Consultation on a new European approach to business failure and insolvency

I. Background Information

Please indicate your role for the purpose of this consultation -single choice reply-(compulsory)	Other

Please specify -open reply-(compulsory)

The Loan Market Association (LMA) is the trade body for the EMEA syndicated loan market and was founded in December 1996 by banks operating in that market. Its aim is to encourage liquidity in both the primary and secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice, which are widely used and adopted. Membership of the LMA currently stands at over 510 from 52 nationalities and consists of banks, non-bank investors, law firms, rating agencies and service providers. The LMA has gained substantial recognition in the market and has expanded its activities to include all aspects of the primary and secondary syndicated loan markets. It sees its overall mission as acting as the authoritative voice of the European loan market vis à vis lenders, borrowers, regulators and other interested parties. In responding to this consultation, we have consulted with our members, particularly those most likely to be affected in practice by the existing insolvency framework and any steps taken to improve or modernise it.

Have you had practical experience with insolvency proceedings and if so, in what capacity? -single choice reply-(compulsory)	Yes
If so, -single choice reply-(compulsory)	as a creditor
Please indicate the country where you are located -single choice reply-(compulsory)	United Kingdom

Please provide your contact information (name, address and email-address) -open reply-(compulsory)

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II. Selected areas where the divergence of national law may create problems for the internal market

1. Second chance for entrepreneurs in honest bankruptcies

Q1. Which of the following measures would you consider as the most efficient in order to reinforce a second chance for honest entrepreneurs? -multiple choices reply-(optional)	
Q2. Do you support the European objective to limit the discharge and debt settlement period to a maximum of three years in order to facilitate second chance? -single choice reply-(optional)	

2. Conditions for opening insolvency proceedings

Q3. In your view, do the differences in national law for the opening of insolvency proceedings	Yes

(insolvency test and/or timeframe) create problems for businesses operating in the internal market? -single choice reply-(optional)	

Please specify -open reply-(optional)

Consistency in triggers of insolvency proceedings are not really an issue in practice. However mandatory time limits do cause problems and do little to assist the management of distressed groups through a restructuring process. Restructuring efforts may be further frustrated where differences in national law impact the level of liability directors' face when mandatory time limits are breached. These various issues could result in forum shopping by distressed entities looking to facilitate a successful restructuring. Whilst abolishing these mandatory requirements may level the playing field we appreciate that they are often linked to established local policy requirements.

Q4. In your view, does the divergence of national laws on the following issues create problems? -multiple choices reply-(optional)	The possibility for creditors to file for insolvency proceedings?

Please specify -open reply-(optional)

Seeking to converge thresholds and adopt a more uniform approach to the opening of insolvency proceedings may deter creditors from "forum shopping".

3. National legal frameworks for restructuring plans

Q5. In your view, is there a need to eliminate all or some of the divergences of national rules regulating restructuring plans? -single choice reply-(optional)	Yes
Please specify -single choice reply-(optional)	Other

Please specify -open reply-(optional)

A standardised approach to voting thresholds, numerosity and bases for formation of electoral colleges in the course of restructuring plans may be useful, although this is an issue to which Member States are becoming increasingly alive and, thanks to the recent flux of amendments to national insolvency law in Western Europe, standards are becoming more harmonised in any event. Individual Member States have a better understanding of the requirements of their domestic creditors and debtors and are best placed to review their national regimes and adapt them where necessary. We are of the opinion that EU-level involvement should focus on aiding cross-border insolvencies of group companies. The new chapter introduced in the European Commission's proposal of reform to the European Regulation of Insolvency Proceedings (Council Regulation 1346/2000) to deal with the insolvency of members of a group of companies may assist in this respect, although at present the draft amendment Regulation relies upon coordination and cooperation and it remains to be seen in what form this chapter is ultimately adopted.

