Consultation on an effective insolvency framework within the EU

Fields marked with * are mandatory.

Introduction

An appropriate insolvency framework is important for society at large and in particular for investors, creditors and debtors. It is an essential element of a good business environment and is therefore important for jobs and growth.

A good insolvency framework maximises the efficiency, predictability and effectiveness of insolvency proceedings. This makes it easier to trade, supports an effective credit system and ensures a favourable investment climate, in turn benefiting the wider economy.

Insolvency frameworks should provide a transparent, predictable and cost-effective set of rules that can be used to preserve and maximise the value of debtors' assets. The rules should make it possible, either to:

- save businesses (by restructuring the existing company or by selling it as a "going concern"); or
- make it easier to liquidate a company and its assets if that company has not prospect of survival.

Efficient insolvency rules could also help increase the recovery rate of debts and avoid the build-up of non-performing loans in the financial system.

The Commission's Annual Growth Survey 2016 explicitly recognises the importance of *'well-functioning insolvency frameworks'*. These are *'crucial for investment decisions since they define rights of creditors and borrowers in the event of financial difficulties'*.

Conversely, inefficient and ineffective frameworks result in the discontinuation of viable businesses, lengthy procedures and a low rate of recovery. This often translates into significant problems for the Member States concerned and for the wider European economy. These problems may take the following forms:

- Unnecessary liquidation of viable businesses, resulting in a loss of productive capacity;
- *De facto* or *de jure* disqualification of failed entrepreneurs or the exclusion from economic life of indebted members of the public;
- Barriers to corporate lending and investment, including cross-border investment. Uncertainty or difficulties over realising value from distressed debt may be particularly pronounced in the case of cross-border lending and investments. This may increase the cost at which investors and creditors are willing to invest in or lend to cross-border borrowers.
- Difficulties for creditors in recovering value from distressed debt. This may contribute to persistently high levels of non-performing loans, which weigh on bank balance sheets and may constrain bank lending.

In the public consultation on a Capital Markets Union, insolvency laws were singled out as one of the key barriers preventing the integration of capital markets in the EU. Consultation respondents broadly agreed that both the inefficiency and divergence of insolvency laws make it harder for investors to assess credit risk, particularly in cross-border investments. Convergence of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress [1].

Focus on restructuring and a second chance:

A clear and effective approach to debt restructuring can benefit both the borrowing and lending sides of the market. Businesses that are in temporary distress should be able to restructure and be saved if their business is viable. Member States' legal frameworks have a crucial role in creating the conditions for successful restructuring, whether within or outside formal insolvency proceedings.

To encourage entrepreneurial activity, entrepreneurs and managers of companies should not be stigmatised when honest business endeavours fail. Individuals should not be deterred from entrepreneurial activity or denied the opportunity for a 'second chance'. Similarly, managers of companies may benefit from clear rules on their disqualification over insolvency-related misconduct.

For consumers (i.e. individuals with debts of a non-professional nature), a possible second chance might give them the incentive to start consuming again and take up gainful employment without the stigma of insolvency burdening them for years on end.

This means that for individual debtors, whether entrepreneurs or consumers, the rules on how to discharge the remaining debt following bankruptcy are important. Any rules providing for debt discharge need to be carefully designed to prevent abuse and incentivise careful management of business debt from the outset.

As a result, in the Capital Markets Union Action Plan, the Commission announced its intention to propose a legislative initiative on business insolvency, including early restructuring and second chance. The legislative initiative seeks to address the most important barriers to the free flow of capital, building on national sets of rules that work well.

The Commission Communication '*Upgrading the Single Market: more opportunities for people and business*' states that the effects of a potential bankruptcy deter individuals from entrepreneurial activity. The prospect of a fresh start for bankrupt entrepreneurs encourages would-be entrepreneurs to start and scale-up new business activities. This creates a more beneficial environment for innovation.

Helping creditors (banks) to recover value in the event of insolvency

The Five Presidents' Report on '*Completing Europe's Economic and Monetary Union*' identified insolvency laws as a key component of Financial Union. An effective insolvency framework should also contribute to the efficient management of defaulting loans and reduce the accumulation of non-performing loans on banks' balance sheets.

This position on insolvency reform was set out in the Commission Communication '*Towards the Completion of the Banking Union*' of 24 November 2015. Efficient insolvency frameworks would increase recovery rates and improve pricing of non-performing loans in the interest of developing a secondary market. Such loans would not then remain on banks' balance sheets for protracted periods of time, debts could be at least partially recovered and debtors could have a fresh start.

The Commission has examined national insolvency regimes as part of the European Semester, the EU's economic governance framework. Lengthy, inefficient and costly insolvency proceedings in some Member States were found to be a contributing factor to insufficient post-crisis debt deleveraging in the private sector and exacerbating debt overhang.

Objectives of this consultation

This consultation asks about the key insolvency barriers. It focuses in particular on gathering views on:

- the efficient organisation of debt restructuring procedures;
- the rationale and the process for debt discharge for entrepreneurs (and its possible extension to consumers).

Beyond these two policy areas, the consultation also invites views on selected aspects of efficient and effective insolvency frameworks which may have particular importance for the Internal Market or the integration of capital markets. Such frameworks should help to maximise the value received by creditors, shareholders and other stakeholders.

The responses will be used to identify which aspects should form part of a legislative initiative [2] and other possible complementary action in this field. The responses will be taken into account alongside the results of an external economic study carried out on behalf of the Commission as well as other evidence and analysis. The results of the consultation are without prejudice to any potential future Commission proposal.

This consultation is run via the 'EU-Survey' online tool, which makes it easier to collect answers from the widest possible range of respondents. In addition to choosing from the pre-defined answers, respondents are encouraged to explain their views or add additional information or explanations in the free text boxes provided. Respondents can add additional information at the end of the consultation and/or can do so by clicking on the 'other' options and the boxes that follow. Alternatively, separate contributions can be sent to the dedicated mailbox.

