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LONG TERM INVESTORS

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Industry response to the European Commission Consultation on an Effective Insolvency Framework within the EU

About Invest Europe

Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately-held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.

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Opening Remarks

Invest Europe appreciates the opportunity to respond to the European Commission consultation on an effective insolvency framework within the EU.

For many years, Invest Europe has been an engaged interlocutor with the European Commission following closely the different discussions and initiatives affecting the European private equity, venture capital and infrastructure industry.

Invest Europe previously responded to two consultations dealing with insolvency matters: (i) in October 2013, when the Commission organised a consultation on a new European approach to business failure and insolvency; and (ii) in May 2015, when the European Commission's consultation on building a Capital Markets Union also included a specific section on insolvency.

We stand ready to provide whatever further contribution to this work the European Commission might find helpful, including attending meetings and contributing additional materials in writing, and look forward to the opportunity to play a constructive role in the development of an effective insolvency framework in the EU.

Introduction

1. A robust approach to business failure and insolvency across Europe will encourage access to finance, enable viable businesses to be rescued, and will improve growth and sustainability in the overall economy. Indeed it is recognised that having a predictable and transparent insolvency and restructuring regime is essential to investors when assessing the credit risks at the outset of any transaction. Equally important is understanding how this insolvency regime interacts with security law, employment law, tax law, etc., which is why harmonisation of insolvency laws without understanding their impact on other laws would be misconceived.
2. In relation to whether specific aspects of insolvency laws would need to be harmonised in order to support the emergence of a pan-European capital market, the private equity industry's responses to the last European Commission consultation on a new European approach to business failure and insolvency (dated October 2013) remain relevant.
3. In addition, it is probably worth noting that since the financial crisis, we have already seen a divergence in the types of finance available in Europe; in particular, recent statistics suggest that bond market debt already significantly outweighs the amount of credit provided by the traditional loan market. There has already been a significant shift in the availability of public debt, suggesting that the lack of harmonisation of insolvency law may not be causing any major problems.
4. The EU proposals for harmonisation, as set out in the Recommendations in March 2014, were less ambitious than the original 2013 consultation, and were limited to harmonising two key aspects of insolvency law:
 - Member States were encouraged to introduce legislation which provides for the early restructuring of debts in order to avoid formal insolvency proceedings, including a stay on enforcement actions, with detailed provisions on the features of a restructuring plan and its confirmation;
 - encouragement for the promotion of a 'second chance' for entrepreneurs in respect of which the Commission recommended a maximum period of three years before discharge from bankruptcy.

These objectives seek to achieve the introduction of minimum standards by protecting the value of the insolvent estates, reducing costs, increasing predictability for creditors and shareholders, reducing forum shopping and protecting employment. Whilst we are in agreement with these laudable objectives, we are not persuaded that harmonisation will necessarily deliver these improvements.

5. It is also worth noting that the lack of established restructuring and insolvency regimes in many jurisdictions, which was especially apparent in the context of the financial crisis, has however gradually improved with many Member States having recently introduced legislation at a national level in respect of pre-insolvency processes designed to encourage restructuring and rescue (for example, France has introduced accelerated and financial safeguard proceedings, Italy has pre-

insolvency and restructuring agreements and Spain has out of court refinancing agreements). In this respect, there has already been a natural convergence in the promotion of pre-insolvency and rescue procedures across Europe, and this, in conjunction with proposals to extend the scope of the European Regulation on Insolvency Proceedings to pre-insolvency and rescue type procedures also referred to in the Green Paper, may be more feasible than a fully harmonised approach.

6. Further harmonisation will require the development of common standards applicable in all Member States, which may be difficult to achieve given that many insolvency laws are inextricably linked to political, cultural and other differences in national policy and in legislation such as security, property, tax, and company law.
7. Many if not most European restructuring regimes function on a company-by-company basis, i.e. each group company filing for and being subject to a separate process. A group having subsidiaries in multiple EU countries therefore faces the reality of having different restructuring regimes being applied to its entities and multiple trustees being appointed, each with potentially different agendas. This makes salvaging going concern valuations difficult. There is no easy solution to resolving company distress on a group-wide basis and indeed it is something that has been grappled with for a number of years. In certain jurisdictions there are practical mechanisms for coordinating group proceedings to facilitate a restructuring and these have been recognised in the Recast Insolvency Regulation.
8. It could be argued that one reason why the US economy is able to recover faster from recession than the EU is the US personal bankruptcy regime. The US regime allows honest debtors to return to new businesses without multi-year waiting periods. The concept of a “waiting period” is neither necessary nor beneficial to the economy and especially not in the case of honest business failure.
9. Finally, we do not see any material benefit in avoidance actions to the extent that they would set aside commercially negotiated arm’s length financing packages.

