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**Pre-insolvency/early intervention, Reorganization measures and
winding up proceedings of banking groups**

National Report

BELGIUM

By

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Background

- 1- For this national report, the authors use
 - "reorganization measures" shall mean measures which are intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims;
 - "winding-up proceedings" shall mean collective proceedings opened and monitored by the administrative or judicial authorities of a Member State with the aim of realizing assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure;
 - "pre-insolvency/our early intervention" shall mean any intervention except and before reorganization measures and winding-up proceedings
- 2- For the facility of the study, the questions were numbered in a continuous way from the number 1, while the titles and sections of the questionnaire were maintained. At the interior of the questions, the paragraphs were maintained from 1 without regard to each question or section to make easier to identify the advanced idea.
- 3- The whole of the background of the study was taken into account.

1- Differences between pre-insolvency/early intervention measures, reorganization and winding-up proceedings

1.1. Please provide precise information about the key moments during gold preceding has banking crisis:

4- Articles 135 and 136 of directive 2006/48 were transposed through in particular chapter IV, from article 56 to 60 of the law relating to the statute and the control of the credit institution, dating originally from March 22, 1993, review in particular on August 2, 2002 and on May 2, 2007, called hereafter "the banking law ».

Title VIII, Chapter 1^{er}, article 109/1 to 109/7 (restructuring proceeding) and Chapter 2 (article 109/8 to 109/16) (liquidation) organise the follow up of these measures for the reorganization and the bankruptcy (with articles common to both procedures (article 109/17 to 109/27)).

5- The authority (banking commission) can take measures as from the moments or the following events:

(Article 56)

- Not activity beginning in the 12 months of approval
- Bankruptcy of the credit institution
- End of the activity exercise

(Article 57)

- Absence of operation in conformity with law and decrees.
- Management of nature to blame the good end of its engagements.
- Situation of nature to blame the good end of its engagements
- Absence of sufficient guarantee of its solvency
- Absence of sufficient guarantee of its liquidity
- Absence of sufficient guarantee of its profitability

(Article 43 § 3)

- structure of management, administrative organization or countable or audit internal which present serious gaps if the policy as regards the requirements in own capital stocks does not answer or more the profit of risk

- 1- Moment/event at which authorities trigger the requirement on a credit institution to take the necessary steps to redress the situation in order to meet minimum requirements in the Directive and to implement the measures referred to in Article 136 (1) CRD.**
- 2- Moment at which Member States trigger early intervention measures.**

6- There is no intervention of the State made compulsory by the Belgian law.

3- Moment at which insolvency is declared.

7- Article 109/6 returns for measurements of restructuring proceeding, (*assainissement*) in the conditions of the law of July 17th, 1997 relating to the composition to creditors (*concordat judiciaire*) which, in its article 9, stipulates that it can be granted if the debtor "cannot temporarily discharge his debts or if the continuity of its company is threatened by difficulty being able to lead, to more or less short times, to a stop of the payments", the legal settlement can be granted only if the financial standing of the company can be restructured and its economic recovery were possible.

Article 109/8 defines the liquidation procedure by reference to the bankruptcy law of August 8th, 1997 which defines in article 2 the event which generates the application of it: "the stop of the payments in a persistent way and the credit trouble".

8- Article 12 of the new law states the legal procedure of reorganization is opened with the company which can preserve, under control of the Judge, the continuity of the company in difficulty, for whole or part of its activities.

Article 11 allows amiable agreements in order to restructure the financial standing or of legal reorganization as soon as the company is threatened in the near future or in the long term and when whole or part of the activities is likely to be maintained by the effect of measurements.

4- Moment at which the Deposit Guarantee Design (DGS) is triggered.

In the event of failure of an establishment, or before such a failure, as noted by the banking commission, or in the event of bankruptcy by the decision of the Commercial court opening the bankruptcy proceeding, that is to say by the decision opening the legal settlement certificated proceedings, 21 days after having established for the 1st time that the credit institution did not restore the deposits fallen and obliged.

1.2. Are the following criteria used in order to determinate the moments you have described:

- 5- The credit institution possesses adequate resources for it to be able to continue activities.**

9- Yes. Articles 57 and 49 of the banking law.

- 6- The credit institution maintains adequate suitability for it to be able to continue activities.**

10- Yes. Article 57 of the banking law.

- 7- The credit institution does not comply anymore with the solvency ratio.**

11- Yes. Articles 57 and 43 of the banking law.

- 8- The credit institution is facing liquidity difficulties.**

12- Yes. Article 57 of the banking law

2- Pre-insolvency and early intervention system

2.1. Pre-insolvency/early intervention systems tailored for banks

- 9- Are there, in your national legislation, special pre-insolvency/early intervention systems that are tailored for banks?**

Yes

13- There is a mode of “exceptional measures” envisaged by article 57 and following of the banking law. This mode is described hereafter as in point 2.5. A particular mode as regards own capital stocks is envisaged in article 43 of the banking law. It is described below as in point 2.6.

2.2. Pre-insolvency/early intervention systems that can be applied to banks

- 10- If it is not the case, is there in your legislation, any pre-insolvency/early intervention system that can be applied to banks?**

Yes

13- On the opposite, the law on the composition to creditors of 1997 and the law on the bankruptcy of 1997 contain only one measure of pre-insolvency. Article 8 of the bankruptcies law makes possible to indicate before (a few days before) the bankruptcy opening, a provisional administrator, while article 10 and 84 of the legal settlement law of 1997 states the possibility of intervention of the commercial investigations Chamber. The new law on the composition to creditors has envisaged new preliminary measures, in addition to the intervention already envisaged of the commercial investigations Chambers, the possibility of agreement friendly ratified by the Court (article 11), the transfer of the activity under the justice authority (article 49), the designation of an ad hoc agent (article 60) or of a mediator. The mode is described hereafter as in point 2.5.

2.3. Conditions and features.

11- Please explain briefly the systems currently available in your Member states.

15- There exists in Belgian legislation, essentially in the law relating to the statute and the control of the credit institutions, dated on March 22nd, 1993, published in the Belgian Monitor on April 19th, 1993 and modified several time¹, called here "banking law", a first general mode of intervention in the event of "banking difficulties" authorizing the authority to intervene rather early in the difficulties and to take measures before the procedures of reorganization and liquidation.

16- The credit institutions aimed by this legislation are defined by the law like the Belgian companies or foreign whose activity consists in receiving from the public deposits of money or other refundable funds or granting loans for their own account or whose activity consists in emitting instruments of payment in the form of electronic money².

17- The law authorizes the indicated proper Authority, the CBFA which is the supervision authority, to take "exceptional measures" defined by the law when these banks have "difficulties" also enumerated by the law.

18- Under article 3, 8^o, the authority has several powers in the restructuring proceeding. The restructuration measures are those tending to preserve or restore the financial standing of a credit institution and suitable for affect the pre-existent rights of the thirds. These measurements can correspond to:

- The legal settlement governed by the law of July 17th, 1997 relative to legal settlement.

- The designation of a special police chief envisaged in article 57, paragraph 1, subparagraph 2, 1^o.

- The suspension or the prohibition of whole or part of the activities aimed to article 57, paragraph 1, subparagraph 2, 2^o.

These measures are described in article 109/1 and following.

19- Under article 3, 9^o, the authority has certain capacities as regards liquidation. These measures are described in article 109/8 and following of the banking law.

¹ The law of March 22nd, 1993 was modified by a royal Decree of April 21st, 2007 (MB April 27, 2007), a Decree-Law of April 27th, 2007 (MB May 31, 2007), a law of May 2 2007 (MB June 12, 2007), a law of May 15, 2007 (MB June 18, 2007), a law of July 24, 2008 (MB August 4, 2008) and a royal Decree of November 14, 2008 (MB November 17, 2008).

² Article 1 of the law of March 22, 1993.

20- However, under article 57, the banking, financial and insurances Commission can take exceptional measures when it's note that a credit institution:

- Does not function in conformity with the provisions of the law, of decrees and payments taken for its execution,

- Or that its management or its financial standing is likely to put in cause the good end of these engagements,

- Or does not offer the sufficient guarantees on the plan of its solvency, of its liquidity or of its profitability,

- That its structures of management its administrative organization or accountant, or its internal audit presents serious gaps. In these cases, it can specify the existing gaps and specify the time in which it must be cured the noted situation.

As underlined by the doctrines, the capacity available to the CBFA as regards fixing of the time in which the bank must correct the situation is discretionary and non arbitrary. It results from it that the CBFA fixes this time by taking account of the importance of the reforms to do³.

If at the end of this time, it was not cured the situation, the CBFA can take various measures which we state hereafter. These measures are analyzed in the questions following.

Moreover, article 33 of the banking law makes possible the authority to take specific measures when the policy of the company in own capital stocks does not answer any more its profile of risk (see hereafter 2.6.).

Article 84 of the banking law makes possible to return the approval of a branch if the protection of the savers or the sane and careful management of the establishment requires the constitution of a subsidiary company.

12- Can it be commenced on a voluntary basis and/or does it cuts to be ordered by the authorities?

21- Voluntary basis

Ordered by the authorities

13- Description

22- The CBFA has the right to take measures officially (even if the bank requires it or causes it) (measures described hereafter) on the basis of article 57 of the banking law in the described cases.

³ Marc Vandemeulebroeke, "exceptional measurements that can take the Banking and Financial Commission", in the new Belgian banking legislation, AEDBF- Belgium, Yearbook 1994, p.117.

It should however be specified that the authorities can be seized by the bank itself, either because of obligation to communicate certain facts within the prudential framework, or spontaneously. The bank can indeed denounce at the Banking Commission, within the framework of prudential control, either the initiative of the facts which make possible for the Banking Commission to take measures in question, or if measures envisaged by article 57 probably do not encourage the bank to request them on a voluntary basis. The bank can however have access indirectly by communicating the facts useful for the Commission.

It results from article 58 of the banking law that the CBFA can take the same measures when it is seized by a controlling authority of the credit institutions of another Member State of the economic European space in which a Belgian credit institution has established a branch or carries out banking activities under the regime of the free provision of services authority, which notes the violation of legal, lawful or administrative applicable provisions within this State.