[1] An Inception Impact Assessment which contains a detailed description of the problems found in this area, as well as the policy objectives and options for action is available on http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_025_insolvency_en.pdf.
[2] The Commission Work Programme for 2016 announced a legislative initiative framing a new approach to business failure and insolvency.

I. Information about you

This consultation is addressed to the broadest public possible, as it is important to get views and input from all interested parties and stakeholders.

*1. Please indicate your role for the purpose of this consultation

- ○ Private individual
- ○ Self-employed person
- ○ Company
- ○ Bank, credit institution, investment fund, financial institution
- ○ Judge
- ○ Insolvency practitioner
- ○ Other legal practitioner
- ○ Business adviser or business support organisation
- ○ Public authority
- ○ Academic
- ◉ Think tank
- ○ Other

Name of your organisation (if applicable)

Droit & Croissance – Rules for Growth

2. Is your organisation included in the Transparency Register?

(If your organisation is not registered, you can register here. You do not have to be registered to reply to this consultation.)

- ◉ Yes
- ○ No

If you are registered, please indicate your register ID Number:

656838421263-12

*3. Have you had practical experience with insolvency proceedings?

- ◉ Yes
- ○ No

*In what capacity?

- ( ) As a creditor
- ( ) As an employee in the context of an insolvency proceeding of my employer
- ( ) As an owner or director of an insolvent business
- ( ) As an over-indebted private individual or consumer
- ( ) As a judge
- (•) As an insolvency practitioner
- ( ) As another kind of legal practitioner
- ( ) As a business adviser or business support organisation
- ( ) Other

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4. Please indicate the country where you are located:

- ○ Austria
- ○ Belgium
- ○ Bulgaria
- ○ Cyprus
- ○ Czech Republic
- ○ Germany
- ○ Denmark
- ○ Estonia
- ○ Greece
- ○ Spain
- ○ Finland
- ◉ France
- ○ Hungary
- ○ Croatia
- ○ Ireland
- ○ Italy
- ○ Lithuania
- ○ Luxembourg
- ○ Latvia
- ○ Malta
- ○ Netherlands
- ○ Poland
- ○ Portugal
- ○ Romania
- ○ Sweden
- ○ Slovenia
- ○ Slovak Republic
- ○ United Kingdom
- ○ Non-EU country

5. Please provide your contact information:

*

First name

Sophie

***Last name**

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*

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***6. Please indicate your preference over the publication of your response on the Commission's website:**

- (•) Under the name given: I consent to publication of all information in my contribution and I declare that none of it is subject to copyright restrictions that prevent publication.
- ( ) Anonymously: I consent to the publication of all information in my contribution, except my name/the name of my organisation and I declare that none of it is under copyright restrictions that prevent publication.
- ( ) Please keep my contribution confidential (it will not be published, but will be used internally within the Commission)

Please note that regardless of the option chosen, your contribution may be subject to a request for access to documents under Regulation 1049/2001 on public access to European Parliament, Council and Commission documents. In this case, the request will be assessed against the conditions set out in the Regulation and in accordance with applicable data protection rules.

II. Questions

In general, an insolvency framework should ensure that viable businesses can be restructured and continue operating, while non-viable ones can be quickly liquidated. Over indebted individuals should also have access to insolvency proceedings and discharge provisions subject to certain conditions. Member States have in place different systems, some of which comply at least partially with these requirements and some of which do not. These differences may have an impact on the functioning of the internal market.

1. Scope

1.1. Which measures should be taken to achieve an appropriate insolvency framework within the EU? (choose all that apply)

- [x] a) Preventive measures to enable the restructuring of viable businesses
- [x] b) Measures to increase the recovery rates of debts in insolvency
- [ ] c) Measures to ensure the discharge of debts for entrepreneurs (individuals)
- [ ] d) Measures to ensure the discharge of debts for consumers
- [ ] e) Measures governing employees' rights in insolvency
- [x] f) Measures ensuring the enforcement of debts
- [x] g) Other measures
- [ ] h) No opinion

Please explain

a) Preventive measures to enable the restructuring of viable businesses

We are of the view that preventive measures to enable the restructuring of viable businesses must avoid the creation of formal pre-insolvency procedures

The case of the French system, now piling up four such pre insolvency procedures has proved inefficient and costly, in terms of restructuring and offering an opportunity for rebound to viable businesses.

Various formal pre-insolvency proceedings available under French law have proved counter productive because they change the order of priority of creditors and introduce substantial violations of their rights and the contractual "absolute priority rule". This only exacerbates the antagonisms between parties during out of court negotiations and lead to suboptimal agreements which do not adequately or sufficiently restructure the balance sheet of the debtors.

The inefficiency of formal pre insolvency procedures lead to the following negative effects :
- costly, lengthy and protracted negotiations during which the debtor generally suffers considerable destruction of value and builds up large social and corporate tax liabilities costing billions to the French Treasury;

- companies cannot properly deleverage their balance sheet due to
- the violation of the rights of secured creditors;
- a restructuring process slowed and frequently held to ransom by particular groups of creditors or by shareholders who no longer have any interest in seeing the company rebound;
- a diversion of management's time and resources away from the problems of company
- companies, (especially LBO companies) abusing pre-insolvency proceedings by filing for protection numerous times without properly restructuring the company and leading to the liquidation of otherwise viable companies.
- new money investors often demanding double digit interest rates in spite of their super-senior priority privilege, expecting the same return as a shareholder would under "normal" (non distressed) circumstances, proving that the company has not been properly deleveraged and that substantial risk remains.

These negative effects prevent viable businesses from restructuring their balance sheet quickly and with enough new capital to effectively bounce back.

The restructuring of viable businesses is been served by the multiplication of formal and inefficient procedures made available to debtors ahead of the formal insolvency procedure.

