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ENHANCING THE CONVERGENCE OF INSOLVENCY LAWS

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Introduction

Discrepancies in national substantive insolvency laws of the Member States create barriers to the free movement of capital in the internal market. Such discrepancies, in particular, make it more difficult to anticipate the outcome for value recovery in cases of insolvency. In 2015, the Commission concluded already in its original Action Plan for a Capital Market Union that “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”.

In 2019, the Directive on Restructuring and Insolvency (Directive (EU) 2019/1023) established minimum standards both for preventive restructuring procedures available for debtors in financial difficulty, when there is a likelihood of insolvency, and for procedures leading to a discharge of debts incurred by over-indebted entrepreneurs and allowing them to take up a new activity. This directive admittedly did not harmonise core aspects of insolvency law, or that of the formal insolvency proceedings, such as a common definition of insolvency, the conditions for opening insolvency proceedings, the ranking of claims, avoidance actions, the identification and tracing of assets belonging to the insolvency estate, etc. Vast differences in insolvency frameworks of EU Member States, where no two systems are alike, thus continue to exist.

The current initiative is complementary to the Directive on Restructuring and Insolvency, and – consequently – focuses on aspects of insolvency laws that were not addressed there. The issue at hand is corporate insolvency (i.e. non-bank insolvency), including companies, partnerships and entrepreneurs. More efficient and predictable insolvency frameworks and enhanced confidence in cross-border financing would help strengthen capital markets in the Union.

This public consultation will contribute to this process by gathering the perception and views of Europeans on a range of issues including: the liability and duties of directors of companies in the vicinity of insolvency; the status and duties of insolvency practitioners; the ranking of claims; avoidance actions; identification and preservation of assets belonging to the insolvency estate; core procedural notions.

About you

* Language of my contribution

- ○ Bulgarian

- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
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- Greek
- Hungarian
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* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union

- ( ) Other

* First name

Diana

* Surname

VAN KLEEF

* Email (this won't be published)

diana.vankleef@eumedion.nl

* Organisation name

255 character(s) maximum

Eumedion

* Organisation size

- (•) Micro (1 to 9 employees)
- ( ) Small (10 to 49 employees)
- ( ) Medium (50 to 249 employees)
- ( ) Large (250 or more)

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- Slovakia
- Slovenia
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- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
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- Sweden

- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
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- Bouvet Island
- Brazil
- British Indian Ocean Territory
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- Chad
- Chile
- China
- Christmas Island
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
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- New Zealand
- Nicaragua
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- Panama
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- Paraguay
- Switzerland
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- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
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- Tonga
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- Turkey
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- United Kingdom

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- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- United States
- United States Minor Outlying Islands
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* More specifically, I am giving my contribution as:

- ◉ stakeholder in the financial sector
- ○ stakeholder in the business and trade sector
- ○ social- or economic interest organization
- ○ practitioner, professional with interest in the field of insolvency
- ○ public authority
- ○ member of the judiciary
- ○ research, academia, “think-tank”
- ○ other

* Your are:

- ○ a bailiff,
- ○ a lawyer,
- ○ a notary,
- ○ an insolvency practitioner,
- ○ a judge,
- ◉ none of these

* Have you had practical experience with insolvency proceedings?

- ○ Yes

- (●) No

* Please, indicate your position from the perspective of employment policy:
  - ( ) employer
  - (●) employee
  - ( ) self-employed
  - ( ) employer representative
  - ( ) employee representative

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?

Select an available ranking scale from 0 to 5: where 0 means ‘no problem’ and 5 means ‘extremely significant problem(s)’

Only values between 0 and 5 are allowed

4

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

Select an available ranking scale from 0 to 5: where 0 means ‘no problem’ and 5 means ‘extremely significant problem(s)’

Only values between 0 and 5 are allowed

4

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?

