firm, as a trustee might not strive for a successful reorganization like the management, thus the firm value might decline. (Brouwer, 2006)

3.1 Overview of Chapter 7

The aim of Chapter 7 is to liquidate a failed firm in a straightforward and clear process. As a first step of the process, the petitioner takes into account and then prepares a list of all the firm's assets and liabilities. Thereafter, the petition is handed in with a detailed description of the value of assets and the list of creditors matched with the liabilities owed to each of them. (Vance, 2009) Next, a trustee is entrusted by the court with the task to shut down the firm by selling the company's valuable assets. (Hotchkiss, John, Mooradian, & Thorburn, 2008) Often an interim trustee is chosen to control and organize the liquidation process. The question whether the interim trustee will be the permanent trustee (which is usually the case) is clarified at the first meeting, when the creditors implement an election on the issue. (Lóranth & Franks, 2014)

As soon as the trustee is appointed by the court, the creditors are informed from the initiation of the bankruptcy and creditors are requested to hand in an evidence for their claim. (Vance, 2009) Meanwhile the trustee selects the approach of selling the company's

assets and initiate to sell them on the market. (Lóranth & Franks, 2014) The trustee has the right to sell the assets below their value, thus to utilize them at a low value. As soon as proceeds are collected, they are distributed among the creditors according to a strict order: first secured lenders and various type of fees such as tax, attorney and court fees are satisfied. In case the secured claim is more than the value of the asset supposed to ensure it, then "the trustee may "abandon" the asset to those holding the security interest. The value of the asset "abandoned" reduces the claim of the creditor. The balance is an unsecured claim". (Vance, 2009, p. 253) No unsecured claims will be fulfilled until all secured and additional fee claims are settled. (Vance, 2009)

As all claims are marshalled, the trustee has to report to the court. (Lóranth & Franks, 2014) Finally, the court will discharge the entity from the unpaid debt, thus the amount of unpaid liability will cease to exist. Some exceptions for the discharge might be if the owner of the bankrupted firm had a personal responsibility (guarantee) of the debt or if within the last half a year a discharge has already been provided in an earlier bankruptcy. (Vance, 2009) The main advantages of Chapter 7 are that they are considered speedy and quite simple, hence they are popular among businesses. However, the Bankruptcy Code itself does not really promote the liquidation for businesses. Applying for Chapter 7 is only recommended in case of experiencing serious issues or after an unsuccessful reorganization procedure. (Anyfantaki, 2017)

3.2 Description of Chapter 11 in general

The aim of Chapter 11 is to implement a successful reorganization process after which the company will be able to continue its business activities. Due to the alternative that Chapter 11 provides, several businesses managed to maintain their existence and were successful in the reorganization of their operations in several sectors of the economy, such as healthcare, communications etc. (Anyfantaki, 2017)

As soon as a firm enters into a reorganization process, an automatic stay provision immediately comes into force, which significantly affects the options of creditors. First, due to the automatic stay, unsecured creditors are prevented from demanding their principal and interest payments. Furthermore, interest is not accrued anymore on the outstanding unsecured debt, which consequently affects the value of the debtholders' claim of the firm assets. On the other hand, as another influence of the automatic stay provision, the secured creditors are forbidden to seize their collateral, however, as a compensation, they might get some kind of protection payments. (Senbet & Seward, 1995) It is also called an 'adequate protection', which means that the debtor might make regular payments for the creditor or optionally might give some additional liens. (Anyfantaki, 2017) Finally, the provision also

ensures that creditors do not terminate contracts or initiate a lawsuit against the company. The court is also entitled to the right to invalidate some type of transfers or contracts, which happened before the petition was handed in. The company may benefit from such a situation, if the court decides to void a contract which is assumed to have high labor cost or possibly lease payments. (Senbet & Seward, 1995) In utmost cases the automatic stay provision comes into force immediately at the time of filing. However, sometimes a releasement from the provision can be given, for instance, if there is a chance that the creditor's collaterals might lose from their value or being damaged. Nonetheless, such incidents are not common during the procedures. (Anyfantaki, 2017)

Then, as a next step, a reorganization plan should be compiled. According to Bris et al. three phases of Chapter 11 can be distinguished, which are namely: "from filing to plan, from plan to confirmation and from confirmation to closure." (Bris, Welch, & Zhu, 2006, p. 1273) Within "the filing part" the original financials are to be handed in, which is followed by the filing of the reorganization plan. The plan must describe the newly planned financial structure (Bris, Welch, & Zhu, 2006), the allocation of creditors to their claimant classes, and should also specify the quantity and the date of the distribution of the company's assets to the different claimant classes. (Ayotte, Hotchkiss, & Thorburn, 2012) Additionally, a reorganization plan should provide evidence to the court that after recovering from the bankruptcy state, the company will be in a stable status. To be more specific, this means that for a while it should not file again for a reorganization due to inappropriate capital structure or because of prolonged weak performance. In order to fulfil such conditions and to become successful again, there might be a need for a wide range of changes or restructurings within the company's operations. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

The reorganization plan should be filed within 120 days (after filing for bankruptcy), in which time period the debtor has an exclusive right to file. (Bris, Welch, & Zhu, 2006) This limited period was first introduced by the Bankruptcy Code of 1978 with the aim to speed up the procedure, thus reduce the time spent with restructuring. (Altman & Hotchkiss, 2006) As the reorganization plan is frequently the starting point of a consecutive bargaining and negotiation processes, the exclusivity seems to be a significant factor. (Senbet & Seward, 1995) The exclusivity period can be extended if the debtor asks for it, which is quite common during the procedure. (Bris, Welch, & Zhu, 2006) The maximum amount of the exclusivity period with the extension can be 18 months. (Ayotte, Hotchkiss, & Thorburn, 2012) In such a situation the creditors have three choices. As a first option, creditors can hand in a petition in order to prevent restructuring and initiate instead a Chapter 7 liquidation process. Secondly, they can try to shorten the exclusivity period. Lastly, they can simply accept the plan. If the debtor is unsuccessful in getting the acceptance from the given number of

creditors within the time provided, thereafter anyone has the right to file a reorganization plan. (Altman & Hotchkiss, 2006)

The second phase of the Chapter 11 process is known as the plan or submission to confirmation, which is mostly controlled by the court and the security holders. During the reorganization process, based on their claims, all the creditors are divided into subgroups or classes, like secured and unsecured creditors' class. If any of those classes' claim is not fulfilled, then such a class will be considered an impaired class, and thus will be entitled to the right to vote on the reorganization plan. However, certain rules have to be fulfilled before the court can approve a reorganization plan: a majority is required not only in the number of the creditors, but also a majority in the amount owed to all of the creditors. As the reorganization plan should be accepted with majority of all impaired classes, the time it takes to receive the approvals might be a proxy to measure the difficulty of the process. (Bris, Welch, & Zhu, 2006)

The last phase according to classification of Bris et al. is the confirmation to closure. In this phase first the approved plan is implemented. This is followed by the distribution of assets, where the process length is based on the number of claimants and the complexity of the issue. Thus, basically the time frame for this period should show the complexity of each case. (Bris, Welch, & Zhu, 2006)

Regarding the time of bankruptcy, Bris et al. conducted a research on the length (days spent) in each phase of Chapter 11. The data was collected from two bankruptcy courts (New York and Arizona) between 1995 and 2001. Their aim was to find out how much time was spent separately in each phase on average. The received data was compared to the ideal 120 days which is implied by the theory. Based on the results of the experiment it appears that in general, approximately equal time was spent in each phase. It was found that only 22% of the companies in the experiment were within the limit of 120 days to file a reorganization plan. (Bris, Welch, & Zhu, 2006)

The researchers also tried to look for an explanation for the length of the phases. Regarding the first stage two reasons were found. First, in case of higher number of secured creditors, the filing process seemed to be faster. Secondly, the higher the percentage of the company owned by the management, the longer time the firm spends in the phase. According to Bris et al.:" This may indicate that managers with more of their own money at stake "play the option" of keeping the firm alive, and are reluctant to resolve the bankruptcy." (Bris, Welch, & Zhu, 2006, p. 1275) For the second stage it was found that with the increasing number of unsecured creditors the time also increases. However, if an unsecured creditors' committee is involved in the process, then the time decreases. Therefore, it suggests that time could be

reduced by a simple coordination mechanism, by organizing creditors into committees. For the third phase no reason was found that could explain the time spent in this stage. (Bris, Welch, & Zhu, 2006)

3.3 Further features of Chapter 11

3.3.1 Debtor-in-possession financing (DIP)

Apart from the automatic stay provision and the exclusive right to file for a reorganization plan, Chapter 11 still has several significant and beneficial features. One of the further features is that as soon as the filing has been done, the debtor receives an access to debtor-in-possession (DIP) financing, which basically means that the debtor is allowed to obtain new sources of money. According to Altman et al. the new financing is primarily allowed to use the new sources of funds to finance those professionals who might be beneficial for the composition of a reorganization plan, for (daily) business operations or for the maintenance of the existing assets. The debtor-in-possession lenders are provided with a superior seniority status, which usually means that they receive a priority status over the existing claims. (Altman & Hotchkiss, 2006) The aim of this provision is to encourage new lending (Senbet & Seward, 1995), hence the debtor receives access to new funds and obtains a chance therefore to remain liquid. In addition, the debtor, due to the access to the new funds, will be still able to invest in positive net present value investments. (Altman & Hotchkiss, 2006)

The new funds accessible enable to spend less time in bankruptcy, while at the same time also increase the chances for a successful reorganization. (Altman & Hotchkiss, 2006) Moreover, a trend can be recognized: debtors usually apply for DIP financing the same time (or shortly after) when they hand in the Chapter 11 petition. (Hotchkiss, John, Mooradian, & Thorburn, 2008) However, some criticize and highlight also the drawbacks of DIP financing. It is argued that it might lead to an overinvestment, as it encourages managers to take on risky or negative net present value projects with the newly accessed funds. Furthermore, another drawback of such a financing is that until the DIP fund is not entirely repaid, the firm is not able to quit Chapter 11. (Altman & Hotchkiss, 2006)

In order to receive DIP financing, the debtors have to go through a certain procedure. As a first step, the firm has to hand in a motion under the Federal Rule of Bankruptcy Procedure, which will be handed over to the trustees and to creditor committees. This is followed by a 15 day long waiting period before the motion is discussed on a final hearing by the court. In case of an urgent need, the court can already allow an immediate borrowing in the waiting period. Permanent DIP financing (the full requested amount) can be enabled by the court at the hearing, however, before the court approval, the debtor must prepare a business plan

and should provide a schedule for the projected cash flows and a valuation of all assets. These elements, after close examination, should be accepted by the court to permit DIP financing. Additionally, a proof should be shown that DIP financing would be feasible, lenders should also be secured. Another important factor is that it should be clear that as a result of the DIP financing, value will be added. (Altman & Hotchkiss, 2006)

As mentioned already, if individual creditors become lenders for DIP financing, they will enjoy the best possible position, as due to the super priority rule their claims will be covered first. However, not only individuals, but also potential acquirers, whose aim is to acquire the bankrupted company, might also provide funds for DIP financing. The incentive behind such a step could be that by this, it can be ensured that they will be later the front runners who have the possibility to buy the firms' assets. As lenders, they might have the possibility to rearrange the loan in a way that helps them acquire the targeted bankrupt firm, while also rise the costs of acquisition for potential competitors or suitors. An illustrative example for this could be if the DIP lender is provided with the option to convert its debt to equity, while others would have to repay the whole amount of debt promptly. (Altman & Hotchkiss, 2006) Thus, DIP lenders might enjoy several types of benefits if they provide funds to bankrupted companies.

One might be wondering how risky DIP financing is. At first sight one might think that such a lending is considered risky, as money is provided to a bankrupt firm. However, the case is just the opposite. Indeed, DIP lending can be considered a quite safe action, which can also be proven with studies. As an example, between 1988 and 2004 there were approximately 500 DIP financing cases, from which the loss rate was extremely low (less than 5% of the cases). Since the 1980s, when DIP lending was introduced, this procedure has become so successful that several other countries have already integrated some similar procedure in their own bankruptcy processes (such as Japan), and still a number of governments are consider introducing such processes in the near future. (Altman & Hotchkiss, 2006)

Another important aspect of Chapter 11 is that even after filing, the debtor remains in possession, meaning that the management is not replaced during the reorganization procedure, they continue to govern the process. The management is only removed by the court in special cases, for instance fraud or if there is an extreme mismanagement, but replacing the management for mismanaging in practice is quite uncommon. (Ayotte, Hotchkiss, & Thorburn, 2012) If fraud, dishonesty or mismanagement takes place, after the replacement of the incumbent management, a trustee is appointed to manage the process. (Anyfantaki, 2017) It is interesting to note that under current bankruptcy laws the management appearing to be incompetent is not a sufficient reason to remove the

management. (Senbet & Seward, 1995) However, it can happen that the board of directors is the one who replaces the management, which already happens frequently in financial distress and in bankruptcy.

It seems that Chapter 11 provides several benefits, as it not only ensures the possibility to uninterruptedly continue the business, but also makes sure that that filing for bankruptcy is not delayed until the last moment. (Ayotte, Hotchkiss, & Thorburn, 2012)

3.3.2 Creditor Committee

As soon as the company files for a Chapter 11 reorganization, the Bankruptcy Code also provides the possibility to appoint creditor committees. The aim of such a cluster is to represent the creditors as a class in the court and to use their influence, if it is needed during the reorganization process. Most commonly (in almost all cases) the U.S. Trustee's office nominates an unsecured creditors committee, which has the right to supervise at the debtor's operation and also the chance to discuss the reorganization plan. (Ayotte, Hotchkiss, & Thorburn, 2012) In general, the committees have seven members, those with the seven largest claims. (If they are willing to take this role) (Altman & Hotchkiss, 2006) The members have not only an advisory role (Anyfantaki, 2017), but they are also entitled to arrange legal counsels or any other professionals who might be beneficial during the reorganization process. (Hotchkiss, John, Mooradian, & Thorburn, 2008) However, it is possible to have more representors in a committee (can only be modified by the court), which frequently happens in complex bankruptcy cases. Moreover, it is also an option to let such committees act for a further, extended period; the only stipulation is that the members should be fairly chosen and should be representative for the different claims. (Altman & Hotchkiss, 2006) There might be other type of committees, such as an equity committee, however, these are not typical during a bankruptcy process. Additionally, such committees should also be accepted and approved by the court. If a person is member any of the committees, they are restricted from trading, due to the insider information they might have concerning the reorganization plan. (Ayotte, Hotchkiss, & Thorburn, 2012)

3.3.3 Approval of the reorganization plan

The next notable aspect of Chapter 11 is the approval by the voting process. After the filing, the debtor is given 180 days to obtain the approval of the plan from the creditors. (Altman & Hotchkiss, 2006) If needed, this period can also be extended to 20 months. (Anyfantaki, 2017) In order to consider the reorganization plan approved, an affirmative vote is needed not only by the two-thirds in face value, but it is also required to have at least one half of the number of the holders in each class. This means that Chapter 11 reorganization could be beneficial, if there are only a few classes of holdouts. (Senbet & Seward, 1995)

However, sometimes claims can be impaired. This concept first appeared only in the Bankruptcy Act of 1978. (Altman & Hotchkiss, 2006). Even nowadays, in general, the court does not intervene in the bargaining process of the claimants. (Hotchkiss, John, Mooradian, & Thorburn, 2008) However, if in the voting procedure the plan is not accepted by a class, the court has the right to initiate a cramdown procedure. This means that the court is entitled to accept a reorganization plan despite the fact that one of the claimant classes exercises their veto right regarding the plan. (Senbet & Seward, 1995) The court will have such a right as long as the reorganization plan is considered "fair and equitable", thus all the classes receive at least as much as they would obtain during a liquidation process, (Hotchkiss, John, Mooradian, & Thorburn, 2008) which is also known as the best interests of creditors test. (Brouwer, 2006) However, in practice the usage of cramdown procedures are considered to be really uncommon. The reason for this is that according to the rules the "fair and equitable standards" necessitate finding out the going concern value. As this can be determined only on a special hearing, which is most frequently not only seen as just costly, but also as a lengthy process, therefore claimants aim to avoid cramdown procedures. (Hotchkiss, John, Mooradian, & Thorburn, 2008) The reorganization plan thus can be approved by the judge even if the creditors refused. But the opposite is also true, the plan can be denied by the judge even when creditors agreed to it: The court has the possibility to refuse a plan if they believe that any of the claimant classes is treated unfairly in the submitted proposal. (Vance, 2009)

An approval is given by the court, if the reorganization plan was considered fair (to all concerned) by the judge and when at least one of the impaired classes also accepted the plan. As soon as the approval was achieved, the firms receive the bankruptcy discharge status. (Vance, 2009) "A bankruptcy discharge releases the debtor from personal liability for certain specified types of debts." (United States Courts, 2018, p. 1) Immediately as such a discharge comes into force, the debtor will not be legally required to pay debts anymore. Thus, after the discharge come to existence, the creditor is not allowed anymore to ask for the discharged debt from the debtor. This prohibits any form of action, such as personal contact, letter or any other type of communication methods. (United States Courts, 2018) Therefore, if in the plan it was stated that some creditor classes will not be provided with the full amount of their claims, after the discharge, they will only be entitled to ask for the amount written in the plan. It is optional for firms to qualify for a discharge, however, in utmost cases companies apply for this opportunity. (Vance, 2009)

3.3.4 Absolute Priority Rule

Another significant element of Chapter 11 is the absolute priority rule or in its shortened form APR. It is basically a rule by which most reorganization plans are guided, claiming that "creditors should be compensated for their claims in a certain hierarchical order and that most senior claims must be paid in full before a less senior claim can receive anything." (Altman & Hotchkiss, 2006, p. 34) According to the rule, first all the administration expenses of bankruptcy should be paid, including among others legal, accounting fees etc. Then special types of unsecured claims are the next in the order. These are for example payments regarding taxes (tax penalties, taxes on income etc.), but also wages, salaries, commissions, which are earned within 90 days before filing. Following this, the secured debts and then the senior debts should be paid. Afterwards the rest of the unsecured creditors' claims should be satisfied. Lastly, the claims of the class of equity holders should be fulfilled, first the preferred and then the common stakeholders. (Altman & Hotchkiss, 2006)

Although the rule seems to be straightforward, the APR is often violated during Chapter 11 reorganization processes. This means that even though the priorities are clearly given, for various reasons lower level claimants receive already some satisfaction, even though more senior claims have not been paid entirely. (Altman & Hotchkiss, 2006) The reason for such deviations lies in the various features of the Code, which let the debtors bargain and protect themselves from the creditors. An example for that is the fact that under Chapter 11 the possibility is provided to receive new senior financing and also to file exclusively for 120 days, which are considered to be beneficial options. (Senbet & Seward, 1995) The infusion of new capital by old equity holders, which is frequently necessary for a business to be restarted, is a good example for the violation of the absolute priority rule. As a result of the necessity of the new capital for the reorganization, new capital will get priority over the old one by payments, which is also a deviation of APR. (Brouwer, 2006) However, as the reorganization plan is based on negotiations and bargaining, the court is allowed to accept such plans as well, although it clearly deviates from the absolute priority rule. (Ayotte, Hotchkiss, & Thorburn, 2012)

In the 1990s several cases in practice have been examined regarding APR violations. It was found in one of the examinations in the early 1990s that within 37 Chapter 11 procedures, in 29 of the cases some deviations of APR were recognized. The amount "lost" by creditors was also studied that time. That investigation illustrated that while looking at 41 large firm bankruptcy processes, only in these cases approximately $900 million was paid to creditors who would not have deserved it according to APR rules. (Altman & Hotchkiss, 2006)

Consequently, APR plays an important role in a reorganization process, as it is a significant tool used for protecting creditors' rights. Nowadays, as several insolvency laws are being changed, the correct implementation of the APR is still debated in the systems. (Wessels & de Weijs, 2015)

Even though debtors have a significant bargaining power, creditors also have some options during the reorganization process. As already mentioned above, creditors can try covert the case to a Chapter 7 liquidation or as an alternative, they can refuse to lend funds, by which it is exacerbated for the debtor to get access to new capital for the reorganization process. Creditors might also ask to lift the automatic stay provision, which, if granted, allows to demand the claims from the debtor. These are just couple of examples that creditors can exercise in order to affect the reorganization process. (Senbet & Seward, 1995)

The table below provides the summary of the most important features of the Chapter 11 reorganization.