Consultation response

1. Scope

Question 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.

Invest Europe response

Each of these three measures are useful components of an insolvency framework, but we are not sure that there is a need for them to be harmonised at an EU level.

- 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)

Question 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? Please explain.

(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.)

Invest Europe response

	To a large extent	To a considerable extent	To some extent	Not at all	No opinion
a) Preventive measures to	X				

enable the restructuring of viable businesses					
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

- Differences in existing regimes are not necessarily problematic in practice, but can be seen as offering a greater variety of options for debtors who operate across borders. For example, English schemes of arrangement have been used as a solution for restructuring non-UK companies.
- Whilst the English scheme, for example, could fulfil the objectives identified in measures (a) and (b) above, its success is largely driven by the fact that it is a flexible process. It facilitates a restructuring where it is not possible to achieve this on an entirely consensual basis, but in a way that is fair and reasonable, and in particular conducted within a regime that is predictable.

Question 1.3. To what extent do the measures mentioned below have an impact on the creation and operations of newly established companies? Please explain.

Invest Europe response

	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

- While such measures can have an impact on the creation and operation of new businesses, other drivers dominate. The potential for a business to grow and deliver returns is much more important than the risk associated with any measures available to restructure and rescue ailing companies.

2. Saving viable businesses in difficulty

Question 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.)

Invest Europe response

	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 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 in national laws affect the functioning of the Internal Market.

Invest Europe response

- Again we reiterate that differences in the laws of Member States are not necessarily barriers to the functioning of the EU internal market. But the key measures identified in a) to e) above do have a part to play and minimum standards that give access to such measures ought to be available in different Member States. The more convergence there is across Member States, this will mean that the operation of cross-border frameworks, such as the Recast Regulation on Insolvency Proceedings (Regulation 2015/848) will operate more efficiently in cross-border cases.

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

Invest Europe response

	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 the viability of a debtor	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 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.

Invest Europe response

- It should be recognised that any legislation for such measures is dependent upon the professionals that operate in this sphere and the infrastructure (most notably the courts) that supports them. Introducing common minimum standards will not necessarily result in a harmonised approach to insolvency laws. Practitioners and courts operate and apply and interpret legislation in different Member States in different ways. By way of example, one of the key concepts of the European Regulation on Insolvency Proceedings, “centre of main interests” (COMI), has been the subject of different interpretations in the different courts of the Member States. This has resulted in a number of referrals to the European Court of Justice, in order to clarify the meaning of COMI. In the case of any future Legislative Proposal we assume that this will take the form of a Directive requiring national legislation to implement and providing the potential for differences in implementation and application to remain.

Question 2.3. If creditors are situated in a different Member State(s) than their debtors, what impact does this have on the restructuring of the business of debtors as opposed to a purely national situation?

- a) Very significant impact
- b) Significant impact
- c) Little impact
- d) No impact at all
- e) No opinion

Please explain your choice, including which aspects are particularly affected.

Invest Europe response

- This depends upon the specific circumstances of any given situation. Creditor engagement is usually driven by the likely outcome and individual effect on creditors. For those with significant exposures there may be more of an incentive to participate in the process. For those with relatively little at stake, dealing with a different regime in a different Member State may not be worthwhile.

- Furthermore, creditors situated in a Member State that is different to the debtor's (or to the location of the main proceedings) may have different expectations of how proceedings should operate or the order of priorities. Such creditors still have the opportunity to disrupt a restructuring by opening proceedings in their home Member State. It is hoped that the Recast Insolvency Regulation, by introducing a clearer definition of "COMI" and allowing synthetic secondary proceedings, will help to reduce this.

Question 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 (please explain)
- e) No opinion

Invest Europe response

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).

