MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

14 June 2016

**Via Electronic Submission**

European Commission
Directorate-general Justice
Unit A 1 Civil Justice Policy – Secretariat
Rue Montoyer 59, 2/74
1049 BRUSSELS, Belgium

**Re: Consultation on Insolvency II**

Dear Sir or Madam:

Managed Funds Association ("**MFA**")[1] welcomes the opportunity to provide comments to the European Commission in response to its consultation document entitled "Consultation on an effective insolvency framework within the EU" published on 23 March 2016 (the "**Consultation**").

MFA supports the efforts of the European Commission to improve and simplify the EU insolvency framework and to seek the views of stakeholders on ways in which, where necessary, the insolvency framework might be improved.

MFA concurs with the European Commission's view that an effective EU insolvency framework should facilitate the efficient restructuring of viable enterprises in financial difficulty. In pursuit of this objective, MFA supports the introduction of measures to enable restructuring at an early stage and therefore maximise value to creditors, employees, owners and the economy as a whole[2].

We have outlined below in summary the key points raised in our response to the Consultation.

**Section 1: Scope**

Restructuring is a key area for EU harmonisation, given the current lack of effective and viable restructuring mechanisms in many EU Member states.

[1] MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals, and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants.
[2] C(2014) 1500 final.

MFA agrees that distortions between certain national insolvency rules can adversely affect the functioning of the Internal Market, but considers that some national provisions are less suited to being harmonised at EU level than others.

**Section 2: Saving viable businesses in difficulty**

An effective restructuring regime is a key consideration for investment into European companies, as it increases the chances of enterprise value being preserved in a distress scenario.

As a general matter, MFA supports measures to improve the amount and quality of information available to stakeholders in EU restructuring and insolvency cases.

Provided that they are properly informed by access to suitable information, MFA considers that a debtor's stakeholders are best placed to assess its viability and the desirability of a restructuring. MFA takes the view that flexibility in the restructuring process, combined with legal tests based on fairness, is more desirable than a detailed and formal test of viability. In addition, MFA considers that a restructuring process should be available whether the company is solvent or insolvent, and the debtor and its stakeholders are best placed to judge when a restructuring should be commenced. Certain features, such as the availability of a stay on proceedings, should be limited to circumstances where the debtor is near insolvency.

We do not propose that a restructuring should always be approved before a court, as in many cases restructurings are largely unopposed. However, in some cases it will be necessary or desirable to have a court hearing. We therefore propose an approach where a court hearing is not automatically required, but is required if creditor approval is marginal, or if requested in certain circumstances by the debtor or by affected stakeholders.

MFA does not support the adoption of minimum standards in relation to the definition of insolvency. There are many different ways in which the test is used under national laws, and standards should be appropriate to the circumstances.

MFA takes the position that a restructuring only needs to be publicised amongst the stakeholders it affects and that there is no need to publish details in every case, especially where it only affects a narrow segment of the company's creditors.

MFA suggests a debtor-in-possession style of restructuring is generally appropriate, but there will be cases where it is not appropriate for various reasons, and in those cases it should be possible to either proceed to a formal insolvency process, or appoint a supervisor of some sort.

MFA considers that a 2-3 month stay on proceedings should accompany the restructuring proceeding, with a right to renew if appropriate, and that creditors must have a clear court route to lifting the stay in appropriate circumstances.

MFA believes that in order for a restructuring mechanism to be effective, the restructuring plan must be able to bind minority dissenting creditors, and that in appropriate cases, cross-class cram down should be permitted. However, it is suggested that in cases where cross-class cram down is used, a court must approve the decision.

MFA proposes that directors of distressed businesses should not be subject to onerous obligations to file for insolvency proceedings within an arbitrary time period from a company



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becoming insolvent, and that culpability and personal liability should instead be imposed based on whether the directors have acted in the interests of the company, having regard to the interests of creditors where the company is insolvent or close to insolvency.

**Section 3. Second chance**

Here, MFA proposes that it is beneficial for and attractive to potential investors if both entrepreneurs and consumers are able to restructure, and achieve a quick (1 year) discharge of their debts, but that there needs to be effective safeguards against abuse.

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

MFA considers that in some EU Member states, the length of insolvency processes are extended by ongoing appeals in connected litigation, as well as onerous procedures for enforcement of security, such as statutory auction procedures. The answers to this section seek to address these two key concerns, in priority to other areas such as the harmonisation of ranking of claims and avoidance procedures.

Respectfully submitted,

/s/ Richard H. Baker

Richard H. Baker
President and CEO



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MFA offers the following responses to the Consultation:

**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**

Answer: (a)-(f) above. MFA acknowledges that each of these measures are deficient in at least some Member states, resulting in an uneven playing field for companies and businesses operating in those Member states, as well as current and prospective investors in those companies. Some of these measures lend themselves better to EU harmonisation and minimum standards than others, with others operating better at a national level. Of those listed, MFA considers that EU coordination may be more effective to establish preventative measures to enable the restructuring of viable businesses, as it appears that notwithstanding the *Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency*, limited action has been taken by many Member states in this regard[3].