Select an available ranking scale from 0 to 5: where 0 means ‘no problem’ and 5 means ‘extremely significant problem(s)’

Please select

	0	1	2	3	4	5
a) Differences in the definition of insolvency;	○	○	○	◉	○	○
b) Differences in how insolvency proceedings are triggered - obligations of debtors and rights of creditors to file for insolvency;	○	◉	○	○	○	○
c) Differences in the duties and liabilities of directors in vicinity of insolvency and in insolvency proceedings;	○	○	○	◉	○	○
d) Differences in the duties and liabilities of insolvency practitioners;	○	◉	○	○	○	○
e) Differences in the identification and tracing of assets that belong to the insolvency estate;	○	○	○	◉	○	○
f) Differences in the ranking of claims;	○	○	○	◉	○	○
g) Differences in relation to avoidance action	○	○	○	◉	○	○

h) Other, please explain

We concur with the remark in this consultation document that the discrepancies between the Member States' insolvency laws 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. Generally the longer restructuring processes take, the more value is destructed for investors. This risk of a lengthy and costly restructuring process is reflected in higher yields paid on debt by especially companies that already are vulnerable. Faster and cheaper restructuring lowers the yields paid on debt by already vulnerable companies and that on its own already increases the chance of survival of those vulnerable companies. In light of the above we agree with the remark in the Final Report of the High Level Forum on the Capital Markets Union that targeted harmonisation of certain definitions and procedures would help investors better manage legal risks of their cross-border exposures. As already mentioned in our response to the aforementioned report we believe that a legislative proposal for minimum harmonisation of certain targeted elements of core non-bank corporate insolvency laws is very important. In this respect we are also in favour of EU harmonised rules on assistance (including interconnectivity of relevant registers) in the cross-border tracing of assets of the insolvent debtor.

In addition to the above ranking of the existing differences we would like to note the following. European corporate groups more often than not, are financed on a cross border basis, meaning that a main borrower in Member State A, will have the benefit of guarantees, granted by affiliated entities in other Member States. When restructuring the group debt via a composition plan, this may lead to issues. In the context of such a restructuring it will be required that if the debt of the main borrower is compromised, that the guarantees granted by affiliates are compromised as well. If the other entities have their COMI in another Member State than Member State A, it may prove difficult to recognize the composition plan in other Member States. This likely is only possible if the judgment confirming the composition plan can be recognized under the Judgment Regulation. Depending on the procedure used, Article 1 (2) under b of the Judgment Regulation may provide limitations, meaning that the composition plan needs to be confirmed via the EU Insolvency Regulation. Given that the EU Insolvency Regulation is based on an ‘entity by entity’ approach, it can prove to be difficult to compromise the group debt, if group debtors have their COMI in another Member State.

As an example: Finance SA has its COMI in Belgium and it is the main borrower under a multi party facility agreement. Opco 1 GmbH (Germany) and Opco2 Sarl (France) have guaranteed the debt incurred under the facility agreement entered into by Finance SA. Both Opco 1 and Opco 2 have their COMI outside of Belgium (in Germany and France). If a Belgian composition plan would compromise the debt of Finance SA, it is also required to compromise the guaranteed debt - otherwise the compromise will have no meaning (lenders can try to enforce against the Opco’s for the full amount).
If the judgment confirming the composition plan, is rendered in a procedure included in the relevant Annexes to the EU Insolvency Regulation, it is likely that Opco 1 and Opco 2 cannot be included in the Belgian proceedings - the Belgian courts do not have jurisdiction because the COMI of Opco 1 and Opco 2 is in another members state. Also, the judgment confirming the composition plan, cannot be recognized under the Judgment Regulation due to article 1 (2) under b EU Insolvency Regulation.

Hence an EU-wide mechanism allowing group debt to be compromised via proceedings in one Member State, with automatic recognition thereof in other Member States would be helpful. In this context it is relevant that - at least until the onset of Brexit - UK schemes of arrangement often were deemed to be recognizable throughout the EU on the basis of the Judgment Regulation.

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

Select an available ranking scale from 0 to 5: where 0 means ‘no problem’ and 5 means ‘extremely significant problem(s)’

