TO EUROPEAN COMMISSION
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I. Introduction

The mission of **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 those 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** is 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 three 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), on the stay of individual enforcement actions to be enacted pursuant to Articles 6 and 7 of the Directive (Guidance Note #2, May 2020), and more recently on procedural features (Guidance Note #3, November 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 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'.

In the course of 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*** (June 2020), to the ***Consumer policy – the EU's new 'consumer agenda'*** (October 2020) and in relation to the EU roadmap on the new EU initiative entitled '***Insolvency laws: increasing convergence of national laws to encourage cross-border investment***' (December 2020).

These are the reasons 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 new insolvency initiative with the following attachment which is the result of our internal consultation led by the INSOL Europe EU Study Group Working Group in response to the ***public consultation*** ending on 26 March 2021.

Respectfully yours,

Marcel Groenewegen
President of INSOL Europe

EU Survey
ENHANCING THE CONVERGENCE OF INSOLVENCY LAWS

Follow up document to the contribution ID: 2544ab8b-f387-4a98-8f90-104c826f388c.

1. FRAGMENTATION OF INSOLVENCY FRAMEWORKS AS A PROBLEM FOR THE INTERNAL MARKET AND THE NEED FOR GREATER CONVERGENCE

At present, substantive insolvency law is regulated exclusively at the level of EU Member States. Owing to different legal traditions and policy priorities, this leads to considerable discrepancies between the Member States' insolvency laws. This fragmentation may create barriers to the free movement of capital in the internal market in particular in view of diverging time-limits and lengths of procedures as well as diverging overall procedural efficiency which may make it more difficult to anticipate the outcome for value recovery, making it harder to price risks, including for debt instruments. Legal uncertainty and additional costs for investors, companies and other stakeholders may lead to the abortion of viable investment projects, reducing growth and employment opportunities and may stand in the way of optimal capital allocation thus constituting a hindrance to the development of a true Capital Markets Union. In this section stakeholders are asked to assess whether and to what extent this situation constitutes an obstacle to a functioning internal market and which particular features of insolvency play the biggest role in that respect. In the following sections, stakeholders are asked to comment on policy options concerning the various areas of insolvency law.

1.1. Do differences in corporate (non-bank) insolvency frameworks in EU Member States pose a problem for the functioning of the internal market?

Indicate a ranking scale from 0 to 5: where 0 means 'no problem' and 5 means 'extremely significant problem(s)'

Answer: 4

Additional comments: The disparity in certain key rules (notably those covered by the *lex fori concursus* rule in the European Insolvency Regulation) as well as some key substantive rules (transaction avoidance etc.) can be a problem for stakeholders accessing procedures across borders.

1.1.1. In particular, do differences in insolvency frameworks in EU Member States deter cross-border investment/lending?

Indicate a ranking scale from 0 to 5: where 0 means 'no problem' and 5 means 'extremely significant problem(s)'

Answer: 3

Additional comments: While the differences in insolvency frameworks may deter some investors, there appears to be little evidence to suggest that there is a specific deterrent effect to lending caused by differences in insolvency frameworks, although it is likely that, in considering all possible outcomes of such decisions, insolvency is at least a consideration, albeit marginal.

1.2. Which of the existing differences between the laws of the Member States in the areas mentioned below most affect the functioning of the Internal Market?

Indicate a ranking scale from 0 to 5: where 0 means 'no problem' and 5 means 'extremely significant problem(s)'

a) Differences in the definition of insolvency;

Answer: 3

Additional comments: The difference is how insolvency processes are accessed can be a problem, particularly if different tests are used (actual insolvency, imminent insolvency, over-indebtedness, precipitous capital

reduction). While differences between these tests are appreciable, insolvency laws worldwide are moving to more fluid tests based on avoidance and anticipation, making it easier for access to procedures without formal insolvency being a necessary pre-condition.

b) Differences in how insolvency proceedings are triggered – obligations of debtors and rights of creditors to file for insolvency;

Answer: 4

Additional comments: The differences in how procedures are accessed/triggered is certainly relevant, particularly the balance between debtor and creditor initiation for certain types of procedures (e.g., voluntary restructuring sees primacy often being given to debtors, while more formal processes generally have creditor initiation gateways). The extent to which these differences impact on access overall and take-up of procedures has not been generally established for certain.

c) Differences in the duties and liabilities of directors in vicinity of insolvency and in insolvency proceedings;

Answer: 4

Additional comments: The differences here may be very significant if the intention is to ensure parity of treatment and knowledge of liability positions for managerial and directorial personnel. Many jurisdictions use similar event triggers (failure to file accounts, fraud, insolvent trading etc), but the range of causes for which directors may be sanctioned is very wide across Europe. This may lead to some uncertainty when directors/managers take up positions or acquire liability due to carrying out business acts across borders, which is only partially palliated by access to professional legal or financial advice.

d) Differences in the duties and liabilities of insolvency practitioners;

Answer: 4

Additional comments: The differences in duties and liabilities is palpable across Europe, but does not appear to cause insolvency office holders (IOHs) much concern, except insofar as accepting a mandate could expose them to liability. If the rules and triggers for liability are clear, then these differences may not pose a significant threat to cross-border activity and may be palliated by access to quality legal advice and professional indemnity insurance.

e) Differences in the identification and tracing of assets that belong to the insolvency estate;

Answer: 4

Additional comments: The differences in the ability to trace and recover assets is certainly a significant impediment to cross-border recovery. The mechanisms available to support the forensic tracing of assets differ very widely and other issues, such as bank transparency, speed of processes, assistance by Government and other bodies are also concerns.

f) Differences in the ranking of claims;