**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.)*

*In each case, chose from:*
*1) To a large extent*
*2) To a considerable extent*
*3) To some extent*
*4) Not at all*
*5) No opinion*

**a) Preventive measures to enable the restructuring of viable businesses**

Answer: 1) To a large extent. In the current EU insolvency framework, the availability of an effective and advantageous restructuring mechanism may depend on factors such as the

[3] The evaluation of the implementation of the Commission Recommendation on a new approach to business failure and insolvency, 30 September 2015 concludes that the Recommendation "has not succeeded in having the desired impact in facilitating the rescue of businesses in financial difficulty and in giving a second chance to entrepreneurs because of its only partial implementation in a significant number of Member States, including those having launched reforms".



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members state in which the Debtor is primarily headquartered and managed (i.e. its centre of main interests or "COMI"), or the laws by which its debts are governed, and the location of its creditors.

The availability of suitable procedures may depend on the Debtor's ability to "forum shop" by changing these factors so they are situated in favourable jurisdictions, which in turn may depend on the size of the company, and the resources that could be dedicated to effecting such changes.

The lack of a level playing field makes it more difficult for debtors in some Member states to restructure and save a viable business than others.

**b) Measures to increase the recovery rates of debts in insolvency**

Answer: 2) To a considerable extent. There are significant differences in recoverability of debts in insolvency across EU Member states. The differences arise both in terms of the time it takes to recover debts and the amount of the recovery. The likely result is distortions in risk and, consequently, the cost of funding.

However, improvements in recoverability can depend on many factors other than simply changing the insolvency law framework. For example, the cultural framework in certain regions sometimes prevents aggressive enforcement action being taken in relation to loans that would be enforced in other regions. Cultural changes as well as legal changes may need to be implemented in order to meaningfully improve recovery rates in such regions.

Whereas it may be desirable for the EU to encourage Member states implement measures to improve recovery rates, it may be more appropriate to reserve the precise nature of the measures implemented to be determined by Member states at a national level.

**c) Measures aimed to ensure the discharge of debts for entrepreneurs (individuals)**

Answer: 2) To a considerable extent. All other things being equal, entrepreneurs may favor jurisdictions which have less severe consequences for business failure. However, this is usually a lower priority for entrepreneurs than other factors such as taxation and proximity to markets.

**d) Measures to ensure the discharge of debts for consumers**

Answer: 3) To some extent. In general, clearer and more accessible procedures for the discharge of consumer debts in all Member states should help to remove regional differences in the market demand for consumer credit and the willingness of lenders to operate in different Member states.

**e) Measures governing employees' rights in insolvency**

Answer: 3) To some extent. Employment rights can have a significant effect on the outcome of a bankruptcy for an investor, and a thorough analysis should be part of the downside case in lending decisions to European borrowers. Whereas this may not affect individual credit decisions, it does form part of the risk landscape of the Member state into which the lender is investing. This landscape differs from Member state to Member state and ultimately will create distortions in the availability and pricing of corporate debt between Member states.



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**f) Measures ensuring the enforcement of debts**

Answer: 2) To a considerable extent. Overly restrictive and lengthy enforcement processes, whether of secured or unsecured debt, ultimately affect the availability and pricing of corporate debt in different Member states.

g) Other measures

**Please explain**

See above

**1.3. To what extent do the measures mentioned below have an impact on the creation and operations of newly established companies?**
*In each case, chose from:*
*1) To a large extent*
*2) To a considerable extent*
*3) To some extent*
*4) Not at all*
*5) No opinion*

a) Preventive measures to enable the restructuring of viable businesses

Answer: 2) To a considerable extent. Although future restructuring is rarely a factor considered by the entrepreneur when establishing a new business, investors will often insist on structures which make restructuring or enforcement (as one of a range of potential exits from an investment) more straightforward. Other drivers such as taxation may be more prominent, but many structures, particularly in leveraged finance or high yield bond issuers, are designed with restructuring in mind. This favors certain jurisdictions which have both restructuring and tax advantages, for example a number of structures use Luxembourg intermediate holding companies, Netherlands debt issuers and English asset-owning vehicles.

b) Measures to increase the recovery rates of debts in insolvency

Answer: 2) To a considerable extent. Please see the response to question 1.2(b) above.

c) Measures to ensure the discharge of debts for entrepreneurs (individuals)

Answer: 3) To some extent. Please see the response to question 1.2(c) above.

d) Measures governing employees' rights in insolvency

Answer: 3) To some extent. Please see the response to question 1.2(e) above.

e) Measures ensuring the enforcement of debts

Answer: 2) To a considerable extent. Please see our response to question 1.2(f) above.