Article 56 reserves also rights to the CBFA of initiative when several events related to the exercise itself of the activity appeared.

14- What are the legal and economic conditions that must be met for these regimes to be prompted and applied?

23- Under article 57 of the banking law, various conditions must be met to such a procedure can be implemented.

a) First at all such a measure can be required by the CBFA when a credit institution does not function in conformity with the law provisions and of the decrees and payments taken for its execution.

b) Then, such measures can be taken when structures of management, the administrative organization or countable or internal audit of a credit institution present serious gaps.

c) Article 57 § 3 of the law also provides that such measures can be taken, when a credit institution infringe systematically and seriously codes of conduct determined by and under the terms of articles 26 to 28 (a) of the law of August 2, 2002.

d) Measures can be taken when a credit institution put in place one particular mechanism having for goal or effect of to support tax evasion by thirds.

e) Lastly, capacities available to the banking, financial and of insurances Commission can be also implemented when the controlling authorities of the credit institutions of another member State of the economic European space in whom an establishment of Belgian credit has a branch established or carries out banking activities envisaged in the article 3, paragraph 2 under the regime of freedom services provision, seize the banking, financial and insurances Commission violating the legal, regulatory or administrative provisions applying in this State⁴.

Under articles 43 and 35 of the banking law, when the policy of a credit institution needs for own capital stocks does not answer the risk profile.

Under article 57 § 3, the CBFA can take these provisions when the credit institution installed a particular mechanism having for goal or effect to give advantage to the rules.

⁴ Article 58 of the law of March 22, 1993.

Under article 57 § 4, the CBFA can take these measures as soon as it notes that the institution credit infringe in a systematic manner and seriously the codes of conduct enacted by articles 26 to 28 (a) of the banking law.

15- Is a judicial decision which states that the legal and economic conditions are met necessary?

24- Not in the case of articles 56, 57 and 58.

Yes in 3 cases:

- Article 56: withdrawal of approval in the event of legal bankruptcy
- article 57 § 5 which provides that article 57 § 1, subparagraph 1 and the § 2 does not apply in continuation of withdrawal of approval of a credit establishment declared in bankruptcy.
- article 60, subparagraph 2 which states article 60 re-examining subparagraph 1 with article 57 does not apply any more as soon as approval was withdrawn for a credit institution in bankruptcy.

2.4. Powers and responsibilities of the intervening authorities.

For the execution of these measures, what are the powers of (i.e. appointment of a negotiator in load of finding solutions to the difficulties faced; organization of the negotiations with the hand creditors of the bank; shares freeze; capital increase in derogatory conditions; forced transfer off the subsidiary; transfer of assets enabling the insulation of the risky activities; stay of actions (full but partial) of payment actions; rescheduling of the hand debts due for payment).

16- The powers of nominated administrator.

25- The special administrator appointed by the CBFA pursuant to article 57 of the banking law has relatively wide capacities.

Indeed, when a special administrator is appointed, the written authorisation general or special of this one, is necessary for all the acts and decisions of all the bodies of the establishment including the General meeting and for all the people in charge of management. The banking, financial and of the insurances Commission can however limit the field of the operations subjected to authorization by its initial decision.

The special administrator can thus submit to the deliberation of all the bodies of the establishment including the General meeting any proposal which he considers convenient.

In addition, the members of the bodies of administration and management and the people in charge of management who achieve acts or make decisions without to have required authorization from the special administrator are responsible jointly for the damage resulting for the establishment or for the thirds.

If the banking, financial and of the insurances Commission published in the Belgian Monitor the special administrator nomination specifying the acts and decisions subjected to his authorization, the acts and decisions intervened without this authorization are null unless the special administrator does not ratify them. Under the same conditions, any decision of the General meeting taken

without to have the required authorization of the special administrator is null unless the special police chief does not ratify it.

17- National Powers of the bank.

26- No capacity is recognized at the national bank within this framework.

18- Powers of the banking supervisors.

27- The Authority can initially prescribe additional requirements with those of article 43 of the banking of solvency or liquidity law.

Let us recall that under the terms of article 43 of the banking law, and without prejudice of the legal provisions relating to regulatory measures which can be imposed for monetary reasons and without prejudice of the measures based on article 57 of the banking law, the Commission, can by way of regulation and in accordance with the European law, enact standards as regards solvency, liquidity, and concentration of the risks and other standards of limitation to respect for all the credit institutions or a category of credit institution. These standards can be as well of quantitative nature or qualitative nature.

Also let us recall that, without prejudice of the preceding paragraph, the establishments of credit must have a policy concerning their requirements in own capital stock which is appropriate to the activities that they exert or intend to exert. The people in charge of the effective direction of the credit institution and, if necessary the Management committee, must elaborate to this under the monitoring of the administration legal body, a policy identifying and determining the requirements in current and futures own capital stock of the credit institution by taking account of nature, the volume and the complexity of these activities, the risks y related and the policy of the establishment as regards risk management.

Moreover let us recall that the credit institution must still regularly evaluate its policy concerning its requirements in own capital stocks and adapt if necessary this policy. The banking, financial and of the insurances Commission can by way of regulation specify the frequency of this evaluation.

Consequently, pursuant to article 43 § 3 of the banking law, when the banking, financial and of the insurances Commission estimates that the policy of a credit institution concerning its requirements in own capital stocks does not answer or more the profile of risk of the establishment, it can without prejudice of the provisions of article 57 impose taking into consideration the objectives of the article 1 of the law, the requirements as regards solvency, liquidity, concentration of the risks and positions in risk which are added to those cited in paragraph 1. It can by way of regulation, to fix the criteria and procedures which it applies for this purpose.

28- Pursuant the article 57, the banking commission can:

- article 57 § 1, subparagraph 1: to put on notice to adopt the adequate measures
- article 57 § 1, subparagraph 2, 1°: to appoint a special administrator by limiting or not the field of the operations subjected to its authorization.
- article 57 § 1, subparagraph 7: to publish its decision or not with the Monitor
- article 57 § 1, subparagraph 8: to appoint a temporary administrator.

- article 57 § 1, 10 (a): to impose additional requirements as regards solvency, liquidity, concentration of the risks, and other requirements or limitation that those envisaged in article 43 of the banking law.
- article 57 § 1, 2°: to suspend for duration the direct or indirect exercise of whole or part of the activity
- article 57 § 1, 2°: to prohibit the exercise of the activity
- article 57 § 1, 2°: to publish or not the decisions of suspension or prohibition of exercise
- article 57 § 1, 2°: to arrange with a credit institution to yield rights of associate aimed at article 32, in accordance with article 32 § 4 and 5 according to the procedure of article 24 § 7, 2°
- article 57 § 1, 3°: to arrange the replacement of the administrators or managers within a time.
- article 57 § 1, 3°: to substitute for the whole of the bodies of administration in the absence of a replacement within this time by one or more provisional administrators.
- article 57 § 1, 3°: to publish or not the decision to ask for the replacement of an administrator.
- article 57 § 1 4°: to revoke the agreement.
- article 24 § 7, 1°: to suspend the exercise of the voting rights of the actions (at least 5% of capital or the voting rights) if the people who exert them have an influence of nature to compromise the healthy and careful management of the establishment
- article 24 § 7, 2°: to give injunction to these people to yield their actions
- article 24 § 7, 2°: with defect of transfer, to indicate a sequestration with the actions and rights.

19- Powers of the Courts

29- The Commercial Court can:

- article 24 § 7, 2°, last subparagraph: to pronounce the nullity of the deliberations of the general assembly if without the voting rights exerted illegally because of a suspension aimed at article 24 § 7, the quorums of presence or majorities will not have been reached.
- Article 57, 6°: to pronounce the nullity of the acts taken without authorization of the special police chief aimed at article 57 § 1 subparagraph 1°
- Article 57, 6°: to pronounce the nullity of the decisions of the bodies of management taken against the decision of suspension or prohibition of activity envisaged to article 57 § 1, subparagraph 2, 2°.
- Article 7 of the law on the bankruptcies: to appoint a provisional administrator if there are serious, precise and concordant indices that the conditions of the bankruptcy are existing

The Council of State can:

- To suspend the decisions of the CBFA
- To cancel the decisions of the CBFA

20- Powers of Ministry of Finance

30- It does not lay out any more capacity.

21- Others (including DGS)

31- For the execution of these measures (or the lack of decision to set these measures), what are the responsibilities of different type of powers:

22- Responsibilities of nominated practitioner

32- We can classify the sequestration noted to article 24 § 7, 2° among the practitioners not administrators.

Its role is of:

- To register the transfer in order to sequestration in the register of the shares holders.
- To prohibit the exercise of the rights attached to the shares holders even not nominated
- To exert the rights to the shares holders voting aiming a sane and careful management of the establishment while balancing with the holders rights.
- To box the dividends and to give them to the holder.
- to subscribe to the capital increasing, other titles conferring voting rights, option as regards payable dividends in title,
- To answer the OPA or OPE
- To release the titles not entirely released with the agreement of the holder.

These civil liabilities founded on article 1382 sanction the behaviour that would not have had a normally diligent professional placed in the same situations taking into account rules relating to its role.

23- Nominated administrator

33- We can classify the special administrator aimed to article 57 § 1, 1° among the administrators.

Its role is:

- To apply if an act which is subjected to him is convenient compared to a sane management
- To appreciate if it is convenient to subject to the deliberation bodies of management a proposal which it considers convenient.

34- We can also classify the provisional administrators aimed by article 57 § 1, 3° among the administrators.

Their role is to hang all the decisions which would make the replaced administrators.

35- We can classify the provisional administrator aimed by article 8 of the law on the bankruptcies among the administrators.

Its role is to preserve the value of the credits, to prevent the passive ones, and payments while waiting for the declaration of bankruptcy.

36- The civil liability is founded on the principles of article 1382 and these standards.

24- The National Bank

37- There are no more powers and thus not more legal responsibility.