Answer: 3

Additional comments: The differences in the ranking of claims is not necessary a significant impediment in cross-border investment, as the position can be ascertained, for the most part, in advance. The injunction in the Guide to the UNCITRAL Model Law on Cross-Border Insolvency 1997, to wit the treatment of creditors on a basis no less favourable than unsecured creditors, is a helpful device to ensure minimum parity. However, the differences in the treatment of public debt (fiscal and social security etc. debts) and the role public authorities play in insolvency is of greater concern, particularly for the success of restructurings.

g) Differences in relation to avoidance actions;

Answer: 3

Additional comments: As above, rules on transaction avoidance are generally ascertainable in advance, but the disparity in limitation/hardening periods, long-stops, initiation rights (creditors and/or insolvency office-holders) and the definition of related/connected parties are all sufficiently diverse to make charting a precise course through the law problematic for many debtors, creditors and third parties alike.

h) Other, please explain

Other areas of concern include those identified in the Insolvency Impact Assessment, in particular minimum and common standards for judicial and office holder training in insolvency. This is an area also addressed in the European Bank of Reconstruction and Development's recent updating of the Insolvency Office Holder Guidelines (due to be published shortly).

1.3. In which area do you consider the insolvency framework of the jurisdiction where you operate is to be reformed?

Indicate a ranking scale from 0 to 5: where 0 means 'no problem' and 5 means 'extremely significant problem(s)'

a) Differences in the definition of insolvency;

Answer: 3

Additional comments: The diversity of procedures across Europe, even given the convergence promoted by the recent introduction of the Preventive Restructuring Directive, remains sufficiently wide to cause some concern about access to suitable processes for debtors at various stages of insolvency. Some jurisdictions are doing remarkably well, other not, though it is true that reforms have been undertaken in most significant economies within Europe, leading to the overall improvement in the quality of and outcome options provided by procedures.

b) Differences in how insolvency proceedings are triggered – obligations of debtors and rights of creditors to file for insolvency;

Answer: 3

Additional comments: Sufficient diversity across Europe still exists to make it difficult for debtors and creditors alike to be certain as to when filing obligations are triggered, thus necessitating recourse to specialist (and often expensive) advice, without which certain debtors may be inadvertently facilitated to linger in business to the detriment of creditors (often referred to as the phenomenon of zombie companies).

c) Differences in the duties and liabilities of directors in vicinity of insolvency and in insolvency proceedings;

Answer: 4

Additional comments: The differences across Europe are sufficiently concerning to require the prudent taking of specialist advice for any director/manager taking up a position that exposes them to liability across borders.

d) Differences in the duties and liabilities of insolvency practitioners;

Answer: 4

Additional comments: The differences in duties and liabilities across Europe remains an issue of concern, albeit not of primary relevance to the insolvency office holder, who generally has access to specialist and jurisdiction-

specific legal advice. However, the position of debtors-in-possession is not sufficiently certain in many jurisdictions, leading to some concern as to the scope of liability and ability for authorities to encourage appropriate behaviour.

e) Differences in the identification and tracing of assets that belong to the insolvency estate;

Answer: 4

Additional comments: The diversity of these rules across Europe is of some concern.

f) Differences in the ranking of claims;

Answer: 3

Additional comments: The differences in ranking of claims is not usually significant for many creditors, except those engaged in substantial cross-border investment or major transactions. However, a minimum treatment rule (i.e., no less than the appropriate treatment of unsecured creditors) would be useful.

g) Differences in relation to avoidance actions;

Answer: 3

Additional comments: As earlier, the differences in procedures across Europe, though significant, can be palliated by access to information prior to investment taking place. However, these differences can be problematic for many creditors and third parties wishing to know how safe asset transactions carried out by debtor entities may be.

h) Other, please explain

N/A

1.4. Which measures should be taken at the EU level to bring about greater convergence of insolvency frameworks?

a) targeted harmonisation through legislation
b) recommendation
c) a combination of both
d) no measures.

Answer: C

Additional comments: A recommendation could be considered in the first instance. However, given the history of insolvency law convergence within the European Union, the model of the Preventive Restructuring Directive, as a form of strong encouragement for the taking of certain steps, could be considered.

1.5 Briefly describe the model for corporate insolvency to which Member States should converge

Brief description:

A robust system should offer debtors a wide range of options, ranging from pre-insolvency and/or preventive restructurings (both consensual/out-of-court and court variants) as well as more formal restructuring and insolvency processes. Light-touch tests for benefit to debtors of entry into procedures can be used for those procedures further upstream, while more formal tests may be necessary for the more formal downstream

procedures. The classification of such procedures, whether as corporate- or insolvency-law driven should not generally be relevant.

The jury is divided as to the merits of "secret" procedures, which allow for restructurings avoiding the glare of publicity (often adverse to business futures) and/or selective plans with selective creditors, but such procedures may have their place, provided robust means exist to control and sanction abuse.

2. DIRECTORS' LIABILITY IN VICINITY OF INSOLVENCY PROCEEDINGS, DISQUALIFICATION OF DIRECTORS

In the vicinity of insolvency, directors are in a key position and it may have to be clarified that their fiduciary duty to act in the best interest of the company includes taking into account the interest of creditors and all stakeholders. Legal systems have prescribed, in different ways, what directors should do when a company is near to or actually insolvent. The Restructuring Directive 2019/1023 provides a minimum level of harmonisation for directors' duties where there is a likelihood of insolvency (Art. 19), while the Company Law Digitalisation Directive (EU) 2019/1151 provides for the exchange of information on disqualified directors through the system of inter-connection of business registers (BRIS). The question is whether there are additional needs.

2.1. In your opinion, should there be any minimum harmonization at EU level on the duties and obligations of directors in the event of vicinity of insolvency or when the company is insolvent?

a) YES
b) NO

Answer: Yes

Additional comments: A certain minimum harmonisation may be useful, provided it is not overly detailed or prescriptive in its scope and application.