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f) Other measures

**Please explain**

See above

**2. Saving viable businesses in difficulty**

**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.)*

*In each case, chose from:*
*1) To a large extent*
*2) To a considerable extent*
*3) To some extent*
*4) Not at all*
*5) No opinion*

*a) Measures to give access to a toolkit enabling fast restructuring*

Answer: 1) To a large extent. MFA considers that a number of Member states do not have an adequate "toolkit" to enable a fast and efficient restructuring. Whereas it might be an incentive for all parties to agree a consensual restructuring, a flawed "toolkit" can, and often does, result in a loss of value where parties are unable to reach an agreement. Member states that have an efficient restructuring toolkit benefit from preservation of stakeholder value and jobs, hence the availability of an effective toolkit is also a key incentive for investment.

*b) Measures to ensure the assessment of a debtor's viability*

Answer: 3) To some extent. For the reasons stated below in 2.6, MFA believes that where a restructuring affects only financial creditors, and sufficient information has been provided to enable those creditors to make an informed decision, there is no need for a separate viability test. However, where the plan involves less sophisticated creditors, there is merit in requiring a review by an independent expert or Insolvency Practitioner.

*c) Measures to provide minimum standards in relation to the definition of insolvency*

Answer: 3) to some extent. Please see the answer to question 2.7 below.

d) Measures to lay down the duties of directors in companies in financial distress

Answer: 2) To a considerable extent. Differing directors' duties do appear to cause significant distortions between Member states. Using the example again of Germany, where company directors face personal liability if they do not file a bankruptcy proceeding for the company within a certain time of its becoming insolvent, directors are at danger of filing too soon, and causing loss of value. In other jurisdictions, for example Greece, directors can seemingly



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continue to trade long past the point where it would be appropriate to file for bankruptcy, thereby placing creditors' interests at risk. Neither approach is ideal.

*e) Measures to protect new financing given to companies that are being restructured*

Answer: 2) To a considerable extent. MFA acknowledges that there are significant differences between Member states as to the protection of new money providers in subsequent insolvency proceedings. MFA notes that the Evaluation of 30 September 2015[4] identified six Member states in which no protection is given to new finance advanced in connection with a restructuring, other Member states where there is some degree of protection from avoidance actions, and others where some sort of priority or special status applies.

MFA believes that new money is vital for restructuring transactions and that there is potential for the different approaches amongst Member states to distort the functioning of the Internal Market. MFA considers that Member states will attract more investment and will preserve greater value in restructurings if their restructuring laws provide that new money advances are: (a) possible, (b) protected from avoidance, (c) protected from liability, (d) given priority status, and, importantly, (e) genuinely incentivize providers to participate in new money and rescue facilities.

*f) Measures to clarify the position of shareholders of companies in insolvency or close to insolvency*

Answer: 2) To a considerable extent. MFA is concerned that certain Member state regimes require shareholders with little or no economic interest in the debtor to consent to a restructuring transaction or otherwise make it difficult to execute restructuring transactions without shareholder approval. For example, in some jurisdictions debt for equity swaps are now possible under the legislation but still problematic to execute in practice, and in other jurisdictions debt for equity swaps are not possible without shareholder approval.

As such, larger companies in those jurisdictions who require a debt for equity swap may seek or be required to move their Centre of Main Interest ("COMI"), or take other steps to use restructuring proceedings in other jurisdictions, for example the English scheme of arrangement ("Scheme"), and/or an English pre-packaged administration. In light of the effect that this asymmetry has on the functioning of the Internal Market, MFA recommends that action is taken to harmonize consent/veto rights of shareholders with no economic interest in the company being restructured.

*g) Measures to promote assistance to financially distressed debtors*

Answer: 3) to some extent. In our view it is not clear that the absence of state measures to assist debtors causes any real distortion to the Internal Market.

*h) Other measures*

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

[4] http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf



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**2.2. What impact do the different types of measures mentioned below have on saving viable businesses?**

*In each case please choose between:*
*1) Very strong impact*
*2) Considerable impact*
*3) Little impact*
*4) No impact at all*
*5) No opinion*

*a) Measures to give access to a toolkit enabling fast restructuring*

Answer: 1) Very strong impact

*b) Measures to ensure the assessment of the viability of a debtor*

Answer: 2) Considerable impact

*c) Measures to provide minimum standards in relation to the definition of insolvency*

Answer: 2) Considerable impact

*d) Measures to lay down the duties of directors in companies in financial distress*

Answer: 2) Considerable impact

*e) Measures to protect new financing given to companies that are being restructured*

Answer: 1) Very strong impact

*f) Measures to clarify the position of shareholders of companies in insolvency or close to insolvency*