25- The banking supervisors

38- Within the framework of articles 43 and 57, the responsibilities of the banking commission are of:

- To note non operation, bad management, the financial standing, the state of the structures of management
- To impose a reasonable time
- To appoint the administrator in time
- To publish or not according the prejudice it shall cause
- To fix the reasonable capacities of the administrator.
- To impose new reasonable but sufficient standards as regards solvency, liquidity and requirements or limitation.
- To suspend or prohibit as soon as the activity is needed
- To arrange to yield the rights in time
- To arrange the replacement of the administrators in time.
- To revoke the agreement in time.

39- It also should be recalled that under the terms of article 59, it is up to the CBFA to inform without delay the controlling authorities of the credit institutions of the other States members of the EEE in which a Belgian law credit institution has established branches or carries out banking under the mode of the free provision of services, of the decisions that it took in accordance with articles 56 and 57 of the law.

40- The CBFA must inflict, when that is essential, in accordance with art 103, of the administrative fines to the establishment which would not treat, within a given period of time, to the deficiencies noted in its organization or its operation⁵.

41- It should be specified that a recourse near the Council of State is open⁶ according to an accelerated procedure determined by the King, with the credit institution, against the decisions of the CBFA taken under the terms of article 57 § 1^{er} Al 2, 2^o, 3^o and 4^o and counter the equivalent decisions made for the branches.

The same recourse is open against the decisions of the CBFA taken under the terms of the §1^{er} Al 2 1^o of article 57 when the CBFA notified with the establishment that it will publish these decisions.

The recourse is suspenseful decision and of its publication, except if, because of a danger engraves for the savers, the CBFA declared its decision executor notwithstanding the recourse.

The Council of State Decision is worth observation of the civil fault, when it can be noted by the Commercial court pursuant the article 1382.

⁵ Andre Bruyneel and Marc Fyon, "the law of March 22, 1993 relating to the statute and the control of the credit institutions", Newspaper of the Courts, n°5685, September 25, 1993, p.565

⁶ Jean-François Van Drooghenbroeck, "procedures derogatory and.

26- The Courts

- 42- The Commercial court must pronounce pursuant the article 57 § 2, at the request of any interested party, the nullity of the acts and decisions of the credit institutions taken without the agreement of the special administrator or with the contempt of a measures of suspension. This action for annulment must be directed against the credit institution. A limit of time is introduced by the law of March 22nd, 1993 to the introduction of the action for annulment. This one must be brought before the expiry of a six months deadline from the date on which the acts or decisions intervened are opposable to whom calls upon nullity or are known by him.
- 43- The Court must suspend, if serious reasons justify it, of the acts or decisions attacked is requested in summary procedure. The order of summary procedure of suspension or the basic judgement pronouncing the nullity takes effect with regard to all. If the contested act were the subject of a publication, the provisional order of suspension and the judgement of nullity will be also published in extract in the same forms.

27- The Ministry of Finances

- 44- Before 2002, Article 57 § 2 of the March, 22, 1993 Act foresaw, a recourse in favour of the bank c/o the Ministry of the Finances within three working days following that of the notice. This recourse was only aimed at measures of suspension, at the forced transfer of the partners' rights, at the administrators' replacement, of the consent's dismissal. This disposal has been repealed by the August, 2, 2002 Act.

2.5 Confidentiality

28- Which measures are confidential and which measures must be made public?

- 45- In reality, none is confidential in its strict meaning. In other words no professional secret is standing but for the members of the CBFA, at it will be seen hereafter.
- 46- As stated, the majority of these measures may be known by third parties because it may be published by the same Banking and Financial Commission. In some cases the publication stays discretionary in the Belgian Official Gazette, in other cases it deems compulsory.
- Many of the measures may be published because the Banking and Financial Commission may decide to publish some of these measures discretionarily. It is compulsory to publish the other measures.
- 47- These measures –except those authorized- cannot be revealed in public by the CBFA because its agents are kept by the professional secret.

2.6 Powers and responsibilities of the intervening authorities

29- Can the intervening authorities reduce the rights of the stakeholders (creditors, shareholders, deposit holders)?

48- Yes, because the decisions taken by the CBFA or the special commissioner or the provisional administrator. These limitations are depicted at point 31.

30- Is there in your legislation a judicial control of those measures? Please explain.

49- The decisions taken by the CBFA may be reversed by (Conseil d'Etat) (The Belgian Highest administrative Jurisdiction and Advisory Body to the Government in matters of legislation) (See n° 41).

These decisions may be the object of a civil suit before any Civil Court.

How are handled the rights of the following stakeholders in the execution of this kind of measures?

31- Right of Shareholders

50- The decisions of the provisional administrators or of the special commissioners may be suspended by a judgment of the Commercial Court and stating on the ground it may be granted damages and interests.

51- The decisions taken by the Commercial Court may go before the Appeals Court, the Supreme Court and being object of a preliminary question before the CJCE.

52- Under Article 57, the decisions of the companies' organs may be declared null and void by judgments of the Commercial Courts and damages and interest may be granted.

53- According to Article 57 § 1 1° of the Banking Law, the shareholders may accept the proposals made by the special commissioner, as stated in Article 57, so avoiding any conflict of laws.

54- Whether the shareholders deny these measures, the commissioner reports it to the CBFA, which may suspend the activity.

55- Independently by what stated at Article 57, Article 24 § 7 foresees that when the Banking, Financial and Insurance Commission considers that the influence exercised by physical or moral persons bearing at least 5% of the shares or 5% of the vote rights may endanger the bank's activities it may suspend the vote exercise attached to these quotas. Furthermore, The Commission may, at request, ask for the withdrawal of the applied measures. This decision is notified to all the shareholders. This decision is enforceable immediately and the Commission may render this decision of public domain.

As underlined by Eva H.G.Hüpkes⁷, the more relevant shareholders need to behave like the bank directors and the managing directors. In detail, no conflict of interests should entail the shareholders. In other words, the shareholders do have to behave with common sense.

Nevertheless, the Directive and the law do not define any misconduct properly, which would be sanctioned by the CBFA. Yet, the writer might foresee a potential danger for the depositors' interests.

It is, in sum, the CBFA that should check the depositors' interests. This check is also a warranty for the shareholders who may always file a suit before the competent courts.

56- The Banking Commission may ask to the company to give within a due delay the taken shareholder's rights. In case of no respect of the fixed deadline, the Banking, Financing and Insurance Commission may ask for the seizure of the shareholder's rights before any determined organ or institution. The company-notified by the Commission's decision modifies the company's register by the simple act of seizure.

This decision will respect the shareholders' rights keeping in consideration the balance of the interests as well.

32- Right of Creditors

57- The creditors' rights may be affected by these measures. These rights are considered even than those that other intervenient.

33- Right of Employees

58- Their situation is even to that of the creditors. The respect of the workers' interests is not registered by the law.

34- Right of Deposit holders

59- Their statuses are, in principle, equal to those of the creditors even if the law seems to give them more power in the interests' balance.

60- In case of damages of any private person because a CBFA miscarriage of judgment, an indemnity⁸ may be accorded under Article 1382 du Civil Code.

61- To remind that the depositors stay protected by the fact that any bank has subscribed - in case of insolvency - a clause of minimum warranty for any depositor⁹. (see hereafter)

⁷ Eva H.G Hüpkes, « The Legal Aspects of Bank Insolvency – A Comparative Analysis of Western Europe, The United States and Canada », Kluwer Law International, 2000, p.43

⁸ Marc Vandemeulebroeke, « Les mesures exceptionnelles que peut prendre la Commission Bancaire et Financière », in La nouvelle législation bancaire belge, AEDBF- Belgium, Yearbook 1994, p.121

35- Can intervention decisions override shareholder's rights in the scope of these measures?

- Yes
No

62- The goal of the CBFA is not to protect the minorities. The decisions may be object of a suit before the Conseil d'Etat (highest administrative court) and on the base of the civil responsibility.

⁹ Jean-Pierre Degué, « Le particularisme des procédures collectives dans le domaine des établissements de crédit », in Faillite et concordat judiciaire : un droit aux contours incertains et aux interférences multiples. Journées d'étude du 24 et 26 avril 2002, p.129

2.7 Relation with the formal insolvency proceedings

36- What is the relation of pre-insolvency/early intervention systems with formal insolvency legislation? How do they interact?

63- The procedures to cleanse the finances and those of banking winding-up are regarded by Title 8, Chapter 1 of the March, 22, 1993 Act (to what concerns the cleanse of the finances) and Chapter II (to what concerns the winding-up) and amended by the December, 6, 2004 Act concerning the reorganization of the finances and of the banking winding-up.

It must be considered, by measures of 'cleansing the finances', those aimed to preserve or restore the financial situation of a bank, which affected any third's rights¹⁰. These measures aim just Belgian banks, but Article 84 and 109/7 of the Banking Law (subsidiary of a company). These measures, however, do not engender the foreign subsidiaries or the foreign branches.

The 'winding-up procedure' has to be meant like a open collective procedure controlled by the administrative or judiciary authorities, which tends to realise some credits belonging to the bank¹¹. Title 8 of the law is called the 'Prudential measures'.

This procedure is aimed only at those banks defined by Title II of the Banking Law. They are only Belgian banks. No subsidiaries or foreign branches are concerned.

64- The procedures to cleanse the finances are also under the July, 17, 1997 Act on the composition to creditors (hereinafter Act on composition to creditors). At this proposal, it has to be reminded also the January, 26, 2009 on the continuity of the enterprises (hereinafter Act on continuity). This Act will be gradually entering into force by its publication on April, 1, 2009.

The winding-up procedures are also ruled by the Act, August, 8, 1997 on the insolvency (Hereinafter Act on bankruptcy).

65- The measures prior to the insolvency encounter those of re-organisation when the debtor (the bank) or the Public Prosecutor (The Belgian Procureur de Roi or der Konings Procureur) ask for the opening of a composition to creditors' measure under the Act on composition to creditors or when the debtor asks for a judicial re-organization under the Act on continuity.

Before the decision over the composition to creditors' request or over the re-organization, the President of the Commercial Court (Article 109/18 of the Banking Law) asks the CBFA an opinion, while keeping the Public Prosecutor informed, as well, in written. This request holds all documents concerned. The CBFA informs the National Bank. The CBFA must render its opinion within 15 days since the consultation with the National Bank, which must answer

¹⁰ Article 3 §1 8° of the March, 22, 1993 Act

¹¹ Article 3 §1 9° of the March, 22, 1993, Act.

within 10 days by the request. In case of special requests or cooperation with foreign authorities the delay is put up to 30 days. This extra-delay is notified to the Judge.

