

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

*** Please indicate the size of your company:**

- large (more than 250 employees)
- medium (51-250 employees)
- small (11-50 employees)
- micro (0-10 employees)

*** Please specify (bailiff, lawyer, notary or other)**

Other.

*** Please specify**

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Name of your organisation (if applicable)

General Council of the Bar of England and Wales ("Bar Council").

The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

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:

39850528734-23

*** 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

*** Please specify**

As barristers.

*** 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

*** Please specify**

5. Please provide your contact information:

*** First name**

*** Last name**

*** Postal address** (if you are replying on behalf of an organisation, please provide your professional postal address)

*** E-mail address** (if you are replying on behalf of an organisation, please provide your professional e-mail address)

*** 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)

- 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 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
- h) No opinion

Please explain

Measures of the kinds identified in (a) to (g) above may all, in principle, be appropriate. Their actual appropriateness will depend on the detail (including content and effect) of any such measures as may be proposed.

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
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a) Preventive measures to enable the restructuring of viable businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
b) Measures to increase the recovery rates of debts in insolvency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
c) Measures aimed to ensure the discharge of debts for entrepreneurs (individuals)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
d) Measures to ensure the discharge of debts for consumers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
e) Measures governing employees' rights in insolvency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
f) Measures ensuring the enforcement of debts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
g) Other measures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please explain

Measures of the kinds identified in (a) to (g) above have, to an appropriate extent, been implemented in England and Wales, and generally work well in our experience. The Bar Council is unable to comment on the laws of other Member States or on whether the differences between the laws of Member States produce any material adverse effect on the functioning of the Internal Market.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
b) Measures to increase the recovery rates of debts in insolvency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

c) Measures to ensure the discharge of debts for entrepreneurs (individuals)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
d) Measures governing employees' rights in insolvency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
e) Measures ensuring the enforcement of debts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
f) Other measures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please explain

The absence of measures of the kinds identified in (a) to (f) above may have an impact on the creation and operation of newly established companies. In England and Wales, such measures have, to an appropriate extent, been introduced and work well in our experience. The Bar Council is unable to comment on the measures adopted by, and their effect in, other Member States.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
b) Measures to ensure the assessment of a debtor's viability	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
c) Measures to provide minimum standards in relation to the definition of insolvency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
d) Measures to lay down the duties of directors in companies in financial distress	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
e) Measures to protect new financing given to companies that are being restructured	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

f) Measures to clarify the position of shareholders of companies in insolvency or close to insolvency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
g) Measures to promote assistance to financially distressed debtors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
h) Other measures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

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

Measures of the kinds identified in (a) to (d) and (f) above have, to an appropriate extent, been implemented in England and Wales, and in our experience they work well. As to (e), a United Kingdom government consultation is currently underway; the Bar Council does not wish to comment pending its outcome. The Bar Council is unable to comment on the laws of other Member States or on whether the differences between the laws of the Member States adversely affects the functioning of the Internal Market.

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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b) Measures to ensure the assessment of the viability of a debtor	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c) Measures to provide minimum standards in relation to the definition of insolvency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
d) Measures to lay down the duties of directors in companies in financial distress	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e) Measures to protect new financing given to					

companies that are being restructured	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
f) Measures to clarify the position of shareholders of companies in insolvency or close to insolvency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
g) Measures to promote assistance to financially distressed debtors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
h) Other measures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

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

Measures of the kinds identified at (a) and (b) above produce a strong positive impact. As to (c): the definition of insolvency has little or no practical relevance, in our experience, in the context of such measures. As to (d): such measures focus the minds of directors and their advisers on their obligations to the companies and creditors. As to (e): a United Kingdom government consultation is currently underway; the Bar Council does not wish to comment pending its outcome. As to (f): the absence of such measures in England and Wales does not cause a problem as the position of shareholders is clear. As to (g): to our knowledge, there are no such measures in England and Wales.

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.

The impact is potentially significant. First, the restructuring tools available in the home Member State may not be those with which creditors are familiar and, accordingly, may not be acceptable to creditors. Secondly, where the restructuring falls outside the scope of the Insolvency Regulation, there may be some uncertainty as to whether and to what extent such restructurings will be recognised and enforced in other Member States. In practice, however, neither potential difficulty has given rise to any real problem in relation to restructurings implemented in appropriate cases under the law of England and Wales.

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

Please explain

Access should be available at any time, when justified by the circumstances; confining access to a situation of actual or imminent insolvency is likely to make restructuring more difficult and, in some cases, may mean any attempt to restructure comes too late.

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

Please explain

The involvement of a court is not necessary or appropriate in every circumstance and it would lead to inflexibility, unnecessary expense and delay. Whether the involvement of a court is required, and the extent of its involvement, will depend on factors such as the degree of creditors' consent and the nature and complexity, as well as the fairness, of the restructuring, and will vary from case to case.

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

Please explain

A distinction is to be drawn between publicity and creditor awareness. While creditors likely to be affected will always need to be aware of what is proposed, publicity should not be an absolute requirement. The need for it will depend on the nature of the restructuring and on factors such as the extent of creditor consent and whether publicity would have an adverse effect on the business being restructured. If publicity is appropriate, its timing and extent may vary depending on the circumstances.

