EUROCHAMBRES

Position Paper

14 June 2016

EUROCHAMBERS contribution to EC consultation on an effective insolvency framework within the EU

I. Information about you

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

   Business adviser or business support organisation (EUROCHAMBRES)

2. **Is your organisation included in the Transparency Register?** Yes (ID Number: 0014082722-83**)**

3. **Have you had practical experience with insolvency proceedings?**
   Yes, as a business adviser or business support organisation

4. **Please indicate the country where you are located:** Belgium

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

   Under the name given: I consent to publication of all information in my contribution and I declare that none of it is subject to copyright restrictions that prevent publication.

II. Questions

1. Scope

1.1. Which measures should be taken to achieve an appropriate insolvency framework within the EU?

g) Other measures

Please explain:

EUROCHAMBRES believes that effective national insolvency systems are crucial for business. It is in the interest of enterprises to have a sound insolvency framework which guarantees their rights regarding recovery and which, at the same time, strengthens companies in financial difficulties and gives honest debtors a "second chance". This is important not only for business transactions within one single country but also in cross-border business activities. Foreign investors as well as foreign suppliers and buyers need to be sure to find a functioning insolvency system also in their host states. In a survey conducted by EUROCHAMBRES in September 2015 with businesses from all 28 Member States, 75% expressed "concerns about payment recovery" also when doing business abroad.

However, EUROCHAMBRES is not of the opinion that national insolvency laws should be harmonised at EU level. EUROCHAMBERS has not seen convincing evidence for the need to fully harmonise the insolvency legal framework at European level and about the legal basis underpinning any future European initiative. Deficits in the insolvency proceedings in some Member States should rather be addressed at national level with support through guidance and exchange of best practices among the Member States as well as through pressure from the European Commission via the European Semester.

The rationale to use article 114, paragraph 1 TFEU to justify European competence in this area is not clear to EUROCHAMBRES. According to the jurisprudence of the European Court of Justice a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU. Art. 114 TFEU requires that the harmonisation is necessary to abolish differences between the provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market.

However, there is no evidence for such kind of obstacles in the internal market because of diverging national insolvency laws. It is right that companies are concerned about payment recovery when going abroad (cf. above mentioned survey). Financial distress and insolvency are main risk factors for enterprises. However, this is a general business risk, not only a risk in cross-border transactions. The level of risk depends mainly on the financial situation of the respective business partner and – if this risk is realised – the efficiency of the applicable insolvency law. Investment decisions of enterprises as well as decisions about cross-border transactions are unlikely to depend on different features of insolvency law in a specific Member State. The differences of the legal systems themselves are inherent in the legal diversity of the European Union and not a problem to be tackled by internal market law as long as there is no evidence of obstacles for free movement.

In the end, a harmonisation of national insolvency laws would mainly affect purely internal situations and probably mostly small companies with no or limited cross-border economic activities and domestic cases so that the Commission's proposal goes far beyond the improvement of the internal market. EUROCHAMBRES appreciates the aim of the Commission to strengthen companies in financial difficulties with a "second chance". However, the aim to reduce the debtors' obligations and insolvency proceedings' costs must be considered as an independent policy goal

with no direct relation with the functioning of the internal market. Such measures, in EUROCHAMBRES' view, may only be based on a substantive competence, but not on Article 114 TFEU.

Many issues addressed in the present consultation (i.e. discharge periods, procedures, professional requirements for liquidators and their liability) are directly or indirectly linked to other areas of law (such as civil law, corporate law, labour law and tax law) as well as to professional rules. In consideration of the fact that the European Union has no or very limited competence in these areas of law, EUROCHAMBRES considers that any EU initiative to harmonise national insolvency laws would impinge national legislative power and go beyond EU competence. Furthermore, the harmonisation of national insolvency law could not be justified under the subsidiarity principle.