2.2. If your answer to the preceding question is in the affirmative, in which aspects of the question do you consider the harmonization of national laws at EU level beneficial? (Multiple replies possible.)

a) A duty of the director in the vicinity of insolvency to formulate plans to take preventative action to avoid insolvency or to identify possible insolvency problems, if necessary to file for preventative proceedings;
b) A duty of the director, once the company is insolvent, to file for the appropriate insolvency proceedings;
c) A clarification of the focus of duties of the director when a company is near to insolvency or is actually insolvent to look at the interests of the creditors (instead of looking at the interest of the shareholders). This includes rules against 'wrongful trading'.
d) Minimum standards at EU level on sanctions for breaches of the duties above. This might include civil and/or criminal liability of the directors.
e) Minimum standards at EU level on the conditions and proceedings leading to the establishment of liability of the directors for breaches of the duties above.

Answer(s): A, B, C and E

Additional comments: All of these are desirable as objectives of any rule(s), saving that sanctions should be kept to the discretion of the member states, which, though mostly directed to civil sanctions, have, in their penal aspects, important impacts on civil participation and eligibility rules. Thus, a minimum criminal sanction would not be appropriate or desirable.

2.3 What measures at EU level do you consider favourable for the enhancement of the effective implementation of decisions disqualifying directors as a consequence of breaching their duties in the vicinity of insolvency? (Multiple answers possible)

a) Harmonizing substantive issues of disqualification law (such as the conditions leading to a disqualification or the disqualification period) in the context of breaching directors' duties in the

vicinity of insolvency
b) Increasing the transparency of decisions on disqualifications vis-à-vis infringed duties in the context of insolvency by putting this information in national public registers
c) Increasing the transparency of decisions on disqualifications in the vicinity of insolvency by enhancing cooperation and information exchange between competent authorities, possibly in the context of the Business Register Interconnection System (BRIS)
d) There shall not be any dedicated measure in insolvency law, the question shall be settled as part of the general company law rules
e) None of the above, there is no need for any legislative intervention at EU level in this context at this point in time.

Answer(s): A and B certainly; C possible.

Additional comments: the objective of any rule(s) should be to encourage minimum standards of behaviour by being able to ascertain the liability position in advance. Jurisdictions may have differing views on publicity in relation to those who may be disqualified, yet such a rule may have an important deterrent effect on behaviour and allow stakeholders to ascertain the business history and pedigree of their counterparts. As for C, the jury is out on how information sharing can enhance standards of business behaviour. However, cooperation between authorities pursuing claims for breach of duties can only be useful.

3. INSOLVENCY PRACTITIONERS (the term „insolvency practitioners" is used in the meaning of the definition of Article 2(5) of Regulation (EU) 2015 /848)

Insolvency practitioners play a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. The Restructuring Directive 2019/1023 comprises provisions on the training, appointment, supervision and remuneration of practitioners (Art. 26, 27), the question is whether further measures are appropriate.

3.1 In your opinion, which questions in the following list would benefit from a harmonization at EU level? (Multiple answers possible.)

a) Licensing and registration
b) Regulation, supervision and discipline
c) Qualification and training of IPs
d) Appointment of the IPs
e) Work standards and ethics for IPs
f) Legal powers and duties of IPs
g) Remuneration of IPs
h) ***Other, please elaborate***: (*please, use the comments box below*)
i) None of the above

Answer(s): A, B, C certainly; E possible.

Additional comments: Despite the great diversity in professional structures across Europe, a survey by the European Bank of Reconstruction and Development in 2014 (albeit only in respect of some member states) was able to demonstrate connections between standards for qualification, type of supervision available and overall structure of the insolvency office holder profession with the robustness of professional practice and trust by stakeholders. To that extent, a minimum standard for the areas covered by A to C above may be desirable. Moreover, certain minimum, non-prescriptive rules for practice standards and adherence to professional standards/ethics can be encouraged. Reference can be made in this regard to the recent updating by the EBRD of their Insolvency Office Holder Guidelines, which address all the issues above.

3.2 A number of international and European standard setting bodies have worked recently on a set of principles laying down parameters for the qualifications of insolvency practitioners/insolvency office holders to guide their performance of their function [1]. There is a considerable degree of commonality in the nature of these standards and guidelines [2]. Which of these principles do you agree with?

[1] See details in University of Leeds, „Study on a new approach to business failure and insolvency", p. 78. The study was commissioned by the European Commission and is available at: https://op.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-

01aa75ed71a1/language-en

[2] A concise summary of this common ground is given by the EBRD when they defined the main principles for benchmarking the IP profession. See EBRD, "Assessment of Insolvency Office Holders: Review of the profession in the EBRD region" (2014) available at: http://www.inppi.ro/arhiva/anunturi/download/196_1f89a9d9c30bb669c1a3020f0960c8da