Basic Chapter 11 reorganization features

1. *The automatic stay*
   - Stops principal and interest payments to unsecured creditors.
   - Secured creditors lose the right to take possession of collateral, but may receive 'adequate protection' payments;
   - Executory contracts can be assumed or rejected. If rejected, these claims then become unsecured creditors.
2. *The debtor-in-possession*
   - Typically the current management and board of directors retain control.
   - Management initially maintains exclusive right to file a plan of reorganization and solicit acceptances by the committees. Exclusivity period extends for 120 days to file the plan and an additional 60 days to seek approval. Extensions are common.
   - Debtor-in-possession financing effectively allows the court to strip seniority covenants and collateral from existing debt. Allows incremental senior borrowing.
3. *Reorganization*
   - Plan must be approved by all classes of creditors and the court. Exception is the cramdown procedure.
   - Threat of delay of reorganization plan by management. Transfers wealth from some creditor classes to equity.
   - Bargaining powers favor debtors, but creditors can
     (i) propose an alternative cramdown;
     (ii) ask for a lift of the automatic stay;
     (iii) request conversion to Chapter 7 liquidation;
     (iv) refuse to lend new funds;
     (v) block asset sales.

Table 2: Basic Chapter 11 reorganization features (Senbet & Seward, 1995)

Summarizing it, in formal bankruptcy, two options are provided: Chapter 7 (liquidation) and Chapter 11 (reorganization). Chapter 7 is the process in which the firm is winded up in order, the assets are marketed, and the proceeds are used to satisfy the creditors' claims according to the absolute priority rule. After all these have been implemented, the entity ceases to

exist. On the other hand, in Chapter 11 instead of a liquidation, the firm tries to restructure its assets and the operations in order to get the business back on track and become successful again. In general (unless fraud or incompetence), the debtor can stay in possession and can continue to manage the business operations. During this process a reorganization plan is filed, which determines the payment of creditors and the strategic business plan of the company for the future. The plan may be approved or refused by the judge. As soon as it has been accepted, the firm is discharged, and any claims not described previously in the plan are not collectible anymore. (Vance, 2009)

Even though several firms try to restructure, not all of them can manage it, thus Chapter 11 is frequently converted to a Chapter 7 process. (Vance, 2009) If a conversion takes place, a new period for filing starts, meaning that the management or the trustee (of the reorganization) required to hand over all records and properties to the trustee of the liquidation process. (Bris, Welch, & Zhu, 2006) "The debtor can convert a case to Chapter 7, except when (a) the debtor is not a debtor-in-possession, or (b) the case originally commenced as an involuntary case or converted into a Chapter 11 as an involuntary case. " (Bris, Welch, & Zhu, 2006, p. 1271)

3.4 Criticism on Chapter 11

Although Chapter 11 procedures have several advantages, recently it has also been often criticized in several considerations. Firstly, most legislators promote to apply for the Chapter 11 protection, however, many are against this argument, because they argue that only those should enter who seem to have high chances of viability. It is argued that the attitude of incentivizing for the application implies judicial irresponsibility, as factors such as corruption or market consideration is not taken into consideration. Therefore, to prevent such situations, judges should also act accordingly, and they should only approve a plan if it is not expected to end up in liquidation or in a further reorganization process. According to estimations, approximately 15% of the reorganization processes faces problems again soon, and file for protection for the second time. Hence, based on these criticisms, the main aim of Chapter 11 should be to remain feasible and rational in the acceptance of reorganization plans. (Anyfantaki, 2017)

Furthermore, Chapter 11 is also criticized for being used to reach the highest price possible when selling the company's properties. The entities even have the possibility to market their properties before the process reaches an end. This mechanism became an extremely popular trend since the early 2000s. Hence, even though previously it was unimaginable to use this chapter to market the firm as a going concern, in 2002 only 50 percent, in 2014 already more than 75 percent of the cases were used as company sales, showing an

increasing trend and also implying the changing philosophy of the chapter. (Anyfantaki, 2017)

Another argument for the potential wrong usage of the chapter is that within the process of Chapter 11, companies frequently need to reduce the workforce, dismiss the management or agree to merge with another firm. Such actions could often reduce the benefits provided by reorganization. Hence, firms often seem to decide wrongly for the implementation of a Chapter 11, instead of a Chapter 7 procedure, which would be more beneficial in several cases. (Anyfantaki, 2017)

Chapter 11 also seems to be more beneficial for large companies than for small businesses. Individuals and small businesses have to satisfy stricter regulations regarding filing and the documents required. In addition, for them feasibility needs to be proved to the court with a number of filings and they are exposed further supervision by the USA Trustee. Hence, it appears that American law advocates rather bigger corporations, due to the protective measurements provided to them, which can also be problematic for smaller businesses. (Anyfantaki, 2017) Thus, as approximately 85% of the cases are SMEs, it has been argued and criticized by Wessels et al. that the Code, due to the overwhelming majority of small businesses in practice, should be rather focused on SMEs and provide some separate regulations for the insolvency of larger entities and not the other way around, as it is the case currently. (Wessels & de Weijs, 2015)

Finally, a legal regulation, which is in force since 1998, lets the creditors to obtain collaterals on assets, hence they are empowered to control the entity's access to capital to a certain extent and can exert pressure on the firm if needed. The phenomena of having opposing aims and prospects to the firms' goals is becoming a more and more frequent phenomenon in the last decades. (Anyfantaki, 2017)

3.5 Proposed reforms for Chapter 11

The section above proves that Chapter 11 could be criticized for a number of aspects. As a result of the criticism, experts constructed several recommendations by which the chapter could be improved, which will be described in detail in the following section.

It seems that Chapter 11 served business purposes perfectly for several decades, however, several practitioners claim that after 30 years a change would be needed. They are explaining the necessity of change with the fact that the world has changed drastically since the Code has been compiled; especially the market and business conditions and circumstances went through significant developments. The most remarkable advancements were the expansion of the types of financial products, the usage of secured credit and the

fact that today's world is more focused on services, intellectual property and further kinds of intangible assets, than it was the case thirty years ago. Furthermore, business relations and internal business structures also changed to a huge extent and due to that the world became more multinational. In addition, it has been argued recently that the original goal of the Chapter 11 reorganization process is eroded, as it was originally aimed for "rehabilitation of businesses, and the preservation of jobs and tax bases at state, local and federal level." (Wessels & de Weijs, 2015, p. 4) Nowadays, the maximization of value seems at least as important (if not even more important) as the previously listed goals. The importance can be proven by well-known bankruptcy cases in practice, such as the General Motors or Chrysler case. (Wessels & de Weijs, 2015)

Professor Michelle Harner, the reporter of the American Bankruptcy Institute (ABI) in her testimony for the U. S. House Representatives argued that the current Chapter 11 is not able to satisfy certain functions anymore. She meant certain policy objectives such as the inspiration of economic development, the preservation of jobs or the rehabilitation of such still viable entities (especially small and middle size firms) that cannot afford to implement a Chapter 11 process. The professor also brings attention to the main drawbacks of the chapter as well. First, she argues (contrary to others) that far too much entities liquidate their business even without making an attempt for a reorganization process under federal bankruptcy law, which could be seen as a bad sign. Secondly, firms usually resort too late to the federal bankruptcy laws, and at that point they will only be able to access less alternatives than they could have had in case of timely application. (Wessels & de Weijs, 2015)

Finally, in 2014 the American Bankruptcy Institute issued the Final Report and Recommendations, which contained the proposed Chapter 11 changes. (Anyfantaki, 2017) Basically, we could say that the recommended changes did not include extreme modifications, meaning that it is more or less the continuation of the existing procedures, with no completely new processes included. However, it is important to be aware of future potential changes of Chapter 11, because if it finally comes into force, it will have a global effect, also impacting Europe. (Wessels & de Weijs, 2015)

One of the reforms described in the Final Report and Recommendations is the introduction of an "estate neutral", which would mainly replace the examiners. Up to the present, examiners were appointed to investigate issues related to the debtor, however, they were not entitled to displace the management. The main reason for such an examiner is fraud or misconduct, thus, they were used in relatively few cases. The new phenomenon of estate neutral would be a bit different from the examiner, as their tasks would not be exactly

described in the Code and thus they would be provided with more flexibility. Their more extensive role would also include the reduction of information asymmetries and also the solution of any disputes that might occur. (Wessels & de Weijs, 2015)

Another reform idea is the introduction of a 60-day long time period, under which the implementation of assets sale is prohibited. (Anyfantaki, 2017) The reason for such a regulation is that most of the sales is considered to happen way too early and owing to that the debtor is unable to examine other potential restructuring activities within a short period of time and therefore are more likely to accept unfavorable market circumstances and conditions. The moratorium would be valid unless the decrease in the value is obvious (also known as "the melting ice cube"), but the exceptional circumstances need to be proved. (Wessels & de Weijs, 2015)

It might happen that the absolute priority rule can prevent the rewarding reorganization process. A firm facing financial difficulties frequently needs to raise funds and it might happen that new funds are not available from outside sources. The dilemma is whether the new funds can be given by old shareholders in exchange for retention of their equity shake. After the reform of Chapter 11, the new fund or value could become an exception under APR, meaning that old equity holders would be offered an equity stake also in the case if the claims of the senior creditors have not been entirely satisfied. Thus, under certain conditions more flexibility would be provided to the APR. (Wessels & de Weijs, 2015)

Additionally, it has been also advised for the courts to rather apply a broad approach, instead of a narrow one, regarding the examination of assets, thus the view allows to include more assets within the process and also the enrichment of the value of the firm. (Wessels & de Weijs, 2015) Thus, several recommendations were made in the reform to improve the Chapter 11 reorganization process and to make the Code more up to date.

3.6 Basic chapters

Even though Chapter 7 and Chapter 11 seem to be the most well-known parts of the Bankruptcy Code of 1978, there still exist some important chapters in the Code which are also crucial to be aware of. (Anyfantaki, 2017) The following part will provide a small description of the most significant further chapters.

In order for the Bankruptcy Code to be complete, general provisions need to be determined; these are described by Chapters 1, 3, and 5. Chapter 1 basically defines the notions, while Chapter 3 provides a basis for administrative issues. Chapter 5 gives an accurate description of what is considered and how to recognize the assets and liabilities of a business. (Anyfantaki, 2017) Besides, it also contains a guide for the correct evaluation of specific

divisions or subsidiaries of the business, which could also be relevant part of the bankruptcy process. (Vance, 2009) Apart from these three chapters, the rest of the Bankruptcy Code deals with special and more detailed aspects of the insolvency cases. (Anyfantaki, 2017)

Aside from Chapter 7 and 11 the most commonly heard type of bankruptcy is Chapter 13, which applies to individuals and not to businesses. Any individual is entitled to enter this chapter, as long as secured and unsecured debt does not exceed a certain level, which is adjusted periodically. Basically, this chapter allows the individuals to develop their own repayment plan and settle their outstanding debts accordingly, satisfying all creditors' claim within three to five years. It provides several advantages compared to the liquidation process. Under this chapter foreclosure processes can be stopped and thus individuals are given the chance to, for example keep their homes. Except for the mortgage payments for primary residences, individuals are also allowed to reschedule the secured payments and extend them as long as the Chapter 13 plan is still in force. (United States Courts, 2018)

Even though several firms try to reorganize their business, it might happen that they do not manage to do so. However, after the unsuccessful reorganization debtors still can try to reorganize for a second time (or even more) and thus "apply" to Chapter 22. (Altman & Hotchkiss, 2006) Chapter 22 bankruptcy does not exist in practice as there is no such chapter in the Bankruptcy Code, however, the term refers to the fact that the company already files for the second time. (MaxwellDunn Law, 2017) There could be several reasons why such a second filing happens. It might be that during the first filing, the burden of debt was higher than expected or the outlook for the firm was seen more optimistic than it was in practice etc. (Altman & Hotchkiss, 2006) However, filing for the second (or more times) is still not a frequent event, as according to Altman, between 1984 and 2013 "only" 253 businesses entered Chapter 22 and 16 turned to Chapter 33. (Less than 5 firms applied for Chapter 44) (Altman, 2014) Thus, it seems that the Bankruptcy Code describes most of the possible cases, which might come up during the bankruptcy process.

4. Out-of-court restructurings

4.1 Choice between out-of-court and formal bankruptcy

Apart from the formal bankruptcy procedures, firms may also decide to solve their financial problems through out-of-court restructurings. (Hotchkiss, John, Mooradian, & Thorburn, 2008) Even though in the United States the debtors have a chance to choose, in most European countries only the non-insolvent debtors can decide for informal workouts. (Anyfantaki, 2017) If private restructuring seems to be unsuccessful, then firms often end up with the formal Chapter 11 reorganizations. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

Even though there are drawbacks and impediments of private restructurings, the direct expenses appear to be clearly less for out-of-court, than for formal bankruptcy restructurings. Studies have shown evidence that Chapter 11 restructurings are clearly not only costlier, but they also take more time as well, also causing a higher level of indirect costs. As private mechanisms are usually considered to be less expensive procedures than the court-supervised types, it is also a significant incentive for claimholders to solve their financial issues with private methods. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

During the 1990s several researches were conducted on the main factors that affect the decision between formal and private restructurings. The results showed that the decision is mostly affected by asset and financial aspects. (Senbet & Seward, 1995) It turned out from further experiments that the likelihood of using private workouts increases with the intangible assets used; the more intangible assets the firm has, the higher the chance that the company will complete an out-of-court restructuring. As the value of intangible assets seem to lose more value in bankruptcy, due to for instance declining customer demand or asset sale, such firms are aiming to preserve the value of their properties through a private method. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

A study implemented in 1995 found a different result than the previous case. They found evidence that process choice is determined mainly by creditor problems and debt issues (level of debt and short-term liquidity). (Hotchkiss, John, Mooradian, & Thorburn, 2008) These are important factors, as they affect the bargaining power during the renegotiation process. If there are only few distinct creditor classes (also only a couple creditors in each class), then in general the occurrence of conflicts of interest or asymmetric information is less likely, therefore they promote the usage of private restructuring. (Senbet & Seward, 1995) The financial situation of the company also contributes to the decision: in general, weakly performing firms with high leverage tend to restructure by Chapter 11, while usually firms with strong operating cash flows decide for private mechanisms. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

It is also interesting to examine how the stock market reacts to the announcement of a private workout or a formal bankruptcy process. The observed reactions show that a less negative abnormal return was measured in case of workouts (compared to Chapter 11). The same result was seen with stock returns, as the effect of the announcement of debt renegotiation could have seriously been seen for Chapter 11 cases. This seems to imply that the market correctly recognizes those companies which have high chances to restructure successfully with an out-of-court method. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

It seems that the proportion of those companies that tried to restructure with the usage of a private method recently decreased, suggesting a trend that this way of solving distress is by far not common anymore. This phenomenon can be explained several ways, for instance with the introduction of legal rulings of claims that discourage the out-of-court restructurings, or the appearance of prepackaged bankruptcies that also might provide an alternative solution. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

4.2 Options after financial distress

According to Senbet et al. it is possible to differentiate three alternatives for settling financial distress outside the bankruptcy court system, which are namely asset restructuring (asset sale), financial restructuring and the infusion of new capital. When done successfully, all these serve to mitigate, or even eliminate the expenses of bankruptcy. (Senbet & Seward, 1995)

4.2.1 Asset restructuring

One of the methods to solve distress and financial difficulties is the restructuring of the asset side of the balance sheet, which can help to obtain the cash necessary and settle ongoing liquidity problems. In order to generate cash and raise funds, the assets can be sold either piecemeal or as a whole to other companies. Assets sales can not only be done in private workout, but also it is possible to implement it in formal bankruptcy processes, either during Chapter 7 or Chapter 11. However, the efficiency and costs of asset restructuring will basically depend on the current circumstances and on the bankruptcy system in which the mechanism is used. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

There might be a number of reasons why the procedure of asset sales of a distressed entity appears to be significantly distinct from asset sales implemented by a healthy firm. First, distressed deals can be difficult to perform due to unfavorable conditions, for instance, due to adverse liquidity problems. Market liquidity is dependent on the asset itself, whether it widely or just rarely used, participation restrictions in the industry and several other issues. Thus, owing to liquidity problems the amount received for the sold good in a distress deal might be adversely affected. (Senbet & Seward, 1995)

Secondly, when assets are obtained from a distressed firm in an out-of-court mechanism, the buyer of such an asset will frequently face unique risks. During the transaction it is crucial to check that the buyer will not be unintentionally liable for any debts or commitments that the seller of the asset had. Furthermore, it can happen that if the price received for the asset was outstandingly low and the selling firm later filed for bankruptcy, the court is entitled to consider the deal as a fraudulent transfer. Then the buyer is exposed to being obliged to return the acquired asset back to the seller. (Senbet & Seward, 1995)

The price for which the asset is sold is completely laid on the negotiation between the parties. The seller is in a disadvantageous position (most probably receiving a lower amount); due to the poor financial performance of the company, his bargaining power is reduced to a high extent. In addition, creditors might also enforce an asset sale, which could result in a lower value received than the real value in practice. (Senbet & Seward, 1995)

4.2.2 Special case: Going concern sale

As mentioned already, the process of formal restructuring is frequently not only expensive, but also time-consuming. Thus, as an alternative the firm can implement a special form of asset sale, where all the firm's assets are sold. This process is called as a going-concern sale. In such a case the acquirer will implement all the required changes to create a new structure for the entity, while the seller can settle its debt and satisfy the creditors from the purchase price. With the aim to provide the creditors with as much return as possible, often an auction is organized, where the highest bid receives all the properties. (Eidenmüller, 2016)

The idea of the going concern sale concept was already suggested decades ago as an alternative solution for a Chapter 11 reorganization process. This special form of restructuring is used by several other countries to settle insolvency. Even though it is a widely used tool, it also has several limitations, which also reconfirms the fact that it is necessary to also have a statutory restructuring process. The first limitation is that even if the entity is planned to be sold as a going concern, there is a chance that there is no market at all, or even if there is, it might not be competitive and informationally efficient. If the whole industry is affected by economic downturns, then most probably only a few investors will be interested in the deal, who might be insiders of the firm or competitors. Such buyers would be most interested due to their industry specific knowledge and experience and hence, they will have an incentive to obtain the target at the lowest price possible. (Eidenmüller, 2016)

A second drawback of such a sale is that it does not always permit the sale of "dedicated assets", which are such that make up a remarkable proportion of the entity's value of its properties. As an example, these could be intellectual property rights, permissions etc. If a country's jurisdiction allows or support going concern sales, some type of problems could be solved, among others the pricing issue as well. However, the regulations concerning going concern sales differs from county to country. (Eidenmüller, 2016)

4.2.3 Section 363 sale

Sale under section 363 of the Bankruptcy Code also provides an alternative option for the traditional Chapter 11 reorganization process. (Ayotte, Hotchkiss, & Thorburn, 2012) Sale 363 means that firms in financial distress are allowed to sell their business free and clear of

any type of debts (LoPucki & Doherty, 2007), to be more specific, free of liens or any other type of claims. (Vance, 2009) Section 363 sales can be either chosen to be an out-of-court sale, however, it can also be implemented with a reorganization plan in a formal procedure. Mostly, by the term 363 sale the selling procedure of all the properties is meant in Chapter 11. (Parrish, Brighton, & Morgan, 2010) Even though this mechanism is mostly used in Chapter 11, as it can also be considered as an alternative to the formal procedure, it will be described in this section shortly.