Answer: 1) Very strong impact

*g) Measures to promote assistance to financially distressed debtors*

Answer: 3) Little impact

*h) Other measures*

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

**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?**



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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.**

Answer: (c) Little impact. MFA considers that where a creditor is situated in a different Member state to the debtor, the impact on the restructuring of the debtor's business is limited. The enforceability of a restructuring plan on creditors in different EU jurisdictions depends on the process used to give effect to the plan. Any restructuring process covered by the EU Regulation on Insolvency Proceedings ("EUIR")[5] will be automatically recognized and enforceable with respect to creditors across the EU (except for Denmark). If a proceeding outside of the EUIR is chosen, such as the English Scheme, it might be enforceable because it compromises debts under a particular governing law, or because it is enforceable as a judgment under the Judgments Regulation[6].

From a practical perspective, the debtor company or its representatives ought to be able to easily communicate with creditors in different Member states, and many international companies publish notices etc, in English in addition to national languages. With smaller companies, language issues may arise, but investors who are active in such markets are likely to have the relevant language capability.

MFA would suggest measures to enable communications circulated to creditors as part of restructuring proceedings to be conveyed in electronic form via company websites.

**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**

Answer: c) At any time. MFA strongly believes that whereas there is merit in making a general stay on proceedings and enforcement subject to some sort of insolvency/pre-insolvency test, the optimal time to seek restructuring measures is best determined by a debtor and/or its creditors. The support of a significant mass of creditors is vital to the restructuring process and debtors are therefore unlikely to commence a process until support of creditors has been

[5] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings
[6] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation)



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achieved. If creditors do not wish to restructure at that time, they would have the option of refusing to engage in negotiations with the debtor until they are ready.

MFA is concerned that by restricting a debtor's recourse to restructuring measures to a time when it is close to "insolvency", there is a risk that debtors will be forced to postpone negotiations until their position has deteriorated, resulting in lost opportunities to refinance, raise rescue and exit finance, and ultimately to restructure. This may be because market conditions for refinancing, or raising rescue/exit finance have changed. Allowing access at any time will allow a debtor to take advantage of timing windows when capital is more readily available.

The alternative argument against a test that is not based on insolvency or insolvency in the near future is that minorities could be oppressed into varying contractual documents. However, this argument fails if the restructuring is always subject to the safeguard of an unfairness test, tested against an appropriate comparator. The appropriate comparator for an insolvent company, or a company close to insolvency, will usually be a liquidation, whereas the appropriate comparator for a solvent company may be continued operation as a going concern. The debtor would need to demonstrate that its plan, approved by a significant body of its creditors, was reasonably likely to produce a result which put the minority in a position no worse than the comparator.

If the debtor needs the protection of a general stay, it is arguable that this should only be available where the debtor is in a position where it would be inequitable to pay some creditors and not others, i.e., where there is a risk of loss to creditors.

**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**

Answer: c) No, the involvement of a court should not be an absolute requirement. MFA considers that although the English Scheme is a robust and flexible process, one limiting factor is that the costs involved can be prohibitive. MFA considers that a restructuring process should be as efficient as possible without compromising its ability to achieve a binding arrangement. One area where costs could potentially be reduced is eliminating the need for court hearings in straightforward cases that have been approved by a significant majority of creditors. For example, hearings to sanction English law Schemes are frequently uncontested, and often follow approval by 98-99 per cent of each class of Scheme creditors.

In such cases, there is little need for a formal hearing, unless one or more creditors wishes to raise a challenge to the restructuring, for example on grounds of unfairness. In order to protect



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the interests of minority creditors, creditors should be able to require a hearing to determine whether there is a genuine issue with the fairness of the plan such that the minority is being unfairly prejudiced.

It is also recognized that in some cases, a judicial decision on the plan may be desirable from a plan proponent's perspective, for example (i) where a court order is necessary to enforce or obtain recognition of the plan in other jurisdictions, (ii) where a robust and binding restructuring is required with no on-going ability to challenge; or (iii) where a judicial decision on fairness is required in order to comply with US Securities Act exemptions. It may also be helpful for an initial court hearing to approve the proposed composition of voting classes or other voting procedures, so that creditors and debtors do not proceed with restructurings where there is an obvious procedural defect.

In order to make the process more efficient, the requirement for a final hearing to approve a restructuring plan could be eliminated other than:

(a) where the creditor/stakeholder support for the plan is marginal;
(b) where creditors, having been given notice of the plan, require a hearing to address an issue with the plan, for example, unfair prejudice, insufficiency of information, or some procedural irregularity, and the court agrees that there is a genuine issue to decide; or
(c) where the plan proponents determine, and the court agrees, that a judicial decision would be beneficial.