Only a formal insolvency procedure that is predictable, reasonably rapid, independently conducted and supervised, especially for the determination of the debtor's enterprise value can reach that objective. This is because a formal insolvency procedure that is swift, fair and predictable is the only effective way to encourage parties to negotiate an effective restructuring far ahead of insolvency. The parties are thus encouraged to negotiate "in the shadows" of the formal procedure in order to avoid it.

Creating an incentive for the parties to negotiate out of court, saves time and public funds. It forces them to make painful decisions that will give the debtor enough resources to bounce back before it is too late..

A fair and predictable bankruptcy procedure requires the following elements :
- A process respecting the rights of creditors by distinguishing secured from unsecured creditors, junior from senior creditors and grant shareholders the status of unsecured junior creditors (nothing more)
- A valuation methodology in order to determine the enterprise value of the debtor and to distinguish its value as a "going concern" from its "liquidation" value.
- A cram down process in order to effectively transfer the power away from shareholders who should not be allowed to hold the restructuring hostage to their own interests

1.2. To what extent do the existing differences between the laws of the Member States in the areas mentioned below affect the functioning of the Internal Market?

(For example, differences affect the Internal Market when creditors or investors and debtors are located in different Member States and this has an impact on the recovery of debts, the legal certainty of transactions, the quantification of risks etc.)

	To a large extent	To a considerable extent	To some extent	Not at all	No opinion
a) Preventive measures to enable the restructuring of viable businesses	○	◉	○	○	○
b) Measures to increase the recovery rates of debts in insolvency	◉	○	○	○	○
c) Measures aimed to ensure the discharge of debts for entrepreneurs (individuals)	○	○	◉	○	○
d) Measures to ensure the discharge of debts for consumers	○	○	◉	○	○
e) Measures governing employees' rights in insolvency	◉	○	○	○	○
f) Measures ensuring the enforcement of debts	◉	○	○	○	○
g) Other measures	○	◉	○	○	○

Please explain

a) Preventive measures to enable the restructuring of viable businesses

The differences existing between the laws of the Member States :
- increase the complexity, unpredictability and costs of restructuring for viable but distressed companies operating in different Members States;
- make it difficult for domestic but especially foreign investors to understand and therefore assess the risks of their investments;
- make it difficult for investors to invest in distressed companies across jurisdictions;

A full harmonisation instrument would:
- make balance sheet restructuring faster, fairer and more efficient;
- create a level playing field for investors across the EU;
- facilitate cross border investments and the better re allocation of capital;
- encourage the emergence of a deep and active market for investors specialized in distressed companies across the EU;
- create more opportunities to find investors willing to give a second chance to distressed companies, their clients, employees and suppliers with new shareholders and under a new management.

b) Measures to increase the recovery rates of debts in insolvency

The differences existing between the laws of the Member States:
- hinder the development of specialized funds investing in distressed but viable companies;
- hinder the development of bond markets.

The respect of creditor rights is essential to the assessment of credit risk, access to bank financing and the facilitation of cross border investments

In France, for example, Insolvency proceedings do not provide adequate protection for the right of creditors and the order of priority of their claims.

A full harmonisation instrument would:
- guarantee creditor rights according to the seniority of their claims and the enterprise value of the debtor as an on-going concern
- provide a consistent and harmonized valuation framework to provide stakeholders with relative certainty of the outcome of a judicial restructuring. At present, creditors in France and elsewhere in continental Europe are in effect all but excluded from the determination of the value of the debtor as an on going concern and face a single alternative : accept the valuation determined by the management (often in collusion with the shareholders), the conciliator or administrator, or see the company go into formal liquidation.

c) Measures aimed to ensure the discharge of debts for entrepreneurs (individuals)

The differences existing between the laws of the Member States:
- slow the development of entrepreneurs and their ability to bounce back.

A full harmonisation instrument would;
 - give a second chance to honest but bankrupt entrepreneurs, thus encouraging risk taking and innovation.

e) Measures governing employees' rights in insolvency

The differences existing between the laws of the Member States :
- make it difficult for investors to assess risks attached to employee rights, privileged claims and employee liabilities.

In France, for example, employee claims can be substantial and are mot always properly reflected in the debtor's enterprise value. French insolvency law is heavily geared towards the preservation of employment at all cost, including to the detriment of other stakeholders and to avoid necessary labor restructuring. Courts have broad authority to artificially minimize the enterprise value of the debtor in order to evict shareholders and creditors in favor of third party acquirers guaranteeing the preservation of employment.

A full harmonisation instrument would:
- bring clarity to the often complex social tax liabilities and potential employment claims of employees;
- create a level playing field for acquirers offering better long term restructuring plans including labor restructuring.

f) Measures ensuring the enforcement of debts

The differences existing between the laws of the Member States:
- hinder the development of specialized funds investing in distressed but viable companies.

The respect of creditor rights is essential to the assessment of credit risk, access to bank financing and the facilitation of cross border investments

A full harmonisation instrument would:
- guarantee creditors rights according to the seniority of their claims and the enterprise value of the debtor as an on going concern
- provide a consistent and harmonized valuation framework to provide stakeholders with relative certainty of the outcome of a judicial restructuring. At present, creditors in France and elsewhere in continental Europe are in effect all but excluded from the determination of the value of the debtor as an on going concern and face a single alternative : accept the valuation determined by the management (often in collusion with the

shareholders), the conciliator or administrator, or see the company go into formal liquidation.

1.3. To what extent do the measures mentioned below have an impact on the creation and operations of newly established companies?