The basic idea by such a provision is to avoid those type of loan agreements which have a lien on all assets. Thus, as a result, due to the easier utilization, reorganization processes can be implemented easier. In practice, sellers usually initiate a 363 sale if they have already found a potential buyer and they have an idea of the purchase price. (Vance, 2009)

As several items in the bankruptcy process, 363 sales are also regulated. The procedure of such a sale can be initiated if the bankruptcy petition has been already filed. The seller must pay attention to include the list of assets to be sold, the price, and also whether it is the intention to sell the property free and clear of lines. As a next step, all the interested parties should be notified, and the court must also provide its acceptance, which is mostly done if there are no opposing motions handed in at all. The only exception for the required court approval could be if the item provided for sale is considered to be part of the ordinary course of business, where real estate or equipment used for production are not acknowledged to be ordinary. The items are sold either in private or public auction (if there are more bidders), where the firm benefits the most if many bidders come and they overbid each other to acquire the desired assets. The bids are not necessarily the same kind, due to the form of payment, which might be for instance cash, stock etc. Thus, it is often required from the seller to determine the standards which will be necessary for the bidders to qualify. Requirements might also include to give deposits (“earnest money”) or even to prove their ability of being able to finance the deal. As soon as the auction is done, information regarding the list of assets sold, their price and their new owner should be handed in to the court. (Vance, 2009) Sometimes debates occur regarding price or the sale procedure itself, which is then followed by a court procedure to decide whether the sale has been implemented in “good faith”. A sale found to be done in “good faith” means that no fraud or anything unfair have been conducted. (Vance, 2009) Finally, the bankruptcy court declares its decision whether the sale to the bidder is approved or not. (Parrish, Brighton, & Morgan, 2010)

Basically, except from insiders, everybody is allowed to buy assets under a 363 sale. In this setting, insiders are owners, employees or anyone who has a fiduciary relationship either

with the vendor or to the asset itself before. The reason for the ban is that insiders could have access to assets for lower price, which would mean a disadvantage for the creditors. The buyer might be entitled to receive some special fee known as the break-up fee if they were the "original buyers", but someone else made an overbid preventing them from conducting the deal. The break-up fee is given to compensate the "original" acquirer, who initially conducted the due diligence of the asset, for bringing attention to the property and to provide a basis for the valuation. Hence, the break-up fee should be about the same amount as it costed to implement the due diligence of the asset. (Vance, 2009)

4.2.4 Case study on 363 a sale

Sales under section 363 has been a controversy issue since long, however, it became outstandingly debated during the GM and Chrysler bankruptcies in 2009, in which both entities tried to reorganize their company through a 363 sale. The Chrysler 363 sale became famous also in the academic literature owing to the value distribution: "secured creditors received $2 billion in cash in exchange for their secured claims, for a recovery of only 29 cents on the dollar. Chrysler (unsecured) employee benefit claimants received debt and stock in the new Chrysler." (Ayotte, Hotchkiss, & Thorburn, 2012, p. 30) Hence, the absolute priority rule has been violated during the distribution, as unsecured creditors' claim has been satisfied before all the secured claims were settled. (Ayotte, Hotchkiss, & Thorburn, 2012)

The case was highly debated in the academic legal literature; the question was whether the result of the case is significantly deviating from the current, ideal bankruptcy law practice. Some argued that the Chrysler 363 sale dictated not only the terms, but also the allocation of the proceeds, which is a setting in which the courts should introduce some condition of the 363 sales to defend creditors, as it is implemented in a common reorganization process. By contrast, others claimed that Chrysler was a typical example of modern bankruptcy practice, in which it frequently happens that it is the DIP lender (in the Chrysler case this lender was the government) who dictates the terms and timing of the sale. Hence in practice the government provided the taxpayer's money to bailout Chrysler from the bankruptcy (and to give shares to retirees), which is rather considered to be part of a bailout policy than as a bankruptcy law. The most criticism of this bankruptcy case originates from the auction setup, which is accused for not pursuing to maximize the price of the properties and because the court approved the bidding procedure which permitted to avoid the liquidation of the company. Even though significant attention has been brought to the adequate usage of 363 sales, it is highly unlikely that it will have a long-term effect on the next bankruptcy

procedures coming, even though the previous one caused observable short-term mixed effects. (Ayotte, Hotchkiss, & Thorburn, 2012)

4.2.5 Financial restructuring

According to Senbet et al. the second alternative to settle financial distress outside the bankruptcy court system is to implement financial restructuring of the company's existing debt obligations, which basically aims to solve the cash flow problems. If the company defaults on its current debt obligations, it entitles the creditors with the right to renegotiate some points of their contract. Hence debt restructuring could be defined "as an agreement by the firm's creditors to modify any term(s) of an outstanding financial claim currently held against the firm." (Senbet & Seward, 1995, p. 931) These debt contracts are often modified regarding the interest or principal payment, extension of maturity etc. These changes will result in new debt contracts. (Hotchkiss, John, Mooradian, & Thorburn, 2008) The concept is considered in a broad sense; thus, it includes not only public, but also private loan agreements. However, the two types are contingent on different regulations and constraints. As a consequence, the type of debt restructuring technique used will entirely depend on the holder of the company's credit obligation (Senbet & Seward, 1995) and also might depend on the capital structure of the firm. (Laryea, 2010) Such debt restructuring methods contain "debt reschedulings, interest rate reductions, debt-for-equity swaps and debt forgiveness." (Laryea, 2010, p. 7) With the aim to become successful in recovering from distress, the firms also often implement an operational restructuring as well beside a debt restructuring, which refers solving efficiency problems such as restructuring productive capacity. (Laryea, 2010)

Debt to equity swaps can be also considered a mechanism in modern restructuring practices. (Eidenmüller, 2016) During such a restructuring the amount of debt is exchanged in return for a part of equity or stock. The amount of equity is determined in advance and mainly dependent on the outstanding level of debt and the value of the stock. The value in general is settled at the current market rates, however, the management has the possibility to provide higher exchange values with the aim to give both for share- and debtholders an incentive to take part in the transaction. (United States Legal, 2018) Moreover, swaps might also be an incentive for creditors as well to maximize the entity's value, which provides a great advantage if they act accordingly, because otherwise creditors could also harm the firm if for instance they force to liquidate even if restructuring would be more beneficial. (Eidenmüller, 2016) In addition, the swaps and the increased participation might also provide the benefit of being able to change the capital structure and to improve for instance the bond ratings. (United States Legal, 2018)

Recovering from financial distress can be done through debt restructuring as well, but as an alternative, improvements can also be implemented by capital structure adjustments, which is frequently done by debt to equity swap or by the infusion of new capital (Adams, 1995), which is the third mode to restructure according to Senbet et al. If the firm manages to attract either new investors or new capital infusion, it would also provide the market with the signal that the entity has a real economic value, thus, due to that, further investors might be also attracted. (Altman & Hotchkiss, 2006) It is debated in the academic literature whether former stakeholders should be allowed to be able to obtain stock in the new, reorganized firm in exchange for the new capital that has been contributed by them and used up in the reorganization process. Further discussions have been made on the topic of the form of the contributed capital, while the appropriate amount of the capital contribution has received quite little attention so far. Some studies seem to agree that a capital contribution must be reasonably equivalent to the ownership interest received in return for it. However, there has still been relatively little analysis on both questions (the amount and sources required to finance reorganization), therefore it will be still a topic for future discussion and debates of economists. (Adams, 1995)

4.2.6 Pre-packaged bankruptcies

As an alternative to the already mentioned methods, the firm can also use pre-packed bankruptcies, which can be seen as a mixture of a private workouts and the legal bankruptcy processes. (Ross, Westerfield, & Jaffe, 2010) This was a significant innovation of the 1978 Bankruptcy Code, as it provided an opportunity to combine several benefits of the two systems. It provides the time and cost saving advantages from private workouts and also takes advantage of the lenient voting conditions of the formal bankruptcy reorganization procedure. (Altman & Hotchkiss, 2006) Already prior to filing for bankruptcy, the entity approaches its creditors regarding the detailed plan for reorganization. (Ross, Westerfield, & Jaffe, 2010) Most often a hearing is implemented by the court to test whether the disclosure is appropriate or not. (Vance, 2009) Thereafter they start the negotiation process aiming to reach a settlement, meaning to get creditors to approve the plan. (Ross, Westerfield, & Jaffe, 2010) Negotiations to receive an approval for the plan might also be done with the creditor's committee, if it has been selected before. (Vance, 2009) The plan will be successful and regarded as approved if at least two-third in face value of each class of the creditors and also more than half in number of the holders in each class give acceptance. (Altman & Hotchkiss, 2006) As a next step, the entity compiles all the necessary paperwork and the documents required for the bankruptcy court, before they are filing for bankruptcy. This is called a pre-packaged arrangement, because as the entity contacts the court, they are able to file already

not only the reorganization plan, but also the documentation of the approval of its creditors. (Ross, Westerfield, & Jaffe, 2010)

Pre-packaged bankruptcies have wide range of advantages. The time a company spends in a Chapter 11 reorganization depends on a number of factors, however, one of the most important elements is the time it takes to receive the creditors' acceptance to the plan of the reorganization. Thus, as in case of a pre-packaged bankruptcy the approvals are gathered before filing, the time spent in the state of bankruptcy is minimized. As a result, even though the process might still take several months, this time is far less than the average Chapter 11 cases, which often lasts for years. (Altman & Hotchkiss, 2006) Due to the reduced time and costs, most probably the extent of the business' disruption is also minimized, and the debtor exercises more control and power. (Vance, 2009) According to Altman et al. in a pre-packaged Chapter 11, a debtor is provided with a clearly defined exist strategy from bankruptcy, which significantly fosters the recovery chances. (Altman & Hotchkiss, 2006) In addition, as the lenient voting conditions of Chapter 11 are also allowed to be utilized to receive acceptance, the holdout problem can be circumvented by the right of the court to make dissenting creditors to give approval for the plan. (Senbet & Seward, 1995) It has been suggested by studies that pre-packaged bankruptcies not only provide several advantages, but they also seem to be more efficient on average. (Ross, Westerfield, & Jaffe, 2010)

Even though pre-packaged bankruptcies seem to be extremely beneficial, the other side of the coin should also be seen, as it also has several disadvantages as well. First of all, such arrangements require approaching and convincing creditors privately, thus, it is not the ideal tool to use if there are thousands of reluctant creditors, as it sets back the deal. (Ross, Westerfield, & Jaffe, 2010) Thus, depending on the number of classes and the number of creditors in each class, to receive acceptance to the plan from most of them can become a complex task. Furthermore, before the plan is filed, the company is not entitled to halt to the accumulation of the interest on unsecured debts or to refuse any unfavorable contracts. In addition, till that time, the entity is also prevented from receiving super priority loans, which could be helpful during the reorganization process. (Vance, 2009) In order to make the most appropriate decision, the entities must consider all the benefits and drawbacks what a pre-packaged bankruptcy would provide to them.

4.3 Potential impediments to private reorganization mechanisms

It has been shown in the previous section that out-of-court methods provide an efficient way to reorganize distressed entities, however, failures might occur that can prevent private methods from successful restructuring. According to Senbet et al. there are two main

hindering factors in becoming efficient. Firstly, outright irrationality performed either by claimants or market participants can cause difficulties. The second issue, which is more significant and therefore also more researched, is the potential impediments to private workouts. (Senbet & Seward, 1995) The next section will lay emphasis on describing the second issue, the most relevant impediments to workouts.

4.3.1 Information asymmetry

One of the impediments to private workouts could be asymmetric information, which can be observed if in a transactions one party has more information regarding the value etc., than the other party. In case of financial distressed entities, asymmetric information might originate from two situations. Firstly, it is possible to have different views- between corporate insiders and outside investors- of the valuation of the entity. The other reason could be, if the corporate insiders intentionally misrepresent value. The aim of such an action could be to make bondholders accept to give their current claims, in return for less valuable securities. In extreme cases, even the status of distress might be mispresented by an entrepreneur (with some private information). (Senbet & Seward, 1995) Studies from the 1990s show that as an effect of information problems, uninformed creditors often seem to rather choose costlier bankruptcy alternatives in case of financial distress. Moreover, later studies added that such issues may result in a prolonged bargaining process during the reorganization. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

4.3.2 Conflict of interest

Besides information asymmetry problems, conflict of interest might also cause hardships. As the reorganization plans usually have an unequal wealth allocation among management, stakeholders and creditors, the plan seems to be created according to two concerns: the effect of the plan on the aggregate asset value and asset allocation among the above-mentioned claimants. Due to the fact that asset allocation depends largely on bargaining, a number of studies examine the relationship of conflict of interests and the resolution of distress. As it could be expected, researches proved that the high level of conflict of interest decreases economic efficiency. To be more specific, it has also been found during an examination that both inter-and intra-claimant class conflicts contribute to the prevention of successful resolution of distress in private workouts. Intergroup clash of views might occur simply because it will always be possible to gain more from a reorganization plan by causing harm to other claimant classes. Differences of interest within an intragroup also appears, if it is permitted for the members to choose whether to participate (or not) in a reorganization plan. As a consequence of the various aspects, the level of conflicts will increase. (Senbet &

Seward, 1995) It appears that there are a wide range of ways in which conflict of interests can affect the success of a reorganization procedure.

Concluding, apart from formal bankruptcy procedures, several out-of-court methods exist to implement restructuring. As private mechanisms are usually considered to be less expensive procedures than the court-supervised types, it is a significant incentive for claimholders to solve their financial issues with private methods.

5. SWEDEN

The previous sections gave a detailed overview of the bankruptcy procedures of the United States, including the most relevant features and the chapters. However, to be able to answer the first research question, which examines the extent to which the U.S. and the European bankruptcy systems are similar, European bankruptcy regimes should be also analyzed, which will be the subject of the following chapters. In section five special attention will be devoted to the unique Swedish system, which will be thereafter compared to the Chapter 11 process. In addition, the subsequent chapter will continue the characterization of the European systems, by describing the bankruptcy system of further three European countries, which will also be followed by a detailed comparison to the U.S.

It is not an easy task to create a set of bankruptcy rules and practices which are appropriate for a country, therefore such a topic is often highly debated. The overall goal should be to avoid having a creditor race, to set up regulations for bargaining procedures and if possible, to reduce the information problems. However, a badly structured and designed Bankruptcy Code can make the already existing problems and conflicts significantly worse. (Thorburn & Eckbo, 2009)

As countries also differ to a huge extent in economics, culture and in several further aspects, so does their attitude and system towards bankruptcy processes and financial resolutions. As it has already been introduced in the previous chapters of this thesis, in the United States the Chapter 11 reorganization process restricts certain creditor rights with the aim of ensuring smooth operations in the state of bankruptcy. Thus, the States has a system which mainly favors the debtors, while other countries, for instance England, appear to be protecting rather the interest of the creditors. Thorburn et al. also distinguishes a third type of system regarding the bankruptcy procedures, which is a mandatory auction bankruptcy system, introduced by Sweden. In this system, firms are not allowed to have a court-supervised renegotiation process regarding the issue of secured debts and hence, companies are sold through an auction process, for which a court-appointed trustee is responsible. (Thorburn & Eckbo, 2009)

5.1 The Swedish auction bankruptcy system

Compared to other countries, the Swedish auction bankruptcy system seems to be extremely simple and straightforward. They use mandatory auctions to solve the problem of bankruptcy, where the company is sold immediately, and firms cannot choose the elective reorganization process. As soon as bankruptcy has been filed, the incumbent management is no longer in control and they are immediately replaced by an independent, court-appointed trustee. (Thorburn & Eckbo, 2009) However, the debtor is also entitled to the option to propose a particular trustee, who will then implement the process. (Lóranth & Franks, 2014) This trustee has a fiduciary responsibility for the creditors, furthermore they are entitled to the task to organize and coordinate the sale of the bankrupted company in an auction. (Thorburn & Eckbo, 2009) The sale of assets should be implemented within one year; the only exception to that might be if the court provides a special permission describing a different time period. (Lóranth & Franks, 2014) The auctions should be open-bid (Thorburn & Eckbo, 2009), and others also call the Swedish type of auction an open ascending English-style auction. (Thorburn, 2000) In Swedish bankruptcy auctions cash is the only accepted form of payment. (Thorburn & Eckbo, 2009)

In the span of the one year in which the trustee has time to implement the sale, the company is either closed (already before the auction), or as another option, is allowed to stay as a going concern within that time frame. (Lóranth & Franks, 2014) In the auction the assets might be sold either piecemeal or as a going concern (Thorburn, 2000), however, this is decided by the winning bidder. (Hotchkiss, John, Mooradian, & Thorburn, 2008) If they are planned to be sold piecemeal, then the trustee tries to provide an estimated value of the company before the auction takes place. In order to receive an approximately correct value, industry experts will provide help with the assessment. (Thorburn & Eckbo, 2009) If a going concern sale takes place, all the properties and operations of the bankrupted company will be merged in the buyer's company. In this bankruptcy system (just as in case of Chapter 11), as soon as the trustee is appointed, an automatic stay provision comes into force, which means that creditors cannot seize their collaterals and debt service is halted as well. In addition, the issuance of new debt is also granted, which deserves a super priority status in case of distribution. (Thorburn, 2000)

"The bankruptcy auction is supervised by the provincial supervisory authority, known as Tillsynsmyndigheten i Konkurs" (TSM). (Thorburn, 2000, p. 342) This authority is a separate part of the Swedish Enforcement Authority (Kronofogdemyndigheten). The aim of the supervisory authority is to control the process of the auction, and to examine the correctness of all files and documents that are relevant for the bankruptcy process.

Moreover, it should also ensure that the trustee acts appropriately regarding the expenses and the quality of service provided to the distressed firm. (Prakt & Larsson, 2014) Thus, the trustee is highly incentivized to fulfil his obligations towards creditors of the bankrupted firm properly, as he is not only bounded by legal regulations and supervision to do so, but their own reputation is also dependent on the quality of the job performed. (Thorburn, 2000)

In the auction it becomes clear whether there is bidder who is intending to pay a premium over the company's piecemeal liquidation value. If this happens, then the core assets and properties of the firm remain intact and the entity will further continue to operate as a going concern. Any potential buyers are allowed either to give bids for the assets separately or for the whole firm. The winning bidder will be the one who offered the highest bid. (Thorburn & Eckbo, 2009) Usually in an auction process 3-4 bidders take part and make bids (Thorburn, 2000), however, it might happen that there is only one bidder who is an insider. If such a trial happens, the trustee is obliged to look for other, competing bids. (Thorburn & Eckbo, 2009)

As soon as the firm is sold on the auction, the proceeds from the sale are distributed among the claimants according to the absolute priority rule. First, super priority claims are satisfied, such as new DIP financing and the administrative and advisory costs that might occur during the process. It is followed by the settlement of the secured claims, then wage claims are satisfied and finally the unsecured claims are paid from the proceeds. (Thorburn, 2000)

There is also a possibility for a forum, where the chance is provided for the renegotiation of unsecured debt. This forum is also known as composition ("accord")(Thorburn & Eckbo, 2009), which is a type of court-supervised process and often considered an alternative in Sweden to solve distress, instead of auctions. (Thorburn, 2000) The exact requirements of such an option are that all the priority and secured claims should be settled entirely, and the claim of junior creditors must also be satisfied in at least 25%. Nonetheless, the composition demands are so extremely high that this is an unfavorable and thus impractical option in most of the cases, thus occurs in practice only rarely. (Thorburn & Eckbo, 2009) This is also proven in a research implemented by Thorburn and Eckbo, in which 1650 companies were examined and only 4 of them undertook the option of composition. (Thorburn, 2000)

In Sweden there is a regulation for the equal treatment of all unsecured claims, therefore there are no further different classes within unsecured creditors. As an additional benefit, below a certain limit the Swedish government provides a guarantee and thus, settles wage claims of the creditors. (Thorburn, 2000)

5.2 Auction prepacks

As an alternative, auction prepacks might also be chosen, which means that the sale is already arranged before filing for bankruptcy. (Thorburn & Eckbo, 2009) In such a process, the buyer of the distressed entity receives the rights for the assets in exchange for cash, but as the liabilities are still predominant, the sold entity should still apply for bankruptcy. In order to make a prepack agreement, a few conditions have to be satisfied, such as receiving the approval of all secured creditors and the appointed trustee. If there is a successful agreement on the auction prepack, then an auction does not take place as the assets of the company are already converted to cash, hence proceeds can already be distributed among creditors according to the APR. (Thorburn, 2000)

A number of reasons exist for a company to decide for an auction prepack, as an alternative for solving bankruptcy. In simple auctions and also in (auction) prepacks the claims and wants of shareholders are eradicated, which is in contrast to the pre-packaged bankruptcy option, when at least some part of the equity is retained in the new company. Even though for most shareholders the situation seems to be disadvantageous (in auction prepacks), there might be cases when certain shareholders, for example ones with private information or ones who gained potential advantage from control, can benefit from a repurchase of a distressed entity. (The conditions of a repurchase deal in prepackaged bankruptcy might be better than in an auction.) Other incentives might also exist, managers and debtholders of the entity can also have a desire to decide for auction prepacks, mostly due to the lower costs. Moreover, managers might also hope for being rehired in the new company, thus tend to choose this lowest cost option, as by that they can prove their intention for their value-maximizing behavior. (Thorburn, 2000)

Several studies have been implemented in order to examine bankruptcy auctions. One of the results was that the more secure debt a company has, the lower the chance that the entity will decide for an auction prepack, thus the conclusion is just in line with the expectations. It has also been proven that if the company expects a high level of auction expenses, then it chooses the option of pre-packaged bankruptcy with a higher probability. (Thorburn, 2000)

5.3 Comparing the Swedish system with Chapter 11

Most often the Swedish auction bankruptcy system is compared to Chapter 11 from the Bankruptcy Code of the United States, however, in most of the aspects the systems seem to show significant differences. The first differences already appear in the filing process. (Prakt & Larsson, 2014) In Sweden, the right to file seems to be broader, as apart from the firm, any individual might apply. In the U.S. besides the entity, only joint creditors are allowed to apply. In addition, joint creditors are only allowed to apply if there are at least three

creditors in the filing and if their unsecured claims exceed the minimum level of $5000. (Thorburn & Eckbo, 2009)

As soon as the filing is done, the incumbent management in the Swedish system is replaced by a trustee, who is appointed by the court in order to arrange for an auction of the assets. In contrast, in the United States in Chapter 11 a trustee is only appointed in a special case, such as fraud, otherwise most frequently the management remains in control and continues with the government of the entity. Moreover, it is also followed by a different resolution mechanism, as in the States the management is allowed to compile a reorganization plan with exclusivity for 120 days and is also provided approximately two months to receive acceptance for it, while Sweden has a mandatory auction system, where there is no chance for reorganization and all the firm's assets are sold during an organized auction. (Prakt & Larsson, 2014) Thus, while the U.S. system strongly protects the managers and equity holders in the Chapter 11 processes, in Sweden no protection like that is provided. (Thorburn, 2000)

As a result of the potential reorganization plan, the voting rights are also different in the two countries. In the U.S., the plan should be accepted by creditor classes to a certain extent (Prakt & Larsson, 2014), while in Sweden due to the auction system, the voting rights simply do not make sense, there the highest bidder determines whether the company is sold piecemeal or as a going concern. (Thorburn & Eckbo, 2009) Due to the mandatory auctions in Sweden, the cramdown procedures that are present in the United States are also not an option. (Prakt & Larsson, 2014)

The settlement of claims also differs to a huge extent. While in Sweden the distressed company should be bought only in exchange for cash, in Chapter 11 securities are also accepted as a means of payment. (Prakt & Larsson, 2014) In addition, in an auction the APR is strictly followed, while in the States some cases might occur which result in deviations from the APR, especially in complex bankruptcy cases. The violations in the absolute priority rule in the Chapter 11 process can be considered a low-cost method to motivate certain claimholders to accept the plan for reorganization. On the other hand, in the Swedish system it is clear that the highest bid will acquire the entity and the rule for distributing the proceeds will not be violated. (Thorburn & Eckbo, 2009)

As soon as the filing has been implemented, in both systems a kind of protection (automatic stay) comes into force that allows for avoiding the repossession of the collateral for secured creditors (Thorburn & Eckbo, 2009), and also the debt service will be halted, meaning that both the interest and principal payments will be stopped. (Thorburn, 2000) Furthermore, the issuance of DIP financing is also allowed under both bankruptcy procedures, however, such

an action appears to be extremely rare in Sweden in contrast to the States, where it is considered a common process. This also explains the speed of the auction process, on average it is approximately implemented within 2 months. Thus, due to the fastness in Sweden, external financing is not needed, therefore it is rarely used. (Thorburn & Eckbo, 2009)

Moreover, in Sweden, in contrast to the U.S. system, as soon as the bankruptcy filing has been handed in, all the labor contracts (including all employees, even the top management) are terminated automatically. However, there is still a chance for keeping the key employees until the end of the auction, or in certain cases it might even be extended to a temporary consulting-type contract. Alternatively, owing to the fact that the auction bidder determines the type of sale, if the entity continues to exist, an employee might be rehired. This is the only chance for workers to continue working by their "old" firm after filing. Whether an employee is rehired or not is based solely on the quality of the employee, however, in most cases only the best CEOs seem to be rehired. (Thorburn & Eckbo, 2009) Furthermore, in Sweden the wage claims are guaranteed by the government until a certain limit, while no such guarantee exists in the States. (Thorburn, 2000)

Consequently, even though most studies compare the Swedish system to the United States, they only seem to resemble in a couple of aspects, such as the automatic stay provision and the DIP financing, but in the overwhelming majority of the aspects they seem to be different. The table below also clearly provides an overview of the most relevant differences between the two regimes.