	I AGREE	I DO NOT AGREE
Licensing and registration - IPs should hold some form of official authorisation to act.	X	
Additional comments: A proper, certain and secure licensing/registration system promotes confidence in the insolvency office holder as a properly qualified administrator/manager of insolvency processes.		
Regulation, supervision and discipline - given the nature of their work and responsibilities, IP should be subject to a regulatory framework with supervisory, monitoring and disciplinary features.	X	
Additional comments: Proper and robust monitoring not only promotes confidence in the system, but engenders trust in the probity of procedures and their outcomes.		
Qualification and training - IPs candidates should meet relevant qualification and practical training standards. Qualified IPs should keep their professional skills updated with regular continuing training.	X	
Additional comments: Skills are not static or set in stone. While access to the profession may be predicated on certain minimum qualifications being met, many qualification regimes delay admission till the completion of a skills-based stage. Often improved by practice, the updating of skills and exchange of ideas is a necessary part of the life of the insolvency office holder and needs to be strongly encouraged (even mandated).		
Appointment system - there should be a clear system for the appointment of IPs, which reflects debtor and creditor preferences and encourages the appointment of an appropriate IP candidate.	X	
Additional comments: Appointments should reflect the wishes of key participants and command the confidence of stakeholders generally. A recent innovation in many jurisdictions has seen a move to randomised appointments (selection by computer), often introduced to remove the possibility of collusion and/or corruption. Such systems can only work if the parameters for choice are sufficiently sophisticated to permit the selection of an insolvency office holder with the appropriate competence, skills level and expertise. In all other instances, it would be generally more useful to allow the parties the freedom to choose, subject to control by a court.		
Work standards and ethics - the work of IPs should be guided by a set of specific work standards and ethics for the profession.	X	
Additional comments: Ethical standards are a must for modern practice. This helps to engender trust and confidence in the probity of procedures, the independence of insolvency office holders and the robustness of outcomes. To the extent that working conditions are comparable, certain minimum work standards can be contemplated.		
Legal powers and duties - IPs should have sufficient legal powers to carry out their duties, including powers aimed at recovery of assets belonging to the debtor's estate.	X	
Additional comments: Clarity over these rules is paramount, though harmonisation may not be totally desirable, given the very different ways in which procedures are organised across Europe.		
IPs should be subject to a duty to keep all stakeholders regularly informed of	X	

the progress of the insolvency case.		
Additional comments: Minimum reporting standards (quality of information and content) may be desirable, though the frequency of communication beyond a certain minimum (reflecting, as it will do, an impact on time and cost) may be left to the management of individual procedures and supervision by a court.		
Remuneration - a statutory framework for IP remuneration should exist to regulate the payment of IP fees and protect stakeholders. The framework should provide ample incentives for IPs to perform well and protection for IP fees in liquidation	X	
Additional comments: Most systems will have a framework for the allocation of remuneration. As remuneration is dependent on a wide number of divergent factors and uses very different bases for calculation, harmonisation beyond a minimum standard for transparency and openness may not be possible.		

4. RANKING OF CLAIMS

With respect to ranking of claims, generally secured creditors are strongly protected and can realise their secured property (collateral). However, some legal systems grant other types of creditors priority status. In some Member States, employee claims are treated as priority claims and may get paid first even ahead of secured creditors. In some Member States tax claims have a preferential status in insolvency proceedings. In some legal systems, a certain carve-out of the proceeds of security rights is used to ensure a minimum satisfaction of unsecured creditors. The question is whether common principles should be introduced by EU measures and what those principles should be.

4.1. According to your opinion, which aspect of the rules on the ranking of claims would benefit most from a harmonization at EU level? ˙(Multiple replies are possible.)

a) The relationship between the claims of secured and unsecured creditors
b) The position of the claims by unpaid employees of the debtor
c) The status of tax and other public law claims in the event of insolvency
d) The subordination of shareholder loans and/or other amounts due to shareholders to general creditor claims
e) The validity of creditor agreements on ranking in non-bank insolvency
f) The super-priority of "new financing*"[„New finance" means finance that is provided to a person or company in financial distress or even when insolvent*], including the definition of the "new money" and the conditions of such a priority
g) None of the above
h) ***Other, please elaborate***: (*please, use the comments box below*)

Answer(s): A and B already exist; C, D, E, F possible.

Additional comments: Most insolvency frameworks already have clarity as to the differences in treatment between secured and unsecured creditors and also, generally, accord a high level of priority to the claims of unpaid employees. Further harmonisation in this respect may be undesirable. However, issues C to F are features of many modern insolvency processes and certainty as to their treatment and the position of stakeholders involved may be unresolved. Some recommendations as to minimum treatment and place in the rankings could be desirable. In particular, given the importance for restructuring (also preventive restructuring), certainty as to any super-priority and the position of public debt would be very desirable.

4.2. Should there be harmonized rules on 'carve outs' for the benefit of unsecured creditors? Or in other words: shall a portion of the amounts secured by security rights (rights in rem) be set aside for the satisfaction of general unsecured creditor claims?

a) YES
b) YES, provided that such rules are clearly defined, have a sufficiently narrow scope and are proportionate,
c) NO, such carve-out rules, even with the narrowest scope, would have a negative effect to credit

availability and to the cost of credit.

Answer: No.

Additional comments: Carve outs are complex to administer and are not generally regarded as efficient when dealing with access to credit. Indeed, in many systems, having such a carve out (although a natural consequence of some sympathy for the position of unsecured creditors) does not have a demonstrable impact on the ability of unsecured creditors to recover more than a slightly enhanced dividend. A better way of addressing the plight of unsecured creditors would be to look at the tax consequences for them of write downs/offs of debt.

4.2.1 If your answer to the previous point was in the affirmative, what types of safeguard would you find necessary to ensure the proportionate nature of such rules? [Multiple answers are possible.]

a) Such benefits shall only apply if a vast proportion of the debtor's assets is encumbered (used as security or collateral for secured creditors)
b) Only involuntary creditors to the debtor may be benefited in this way
c) There shall be a ceiling to the amount to be used for the purpose of such benefit

Answer(s): n/a

Additional comments: n/a

4.3 Rules on privileged claims are a reflection of different economic and social systems individual Member States. Thus, for instance in Member States where social protection of workers is generally insufficient, workers' claims would often be privileged and ranked first in order to at least partially protect those vulnerable categories of persons. Recital 22 of the EU Insolvency Regulation [Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p.19-72.**] states that "at the next review of this Regulation, it will be necessary to identify further measures in order to improve the preferential rights of employees at European level". In your opinion, how should the position of the employees at the event of insolvency be improved at EU level?** (Multiple answers are possible.)

a) Unpaid employees shall be given priority status in the ranking of claims in insolvency proceedings (e.g. certain employee claims shall rank above secured creditors);
b) The priority status of unpaid employees shall be subject to monetary and/or other limits;
c) Certain employees / categories of employees shall not enjoy priority rights;
d) The financial position of employees in the context of insolvency proceedings might be more appropriately protected by enhancing the protections available under employment law directives, in particular, by strengthening the safeguards available under national wage guarantee funds [*See Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer*];
e) Insolvency or more general insolvency related protections available to employees should be extended to self-employed persons;
f) No harmonisation is needed.