The European Commission should consider other policy options. Instead of harmonising insolvency laws, it would be more appropriate to support those Member States whose insolvency rules and/or implementation are still deficient, for example because of lengthy, costly or inefficient proceedings, for insufficient creditor protection or for a lack of a "second chance", in improving their systems. The European Commission already makes proposals for improvements in the country-specific recommendations for several euro area Member States. Guidance and exchange of best practices between the Member States is of utmost importance as well as continuous follow-up via the European Semester process. The Euro Group – most recently in its meeting on 22 April 2016 – confirmed this policy option and agreed on a number of core common principles that could serve as guidance for improving the efficiency of national insolvency regimes[1]. At the same time the ministers recognised that when applying these common principles, national legal frameworks need to be taken into account. This approach meets the requirements of the principle of subsidiarity.

It is important that companies have sufficient information. The risk concerning payment recovery is even higher if the company is not well informed about the financial situation of their business partners. The setup of a insolvency register could be instrumental in reaching this objective. Furthermore, it could be helpful for companies to find easier access to information about the legal framework of the market where the business partner is from. The European Commission is since recently working on the improvement of the online information about national regulations. Insolvency law could be one priority in that.

The specific problem of forum shopping and "insolvency tourism" could be prevented through the revision of the rules on the applicable law and jurisdiction rather than via a complete harmonisation of substantive law.

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.)

[1] Eurogroup statement - Thematic discussions on growth and jobs: National insolvency frameworks, http://www.consilium.europa.eu/en/press/press-releases/2016/04/22-eg-statement-nationaln-insolvency-frameworks/

	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				X	
b) Measures to increase the recovery rates of debts in insolvency				X	
c) Measures aimed to ensure the discharge of debts for entrepreneurs (individuals)				X	
d) Measures to ensure the discharge of debts for consumers				X	
e) Measures governing employees' rights in insolvency				X	
f) Measures ensuring the enforcement of debts				X	
g) Other measures				X	

Please explain:

There is no evidence for such kind of obstacles in the internal market because of diverging national insolvency laws (see above 1.1). It is right that companies are concerned about payment recovery when going abroad. Financial distress and insolvency are main risk factors for enterprises. However, this is a general business risk, not only a risk in cross-border transactions. The level of risk depends mainly on the financial situation of the respective business partner and – if this risk is realised – the efficiency of the applicable insolvency law. Investment decisions of enterprises as well as decisions about cross-border transactions are unlikely to depend on different features of insolvency law in a specific Member State. The differences of the legal systems themselves are inherent in the legal diversity of the European Union and are not a problem to be tackled by internal market law as long as there is no evidence of obstacles for free movement.

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			X		
b) Measures to increase the recovery rates of debts in insolvency		X			
c) Measures to ensure the discharge of debts for entrepreneurs (individuals)		X			
d) Measures governing employees' rights in insolvency		X			
e) Measures ensuring the enforcement of debts		X			

f) Other measures					X

2. Saving viable businesses in difficulty

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				X	
b) Measures to ensure the assessment of a debtor's viability				X	
c) Measures to provide minimum standards in relation to the definition of insolvency				X	
d) Measures to lay down the duties of directors in companies in financial distress				X	
e) Measures to protect new				X	

financing given to companies that are being restructured					
f) Measures to clarify the position of shareholders of companies in insolvency or close to insolvency				X	
g) Measures to promote assistance to financially distressed debtors				X	
h) Other measures				X	

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

The measures described above are important for the recovery of debts. However, as explained above (1.1), there is no necessity for the functioning of the Internal Market and furthermore, there is no clear EU competence.

Most important for companies as well is that there is sufficient information available on all applicable insolvency laws in the EU.