**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**

Answer: d) Other options. MFA considers that the requirement for publicity should depend entirely on what the procedure is intended to achieve. For example, if it becomes necessary to impose a stay, anyone affected by the stay should be notified. If the restructuring is conducted without the need for a stay, and affects only a limited class of the debtor's creditor base, then there is no need to inform creditors whose interests are not affected (whether directly or indirectly).

**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



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e) No opinion

**Please explain**

Answer d) Other. MFA proposes that there is no reason to restrict the availability of these processes to the above categories. The benefits of streamlining the restructuring process, subject to appropriate checks and balances, and safeguards such as court challenge, apply equally to each category. The nature of the checks and balances might be different, however, such as a requirement for SMEs and microenterprises to present a restructuring plan that has been prepared by a registered IP.

**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**

Answer d) Other persons or bodies/experts chosen by the creditors. MFA believes that detailed measures to assess the debtor's viability are detrimental to efficient restructuring. It is our view that creditors / stakeholders are the best judge of viability when presented with adequate information to make that assessment. If a sufficient number of creditors and stakeholders are prepared to restructure a company on the basis that they consider it viable post-restructuring, and the minority are not unfairly prejudiced as a result (compared to an appropriate comparator which would in this instance be liquidation), it is difficult to see what role a court should have in second-guessing that conclusion. MFA takes the view that flexibility in the restructuring process is more desirable than a detailed and formal test of viability and the emphasis should be on: (a) providing stakeholders with adequate information to make an informed decision when voting on a plan; and (b) tests of fairness and no unfair prejudice, rather than viability based tests.

By way of example, European companies have historically favored restructuring regimes such as the English Scheme, where there is no viability test other than the creditors' approval of the restructuring plan. This has also been the case where certain international companies have selected an English Scheme in preference to a US Chapter 11 proceeding to restructure debts, where the restructuring is a shorter term solution and might not satisfy the US bankruptcy code rules for "feasibility" of the plan of reorganization.

Hence, where a restructuring affects only financial creditors, and sufficient information has been provided to enable those creditors to make an informed decision, MFA considers that there is no need for a separate viability test. However, where the plan involves less sophisticated creditors, MFA suggests that there is merit in requiring a review by an independent expert or Insolvency Practitioner.

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



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

**Please explain**

Answer c) Other. MFA does not consider that a harmonized 'insolvency' definition would significantly affect the functioning of the Internal Market. Even within Member states, different definitions of "insolvency" are used for different purposes. The definitions are often intended to work in conjunction with national laws that will not necessarily be harmonized, such as company law. As such, MFA considers that a 'one-size-fits-all' approach may not be suitable and that different definitions in different circumstances would be preferable.

Where the insolvency definition is to be used as one of the criteria for accessing a harmonized EU restructuring process, please refer to the response to question 2.4.

The insolvency definition is also relevant for determining when antecedent transactions can be avoided, in relation to which please see our response to 4.4.

**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**

Answer c) The combination of an illiquidity and a balance sheet test. It is our view that where insolvency tests are used, it makes little sense to test only short term liquidity without taking a view as to the effect on long term creditors. In fact, many tests which appear to be liquidity focused, also take into account longer term liquidity. The helpful discussion in the UK Supreme Court decision in *Eurosail* makes it very clear that both parts of the test are necessary for a proper assessment of a company's solvency.

**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



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**Please explain**

Answer b) Yes, but subject to supervision from a suitably qualified mediator/ supervisor/ court.
MFA acknowledges that in most cases, the debtor's existing management, with the assistance of restructuring professionals, are best placed to manage a company while it undergoes a restructuring provided that there is adequate information provided to creditors to enable creditors to determine whether intervention is required. In most restructurings, MFA considers that it is important to keep any disruption to the company's operations to a minimum. The appointment of insolvency officials to manage the business: (i) involves considerable cost and delay as the officials get up to speed with the company; (ii) can cause disruption to operations both internally and with third parties, and (iii) may involve a cessation of operations if the officials determine that continuing the business would expose them to liability.

Where the company is not insolvent and there is no risk of immediate insolvency, no supervision is required. However, where the company is close to insolvency such that the actions of management could have a material impact on creditor recoveries, some supervision should be imposed.

In each case where a debtor remains in possession, improved access to information will be an important safeguard for creditors. Successful debtor-in-possession processes, such as the USA's Chapter 11 process, require frequent updates and detailed information to be made available to creditors, which allow creditors to monitor and intervene if necessary through the Bankruptcy Court.

MFA would support improved information rights for creditors combined with a "light touch" supervision by a court, or individual who has the power to report back to the court if the company is being managed in a concerning manner, but who otherwise would not interfere with management. If significant decisions, such as asset sales, out of the ordinary course of business, need to be considered at a time when the company is close to insolvency, it may be appropriate to require approval by a creditor committee, supervising official, or by a court.