Please select

	0	1	2	3	4	5
a) Differences in the definition of insolvency;	◉	○	○	○	○	○
b) Differences in how insolvency proceedings are triggered - obligations of debtors and rights of creditors to file for insolvency;	◉	○	○	○	○	○
c) Differences in the duties and liabilities of directors in vicinity of insolvency and in insolvency proceedings;	◉	○	○	○	○	○
d) Differences in the duties and liabilities of insolvency practitioners;	◉	○	○	○	○	○
e) Differences in the identification and tracing of assets that belong to the insolvency estate;	◉	○	○	○	○	○
f) Differences in the ranking of claims;	○	◉	○	○	○	○
g) Differences in relation to avoidance action	◉	○	○	○	○	○

h) Other, please explain

First we would like to make a general remark. This question refers to “the insolvency framework of the jurisdiction where you operate”. The scope of Eumedion’s work is confined to the corporate governance and sustainability issues at Dutch listed companies, therefore this answer relates to the Dutch insolvency framework. We are of the opinion that the Dutch insolvency framework is efficient, predictable and understandable. This enables investors to anticipate the length and outcome of value recovery, and by consequence makes it possible to adequately price the risk in advance when making an investment. Notwithstanding the above we believe that the Dutch rules with respect to the suspension of payment (surseance van betaling) could be reformed; currently those proceedings have no effect on the rights of preferred creditors and creditors with security interests. As a consequence the suspension of payments proceedings are not always effective as a restructuring tool.

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.

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

Generally we believe that the model for corporate insolvency should be efficient, predictable and understandable.

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?

- (●) Yes
- ( ) No

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 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;
- [x] A duty of the director, once the company is insolvent, to file for the appropriate insolvency proceedings;
- [x] 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'.
- [x] Minimum standards at EU level on sanctions for breaches of the duties above. This might include civil and/or criminal liability of the directors.
- [ ] 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.

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)

- [ ] 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
- [ ] 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
- [x] 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)
- [x] There shall not be any dedicated measure in insolvency law, the question shall be settled as part of the general company law rules
- [ ] None of the above, there is no need for any legislative intervention at EU level in this context at this point in time.

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.)

- [ ] Licensing and registration
- [ ] Regulation, supervision and discipline
- [ ] Qualification and training of IPs
- [ ] Appointment of the IPs
- [ ] Work standards and ethics for IPs
- [ ] Legal powers and duties of IPs

- [ ] Remuneration of IPs
- [x] Other, please elaborate:
- [ ] None of the above

please elaborate:

No opinion. This question falls outside the scope of the activities of Eumedion.

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.	○	○
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.	○	○
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.	○	○
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.	○	○
Work standards and ethics - the work of IPs should be guided by a set of specific work standards and ethics for the profession.	○	○
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.	○	○

IPs should be subject to a duty to keep all stakeholders regularly informed of the progress of the insolvency case.		
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		

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.)

- [ ] The relationship between the claims of secured and unsecured creditors
- [ ] The position of the claims by unpaid employees of the debtor
- [ ] The status of tax and other public law claims in the event of insolvency
- [ ] The subordination of shareholder loans and/or other amounts due to shareholders to general creditor claims
- [ ] The validity of creditor agreements on ranking in non-bank insolvency
- [x] The super-priority of “new financing”[1], including the definition of the “new money” and the conditions of such a priority
- [ ] None of the above
- [x] Other, please, elaborate:

[1] „New finance“ means finance that is provided to a person or company in financial distress or even when insolvent.

Please elaborate

Provided that such harmonization of rules with respect to “new financing” would include a balanced way of dealing with the interests of existing secured creditors, we believe it could be beneficial to the restructuring climate in the EU. Furthermore we believe it is important that the ranking of claims is known and predictable.

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?

- ○ Yes,
- ○ Yes, provided that such rules are clearly defined, have a sufficiently narrow scope and are proportionate,
- ◉ No, such carve-out rules, even with the narrowest scope, would have a negative effect to credit availability and to the cost of credit.

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.]

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

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[1] 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.)

[1] 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

- ☐ 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);
- ☐ The priority status of unpaid employees shall be subject to monetary and/or other limits;

- [ ] Certain employees / categories of employees shall not enjoy priority rights;
- [ ] 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[1];
- [ ] Insolvency or more general insolvency related protections available to employees should be extended to self-employed persons;
- [x] No harmonisation is needed.

[1] 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

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?

- ( ) Yes, tax and other public law claims shall be put in the category of general unsecured claims.
- ( ) Yes, tax and other public law claims shall be treated as claims by involuntary creditors.
- (•) No, it is important that Member States may maintain the priority status of such claims in insolvency proceedings

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)?

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

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[1]?

[1] 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.

- (●) Yes
- ( ) No

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

- (●) Yes
- ( ) No

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

- ( ) Yes
- (●) Yes, but with the following exceptions (please, elaborate)
- ( ) No, there is no need to use the same priority rules for the two regimes.