Answer(s): A, B, D and E are all desirable.

Additional comments: The treatment of employees is a highly sensitive issue within Europe, most systems acknowledging the vulnerable position of this category of "involuntary creditor". It is right that as much protection is afforded for those adversely impacted by insolvency, although some consideration of the impact on resources can be taken into account in the determination of appropriate ceilings on claims. Similarly, the repartition of support via guarantee schemes and ultimate recourse to insolvency funds may be an issue of concern if impacting on the availability of resources for successful restructuring efforts. The position of the self-employed (often serving as contractors, sub-contractors etc. to insolvent entities) needs to be reassessed as an issue of priority in many insolvency systems.

4.4 Do you agree that the priority status of unpaid taxes and other public contributions in the context of insolvency proceedings shall be abolished at EU level?

a) Yes, tax and other public law claims shall be put in the category of general unsecured claims.
b) Yes, tax and other public law claims shall be treated as claims by involuntary creditors.

c) No, it is important that Member States may maintain the priority status of such claims in insolvency proceedings

Answer: A (with reservations).

Additional comments: Fiscal and other public claims may not need to be harmonised, provided that public authorities have the ability to participate in insolvency proceedings on the same basis as private entities (i.e., with the ability to consent waivers, take haircuts etc.), a position that is not at all the case in many European countries and which can have a strong impact on the success of restructuring efforts. Dealing with this problem first may lead, ultimately, to a reconsideration of where in the ranking such claims could sit, but dealing with the ranking alone is not a sufficient step.

4.5 Should there be harmonized rules at EU level that subordinate claims arising out of shareholder loans to claims of other creditors (i.e., subordinate shareholder claims to debt claims)?

a) Yes, unless creditor claims are met in full (or unless each class of creditors consents), shareholders cannot receive anything for their shares.
b) Yes, shareholder loans have to be treated in the same way as other unsecured claims.
c) Yes, but difference has to be made between secured or unsecured loans by shareholders.
d) No, the current divergence in national solutions is satisfactory in this respect

Answer: B (with reservations)

Additional comments: The position with respect to shareholder loans across Europe is complex and very diverse. The automatic relegation or deferral of such claims in many insolvency procedures may have a disincentivising effect on shareholders (other than perhaps major/majority shareholders) who may have to weigh up the costs of participating in a recapitalisation against the downgrading of their claim in the event of an insolvency. A more nuanced approach that does not view shareholder loans as suspect may be required.

4.6 should there be rules at EU level protecting "new financing" with a view to promoting corporate restructuring in insolvency in addition to the rules in Directive 2019/1023 for pre-insolvency restructuring [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, OJ L 172, 26.6.2019, p. 18–55.]?

a) YES
b) NO

Answer: Yes

Additional comments: A common approach to the protection of new financing is greatly desirable, especially to promote the success of preventive restructuring processes.

4.6.1. If yes: should new finance rank above prior unsecured claims but below secured claims?

a) YES
b) NO

Answer: Yes (with reservations)

Additional comments: Consideration could be given to establishing a priority no different to existing security as a way of comforting existing creditors that their participation will not come at a complete loss of priority.

4.7 Should the general priority rules determining the ranking of claims that apply in liquidation proceedings also apply in restructuring proceedings within insolvency?

a) Yes
b) Yes, but with the following exceptions (***please, elaborate using the comments box***)
c) No, there is no need to use the same priority rules for the two regimes.

Answer: B

Additional comments: A more open-textured approach to claims, given that distributions in restructuring are often notional (and calculated usually only for establishing priority or participation in plan voting procedures), may be desirable, taking into account the interrelationship between classes of creditors and those to be affected (or not) by the plan. Different treatment could thus be contemplated diverging from the usual pattern of priority in liquidation.

5. AVOIDANCE ACTIONS

While legal systems in the various jurisdictions of the EU provide for possibilities to set aside suspect transactions, especially due to fraud, allowing additional assets to be distributed to the creditors. There are divergent approaches as to the conditions for a transaction to be set aside and the time-periods determining when a transaction can be challenged.

5.1. Which kinds of transactions should be covered by the harmonised rules at EU level governing avoidance action? (Multiple answers possible.)

a) Preferences (transactions benefiting one creditor to the detriment of the general body of creditors);
b) Transactions at an undervalue, including gifts to a creditor or a third party;
c) Securities created in the "suspect period" in order to convert a debt from being unsecured to being secured (invalidation of securities);
d) Transactions to defraud creditors [„*Transaction defrauding creditors" means any transaction that was entered into by a debtor who subsequently becomes subject to formal insolvency proceedings and there was some intention to put creditors at a detriment as a result of the transaction. This derives from the action pauliana*];
e) Transactions entered into after insolvency proceedings;
f) Other [***please, indicate using the comments box***];
g) None of them, there shall not be such harmonized rules.

Answer(s): A to E

Additional comments: Categories A to D are usually already covered in most transactions avoidance frameworks, while category E is often dealt with by a prohibition on unsanctioned disposals post-insolvency (or other limitations on debtor behaviour). To that extent, the commonalty of the provisions, being available in most insolvency systems, may lend itself to some useful, targeted harmonisation.

5.2. What types of condition would you find necessary to determine at EU level for a transaction to qualify as avoided action? (Multiple answers possible, but note that some conditions exclude the acceptation of others. If you consider a condition relevant only in relation to certain types of transaction, please, indicate them)

Objective criteria

a) The transaction happened within the "suspect period" (a set time period before the opening of insolvency proceedings);
b) The transaction is to the detriment of the general body of creditors;
c) The transaction places the creditor recipient in a better position than he or she would have been in a liquidation;
d) The debtor was insolvent at the time of the transaction;
e) The debtor became insolvent as a result of entering into the transaction.