MFA also considers that there will be situations where it is not appropriate for the existing management team to continue in control of the debtor, for example where there has been mismanagement or fraud. In such cases (i) a formal insolvency process, rather than a pre-insolvency restructuring tool may be more appropriate, and (ii) there should be a method to convert the debtor-in-possession process into one that is supervised by an appointed insolvency practitioner.

In any case of restructuring, it will be important for creditors or other stakeholders to have recourse to a court in the event that their interests are unfairly prejudiced, or the company is being mismanaged to the potential detriment of the creditors/stakeholders. As mentioned above, it is important that creditors are provided with sufficient information to determine whether such actions are necessary or appropriate.

**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



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**Please explain**

Answer b) In formal insolvency proceedings and in preventive/pre-insolvency restructuring procedures. MFA believes that a pre-insolvency procedure which can only be effected in cases where there is no enforcement pressure is ineffectual. It is true that the English Scheme does not have an automatic stay, but this has produced some unusual practices:

- there are cases where a company cannot be restructured using a Scheme alone and the company is forced into an insolvency proceeding (such as an administration), to provide a stay while it negotiates;

- many Schemes are not announced until the company has obtained a lock-up agreement from 75 per cent of the creditors in each Scheme class. This results in many Schemes being negotiated in relative secrecy which is not necessarily the best position for some creditors;

- courts have been prepared to stay individual actions (rather than a general stay) pending the creditors vote on the Scheme (for example *Vinashin* / *Vietnam Shipbuilding*);

- some recent Schemes have been conducted largely for the purpose of imposing a moratorium on a minority of Scheme creditors while a comprehensive restructuring is negotiated. This creates a lot of unnecessary expense simply to obtain a stay.

MFA appreciates that the downside to a stay is that it may interfere with creditors' rights and be abused by debtors. However, MFA suggests that these concerns can be dealt with by: (a) requiring an insolvency or pre-insolvency test before a stay is available; (b) improved information to creditors; and (c) providing a clear route for creditors to lift the stay if (i) the debtor is abusing it or (ii) it is possible for that creditor to enforce its rights without affecting the objectives of the restructuring (for example non-core collateral which is not key to the business).

**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 fulfillment of certain conditions
f) Other
g) No opinion

**Please explain**

Answer c) 2-3 months, with the possibility of renewal in certain circumstances. MFA contends that the appropriate length of a stay to enable restructuring negotiations will be determined by the nature of those negotiations. In practice, 2-3 months is usually enough time for a debtor to negotiate even a relatively complex restructuring to a point where either there is a Scheme



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ready to launch or it is possible to inform the court that the process is well advanced and a short extension is required. Some complex cases will require longer and MFA suggests that there ought to be a mechanism for renewal in such cases.

**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**

Answer d) Other. MFA suggests that if a stay is imposed, there ought to be a clear procedure for a creditor to lift the stay, for example if (a) the debtor is abusing it or (b) it is possible for that creditor to enforce its rights without affecting the objectives of the restructuring (for example non-core collateral which is not key to the business). It is key that creditors are provided with sufficient information to enable them to determine whether it is necessary to apply to lift the stay.

**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**

Answer d) Other. MFA proposes that a restructuring plan should be binding on all creditors, including secured creditors, if it is confirmed by a requisite percentage of creditors and provided there is a clear route for an aggrieved creditor to require a court hearing in order to bring a challenge. This would avoid the cost of uncontested hearings.

**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**



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Answer b) Yes, but subject to certain conditions.

**Please explain**

MFA considers that the cram down mechanism should be subject to safeguards to protect minorities. For example, tests of fairness with objective and independent valuation evidence, if necessary, to demonstrate the comparator. Moreover, MFA understands that cross-class cram down will almost always result in a challenge from crammed down classes, so suggests that a court hearing may be necessary in cases where the restructuring plan can only be approved by using cross-class cram down.

**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**

Answer a) Yes, always. MFA maintains that new money is vital to turning around distressed companies. It is a long-accepted principle of restructuring that new money should be protected and prioritized. New money is important both during negotiation of a restructuring, and after the plan has been approved by creditors and court. The process of restructuring, however streamlined, is likely to lead to a number of months during which the public are aware that the company is undergoing restructuring before the plan has been approved. During that time, companies often need additional sources of funding in order to counterbalance contraction in trade, additional requirements for cash collateral, payment of restructuring professionals, paying important trade creditors etc. Restricting protection and priority to post-confirmation "exit" finance without making it available to pre-confirmation "rescue" finance would therefore be missing an important part of the finance requirement for distressed companies.

By way of an example, the US has an active market for DIP finance, the availability of which leads to more companies being rescued, and has other advantages such as allowing a potential bidder to provide finance in order to preserve operations and value while it conducts its due diligence. The opportunities for rescue finance in the UK and Europe are far fewer, because rescue lenders are often not protected in subsequent insolvency proceedings, and cannot prime existing security packages. In the UK, an administrator will only allow a company to trade in administration if it generates enough cash to fund the administration, or if finance can be raised against unencumbered assets (which is not often the case). This leads to more businesses being sold in pre-packaged administrations where the business does not trade at all while in administration.