	To a large extent	To a considerable extent	To some extent	Not at all	No opinion
a) Preventive measures to enable the restructuring of viable businesses	○	◉	○	○	○
b) Measures to increase the recovery rates of debts in insolvency	○	◉	○	○	○
c) Measures to ensure the discharge of debts for entrepreneurs (individuals)	○	◉	○	○	○
d) Measures governing employees' rights in insolvency	○	○	◉	○	○
e) Measures ensuring the enforcement of debts	○	◉	○	○	○
f) Other measures	○	○	○	○	○

Please explain

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a) Preventive measures to enable the restructuring of viable businesses
Facilitate debt restructuring, access to financing.

b) Measures to increase the recovery rates of debts in insolvency
Facilitate debt restructuring, access to financing.

c) Measures to ensure the discharge of debts for entrepreneurs (individuals)
Facilitate entrepreneurship, risk taking and innovation.

d) Measures governing employees' rights in insolvency
Facilitate debt restructuring, access to financing.

e) Measures ensuring the enforcement of debts
Facilitate debt restructuring, access to financing.

Academic studies have shown that entrepreneurs fail to consider bankruptcy
laws at the time of incorporation of their company because they do no think
about failure.
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2. Saving viable businesses in difficulty

In general, an insolvency framework should ensure that viable businesses can be restructured and continue operating. However, the conditions under which a company is deemed viable and should be restructured or liquidated differ from Member State to Member State. In this consultation, the term ‘restructuring’ covers both restructuring as an existing company and the sale of a company as a going concern to another company. There is also a difference between the viability of a legal entity and that of a business contained within it or even spread across several legal entities.

The rules regulating restructuring procedures (including the contents of the restructuring plan and related procedural issues) have a crucial role in creating the conditions for successful restructuring, whether within or outside insolvency proceedings. There are major differences across Member States in the rules on the procedure for adopting a restructuring plan, including required majorities for its adoption and the rights of dissenting creditors.

Laws of Member States also differ on the standards applied by the courts when asking for a stay of individual enforcement actions (i.e. a suspension of the right to enforce a claim by a creditor against a debtor, also known as a ‘moratorium’) to be granted, when approving the plan and the possibility to challenge such approval. Moreover, under certain national insolvency frameworks, courts may have wide discretionary powers over the approval of the plan and possible changes to it, while under other laws these powers are rather more limited.

Rigid and impracticable rules may hinder the chances of adopting a restructuring plan. Restructuring viable businesses avoids unnecessary liquidation and thus helps safeguard the debtor’s assets as a going concern, maximising value for owners and shareholders as well as for creditors. An efficient business restructuring procedure may also give equity investors a chance to recover the value of their investment. At the same time, restructuring procedures must be safeguarded against misuse and depletion of the assets in the process.

There are also significant differences between the criteria for opening insolvency proceedings. In certain Member States, insolvency proceedings may be opened only for debtors that are already affected by financial difficulties or are already considered insolvent. In others, proceedings can be opened for solvent debtors that anticipate facing insolvency in the imminent future. Such proceedings do not have the character of informal pre-insolvency proceedings. Further differences may also be found in insolvency tests (liquidity test, balance sheet test, over-indebtedness test) and in the obligation for a debtor to file for the opening of insolvency proceedings when insolvency occurs.

In a company, directors exercise corporate powers which are generally balanced with duties of care prohibiting wrongful trading. Some Member States have certain obligations in place for directors in the period before insolvency occurs and impose liability for any harm caused by continuing to operate when it was either clear or should have been foreseen that insolvency could not be avoided. The rationale for such provisions is to create appropriate incentives for early action through the use of voluntary restructuring negotiations. It may also encourage directors to obtain competent professional advice when financial difficulties occur and thus avoid insolvency.

GENERAL QUESTIONS

2.1. To what extent do existing differences between the laws of the Member States in the areas mentioned below affect the functioning of the Internal Market?

(For example, differences affect the Internal Market when creditors or investors and debtors are located in different Member States and this has an impact on the recovery of debts, the legal certainty of transactions, the quantification of risks etc.)

	To a large extent	To a considerable extent	To some extent	Not at all	No opinion
a) Measures to give access to a toolkit enabling fast restructuring	○	◉	○	○	○
b) Measures to ensure the assessment of a debtor's viability	○	◉	○	○	○
c) Measures to provide minimum standards in relation to the definition of insolvency	○	◉	○	○	○
d) Measures to lay down the duties of directors in companies in financial distress	○	◉	○	○	○
e) Measures to protect new financing given to companies that are being restructured	◉	○	○	○	○
f) Measures to clarify the position of shareholders of companies in insolvency or close to insolvency	◉	○	○	○	○
g) Measures to promote assistance to financially distressed debtors	○	◉	○	○	○
h) Other measures	◉	○	○	○	○

Please specify which other measures in national laws affect the functioning of the Internal Market.

The insolvency laws of the various Member States are too different

In France, for example, the current insolvency procedure presents many flaws, as it does not provide for:
- the safeguarding of the rights of creditors;
- a valuation methodology to determine the enterprise value of the debtor as an on-going concern;
- a cram down process to transfer power away from shareholders;

Thus:
 - 85% of companies successfully emerging from a formal insolvency procedure (redressement judiciaire) on a stand alone basis, end up in liquidation in the following five years, making these procedures highly ineffective;
- 50% of companies successfully emerging from a formal pre-insolvency procedure (procedure de sauvegarde), end up in liquidation in the following five years, making these highly ineffective as well;
- There is no active market for the shares or the debt of debtors who have filed fo formal insolvency proceedings, as such market exists in the United States of America (Debtor In Possession) ;
- Banks and other lenders often demand significantly higher collateral and personal guarantees than in other jurisdictions such as Germany or the United Kingdom;
- Businesses in France are forced to rely excessively and dangerously on obtaining trade credit in order to finance their working capital needs, compared to Germany

2.2. What impact do the different types of measures mentioned below have on saving viable businesses?

	Very strong impact	Considerable impact	Little impact	No impact at all	No opinion
a) Measures to give access to a toolkit enabling fast restructuring	◉	○	○	○	○
b) Measures to ensure the assessment of the viability of a debtor	◉	○	○	○	○
c) Measures to provide minimum standards in relation to the definition of insolvency	○	○	◉	○	○
d) Measures to lay down the duties of directors in companies in financial distress	○	◉	○	○	○
e) Measures to protect new financing given to companies that are being restructured	◉	○	○	○	○
f) Measures to clarify the position of shareholders of companies in insolvency or close to insolvency	◉	○	○	○	○
g) Measures to promote assistance to financially distressed debtors	◉	○	○	○	○
h) Other measures	○	○	○	○	○

Please specify which other measures have an impact on saving viable businesses.