4. Special arrangements for SMEs

Q6. Does simplified and cost-efficient insolvency scheme for SMEs exist in your Member State? -single choice reply-(optional)	Yes

If yes, do you have any comment or suggestion on how these schemes can be improved? -open reply-(optional)

Are you aware of any problems which SMEs as creditors encounter? If yes, please specify. -open reply-(optional)

Q7. Are the following types of procedures available to SMEs in your Member State? -multiple choices reply-(optional)	No
Q8. Which of the following aspects should be	

improved in view of making insolvency proceedings more efficient and effective for SMEs? -multiple choices reply-(optional)	

If no, do you think they should be? Please specify -open reply-(optional)

There is no bespoke regime for SMEs, but, consensual out of court restructurings; company voluntary arrangements (including a moratorium for small companies); administration (both out of court and court appointed); and liquidation processes are all available to SMEs.

5. Status, power and supervision of liquidators

Q9. Do you consider that the divergence of national laws with respect to the issues set out below has created problems in cross-border insolvency proceedings? -multiple choices reply-(optional)	the powers attributed to the liquidator?

Please specify -open reply-(optional)

Closer co-operation and communication between liquidators in a cross-border insolvency of a group of companies is already provided for in the Insolvency Regulation. However, the responsibilities and powers attributed to liquidators under the laws and practices of the place of appointment can sometimes prevent co-operation in a way that is in keeping with the strategies and interest of all creditors in both sets of proceedings especially where proceedings in one jurisdiction are aimed at rescue whereas they may be focussed on liquidation in another. In addition, a duty of communication and co-operation should be put in place between the liquidators and the courts involved in cross border cases, or between the courts themselves. We do, however, appreciate that this could be difficult due to the diverse court practices and local rules that exist in different jurisdictions. In addition, difficulties may arise through the treatment of different classes of creditor as 'preferential'. However, it may be that action is found to be unnecessary given that liquidators and courts do show a willingness to co-operate in practice. The consultation suggests some form of standardisation in terms of the qualification, licensing procedures, eligibility for appointment, conditions for dismissal powers and remuneration and rules concerning the suspension of liquidators may solve problems in cross border cases – we do not consider that this has given rise to problems in the past, and the logistics of implementing a standard approach, given the diversity both in practice and experience at a national level, would make this very difficult.

6. Directors' duties and liability and professional disqualifications

Q10. In your view, are there problems with the enforcement of liability claims against the directors of insolvent companies within the EU? -single choice reply-(optional)	
Q11. In your view, have the regulatory gaps in the liability regime outlined above led to any problems in practice? -single choice reply-(optional)	
Q12. In your view, is there a need to take action at EU level with a view to preventing disqualified directors from heading companies in another Member State? -single choice reply-(optional)	Yes
Please specify -single choice reply-(optional)	by ensuring that information on national disqualification orders is available to the relevant authorities in other Member States?

7. Avoidance actions

Q13. In your view, has the divergence within the	No

EU of the conditions under which a detrimental act can be avoided created problems in practice? -single choice reply-(optional)

III. Other Issues

Q14. In your view, are there any other issues where the divergence of national law creates problems for the internal market?
-open reply-(optional)

With regards to Q13 - We note that there have not been any cases in relation to this issue before. Whilst there are national divergences in terms of time limits and burdens of proof there are also common themes in respect of the types of action available and ability to hold those responsible for the failure to account. We do not consider that parties choose applicable laws for a transaction by reference to whether there is a lenient avoidance regime. With respect to other issues:- - Publication of insolvency proceedings and the lodging of claims - the good functioning of cross-border insolvency proceedings relies on the exchange of information between insolvency practitioners, courts and creditors. In particular, a court opening insolvency proceedings needs to know whether the company is already subject to insolvency proceedings in another Member State. The Insolvency Regulation currently leaves it up to the insolvency practitioners to decide whether to request publication of the opening judgment in another Member State. At present, EU law does not contain an obligation to publish the opening of insolvency proceedings in an insolvency register nor does it provide for a way to search insolvency registers in other Member States. Member States should therefore be required to register the opening judgment in an insolvency register based on a common set of entries to facilitate cross-border searches and the interconnection of national insolvency registers. We note that steps are being taken in this regard in the proposed amendments to the European Regulation on Insolvency Proceedings.

Do you want to upload a file?
-open reply-(optional)