This consultation held the delay within which the Court must take a decision. With no opinion within the delay the Court may take a decision.

The CBFA's opinion is in written and it is transmitted to the Public Prosecutor, to the Commercial Court and to the National Bank.

The prior-insolvency measures are in conflict with those of the bankruptcy when a provisional administrator is appointed under Article 8 of the Act on bankruptcy.

Before this designation, the Court must dialogue with the CBFA like in the case of a composition to creditors.

The pre insolvency measures are in conflict with those of the insolvency when this latter is opened.

Before this designation, the Court must respect the same procedure of dialogue with the CBFA than that applied to the insolvency.

66- Under Article 57 § 1 and § 2, the CBFA powers are applicable only when a bank loses its agreement because a state of insolvency. These powers are up to that moment concurrent. Some of the measures established by the Judge during the phase of the finance cleansing are under the CBFA control in accordance with the banking law.

About the CBFA

- 109/3 Inform the authorities where the bank has a subsidiary about the decision to carry on a measure of finance cleansing.
- 109/3 Inform the authorities about the evolution of the composition to creditors' procedure before the Court.
- 109/4 Inform the foreign authorities that the foreign bank should carry on a composition to creditors' procedure.
- 109/5 Publish on the Official Gazette or monitor the bailiff of the court publishing the CBFA's decision over the composition to creditors' procedure. This publication –along with some publications in domestic newspapers- has character of publicity in any EU State.
- 109/6 Inform the control authorities about its intention to adopt a measure in accordance with Article 84 and over the effects of that decision.

In addition, in case of insolvency the CBFA:

- 109/10 Inform the control authorities of any EU Member State, where a subsidiary is established, about the possibility to open a procedure of insolvency of the Belgian Bank.
- 109/16 Delete the agreement

However, some overlapping may arise during the composition to creditors and the pre-insolvency phases¹².

67- An overlapping about the composition to creditors and the cleansing measures is foreseeable. This overlapping has a prudential rule. The comparison of the conditions over where these measures are held may conduct the CBFA to take¹³ outstanding prudential measures¹⁴. This overlapping deems clear and the two measures are interconnected together.

Beyond the overlapping, the composition to creditors' Act seems to be inadequate in a case of bank insolvency. In fact, the introduction of a composition to creditors by the Public Prosecutor may result to cause a prejudice because when the latter initiate a composition to creditors' procedure and it does not work out any prudential activity by the control authority would be rendered void.

As stated by Jean-Pierre Degué¹⁵, it is relevant to combine the goal of the company recovery with other goals like the sparing protection and to maintain of the public confidence towards the bank. Yet, these side phenomena are nowadays not assured by the Belgian law.

In addition, it is essential to assure the protection of the financial market stability, which is still not protected by the Belgian law.

Finally, the two procedures together may pose some problems to the intervenient. In fact, in case of a composition to creditors an auditor may be elected when a special commissioner may be elected by the CBFA as well. Now, the competences of the two characters may be the same and they may create –as detected by the Commercial Court- some conflicts of competence especially during the observation period indicated by Articles 15 and following of the July, 17, 1997. This phenomenon has not been remarkably amended by the Act on Continuity.

68- Other overlapping exists between the insolvency legislation and the prudential one.

A first question is to detect whether a bank-whose special commissioner has been appointed by the CBFA must obtain the agreement of this commissioner to declare the bankruptcy. The Article of the August, 8, 1997 Act established that the debtor has to declare the state of insolvency. To the contrary, under Article 489 of the Penal Code a sanction is foreseen. Is this consent

¹² Jean-Pierre Degué, « Le particularisme des procédures collectives dans le domaine des établissements de crédit », in Faillite et concordat judiciaire : un droit aux contours incertains et aux interférences multiples. Journées d'étude du 24 et 26 avril 2002, p.138

¹³ Article 9 § 1^{er} de la Loi du 17 juillet 1997 relative au concordat judiciaire, MB 28/10/1997

¹⁴ Article 57 § 1^{er} al 1 de la loi du 22 mars 1993

¹⁵ Jean-Pierre Degué, « Le particularisme des procédures collectives dans le domaine des établissements de crédit », in Faillite et concordat judiciaire : un droit aux contours incertains et aux interférences multiples. Journées d'étude du 24 et 26 avril 2002, p.144

necessary and in this hypothesis the absence of authorisation may be an excuse under the Penal profile? This point may cause problems. In fact if the CBFA has nominated a commissioner without withdrawing the agreement to the bank, it means that a financial recovery is always likewise. In this peculiar case how come a Judge may dismiss the Commission's action and declare the bankruptcy?

Jean-Pierre Degué¹⁶, in one of his Articles, proposes some solutions in order to conjugate the administrative action in term of financial cleansing of banks and the insolvency procedures. To conjugate the two procedures a dialogue deems relevant. How come?

- Through informing the Public Prosecutor along with that of the control authority based on exceptional circumstances to recovery the bank.
- Through the consultation of the authority by the Public Prosecutor before the introduction of a certified bankruptcy.
- Through the appointment of an auditor chosen on a list having the endorsement of the control authorities.

Another solution may follow the French example. It means to build a procedure of consultation according to which the opening of an insolvency procedure must be prior submitted to the CBFA.

69- The problem caused by the collaboration among the authorities is the necessity of an information exchange, which deems covered by the professional secret of the CBFA members, yet. (Article 30, Directive 2000/12/CE).

70- There exists particular rules for the subsidiaries outside the EU

- a) Under Article 84, the Banking, Financial and Insurance Commission may revoke the agreement of a subsidiary of a country outside the EU when it considers that the sparing protection passes through the existence of a Belgian branch.
- b) Under Article 109-7°, the CBFA informs with no delay the control authorities of the country outside the EU about the decision to adopt a cleansing procedure under Article 84. The CBFA tries to coordinate the control authorities of the country outside the EU along with its actions and those of the banks of the other EU Member States altogether.
- c) To remind that under Article 109/1 the Belgian cleansing authorities are competent for cleansing measures towards banks under Title 2 only. In other words, under Article 7 the Belgian banks, which exercise their activity in Belgium, need to be commercial activities with a minimum capital under Article 16, need to be ruled by persons with the requisites under Article 18 and following of the law and need to be reorganised as stated

¹⁶ Jean-Pierre Degué, « Le particularisme des procédures collectives dans le domaine des établissements de crédit », in Faillite et concordat judiciaire : un droit aux contours incertains et aux interférences multiples. Journées d'étude du 24 et 26 avril 2002, p.148

under Article 20 of chapter II. No other European subsidiaries are envisaged, but those under Chapter IV (no EU subsidiaries).

71- The Article 109 establishes that the cleansing measures are first of all those that are used by the Belgian legislation, under reserve of the contrary. The Banking law adds some extra measures.

The Article 109 does not impede the adoption of a provisional delay by July, 17, 1997 Act on the composition to creditors, which may be applied plainly and independently by the provisional measures in accordance to the Article 57 of the Banking and Financing Commission Act.

72- About the voluntary winding-up it is under Article 180 of the Company law that the bank under title 2 is concerned. The organs of control of the bank may consult the CBFA previously before gathering the annual assembly together. Before any winding-up procedure over a bank, the Commercial Court must ask the CBFA of an opinion as stated by Article 109-18°. No winding-up is possible without prior opinion. (See hereafter).

37- Is there in your legislation any special effect of the pre-insolvency/early intervention measures on special contracts (set off, netting for example)?

73- By Article 57, there are no traces of special effects imposed by the Banking Commission, but in the case a taken decision has affected any third right without any prior decision of a special commissioner. In this hypothesis the Commercial Court may render null and void the decision according to the third parties damages and interests.

Only the decisions about the procedure of reorganisation and/or bankruptcy have an effect towards these special effects.

38- Is there in your legislation any specific financing system for banks under pre-insolvency/early intervention?

74- No specific financing systems exist in Belgian domestic law providing special ranks.

39- Can the deposit guarantee scheme be used to finance the pre-insolvency measures?

75- Yes, when the CBFA monitor the economical breakdown within 21 days after having established for the first time that the bank has not returned the goods to be rendered, while the bankruptcy or the composition to creditors has not been opened yet.

2.8.Group aspect and Cross-border situations

40- In a national context (when both the parent company and the subsidiaries are located in your Member state), do the pre-insolvency measures apply to the subsidiaries?

76- Article 57 is applicable to any branch separately but Article 57 may be potentially applicable to any branches.

When the Banking Commission establishes that the difficulties of one of the companies of the group have consequences or could have consequences on other companies of the group based in Belgium, it takes some special measures.

41- Do the systems you have described above apply to cross-border situations (on which legal basis, i.e. territoriality or universal principles)? How would a cross border case be managed in the following cases?

77- Article 57 is applicable to Belgian banks and outside EU for the subsidiaries only. The Belgian authorities could not take measures over subsidiaries of foreign companies.

To the contrary, the Belgian authorities have full power towards any Belgian subsidiary.

No measures are taken against branches based in other EU States where the domestic authorities of these States are competent only.

42- When the ailing bank in your Member state is the subsidiary of a parent company located in another Member state?

78- Article 57 is part of Title II applicable to Belgian banks.

Belgian banks are under domestic rules contained into Article 7 and following.

Whether a branch of a foreign bank is under Article 7, it becomes ruled by domestic rules as well.

43- When the ailing bank in your Member state is the parent company of one or several subsidiary located in another Member state?

79- Article 57, like the whole Title II; do not rule the case of the branches of a Belgian bank.

In this case, it is the control authority of the Member State who satisfies all control obligations.

44- When the ailing bank in your Member state is the subsidiary of a parent company located in a third country?

80- In a line of principle it is the Belgian authority which stays competent because it is a Belgian bank or a branch of a foreign bank.

45- When the ailing bank in your Member state is the parent company of one or several subsidiary located in a third country?

81 - The answer is the same than that of point 80.