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- Measures to provide a harmonized, fast, fair and predictable formal
insolvency procedure
- Measures to encourage the emergence of a market for distressed companies in
the EU
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SPECIFIC QUESTIONS

2.3. If creditors are situated in a different Member State(s) than their debtors, what impact does this have on the restructuring of the business of debtors as opposed to a purely national situation?

- a) Very significant impact
- (●) b) Significant impact
- c) Little impact
- d) No impact at all
- e) No opinion

Please explain your choice, including which aspects are particularly affected.

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Foreign creditors face increased costs to participate in the restructuring and
understand local laws.
They will often behave based on different assumptions than local creditors and
realize too late that local insolvency law does not enforce their rights.
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2.4. When should debtors have access to a framework of restructuring measures enabling them to restructure their business/liabilities?

- a) Only once the debtor is already insolvent
- b) Before the debtor is insolvent, but where there is a likelihood of imminent insolvency (for example because the debtor has lost a major client)
- (●) c) At any time
- d) At another moment in time
- e) No opinion

2.4.1. Should such restructuring measures always require, at some stage, the opening of some sort of a formal procedure in which a court (or other competent authority or body) is involved?

- ○ a) Yes, as of the beginning of the negotiations on a restructuring plan
- ○ b) Yes, from the moment it becomes necessary to stay enforcement actions (moratorium) or obtain confirmation for the restructuring plan
- ◉ c) No, the involvement of a court should not be an absolute requirement
- ○ d) Other options
- ○ e) No opinion

2.4.2. Should such restructuring procedures always require publicity (e.g. through an Insolvency Register)?

- ○ a) Yes, as of the beginning of the negotiations on a restructuring plan
- ○ b) Yes, from the moment it becomes necessary to stay enforcement actions (moratorium) or obtain confirmation for the restructuring plan
- ◉ c) No, publicity should not be an absolute requirement
- ○ d) Other options
- ○ e) No opinion

2.5. Restructuring measures in which the courts are involved to a lesser degree (e.g. only for the confirmation of a restructuring plan) or not at all (e.g. an out-of-court process) should be available to: (choose all that apply)

- ☑ a) Microenterprises (up to 10 employees)
- ☑ b) Small and medium-sized enterprises, excluding microenterprises
- ☑ c) Large enterprises
- ☐ d) Other
- ☐ e) No opinion

2.6. Who should do the assessment of whether a debtor is viable and fit for restructuring?

- ○ a) The courts or external experts appointed by the courts
- ○ b) The debtor or external experts chosen by the debtor
- ◉ c) The creditors or external experts chosen by the creditors
- ○ d) Other persons or bodies than those listed in points a), b) or c)
- ○ e) No one
- ○ f) No opinion

2.7. Is there a need for a common definition of insolvency at EU level?

- a) Yes
- (●) b) No
- c) Other
- d) No opinion

2.8. Should debtors in the context of restructuring measures be able to keep control over the day-to-day operations of their business (so-called 'debtor-in-possession arrangements')?

- a) Yes, without any supervision or control
- (●) b) Yes, but subject to supervision from a suitably qualified mediator/ supervisor/ court
- c) Yes, but subject to conditions other than supervision from a suitably qualified mediator/ supervisor/ court
- d) No, debtors should not be able to keep control over the day-to-day operations at all
- e) Other
- f) No opinion

Please explain

Debtor in Possession arrangements provide valuable financing opportunities for debtors in distress, provided that the debtor agrees to a reorganization plan with the new investor.
Therefore, the management may be allowed to keep the control of the company. However, creditors should be allowed to submit their own reorganization within a short period (plan four months) after the filling for bankruptcy proceedings.

2.9. When should debtors be able to ask for a stay of individual enforcement actions?

- (●) a) Only in formal insolvency proceedings
- b) In formal insolvency proceedings and in preventive/pre-insolvency restructuring procedures
- c) Other
- d) No opinion

Please explain

Stays of individual enforcement actions create a fundamental disruption in the balance of rights bargained by the parties at the time of the initial investment
They can create significant and undue transfers of wealth from creditors to shareholders
This is why they should be strictly limited to the formal insolvency proceedings and not be granted before
Any stay available before the formal proceedings creates a violation of rights and leads to sub optimal agreements which do not allow the debtor to achieve an efficient restructuring to bounce back.

2.9.1. For how long should the enforcement of actions of individual creditors be stayed once the restructuring attempts are ongoing?

- a) 2-3 months, without the possibility of renewal
- b) 4-6 months, without the possibility of renewal
- c) 2-3 months, with the possibility of renewal in certain circumstances
- d) 4-6 months, with the possibility of renewal in certain circumstances
- e) Any time limit set by the court subject to the fulfilment of certain conditions
- f) Other
- g) No opinion

Please explain

Restructuring should be achieved in a minimal amount of time in order to avoid the destruction of value caused by the financial distress of the debtor.
Renewal should be authorized in limited circumstances.

2.9.2. Should an individual creditor be allowed to ask the court to lift the stay granted to the debtor?

- a) Yes, in all cases
- b) Yes, subject to certain conditions
- c) No
- d) Other
- e) No opinion

Please explain

All creditors should be treated equally but a stay may be lifted under limited conditions, to preserve the activities of the business and to prevent value destruction
The US concept of adequate protection should be introduced in EU law.
If a secured creditor can show that the bankruptcy proceedings entails a destruction of value of the underlying assets of his collateral, unless that the debtor is able to provide adequate protection, the court should lift the stay granted to the debtor.