If the response to Question 2.4. is a), b), c) or d) -> Question 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 (please explain)
- e) No opinion

Invest Europe response

c) Having a variety of procedures, both court supervised and out of court, will mean that debtors, irrespective of their size and complexity will be able to choose a procedure which is appropriate to their needs.

However, a balance should be struck between (a) allowing out of court restructurings (which have the advantage of being less-time consuming and expensive than court-based restructurings) and (b)

having appropriate safeguards in place if creditors' claims are to be compromised, or where there is to be a moratorium imposed on creditors. Such safeguards will often require some form of supervision by the court or an officeholder.

Question 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 (please explain)
- e) No opinion

Invest Europe response

c) No, but where restructuring procedures impact upon creditor rights without their consent those affected should at a minimum be notified and provided with information that enables them to take action (if necessary) to protect their interest and if appropriate to vary the effects of the restructuring.

Question 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 (please explain)
- e) No opinion

Invest Europe response

- a) Microenterprises (up to 10 employees)
- b) Small and medium-sized enterprises, excluding microenterprises
- c) Large enterprises

We believe that having a broad range of restructuring measures available irrespective of a debtor's size is essential.

Question 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) (please specify who)
- e) No one
- f) No opinion

Invest Europe response

Initially, it will be the debtor that considers whether it needs to restructure and whether it is viable to do so. But creditors will also wish to assess the viability at an early stage so they too can ascertain whether they support the restructuring. Assessing value and mediating between different, competing interests may also be contentious, especially depending on the nature of the debtor and its assets, so the court may also need to be involved in the process.

- a) The courts or external experts appointed by the courts
- c) The creditors or external experts chosen by the creditors

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

- a) Yes
- b) No
- c) Other (please explain)
- d) No opinion

Invest Europe response

b) No. The ability to continue good faith negotiations with creditors without a strict time line to file for a public process is often helpful.

Furthermore:

- We do not believe that tests for insolvency should be harmonised. There is already considerable case law and new primary legislation in this area may be unhelpful, not least by introducing new tests that would inevitably require interpretation and almost entail further recourse to the courts.
- We do not think that priority should be given to the development of standard model forms or templates. The problem does not lie in the lack of templates; rather, it is situated in the lack of

understanding and failure to recognise that the restructuring is necessary, together with a lack of support during the proceeding that makes rescue difficult.

If the response to Question 2.7. is Yes ->

Question 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 (please specify)
- e) No opinion

Invest Europe response

Not applicable.

Question 2.8. Should debtors in the context of restructuring measures be able to keep control over the day-to-day operations of their business (so-called 'debtor-in-possession arrangements')?

- a) Yes, without any supervision or control
- b) Yes, but subject to supervision from a suitably qualified mediator/supervisor/court
- c) Yes, but subject to conditions other than supervision from a suitably qualified mediator/supervisor/court
- d) No, debtors should not be able to keep control over the day-to-day operations at all
- e) Other
- f) No opinion

Please explain.

Invest Europe response

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

The supervision from a suitably qualified mediator/supervisor/court should only take place concerning relevant operations, i.e., those acts which could affect significantly the debtor's financial situation.

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

- a) Only in formal insolvency proceedings
- b) In formal insolvency proceedings and in preventive/pre-insolvency restructuring procedures
- c) Other
- d) No opinion

Please explain.

Invest Europe response

- b) In formal insolvency proceedings and in preventive/pre-insolvency restructuring procedures

If the answer to Question 2.9. is a), b) or c) -> Question 2.9.1. For how long should the enforcement of actions of individual creditors be stayed once the restructuring attempts are ongoing?

- a) 2-3 months, without the possibility of renewal
- b) 4-6 months, without the possibility of renewal
- c) 2-3 months, with the possibility of renewal in certain circumstances
- d) 4-6 months, with the possibility of renewal in certain circumstances
- e) Any time limit set by the court subject to the fulfilment of certain conditions
- f) Other
- g) No opinion

Please explain.

Invest Europe response

- e) Any time limit set by the court subject to the fulfilment of certain conditions, bearing in mind the timeframe established by law for the duration of the ongoing restructuring proceedings

Question 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.