46- Is there in your legislation state a specific pre-insolvency/early intervention created for cross border situations (please consider both subsidiaries and branches separately)

82- Yes for the branches, no for the subsidiaries

47- How does (or would) your national legislation deal with the cross-border aspects (are there situations where the Law of another Member state is applied) in the case of subsidiaries, not branches?

83- In the case of a branch, the international private law of the two concerned Member States may solve any existing conflict. Some other aspects may be ruled by multilateral, bilateral or European private international law.

No specific rules are contained in the Belgian banking law.

48- How does your court deal with a conflict with another Member states' Law: when there is a divergence between both Laws, can an agreement be concluded under the control of your national judge?

84- No by law, yes on the facts but under the limits of the creditors' rights, of the law and order and of the equality of the creditors whether these principles are applicable. These principles, however, may be rendered null and void by the justice.

2.9.Efficiency of those proceedings

49- Do you think the measures you have described above provide for optimal response in order to deal with problems in an ailing cross-border bank (please explain)?

85- No, no solutions exist for the group of companies.

To the contrary, the branches are considered as different companies submitted to the control authority of the State where they are based.

There is not a general solution for cross-border bank problems, at least for what explained into Article 57 and following of the regulation.

50- Are there changes recently adopted or being discussed in your legislation?

86- No changes that are known by the today's writer.

3- Formal reorganization measures and winding up rules

3.1. General question

51- Can you briefly explain what types of insolvency systems currently apply in your Member states (please briefly explain the differences if there are several)?

87- Under Belgian law, it is useful to remind, that all the measures concerning insolvency are condensed in the designation of a special commissioner, in the suspension of any economic activity, in the possible composition to creditors as established by the Act July, 17, 1997.

Any winding-up procedure, corresponds to a bankruptcy ruled by the Act July, 17, 1997.

However, it is to be noted that the disposal over the composition to creditors has been amended in the new text over the reorganisation of enterprises (see Continuity Act). The Act July, 17, 1997 was called as 'Composition to creditors' Act'. The new text will enter into force 6 months after its publication on the Belgian Gazette, presumably on June 2009.

88- The new composition to creditors, as applicable into the text of the same name consists to obtain by the Commercial Court a provisional order of payment which permits to suspend the enforceability of any debt but not impeding the payments made by the debtor under the composition to creditors' rule.

The company may be ruled by the debtor itself or by different commissioners appointed by the Court, which may suspend or modify the business powers.

During the composition to creditors' period, a financial plan may be built up. A suspension period of 6 months is established before the general assembly deals with the company's composition to creditors.

These proposals may foresee either the credit diminishing or the payment of the due credit in several instalments within the maximum terms of delay requested by law.

In a line of principle, the whole body of creditors must be paid within 24 months by the decision to a composition to creditors. An extra 12 months delay may be conceded by the Court following the expiration of the first 24 months delay.

The public creditors must be paid, in a pure line of principle, under the old law within an 18 months period.

Though, other creditors with no special rank or privileges may after the vote of a double majority of them to return to a 24 months delay of payment.

The composition to creditors is submitted to a double majority of vote where the creditors who are present at the moment of the vote shall decide.

The Court may admit by judgment the credits, which have been contested during the exercise of the vote in public assembly.

The Court must, in addition - despite the positive vote of the assembly - ratify the composition to creditors unless the decision taken by the general assembly of the creditors is not contrary to the law and order. This law and order has a very limited character, either that contained into Articles 81 and 82 of the EC Treaty or that contained into the Belgian Criminal Code.

Unless the decision spurring out of the general assembly of creditors and ratified by the court and published on the Belgian Official Gazette is not to be called in Appeal, it will work out its effects.

The final delay takes effect at this decision till the date the Court will fix for the stay of the composition to creditors.

The composition to creditors ratified by the Court may produce effects beyond the 24 months period even if the Court has determined its expiration.

Since the composition to creditors' plan is adopted, the company takes back its power of provisional administration and the Commissioner designated by the court ends its own rights.

In the hypothesis that the composition to creditors might not be obtained or it might not be obtained during the period of provisional delay, or it might not be enforced, the Court may by request of the commissioner to the proceeding allowing time for composition or by any third either to revoke the provisional delay or to revoke the final delay, opening at that time an insolvency procedure.

The Court may or may not open the bankruptcy procedure.

89- The procedure of reorganisation as inserted in the new text of law consists in:

The new procedure does not substitute the old one integrally as it may be easily detected by any lecturer. Yet, the new procedure gives extra instruments to the enterprises, to the creditors and to the Commercial Court. This new Act does not only substitute the 'procedure of judicial reorganization' with that of 'composition to creditors' procedure' but also enlarges the panoply of possible remedies similar to a « Chapter 11 » with the creditors' interests and try to avoid the insolvency as far as it is possible

Conditions of application

The procedure may be opened when the economic life of the company is in jeopardy, no matter if this menace is only foreseen or just a part of the company's activities stay menaced.

This procedure is applicable towards a company or a private person. When it is a company it lasts that the losses are more important than the half of the capital.

New-commerciality and terminological innovation

This new act goes beyond the classic schemes including: the merchants, the familiar companies, the agriculture companies and the civil companies but those who exercise a liberal profession may benefit of it.

New definitions are forged like the « créancier sursitaire ordinaire (the ordinary creditor on delay), « le créancier-propriétaire » (the owner creditor). Even terms like the main centre of interests and the Court receive new specific meaning.

Collecting information and the commercial enquiries on one side and the possibility to nominate a company mediator « médiateur d'entreprise » on the other side.

All the elements apt to detect the signs of insolvency are hereto recollected.

Yet this new act creates the company mediator in order to ease all the procedures among the debtor, the Court and the creditors.

The settlement

The debtor may nowadays propose to his/her creditors or to some of them a settlement which will be opposed to others creditors and to the commission in case of insolvency.

The judicial reorganization

The judicial reorganization tends to give a delay either to let the possibility of a settlement or to permit the creditors to draw a reorganisation plan. The judicial reorganization permits also the transfer of a part or of the whole company.

The procedure starts with the deposit of a request looking like the composition to creditors' request and with similar effects :

- the debtor is not declared insolvent up to the moment the Court has not stated on the request;
- all enforcement actions are suspended;
- the other debtors may be the object of a civil suit, but their possibility of a caution-money.

The insolvency does not dismiss this procedure if pending.

Three types of reorganisation

Three types of reorganisation are set up by the law, and they are combined together simultaneously or one after the other:

- the reorganisation by settlement under judiciary supervision;
- the reorganisation by collective agreement, which is the composition by creditors;
- the reorganisation by transfer to the justice.

The commissioner of the delay disappears as well as the insolvency judge. A delegated judge « juge délégué » will replace these two characters and will keep monitored the Court all along the reorganisation phases.

The debtor shall continue to run his/her own enterprise, though by his/her request or by a third one a person delegated may assume these tasks. Thy appointment of a provisional administrator is possible as well.

Ways to keep things simple

The new Act try to simplify things up. Some may, however, regret that the word composition to creditors is not employed. In any case the judicial reorganisation is a procedure different from that of a composition of creditors.

For instance the procedure to declare its own credit is simplified.

The new Act puts the word end to any condition of avoidance in contract because the request of a composition to creditors or to the possibility for the Court to declare automatically the insolvency procedure in case of discharge from the composition to creditors.

The new Act clarifies the compensation regime, the direct action of the sub-contractors and the regime of the fiscal credits.

The new Act adds the different steps of the procedure like the way of voting under the reorganisation regime.

Finally, this new Act puts an end to the fiscal penalties which engendered the debtor when the creditors superseded to the whole or to a part of their credits.

The judicial reorganization

More than ten Articles are consecrated to the transfer about the judicial, reorganization of a part or of the whole enterprise.

These Articles detail:

- the appointment of a substitute, which organizes the transfer;

- some protective measures which protect the rights of the workers and the conditions to be applied to make the working contracts being modified;
- the measures to protect the credits on mortgage and the pawn on the goodwill;
- the phases of the procedures of reorganization with the dissolving of the moral authority and the discharge of any debt towards the private person;
- the securities.

90- The August, 9, 1997 Bankruptcy Act foresees a classical procedure of liquidation of the assets.

The administrator may obtain by the Court the authorization to pursue the economical activities of the company for a fixed period of time and according to the guarantees of law fixed by the Court.

If he does not obtain this authorisation, the administrator stops all activities immediately dismissing all the company personnel.

By the act of bankruptcy, an equality of ranking and rights is created among the creditors.

The Court may, however, put the date of the equality of ranking and rights to a prior date and render null and void some acts that may have a suspicious character.

Some particular disposals like the annulment of acts in the suspicious period, the inconsistency of certain warranties or of certain mechanisms of compensation are ruled by law.

Furthermore, the responsibility of the shareholders is easily detected by the insolvency.

The administrator collects all the assets and shares them in respect of the ranking and the rights of the creditors.

The administrator will refer to the creditors constantly as well as to the Court. The sharing plan is submitted to the Court's approval.

3.2. Definition and scope of reorganization measures

52- What do "reorganization measures" mean in practice in your Member state? (In general and for banks especially)?

90-In general, in case of a composition to creditors the reorganization measures are:

- a. Abandon of the credit
- b. Delay of the payment
- c. Put some credits into the capital
- d. Give up some branches of the whole assets
- e. Provisional suspension of payments

- f. Provisional suspension of the contractual rights
- g. Delay of the enforcement
- h. Attribution of a privilege « new money »
- i. Internal measures of rebuilt

91-No particular disposals over the composition to creditors are applicable to banks. In other words, these latter are submitted to general rules.

In reality, the Belgian law authorises the bank under the composition to creditors to act as a company, which has received the creditors' endorsement after the general assembly's vote and the Court's ratification.

These measures applicable to the banks are generally as follows:

1. the transfer of a branch of activities
2. the transformation of the creditors' rights in shares
3. the delay of the losses with a payment in instalments
4. the reduction of the losses by an abandon of the credits
5. The injection of assets and/or losses to some companies
6. Any other measure taken by the enterprise during the provisional delay like:

- reduction of the personnel
- closing of certain branches of activity
- making of assets under detailed conditions
- giving up certain assets to third parties
- location to certain activities
- etc.