Characteristic	Swedish auction bankruptcy	Chapter 11 Reorganization
Right to file:	The firm or any individual creditor.	The firm or a joint filing of at least 3 creditors with unsecured claims exceeding $5,000.
Control rights in bankruptcy:	Court-appointed trustee. May retain management to run firm during auction process.	Incumbent management (except in cases of fraud). Bankruptcy judge approves major decisions.
Resolution mechanism:	Firm is sold in an auction, either piecemeal or as a going concern, depending on the bids.	Management has exclusive right to propose a reorganization plan and seek creditor approval during a six-month period.
Voting rules:	Redundant. Highest bidder buys the assets.	1/2 in number of votes and 2/3 in value of claims in each debt class. Judge can cram down plan on dissenting class.
Settlement:	Claims paid in cash according to their absolute priority.	Claims paid in cash and new debt and equity securities. Absolute priority may be violated.
Firm protection:	Stay of debt payments and assets. Debtor-in-possession financing legal, but largely irrelevant due to speed of auction	Stay of debt payments and assets. Debtor-in-possession common for publicly traded firms.

Table 3: Characteristics of Swedish auction bankruptcy and U.S. Chapter 11 reorganization (Thorburn & Eckbo, 2009)

5.3.1 Is Chapter 11 heading towards an auction system?

Recently there seems to be an increasing trend for settling distress with an auction in the United States. This became an alternative solution to those banks and large entities that suffer from financial distress.

One of the basic principles of economics is that if the capital market works appropriately, then auctions will achieve the efficient reallocation of the firm's properties and resources. Therefore, in general it is forecasted that an auction method will be chosen if the rest of the bankruptcy process is estimated to be expensive and inefficient. Studies also seem to prove that the number of accelerated sales and auction bankruptcies increased in practice in Chapter 11 cases. In 2002, more than 50% of large Chapter 11 issues have been solved with an auction (sales) mechanism. In these cases, auction prepacks were also included. (Thorburn & Eckbo, 2009)

Even though there appears to be a growing trend in the States for using auctions and it is also proven to be an efficient tool, Chapter 11 processes are still considered to be more significant. (Thorburn & Eckbo, 2009) It seems that in the U.S. in most Chapter 11 cases the option of reorganization is still preferred over the possibility of an immediately sale. A change has been started regarding this trend recently, however, owing to a couple of interest groups who profit more from the reorganization option seem to strongly resist such

a changing process. Opponents to such a change could be lawyers or judges who would suffer due to the lack of experience regarding the issue, or even the incumbent management that want to maintain their control in order to avoid a potential removal of management in an auction procedure. (Thorburn & Eckbo, 2009)

However, it is still interesting to study whether once Chapter 11 will be replaced by auction system in case of large and complex bankruptcy cases.

5.3.2 Potential economic inefficiencies in auctions and in reorganization processes

It has already been described in the previous section that the Swedish auction bankruptcy system and the tradition Chapter 11 process share more differences than similarities. In this section the two systems will be considered from an economical point of view.

The first issue considered is the bankruptcy costs. As it could be expected, due to the speed of the auctions not only the direct, but also the indirect costs are low in the Swedish process, in contrast to Chapter 11, where the expenses are significantly higher. (Thorburn & Eckbo, 2009)

Next, the winning bidder (the new company owner) tries to optimize for the most appropriate capital structure, as not doing so, the cost of making a non-optimal restructuring would be high. Consequently, if some conditions are met (no fire sales, no excessive liquidations and the investment policy is not misdirected in order to evade bankruptcy or being dismissed) then the auction system encourages the efficient allocation of the control rights of the company. (Thorburn & Eckbo, 2009)

Chapter 11 favors debtors, due to the exclusive right to compile a reorganization plan and also owing to the voting procedure, which is concomitant with that. Some argue that these conditions foster to avoid the intention to delay filing and thereby also saves costs. However, many people question the correctness of the options of Chapter 11, as the system allows for the management to retain their power, even though they were the ones who did not prevent the firm from facing financial difficulties. In addition, the management will frequently force inefficient continuation of business, instead of a more efficient liquidation process. (Thorburn & Eckbo, 2009) Thus, “although designed to reduce excessive corporate liquidations, Chapter 11 may instead cause the opposite problem: excessive continuations.” (Thorburn & Eckbo, 2009, p. 10) To the contrary, in auctions excessive continuations are highly unlikely to happen, as the buyer will agree to continue the business operations only if it appears to be profitable. (Thorburn & Eckbo, 2009)

Fire sales might also be important issues during an auction process. As a result of certain circumstances, fire sale discounts might even increase. For instance, as the phenomenon of

financial distress seems to spread fast within an industry, the competitors might also quickly become financially constrained and thus, are unable to take bid in the auction. Therefore, it frequently happens that nobody bids from the industry and that increases the chance that a low-valuation industry outsider will take the highest bid on the auction and as a winner gain the assets at fire sale prices. The likelihood of such a situation is especially high if the assets to be sold are unique, or designed for special use, as then less people might be interested in the sale. (Thorburn & Eckbo, 2009)

Due to one of the specialties of auctions, as soon as it is filed, all labor contracts are terminated, and this could be a reason for managers to invest in especially risky projects with the aim to delay filing or even to try to avoid bankruptcy. Such a constraint may result in risk shifting, as although this is benefitting stockholders, the management gambles to the expense of creditors', probably losing their money and also harming the total value of the firm. However, some argue that in contrast to the risk shifting reasoning, the management will pursue a conservative investment trend in order to keep the company as a going concern, because they are aiming to be managers in the new firm. Thus, the management takes no risk in investments in order to keep their job and the firm alive. (Thorburn & Eckbo, 2009)

Type of inefficiency	Reorganization	Auction
Direct and indirect costs	Substantial due to large numbers of lawyers and bankers representing the different committees, and drawn-out proceedings	Relatively low due to fast auction process
Allocation of control of assets	Assets allocated to the residual class of claimholders	Assets allocated to highest bidder in the auction
Excessive continuation?	Managers may force a continuation of the operations also when it is optimal to reallocate assets to higher-valued use	Unlikely that buyer would invest in continuation unless profitable
Excessive liquidation?	Bias toward continuation limits chance of liquidation	Viable firms could be liquidated if highest-value buyers are constrained from participating in auction
Risk shifting and delayed filing?	With continued control in bankruptcy, managers may be encouraged to file timely	Managers may gamble and delay filing in an attempt to avoid a loss of control through the auction
Asset fire-sales?	No asset sales	Could hurt creditor recovery if high-value buyers are liquidity constrained or it is costly to prepare a bid

Table 4: Potential for economic distortions and inefficiencies in reorganization and auction systems (Thorburn & Eckbo, 2009)

Thus, as it could be seen from both the table and from the description, even though auction systems encourage the efficient allocation of the control rights of the company, it can be proven that there are still a number of inefficiencies and distortions caused by both systems.

5.3.3 Empirical evidence on Swedish bankruptcy auctions and on Chapter 11

In order to make it clear to what extent are these systems efficient, empirical studies have been conducted by several researchers. The first measure of efficiency of the reorganization process is the post-bankruptcy performance of the entity. Examining the Swedish firms, it can be concluded that less than 20% of the entities had operating losses, while the same measure for Chapter 11 was 20-40%. Consequently, the auction mechanism from this aspect appears to be a more efficient restructuring tool. (Thorburn & Eckbo, 2009)

Although the US firms had significantly worse operating performance, contrary to expectations, they did not seem to be worse in further bankruptcy filing when compared to Swedish firms. In both systems, approximately one-third of the firms refile for bankruptcy again (or resort to out-of-court alternatives) within five years. The time spent in bankruptcy and costs of bankruptcy showed significant differences. The time in Sweden was remarkably less, thus also caused a lower level of direct cost. (Thorburn & Eckbo, 2009)

Some CEO related measures were also examined. Looking at the CEO turnover rate only a small difference was noticed; in Sweden 61% of the CEOs were replaced, while in the States 75% of the CEOs lost their jobs within two years after filing. Regarding the CEO compensations, the same trend could be seen, as in both countries the CEO income significantly dropped. (Thorburn & Eckbo, 2009) Thus, CEOs were also widely affected by bankruptcy filings, especially their position and income were influenced. As a summary, the table below presents several empirical evidences on Swedish auctions and on Chapter 11 processes.

Issue	Swedish Auction Bankruptcy	U.S. Chapter 11
Direct costs:	4-6% of book value of total assets; 13-19% of market value. Costs decrease in firm size.	6.5% of book value of total assets; averages ranging from 1-10% across various samples.
Time in bankruptcy:	Business sold after 2 months.	2 years.
Creditor recovery:	35% total recovery (paid in cash); 39% in going concern sales and 27% in piecemeal liquidations.	60% based on face value of distributed claims, 41% using market values.
Firm survival:	75% of firms are sold as a going concern.	60% of firms exit as independent firms or are acquired. Survival rates are higher for large firms.
Fire sales:	Fire-sales in piecemeal liquidations but not in going concern sales. Bank often finances a buyer, increasing liquidity in the auction.	Reorganization value in traditional Ch. 11 proceedings exceeds sales proceeds in 363 auctions as a fraction of pre-filing value of total assets.**
Post-bankruptcy performance:	Less than 20% of surviving firms show operating losses. The performance is at par with industry rivals.	20-40% of emerged firms continue to show operating losses. Two-thirds of the firms underperform industry rivals over a five-year period.
Bankruptcy refilling:	One-third of firms refile for bankruptcy within five years.	One-third of emerging firms subsequently need to restructure the debt through bankruptcy refiling or an out-of-court workout.
CEO turnover:	61% of incumbent CEOs lose their job; 39% are rehired by the buyer in the auction. Buyers screen CEOs on quality.	Three-quarters of CEOs in place two years prior to filing are replaced within two years of filing.
CEO compensation:	CEOs experience a substantial income drop following bankruptcy, rehired or not.	Managers who retain their position take a substantial pay cut. The compensation is often tied to the success of the debt restructuring.

* The evidence on the U.S. Chapter 11 is from Hotchkiss, John, Mooradian and Thorburn (2008) and the evidence on Swedish auction bankruptcy is from Thorburn (2000) and Eckbo and Thorburn (2003, 2008, 2009).
** LoPucki and Doherty (2007).

Table 5: Empirical evidence on Chapter 11 and Swedish bankruptcy auctions (Thorburn & Eckbo, 2009)

5.3.4 Summary of the Swedish auctions

Based on the section above, it seems that there are more differences than similarities between the two systems. In contrast to the U.S., Swedish firms are not allowed to choose from any court-supervised reorganization process, in case of bankruptcy a mandatory auction process is implemented. Therefore, all Swedish firms are sold on an auction soon after filing, either as a going concern or piecemeal depending on the buyer. The process is organized and controlled by an independent trustee, who was appointed by the court. (Thorburn, 2000)

Furthermore, there are several benefits that an auction can provide. It has been stated that both direct and indirect costs seem to be on average lower in the auction system, owing to

the shorter time spent in bankruptcy in this system. (Thorburn, 2000) However, opponents argue that there are also some downsides of the auction processes. They claim that even though there seem to be several benefits, it might result in a fire sale of still viable companies, for example if the possible bidders face financial constraints. (Betton, Eckbo, & Thorburn, 2008)

As it can be seen, several studies have already compared the formal U.S. bankruptcy procedure with Swedish auctions from a wide range of point of views. Concluding, even though there are drawbacks, several researchers argue that auctions, compared to the Chapter 11 processes, are speedy and relatively cost-efficient tools for restructuring firms. (Betton, Eckbo, & Thorburn, 2008)

6. Further European bankruptcy systems

Several features might be used to indicate the orientation of an insolvency system. The orientations might be measured based on whether the management stays in control, in contrast to an appointment of a trustee, or alternatively whether an automatic stay provision comes into force etc. (Eidenmüller, 2016) Another feature that is frequently taken as a basis, as mentioned already, is the creditor-debtor orientation. “The protection of security interests, the existence of the trust as a legal device, the marketability of contracts, and the tracing of tainted money – every single one of these criteria is meant to indicate a stronger creditor orientation.” (Eidenmüller, 2016, p. 11) Sometimes it might be hard to judge some of those criteria, due to the fact that many of them are rather just “measured” in an intuitive sense. (Eidenmüller, 2016)

Instead of just measuring intuitively, a common standard measure was created, known as the creditor rights index. (LLSV) (Eidenmüller, 2016) This index judges a jurisdiction based on four characteristics: whether there is any constraint when the debtor hands in the filing, whether there is no automatic stay provision, whether APR holds, thus secured creditors’ claim is settled first, and lastly whether the operations during a restructuring is led by a trustee (administrator) and not by the incumbent management. When a condition is met, then a value of 1 is received. As a score is given based on all of the characteristics, at the end the index consists of the sum of the scores, which thus can vary between 0 and 4, where 4 would mean strong creditor rights. (Djankova, McLiesh, & Shleifer, 2007) Thus, based on this measure, it is possible to characterize jurisdictions according to whether they are rather creditor or debtor oriented. (Eidenmüller, 2016)

According to the creditor rights index, Germany and England are considered to be strongly creditor oriented, while to the contrary, France is seen as a strongly debtor oriented country, and the United States is claimed to be approximately at the middle. The differences can also

be recognized in the aim settings of the bankruptcy codes. The German insolvency regime states that their processes should collectively satisfy the interests of creditors by the liquidation of all assets and the allocation of proceeds gained from the sale or organizing a plan, which aims to continue the business operations of the company. On the contrary, the debtor oriented French bankruptcy code (Code de commerce) argues differently. In their country, the aim of the restructuring process is to arrange for a successful continuation of the firm, while keeping the employment and settling the outstanding liabilities. As it has been claimed by Eidenmüller, the United States is somewhere in the middle, however, several other researchers considered it to be clearly debtor oriented, due to the option of restart being provided. (Eidenmüller, 2016)

Although only a couple of examples have been mentioned so far, it clearly stands out already that jurisdictions' bankruptcy philosophies differ to a huge extent. These examples also definitely illustrate that due to the differences shown in the insolvency regimes, once harmonization will be an aim, then significant efforts will be required in order to reach an agreement. (Eidenmüller, 2016)

The next section will separately describe the bankruptcy system and processes of The United Kingdom, Germany and France in detail. Thereafter a comparative analysis will be given regarding these countries and the United States of America.

6.1 The United Kingdom

In the United Kingdom a number of court-supervised possibilities are provided. The most well-known process is called receivership. (Hotchkiss, John, Mooradian, & Thorburn, 2008) According to Brouwer, even though receivership is considered the most important alternative to immediate liquidation, only about one-fifth of the companies take the opportunity to choose this option, the rest of the bankrupted entities decide for the liquidation process. (Brouwer, 2006) In a receivership, "a secured creditor appoints a receiver representing the interests of this creditor." (Hotchkiss, John, Mooradian, & Thorburn, 2008, p. 273) In this system, the automatic stay provision does not exist, thus creditors (having fixed liens on a fixed property) are allowed to repossess their collateral. They are also entitled to this option even if the property claimed would be crucial for business operations. The receiver realizes the security, which is followed by fee subtractions, such as any higher priority claims and also the fee of applying a receiver. Thereafter, the rest of the proceeds are used to settle the claims of the creditor who appointed the receiver. After all such claims have been settled, the remaining amount of the proceeds is distributed among further claimholders, based on the APR. (Hotchkiss, John, Mooradian, & Thorburn, 2008) In an ordinary process, the sale of the properties (or the entire entity) is completed

quickly, after the installment of the receivership it is implemented within a couple of days or weeks. (Brouwer, 2006) As it can be seen, unsecured creditors usually dispose little power to affect the process and the distribution of the proceeds. (Hotchkiss, John, Mooradian, & Thorburn, 2008) Most frequently, after the installment of the receivership, the contracts of the employees of the firm are also terminated. (Brouwer, 2006)

As corporate restructuring has gained importance in the last couple of decades, jurisdictions adopted to the occurring needs, by providing more than one possibility to reorganize distressed firms. Since the Insolvency Act of 1986, companies might choose, apart from the liquidation, a couple of reorganization processes which intended to facilitate recovery. (Eidenmüller, 2016) The most popular court-administered restructuring processes are Administration and Company Voluntary Arrangement (CVAs). (Hotchkiss, John, Mooradian, & Thorburn, 2008) Administration is a collective process, where the administrator is entitled to negotiate arrangements, also having the right to terminate contracts, for instance with suppliers. On the other hand, he is not allowed to delay either any capital or any interest repayment. In such a procedure an automatic stay provision exists. Unsecured creditors are the ones who benefit the most from that type of process. (Brouwer, 2006)

Company Voluntary Arrangements were also established to facilitate restructuring processes; however, it is dependent on the collaboration of all the members. In the CVA, just like in case of a receivership, there is no opportunity for an automatic stay provision or to issue new priority financing. (Brouwer, 2006) The procedure is provided for smaller entities and ensures just a short-term relief from the creditors. However, any secured creditor is entitled to the right to veto either Administration or CVA, but in such cases a receiver should be appointed. Consequently, an administrator is only appointed for the representation of all the creditors by the court if no secured creditor exercises its right, which is really uncommon in practice. (Hotchkiss, John, Mooradian, & Thorburn, 2008) In addition, in CVAs the control is always transferred from the management to a bankruptcy professional, therefore managers tend to avoid initiating CVAs, as they assume that professionals would not struggle for restoration but would instead choose an easier option. (Brouwer, 2006)

As it could be seen, basically the insolvency proceedings of the United Kingdom are rather creditor oriented. As an example, in a receivership the operations are only protected to a small extent. In addition, secured creditors are also given the possibility to decide about liquidation, which is a significant right. Some researchers argue that usually the allocation of control rights to secured creditors will result in an underinvestment problem and also in the chance that even still viable firms will terminate their business. A potential solution for the problem of premature liquidation could be if the creditor (who asked for the receiver) had

an advantage of control if the bankrupted company manages to recover. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

As secured creditors benefit from the formal bankruptcy procedures, it would be expected that the out-of-court methods are used rarely. A study conducted with the sample of small firms showed that approximately three quarter decides to enter a formal bankruptcy, while only the rest chooses private workouts in the United Kingdom. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

Recently, an initiative was launched in order to compile modernized and also consolidated bankruptcy laws that will replace the Insolvency Rules of 1986 and all the amendments since then. The main purpose was to introduce modern business practices, while also to ensure that the procedures will become even more efficient. The new set of regulations and procedures came into force in April 2017 in both England and Wales. (The British Government, 2016)

In the new rules several changes have been introduced. First of all, the insolvency terminology was changed in order to make it more user-friendly. Previously, it frequently caused problems to creditors to understand and interpret the rules, therefore misunderstandings occurred quite often. As a result, in the new system the wording was improved, documents and further forms were standardized, which will also contribute to easier and smoother insolvency procedures. Secondly, the previous requirement to organize an initial meeting (Section 98) and also a final meeting (to introduce accounts in the liquidation process) for creditors were abolished. Such meetings were usually costly, and also due to low attendance, it was often considered as a waste of not only money but time as well, which are not beneficial to the creditors. Since the introduction of the new regulations, all the information is available on a website, which not only helps to avoid delays but also to save the postage cost. However, it is still possible to ask for a personal meeting, which the office holder is obliged to fulfil if at least 10% of the creditors, either by value or in number, request it. (Real Business Rescue, 2017)

In addition, since 2017 insolvency practitioners are allowed to send their proposals to creditors in letter and through that the plan is considered accepted, unless more than 10% in value of the creditors hand in their refusal. Further modes for providing consents are allowed through either an electronic voting system or through virtual meetings. All these new rules aim to compile a system which pursues equal participation of all creditors. (Real Business Rescue, 2017)

Thus, the main changes were key communicational and technical changes, to modernize the system in order to keep up with the developments of the last decades. Since the new

regulations, email usage has been increased, and the documents and consents have also been received electronically. The reliance on digital platforms and the usage of web portals have also been growing, which enables to implement faster processes by downloading the documents instead of physical delivery. There are only some exceptions, usually some more significant documents, which are not yet available online; instead, they are still delivered. (Januszewski, 2017)

Thus, in England there are various ways to solve bankruptcy cases. Companies might choose from liquidations, receiverships, administration processes and CVAs. As all these procedures seem to have distinct characteristics and various benefits and drawbacks as well, and this implies that they might be appropriate for different situations and circumstances. Consequently, firms need to consider the options carefully before they choose the preferred one.