Invest Europe response

b) Yes, subject to certain conditions. An equitable stay should ensure that creditors whose rights are stayed are adequately protected or there is, at least, an assessment of whether the prejudice caused to the individual creditor by the stay is outweighed by the benefit to the restructuring/general body of creditors. A balance must be struck between depriving creditors (especially secured creditors) of their contractual or proprietary rights to enforce or repossess, and allowing the debtor breathing space to restructure.

Question 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 (please explain)
- e) No opinion

Invest Europe response

- a) Yes, including on secured creditors

If the answer to Question 2.10 is Yes (a or b) or Other (d) -> Question 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 (please specify)
- c) No
- d) Other (please explain)
- e) No opinion

Invest Europe response

b) Yes, but subject to certain conditions (e.g. depending on the percentage of votes and subject to the plan being fair and reasonable and creditors in the dissenting class being no worse off than the other likely alternative).

There should also be a recognition that any such process should allow creditors who have no economic interest in the debtor to be excluded or crammed-down.

Question 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 (please specify)
- e) No opinion

Invest Europe response

a) Yes, always but subject to necessary safeguards to ensure that existing creditors are adequately protected and that the financing is on fair terms.

Question 2.12. Should directors of companies be incentivised to take appropriate preventive measures if companies are in distress but not yet insolvent, for example by being able to avoid related liability?

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

Please explain.

Invest Europe response

b) No. While directors ought to be encouraged to take early action, they should not be driven to initiate a formal process in order to simply avoid personal liability when in fact an alternative course of action may be better for the creditors as a whole. We have seen that in certain jurisdictions where liability is triggered by a mandatory filing period this can have a negative impact on the possibility of a restructuring.

In some jurisdictions rigid rules may force directors to file for formal insolvency at too early a stage, thus closing off other more appropriate procedures or measures. If the company is in distress the directors should (of course) take appropriate preventative measures, without having to be concerned about their personal liability. National laws should allow or incentivise directors to recognise a problem and take action at this stage. Laws which oblige directors to take some form of given action when particular insolvency triggers occur is too rigid.

Question 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 (please explain)
- g) No opinion

Invest Europe response

- d) Yes, but only for individuals

3. Second chance

Question 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.

Invest Europe response

- a) Yes, entrepreneurs (individuals) as well as consumers

If the answer to Question 3.1. is a), b), c), d) or e) -> Question 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

Invest Europe response

c) To some extent. Individuals may seek to invoke a more favourable discharge period by moving the centre of their main interests. Such manipulation will be curtailed to a degree by the amendments introduced by the Recast Insolvency Regulation which requires individual debtors to have an established COMI for a six-month period before they initiate a formal process in that Member State. Previous manipulation has meant that it has been difficult to assess the risk of insolvency in any given Member State with any sufficient degree of certainty.

Question 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 (please explain)
- f) No opinion

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

Invest Europe response

- a) Yes, entrepreneurs (individuals) and consumers, possibly subject to certain conditions

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.

Invest Europe response

- a) Yes, to entrepreneurs (individuals) and consumers

If the answer to Question 3.3. is a), b), c) or e) Question 3.3.1. Should the test of 'honesty' be made the same across all EU Member States?

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

If yes, what should be the substance of such test? Please explain.

Invest Europe response

a) Yes. The debtor should have to have co-operated in the formal process and not be guilty of any fraud or dishonesty either before or during the bankruptcy.

Question 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.

Invest Europe response

a) 1 year or less but there may be exceptional instances where it is acceptable to extend the discharge period (for example, where the debtor is guilty of fraud or dishonesty).

Question 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 (please explain)
- d) No opinion

If yes, please specify what that amount should be.

Invest Europe response

a) Yes, with the amount depending on the value of available assets/assets to be liquidated

Question 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 (please specify)
- f) No opinion

Invest Europe response

e) Matrimonial contributions, child support payments and criminal penalties should be excluded, as we believe there are wider public policy reasons for ensuring they are not the subject of a discharge. Failure to protect such debts could lead to abuse.

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

Invest Europe response

- d) Other options

Question 3.4.1. Please explain.

Invest Europe response

It is important to avoid discouraging entrepreneurs from starting businesses and one might therefore look at the rules in this area and reflect whether they can make a contribution.

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

Question 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? Please explain.

(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.)