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		X			
b) Measures to ensure the assessment of		X			

the viability of a debtor					
c) Measures to provide minimum standards in relation to the definition of insolvency			X		
d) Measures to lay down the duties of directors in companies in financial distress		X			
e) Measures to protect new financing given to companies that are being restructured					X
f) Measures to clarify the position of shareholders of companies in insolvency or close to insolvency		X			
g) Measures to promote assistance to financially distressed debtors	X				
h) Other measures		X			

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

There is a director/officer liability to consider, especially in case of wrong-doing and bad will. One should also take into account the status of state enterprises as they should follow the same rules in case of insolvency. There is a need for a comprehensive insolvency test via an introduction of a liquidity test (cash flow test) as a first step and only afterwards a secondary (if needed) a balance sheet test. Nevertheless a balance sheet test should never replace a liquidity test due to differences in accounting standards and valuation techniques.

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?

c) Little impact

2.4. When should debtors have access to a framework of restructuring measures enabling them to restructure their business/liabilities?

c) At any time

Please explain

The earlier in the process companies can receive guidance on their liquidity position the better. Eventually this should be to the benefit of the whole business community, including banks and other lending organisations as it would reduce the overall default rate. Further, excluding a number of specific cases it might be an arduous task to evaluate the difference between a “imminent” insolvency and a potentially threatening situation.

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?

c) No, the involvement of a court should not be an absolute requirement

Please explain

EUROCHAMBRES considers that access to pre-insolvency or hybrid proceedings and the recognition of their effects throughout the European Union should be promoted when they ensure a balanced protection of creditors’ and debtors’ interests by including the greatest number of creditors whilst preserving the public credibility of concerned entrepreneur (e.g. appointment of a mediator, out-of-court agreement, reorganisation proceedings, etc…).

The establishment of flexible out-of court procedures would probably be beneficial to the economic system as out-of-court procedures have demonstrated to be an efficient and viable solution both in terms of success rate that in terms of duration.

As demonstrated by a survey (http://www.wifiwien.at/default.aspx/Unternehmenssicherung/@/menuId/2420/) the rate of success of out-of-court settlements is approximately 42% and lower rates of insolvencies coupled with higher survival rates of firms are to be found in countries with efficient out-of-court settlements.

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

b) Yes, from the moment it becomes necessary to stay enforcement actions (moratorium) or obtain confirmation for the restructuring plan

Please explain

To ensure that creditors are timely informed about the commencement of the insolvency proceedings involving one or more of their debtors, EUROCHAMBRES calls for a European register of insolvencies based on existing national registers

The register would be beneficial particularly in cross-border cases, as creditors could be informed about the opening of an insolvency proceedings against their debtor in another Member State and would be informed about the terms for their full participation in the procedure (i.e. failure to meet provided national time limits, knowledge about procedural rules, no public information available about the opened insolvency proceeding, etc.) Such a register should be easily accessible as well as easy to understand.

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:

a) Microenterprises (up to 10 employees)

b) Small and medium-sized enterprises, excluding microenterprises

c) Large enterprises

Please explain

The costs for companies of court procedures are not to be underestimated. SMEs in particular who don't necessarily have in-house lawyers could benefit from procedures settled outside of court.

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

Please specify who

A formally recognised expert (such as a mediator) appointed by a national authority could be in charge of such activities. Courts do not necessarily by definition need to be involved**.**

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

b) No

Without a need to harmonise at the European level, there can't be a rationale arguing in favour of a common definition as a consequence.

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')?

b) Yes, but subject to supervision from a suitably qualified mediator/ supervisor/ court

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

a) Only in formal insolvency proceedings

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

c) No

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?

d) Other

There should be a possibility to offer some certainty to secured creditors.

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?

c) No

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?

b) No

The executive director is in any case responsible to set the right measures. The incentive is that if he does so, he will not face liability for delaying insolvency.

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?

e) No

3. Second chance

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

Please explain

Consumers as well as businesses should have the possibility to restructure debts under certain conditions. However it should be made clear what term "restructure debts" means. The term "honest failure" is too wide as it should be made clear that entrepreneurs themselves are at the basis of their business failure.

Further, a system of debt releases for consumers in financial troubles was introduced in the Czech Republic since 2008 and has proven its worth since then. If debtors are able to pay at least 30 % of their debts within the five years the rest of their debts is discharged. This system enables them to find a job legally and prevent them from entering

into the grey economy. This is therefore beneficial also for entrepreneurs who can hire them as relatively responsible employees.