92-The restructuring measures are:

Other than the measures found in the Composition to creditors' Act:

- Any settlement (under Article 11);
- The transfer of a part or of the whole of the activities even if the company has filed bankruptcy;
- The fixation of payment rules;
- No compensation.

53- What are the conditions for commencing reorganization measures (for banks especially)?

93- In the composition to creditors Act, when the debtor may not pay temporarily or when his/her company is menaced by close insolvency, it means that the losses have reduced the net assets over half of the capital.

94- In the Continuity Act, when a settlement is foreseen the transfer of the whole or of a part of the assets stays as a solution to avoid the insolvency.

54- Who can initiate a reorganization measures (in general and for banks especially)?

95- In the composition to creditors' Act, the enterprise or the Public Prosecutor.

96- In the Continuity Act, the enterprise.

55- Are banks treated specifically in insolvency legislation (are there specific rules for either reorganization measures or winding up proceeding)?

97- No, but the competence assigned to the CBFA.

3.3. Relations between reorganization measures and winding up

56- Are the triggering events defined by laws for both reorganization and winding up measures or it is up to the courts to decide? Explain

98- The bankruptcy intervenes when the recovery of the enterprise by the composition to creditors' Act it is not likewise

The creditors may ask the procedure of bankruptcy at this period as well. The competent court will open a procedure of insolvency.

3.4. Power and authorities of the authorities intervening

Regarding reorganization and winding up, what are the powers of (for the commencement and the management of this kind of measures)?

57- Power the nominated administrator

99- The administrator under the insolvency procedure has limited powers of conservatives' acts under Article 8. He/she must impede any prejudicial act and he/she must monitor the assets.

The special commissioner under Article 57 § 1, 1°, has the power to impede any act of dissipation of assets.

The provisional administrators under Article 57 § 1 30 have representative powers

58- Power the central bank (if it is not the banking supervisor)

100- Under Article 109/18, the Central Bank has only the power of consultancy about the insolvency and the composition to creditors.

59- Power the banking supervisor

101- The CBFA has the faculty - during the whole phase of composition of creditors - to dissolve the agreement to the bank as established Articles 43; 57 and 84.

60- Power the court

102- The Court has in fact a great power, like:

1. Open or refuse to open the insolvency procedure.
2. Modify in any moment the judgement of the opening.
3. Design one or more commissioners.
4. Retire partially or totally the power to the company's organs.
5. Suspend the properties' sequester.
6. Prolong the timing of the properties' sequester.
7. Keep a book of the creditors.
8. Endorse or not a creditors' decision.
9. Pronounce the bankruptcy.
10. Decide to transfer a part of the assets.
11. Give extra warranties.
12. Recopy an endorsed plan.
13. Dismiss the decisions of the creditors' assembly of vote.

During the reorganisation under the Continuity Act, the Court has - among other powers attributed by the composition to creditors' Act:

- Nominate a company mediator;
- Nominate a substitute *ad hoc*;
- Authorise the following-up to the authority;
- Ratify or not the templates of the winding-up;
- Close the winding-up;
- Dismiss the bankrupt.

61- Power Ministry of finance

103- The Ministry of the Finances has no power during an insolvency procedure.

62- Power Others

104- The special commissioner for the delay in the composition to creditors' Act may authorize the debtors' acts or assist the debtor during the procedure in respect of the ranks and the rights of the creditors.

In the Continuity Act, the creditors refer to the act committed during the procedure towards the new engagements of the debtor or towards the running contracts.

For the execution of these measures (or the lack of decision to set these measures), what are the responsibilities of:

63- Responsibilities of The nominated administrator

105- In the composition to creditors' Act, the provisional commissioner under Article 57 § 1, 3°, has the same responsibilities that those attributed to the company's organs.

The provisional commissioner is under the criminal responsibility if:

- hides the assets or the losses or exaggerate or minimise the assets or the losses in order to obtain a composition to creditors.
- let intervening creditors, which credits are exaggerated
- omits some names in the list of creditors
- make false statements before the Court about the real financial situation or about the reorganisation.
- Negotiate with the creditors their vote according them special advantages

Under the civil plan, the provisional commissioner stays responsible if engages him into a composition to creditors without any issue towards the creditors.

- transfer a procedure of reorganisation in case of a settlement out of the court
- entertain amicable relationships with the bankrupt
- authorise a total transfer of the enterprise
- Let any dismiss to the debtor

In case of insolvency the Court may:

- declare the insolvency
- design a special administrator and a special judge for the insolvency phases
- set up launch the creditors ranks and rights
- stop the execution over certain goods with special privileges.
- authorise some acts of the administrator like some payments
- verify the creditors' ranks and rights
- close the insolvency, even if partially
- appoint an administrator *ad hoc* to impede any sold by an incompetent administrator
- ratify the transfer of assets

In the Continuity Act, the responsibilities are the same.

In the Bankruptcy Act, the same administrator may be criminally charged if:

- Act in favour of any third party without having any considerable economic return and exposing the company to greatest economic risks.
- avoid executing the disposal contained into Article 53 assisting the commissioner
- delay the bankruptcy buying or selling company goods under price
- do not divulge the existence of assets
- favour a creditor among others
- do not publish the insolvency report within the delays
- do not provide with the necessary information in case of insolvency
- embezzle or conceal some assets

- purloin documents

In addition, any civil responsibility may be carried towards this administrator.

The special commissioner, under Article 57 § 1, 1°, may face some of the above stated responsibilities, unless it is proven that he/she has contributed to avoid its commitment.

64- Responsibilities of The national bank (if it is not the banking supervisor)

106- The national bank is not responsible for the written opinion.

65- Responsibilities of The banking supervisor

107- Liability may be implied on the basis of general principles of administrative law for failure to take the measures required by Article 57 of the Banking Act promptly.

66- Responsibilities of the Courtt

108- The Tribunal's decision may be the subject of an appeal and of a reference for a review by the Court of Cassation [Belgian Supreme Court]. The decisions of the Courts may give rise to a claim for compensation with regard to [mal-administration] by the State.

3.5. Group treatment

67- Are there any legislation or court practises that specifically apply to a group?

109- With regard to banking law, we should first mention the Royal Decree of 21 November, 2005¹⁷, whose aim is to provide supplementary supervision of credit institutions [and other investment entities] which are members of a financial services group as defined by the legislation.

Parent companies, formed and regulated under Belgian law that [control] a financial services group, as well as companies regulated by Belgian law which form part of a financial services group the parent company of which is

¹⁷ Royal Decree of 21 November 2005 for supplementary supervision of credit institutions, insurance companies, investment firms and collective investment management companies, as part of a of a financial services group and amending the Royal Decree of 22 February 1991 laying down general rules on the control of insurance companies and the Royal Decree of 12 August 1994 on the control on a consolidated basis of credit institutions. Belgian Official Gazette (Moniteur Belge) 30 November 2005.

regulated and organized under the laws of a Member State of the European Economic Area, are subject to additional supervision carried out at group level by the Banking, Finance and Insurance Commission (la Commission bancaire, financière et des assurances – hereafter referred to as the “**CBFA**”).

Within the meaning of Article 19, and by derogation from paragraph 1 of that Article, when the regulated firm [is part of] a financial service group [controlled by] a non-Belgian company whose head office is located in a member state of the European Economic Area, the group supervision is exercised by the [regulatory] authority that is competent to regulate the controlling entity. Notwithstanding paragraph 1, where the parent company that heads the financial services group is a company whose registered office is located outside Belgium, but in the Member State of the European Economic Area, the supervision of the group is performed according to the following rules:

- where the [composite] financial holding company, in the State concerned, has a subsidiary which is regulated by the competent authority of that State;
- where several subsidiaries exist in that state, that are each regulated, by a different competent authority, the group supervision shall be exercised by the competent authority of the regulated financial sector that is the most significant.
- where several “mixed” [composite] financial companies, having their registered offices in different Member States of the European Economic Area, have as a parent the same [composite] financial services company and if none of the subsidiary companies is a regulated entity within the jurisdiction of the parent, the group supervision is exercised by the competent authority of the regulated entity whose total assets is greatest if the activities of these companies are in the same financial sector or by the competent authority of the regulated financial sector which is most important [for the group companies].
- where the financial services group does not have a parent company that heads the group as such, as well as in cases [other than those cited above], the group supervision shall be exercised by the competent authority which granted regulatory approval to the regulated entity having the greatest total assets in the financial sector that is most important [to the group companies].

The CBFA and the other relevant competent authorities may in special cases, mutually agree to waive the rules on jurisdiction set out in paragraphs 1, 2 and 3 if, having regard to the structure of the financial services group and the relative importance of the group’s activities in the different Member States of the European Economic Area, and they may designate a competent authority which shall be responsible for supervision of the group. They shall consult with the financial services group before making such a decision.

Nevertheless, the tasks of the competent authority within the meaning of Article 20 of the regulations primarily concern certain aspects of supervision namely, coordination of collection and dissemination of information, monitoring and evaluation of the group's financial situation , monitoring compliance with the solvency rules, supervision including evaluation of the structure and organization of internal control arrangements.

The only scenario in which that authority may act is that foreseen in sub-section f) which provides for sanctions to be taken against the financial holding company as provided by Articles 102 and 103 of the Banking Act.

It will be recalled that, Articles 102 and 103 in Title VII "Penalties" provide that, without prejudice to other measures provided by law, the CBFA may cause a notice to be published stating that either a Belgian or foreign controlled credit institution, a financial holding company or a [composite] company within the meaning of Article 4.20 of Directive 2006/48CE of 14 June 2006, or a [composite] financial holding company is not in compliance with orders that have been made in respect of a period of time foreseen by the Act or of orders issued for its implementation.

Moreover, and without prejudice to the other measures provided for by the Act, under Article 103, the CBFA may, in respect of a credit institution, a financial holding company or a composite company under section 102 or a financial holding company of Belgian or foreign law parentage established in Belgium, fix a period within which the company must:

- a) comply with specified provisions of the Act or orders made pursuant thereto ;
- b) make necessary adjustments to its management structure, its policy regarding capital requirements, its administrative organization or its internal controls, under penalty of a fine of a maximum of 2,500,000 € per offence and up to € 50,000 per day in the case of non-implementation.