2.10. Should a restructuring plan adopted by the majority of creditors be binding on all creditors provided that it is confirmed by a court?

- a) Yes, including on secured creditors
- b) Yes, but secured creditors should be exempted
- c) No
- d) Other
- e) No opinion

2.10.1. Should a 'cross-class cram down' (i.e. the confirmation of the restructuring plan supported by some classes of creditors in spite of the objections of some other classes of creditors), be possible?

- a) Yes, in all cases
- b) Yes, but subject to certain conditions
- c) No
- d) Other
- e) No opinion

Please specify

The conditions of a cramdown are
- a valuation methodology to determine the debtor's "enterprise value" as an on-going concern
- the distribution of all creditors under their order of priority
- the cramdown of all creditors and shareholders who fall below this value (are out of the money)
- the cramdown of dissenting investors in a specific class of creditors can occur provided that they are not worse off than they would have been in the event of a liquidation
- an appeal process for the determination of the debtor's "entreprise value" as an on-going concern

2.11. Should financing necessary for the implementation of a restructuring plan/ensuring current operations be protected if the restructuring subsequently fails and insolvency proceedings are opened?

- (●) a) Yes, always
- ( ) b) Yes, but only if agreed in the restructuring plan and confirmed by the court
- ( ) c) No, never
- ( ) d) Other
- ( ) e) No opinion

2.12. Should directors of companies be incentivised to take appropriate preventive measures if companies are in distress but not yet insolvent, for example by being able to avoid related liability?

- (●) a) Yes
- ( ) b) No
- ( ) c) Other
- ( ) d) No opinion

Please explain

Directors should have an incentive to restructure the debtor's balance sheet in advance of insolvency.
This is to;
- negotiate with all stakeholders to avoid insolvency proceedings
- reduce the inevitable destruction of value occurring when a debtor is under financial distress
- maximize the chances of the debtor to bounce back
The best way to create this incentive is to strip directors of their power to do whatever they want in a formal bankruptcy proceedings.
A predictable insolvency proceedings creates appropriate and effective ex ante incentives for the parties to negotiate, and accept the compromises necessary for an effective restructuring.
Directors of companies should be held liable for insolvency only in very limited circumstances.

2.13. Should Member States be encouraged to take specific action to help debtors in financial distress, such as setting up special funds or insurance systems covering the provision of cheap and accessible restructuring advice, possibly subject to certain conditions?

- a) Yes, for all debtors
- b) Yes, but only for SMEs
- c) Yes, but only for SMEs and individuals
- d) Yes, but only for individuals
- e) No
- f) Other actions
- g) No opinion

3. Second chance

The Competitiveness Council in May 2011[3] invited Member States to promote a second chance for entrepreneurs by limiting, where possible, the discharge period and enabling debt settlement for honest entrepreneurs once they are insolvent. An 'honest' failure is a case in which the business failure occurred through no obvious intentional fault of its owner or director, i.e. it was honest and above-board. This would be contrary to cases in which the bankruptcy was fraudulent, for example where the debtor transferred its assets outside the jurisdiction, made an advance payment to a single creditor, accumulated excessive private expenses, etc.

An important element to support an effective second chance regime is the 'time to discharge'. This is the time from when an entrepreneur enters into insolvency proceedings to when he/she can effectively restart an entrepreneurial activity. Currently, the discharge time varies significantly from country to country. In some countries, honest entrepreneurs in bankruptcy are automatically granted a discharge immediately once liquidation of the assets is finished. In others, bankrupted entrepreneurs have to apply for a discharge, while in some countries they cannot obtain discharge at all.

Furthermore, the procedures to release consumers from a 'debt trap' vary significantly between Member States. In some countries, there is no bankruptcy or debt settlement procedure for consumers. In others, a general insolvency regime with some changes applies to consumers.

[3] Council of the European Union, Competitiveness (Internal Market, Industry, Research and Space), Brussels, 30 and 31 May 2011. Press release available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/122359.pdf.

3.1. Should honest debtors (entrepreneurs and consumers) who are over-indebted be offered the chance to restructuring their debt?

- (●) a) Yes, entrepreneurs (individuals) as well as consumers
- ( ) b) Only entrepreneurs (individuals) for debts related to their professional activity
- ( ) c) Only consumers
- ( ) d) Neither entrepreneurs (individuals) nor consumers
- ( ) e) Other options
- ( ) f) No opinion

Please explain

Studies (in particular the work of Senator Elisabeth Warren in the US) have shown that the risk of frauds is limited

3.1.1. To what extent do existing differences between the laws of Member States in the area of second chance affect the functioning of the Internal Market?

(For example, differences affect the Internal Market when creditors or investors and debtors are located in different Member States and this has an impact on the recovery of debts, the legal certainty of transactions, the quantification of risks etc.)

- ( ) a) To a large extent
- ( ) b) To a considerable extent
- ( ) c) To some extent
- (●) d) Not at all
- ( ) e) No opinion

3.2. Should over-indebted individuals have access to free or low cost debt advice?

- (●) a) Yes, entrepreneurs (individuals) and consumers, possibly subject to certain conditions
- ( ) b) Only entrepreneurs (individuals) for debts related to their professional activity, possibly subject to certain conditions
- ( ) c) Only consumers, possibly subject to certain conditions
- ( ) d) Neither entrepreneurs (individuals) nor consumers
- ( ) e) Other options
- ( ) f) No opinion

Please explain what particular conditions, if any, should be attached to such access.

3.3. Should a full discharge of debts, possibly subject to certain conditions, be offered to all over-indebted individuals provided they are 'honest' debtors?