Answer(s): A to E

Additional comments: The above elements are all usually found in the definition of various avoidance transactions. To that extent, convergence in the rules is already in process and further harmonisation could be desirable.

Subjective criteria

a) The debtor knew or should have known that the transaction benefits the particular creditor or third party over the other creditors;
b) The beneficiary of the transaction (a creditor or a third party) knew that the debtor is insolvent or that the payment is detrimental to the general body of the creditors;
c) The beneficiary of the transaction (a creditor or a third party) knew that the debtor's intention is to prejudice his or her creditors.

Answer(s): None of the above

Additional comments: Objective criteria are easier to establish. The problem with subjective criteria is proving sufficient intent or knowledge to enter into a transaction, which may defeat the ability of an insolvency office holder to recover for the benefit of the estate. However, proof of the knowledge of the precarious position of the debtor (or indifference thereto, i.e., on a *culpa lata*/negligence basis) may be useful if recovery is sought of property that has been subject to transactions that might otherwise be protected by a need for commercial certainty.

5.2.1 Shall the fact that the transaction was performed when the payment was not yet due have any effect on the EU rules on avoidance in insolvency proceedings? (Multiple answers possible.)

a) Yes, in this case the "suspect period" has to be longer;
b) Yes, presumptions shall apply in favour of the claimant seeking the avoidance of the transaction (e.g., that in such a case the subjective condition on the knowledge of the debtor/ beneficiary of the transaction is considered to be established; or e.g., in such a case the objective condition on the insolvency of the debtor at the time of the transaction is presumed)

Answer: Neither A nor B

Additional comments: It should be possible to determine objectively whether a payment is due (or not) so as to trigger avoidance proceedings, thus obviating the need to show intent or knowledge. Extension of the suspect period in such cases is not seen as procedurally necessary, if the insolvency office holder is able to determine as part of his management duties the status of any transactions that have occurred within the usual suspect period. Opening up transactions beyond a (necessarily limited) suspect period would unnecessarily undermine commercial certainty. However, the presence of fraud/fraudulent behaviour could legitimately form a reason for the extension of the suspect period.

5.2.2 Shall the fact that the transaction was made outside of the normal course of commerce/business of the debtor have any effect on the EU rules on avoidance in insolvency proceedings?

a) Yes, in this case the "suspect period" has to be longer;
b) Yes, presumptions shall apply in favour of the claimant seeking the avoidance of the transaction (e.g., that in such a case the subjective condition on the knowledge of the debtor/ beneficiary of the transaction is considered to be established; or e.g., in such a case the objective condition on the insolvency of the debtor at the time of the transaction is presumed)

Answer: B

Additional comments: As stated immediately above, the forensic exercise carried out by the insolvency office holder with respect to transactions should enable the detection of such events. In general, as stated further above, objective criteria are to be preferred.

5.2.3 Shall the fact that the person who benefited from the transaction (the creditor or a third party) is connected (family members, group of companies) with the debtor have any effect on the EU rules on avoidance in insolvency proceedings?

a) Yes, in this case the "suspect period" has to be longer;
b) Yes, presumptions shall apply in favour of the claimant seeking the avoidance of the transaction (e.g., that in such a case the subjective condition on the knowledge of the debtor/ beneficiary of the transaction is considered to be established; or e.g., in such a case the objective condition on the

insolvency of the debtor at the time of the transaction is presumed)

Answer: B

Additional comments: It is usually the case that, in respect of connected/related parties (for which a common definition would be useful), a presumption to the effect that it is for the connected/related party to provide proof of the non-infringement of transaction avoidance rules would be useful.

5.2.3.1 Who shall be considered as a "connected person" in the context of avoidance of transactions according to the harmonized rules?

Free text

Family members (within limits of degrees); entities connected through share ownership or common shareholders (normally those with significant investments) as well as where control can be exercised directly or indirectly through connected management, shareholders or contractual partners.

5.3 Should the time-periods before the opening of insolvency proceedings in which a transaction must have been entered into for it to be avoidable (the "suspect period") be harmonized at EU level?

a) Yes
b) No

Answer: Yes

Additional comments: At the very least, consideration should be given to establishing an upper limit (for commercial certainty).

5.3.1 What would be the appropriate length of harmonized time-period(s) with regard to the various transaction types?

5.3.1.1 Preferences:
Please indicate the length

General
a) 3 months
b) 6 months
c) 1 year
d) 2 years or more

Answer: D (2 years)

Additional comments: 2 years should be a reasonable period for the insolvency office holder to determine the nature of the suspect transaction and to be able to bring a claim.

Where connected party involved
a) 6 months
b) 1 year
c) 2 years
d) 3 years or more

Answer: D (certainly longer than 2 years, but subject to a maximum)

Additional comments: 2 years should be a reasonable period for the insolvency office holder to determine the nature of the suspect transaction and to be able to bring a claim. But, for connected/related parties, the need for commercial certainty does not necessarily apply and such transactions can be subject to a longer period.

5.3.1.2 Undervalued transactions/ gifts
Please indicate the length

General

a) 6 months
b) 1 year
c) 2 years
d) 3 years or more

Answer: C (2 years)

Additional comments: 2 years should be a reasonable period for the insolvency office holder to determine the nature of the suspect transaction and to be able to bring a claim.

Where connected party involved

a) 1 year
b) 2 years
c) 3 years
d) 5 years or more

Answer: C (certainly longer than 2 years, but subject to a maximum)

Additional comments: 2 years should be a reasonable period for the insolvency office holder to determine the nature of the suspect transaction and to be able to bring a claim. But, for connected/related parties, the need for commercial certainty does not necessarily apply and such transactions can be subject to a longer period.

