



President: Marcel Groenewegen (Neths)
Deputy President: Frank Tschentscher (Germany)
Vice President: Barry Cahir (Ireland)

Chief Operating Officer: Catherine Dyke-Price (UK)
Event Strategy Director: Caroline Taylor (UK)

Please reply to: Catherine Dyke-Price (UK)
Tel: +44 7870605382
Email: catherine.dykeprice@insol-europe.org

Website: www.insol-europe.org

TO EUROPEAN COMMISSION
JUST-consultation-CA@ec.europa.eu

5 October 2020

I. Introduction

The mission of the **INSOL Europe** is to take and maintain a leading role in European business recovery, turnaround and insolvency issues, to facilitate the exchange of information and ideas amongst its members and to discuss business recovery, turnaround and insolvency issues with who are affected by those procedures. The association encourages greater international co-operation and communication within Europe and also with the rest of the world.

To that end, INSOL Europe gathers academics, judges, lawyers and insolvency practitioners from the European Union and beyond. It organises international meetings on topics related to national and international insolvencies. It also publishes the 'Eurofenix' magazine (quarterly) as well as a stand-alone series of comparative law texts (Technical Series) arising from events organised by the INSOL Europe Academic Forum and the Judicial Wing of INSOL Europe. It possesses a large network of institutional and private correspondents throughout the EU and beyond through its eleven working groups and committees covering a wide aspect of the work undertaken.

Within INSOL Europe, the standing **EU Study Group**, composed of a research team on comparative law, a majority of whose members are regular attendees at meetings organised by official European and other international bodies (e.g. UNCITRAL's bi-annual meetings). Members of this Group are active academics, lawyers, insolvency practitioners or national officers. In the course of 2020, some of their work has resulted in the publication of two Guidance Notes on Directive 2019/1023 on Restructuring and Insolvency with the aim of assisting EU Member States with putting the restructuring frameworks mandated by the Directive in place as soon as possible. The guidance notes offer technical insights and policy considerations relevant to national implementations of the EU Restructuring Directive on the key points of classification of claims, voting, and confirmation of restructuring plans, including by way of a cross-class cram-down (Guidance Note #1, April 2020) and on the stay of individual enforcement actions to be enacted pursuant to Articles 6 and 7 of the Directive (Guidance Note #2, May 2020). The goal is to offer guidance by insolvency experts to national regulators where no similar restructuring frameworks exist or where equivalent restructuring frameworks do already exist, refining and adapting them to the Directive.

INSOL Europe has recognised experience as a regular contributor to the debate relating to the harmonisation of insolvency laws in Europe. Indeed, in 2014 and as a follow up to the 2012 Communication of the Commission on 'A new approach to business failure and insolvency', INSOL Europe provided a comprehensive and condensed report on restructuring mechanisms available at that time in the 28 Member States, together with recommendations by 28 national experts for an early preventive restructuring mechanism ('Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices'). This report followed the INSOL Europe report published in 2010 and entitled 'Harmonisation of Insolvency Law at EU Level' which was prepared at the request of the European Parliament. In particular, this report identified a number of areas of insolvency law where harmonisation at EU level was worthwhile and achievable, including an evaluation as to what extent harmonisation of insolvency law could facilitate



President: Marcel Groenewegen (Neths)
Deputy President: Frank Tschentscher (Germany)
Vice President: Barry Cahir (Ireland)

Chief Operating Officer: Catherine Dyke-Price (UK)
Event Strategy Director: Caroline Taylor (UK)

Please reply to: Catherine Dyke-Price (UK)
Tel: +44 7870605382
Email: catherine.dykeprice@insol-europe.org

Website: www.insol-europe.org

further harmonisation of company law in the EU. INSOL Europe was also an invited non-governmental organisation at the European Commission Insolvency Conference held in Brussels on 12 July 2016, entitled 'Convergence of insolvency frameworks within the European Union - the way forward'.

On 29 June 2020, INSOL Europe submitted its contribution following the call for feedback in relation to the report of the High Level Forum on the Capital Market Union.

These are the reason why INSOL Europe would like to continue making submissions and to contribute to the forthcoming work of the European Union staff in relation to the **Consumer policy – the EU's new 'consumer agenda'** public consultation as follows:

II. INSOL Europe contribution to the Consumer policy – the EU's new 'consumer agenda' public consultation

Summary:

INSOL Europe is of the opinion that the EU cannot ignore any longer the issue of consumer insolvencies, and in particular because in parallel the European Commission is preparing a new CMU Action Plan which may contain provisions or recommendations on business insolvency.