Paragraph 2 provides that without prejudice to other measures provided by law and without prejudice to the measures provided by other laws or other regulations, the CBFA may, if it finds a violation of the provisions of this Act or of measures taken in pursuance thereof, impose on a credit institution, a financial holding company or a [composite] company, as referred to in Article 102 or a [composite] financial holding company of Belgian or third country parentage established in Belgium, an administrative fine which shall not be less than 2,500 € nor more than € 2,500,000. for each act or in regard to regard to the same set of facts.

Article 20 g) further provides that the authority may implement other tasks, measures and decisions assigned to it under or in pursuance of the Royal Decree law or the [EU] Directive.

On the other hand, the competent authorities may, where appropriate, in consultation with other competent authorities, agree to entrust to the competent authority responsible for the supervision of the group other monitoring tasks as [referred to above] in paragraph [19]1.

When the CBFA acts as the competent authority, without being responsible for the supervision of the group, it co-operates, without prejudice to the provisions of Chapter 3, with the other competent authorities and with the competent authority responsible for the supervision of group to carry out the tasks referred to in paragraph [19]1.

Without prejudice to delegation of powers and oversight responsibilities in accordance with specific regulations, the designation of the competent authority responsible for the supervision of the group does not alter the duties and responsibilities of the competent authority as defined by the [financial services] legislation.

Chapter 3 sets out a series of provisions relating to the communication of information to the CBFA, providing information to competent third country authorities, the exchange of data within a group, on-site verification, cooperation and exchange of information between competent authorities and the formation of cooperation agreements.

If the CBFA finds that a regulated business, financial, insurance holding company or financial holding company, part of a financial services group, circumvents or attempts to circumvent the regulatory sector, it may take, with respect of the regulated action of remedies and may impose on the undertakings above administrative sanctions as provided for in Articles 57, 102 and 103 of the Banking Act¹⁸ in respect of credit institutions, financial companies and [composite] financial companies and Articles 26, 27, 81 and 82 of the Insurance Act in respect of insurance companies.

The CBFA and other competent authorities concerned shall coordinate as needed to take administrative measures in implementation of provisions on the supervision of financial services groups.

Accordingly, in my opinion, we may conclude from the paragraphs above that having regard to the provisions of Article 27, the CBFA, may use Article 57 with regard to regulated businesses, including those that form part of a financial services group, but must do so in coordination with other [EU] Member States.

The above text does not, however, set out provisions relating to the cross-border effects of these measures.

110- By contrast, the insolvency law, the law concerning composition with creditors and the law on business continuity do not contain particular provisions with regard to "group companies". Accordingly, [under these provisions] each [group] company is treated as a separate entity.

This does not mean the [competent] [Tribunal] may not open procedures whether for composition, business continuity or insolvency, for each and every company subject to Belgian jurisdiction, potentially on the same day. Regulation 1346/2000 does not apply but the provisions of the International Private Law Code of Belgium¹⁹ (the "IPLC") concerning insolvency are applicable.

¹⁸ Law of 22 March 1993 on the status and supervision of credit institutions, consolidated updated at 29-12-2008 - available to http://www.juridat.be/cgi_loi/loi_a.pl?language=fr&caller = cn = list & la = 1993032234 & f = & fromtab Act sql = & dt = 'loi' & tri = dd + as + rank & rech = 1 & numero = 1.

¹⁹ The Official Gazette of 27 July 2004 published the Law of 16 July 2004 - the International Private Law Code which came into force on 1 October 2004. CHAPTER X: is headed 'Legal persons'. Article 109 concerns: The jurisdiction for legal entities: Notwithstanding the general provisions of this law, Belgian courts are competent to hear any application concerning the validity, operation, dissolution or liquidation of a legal person if the principal or registered office of that person is located in Belgium during the introduction of the proceeding. «Article 110 concerns the law applicable to corporations: "The corporation is governed by the law of the State in which its principal office is located upon its creation. If foreign law designates the law of the State under which the corporation was formed, the law of that State is applicable. «CHAPTER XI. Collective insolvency. Article 118 covers jurisdiction in insolvency matters: "§ 1. Notwithstanding the general provisions of this law, Belgian courts have jurisdiction to open insolvency proceedings in the cases provided for in Article 3 of the Insolvency Regulation.

Article 3 § 1, 9° of the Banking Act defines liquidation proceedings as: collective proceedings opened and controlled by administrative or judicial authorities with the aim of realizing assets of a credit institution under the supervision of those authorities. For credit institutions referred to in Title II, such a procedure corresponds to an insolvency procedure governed by the Insolvency Act of 8 August 1997;²⁰

Article 3 § 1, 10° [of the {Banking Act}?] **[defines the judicial and administrative authorities competent to deal with reorganisation of banks as the Tribunal of Commerce and the CBFA respectively]²¹. [Article 3 § 1, 10° [of the {Banking Act}?] **defines the Tribunal of Commerce as the judicial authority with jurisdiction to deal with liquidation of a bank²². Article 109 § 1 of the Banking Act limits the jurisdiction of the competent authority to re-organisation of a Belgian credit institution as defined in Part II of the Act. Article 109 § 8 [of the Banking Act] **[similarly limits the jurisdiction of the Tribunal of Commerce to open insolvency proceedings to proceedings in respect of Belgian credit institutions as defined in Part II of the Act.]******

This suggests that the *lex specialis* of the Banking Act derogates from the *lex generalis* of the IPLC so that in fact, **only those members of a group of companies governed by Belgian law, and subject to the jurisdiction of the Belgian judicial and administrative authorities, may be the subject of such a “collective” procedure.**

Therefore, the proceedings for so called concentration or extension of insolvency proceedings (“*les procédures en confusion ou en extension de faillite*”) that were in vogue in the jurisprudence of the 1980s, but which, following judgments of the Court of Cassation, have been of more limited application in recent years, could not in any event be applied to subsidiaries or

In other cases, they are responsible:

1 ° to open main proceedings: when the principal or registered office of a corporation is located in Belgium, or the home of an individual is located in Belgium;

2 ° to open territorial proceedings when the debtor has an establishment situated in Belgium.

§ 2. When the Belgian judge has jurisdiction to open insolvency proceedings on the basis of the Insolvency Regulation or § 1, it is also to hear challenges that derive directly.

§ 3. Recognition in Belgium of a court decision opening a foreign main proceeding does not preclude the opening of territorial proceedings by a Belgian judge. "

²⁰ 9° par procédure de liquidation : une procédure collective ouverte et contrôlée par des autorités administratives ou judiciaires dans le but de la réalisation des biens d'un établissement de crédit sous la surveillance de ces autorités. Pour les établissements de crédit visés au Titre II, une telle procédure correspond à la faillite régie par la loi du 8 août 1997 sur les faillites;

²¹ 10° par autorités d'assainissement : les autorités administratives ou judiciaires compétentes en matière de mesures d'assainissement. Pour les établissements de crédit visés au Titre II, ces autorités sont le tribunal de commerce et la CBFA en ce qui concerne leur compétence respective en matière de mesures d'assainissement;

²² 11° par autorités de liquidation : les autorités administratives ou judiciaires compétentes en matière de procédure de liquidation. Pour les établissements de crédit visés au Titre II, une telle autorité correspond au tribunal de commerce en ce qui concerne sa compétence en matière de faillite;

related parent companies of credit institutions in other EEA States, because the Belgian Judges lack relevant international jurisdiction.

111- No other law likely to have an impact on this study sets out legislation on group companies.

Group companies are included in specific legislation such as competition law, tax law and company law, social law, accounting law and others.

Group companies may also be the subject of regulations or judicial decisions in criminal or administrative proceedings.

These laws may have an impact on the practical implementation of the reorganization or insolvency of entities but not on the relevant insolvency law as such.

68- Is there any special legislation or court practise that specifically applies to a banking group?

112- Neither the law on composition, nor on business continuity, nor the Insolvency Act²³ itself contains provisions relating to banks. To the contrary Article 3, paragraph 1 [of the Insolvency Act], in the text applicable before the adoption of the IPLC, expressly provided for exclusion of insurance companies and credit institutions from the definition of the traders principal economic interests precisely because that legislation was applicable to transnational corporations.

That exclusion was consistent with Articles 109 / 1 and 109 / 8 of the Banking Act. **(For the current text of Article 3(1) of the Insolvency Act as amended and replaced in 2002, see below at²⁴).**

69- What is the definition of the "group" that can be treated in a coordinated or joint way?

113- Within the meaning of Article 2§1 of the Royal Decree of 21 November 2005 for supplementary supervision of credit institutions, to determine whether group companies are to be considered as a

²³ **Loi du 8 AOÛT 1997 sur les faillites version consolidée et mise à jour au 28-08-2008 – disponible à http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1997080880&table_name=loi**

²⁴ **<L 2002-09-04/38, art. 2, 003; En vigueur : 01-10-2002>** (§ 1er. Lors d'une procédure territoriale d'insolvabilité ouverte en vertu de l'article 3, § 2, du règlement 1346/2000/CE du Conseil du 29 mai 2000 relatif aux procédures d'insolvabilité ou en vertu de l'article 118, § 1er, alinéa 2, 2°, de la loi du 16 juillet 2004 portant le Code de droit international privé, l'état de faillite de l'établissement s'apprécie indépendamment de la qualité de commerçant du débiteur et de l'état des établissements de celui-ci situés à l'étranger.

Lors d'une procédure territoriale d'insolvabilité ouverte en vertu de l'article 3, § 3, de ce règlement, ou en vertu de l'article 118, § 1er, alinéa 2, 2°, de cette loi à la suite de la reconnaissance d'une décision judiciaire étrangère d'ouverture d'une procédure principale, la faillite est déclarée indépendamment de tout examen de l'état du débiteur.)

'financial services group' the relevant thresholds which are there set out²⁵ are to be applied.

This definition is only valid only for the application of Royal Decree, application as described above. Cette définition n'est valable que pour l'application de l'arrêté royal précité, application décrite ci-dessus.