Please elaborate:

> Dutch law (wet homologatie onderhands akkoord) already provides for restructuring proceedings outside bankruptcy. In short when distributing capital gains realised through the restructuring of the debts within the company, account must be taken of the legal order in which the providers of capital can take recourse against the debtor's assets. Deviations from this ranking are possible, but only if the debtor has provided a good reason for doing so and can demonstrate that the capital providers who invoke the "absolute priority rule" are not affected in their interests. There is no justification why the ranking of claims should differ in case of restructuring proceedings within insolvency.

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.)

- [x] a) Preferences (transactions benefiting one creditor to the detriment of the general body of creditors);
- [x] b) Transactions at an undervalue, including gifts to a creditor or a third party;
- [x]

- [ ] c) Securities created in the “suspect period” in order to convert a debt from being unsecured to being secured (invalidation of securities);
- [x] d) Transactions to defraud creditors[1];
- [x] e) Transactions entered into after insolvency proceedings;
- [ ] f) Other [please, indicate!];
- [ ] g) None of them, there shall not be such harmonized rules

[1] „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 actio pauliana.

Please indicate:

At present, substantive insolvency law is regulated exclusively at the level of EU Member States. This is the reason why there are considerable discrepancies between the Member States' insolvency laws. There is no justification why the protection of creditors against avoidance actions should differ from Member State to Member State.

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 in the pop-up free text box by using the letter codes under point 5.1)

Objective criteria

- [ ] The transaction happened within the “suspect period” (a set time period before the opening of insolvency proceedings);
- [x] The transaction is to the detriment of the general body of creditors;
- [x] The transaction paces the creditor recipient in a better position than he or she would have been in a liquidation;
- [x] The debtor was insolvent at the time of the transaction;
- [x] The debtor became insolvent as a result of entering into the transaction

If you consider a condition relevant only in relation to certain types of transaction, please, indicate them in the free text box at the end of the condition by using the letter codes a) to g) under point 5.1)

Not applicable.

If you consider a condition relevant only in relation to certain types of transaction, please, indicate them in the free text box at the end of the condition by using the letter codes a) to g) under point 5.1)

Not applicable.

If you consider a condition relevant only in relation to certain types of transaction, please, indicate them in the free text box at the end of the condition by using the letter codes a) to g) under point 5.1)

Not applicable.

If you consider a condition relevant only in relation to certain types of transaction, please, indicate them in the free text box at the end of the condition by using the letter codes a) to g) under point 5.1)

Not applicable.

Subjective criteria

- ☑ The debtor knew or should have known that the transaction benefits the particular creditor or third party over the other creditors;
- ☑ 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;
- ☑ The beneficiary of the transaction (a creditor or a third party) knew that the debtor’s intention is to prejudice his or her creditors

If you consider a condition relevant only in relation to certain types of transaction, please, indicate them in the free text box at the end of the condition by using the letter codes a) to g) under point 5.1)

Not applicable.

If you consider a condition relevant only in relation to certain types of transaction, please, indicate them in the free text box at the end of the condition by using the letter codes a) to g) under point 5.1)

Not applicable.

If you consider a condition relevant only in relation to certain types of transaction, please, indicate them in the free text box at the end of the condition by using the letter codes a) to g) under point 5.1)

Not applicable.

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.)

- [ ] Yes, in this case the “suspect period” has to be longer;
- [x] 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)

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?

- [ ] Yes, in this case the “suspect period” has to be longer;
- [x] 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)

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?

- [ ] Yes, in this case the “suspect period” has to be longer;
- [x] 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)

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

We refer to article 43 of the Dutch Bankruptcy Act. That article refers to the following transactions with the following persons:

1) a juridical act performed by the debtor, who is a natural person, with or towards:
   a) his spouse, his foster child or a blood or relative up to the third degree;
   b) a legal person in which he, his spouse, his foster child or a blood or relative up to the third degree is a member of the Board of Directors or of the Supervisory Board, or in which these persons, independently or jointly, participate as a

shareholder, directly or indirectly, for at least one half of the issued share capital;