Some initiatives carried out at national and local level by Chambers of Commerce and Industry demonstrate that companies can get back on track when warning signs of trouble are identified at an early stage and a professional support aimed at mentoring, training and advising entrepreneurs in financial distress is provided.

The « Centre pour entreprises en difficulté » (CED) organised by the Brussels Chamber of Commerce, for example, brings together different professionals (lawyers, accountants, psychologists, marketing experts etc.) and in 2012 assisted 1.837 companies of which 29% less than 2 years old, and 1.951 in 2011. CED estimated that 35% of assisted companies have no other option than failure, compared to a range of between 25% and 30% that are able to get back on track following the mentoring they receive. The remaining 40% are cases that still need an assistance from the centre (15%) and entrepreneurs that did not follow the programme proposed by the centre or that were satisfied with the information they received during the first meeting (20%-25%).

Drawing on these success of this initiative, EUROCHAMBRES is running a large scale project called Pre-Solve (prPREventing business failure and inSOLVEncy - "PRE-SOLVE"), which is implemented in 8 Member States by Chambers of Commerce (BE, BG, CY, CZ, FR, IT, SP, RO) Under the coordination of EUROCHAMBRES, the chambers of commerce will provide business intermediaries with tools to support natural or legal persons in difficulties with their business activities where there is a likelihood of insolvency, where insolvency proceedings are pending, or after insolvency proceeding.

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.)

d) Not at all

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

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

Systems of free or low charge basic advices should be introduced both for entrepreneurs and for consumers. Basic advice could significantly help in many situations and could prevent debtors to get into deeper troubles.

At the same time in the Czech Republic there exists many unfair “advice services companies” who charge quite high fees for this type of services, and their advice does often not meet very high quality standards. They can therefore significantly deteriorate the situation of the debtor. The introduction of new systems could prevent such situations.

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

Please explain

The European Commission states that honest and fraudulent or culpable failed entrepreneurs should not be subject to the same insolvency rules and that "honest entrepreneurs" should take advantage of fast-track procedures and ad hoc measures to support them in restarting a new business.

In the Commission's view, the stigma of bankruptcy should be removed and programmes to mentor, train, advise and support second starters should be developed.

EUROCHAMBRES generally agrees that failed entrepreneurs should not be discriminated against because of the stigma. On the contrary, failure in a previous business and the lessons learned might be viewed as potential success factors for a new entrepreneurial initiative. However, this demands a cultural rather than a legislative change in the Chambers' view.

With regard to the adopted terminology and its legal consequences, EUROCHAMBRES considers that no legal value should be given to subjective concepts, such as "honest entrepreneur".

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

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

c) Child support

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?

b) No, the conditions applicable to entrepreneurs should be stricter than those applicable to consumers

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

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

Please explain

All these measures mentioned in the list above are important, however the internal market dimension is not clear. Please refer to question 1.

SPECIFIC QUESTIONS

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

c) Other rules

Please explain

EUROCHAMBERS does not see a need to harmonise the rules in this area**.**

4.5. In what areas would minimum standards for insolvency practitioners help to increase the efficiency and effectiveness of insolvency proceedings?

g) No standards should be harmonised

Please specify

There is no need of harmonisation at all and furthermore, there is no EU competence.

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

a) Yes

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

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

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

5. Additional comments

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

- The liquidator should be obliged to coordinate and reconcile insolvency processes with and between several creditors. Where appropriate, control (or audit) processes should be defined to identify the cases in which insolvency rules were improperly applied.
- The position of secured creditors in insolvency processes should be strengthened.
- Any settlement should take possible tax implications into account and define the tax deductibility of claims (when the insolvency procedure is completed or when the result is obvious). The question remains how long the enforcement efforts of individual creditors (lawsuits, executions) from the start of the restructuring efforts (precondition must be formal insolvency proceedings) should be on hold not to endanger restructuring.

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