6.2 Germany

The German Bankruptcy Code in the past was not as influential as the French Bankruptcy Code, but due to the size of the current German economy, it has a significant effect on other country's bankruptcy laws. Since the introduction of the 1877 Bankruptcy Act (Konkursordnung), a number of amendments and changes were implemented in the basic concepts. In 1935 the reorganization process (Vergleichsordnung) was introduced into the system, in order to keep the viability of the distressed entities. After many reforms, a new insolvency law, the Insolvency Code was compiled in 1994 (and came into effect in 1999) known as Insolvenzordnung, however, since then several amendments were implemented in the further years. (Anyfantaki, 2017)

The German Bankruptcy Code, just as the English Code, seems to rather focus on creditors. The first article of the Insolvenzordnung claims: "The insolvency proceedings shall serve the purpose of collective satisfaction of a debtor's creditors by liquidation of the debtor's assets and by distribution of the proceeds, or by reaching an arrangement in an insolvency plan, particularly in order to maintain the enterprise." (Anyfantaki, 2017, p. 9) It seems to be controversial that even though Germany is one of the most powerful and modern economies in Europe nowadays, the bankruptcy policy of the country still seems to be quite conservative. (Anyfantaki, 2017)

In the general German bankruptcy procedure both the debtor or the creditors are allowed to initiate the insolvency process. (Anyfantaki, 2017) One reason for the opening of a final insolvency procedure could be, for instance, if the court considers that the debtor is not capable of paying the debts in due time, thus they are illiquid. (Zahlungsunfähigkeit) The other reason could be, if the debtor is over-indebted (Überschuldung), meaning that the

assets of the debtor are not sufficient to cover all the liabilities. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

The procedure itself is divided into two parts: to a preliminary part (vorläufiges Insolvenzverfahren) and to a final process part. (Anyfantaki, 2017) The time interval from the filing handed in for insolvency is known as the preliminary insolvency process until the judgement is made by the court whether to initiate the final insolvency procedure or not. This means that the court does not automatically allow to start an insolvency case based only on the request of the filing. The preliminary part is strictly supervised by two entities, both of them are appointed by the Court, and they are known as the preliminary insolvency administrator (Eigenverwaltung) and the preliminary creditors' committee (Gläubigerausschuß). (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) Firstly, the role of these entities is the supervision, which lasts for the duration of the whole process, from filing until the decision of the court. (Anyfantaki, 2017) Secondly, their task apart from supervision is to prepare the basis for the choice of the Insolvency Court. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) If during the evaluation and consideration of the preliminary insolvency administrator, it is found that there is basis for insolvency and in addition the property would be appropriately high to cover all procedural expenses, then the final process is initiated. (Anyfantaki, 2017) In all other cases the initiation of a procedure will be refused owing to the reason of insufficient assets. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

As soon as the final process is initiated, a final insolvency administrator is appointed. (Anyfantaki, 2017) After the final process starts, the preliminary administrator is no longer responsible for the entity as a preliminary administrator, however, they are also frequently appointed as the final administrator. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) However, the creditors' meeting is entitled to the right either to confirm or to replace the final administrator. The final administrator, just as the preliminary administrator, will be supervised by the Insolvency Court. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

The final administrator is endowed with remarkable responsibilities and tasks, for instance, he might take efforts in order to keep the entity as a going concern, at least till the first meeting of the creditors (Gläubigerversammlung). The meeting is to be implemented three months after the final procedure has been initiated at the latest. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) The creditors' meeting is organized in order to decide by voting, where the majority rule applies (in number and in value), whether the business will be liquidated or reorganized. (Anyfantaki, 2017) As a basis for the decision, the reports on the financial status and circumstances are used, which were prepared by the administrator.

As a result of the meeting, the administrator could be requested to prepare the insolvency plan. (Insolvenzplan) It might also happen that the administrator intends to close the business even before the creditor's first meeting, but in order to implement that, the creditors' committee consent is needed. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

In addition, the administrator is also empowered to challenge some of the transactions which were initiated before the opening of the insolvency process. Only those transactions can be reversed which seems to have and unfair preference and which significantly influences the creditors (also known as a claw back right). The transactions that are challenged are those which took place most frequently, in the period from three months prior to handing in the filing until the opening of the final procedure. In special cases, depending on the nature of the deals, the challenge period can even date back to ten years. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

The aim of an insolvency plan is to maintain the company as a going concern. Such reorganizations are only opened if the firm, based on the valuations, is considered to be worth to reorganize. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) In order to receive the right to compile an insolvency plan, the firm should be either already in the status of insolvency or a potential threat should be around, after which the reorganization might come too late. (Anyfantaki, 2017) The Insolvency Code provides the company three months to constitute the reorganization plan (insolvency plan), which will be supervised by the administrator, who was appointed by the court. Some argue that the three months given is often too short to compile a clear reorganization plan, where complex operations and also the financing needs should be restructured. (Hotchkiss, John, Mooradian, & Thorburn, 2008) The plan can also be compiled before and can be submitted together with the insolvency filing or as an alternative, it can also be developed by either the debtor or the administrator after the initiation of the insolvency. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

The plan gives a detailed description of both the financial and asset restructuring steps, which also contain a sketch for a potential going concern sale of the entity. (Hotchkiss, John, Mooradian, & Thorburn, 2008) In addition, the insolvency claims will also be listed here. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) If the purpose is to preserve the firm, then the constituted insolvency plan (Insolvenzplan) will be accomplished. The reorganization plan, in order to be effective, should be approved not only by the majority of each of the classes of creditors (in number and value), but also the court has to accept it. (Anyfantaki, 2017) It is also required in a plan that everybody within a class is treated equally, thus the offers to each group participant should be the same. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) In Germany the court has an option for a cramdown procedure, which can

be implemented if creditors are better off than they would be with the possibility of a piecemeal liquidation. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

After the approval of the plan, the proceeds will be distributed to creditors according to it. The creditor ranking system is also quite simple in Germany. (Anyfantaki, 2017) Creditors are divided into different groups, to secured, unsecured and preferential creditors (Massegläubiger). First, the preferential creditor's claim is satisfied, and these are enforceable claims. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) Then comes the wants of secured creditors, which is followed by paying the administrative expenses. At the end, unsecured creditors, subordinated creditors and also shareholders will be paid in this order. (Anyfantaki, 2017) If the unsecured creditors want to make their claims satisfied, they need to file their non-preferential claims (Insolvenzforderungen) in order to include such claims in the schedule of payments. The administrator has power to deny registering such a claim in the order, owing to insolvency specific reasons. If the unsecured creditors' claim is refused, they can initiate legal action with the aim to enforce the satisfaction of their claims. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

Employees also get a compensation, called the insolvency money (Insolvenzgeld), which is equal to a three-month salary compensation. (Anyfantaki, 2017) The opening of an insolvency process does not necessarily mean the termination of employee's contract, however, it might be finished with a notice of three months or sometimes, depending on the contact, even earlier. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) Regarding payment claims of the transactions, these terminations are based on the judgement of the administrator, there the counterparty is not allowed to request for payment, only for a compensation. (Anyfantaki, 2017) As soon as all have been distributed and arranged, the entity will be dissolved and thereafter no further claims can be requested. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

Aside from the already explained process, there exists another possibility, called as the self-administration (Eigenverwaltung), which is most similar to the debtor in possession (from the States), which gives the right for the management to stay in control, while it will be still supervised by a trustee (Sachwalter) who is chosen by the court. The trustee in such a case might also have an important role, as several tasks, which previously belonged to the insolvency administrator, are added to his responsibilities. In order to implement a self-administration, clear and accurate preparation is inevitable. Frequently the support of the most significant creditor is also necessary, and in addition it might be needed sometimes to appoint an experienced and new management, which could remarkably contribute to the success of the process. (Anyfantaki, 2017)

It is also an option to couple the self-administration process with an insolvency plan. If such a possibility is to be implemented, there is also an option to take the “Protective Shield Proceeding”. Those entities which apply to this are able to reorganize their business with the help of an early filing and the self-administration process. The basic requirement for such a combined process is that the firm should be either over-indebted or in pending illiquidity, however, companies, which already face illiquidity are not allowed to take part. In addition, either of the above-mentioned financial statuses should be proved by a certificate prepared by an insolvency law expert. As soon as this has been done, the court will determine a deadline (maximum in three-months time) until which the debtor should already hand in an insolvency plan. Furthermore, when the deadline is determined, a preliminary trustee will be also denominated by the Court. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

One way for the insolvency procedure to come to an end is if the firm manages to recover and all the debts of the entity have been settled, which means that the firm is released from the status of the administration. But in several cases, the debt is not covered, and creditors often face the situation of only partial recovery, but it might also happen that they do not receive anything. As a result, there are two possibilities: the debtor might be eliminated from the commercial register or, as an alternative, the debtor might be acquitted from the process of insolvency, however, in such a case all assets and properties will be stripped. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017)

In the last 15 years Germany started to implement various reforms, mostly focusing on facilitating the option of restructuring, which was not very popular before. Since 2009, no enforcement actions are allowed regarding those assets which are necessary properties for the business of the insolvent firm. Moreover, in 2012 further regulations were introduced, for instance the Act for the Further Facilitation of the Restructuring of Companies (Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen, ESUG). This rule, among others, aimed to construct a protective system for still viable companies, while harmonizing the different laws and regulation and also strengthening the position of the creditors in the restructuring. In the same year the reorganization of financial institutions was also regulated by the foundation of the restructuring funds and further alternative mechanisms. In general, the process members were provided with more flexibility and also the possibility of pre-insolvency processes were announced. (Anyfantaki, 2017) Further amendments were also implemented in 2014 and the latest changes were introduced in April 2017 regarding the challenge rights. (Wilhelm, Richter, Skoruppa, & Hoffmann, 2017) All these reforms not only seem to have positive comments, but they also bring the German regime closer to the reorganization process of the United States. (Anyfantaki, 2017)

However, others claim that the reforms in Germany were not that successful as it was expected. It is argued that the liquidation process is still more encouraged by the Insolvenzordnung. (Anyfantaki, 2017) Due to that, the Insolvency Code is frequently associated with the process of liquidations, also indicating that the focus is not on the restructuring procedures. (Eidenmüller, 2016) The summary conducted on the insolvency processes of 2010 also proves this argument, as from 136 000 filings only 2000 ended up with the continuation of business. (Anyfantaki, 2017) In another study, it has been shown that in Germany more piecemeal liquidations are conducted than in Sweden and in the United Kingdom, but still less than in France. (Hotchkiss, John, Mooradian, & Thorburn, 2008) The reason for the low number of formal reorganization processes is frequently said to be the sharp measures which need to be fulfilled before filing for reorganization. In addition, often the filed reorganizations are refused by the court. (Brouwer, 2006) Some also criticize the regulation which makes the director personally liable for the company's debt in case the filing is not handed in within three weeks after a cash flow imbalance. Moreover, it is argued that many insolvency legislations and rules should still be developed (based on the States example), as now they do not appear to be ready or to be updated to current circumstances. All these factors are reasons to rather decide for the very popular out-of-court mechanisms, and approximately 20-30% of the insolvent entities resort to such modes first, before trying any other methods. (Anyfantaki, 2017)

It seems that the border between creditor and debtor oriented systems fades away with the passage of time, which is mainly attributable to the Chapter 11 process. However, even though the reorganization method became more used, Germany still has a number of things to improve, such as the negative view of insolvency or the excessive rates for liquidation. (Anyfantaki, 2017)

6.3 France

In contrast to Germany and England, France is considered to be a strongly debtor oriented country. This can be proved both by the aim setting of the Bankruptcy Code and the methods provided to solve distress.

In France a number of options are provided to rescue businesses. To be more specific, according to Anyfantaki the processes can be divided into two broad types, to court-assisted and to court-driven procedures. (Anyfantaki, 2017) Court-driven procedures mean that the whole process is supervised by the court, while in the court-assisted type the role of the court is limited. (Eidenmüller, 2016)Court-assisted procedures contain conciliations and mediations, while under the court-driven processes the simple and accelerated safeguard

proceedings, the judicial settlement-reorganization and liquidations are meant. (Anyfantaki, 2017) In the following section these processes will be described in detail.

A conciliation process is only provided to those firms who are experiencing financial difficulties for a maximum of 45 days. The longest possible duration of this procedure is also regulated, it can at most last for five months. During this process, the debtor is allowed to confidentially negotiate about the issue of the debts, to which a conciliator also provides help and support. As soon as any compromise is achieved, it should be ratified by the Commercial Court. One of the most significant advantages of this process is that the management is allowed to retain control. (Anyfantaki, 2017)

Apart from the conciliation, mediation is also seen as a court-assisted process. Mediation is considered to be informal and flexible, with the benefit of the lack of time constraints. In this process, based on request, help is also provided by the court in form of a mediator, acting as an advisor to the entity. This process rather focuses on specific issues instead of aiming to deal with general financial problems. The only requirement to resort to such a process is the firm's solvency. In both of the above-mentioned processes creditors can strive to get back their payments. (Anyfantaki, 2017)

On the other hand, within the safeguard processes (which are court-driven processes) a solvent debtor targets the reorganization process, for which a prerequisite is that the majority of the creditors (in number and value) agrees with the compiled plan. Since 2014, creditors are also empowered with the right to propose a plan. However, they are not allowed to enforce individual measurements with the aim of settling their claim for a certain time period, in which an administrator is entitled to control the assets and properties. Some argue that this method ensures the harmony between individual negotiations and judicial control. (Anyfantaki, 2017)

The accelerated safeguard processes seem to be significantly affected by the Chapter 11 reorganization and as a consequence, several connections and similarities can also be recognized in between them. However, these safeguards also differ to a certain extent. For instance, only larger companies can resort to such a process and only for a shorter period of time, namely for only two months. In addition, in safeguards only those reorganization plans are completed which have already been approved and also for which the compulsory conciliation has also been accomplished already. Even though the creditors' majority is also required just as in the court-assisted processes, this method can also be applied to insolvent debtors as well, who face difficulties for maximum of 45 days. (Anyfantaki, 2017)

The last method which tries to improve the financial situation is the reorganization process. (Anyfantaki, 2017) By its French name, the redressement judiciaire with several other

options also came into force with the Bankruptcy Act of 1985 (Brouwer, 2006), and provides an extremely strong protection for the company. (Hotchkiss, John, Mooradian, & Thorburn, 2008) The aim of the reorganization (in this order) is to maintain the company's operations, try to keep employees and finally to settle the creditors' claims. This also has its downside, as it also means that several inefficient companies are also reorganized. As debtholders are not allowed to be part of the process, their incentives are represented by an officer, who is appointed by the court. The restructuring process is supervised by an administrator, who is also assigned by the court. The task of this administrator is to estimate the chances for the restructuring and to compile a reorganization plan which will be presented at the court. The creditors are not entitled to the right to refuse any decision made by the court and they are also not allowed to refuse the acceptance of the reorganization plan. In case of secured creditors, their acceptance to sale of collateral is also not needed. Instead of the impaired claims of the creditors, frequently a new, completely changed claim is provided. Such a deal cannot be forced to accept; however, the court has the right to redefine terms of loan, therefore creditors mostly seem to agree to a write-down with timely settling of payments instead of a full satisfaction with an uncertain deadline. (Hotchkiss, John, Mooradian, & Thorburn, 2008) Moreover, in the official French reorganization procedure an unlimited automatic stay provision also exists, which provides further benefits for the debtor. (Davydenko & Franks, 2008) Super priority financing brings additional benefits to the firm, as it can also be raised by the administrator, and no creditor approval is required to implement it. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

Even though it seems that the French Code focuses on facilitating the continuation of businesses, the results of the surveys' do not seem to prove that. Some studies show that approximately only 15% of all companies manage to go on with their business as a going concern after a reorganization process, while other researches imply that more than 60% of the entities are liquidated piecemeal, which appears to be higher than it is in the United Kingdom. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

It appears that recently in France this method decreased in significance, it is not among the most popular methods for solving distress. In this procedure, the majority approval of the plan is also required, however, it is court-driven and most frequently it is also slower and under the control of the administrator. (Anyfantaki, 2017) In addition, in reorganizations the owner is required to assume each contract of the employees, which also contributes turning to other processes. (Brouwer, 2006)

Finally, it is also an alternative to liquidate the company. This process can be either requested by the debtor, the creditors, or even the court. As soon as the liquidation is

initiated, the debtor is not in charge of the assets anymore. In order to gain the proceeds, either the properties or the entire firm is sold to settle the claims of creditors, and the gains are distributed strictly following the order. If liquidation is implemented directly (not preceded by any type of restructuring) strict criteria should be met regarding the creditors' payment. The claims can be satisfied from the sale of properties or even from the sale of the entire firm. In such a situation the payment seniority is clear and fixed, claims are settled immediately. (Anyfantaki, 2017)

During the collective processes usually it is required for creditors to hand in their claims. As soon as all have been filed, a list of the claims is compiled, which needs the approval of the supervisory judge and within one month from the declaration of insolvency, anyone can appeal. Then the debtor has to construct a plan for potential payments, however, it might be extremely difficult to compile a schedule which keeps the goal of decreasing liabilities. Mostly such a schedule is only reached in extraordinary cases, for instance when the creditor is an authority or a parent company. Regarding the distribution of the proceeds, in practice most of the time only partial payment is provided, however, there is not a minimum limit set as to what amount of the claims should be satisfied. The regulation clearly serves the interest of the debtor. The first settlement of payment can be implemented within a year after the plan has been ratified. (Anyfantaki, 2017)

Due to the different versatile processes, different number of entities might take part in each procedure. Within safeguard and restructuring processes both preliminary and supervisory judges and also a representative for creditors participate. In addition, administrators as legal experts and commissioners of the plan (who might be the creditors' representative or the administrator) also have a role in the process. Considering the stakeholders, within the above-mentioned procedure not all types of stakeholders are represented. On the other hand, in case of liquidations, owing to the lack of chance of recovery, neither the creditors' committee, nor the administrator participates. In such a situation the liquidator will act in favor of the debtor. (Anyfantaki, 2017)

The role of employees is also considered to be important in France. Under the law, employees are regarded as creditors, who can demand their wages and compensations. It is not needed to file such a demand, as employees have a general lien over the debtor's assets, which is valid for the last half year of work. Since the 1970s, the claims of employees are handled with priority (placing it even over the claims of secured creditors). (Anyfantaki, 2017) Such priority of employee and government claims lead to the violation of the absolute priority rule. (Hotchkiss, John, Mooradian, & Thorburn, 2008)

However, these conditions regarding employee claims are not easy to satisfy. In safeguard processes evidence has to be shown that debtor is still able to implement payments, while both in liquidation and restructuring, the debtor is usually in such circumstances that it is not possible to release the required amount. As in financial distress employees might often be considered “disposable workforce”, resulting in the dismissal of the employee, the French Labour Law requires to implement an employee safeguard plan. The main aim of this plan is to protect employees from potential law infringements. The plans and methods might differ on the type of mechanism used (whether liquidation, restructuring etc.), however, the general purpose remains the same. (Anyfantaki, 2017)

In the insolvency processes the causal connection between fault and loss is also considered. If either fault or fraud is observed, then it will have certain consequences such as criminal sanctions or financial penalties on the directors of the company. Even though the rules are harsh, they are still not as strict as in Germany. (Anyfantaki, 2017)

In French bankruptcy legislations several reforms have been implemented recently. Some changes were conducted in 2005 and 2010, however, the most relevant reform came in 2014. The most crucial purpose of the last reform was to covert the extremely debtor related law a bit more creditor friendly. Changes were introduced regarding the rights of creditors within safeguard processes. According to the changes, creditors are entitled to the right to hand in a plan either to the court or to the creditors’ committee. Alternatively, the plan compiled by the debtor is not allowed to contain any kind of debt reduction and also no change of any part of the contract, instead they are only permitted to have claim renegotiations. Since 2014, the agreement of creditors is required to have for the confirmation of the plan in reorganization. Furthermore, the process of filing was made easier, meaning that beside the debtor recording the creditors’ claims, creditors also do not have to file their wants, which was the case before the reform. In addition, liquidation processes have been accelerated, which means an advantage for the creditors. (Anyfantaki, 2017)

Thus, in the past the French legislation was considered weak in the protection of creditors. In a research which evaluated the creditor protection criteria, France earned the lowest possible score, while the United Kingdom received the highest score (4) and Germany received (3). Other studies focusing on the rights of creditors also yielded the same results and ranked France in one of the last places. Since the time of these rankings a couple reforms have been introduced, which put in a few procreditor components to this extremely debtor oriented code. However, even though several creditor related elements were introduced, the French Code is still far from being creditor oriented. (Anyfantaki, 2017)

6.4 Comparison of the European systems with the U.S. Bankruptcy system

As it has been seen already, there is a wide range of differences between bankruptcy systems. This chapter tries to provide a summary on the extent to which the US and the European bankruptcy systems are similar. Even though a common European legislation system does not exist, there are some characteristics which are same or similar in Europe, in contrast to the United States.