Post-confirmation "exit" finance is more straightforward to implement in the UK than some other EU Member states, as a Scheme can insert layers of finance into priority positions in the capital structure, provided that 75 per cent in value of the relevant secured creditors present and voting, vote in favor of the Scheme (as well as the other affected classes approving the



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Scheme). In many other EU Member states, this is not possible even at exit/confirmation stage, because the composition mechanism cannot bind secured creditors.

We would therefore suggest that both pre-confirmation, rescue finance and post-confirmation, exit finance are encouraged, and lenders providing such finance are protected and prioritized, if necessary with priming liens, in subsequent insolvency proceedings. Where existing secured creditors are primed, it would be appropriate to have a court decide whether relevant requirements and conditions (such as adequate protection) are satisfied.

**2.12. Should directors of companies be incentivized 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**

Answer c) Other. MFA considers that directors should be incentivized to act in the best interests of the company, having regard to the interests of creditors if there is a risk of insolvency. This might require that the directors take preventative measures by filing for an insolvency or restructuring proceeding, but it might not. Filing for a proceeding might, in the circumstances, be harmful to creditors. It depends entirely on the circumstances and an overly-prescriptive approach is therefore undesirable.

It would be wholly wrong, for example, to allow directors to avoid liability simply by filing for a certain procedure. Those directors should only be able to avoid liability if filing for the procedure was the right thing to do in the circumstances, having regard in particular to the interests of creditors.

However, directors should be encouraged to seek appropriate advice, which if obtained and followed should help a director demonstrate that he or she was acting in the best interests of the company, having regard to the interests of the creditors.

**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**



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Answer c) Yes, but only for SMEs and individuals. MFA agrees that, in theory, providing a source of advice for those who cannot necessarily afford it is beneficial, as it might reduce the number of ill-advised insolvency filings and creditors harmed by companies trading-on past the point of no return. However, funding is always an issue, and one option is for lenders to fund an independent (and confidential) advisory service/helpline to their customers.

**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
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**

Answer: a) Yes, entrepreneurs (individuals) as well as consumers. In general terms, MFA considers that there would be advantages to investors if improved restructuring procedures for entrepreneurs and consumers were implemented in the EU, although there should be safeguards against abuse in each case.

It is likely that investors would benefit from improved levels of entrepreneurial activity, because of increased opportunities for investment, as well as a higher level of economic activity in general. Entrepreneurs would be encouraged to take risks if the consequences of failure are less severe. Safeguards should protect less sophisticated investors and stop dishonest entrepreneurs from abusing the system.

Similarly, consumers trapped in debt have little positive effect on the economy, and it will generally assist the economy and improve recovery rates on consumer loans if consumers have an effective way to restructure. There is an obvious risk of abuse which needs to be addressed by appropriate measures.

**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



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Answer: c) To some extent. There is significant evidence of forum shopping by individuals, which although likely to be addressed to some extent by the restrictions on abusive forum shopping in the re-cast EU Insolvency Regulation, is evidence of significant asymmetry in this area. In addition to prohibitions on forum shopping, there is a case for addressing the factors which have given rise to the increase in forum shopping.

**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.**

Answer: f) No opinion. MFA does not intend to comment on this question.

**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**

Answer: a) Yes, to entrepreneurs (individuals) and consumers. For the reasons stated in the answer to question 3.1, a discharge is an important factor to enable an individual to restructure its debts.

**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)

Answer: b) No. This is an area which depends on national concepts of criminal law, and it is unrealistic to expect Member states to change such concepts. An entrepreneur operating in multiple Member states must ensure that he or she complies with local criminal law in each such Member state.



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**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**

Answer: a) 1 year or less. The benefits of honest entrepreneurs returning to activity, and honest consumers returning to economic activity, generally outweigh the reasons for delaying the discharge date.

**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**

**Please explain**

Answer: c) Other options. There should not be a minimum fixed amount, or a percentage based amount, which needs to be repaid in order to achieve a discharge. Rather this should be assessed on a case by case basis, for example based on what the debtor can reasonably be expected to pay, following an independent assessment of his or her means. Any other approach risks being too inflexible in practice and may lead to injustices.

**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**



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Answer: f) No opinion. MFA does not intend to comment on this question.

**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

**Please explain**

Answer: d) Other options. The provisions to prevent abuse of the system should be different for entrepreneurs than for consumers, as dishonest debtors are likely to abuse the system in different ways and for different reasons.