5.3.1.3 Transactions to defraud creditors
Please indicate the length

General

a) 2 years
b) 3 years
c) 5 years
d) 10 years or more

Answer: C (5 years)

Additional comments: A balance must be struck between the legitimate desire to sanction fraud/fraudulent behaviour and commercial certainty. 5 years is about right as a maximum.

Where connected party involved

a) 2 years
b) 3 years
c) 5 years
d) 10 years or more

Answer: C or D

Additional comments: 5 years should be sufficient in all cases of fraud and it may not be necessary to specifically single out related/connected parties for different (more extended) time periods.

5.3.2 What shall be the point in time from which the "suspect period" shall be counted from?

a) The opening of insolvency proceedings
b) The appointment of the insolvency practitioner
c) Other

Answer: A (with reservations)

Additional comments: At the very least, certainty would be promoted by having a common start date for suspect periods, subject to the possibility of extending them, should facts only subsequently come to light (for example, where there has been an attempt at concealing evidence etc.).

5.4 In most Member States, the right to file an avoidance action lies with the insolvency administrator, however, in certain Member States, creditors are also empowered to file it under certain conditions. In your view, who should be entitled to take action in the courts in relation to the avoidance of transactions?

a) the IP
b) a government official;
c) a court supervisor;
d) a creditor alone;
e) a creditor subject to approval of a court or some other independent body

Answer: A and E

Additional comments: Action by the insolvency office holder alone would have the merit of being procedurally efficient. However, the possibility of inaction could prompt a person with a legitimate interest (not just a creditor, but usually so) to bring an action subject to approval by a court.

5.5. Should there be a harmonized limitation period as far as the institution of avoidance proceedings?

a) Yes
b) No

Answer: Yes

Additional comments: Just as in relation to the suspect period, establishing time limits are useful, so too would a limitation period confer certainty on transactions. However, this could be subject to the possibility of extension them, should facts only subsequently come to light (for example, where there has been an attempt at concealing evidence etc.).

5.5.1 If your answer to the preceding question was in the affirmative, what shall be the time-period within which avoidance proceedings have to be instituted?

Free text:

3 years would be a reasonable time period.

6. HARMONISING PROCEDURAL ISSUES RELATING TO FORMAL INSOLVENCY PROCEEDINGS

This section addresses the definition of insolvency, the obligation (of the debtor) and the possibility (for others) to file for insolvency proceedings and the requirements for filing claims against an insolvent debtor. On all those questions, there are divergent solutions in the Member States' legal systems. Insolvency is defined on the basis of either only a cash flow/illiquidity test (a company cannot pay its debts as they fall due) or, as an alternative, a balance sheet/overindebtedness test (the value of a company's liabilities outweigh the value of its assets). Approaches also differ as to whether directors are required to file for insolvency proceedings and as to the conditions for creditors to request the opening. To ensure that their claims are acknowledged and taken into account in the calculation of creditors' pay-out in liquidation and in the voting for arrangements for restructuring, creditors need to file their claims with the insolvency practitioner but the conditions, especially concerning the time allowed for the filing varies significantly

across the EU.

6.1. Should there be a harmonised definition of insolvency at EU level?

a) Yes
b) No

Answer: Yes (with reservations)

Additional comments: At the very least, the various entry tests could be rationalised as part of an overall definition of insolvency.

6.1.1. Should the definition of insolvency be based on?

a) Liquidity test?
b) Balance sheet test?
c) The possibility to opt for one of both?
d) Other test (for instance, a combination of elements from both tests)?

Answer: A (with reservations)

Please explain: A liquidity test is very common in most insolvency frameworks. However, a nuanced approach towards encouraging recourse to restructuring/insolvency as appropriate needs to be more flexible and allow for entry without necessarily meeting this criterion. As such, anticipating or foreseeing the possibility of illiquidity within a reasonable period (short- to medium-term) should be acceptable as an entry test.

6.2. In view of procedural economy, would you consider beneficial introducing rebuttable legal presumptions that would facilitate proving that a debtor is insolvent (for instance: if a debtor is unable to meet its financial obligations over a period of time longer than 90 days, it is considered insolvent)? [Indicate an available appropriate ranking scale from 0 to 5]

Only values between 0 and 5 are allowed

Answer: 0.

Additional comments: The diversity of approaches in Europe does not lend itself to the imposition of a common presumption. The liquidity test merely refers to the non-payment of any sum that is due. That should be sufficient without imposing a rebuttable presumption based on time.

If such presumptions exist in your respective national rule, please provide a short explanation on the type of presumption and on its main elements or provide reference to it in your respective jurisdiction

Short explanation:

Generally, a presumption of insolvency based on time is not a feature of most insolvency systems. Some jurisdictions impose time limits for access to procedures (e.g., in France, conciliation proceedings apply to solvent debtors but can also be opened at the benefit of debtors in a 'state of cessation of payment' (‘insolvent’ under French law) but for less than 45 days which is the time allocated for the director to file for insolvency), which can in turn hinge on a state of insolvency being proven.

6.3. Should there be harmonised rules on how insolvency proceedings are opened? [Indicate an available appropriate ranking scale from 0 to 5]

Only values between 0 and 5 are allowed

Answer: 3

Additional Comments: The diversity of approaches in Europe does not lend itself to the imposition of a harmonised approach to the opening of proceedings. It may be sufficient, however, for minimum criteria to be fulfilled prior to the opening to be set (e.g., provision of notice to creditors).