First of all, the view of how bankruptcy is seen differs. While European countries consider bankruptcies as a consequence of preventable failures, in the States a current failure does not necessarily mean that the management will not be successful sometimes in the future. Secondly, filing in general also differs within the two continents. In Europe, usually the bankruptcy process is initiated by the creditor, thus it is an involuntary bankruptcy contrary to the United States, where almost all the cases (approximately 90%) is filed voluntary, meaning that the debtor requested the process. The disadvantage of an involuntary case is that the filing might happen late, thus often there is no chance for reorganization or even if there is, it is exacerbated. The reason for that could be that debtors would like to go on with the business operations and hence frequently hide the real financial position of the entity. (Brouwer, 2006)

Further differences can be found in facts like whether the management is allowed to stay, or they are dismissed. In the United States in the vast majority of the cases the management is allowed to stay, while in Europe they cannot retain their control. In addition, the remained debtors from the States are entitled to the right to compile a reorganization plan in order to save the business, while in Europe most frequently this right is not provided. In Europe, instead of the debtor, the plan is constructed by either a curator appointed by the court or a trustee entrusted by the main creditor. Thus, some argue that in Europe due to the lack of the right to compose a plan, the management has less motivation for filing than in the States. (Brouwer, 2006)

In addition, the automatic stay provision does not exist in a number of European legislations, while it is an option in the U.S. As a result, in Europe the secured creditors are allowed to demand their claims not only in restructuring processes, but also in liquidations. In order to restructure in most cases new capital is needed, which is often not allowed in Europe. Relatedly, in most of Europe the norm is that courts are the ones who assess the viability of the entity. In the States the fate of the firm in reorganization is only based on the investors' evaluation. (Brouwer, 2006)

So far, several differences could be seen between the States and Europe, however, the next section will go into more detail and instead of a general view, it will rather compare each

European country to the United States' bankruptcy system. The countries will be compared according to several points of views, such as the trigger for bankruptcy, control rights, the automatic stay provision etc. The summary of all the countries' features will be presented in table 6 below.

Even though the bankruptcy systems resemble each other in Europe, significant differences can still be recognized. Just as between Europe and U.S., there are also a number of differences within European countries. Firstly, there is a difference in the aims of codes. In France the focus is laid on maintaining the firm as a going concern and keeping employment, in contrast the UK code is rather creditor oriented and provides more freedom within aims and procedures. Secondly, for instance both in Germany and in France there is a need for court supervision, on the other hand it is not an obligation in the United Kingdom. (Davydenko & Franks, 2008)

In order to see the most significant differences, the secured creditors' point of view will be considered within the countries. While in the UK the trigger for bankruptcy is the default, both in France and Germany just the cessation of payment is enough. In this sense Chapter 11 is completely different, as in the U.S. still solvent companies might also decide for a reorganization process. (Davydenko & Franks, 2008)

Next, the control rights will be examined. In the UK in case of bankruptcy, the secured creditors receive the control rights. (Davydenko & Franks, 2008) The reason for that is that in the UK the secured creditors are the ones who select the administrator, while unsecured creditors do not really have a decision right in this issue. Secured creditors will choose an administrator who, based on experience of the past cases, appropriately satisfied the requirements and incentives of the secured creditors. (Lóranth & Franks, 2014) In addition, there is no opportunity for automatic stay provision or for super priority financing. In France the secured creditors' rights are considered to be weak as their approval is not necessary for important decisions, for instance for the acceptance of the reorganization plan. The weak rights are also reflected in the priority of claims, where first the states' and employee claims are satisfied before the secured creditors' wants. In addition, the administrator is entitled to the right to raise super priority financing and to act so, the agreement of creditors is not required. These all suggest that in France the court-appointed administrator has the control right (instead of creditors). Regarding Germany, the control rights are said to be given to the creditors, but under court supervision. This can be proved by the fact that for any plan to be passed by the court, the majority of secured creditors' is needed, and their approval is also needed to have access to super priority financing. Even though an automatic stay provision exists, it is just limited to a three months period. (Davydenko & Franks, 2008) In addition, in

Germany the administrator apart from the court must also report to the creditors, which also shows their power. Moreover, the creditors' committee can also limit the work of the administrator, as they also have the right to supervise and if needed, question the administrator. (Lóranth & Franks, 2014) Finally, the reorganization and liquidation options are examined in the States. In Chapter 11 the debtors and creditors have control rights collectively and there is also a bankruptcy court supervision included in the process. Just as it is in France, in Chapter 11 the automatic stay provision is also not limited by time, thus it is unlimited and also there is a possibility to raise super priority financing. (Davydenko & Franks, 2008) While, in contrast to the reorganization, in the liquidation process the trustee has the control rights. He is appointed with the aim of overseeing the process of utilizing the company's assets and properties, allowing him to choose the method of selling and after selling distributing the gains. (Lóranth & Franks, 2014) Thus, as it could be seen, there are several differences in control rights.

The differences are also shown by the LLSV score, which is a measure for the creditors' rights. As it has already been described before, the values are between 0 and 4 according to how creditor friendly is a country, where the value of 4 would mean strong creditor rights. As it can be seen from table 6, England has the strongest score (4) with the highest possible value, meaning that it is a creditor oriented system. Germany has a value of 3, which means that creditors have just a bit fewer rights (compared to England). Owing to the low scores, it is clear that France and the USA are rather debtor oriented, the States has a bit higher score than the absolute debtor oriented France. Thus, the score provides an impression regarding the different country's bankruptcy systems. (Davydenko & Franks, 2008)

A study has also been conducted, discussing in which country is the reorganization process most widely used. In the States approximately 25% of all petitions are Chapter 11 cases, while the European numbers appear to be significantly lower. In France 2,5% of the cases result in a reorganization process, while in Germany it is even lower, 0,39% of the cases were reorganizations in the period between 1985 and 1992. In the United Kingdom the same trend can be recognized, as the reorganization procedure takes place mostly if the entity falls under CVA following administration. On the other hand, the number still remains low, as CVA processes are uncommon, approximately only stand for 2% of the cases. Thus, in general, it could be concluded that in Europe on average less reorganization processes happen than in the United States. (Brouwer, 2006)

Bankruptcy Procedures in France, Germany, the United Kingdom, and the United States

The table lists principal bankruptcy procedures in the United Kingdom, France, Germany, and the United States, and compares their main characteristics. The bottom row reports creditor protection scores given by La Porta et al. (1998).

	U.K.	France	Germany	U.S.	
Main procedure	Administrative receivership	*Redressement judiciare*	*Insolvenzordnung* (the 1999 code)	Chapter 11	Chapter 7
Bankruptcy trigger	Default (covenant breach)	Cessation of payments (inability to meet current liabilities)	Cessation of payments or over-borrowing	No objective test. Solvent firm may enter Chapter 11	No objective test
Control rights	Secured creditor	Court-appointed administrator	Creditors under court supervision (secured creditors have more power)	Debtor, creditors collectively, bankruptcy court supervision	Trustee
Automatic stay	None	Unlimited	3 months	Unlimited	None
Super-priority financing	None	Yes	Creditors' approval required	Yes	None
Dilution of secured claims	None	Significant	Limited	Limited	None
LLSV creditors' score (max=4)	4	0	3	1	N/A

Table 6: Bankruptcy processes in the UK, France, Germany and in the U.S. (Davydenko & Franks, 2008)

The analysis above provides evidence that even though the basic processes and features seem to be similar to some extent, the mechanisms used differ significantly. In order to also provide a practical example, the following subsection will describe and analyze a case study related to reorganization processes, implemented under different bankruptcy regimes.

6.5 Case studies on reorganization process

Restructuring might be implemented in different ways depending on the legislations. The following case studies illustrate the differences of the USA and German reorganization processes and the most recent restructuring laws and regulations. At the end, not only the relevant consequences will be drawn, but also the efficiency of the processes will be evaluated. (Anyfantaki, 2017)

6.5.1 The General Motors Corporation Case

The General Motors Corporation was established more than a hundred years ago in 1908 and pursued activities in the car manufacturing industry. Throughout the years the firm became successful and achieved a leading role in America. However, the situation and conditions changed significantly due to several factors. First, around 2000 a pressure occurred, due to a recession, to cope with excessive pension funds. Then a bit later, in 2005 the company ended up with a 10,6-billion-dollar capital loss and two years later a serious labor strike also took place. These were followed by a series of events in 2008, such as the automotive crisis, high oil prices and the global financial crisis. All these factors forced the management of GM in 2009 to file for Chapter 11 with the purpose (among others) to enhance business value. At the time of filing the company reached bottom; their amount of debt was 172,81 billion dollars, while the value of the firm's assets was much lower, only 82,29 billion dollars. (Anyfantaki, 2017)

The aim of the company's (debtor-in-possession) filing was to implement a successful reorganization with the help provided by the government, which is considered a usual method in the U.S. Based on the plan, the support provided by the U.S. Treasury would be around fifteen billion dollars, which would mean a huge help, as otherwise the entity would have been liquidated. (Anyfantaki, 2017)

In the plan it was described that the NGMCO Inc. (which was a company owned mostly by the U.S. government, but unsecured GM bondholders and worker funds also had smaller stakes in it) bought all the assets, trademarks etc. of GM. (Anyfantaki, 2017) The name of NGMCO Inc. has been changed to General Motors Company. It has been decided that they would pursue business under the historic brand of GM, which also contributed to this process of initiating an independent and new GM. The new firm was dedicated to reducing risk and focusing on technology and also on product developments. Moreover, it has also

been stated that the new entity will also try to acquire those subsidiaries which are not situated in the States. (Noria Corporation, 2009) The new entity only kept four of its previous brands (Chevrolet, Cadillac, GMC and Buick). In addition, the number of agreements, employees, factories and other centers have also been scaled down. (Anyfantaki, 2017)

The president (and also the CEO) became Fritz Henderson, who declared the following: "A healthy domestic auto industry remains vital to the global economy and we deeply appreciate the support the U.S., Canadian and Ontario governments and taxpayers have given GM, and the sacrifices that have been made by so many. This has been an especially challenging period, and we've had to make very difficult decisions to address some of the issues that have plagued our business for decades. Now it's our responsibility to fix this business and place the company on a clear path to success without delay" (Noria Corporation, 2009, p. 1)

The deal was a prepackaged agreement, which is a common method by complicated and complex bankruptcy processes. The new firm is considered to be entirely independent and separate from the old GM. The old GM (the rest of General Motors Corporation, which was not sold) was also renamed to Motors Liquidation Company. This included the brands which were not successfully sold to the new GM in the section 363 sale process, such as Hummer and Saturn, which were both sold to separate competitors. (Anyfantaki, 2017) All the rest of the assets and properties were also sold. The liquidation procedure was supervised by the bankruptcy court till the end of the company in 2011. (Noria Corporation, 2009)

The described case is an excellent example of a complex bankruptcy where not only one legal mechanism has been implemented. During the process the following have been used: a prepackaged agreement, the stay of management in control (DIP), support by the government, sale of assets and properties/partial liquidation, and change of the company's structure/change of focus. In addition, the U.S. trend of "not giving up" and the avoidance of liquidation have also been proved. Nowadays, the firm seems to be successful again, which might also indicate the efficiency of the U.S. system. (Anyfantaki, 2017)

6.5.2 The IVG Immobilien AG Case

IVG Immobilien was established in 1916 in Germany and originally the firm was dealing with coal and steel. However, around 1997 the whole face of the company has changed and since then, it deals with mainly real estates. In 2013 the entity faced significant financial difficulties leading to the threat of a bankruptcy process. The situation was a consequence of the shrinkage in the demand for their houses and buildings. Additionally, the expensive constructions in progress made their position even worse. As a result, in 2013 the reorganization process has been filed under self-administration. At that time the entity's

debt was approximately 4,2 billion euros, while the value of assets was about 20 billion euros. (Anyfantaki, 2017)

The plan handed in was accepted by the creditors. The creditors were stable and well-known hedge funds such as Morgan Stanley, Cerberus Capital Management and the Marathon Asset Management. According to the deal, the claim of creditors would be settled in a debt to equity swap, in which they would be provided with shares (approximately with a value of 1,4 billion euros) and also ensured that they will be the owner of IVG with significant control. In addition, several other sale processes were described in the plan. An example for that is the merchandise of their stake (50%) in the London Gherkin tower, which, among others, brought the entity 12 billion euros and also a debt reduction (about 2,2 billion euros). The only condition for the approval of the plan was that creditors should enjoy a better settlement than they would receive in a liquidation process. In this deal even the unsecured creditor's claims have been settled to about 60%. (Anyfantaki, 2017)

In the compiled plan several concepts were used, such as the automatic stay provision, the possibility for a cramdown, the right of debtors to terminate contracts and several others as well. Finally, during the year 2014 the entity managed to become free of any kind of debt obligations and according to estimations, was able to restructure about 4 billion euros of debts. However, even though the reorganization process was successful, the firm had to implement remarkable changes in its structure and in the operations. The most important aspect of the process was to settle the creditors' claims, while the aims of the company only remained the second purpose to be fulfilled. (Anyfantaki, 2017)

IVG's restructuring, among other factors, became successful owing to the legal changes made in bankruptcy law in 2012. In this reform, more flexibility was provided in negotiations and it facilitated the process of self-administration and allowed creditors to take a bigger role in the process. Even though the law became more acceptable concerning providing second opportunities, there are still some points to improve, such as the speed of the processes. (Anyfantaki, 2017)

The case studies further verify that even though the countries seem to have more or less the same tool set for bankruptcy cases, the usage of such methods, however, appears to be significantly different.

7. Heading towards a common and unified system

The further chapters of the thesis will deal with the second research question, whether we are heading towards a common and unified system of bankruptcy law within the European Union. First, after a general section on history of the harmonization efforts, the background

will be described for the Eurofood case. This case study will be used as a basic tool to introduce the fundamental regulations for common international insolvency cases within the European Union. Apart from a detailed analysis provided, criticisms and recommendations will also be given concerning the regulations which are in force already.

The reason for the choice of the Eurofood case was that it unequivocally illustrates the most relevant points and also the inefficiencies of the European Insolvency Regulation. Even though further regulations have been introduced since then (the Recast EIR), the long-term effects and consequences of the newest guidelines cannot be drawn yet. This is why Eurofood was chosen as a subject of analysis, although it was still judged based on the older regulations.

7.1 Efforts for harmonization

Just like in various other cultural areas, countries within Europe have significant differences in their insolvency systems. As in the last decades the member states of the European Union (EU) have reached a high level of integration regarding economy and trade, the next logical step would be to create a common legal system as well, which, among others, would include laws and regulations of insolvency cases. By harmonizing the regimes of the different countries, the internal market of the EU could be strengthened, and common conditions could be set up for insolvency, regardless of where the company is situated. However, this would also mean that the traditional insolvency systems of the member states should be significantly changed, which undoubtedly will lead to harsh debates and resistance. More specifically, it is predicted that conflicts within the negotiations will rise concerning the role of courts, administrators and regarding the ranking of claims. (Eidenmüller, 2017)

Even though today there is still no unified body of insolvency law procedures within the European Union, the establishment of such a system has always been considered an important aim to achieve. Therefore, several agreements and initiatives came already into existence regarding harmonization, however, most of them were relatively unsuccessful. (Anyfantaki, 2017)

The first initiatives of a common system appeared in the 1960s. In 1968 the Brussels Convention came out, which set basic rules on jurisdiction issues, and on the enforcement of civil and commercial matters. In the 1970s the Draft EEC Bankruptcy Convention was compiled, however, after several modifications it was abandoned. A decade later a Draft on Liquidation Directive was composed, but soon, just as the previous trial, it was also abandoned. In 1990 the European Insolvency Convention was created, which is also known as Convention on Certain International Aspects of Bankruptcy or as Istanbul Treaty.