That is why INSOL Europe's intention is to participate to the public consultation which has been published at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12464-A-New-Consumer-Agenda> with the following text:

CONSUMER INSOLVENCY: A NEED FOR A EU ACTION IN VIEW OF RECENT INTERNATIONAL DEVELOPMENTS

There is a great diversity in the types of consumer-focused insolvency proceedings available across the EU.¹ While many function well to deliver debt discharge or rehabilitation for consumers, notions of rescue and rehabilitation generally have remained out of reach for many consumers, not just owing to the cost and complexity of proceedings applicable to individual debtors. Critical issues in this area include the (general) poor amount of consumer assets available for satisfaction and whether proceedings offering a debt discharge should be available in this case. Moreover, the relationship more widely between entrepreneurial funding and consequent consumer debt and whether proceedings focused on the former adequately deal with the latter remains a difficult subject in many legal systems. Nonetheless, the large numbers of individual debtors with limited assets and income throughout the EU cannot be ignored. The rise in the volume of consumer debt and consumer-oriented proceedings in the last few years is also a major concern.

In the specific EU context, it is worth mentioning that, in March 2014, the European Commission adopted a Recommendation on '*A new approach to business failure and insolvency*' for the EU. That Recommendation aimed to enable efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance to run a successful business, but it also *urged Member States*

¹ See T. Kadner Graziano, J. Boyars and V. Sajadova (eds), *A Guide to Consumer Insolvency Proceedings in Europe* (Elgar, 2019).

to explore the possibility of applying the principles on discharge also to over-indebted consumers. During the legislative adoption process which led to the adoption of the Directive (EU) 2019/1023 of 20 June 2019² (hereafter the ‘Directive on Restructuring and Insolvency’), a legal comparative study was commissioned by the European Commission.³ The findings of the report⁴ on consumer insolvencies led to the following conclusion: *‘The study shows that whilst there is generally some similarity in approach to Consumer Over-indebtedness, divergence is in evidence, for example, in eligibility for procedures and differing conditions for Debt Discharge. There are active reform initiatives across many Member States, and it is as yet too early to assess the extent to which such reform will be successful. Indeed further research would be useful, for example in terms of impact of Consumer Over-indebtedness Procedures on the supply of personal credit, and for example, the extent to which non-discharge of certain debts precludes fresh start for debtors and their families. Further study of the existence and impact of civil society organisations which represent Consumers and/or provide debt advice would also be of benefit.’*

As a result, the recently adopted Directive on Restructuring and Insolvency does not include rules on consumer over-indebtedness, but considers, however, that *‘it would be advisable for Member States to apply also to consumers, at the earliest opportunity, the provisions of this Directive concerning discharge of debt’*.⁵ Nonetheless, the issue of whether action needs to be taken to address consumer insolvency remains a live one.

² Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), PE/93/2018/REV/1, OJ L 172, 26.06.2019, p. 18-55.

The text is available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1023>

³ University of Leeds, ‘Study on a new approach to business failure and insolvency: Comparative legal analysis of the Member States’ relevant provisions and practices’, available at <https://op.europa.eu/fr/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1/language-en>

⁴ *‘This issue is of major significance, both to individual Member States and the Commission, particularly following the global financial crisis. The EC Recommendation sees the goal of providing a fresh start as relevant to consumer debtors, as well as Entrepreneurs. Over-indebtedness, as it relates to the private individual or household is a tricky concept in that there is no one accepted or standard definition. However what is clear is that it encompasses financial difficulty in terms of an inability or on-going difficulty to meet outstanding financial commitments, whether household bills or credit instalments. There are a number of procedures, across the EU, which are available to consumer debtors, from Bankruptcy and Debt Settlement Procedures, to the Informal Arrangement. These may or may not incorporate some form of Payment Plan, whereby a consumer is committed to repaying a proportion of outstanding debt over a period of time. As with the Entrepreneur, an integral element to fresh start is the availability of discharge from debt, where there is distinct advantage in allowing discharge without the need in principle to re-apply to a court after a short period. One area of potential concern that emerges, lies in the debts that are excluded from discharge: consideration should be given to encouraging common practice across Member States, keeping the category of non-dischargeable debts to a minimum, for example the social responsibilities of maintenance and child support, student loans and debts that arise from criminal activities, such as fines. Another is the length and use of the Payment Plan, which may do little more than lock the debtor into a period of debt repayment which leads to non-productivity, and potentially exacerbates detriment such as financial exclusion.’*

⁵ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019, Recital 21.