Do you think such rules should:

a) Oblige an insolvent debtor to file for insolvency
b) Provide creditors with a right to file for insolvency

Answer: A and B (subject to reservations)

Additional comments: Obliging a debtor to file for insolvency is seen as the most efficient way to protect the interest of creditors. However, compliance with the test for insolvency should not in itself necessitate such a filing if the debtor is, for example, still in negotiation with creditors or is seeking advice as to appropriate steps to take. In such cases, it should be possible for the debtor's behaviour to be appropriately upheld by a court. Providing creditors with a right to file is often seen as a natural corollary of the principle of contract (*pacta sunt servanda*). However, many systems limit this right in the case of some procedures (often those of a pre-emptive or preventive type). Limitations in respect of creditors' rights should, however, be subject to proportionality and carefully controlled.

6.4. One of the most important issues for legal entities, when they learn that insolvency proceedings have been opened against their debtor, is to learn about this fact in a timely manner and to acquire certainty about the time-period for lodging their claims in the respective insolvency proceedings.

As regards the information on the opening of insolvency proceedings, are national insolvency registers and the interconnectivity of national insolvency registers at EU level functioning properly? [bearing in mind that the EU-wide interconnection of insolvency registers (IRI 2.0, see Article 25 of Regulation (EU) 2015/848) will be fully operational in all Member States only as of 30 June 2021)]

a) Yes
b) No. If no, what should be improved?

Answer: Neither

Additional comments: As per a presentation at the European Judicial Network meeting of 18 March 2021, this is still a work-in-progress. Thus, it would not be appropriate to comment on the efficiency of the interconnection at this point in time.

Do you see merit in harmonising national rules on the time-limits for creditors as regards the lodging of their claims?

a) Yes. If yes, what would be the most appropriate time-limit?
b) No

Answer: Yes (with reservations)

Additional comments: A minimum (and reasonably generous) time could be stipulated, to which member states can be free to add.

6.5. Given the increasing number of cross-border insolvency cases and the need for specialised legal knowledge, should the rules on minimum training requirements/professional qualifications for judges be harmonised at the EU level?

a) Yes
b) No. If no, please explain or indicate „no opinion"

Answer: Yes

Additional comments: As for insolvency office holders, determination of appropriate minimum qualification, expertise and experience should be set, together with a requirement for continuous professional development, particularly in subject-appropriate areas.

6.6. In your assessment, would it contribute to the efficiency of insolvency proceedings if Member States designated specialised chambers at the appropriate court instances for the handling of insolvency cases?

a) Yes
b) No

Answer: Yes (with reservations)

Additional comments: It would certainly be efficient for some certainty to be introduced as to the appropriate court and/or judges to handle insolvency matters, as expertise in dealing with such cases can only assist in the conduct of future cases.

7. ASSET PRESERVATION, ASSET IDENTIFICATION AND TRACING OF ASSETS BELONGING TO THE INSOLVENCY ESTATE

Asset tracing is a process that enables courts, IP, investigators or parties that demonstrated a legitimate interest to determine a debtor's assets, examine the revenue generated by often fraudulent activity, and follow its trail. EU law has established a specific tool for asset tracing in the area of civil judicial cooperation, in order to obtain information on bank accounts in another Member State in the context of the cross-border freezing of accounts in the Regulation on a European Account Preservation Order [Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ L 189, 27.6.2014, p. 59].

However, there is no horizontal instrument to assist cross-border asset tracing and enforcement in insolvency cases.

7.1. Businesses across the Union often stipulate in contracts among themselves specific "acceleration" or "termination" clauses (also known as "ipso facto clauses") for the event if any of them becomes insolvent. Since rules on such clauses in EU Member States diverge or do not exist and since courts and arbitral tribunals issue very diverging decisions when interpreting such contractual clauses, would you estimate that harmonisation of those rules would enhance legal predictability and security for businesses?

a) Yes
b) No

Answer: No

Additional comments: The diversity of such contracts and their treatment in insolvency do not lend themselves to easy harmonisation, as common practice has yet to develop in relation to their use and prevalence.

7.2. Should there be EU harmonised rules on assistance (including interconnectivity of relevant registers) in the cross-border tracing of assets of the insolvent debtor?

a) Yes
b) No

Answer: Yes

Additional comments: Greater information sharing would be very useful indeed.

7.2.1 If YES, information on which types of assets is the most useful? (Choose one or more of the following)

a) Real estate

b) Movables
c) Company interests
d) Bank accounts
e) Claims (other than arising from bank accounts)

Answer(s): All of the above

Additional comments: The increasing use of crypto-currency and assets poses particular challenges for insolvency office holders in tracing and securing them. Some action in this area would be desirable.

7.3. What are the powers and duties that insolvency practitioners should have /observe in order to trace, secure and recover assets:(choose one or more of the following):

a) the power to compel the production of books and records (including from lawyers, accountants and banks)
b) the power to conduct audits
c) search order
d) freezing order
e) examination of corporate officers
f) the duty to report suspicious transactions to law enforcement authorities
g) other

Answer(s): All of the above

Additional comments: Most of these powers are already available in many insolvency frameworks, together with the duty to report criminal conduct.

7.4. Where appropriate, please provide reference for any freezing order or proprietary injunction available in your respective jurisdiction to the insolvency practitioner against the debtor within insolvency proceedings.

Free text:

There are many such injunction types across Europe.

7.5. Should insolvency practitioners have full access to property and collateral database?

a) Yes
b) No

Answer: Yes

Additional comments: Establishing asset ownership or rights is one of the first tasks of the insolvency office holder. Access to all legal and regulatory databases is useful.

7.6. Should the insolvency practitioner (and other interested parties) be allowed to participate at an early stage of criminal investigation, in order to obtain an easier and wider access to evidence?

a) Yes
b) No

Answer: No (with reservations)

Additional comments: The insolvency office holder is not usually a specialist in criminal procedure. While participation may not be a necessary feature of their work, access to any evidence that results (even on a *sub judice* basis) would be useful.

7.7. What other powers or investigative tools should be available to insolvency practitioners? Please, elaborate

Comments: N/A

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