- (●) a) Yes, to entrepreneurs (individuals) and consumers
- ( ) b) Only to entrepreneurs (individuals) for debts related to their professional activity
- ( ) c) Only to consumers
- ( ) d) Neither to entrepreneurs (individuals) nor to consumers
- ( ) e) Other options
- ( ) f) No opinion

Please explain

3.3.1. Should the test of 'honesty' be made the same across all EU Member States?

- ( ) a) Yes
- ( ) b) No
- (●) c) No opinion

3.3.2. What should be the maximum discharge period for honest debtors who cannot repay their debts (in other words, what should be the period after which such debtors would be completely discharged from debt, as long as they meet the obligations imposed by national laws)?

- ( ) a) 1 year or less
- ( ) b) 3 years
- ( ) c) 5 years
- ( ) d) More than 5 years
- ( ) e) Other
- (●) f) No opinion

3.3.3. . In the case of debtors that are insolvent, should a full discharge be conditional on the repayment of a certain amount of debt?

- (●) a) Yes
- ( ) b) No
- ( ) c) Other options
- ( ) d) No opinion

Please specify what that amount should be

a difference must be drawn between secured debt and unsecured debt

3.3.4. Which special types of debt should be excluded from discharge? (choose all that apply)

- [ ] a) Tort claims
- [ ] b) Fines
- [x] c) Child support
- [ ] d) Tax and other public liabilities
- [ ] e) Other types of debt
- [ ] f) No opinion

3.4. If it is decided that the discharge of debts should be offered to all individuals, whether entrepreneurs or consumers, should the conditions for the discharge be the same?

- ( ) a) Yes
- ( ) b) No, the conditions applicable to entrepreneurs should be stricter than those applicable to consumers
- ( ) c) No, the conditions applicable to consumers should be stricter than those applicable to entrepreneurs
- ( ) d) Other options
- (●) e) No opinion

4. Increasing the efficiency and effectiveness of the recovery of debts

The efficient and effective recovery of debts depends on many factors. The recovery rates of debts may depend on:

- the effectiveness of insolvency proceedings;
- their length;
- the specialisation of the people dealing with them;
- the qualification of the directors of distressed companies.

The recovery rate of debts also has an impact on high levels of non-performing loans in the EU.

The laws of Member States differ significantly on the priority of claims in insolvency. This has an impact on how insolvency proceedings are run and how debts are recovered. Laws also differ on possibilities for avoiding contracts detrimental to companies and creditors. Differences concern conditions under which a detrimental act can be avoided (avoidance actions) and the period within which such acts can be challenged.

Also, the laws of Member States have different rules on insolvency practitioners themselves, namely the qualifications and eligibility for their appointment and also their licensing, regulation, supervision, professional ethics and conduct. The questions related to insolvency practitioners concern any mediators or supervisors engaged in the insolvency process. Moreover, in most Member States, insolvency proceedings are administered by a judicial authority, often through commercial courts, courts of general jurisdiction or through specialised insolvency courts. Sometimes judges have specialised knowledge and responsibility for insolvency matters, while in other cases insolvency matters are just one of a number of wider judicial responsibilities of the courts.

There is currently no rule at EU level which ensures that directors who have been disqualified in one Member State, e.g. because of fraudulent behaviour, are prevented from setting up a new company or from being appointed as director of a company in another Member State. This means that disqualified directors can easily move from one Member State to another and manage companies in the EU even if they were not allowed to, at least for a certain period of time, in the Member State that disqualified them. The European Commission supports cross-country access to information about whether directors have been disqualified. The Commission will establish a decentralised system to interconnect insolvency registers. Under this system, Member States are invited, in accordance with Article 24(3) of Regulation (EU) 848/2015, to include in their national insolvency registers documents or additional information such as insolvency-related disqualifications of directors.

GENERAL QUESTIONS

4.1. To what extent do existing differences between the laws of the Member States in the areas mentioned below affect the functioning of the Internal Market?

(For example, differences affect the Internal Market when creditors or investors and debtors are located in different Member States and this has an impact on the recovery of debts, the legal certainty of transactions, the quantification of risks etc.)

	To a large extent	To a considerable extent	To some extent	Not at all	No opinion
a) Minimum standards on the ranking of claims in formal insolvency proceedings	◉	○	○	○	○
b) Minimum standards on avoidance actions	○	◉	○	○	○
c) Minimum standards applicable to insolvency practitioners/mediators/supervisors	○	◉	○	○	○
d) Measures providing for a specialisation of courts or judges	◉	○	○	○	○
e) Measures to shorten the length of insolvency proceedings	○	◉	○	○	○
f) Measures to prevent disqualified directors from starting new companies in another Member State	○	○	◉	○	○
g) Other measures	○	○	○	○	○

Please explain

a) Minimum standards on the ranking of claims in formal insolvency proceedings
- safeguard the rights of creditors
- encourage investments, including investment in distressed companies
- provide predictability on the outcome of formal insolvency proceedings thus encouraging parties to negotiate reorganization plans well ahead of the formal insolvency proceedings
These minimum standards are essential to an effective insolvency law

d) Measures providing for a specialisation of courts or judges
While substantive insolvency laws may differ across Europe, the quality of the judiciary differs greatly as well.
The US Chapter 11 is the world's most efficient insolvency law, provided that judges and parties are sophisticated enough.
Otherwise, English insolvency law is more advisable, although it is also more costly than the US Chapter 11.
English insolvency law is far from perfect but because it it widely perceived as having the most experienced judiciary in Europe, COMI shifts from Germany and Spain to the UK are frequent.
Such COMI shifts do not exist in France because the French Treasury unofficially forbids them.