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

Please explain

The size of the business is not a relevant factor in this regard.

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

Please specify who

In the first instance, the assessment should be carried out by the debtor and its advisers. In practice, however, the creditors affected will need to be satisfied as to the viability of the debtor and its fitness for restructuring, whether on the debtor's analysis or their own. The scope for any such analysis by the Court will be very limited once the debtor and the creditors have considered these issues and should be a last resort, if at all, in the event there is a dispute.

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

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

Please explain

The Bar Council does not believe that a common definition of insolvency is required, particularly not in the context of restructuring, for reasons explained in answer to questions 2.2(c) and 2.4 above.

2.7.1. What should be included in such a definition (insolvency test)?

- a) Inability to pay debts as soon as they fall due (illiquidity/cash flow test)
- b) Value of a company's assets compared with its liabilities, including prospective and contingent liabilities (balance sheet test)
- c) The combination of an illiquidity and a balance sheet test
- d) Other
- e) No opinion

Please specify

If a common definition of insolvency at EU level is to be proposed, the definition should include both (a) and (b).

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

Whether debtors should be able to keep control over the day-to-day operations of their business will depend on the nature of the restructuring process which has been engaged and on the surrounding circumstances.

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

Debtors should be able to ask for such a stay at any time in formal insolvency proceedings, in preventive/pre-insolvency restructuring procedures, or in other cases in which the court is given the general jurisdiction to stay proceedings or other enforcement by creditors. Whether the court will grant such a stay should be dependent on its assessment of all the circumstances. In the case of certain forms of restructuring procedure, it may be appropriate that there be an automatic stay, with creditors being able to apply to the court for the stay to be lifted where they can demonstrate a good reason.

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

A degree of flexibility is required, as in many cases the creditors themselves will agree a standstill with the debtor while a restructuring is being considered. In the case of certain forms of restructuring procedure, it may be appropriate that there be an automatic stay of a predetermined duration. In others, it may be appropriate that the stay be granted by order of the Court for the duration it decides is appropriate. In each case, the stay should be subject to subsequent renewal or revocation depending on the 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

The creditor should be able to make such a request in all cases, if it is able to demonstrate a good reason why the stay should be lifted, either in part or in its entirety. It should be for the court to decide whether it accedes to the request.

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

Please explain

The confirmation of the Court should not be required in all cases. In cases where the court's confirmation is not required, creditors should (and, in our experience, in England and Wales do) have the ability to apply to the Court for scrutiny of the plan in order to safeguard against oppression of the minority or if there has been some material irregularity. The rights of secured creditors will vary depending on the restructuring process invoked.

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

Cross-class cram down is not currently recognised under the law of England and Wales. In principle, however, we have no objection to cross-class cram down, provided that it is subject to proper safeguards. As a minimum, these must include (i) obtaining the approval of a minimum percentage of creditors in each class and of all classes, and (ii) the ability of the Court to undo the cram down, on the application of a person affected, if it is satisfied that there is evidence of oppression or material irregularity.

Please explain

Although class rights are of vital importance, there may well be circumstances in which some compromise of such rights is necessary in the interests of the restructuring as a whole and to prevent the inappropriate adoption of a hold-out position. However, the conditions under which cross-class cram downs may be available will require careful consideration and there will need to be adequate safeguards against oppression in place.

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

Please specify

A United Kingdom government consultation is currently underway in relation to this question; the Bar Council does not wish to comment pending its outcome.

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

In England and Wales, directors are already subject to statutory and fiduciary duties, including the duty to take into account or act in creditors' interests if the company is in financial difficulty. Those duties are carefully balanced. Directors are also already subject to the possibility of quasi-criminal sanction (including disqualification proceedings) in relation to their conduct in running the company. New incentives may upset that balance and, in our view, are not required.

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

Please explain

This is a matter of policy about which the Bar Council is unable to comment.

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

The ability of individual entrepreneurs and consumers to restructure their debt is beneficial to both creditors and debtors.

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.

No conditions for access to such advice should be imposed.

Please explain

Access by individual entrepreneurs and consumers to free or low-cost advice of this kind would be beneficial. The advice would need to be of sufficient quality, objective and appropriate to the debtor concerned. That has cost implications which are a matter of policy about which the Bar Council is unable to comment.

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

Full discharge of debts is the most appropriate course of action, returning the honest debtor to productive economic activity.

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

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

What should be the substance of such test?

(please explain)

The test of honesty is nuanced by the particular cultural and economic circumstances of each jurisdiction. In England and Wales, the test is a carefully-calibrated one which has been developed by the courts. The test should remain a matter for the legal systems of each Member State to determine.

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

Please explain

The appropriate period is one year, subject to extension by the Court if satisfied that the debtor has been unco-operative in the insolvency proceedings.

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

Not applicable.

Please explain

Not applicable.

3.3.4. Which special types of debt should be excluded from discharge?

(choose all that apply)

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

Please specify

Fines imposed by a Court, child support or other payments ordered to be paid in family proceedings, and student loans should be excluded from discharge, as is currently the position in England and Wales. In addition, unless the Court so directs, discharge should not release the debtor from any liability to pay damages in respect of personal injuries.