2) a juridical act performed by the debtor, who is a legal person, with or towards a natural person:
   a) who is a member of the Board of Directors or of the Supervisory Board of the legal person or who is this member's spouse, foster child or a blood or relative up to the third degree;
   b) who, independently or jointly with his spouse, his foster children or his blood or relatives up to the third degree, participate as a shareholder, directly or indirectly, for at least one half of the issued share capital;
   c) whose spouse, foster children or blood or relatives up to the third degree, independently or jointly, participate as a shareholder, directly or indirectly, for at least one half of the issued share capital;
3) a juridical act performed by the debtor, who is a legal person, with or towards another legal person if:
   a) one of these legal persons is a member of the Board of Directors of the other;
   b) a member of the Board of Directors, natural person, of one of these legal entities, or his spouse, foster child or blood or relative up to the third degree, is a member of the Board of Directors of the other;
   c) a member of the Board of Directors, natural person, or member of the Supervisory Board of one of these legal entities, or his spouse, foster child or blood or relative up to the third degree, participate as a shareholder, directly or indirectly, for at least one half of the issued share capital of the other;
   d) in both legal entities, at least half of the issued capital is directly or directly held by the same legal person, or the same natural person, whether or not together with his spouse, his foster children and his blood or relatives up to the third degree;
4) a juridical act performed by the debtor, who is a legal person, with or towards a group company.

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?

- ○ Yes
- ◉ No

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

	3 months	6 months	1 year	2 years or more
General	○	○	○	○

Please indicate the length

	6 months	1 year	2 year	3 year or more

Where connected party involved				

5.3.1.2 Undervalued transactions/ gifts

Please indicate the length

	6 months	1 year	2 years	3 years or more
General				

Please indicate the length

	1 year	2 year	3 years	5 years or more
Where connected party involved				

5.3.1.3 Transactions to defraud creditors

Please indicate the length

	2 years	3 years	5 years	10 years or more
General				

Please indicate the length

	2 years	3 years	5 years	10 years or more
Where connected party involved				

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

- The opening of insolvency proceedings
- The appointment of the insolvency practitioner
- Other

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?

- [x] the IP
- [ ] a government official;
- [ ] a court supervisor;
- [ ] a creditor alone;
- [ ]

a creditor subject to approval of a court or some other independent body

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

- (●) Yes
- ( ) No

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?

Three years after discovery by the IP. This is in line with the Dutch approach with respect to actio pauliana (article 52 of Book 3 of the Dutch Civil Code).

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?

- (●) Yes
- ( ) No

6.1.1. Should the definition of insolvency be based on?

- [x] Liquidity test?
- [ ] Balance sheet test?
- [ ] The possibility to opt for one of both?
- [x] Other test (for instance, a combination of elements from both tests)?

Please explain

We are – in line with the current Dutch Bankruptcy Act – of the opinion that insolvency should refer to the situation where a debtor is in a situation where he has stopped to pay his due and demandable debts. We refer to article 1 of the Dutch Bankruptcy Act.

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)?[Select an available appropriate ranking scale from 0 to 5]

Only values between 0 and 5 are allowed

0

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

Not applicable.

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

Only values between 0 and 5 are allowed

3

Tick the below replies if you think such rules should:

- [ ] Oblige an insolvent debtor to file for insolvency
- [x] Provide creditors with a right to file for insolvency

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? [1] 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

- ○ Yes
- ○ No

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

- ○ Yes
- ○ No

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?

- ○ Yes
- ◉ No

If no, please explain or indicate „no opinion“

No opinion.

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?

- ◉ Yes
- ○ No

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

[1] 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.

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?

- ○ Yes
- ◉ No

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?

- ◉ Yes
- ○ No

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

- ☑ Real estate
- ☐ Movables
- ☑ Company interests
- ☑ Bank accounts
- ☐ Claims (other than arising from bank accounts)

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):

- ☐ the power to compel the production of books and records (including from lawyers, accountants and banks)
- ☐ the power to conduct audits
- ☐ search order
- ☐ freezing order
- ☐ examination of corporate officers
- ☐ the duty to report suspicious transactions to law enforcement authorities
- ☑ other

Please explain

No opinion. This question falls outside the scope of the activities of Eumedion.

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.

No opinion. This question falls outside the scope of the activities of Eumedion.

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

- (●) Yes
- ( ) No

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?

- ( ) Yes
- (●) No

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

No opinion.

Contact

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