⁶ See also Recital 98 of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 which states that *‘A study should be carried out by the Commission in order to evaluate the necessity of submitting legislative proposals to deal with the insolvency of persons not exercising a trade, business, craft or profession, who, as consumers, in good faith, are temporarily or permanently unable to pay debts as they fall due. Such study should investigate whether access to basic goods and services needs to be safeguarded for those persons to ensure that they benefit from decent living conditions.’*

In this light, attention might be given to developments at the international level. It should be noted that, while the UNCITRAL's Legislative Guide on Insolvency expressly excludes consideration of issues specific to consumer insolvencies, it admits in the meantime that cases involving individual debtors will inevitably involve *'the intersection of business indebtedness with consumer indebtedness'*, as *'it may not always be possible to separate the debts into clear categories'*⁷. In a recent working paper,⁸ the UNCITRAL Secretariat made clear that *'Given the likelihood that business and personal debts are intertwined, it may be burdensome for an MSME debtor to apply for separate procedures to discharge all debts, especially if they have different criteria and discharge periods. (...) it is (then) desirable that both types of debt can be dealt with in a single discharge regime or, at least, that separate proceedings may be consolidated.'*

Of further note is the fact that the World Bank began to initiate an examination of the policies and characteristics of effective insolvency systems for individuals (natural persons) in 2011.⁹ In 2016, the Insolvency and Creditor/Debtor Rights (ICR) Task Force published several recommendations¹⁰ including that *'intersections between personal insolvency and MSME need to be further explored'*. In this light, the planned release in 2020 by the World Bank Group of revisions to the 'Principles for Effective Insolvency and Creditor/Debtor Regimes' with a focus on SME insolvency should be assessed as part of a focus on the position of consumer insolvency globally.

Conclusion

In view of the current implementation of the EU Directive on Restructuring and Insolvency in Member States and the various international initiatives described above, the EU's new 'Consumer Agenda' cannot ignore the need to modernise personal insolvency law at a EU level. The EU institutions need to address more fully the critical issues facing the large number of ordinary consumers suffering from financial distress by focusing on the appropriate principles applicable to honest individual debtors in order to complete and make coherent the EU insolvency framework that is already in place.

That conclusion may also serve the CMU New Action Plan objectives as a proper (minimum) harmonised personal insolvency regime in the EU may be of benefit to honest individual debtors and their families, which may in turn contribute to sustainable economic growth. Indeed, consumer over-indebtedness with

⁷ UNCITRAL Legislative Guide on Insolvency Law (2014), Part II, Chapter VI, p. 284.

Text available at: https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf

⁸ UNCITRAL Working Paper 'Insolvency of micro, small and medium-sized enterprises' at § 73.

Text available at: <https://undocs.org/en/A/CN.9/WG.V/WP.159>

⁹ Report on the Treatment of the Insolvency of Natural Persons, available at:

<http://documents1.worldbank.org/curated/en/668331468331807627/pdf/771700WP0WB0In00Box377289B00PUBLIC0.pdf>

See also the WB revised 2015 Principles - Part A. Creditor/Debtor rights - A1. Key Elements: *'A modern credit-based economy should facilitate broad access to credit at affordable rates through the widest possible range of credit products (secured and unsecured) inspired by a complete, integrated and harmonized commercial law system designed to promote: - reliable and affordable means for protecting credit and minimizing the risks of non-performance and default; - transparency of credit instruments and a fair treatment of the rights of creditors and debtors, including appropriate protection for natural persons with respect to consumer debts and assets ; (...)'*.

¹⁰ Recommendations of the ICR Task Force Meeting, September 19, 2016 available at:

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/final_-_msme_uncitral_slides.pdf



President: Marcel Groenewegen (Neths)
Deputy President: Frank Tschentscher (Germany)
Vice President: Barry Cahir (Ireland)

Chief Operating Officer: Catherine Dyke-Price (UK)
Event Strategy Director: Caroline Taylor (UK)

Please reply to: Catherine Dyke-Price (UK)
Tel: +44 7870605382
Email: catherine.dykeprice@insol-europe.org

Website: www.insol-europe.org

appropriate control mechanisms in place to combat fraud and bad faith is a matter of great economic and social concern and is closely related to the reduction of debt overhang.

At the very least, a constructive discussion of these issues might signal the desirability of some and potential dangers of other approaches with view to producing durable solutions in the not-too-distant future including relevant education and efficient communication strategies regarding available options and the accessibility of freely available and cost efficient independent debt advice and guidance.

Respectfully,

A handwritten signature in black ink that reads "C. E. Dyke-Price".

Catherine Dyke-Price
Chief Operating Officer