(Anyfantaki, 2017) This agreement recommended a common system in Europe to coordinate international insolvencies, however, Cyprus was finally the only one who ratified it. Until this time a territorial system was used, thus in case of international bankruptcies, the assets were solely divided based on where they were situated. Due to the territorial system, creditors' claims were unevenly paid, and these cases frequently resulted in significant losses of value. (Bufford S. , 2014)

During the 1990s, two crucial international insolvency cases provided motivation to create a common insolvency procedure as soon as possible. The first was the case of BCCI, a banking chain, which focused its business in the third world. The second motivation was the failure of Maxwell Communications, which operated in the publishing industry. As a consequence of these and some other bankruptcies, in the mid-1990s more initiations were launched. One of them was the Model Law on Cross-Border Insolvency, which was compiled by the United Nations Commission on International Trade Law (or just shortly, UNCITRAL). The aim of this was to set a model law for internal usage, which was soon successfully reached and also used in currently more than 20 countries like the U.S., UK or Australia. The second initiative (1995) was the European Union Convention on Insolvency Proceedings and this was finally converted to a regulation. (Bufford S. , 2014)

This regulation, which is known to as the European Insolvency Regulation (EIR) was published in 2000, but only came into force in 2002. (Bufford S. , 2014) This is a Community Act which is in effect in all the European Union member states, except for Denmark. The general aim of this agreement is to regulate and provide guidelines for international insolvency cases within the Union and to provide an accelerated procedure. (Anyfantaki, 2017) In addition, it was hoped that it would also arrange for an efficient coordination, by requiring that it should be recognized by all other states, regardless of where the insolvency within the Union was initiated. In the regulation, among others, the choice of law for several insolvency cases are determined, claims are also coordinated, and the language of international cases is also set. (Bufford S. , 2014) Pre-insolvency and voluntary procedure description were not set within this agreement. (Anyfantaki, 2017)

Even though the Insolvency Regulation seems to show a significant advancement compared to previous initiatives, several problems and issues are still unsolvable. As the national systems regarding the insolvency processes are still valid and distinctive, it became a source of debate in the international law system. (Anyfantaki, 2017) Moreover, instead of harmonization of the laws, the Regulation rather gives a jurisdictional framework, stating which are the appropriate rules for the procedure to be implemented. (Eidenmüller, 2017)

7.2 The Parmalat-Eurofood case

The following section will introduce and describe the bankruptcy case of Parmalat S. p. A., which is one of the most well-known insolvency cases that deserved international attention in the last decades. Parmalat implemented operations, among others, in Ireland, under the name Eurofood IFSC Ltd (therefore the case is also known as Eurofood case). The legal case will highlight certain aspects and implications of the Eurofood litigation and the current legislations, also adding some recommendations for potential future bankruptcy issues. (Winkler, 2008)

7.2.1 Background of the case

In order to understand the case, it is necessary to provide an overall background and history of the firm and the subsidiary involved. Parmalat was established in the 1960s by a student, Calisto Tanzi. He made a pasteurization plant first. After a while not only milk was traded, but the firm was expanded also to the food business and later also to financial services. (Winkler, 2008) The expansion was so successful that Parmalat became international, conducting business in more than 30 countries with the help of 30 000 employees. (Bufford, 2006) Thanks to the several acquisition processes implemented, Parmalat became a multinational giant, mostly known for milk products. (Winkler, 2008)

Its wholly owned subsidiary, Eurofood, was established significantly later, only in 1997. They had their registered office in the International Finance Services Center in the city of Dublin in Ireland. Several countries prefer Ireland to be the location of the registered office, because this country is well-known for providing remarkable tax benefits. Even though the registration provides a tax advantage, several other conditions need to be satisfied. For instance, if there is a desire either to implement a change in the structure of the management or to change the location, it has to be approved by the Ministry of Finance. In addition, the scope of Eurofood was also regulated, they were only allowed to provide financial services to the members of the Parmalat Group. Eurofood did not have any employees and its usual operations were implemented by the Bank of America (in Ireland) according to Irish laws, forms, procedures and accounting requirements. (Bufford, 2006)

All in all, since the establishment, Eurofood only had three financial transactions, from which two happened in 1998. One was a borrowing transaction to finance some of Parmalat's businesses in Brazil, while in the other collateral was provided to finance some operations of Parmalat, which were implemented in Venezuela. The third, which was a swap transaction, happened in 2001 with the aim to being able to finance Irish operations. Eurofood's debt was guaranteed by Parmalat, however, the parent company's financial abilities to satisfy the promised guarantee also became doubtful a bit later. (Bufford, 2006)

7.2.2 Event leading to bankruptcy

The case began in 2003, when Parmalat issued bonds approximately with the value of 500 million Euros, which lead to mistrust and suspicion regarding the level of debt of the company. As Calisto Tanzi did not agree with the issuance of debt, the board was replaced, and the public was notified that the debt will be repaid. During the summer of 2003 newspapers claimed that a new bond was issued in unknown amount and that the gained cash was not used to satisfy the debt. As a reaction the CONSOB, which is similar to the Securities Exchange Commission of the United States, demanded notification of the action, however, Parmalat stated they are not able to give a more detailed explanation regarding the "Epicurum Fund", (a mutual fund) which Parmalat had an interest in. In autumn the trouble even seemed to be more complex, when it was declared that as Epicurum was not able to satisfy the interest (Eurofood was unable to receive cash from the fund), consequently Parmalat was unable to fulfil its obligation on another bond. Soon, Calisto Tanzi also acknowledged that the Parmalat group's financial statement was falsified, which finally lead to a number of examinations. As an example, it was required by CONSOB to verify that one of their subsidiary's, Eurolat had an important bank account at the Bank of America. At the end of the investigation it turned out that such an account did not exist, it was only made up in order to "prove" the groups solvent position, meaning that almost 4 billion Euros claimed to be held at the bank did not exist at all. As a result, the share price immediately dropped significantly and the firms within the Parmalat group all went bankrupt. Thereafter a commissioner (Enrico Bondi) was elected by the Italian government to control the process of restructuring. (Winkler, 2008)

As it could be seen, the role of subsidiaries is an important point in this case. Parmalat basically also used its subsidiaries to hide the level of debt they owed, however, due to the lack of financial help and assistance in decisions, just as the parent company, the subsidiaries collapsed. Eurofood was also one of its subsidiaries. The Bank of America, which was the largest creditor, filed for an involuntary bankruptcy at the High Court of Dublin in January 2004. The filing was accepted, and the process was started by appointing a liquidator. However, in early February, as it was mentioned already, a commissioner (Enrico Bondi) for Eurofood was appointed from the Italian side with the purpose to restructure. (Winkler, 2008) By this time, apart from Eurofood, several other subsidiaries also filed in the Italian court. (Bufford, 2006) Soon the Tribunal of Parma proclaimed the status of insolvency of the subsidiary Eurofood, however, the Irish challenged it, at the regional administrative tribunal of Lazio. In July 2004 the Italians decided that as they were the first to seize, the Italian court should have the jurisdiction over the subsidiary, also claiming that the appointment of the

Irish liquidator does not mean that an insolvency process was started in Ireland. This was opposed by the Irish Supreme Court and hence they turned to the European Court of Justice (ECJ) in order to decide which country should take the jurisdiction of the Eurofood case. Thus, the ECJ made the final decision whether the company would be restructured as the Italian court wished to implement or liquidated according to the Irish court. The final verdict by the ECJ was made in May 2006. (Winkler, 2008)

7.2.3 Universalism and territorialism

It is a common issue that insolvencies which affect more countries face the problem of determining where to initiate the process. (Winkler, 2008) The aim would be to implement a procedural consolidation in which all subsidiaries of the multinational group are able to initiate the insolvency process at one court. This would be advantageous because the value of the group could be safeguarded. Furthermore, by this, costs of the insolvency process could also be reduced. Most often the entity as a whole is more valuable than if sold piecemeal, hence it would be in theory everyone's interest to organize a procedural consolidation, by which cost could be saved and the value would not decline. (Daoning, 2017)

According to Daoning, two basic theories of insolvency could be distinguished: universalism and territorialism. Both of these ideas aim for value maximization; however, the way of implementation completely differs. In case of territorialism "international insolvency cases should be regulated by courts whichever possess the assets of the debtors" (Daoning, 2017, p. 244) As a result of this allocation method, more courts would be concerned to initiate a process owing to the different facilities and assets situated in several countries. (Daoning, 2017) The processes in each country would be implemented parallelly and each jurisdiction would use different methods and processes, as the jurisdictions are each restricted only to the certain country. (Winkler, 2008) To the contrary, by universalism only one court is involved and in this case the insolvency is handled as one case and only one set of rules and regulations would be used, even though it is a multinational insolvency. From a value maximization point of view universalism usually seems to provide more benefits. (Daoning, 2017)

On the other hand, Winkler argues that there are four basic directions for insolvencies. Apart from territorialism and universalism, he also distinguishes modified universalism and cooperative territorialism. Within modified universalism "the court principally responsible for the debtor's insolvency is assisted by foreign courts in "ancillary proceedings," whose jurisdiction does not extend beyond the debtor's establishment and the territorial boundaries of the respective countries."(Winkler, 2008, p. 358) Finally, cooperative

territorialism refers to the cooperation of courts that are on equal level in various countries. (Winkler, 2008) Even though the four directions only seem to be clear in theory, in practice several difficulties may rise.

Such difficulties occur because of the current international trade rules and laws used. The countries widely differ concerning their bankruptcy systems, for instance in the attitude of debtors, priority rules etc. In addition, the different treatments among the states result in competition, which is also a setback when trying to enact any international agreements. In order to make an international treaty to come into existence, it is important to have a clear determination of the procedures, the priority of courts etc. However, a treaty which determines all the mentioned aspects is not signed yet. (Winkler, 2008)

7.2.4 Definition of COMI

The first international law which deals with such international issues is the European Insolvency Regulation (also sometimes called the European Council Regulation) with the purpose to provide a basis for an effective cross-border insolvency system, by using the modified universalism concept. This regulation tries to create a clear guideline for bankruptcy processes within the European Union. To be more specific, it determines the applicable law and also a hierarchy of courts, moreover, also prescribes to recognize if a process has been initiated by another member state of the Union. The usual process is described by the Regulation in the following way (Winkler, 2008):

“the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.” (Winkler, 2008, p. 361)

As it is suggested by the Regulation, the adjudication process is closely related to the notion of the “centre of main interest” (COMI). The competent court of the given insolvency case will be where COMI is located. Furthermore, the Regulation also specifies the process to be the main proceeding if it has been initiated by the COMI court, while any other process which might have been started is categorized as a secondary proceeding. (Winkler, 2008)

Secondary proceedings are allowed to be initiated only where the debtor has an “establishment”. (Winkler, 2008) Establishment means “any place of operations where the debtor carries on a non-transitory economic activity with human means and goods”. (Bufford, 2006, p. 433) Secondary proceedings only deal with those type of assets which are located under the courts’ jurisdiction, meaning that assets situated abroad are not subject to

the process. If there is a main process initiated, anyone else can only interact though a secondary process. Finally, secondary processes are also constrained in the sense that they can only include liquidations. (Winkler, 2008) As the Regulation specifies it, during the secondary proceeding the local law of the country of opening is used. (Bufford, 2006) Hence, even if there are assets located in a country, in which there is neither an establishment nor a COMI, those country's courts have no right to intervene in the process. (Winkler, 2008)

As it can be seen, it is crucial to specify the competent court in each bankruptcy process. Within the Regulation, COMI is the concept which determines the court which has power for the jurisdiction. The difficulty rises in the fact of unequivocally determining the concept of COMI, for instance for multinational enterprises. Based on the Regulation COMI "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." (Winkler, 2008, p. 363) Hence, two criteria are needed to determine the place of COMI: the place for the main interest (where commercial, professional etc. activities are administered) should be found and this should be ascertainable to third parties. (Basiulyte, 2011) The third parties are typically creditors. Usually, the creditors are trying to ensure that they are located where COMI is. Creditors have an interest in estimating where most probably the insolvency will be filed, and thus which law will be applicable. (Bufford S. L., 2006)

According to ECJ, objectivity and ascertainability are crucial characteristics for the Regulation, as it arranges not only for certainty, but also for foreseeability regarding the determination of jurisdiction which will initiate the main process. (Bufford S. L., 2006) As companies can only have one COMI, only one main proceeding can be initiated. (Bufford, 2006) Usually, it is assumed that for multinational enterprises COMI is the country of incorporation, unless it is clearly stated that COMI is in another state. (Winkler, 2008)

The initiation of the main proceeding has various consequences. As a result of the initiation, the process will be recognized in all the EU states. Secondly, the law applicable will be automatically the law of the country in which the case was opened. Finally, the administrator of the process after opening the case is entitled to the right to exercise power in all EU countries, meaning that he is allowed to register the judgement, publish notice etc. (Bufford, 2006) Therefore, as soon as a case initiated, it will be followed by wide range of consequences.

7.2.5 The problem of COMI in the Eurofood case

Eurofood entered the winding-up process in January 2004, and the first court which implemented actions was the High Court of Dublin. The Italian government also started to

cope with the bankruptcy case, claiming that they have jurisdiction, thus the Italian commissioner started a reorganization procedure which was embodied in a greater restructuring of the company Parmalat. This happened even though it was verified by the Regulation that the initial step was implemented by the Irish court. Hence, since the judgement of the Irish court, within the whole Union, Eurofood was in the status of liquidation. However, it has been questioned whether the Irish court had the right to select Ireland as the appropriate place for COMI. According to the Regulation, as Eurofood was incorporated in Ireland, the first precondition was fulfilled. Italy was not entitled to the right to revise the place of COMI to be in Italy unless a strict violation of rules were recognized. (Winkler, 2008)

According to the ECJ, if the registered office of the subsidiary is located in a different EU country than the parent company, just as in the Eurofood case, the presumption of COMI being at the registered office can only be rebutted if it can be objectively and ascertainably proven by a third party that the above-mentioned situation is not the case in fact. This could especially be the situation in those cases when the company does not implement business activities in the state of registered office (letter-box company). (Bufford S. L., 2006) These letter-box companies are also known as “shell companies”, which in the Eurofood case means that this company was only used by Parmalat to be able to implement various financial tactics and also to receive some benefits provided by the Irish law. (Winkler, 2008) On the other hand, if business activities are present in the country of the registered office, the fact that the decisions are or could be controlled by the parent firm is not sufficient to rebut the presumption of the Regulation. (Bufford S. L., 2006)

Both Eurofood and Parmalat handed in different evidences to convince the Dublin High Court and the Parma Court respectively about their own beliefs regarding this issue, hence an examination was started. (Bufford S. L., 2006) During the investigation it has been found that all the subsidiary’s administration of interest was located in Ireland. In addition, referring back to the definition of COMI, it should be ascertainable by creditors. In this case a wide range of evidence was shown that COMI is located in Ireland. Although these already seemed to be convincing arguments, Mr. Bondi still argued against the Irish court. He argued that Eurofood is owned in 100% by the parent company Parmalat and the aim of the subsidiary was to give financing aid to any member of the Parmalat Group, if needed. He also added that Eurofood did not have decision-making right and nobody was employed in Ireland and that all main decisions were made in Italy at Parmalat. His last argument was that all the liabilities of the subsidiary were guaranteed by the parent company. (Bufford, 2006)

Based on the description of the ECJ, the implications are unequivocal. The presumption, namely that due to the locus of the registered office COMI is also in Ireland, was also proven by the main creditors. Consequently, Parmalat had no right to rebut the presumption. (Bufford S. L., 2006) The ECJ published its conclusion in May 2006. (Winkler, 2008)

7.2.6 Consequence of appointing a provisional liquidator

It was also questioned whether the appointment of the provisional liquidator in Ireland means that the case was opened for the Eurofood subsidiary. This is crucial, as this decides whether the Irish took the priority step in January of 2004, or the Italians admitted first the status of bankruptcy. (Bufford S. L., 2006)

ECJ claimed that it is fully specified how to decide who initiated the process first, however, the EIR does not describe when we can claim that a procedure was initiated. Moreover, it has been realized by the ECJ that the requirements and further formalities regarding the initiation of insolvency cases are not specified in the Regulation, hence they are regulated according to domestic law, meaning that it differs between the EU states. For instance, there are some states where the procedure is initiated right after the application, however, in other places more time is required to open the process. Concerning provisional opening of cases, ideally they should be implemented as fast as possible in order to ensure the effectiveness and clearness of the processes, however, in practice even a provisional initiation might take more than a month to accomplish. (Bufford S. L., 2006)

As it has been mentioned already, the Regulation does not specify what is meant under the opening of an insolvency process. As an example, within Irish law, during the commencement of a case there exist no such point which is designated as “decision of opening” of a process. In addition, in Ireland the moment when the case is opened based on the Regulation varies in each single case. Regarding this issue, instead of dealing with the gap caused by the different national laws, the ECJ tried to solve the issue by determining what constitutes the initiation of a process. It has been decided that a process is opened within the Union if all the formal criteria in the regulation is fulfilled and a liquidator is appointed either temporarily or permanently. (Bufford S. L., 2006)

Concerning the Eurofood case, the Italians admitted the appointment of an interim basis liquidator by the Irish in January 2004, however, they pointed out that based on Article 38, even though an administrator was appointed in Ireland, it does not mean that the case was opened. This argument was refused by the ECJ, and they verified that the appointment of a temporary administrator constituted the case initiation of the Eurofood main bankruptcy process, and from that time on it should have been recognized by all further EU states,

including Italy. Hence, the law was violated when in February 2004 the Parma court also opened a main insolvency procedure parallel to the already initiated Irish procedure. (Bufford S. L., 2006)

Although several arguments were mentioned in the debate, the final verdict of the ECJ was the following: “another company's control over the debtor is not sufficient to locate the debtor's COMI anywhere other than the country of incorporation.” (Winkler, 2008, p. 365) This means that only the Irish court could have initiated the main proceeding of the Eurofood subsidiary and that the Italians did not have a right to also open a procedure. This decision was also binding for the further member states. Hence, the final verdict was that Eurofood’s winding-up procedure in Ireland was opened according to the law and that no other states have jurisdiction. (Winkler, 2008)

7.3 Criticism and recommendation on the EIR

As it can be seen from the case study above, the European Insolvency Regulation still has deficiencies and mistakes, therefore the Regulation should be improved or clarified. Therefore, the forthcoming section will describe in detail the criticism which have been articulated by experts throughout the years. It will be followed by a wide range of recommendations implied by professionals.

One of the most debated and criticized issues in EIR is the topic of COMI within corporate groups. According to Vette, the Regulation was not able to determine unequivocally the concept of COMI, it just suggests a principle (Vette, 2011) that it "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.“ (Winkler, 2008, p. 363), as it was also described before. Based on that, in case of firms COMI is considered to be in the country where the entity is registered, and the presumption is only rebutted if an evidence is shown for the opposite. (Winkler, 2008)

However, during the Eurofood case when the parties turned to the ECJ, the Court declared that the above-mentioned presumption “can only be rebutted if factors that are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating at that registered office is deemed to reflect.” (Vette, 2011, p. 218) If the wording of the EIR is taken into account, it is sufficient for a third party to claim that COMI is not at the place of the registered office, which should result in the rebuttal of the presumption by the court. However, as it can be seen from the declaration during the Eurofood case, the presumption in the EIR is incomplete and it was only specified during the actual case. (Basiulyte, 2011) Hence, the EIR is not precise enough

regarding the rebuttal of the presumption, which could lead to ambiguity and consequently to delays and even to incorrect final decisions of the court.

In addition, another concern has also been raised regarding the wording of COMI. Winkler argues that the word “interest” (within the definition) in the guideline is not appropriate, as it cannot be determined objectively. As an example, a debtor could have different interests towards his creditors, employees etc., meaning that even one debtor could have different interests, which would indicate more COMIs as well. Furthermore, the different subsidiaries frequently have diverse interests from the parent company, which also exacerbates the situation. (Winkler, 2008) Consequently, as this example also illustrates, the wording of the guidelines should be even more precise.

Moreover, Bufford added further criticism regarding the corporate groups. He argued that if the entire group would face hardships (such as it was with Parmalat) a solution should be appreciated which is optimal for the whole group. If several countries are affected by the problem, then the negotiation of favorable terms is even harder. However, if all would file at the same court, then the process would be clearer as only one judge and one group of professionals would cope with the given filing. Furthermore, in such a case only one legal regime and set of guidelines would be applied and the process would not be delayed by the conflicts between different sets of rules. (Bufford S. L., 2006) Therefore, it would be advisable to have common principles for the whole group, because it can smoothen the insolvency process.

Another problem which is relevant from the EIR point of view is the initiation of an insolvency process. As it has been already mentioned previously, EIR also does not explain clearly when a procedure is considered open. As the Regulation does not explain it in detail, initiation is solely based on domestic national law, which differs to a significant extent within EU member states. For example, in some countries the procedure is initiated right after the application, while others require more time till the opening. Within the Irish law, during the commencement of a case there is no point which is designated as “decision of opening” of a process, this point only depends on the given case. Concerning the topic, ECJ decided not to deal with the gap caused by the domestic laws, but they rather decided that a case is opened if all the formal criteria in the Regulation is fulfilled and a liquidator is appointed either temporarily or permanently. (Bufford S. L., 2006) Even though the criteria have been described for initiation, as it can be seen, national domestic laws still cause debates and delays, hindering the smooth and fast course of the insolvency process.

As it can be seen, the Regulation seems to be a good basis for a common European insolvency regime, but in practice, during several insolvency cases in the last decade, there

turned out to be a number of deficiencies and unclear points. Apart from making the Regulation more precise in the above-mentioned points (like COMI and the process initiation definitions) a couple of further improvement could also be implemented.

One additional recommendation was to delete the presumption of the place of COMI to be the registered office, as some believe that it would help to clarify this issue. If this comment was deleted, then there would not be any more debates on whether the proof is adequate or about the identity of the third party. Moreover, Basiulyte argues that as the case study also proves that courts only decide on factual basis, the whole concept of the presumption could be deleted. She also adds that the presumptions only cause uncertainty in decisions, which hinders the completion of the insolvency process, therefore it would be better to delete it. (Basiulyte, 2011)

Bufford recommends adding certain provisions that would allow to recognize cases coming from outside of the European Union, for which one assistance could be to incorporate the UNICITRAL Model Law. (Bufford S. , 2014) This set of laws was compiled by the United Nations (UN) in the field of international trade. The aim of UN was to arrange for a modern and harmonized guideline for trade by including several conventions and worldwide accepted principles. (UNICITRAL, 2018) Therefore, Bufford believes that if the UNICITRAL Model Law was included in the Regulation, then several further gaps and uncertainties could be clarified. (Bufford S. , 2014)

Finally, Bufford would also provide an opportunity to any parties to be heard regarding the processes, as it could have an influence on the decision of the court. Moreover, it should be ensured that all proofs and evidences are collected and taken into consideration before the court starts the examination. (Bufford, 2006)

As a conclusion, EIR was one of the first crucial initiatives to set common rules for insolvency cases within the European Union, overall it could be rated successful, however, still several points and concepts need further improvement.