Invest Europe response

	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

- For more complex transactions, the differences will be part of the risk assessment at the outset. As long as those risks are identifiable and quantifiable, the differences are not necessarily obstacles to investment.

Question 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 (please explain)
- h) No opinion

Invest Europe response

- 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

As regards insolvency practitioners in particular:

- In order to ensure high-quality services from insolvency practitioners dealing with insolvency cases, creditors should be able to influence the appointment of insolvency practitioners.
- Within the context of removing obstacles to the proper exercise of the duty for insolvency practitioners to cooperate in cross-border proceedings within the scope of the European Insolvency Regulation, it is important to keep in mind that maintaining “going concern” on a group level is often vital to the outcome of restructuring and bankruptcy realizations.

As regards the specialisation of judges:

- We do see benefit in any future legislative proposal recommending the specialisation of judges who are/will be in charge of insolvency cases in order to speed up proceedings and respond quickly to calls for stay, plan confirmation, challenges to the plan, etc. Jurisdictions that have done this have benefitted.

Question 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.

Invest Europe response

- a) Secured creditors should be satisfied in principle before all other creditors

Secured creditors should have priority up to the real value of the collateral. Save for restructuring process costs priority any other priorities would only be detrimental to a well-functioning market.

Question 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.

Invest Europe response

- 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)

There are already similar types of avoidance actions in each of the Member States. We do not believe that a harmonised approach will necessarily improve investment or indeed recovery rates.

Question 4.5. In what areas would minimum standards for insolvency practitioners help to increase the efficiency and effectiveness of insolvency proceedings? (choose all that apply)

- a) Licensing and registration requirements
- b) Personal liability
- c) Subscribing to a professional liability insurance scheme
- d) Qualifications and training

- e) Code of ethics
- f) Other (please specify)
- g) No standards should be harmonised
- h) No opinion

Invest Europe response

- d) Qualifications and training
- e) Code of ethics

Question 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 (please specify)
- e) No additional standards are needed compared with those relevant for domestic insolvency cases
- f) No opinion

Invest Europe response

e) No additional standards are needed compared with those relevant for domestic insolvency cases but we can see that from a practical perspective having sufficient human and financial resources would be key.

Question 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.

Invest Europe response

- 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)

Question 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 (please explain)
- e) No opinion

Invest Europe response

- a) Yes, but with flexibility that the maximum could be extended in complex cases.

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

Invest Europe response

- Ensuring that the court system supports the drive for such efficiencies and also encouraging out of court proceedings to be streamlined.

Question 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.

Invest Europe response

b) automatically prevent disqualified directors from managing companies in other Member States

Rules on disqualification may vary dramatically depending on the jurisdiction but free movement should not mean free movement of fraudulent directors.

Whether there is a need for minimum standards on directors' duties linked with preventive restructuring and insolvency procedures is a different question of course. Hard and fast rules have often proven to be counterproductive. Companies often benefit from being able to continue "good faith" work-out negotiations with creditors without a short mandatory filing time line.

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
- 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 (please explain)
- f) No opinion

Invest Europe response

b) Only for the duration applicable to equivalent disqualification orders in the host State.

See response above. Free movement should not mean free movement of fraudulent directors.

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 (please explain)
- g) Measures unrelated to insolvency (e.g. enforcement of contracts) (please explain)
- h) No opinion

Invest Europe response

- a) Measures to improve the effectiveness of insolvency proceedings
- b) Measures enabling the rescue of viable businesses
- d) Measures to ensure a discharge of debts of entrepreneurs (individuals)
- e) Measures to ensure a discharge of debts of consumers

5. Additional comments

Question 5.1. Are there any additional comments you wish to make on the subject covered by this consultation?

Invest Europe response

- As set out in our introduction, we are not persuaded that harmonising insolvency law at an EU level will necessarily bring about an improvement in investment but rather, it could prove counterproductive.
- Focussing on certain aspects for harmonisation only and also recognising that the insolvency law is linked to other legislation (property law, employment law, trusts etc.) means that such changes have the potential to have a negative impact.
- Even if total harmonisation of legal provisions were feasible, implementation and operation of that law would continue to vary across Member States.
- We can see that using examples of international best practice as a basis for adopting some minimum standards may seem attractive but we remain to be convinced that they will achieve the objective of promoting greater investment across the EU.