The November 2005 Royal decree defines the following thresholds:

The activities of a group are deemed to be primarily in the financial sector within the meaning of Article 1, 12 ° if the ratio between the assets of group companies in the financial sector and the total assets of all group companies is greater than 40%.

- Business activities of a group that are part of the same financial sector are deemed significant within the meaning of Article 1, 12 ° e) if:

a) the average of the two following ratios is greater than 10%:

the ratio between the total assets of firms in the group that form part of the same financial sector and the balance-sheet total of the entire group companies belonging the financial sector; and

the ratio between the common solvency requirements of the group companies belonging to the same financial sector and the solvency requirements common to all group companies belonging to the financial sector.

b) the total assets of firms that are part of the financial sector that is of least importance in the group are greater than six billion euros.

A "group" is defined within the meaning of Article 1, 11, as a group of companies consisting of a parent company, its subsidiaries, companies in which the parent or its subsidiaries hold direct or indirect participations as well as companies with which a consortium has been formed and companies that are controlled [by the parent or subsidiaries or in which they hold an interest].

A "financial services group" is one that satisfies the criteria that it includes at least one regulated entity which is a credit institution, insurance company or investment firm whether as the parent company or as a subsidiary.

If the parent company is a regulated entity, it is either: the parent of a financial sector company; or a company that holds a direct or indirect interest in a financial sector company; or a company that is in a consortium with a company belonging to the financial sector.

If the parent company at the head of the group is not a regulated entity, the group's activities [are nevertheless] mainly exercised in the financial sector.

²⁵ Article 2§1 of the Royal Decree of 21 November 2005 op cit provides: "To determine whether a group is a financial services group within the meaning of Article 1, 12 °, the thresholds defined in the following paragraphs are applied".

The group operates in both the insurance industry and in banking and / or investment services sector.

The group's activities in the insurance sector in banking and in investment services sector are 'significant' within the meaning of Article 2 § 3.

114- The laws, on business continuity, insolvency and composition do not contain a definition of a 'group'.

The Courts and Tribunals, for the purposes of this legislation, have never defined a group in a comprehensive manner.

70- Is it possible to include solvent subsidiaries in the formal insolvency proceedings?

115- It is possible to include a solvent company in a composition if it might be affected by [the same] difficulties.

The same is true, a fortiori, in the case of business continuity proceedings. [However] this is not possible in the insolvency proceedings.

Could you explain if the following measures are available in your Member state (please consider both purely internal situations and if a close notion exists in your Member state, please explain):

71- Measures of joint application

116- From a purely [Belgian] national point of view, a Court may open two or more proceedings at the same time, designating the same [competent judicial or administrative authorities], but [it may not consolidate the proceedings as such].

The jurisprudence, on concentration or extension ("les procédures en confusion ou en extension de faillite") subsequent to the opening of proceedings, current in Belgium in the 1980s has only been applied with difficulty, if at all, more recently having regard to developments in the jurisprudence. Moreover, such jurisprudence was only ever applicable in marginal cases that would be unlikely to arise in the context of the subject matter of the study at hand.

72- Measures of joint administrator

117- The reply to point 116 is also applicable here.

73- Measures of joint or coordinated proceedings

118- The reply to point 116 is also applicable here.

74- Measures of cooperation of insolvency administrators

119- Belgian law does not explicitly provide for co-operation between administrators, supervising auditors or judges, nor with regard to composition or reorganization as between trustees, other administrators, supervising auditors or judges.

Although such co-operation could be organised informally it may be impeded in practice by the individual interests of each body of creditors, and the rules concerning public order and equality, ranking and privileges of creditors.

75- Measures of joint reorganization plan

120- M The reply to point 116 is also applicable here.

76- Measures of consolidation or pooling of assets

121- The jurisprudence concerning concentration or extension of proceedings ("les procédures en confusion ou en extension de faillite") has come to a halt and it only applied to marginal cases in any event.

There is no possibility of consolidation or asset pooling except when that is in the interest of each [group of creditors] and also in compliance with the laws on public order, which is a very rare occurrence.

77- Measures of extension of liability

122- An action for damages is available against the directors, even if they are corporate persons, based on the law of director's and officer's liability.

Bringing an action against a shareholder would be extremely difficult even if it is theoretically possible.

The situation as regards proceedings for concentration or extension of the insolvency proceedings ("les procédures en confusion ou en extension de faillite") has been explained above.

78- Measures of contribution orders

123- There is no contribution order as such under Belgian law, even if provisional [interlocutory] procedure may be available against a particular debtor from amongst the body of debtors due, [for example, to an earlier credit, a credit liability (see also point 126) or a joint debt].

79- full/partial liability of majority owner/mother

124- It will be extremely difficult to bring an action for damages against a shareholder.

80- Other practises that are in favour of group treatment

125- Such proceedings might include consider a criminal and civil claims in respect of breach of trust, abuse of company assets, forgery or fraud against the group companies.

3.6. Cross border situations

81- In a national context (when both the parent company and the subsidiaries are located in your Member state), do the reorganization and winding up proceedings apply to the subsidiaries?

126- Yes, if specific conditions are met for these subsidiaries independently.

82- Do the systems you have described above apply to cross-border situations (on which legal basis, i.e territoriality or universal principles)? How would a cross border case be managed in the following cases:

127- Irrelevant since no joint insolvency.
[As regards the company, the IPLC sets out an implementation of an international code, but as regards branches, the Banking Law has incorporated the provisions of the 2001 Directive

83- When the ailing bank in your Member state is the subsidiary of a parent company located in another Member state?

128- No jurisdiction.

84- When the ailing bank in your Member state is the parent company of one or several subsidiary located in another Member state?

129- No jurisdiction.

85- When the ailing bank in your Member state is the subsidiary of a parent company located in a third country?

130- No jurisdiction.

86- When the ailing bank in your Member state is the parent company of one or several subsidiary located in a third country?

131- No jurisdiction.

87- Are there in your legislation specific reorganization/winding up proceedings created for cross border situations (please consider both subsidiaries and branches separately)

132- No.

88- How does (or would) your national legislation deal with the cross-border aspects (are there situations where the Law of another Member state is applied) in the case of subsidiaries, not branches?

133- Each subsidiary is treated separately.

89- How does your court deal with a conflict with another Member states' Law: when there is a divergence between both Laws, can an agreement be concluded under the control of your national judge?

134- As such, no, except in the absence of conflict with the laws of Belgium and provided it is in the interests of the Belgian company.

90- Is there any legal basis for cross border cooperation in reorganization measures or winding up proceedings at group level? Could you explain precisely which authorities actually cooperate under this legal basis and how?

135- No.

Could you explain if the following measures are available in your Member state (please consider only cross-border situations, and if a close notion exists in your Member state, please explain):

91- Joint application

136- No.

92- Joint administrator

137- No.

93- Joint or coordinated proceedings

138- No.

94- Cooperation of insolvency administrators

139- No.

95- Joint reorganization plan

140- No.

96- Consolidation or pooling of assets

141- No.

97- Extension of liability

142- No.

98- Contribution orders

143- No.

99- Full/partial liability of majority owner/mother

144- No.

100- Other practises that are in favour of group treatment:

145- Nothing.

3.7. Efficiency of those proceedings

Do you think the measures you have described above provide for optimal response in order to deal with problems in an ailing cross-border bank regarding:

101- The interest of the entity concerned?

146- No.

102- The interests of its creditors?

147- No.

103- The interests of the deposit holders?

148- No.

104- The interest of shareholders

149- No.

105- The interest of the employees

150- No.

106- Do you think these measures can efficiently solve financial difficulties faced by a bank?

107-

151- No.

108- Are there changes recently adopted or being discussed in your legislation?

152- Not to my knowledge.

4- Recent cases

4.1. Recent cases - pre-insolvency/early intervention measures

Have you had any recent cases of pre-insolvency/early intervention measures applied to a credit institution (standalone, parent, subsidiary or branch) in your country?

109- Please provide examples of institutions which experienced difficulties or failures over the past 4 years in your country that required the implementation of pre-insolvency/early intervention measures?

153- - Kauphing
- Fortis
- Dexia
- KBC

110- Did these credit institutions have branches in other member states?

154- Yes

111- Did these credit institutions have subsidiaries in other member states?

155- Yes

112- Briefly explain the case(s), the procedures followed, the results, the participating authorities, sources of financing

156-

113- Explain how the cross border elements were taken into consideration (cooperation of authorities, administrators etc)

157- - Cooperation between States
- Cooperation between authorities

114- Explain how and by which organisation decisions were made about the appropriate measures to implement.

158-

115- Explain how decisions were made (and by whom) on whether to implement the pre-insolvency/early intervention measures the credit institution.

159-

116- Are there things that you would have wanted to do, as part of pre-insolvency/early intervention that you were not able to do under the current legal framework? If so, what?

160-

4.2. Recent cases – Reorganization and winding-up

Have you had any recent cases of winding-up of a credit institution (standalone, parent, subsidiary or branch) in your country?

117- Which institutions had difficulties or failures over the past 4 years in your country that required the implementation of reorganization and winding-up?

161- None to my knowledge.

118- Did these credit institutions have branches in other member states?

162- Not relevant.

119- Did these credit institutions have subsidiaries in other member states?

163- Not relevant.

120- Briefly explain the case(s), the procedures followed, the results, the participating authorities and the sources of financing

164- Not relevant.

121- Explain how the cross border elements were taken into consideration (cooperation of authorities, administrators etc)

165- Not relevant.

122- Explain how and by which organisation decisions were made about the appropriate measures to implement.

166- Not relevant.

123- Explain how decisions were made (and by whom) on whether to reorganise or wind up the credit institution.

167- Not relevant.

4.3. Contact

What are the main actors (banks, liquidators, law firms,...) in your country involved in reorganization measures and/or winding-up proceedings of credit institutions:

124- Please send us contact details of people/firms who already have applied the provisions of the Winding-up Directive or who might apply the Directive in the future if a credit institution fails in your country.

168- Not relevant.

125- Please also send us contacts details of associations of liquidators (if any) dealing with reorganization measures and/or winding up proceedings in the financial sector.

169- There is no liquidator's association as such.

5- Annex A - The relevant legal texts and cases in English