7.4 The Recast EIR

After the appearance of the European Insolvency Regulation in the early 2000s, several other initiatives were launched in order to harmonize and to make a common insolvency regime in Europe. In 2014 the European Commission introduced a recommendation under the name “Recommendation on a new approach to business failure and insolvency”. However, as it is just a recommendation, consequently was not binding, it did not receive much attention. Besides the several conferences on this issue, a “Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks” was

issued with the purpose of making procedures and restructurings even more efficient. (Eidenmüller, 2017) Several recommendations, proposals and initiatives were issued recently, however, the most crucial one is the Recast European Insolvency Regulation. The original Regulation has been reviewed a decade after it came into force, and plans were made for its update based on the examples from the bankruptcy cases of the last ten years. Based on the proposals of the European Commission, the European Parliament and the Council, the final version of changes was accepted in 2015 and the insolvency processes within the Recast Regulation came into force from June 2017. (Cases before this date will still be judged based on the "old" Regulation.) (Anderson & Oliver, 2015)

Compared to the Regulation, several changes were implemented in the Recast version. In the new set of rules a framework has been introduced concerning the handling of groups of companies.

The purpose of the principle is to enhance efficiency and cooperation between the different entities within a group, which can result in a smoother insolvency process. According to the new rules, if at least two entities of the group go through an insolvency process, then a practitioner is appointed in order to ensure coordination and the correct administration. By this a coordination plan can be established, which offers an organized and clear list of measures for an integrated approach to solve the insolvencies of the members. Practitioners from further countries have the option to decide whether they would like to participate in the coordination, which is ensured through a consensus. Consequently, such "voluntary practitioners" have a chance to affect the group coordination plan. (Anderson & Oliver, 2015)

However, not only the group of company principles was affected by the new guideline. As a number of problems came up regarding the definition of COMI, this topic was also covered in the Recast EIR. The presumption of registered office became a bit stronger by adding some supplements that were previously not covered by EIR but were only implied for example in the Eurofood case. However, according to the Recast EIR, if the registered office was replaced in the last three months before the opening of the process, the presumption is not applicable. (Anderson & Oliver, 2015) Thus, the notion of COMI received a bit broader meaning. (Anyfantaki, 2017)

In addition to the slight modifications mentioned above, the scope of the Regulation was also broadened. The new set of rules already covers pre-insolvency processes as well. Besides, changes were introduced regarding secondary proceedings and establishments. (Anderson & Oliver, 2015) Secondary proceedings, which are those processes that are not initiated by COMI court, based on the original Regulation, are only allowed to be opened

where the debtor has a so called “establishment”. (Winkler, 2008) As discussed already, in the Regulation, establishment was described as “any place of operations where the debtor carries on a non-transitory economic activity with human means and goods”. (Bufford, 2006, p. 433) This was changed in the Recast version; the definition of establishment was broadened by changing the expression of „good” to „asset”, and the constraint that secondary proceedings can only be liquidations was also abolished in case of establishments. (Anderson & Oliver, 2015)

Moreover, in the new Regulation the court of the main process is also entitled to the right to hear actions in connection with the insolvency cases, with the purpose of preventing incorrect decisions. In order to ensure efficiency, new registers of the different insolvency processes will be established. The plan is to make electronically-searchable databases in each country and these should be connected with the help of a European e-justice portal. The database will be established from June 2018; however, it will be only connected with further states only a year later. (Anderson & Oliver, 2015) This would also help to avoid the initiation of multiple processes and in addition it will be possible to check the status of the cases.

All in all, it could be said that several recommendations were taken into consideration. It was tried to refine and clarify the definition of certain term such as COMI, establishment or secondary proceeding, however, the presumption was not deleted as it was recommended by some researchers. Rules regarding corporate groups were also improved and the idea of „hearings” was also included in the new version. In addition, the plan for Europe-wide interconnected registers was introduced, also showing that several additions were made to the original EIR. As the Recast Regulation was only introduced a year ago, due to the lack of closed cases, long-term consequences cannot be drawn. Nevertheless, it seems that even though several changes were introduced, there would be still room for improvements in order to turn the European system of insolvencies into a unified and efficient unit.

8. Opinion

The following chapter will describe my opinion concerning the two research questions of thesis and the bankruptcy systems of the separate countries in detail. The aim of this section is to clarify which concepts I agree with and which are those that based on my opinion should be improved. The first part will focus on the first research question and my comments on each country’s bankruptcy system. Secondly, I will make remarks on the current legislations regarding bankruptcies within the EU. Afterwards, at the end of this chapter an opinion will be provided to the second research question as well.

8.1 Opinion concerning the first research question

The first research question focuses on the extent to which European bankruptcy systems in general differs from the bankruptcy system of the United States of America, thus first I will provide comments on each country's system.

We first focus on the Swedish bankruptcy system. Even though it is hard to decide among the several advantageous features, I think that the most desirable property is that the whole system is clear, simple and straightforward, meaning that it is clear for all debtholders what to do and when. It is common knowledge what will be the next step and what to expect during the procedure. On the other hand, obviously, this also has its downside, as it also means lack of or limited choices in the procedures. This can be a drawback especially in complicated bankruptcy issues, when several methods could be used, just as it was described in the case studies. Even though there seems to be further alternatives to mandatory auctions, such a composition, in this process the requirements are so extremely high (all the priority and secured claims should be settled entirely, and the claim of junior creditors must also be satisfied in at least in 25%) that it can only be satisfied very hardly. Therefore, it is also rarely used and as a result I am reluctant to call it an alternative for auctions.

Overall, I think the best is if companies still have freedom to choose from a couple of possibilities, but, based on my experience, too much opportunities provided is also not beneficial, as most of the cases people are not competent enough to assess all the influencing factors, different circumstances, risks etc. Therefore, I believe that having only one (or few) options is still better than a wide range of choices.

In Sweden the incumbent management is immediately replaced by a trustee, while in the States unless there is fraud, the management can retain the control. From my perspective, the optimal solution would be somewhere in between. It could be that a trustee does not strive for the company as much as a management would do, however, for instance in case of incompetence the management should be changed (which is not the case in the U.S.). Although it cannot be denied that judging whether something can be considered incompetence is extremely hard.

In contrast to the U.S., the Swedish government provides a guarantee to settle wage claims of the creditors up to a point. It is a great advantage for employees that at least they are protected by covering some of their wage claims. However, one disadvantage is that in Sweden, in contrast to the U.S. system, as soon as the bankruptcy filing has been handed in, all the labor contracts (including all employee even at the top management) are terminated

automatically. This I see it as quite irrational, as if the company is sold entirely, it could still be easier for the new owner to work with previous employees, instead of looking for new, competent personnel. There could be situations when the old personnel is not needed anymore, however, then their contract could be simply ended by the new owner.

The question whether, due to the increased number of auctions in the States, the U.S. system is heading towards an auction system has been raised by some researchers. I would say definitely not, as usually the auction method was chosen if the rest of the bankruptcy processes were estimated to be too expensive and inefficient. Additionally, in several cases the reorganization process still makes sense, therefore abolishing it in the U.S. would be an inappropriate decision. Moreover, based on some past bankruptcies it could be said that the method of auction became more popular, but still we cannot generalize that they are heading towards the Swedish auction system.

Concluding, the Swedish auction system is often compared to the Chapter 11 process, however, as far as I am concerned they are similar only in a few aspects, therefore I would not compare Sweden to the U.S. I believe that the system is Sweden is so unique that it cannot be compared to any of the further countries examined in this thesis.

The United Kingdom, on the other hand, has more similar mechanisms to the U.S. example than Sweden had. In the UK there are several possibilities for bankrupted firms, such as the receivership, which stands the closest to the liquidation process. In the 1980s two types of reorganization processes were introduced, which I believe are such options that are crucial to have in a bankruptcy system. In the administration process I only disagree with the right of the administrator to terminate contracts. In my view, even though administrators could be competent experts, I still doubt that they always consider and know what the best option for the company is, thus I think they should not have the right to negotiate and to terminate contracts.

Regarding CVAs, I believe that the process has really unfavorable settings. There is no option for an automatic stay provision or for priority financing, which could both facilitate the reorganization. Furthermore, which makes the option even worse, in CVAs the control is always transferred from the management to a bankruptcy professional. In this situation it is often assumed that professionals would not struggle for restoration as much as the management would. On the top of that, any secured creditor is entitled to the right to veto either Administration or CVA (which is implemented most often), but in such cases a receiver should be appointed, which means the case will result in a process similar to liquidation. Hence, according to my opinion, in the UK there are several processes, however, I think none of them are beneficial for the management. Thus, as CVAs and Administrations have hard

conditions it could be also argued that there is not really an option for reorganization in the UK. Even though there have been several disadvantages, most of the recent changes made in the law were beneficial, for instance the modernization of the system. Hence, I would say it would be also advisable for further countries to introduce all the benefits provided by technology in law, such as the electronical voting system etc., as they could make the process faster, and also easier to coordinate.

Next, my opinion will be expressed concerning the German processes. The uniqueness of the German process is that the court does not allow automatically to initiate an insolvency case based only on the request of the filing, thus evidence is collected in order to decide whether to open the final process or not. If the property is enough to cover all procedural expenses, then the final process will be initiated, otherwise it will be rejected. The idea to deal with only serious issues is good, however, an alternative should be provided to those who are rejected. Additionally, I reckon it hard to determine again how to decide whether there are enough assets to cover the procedure costs and further possible unexpected expenses. As soon as it has been decided for a final procedure, the creditors' meeting decides whether the business should be liquidated or reorganized. This is, in my view, a great solution, as even though it is hard to decide which could be a better solution, the final decision is not in the hand of just one expert, but rather a committee which decides based on previously compiled valid financial data.

In addition, in Germany the automatic stay provision exists. There is still room for improvement as it is only for 3 months, which I would rather extend to 6-9 months at least, in order to give a longer period of time for the management to get back on track. The limitation of the automatic stay is a good idea, as creditors also have the right to receive their money back if the firm is not able to stabilize its financial situation. Moreover, super priority financing is also allowed, which facilitates reorganization, but in Germany the creditors' approval is required to receive it. This condition I also find positive, as it is ensured that the management is under control. Furthermore, what I have already criticized in Sweden is done well in Germany, as here an insolvency process itself does not necessarily mean that the employee's contract will be terminated.

As an alternative, the firm can enter a self-administration, which is similar to the debtor in possession, thus allows the management to stay in control. I also find it a great opportunity that firms can choose from such an option under certain conditions. What is more, here the management will still be supervised by a trustee, which also ensures an efficient restructuring process.

The recent German reforms were often criticized for being too strict and it is argued that liquidation process is still more encouraged by the Insolvenzordnung. I disagree with this statement, as I think that among the four countries examined, Germany has the most fair and optimal regulations for insolvency cases, as they try to find the balance between creditor and debtor orientation, therefore I would rather put them in the middle of that scale. Even though their Code could still be improved at some points, I believe that Germany has the most favorable and optimal conditions within this research.

Finally, my opinion regarding France will be illustrated. This county has the most options for financial troubles, however, this might not always be positive, as it could be hard to decide which process is optimal for the current circumstances. Court-assisted procedures and safeguard proceedings provide help for those companies which are still solvent. In case of the accelerated safeguard processes, those processes can also take part which are insolvent for less than 45 days. These "pre-insolvency assistances" are great achievements, by such processes the insolvency could be avoided by several firms, hence I find it a good idea. However, most of these processes are only planned for a short period of time, usually just for 1-2 months, which I believe to be usually too short to be able to solve financial difficulties, therefore I would extend this period to approximately 6 months at least.

France also has a reorganization procedure, which has several positive characteristics. One of those is the allowance of super priority financing, which is helpful, but still could be better if creditor approval was requested, as then the system would be more balanced. There is a provision for an unlimited automatic stay, which benefits the interest of the debtor. I find the unlimited right to be too advantageous, I would limit it to a certain period, in order to motivate debtors to reorganize as fast as possible. For such reasons, their Code is far too concessive with debtors, they are provided with much more rights than they would deserve according to my opinion. As a result, several inefficient companies are also reorganized, which should also be avoided as much as possible.

According to the experts, studies show that approximately only 15% of all companies manage to go on with their business as a going concern after a reorganization process, while other researches imply that more than 60% of the entities are liquidated piecemeal. These are incredibly high numbers, especially if it is taken into consideration that France has the most "pre-insolvency" options. The law should be compiled so that only efficient firms are reorganized, however, I still believe that 15% is far below the optimal efficient level, therefore further actions should be implemented to facilitate that.

As a last recommendation, even though in the previous years measures were implemented to make the system of France more creditor oriented, I believe that the law in that sense could still be improved to reach a balance between the two types of orientations.

As it can be seen, all systems are unique in a sense. There are some features which are in general typical for Europe, such as considering bankruptcy as a preventable failure or the tendency for involuntary filing. Even though there are some common traits in Europe, it is obvious that even within Europe the features and processes could be really different. As far as I am concerned, the Germany system is the fairest, as it is in most balance between the debtor and creditor orientation. Additionally, I am of the opinion that based on the features, Germany resembles the most to the U.S. bankruptcy system, however, although Germany stands to the closest to the U.S., even between them there are significant differences. Therefore, contrary to what I assumed before my research, the European bankruptcy systems in general differs to a significant extent from the bankruptcy system of the United States of America.

8.2 Second research question

While the first research question deals with a comparison of the two continents, the second research question rather deals only with the European system.

One of the most debated issues recently was the concept of COMI. First, the wording of the definition was debated, especially the word “interest” in the definition. It was argued that “interest” can be seen in several context. Such ambiguities should be avoided as much as possible, by providing the clearest definition.

Furthermore, making the supplement regarding the presumption in the Recast version was a good step, as it made the definition even more precise and clear for the users. I found the idea of deleting the presumption to be disadvantageous, as it was intended to be deleted only because of not being able to make the definition precise enough and it was supposed that if it was omitted, then there would not be any issues concerning the proof or third parties. I am convinced that this would only be an avoidance of the problem and I am positive that the clear solution would be to specify the presumption as much as possible. I would say that in general the presumption makes sense, as I assume that by far most of the cases COMI is the registered office and there will be just a few cases when this presumption would be invalid.

Moreover, a provision was added that if the registered office was replaced in the last three months before the opening of the process, the presumption is not applicable. In general, I agree with this idea, however, I would choose a different time frame. I am of the opinion

that three months is too short, as most companies suffer from financial difficulties for a longer period. I believe that if the time frame would be 6-9 months then it could be clearly identified which firms replaced their registered office only because of better conditions of bankruptcy and on the other hand, which ones did it for further reasons. Thus, I argue that longer time frames would be needed, as it could be that a firm already sees 4 months in advance that it will end up in a bankruptcy process and based on the current regulations, if they replaced the registered office within 4 months, then the presumption would be still valid, and they could receive better conditions.

Therefore, I believe that both the definition of COMI and also the presumption should be described in as much detail as possible, because clear explanations help to avoid ambiguities in these cases.

In addition, certain changes also affected group companies. I am of the opinion that it is important to find solutions which are relevant for the whole group, as filing at the same court, with one judge and one law applicable should make the processes far quicker and easier to solve. The new framework introduced in the Recast Regulation is welcomed, as already by at least two entities of the group a practitioner is appointed in order to ensure clear coordination, which I believe to result in a smoother process.

A further problem which I think is advisable to improve is the initiation process. As it was described already, there are gaps caused by the national laws for which a solution was attempted in another way. I am aware of the fact that the issue is quite complex, however, I still believe that it should be solved differently. Maybe a solution could be provided by using Model Law, which was also recommended by some experts. Integrating the whole Model Law would be unnecessary, however, the usage of certain provision could still be extremely beneficial.

The scope of the Regulation was also changed, which is also a positive characteristic of the new system. As it already also covers pre-insolvency procedures, it helps to prevent financial troubles, thus some might even avoid the undesired state. It was also decided to hear actions in connection with the insolvency cases, which I generally find to be a good idea, as it gives the opportunity to make the cases even clearer. However, on the other hand such hearings could delay the processes to a huge extent, therefore I would advise to find a way to still implement hearings, however, at the same time to also ensure smooth and quick processes.

To make the systems even more efficient, it was decided that technology would be used by establishing new registers which would include all the insolvency processes Europe-wide. As

by the electronically-searchable databases each country would be connected, it would not only make easier to look for the status and data of each case, but it would also help to avoid the initiation of multiple processes, therefore I find it an extremely useful idea. Additionally, there would definitely be further benefits that technology could provide, these should also be used.

Based on my opinion all the above-mentioned facts contribute to the response to the second research question. It seems that already in the early 2000s initiations were implemented to make further steps towards an integrated system. This and also the further corrections and regulations still also imply that there is a demand for a system which would make coordination within Europe far easier. Therefore, I would argue that there is definitely an intention to make a common European bankruptcy system, however, we are still quite at the beginning of the process. The process could be also accelerated if the current laws would not be reviewed just once a decade, but more often, for instance in every 3-5 years, as I believe that this time would already be sufficient to correct the current mistakes and deficiencies in law, based on the cases from the last couple of years. Thus, the answer is definitely “yes” to the second research questions, as there is not only a clear intention for such a system, but also new and more precise rules and guidelines are constantly made in order to make a more efficient system, however, it also has to be added that there is still a lot to be done, and the integration is rather just at the beginning.

9. Conclusion

The purpose of this Master Thesis was to provide a comparative analysis of corporate insolvency laws with special focus on the system of Europe and the United States of America. Besides giving an overview of the topic and the current circumstances, the aim was to answer to the specific research questions. The first research question examines the extent to which European bankruptcy systems in general differ from the bankruptcy system of the U.S. Within the analysis Sweden, the United Kingdom, Germany and France was compared in detail to the U.S., with respect to the different processes and provisions which are provided by law. Meanwhile, the second research question devotes a special attention to Europe, as it focuses on whether there is a tendency of heading towards a common and unified system of bankruptcy laws within the European Union. This is investigated through a case study, which outlined the recently introduced regulations and also pointed out the criticism and deficiencies, while also a recommendation was provided for the future guidelines.

We could claim that there are a certain set of features which could be generalized in Europe, for instance the view of bankruptcy, type of filings etc. However, it can be argued that although several traits are similar in Europe, the usage of the processes and provisions can

differ to a huge extent. During the examination of the above mentioned four countries it was pointed out that Germany has the most similar features and processes to the U.S., however, even in this comparison there are far less features in common than it was expected before the analysis. As a consequence, the response to the first research question is that the extent to which the systems of the two continents differ is much bigger than it was assumed.

Regarding the second research question, first the guidelines of the last two decades were analyzed in the European Union. Based on the famous case study of Eurofood it could be recognized that several initiations were implemented recently with the aim of generating a unified system of bankruptcy laws. Even though previous guidelines were quite unsuccessful, it appears that from the European Insolvency Regulation on, steps were made towards integration. Consequently, even though there is still room for improvements, an intention to make a unified insolvency system for the European Union definitely exists. Additionally, a demand for such a system is also shown by the constantly updated and improved guidelines and laws, however, it is also clear that the level of integration has not yet reached a high level.

Abstract

Since the financial crisis of 2008, an increased attention is devoted to the topic of bankruptcies. As a consequence of the depression, framing laws and guidelines concerning financial distress and bankruptcies became even more important worldwide. Therefore, besides the development of the national bankruptcy laws, in the last couple of decades considerable attention was dedicated to the constitution of a common set of international bankruptcy laws as well. The aim of this thesis is to determine the extent to which the European and the United States' bankruptcy processes differ, by analyzing four bankruptcy systems in Europe, which are finally compared to the States. Additionally, in the second part the focus is laid on Europe, investigating whether there is a tendency of heading towards a common and unified system of bankruptcy laws within the European Union. The result of the research is that even though the European systems are less similar to their U.S. counterparts than it was expected, there is a clear tendency for generating a common system of bankruptcy laws within the EU.

Abstract in German

Seit der Finanzkrise 2008, wird dem Thema "Konkurse" verstärkt Aufmerksamkeit gewidmet. Als Folge der Wirtschaftskrise wurde die Gestaltung von Gesetzen und Richtlinien in Bezug auf finanzielle Notlagen und Konkurse weltweit noch wichtiger. Daher wurde in den letzten Jahrzehnten-, neben der Entwicklung der nationalen Konkursgesetze, auch dem Verfassen gemeinsamer internationaler Konkursgesetze große Aufmerksamkeit geschenkt. Das Ziel dieser Masterarbeit ist es, das Ausmaß zu bestimmen, in dem sich die Insolvenzverfahren in Europa und den USA unterscheiden, indem vier Insolvenzsysteme in Europa analysiert werden, die schließlich mit den Vereinigten Staaten verglichen werden. Darüber hinaus wird im zweiten Teil der Schwerpunkt auf Europa gelegt, wobei untersucht wird, ob eine Tendenz zu einem gemeinsamen und einheitlichen System des Konkursrechts in der Europäischen Union besteht. Das Ergebnis der Untersuchung ist, dass-, obwohl die europäischen Systeme ihren amerikanischen Pendants weniger ähnlich sind als erwartet, eine klare Tendenz zur Schaffung eines gemeinsamen Systems von Konkursgesetzen innerhalb der EU besteht.

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