**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.)*

*In each case, chose from:*
*1) To a large extent*
*2) To a considerable extent*
*3) To some extent*
*4) Not at all*
*5) No opinion*

a) Minimum standards on the ranking of claims in formal insolvency proceedings

Answer: 3) To some extent. Certain claims, e.g., tax and employee claims, having priority in some states will increase risk and costs of finance in those states compared with others where lenders are prioritized. However, this needs to be considered alongside other factors which might affect risks of recovery in certain Member states.

b) Minimum standards on avoidance actions

Answer: 3) To some extent. Please see the answer to question 4.4 below.

c) Minimum standards applicable to insolvency practitioners/mediators/supervisors



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Answer: 3) To some extent. Forum shopping occurs to avoid commencing insolvency proceedings in jurisdictions where the creditors or the debtor cannot choose the insolvency practitioner who will be appointed (for example, historically Germany, Luxembourg).

d) Measures providing for a specialisation of courts or judges

Answer: 3) To some extent. It is not so much specialisation but quality and training of judges that matters. In some civil law jurisdictions, insolvency judges are often inexperienced, relatively junior, public officials.

e) Measures to shorten the length of insolvency proceedings

Answer: 2) To a considerable extent. Insolvency proceedings are actively avoided in Member states which have excessively long periods before creditors are able to access a distribution. The threat of filing for insolvency in those jurisdictions is often a powerful tool used by debtors in restructuring negotiations with creditors. These measures are often a result not of the insolvency laws, but of the way the civil justice system works in general. Many years and layers of appeals are often the norm before a final judgment can be reached, and insolvency practitioners are required to conservatively reserve for the outcome of the appeal.

f) Measures to prevent disqualified directors from starting new companies in another Member state

Answer: MFA does not intend to comment on this question.

g) Other measures

**Please explain**

**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**

Answer: (a) to (f), for the reasons set out above.

**SPECIFIC QUESTIONS**



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**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**

Answer: d) Other ranking of priorities

As this is a political issue at Member state level, it is unrealistic to expect it to be harmonized across Member states. Whereas a form of security interest which always ranks ahead of all other claims would go some way to improving certainty and recovery of secured debts, it is difficult to see how this could be achieved without harmonizing property law across the EU

**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**

Answer: c) Other rules

Avoidance action provisions in the EU are so varied and complex that harmonizing either or both of (a) or (b) would still leave Member states with extremely different provisions. For example, some avoidance actions apply automatically to all transactions of a particular type entered into in a certain period prior to the proceedings, while others require transactions to meet certain criteria, or certain facts are required to be made out, such as insolvency of the company, or the intention of the parties. There are different rules applying to transactions with connected parties, identifying who has standing to bring the action, who the proceeds of an action are paid to, the degree to which honest third parties are protected, and many more. They also overlap with criminal laws, such as fraud, which are difficult to harmonize. The result is likely to be a "highest common denominator" approach, which would be overly complex and achieve little.

**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



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d) Qualifications and training
e) Code of ethics
f) Other
g) No standards should be harmonised
h) No opinion

**Please specify**

Answer: f) Other. The issue with imposing minimum standards on any of the above matters is that the systems are so different, with so many different types of official, deriving their powers and authorities from different sources, that it will be almost meaningless to impose minimum standards across Member states. However, there is a case for ensuring that IPs, where appointed, are properly trained, and qualified to do what they are required to do in their national system of laws, and that they do so under a code of ethics. This will be so varied from Member state to Member state that the only sensible way is to formulate general principles, and leave all implementation and detail to Member state level.

**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**

Answer: (a) and (b). Again, overly prescriptive rules are perhaps counterproductive in this area, but it would be possible to impose a minimum requirement on the practitioner, such as the practitioner must ensure before he or she accepts an appointment, that he or she has access to sufficient human resource with the relevant skills and experience (including language and technical skills) to properly undertake and carry out the appointment.

**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**



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Answer: (a) to (e) – all of the above. But in particular (c) and (d). The progress of disputes through national legal systems can be delayed for significant periods of time, sometimes with many years of appeal processes before a final decision. Procedures for enforcing security interests can also cause delays, for example statutory auction proceedings for real estate can take many years to complete.

**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**

Answer: (a) Yes. However, any target needs to be flexible to accommodate complex cases and cases which naturally take a long time.

**4.9. What incentives could be put in place to reduce the length of insolvency proceedings?** (please explain)

Rather than incentivising insolvency practitioners to complete matters quickly, which has the potential to produce injustices as it risks incentivising the length of the process above the interests of the stakeholders, it may be better to focus on implementing a more efficient system for reaching a final decision in relation to disputes, for example cutting out the length of the appeal process.

**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**

Answer: e) No opinion. MFA does not intend to comment on this question.

**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



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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**

Answer: f) No opinion. MFA does not intend to comment on this question.

**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**

Answer: (a) to (e) would all assist in some way.

**5. Additional comments**

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



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