4.2. Which measures would contribute to increasing the recovery rates of debts? (choose all that apply)

- [x] a) Minimum standards on the ranking of claims in formal insolvency proceedings
- [x] b) Minimum standards on avoidance actions
- [x] c) Minimum standards applicable to insolvency practitioners/mediators/supervisors
- [x] d) Measures providing for a specialisation of courts or judges
- [x] e) Measures to shorten the length of insolvency proceedings
- [x] f) Measures to prevent disqualified directors from starting new companies in another Member State
- [ ] g) Other measures
- [ ] h) No opinion

SPECIFIC QUESTIONS

4.3. Which claims should have priority in insolvency proceedings (i.e. be satisfied first from the proceeds of the insolvent estate)? (choose all that apply)

- [x] a) Secured creditors should be satisfied in principle before all other creditors
- [ ] b) Secured creditors should be satisfied before unsecured creditors but not before privileged creditors such as employees and/or tax and social security authorities
- [ ] c) Tort claims should have a higher priority than other unsecured claims
- [ ] d) Other ranking of priorities
- [ ] e) No opinion

Please explain

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Tax and social security authorities should no longer be privileged creditors.
Employees should be privileged creditors but a cap should apply.
In the US, it is 12,000 dollars.
It should be higher than that but lesser than in France.
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4.4. What minimum standards should be harmonised for 'avoidance actions'? (choose all that apply)

- [x] a) Rules on the types of transactions which could be avoided
- [x] b) Rules on 'suspect periods' (periods of time before insolvency when a transaction is presumed to be detrimental to creditors)
- [ ] c) Other rules
- [ ] d) No opinion

Please explain

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A principle of "substance over form" should apply as in the US fraudulent
conveyance law.
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4.5. In what areas would minimum standards for insolvency practitioners help to increase the efficiency and effectiveness of insolvency proceedings? (choose all that apply)

- [x] a) Licensing and registration requirements
- [x] b) Personal liability
- [x] c) Subscribing to a professional liability insurance scheme
- [x] d) Qualifications and training
- [x] e) Code of ethics
- [ ] f) Other
- [ ] g) No standards should be harmonised
- [ ] h) No opinion

4.6. Which additional minimum standards, if any, should be imposed on insolvency practitioners specifically dealing with cross-border cases? (choose all that apply)

- [x] a) Relevant foreign language knowledge
- [x] b) Sufficient human and financial resources in the insolvency practitioner's office
- [x] c) Pre-defined period of experience
- [ ] d) Others
- [ ] e) No additional standards are needed compared with those relevant for domestic insolvency cases
- [ ] f) No opinion

4.7. What are the causes for the excessive length of insolvency proceedings? (choose all that apply)

- [x] a) Judicial activities concerning the supervision or administration of insolvency proceedings
- [x] b) Delays in the liquidation of the debtor's assets
- [x] c) The time taken to obtain final decisions on cases concerning the rights and duties of the debtor (e.g. claims, debts, disputed property in goods)
- [x] d) A lack of promptness in exercising creditors' rights
- [x] e) Lack of electronic means of communication between the creditors and relevant national authorities, such as for the purposes of filing of claims, distance voting etc.
- [ ] f) Other
- [ ] g) No opinion

Please explain

The EU should launch an open data platform to collect important insolvency data from Member States that would be available to private sector applications.
A good example of such private sector application is EPIQ in the US (http://www.epiqsystems.com) which collects public insolvency data and aggregates it to serve creditors and insolvency professionals and facilitate the filing of bankruptcy proceedings.

4.8. Would a target maximum duration of insolvency proceedings — either at first instance or including appeals — be appropriate?

- (●) a) Yes
- ( ) b) Yes, but only for SMEs
- ( ) c) No
- ( ) d) Other possibilities
- ( ) e) No opinion

4.9. What incentives could be put in place to reduce the length of insolvency proceedings? (please explain)

Creditors should be able to submit a restructuring plan very quickly if the directors of the debtor fail to do so.

4.10. When disqualification orders for directors are issued in one Member State (i.e. the 'home State'), they should:

- [x] a) be made available for information purposes via the interconnected insolvency registers so that other Member States are informed
- [x] b) automatically prevent disqualified directors from managing companies in other Member States
- [ ] c) not automatically prevent disqualified directors from managing companies in other Member States, but make them subject to intermediary steps (e.g. a court order)
- [ ] d) Other options
- [ ] e) No opinion

Please explain

4.11. Directors disqualified in one Member State (home State) should be prevented from managing companies in other Member States (host States): (choose all that apply)

- [ ] a) Always
- [x] b) Only for the duration applicable to equivalent disqualification orders in the host State
- [ ] c) Only in the same or similar sector of activity
- [ ] d) Never
- [ ] e) Other options
- [ ] f) No opinion

4.12. Which measures would contribute to reducing the problem of non-performing loans? (choose all that apply)

- [x] a) Measures to improve the effectiveness of insolvency proceedings
- [x] b) Measures enabling the rescue of viable businesses
- [x] c) Measures to provide user-friendly information about national insolvency frameworks
- [ ] d) Measures to ensure a discharge of debts of entrepreneurs (individuals)
- [ ] e) Measures to ensure a discharge of debts of consumers
- [x] f) Other measures related to insolvency
- [x] g) Measures unrelated to insolvency (e.g. enforcement of contracts)
- [ ] h) No opinion

Please explain

Non performing loans are responsible for the lack of availability of capital in the EU and hinder economic growth
Reducing non performing loans requires a better understanding of the risks carried by investments across the EU
Only a harmonization of bankruptcy law can clarify such risks and improve credit and efficient re-allocation of capital.

5. Additional comments

Are there any additional comments you wish to make on the subject covered by this consultation?

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Disqualification orders for Directors should be limited to cases of fraudulent
actions.
Judges should not be allowed to review ex post the actions of Directors in
abstract.
A concept similar to the US business judgement rule should apply.

We are available for further comments at your convenience.
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You can also send a separate written contribution by uploading your document here:

Contact

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