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

3.4.1. Please explain

There is no sufficient justification for treating individual entrepreneurs and consumers differently in this regard.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
b) Minimum standards on avoidance actions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
c) Minimum standards applicable to insolvency practitioners/mediators/supervisors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
d) Measures providing for a specialisation of courts or judges	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
e) Measures to shorten the length of insolvency proceedings	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
f) Measures to prevent disqualified directors from starting new companies in another Member State	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
g) Other measures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please explain

Measures of the kinds identified in (a) to (g) above have, to an appropriate extent, been implemented in England and Wales, and work well in our experience. The Bar Council is unable to comment on the laws of other member states or on whether the differences between the laws of Member States adversely affect the functioning of the Internal Market.

4.2. Which measures would contribute to increasing the recovery rates of debts?

(choose all that apply)

- 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

h) No opinion

Please explain

Measures of the kinds identified in (a) to (g) above have, to an appropriate extent, been implemented in England and Wales, and generally work well in our experience. What works best in the context of debt recovery, however, is the availability of measures which enable viable businesses to be restructured and rescued. The Bar Council is unable to comment on the laws of other member states, and is unable to say whether introduction, at an EU level, of any such measures as are identified in (a) to (g) would materially increase debt recovery rates; but it doubts whether this would materially improve the position in England and Wales.

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)

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

Where the debtor's debt is secured by a fixed charge or analogous security, (a) is appropriate. Where there is a floating charge or analogous security, (b) is appropriate.

4.4. What minimum standards should be harmonised for 'avoidance actions'?

(choose all that apply)

a) Rules on the types of transactions which could be avoided

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

The Bar Council expresses no opinion as to whether avoidance actions should be harmonised. However, if they are to be harmonised then rules of the kinds specified in (a) and (b) would need to be harmonised. In relation to (a), care is needed to ensure that "transaction" is not defined too restrictively. In England and Wales it has a wide definition, which in the Bar Council's view is appropriate.

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)

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

Please specify

Measures of the kinds identified in (a) to (e) have been implemented in England and Wales, and in our experience they generally work well. The Bar Council expresses no opinion as to the measures taken in other Member States and is unable to say whether introduction of such measures at an EU level would materially increase the efficiency and effectiveness of insolvency proceedings generally; but it doubts whether this would materially improve the position in England and Wales.

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

- a) Relevant foreign language knowledge
- b) Sufficient human and financial resources in the insolvency practitioner's office
- 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

Please specify

Not applicable.

4.7. What are the causes for the excessive length of insolvency proceedings?

(choose all that apply)

- a) Judicial activities concerning the supervision or administration of insolvency proceedings
- b) Delays in the liquidation of the debtor's assets
-

- 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)
- d) A lack of promptness in exercising creditors' rights
- 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

All of the factors listed at (a) to (f) above may contribute to the length of insolvency proceedings but that is not to say that such proceedings are excessively long. The duration of such proceedings arises primarily from the complexity of the case.

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

Please explain

The duration of such proceedings arises from the complexity of the case and so the imposition of a target maximum duration would not be appropriate.

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

(please explain)

The conduct, duration and cost of legal proceedings are kept under continual review in England and Wales. The most recent such review was conducted by Lord Justice Briggs. His "Civil Courts Structure Review - Interim Report", published in December 2015, proposed measures which would fundamentally alter the administration of justice in this jurisdiction by the use, in particular, of information technology to manage and resolve litigation, including insolvency proceedings.

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

- a) be made available for information purposes via the interconnected insolvency registers so that other Member States are informed

- 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

In the context of the Internal Market, if disqualification orders are to have their intended punitive and protective effects they should produce the automatic effect described in (b).

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
- 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

Please explain

The director should be subject to the punitive effect, and the disqualification should produce the protective effect, which are thought to be appropriate by the host state in that jurisdiction.

4.12. Which measures would contribute to reducing the problem of non-performing loans?

(choose all that apply)

- a) Measures to improve the effectiveness of insolvency proceedings
- b) Measures enabling the rescue of viable businesses
- 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
- f) Other measures related to insolvency
- g) Measures unrelated to insolvency (e.g. enforcement of contracts)
- h) No opinion

Please explain

Where there is a viable business which needs restructuring of its debts in order to avoid formal insolvency it is in the interests of creditors as much as the debtor to have tools available to enable the debts to be restructured and eventually repaid. However, other than in that context, the problem of non-performing loans is not one which the insolvency procedures of the member states can address.

5. Additional comments

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

The EU has launched ambitious initiatives in the field of insolvency law. Whilst the Bar Council has supported several of those initiatives, we have sounded and continue to sound a note of caution in respect of a “one size fits all” approach.

We regard it as appropriate to do so again in this consultation, and in particular in relation to restructuring, a field in which flexibility is paramount.

Provided such models as may be proposed at EU level exist in parallel with national models, leaving flexibility for companies to choose, we continue to be open to EU activity in this area.

You can also send a separate written contribution by uploading your document here: