



The Insolvency
Service

Response Form:

European Commission Recommendation
on a new approach to business failure
and insolvency

February 2015

1. General Information

How to respond

1.1 This is a template response form. If you would like to use an alternative format please do so in writing.

1.2 Please send completed short form responses to:
policy.unit@insolvency.gsi.gov.uk, or post to:

Nicholas Blaney
The Insolvency Service
4 Abbey Orchard Street
London
SW1P 2HT

General Information

1.3 What is your name, or the name of the organisation you represent?

MARIA POMBO BA (Hons), MEACTP (Certified Turnaround Professional)
BE RESCUED (BUSINESS) CONSULTING Limited (Previously Firefox Associates UK LLP)

1.4 If writing on behalf of an organisation, what is the size of your organisation?
(mark with an 'X' as appropriate)

0-9 employees (micro)	X
10-49 employees (small)	
50-249 employees (medium)	
250+ (Large)	

1.5 If writing on behalf of an organisation, what type of organisation do you represent?

2. Introduction

1. In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

3. Definitions

2. Are the terms used by the Commission that are explicitly defined, clear?

3. Are any of the explicit definitions problematic in a UK context?

pre-packs needs compliance of SIP 16 and conducted by IPs which may not be practical or affordable in some circumstances

4. Are there any other terms, aside from ‘an honest bankrupt’ and ‘a second chance’, used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

efficient insolvency
framework” and whether the proposed “national preventive restructuring framework” is
separate from the “efficient insolvency framework”. Also a

4. Preventative Restructuring Framework

Availability of a Restructuring Framework

5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

In the UK Administrations, CVA and other formal scheme of arrangements are a form of an insolvency process even if it is with the purpose of rescuing a business. The commission recommendations as described it seems to me aims for a framework that is not overseen by an insolvency regime but for the debtor to be more in control of how they want to take their business forward with the right advice/support/tools and instruments and to encourage a closer working relationship, cooperation and dialogue with the creditors if business owners choose not to opt for, believes are not insolvent or are unable to afford a formal insolvency process. In the UK elements (a) to (e) are only catered under a formal insolvency regime which usually knocks creditors' confidence particularly the smaller trade unsecured creditors. I believe a preventive intervention via a restructuring framework will achieve better result for both debtor and creditor without the knock on effect and poor credit rating that usually is suffered by businesses under a formal insolvency process.

6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

To an extent for instance the introduction of the pre-action protocol under consumer credit and residential mortgages, the role of the financial conduct authority and the ombudsman via formal complaint procedure. This is a much simpler and cost effective way available to business owners to stay enforcement actions without court intervention. It also gives business owners time to establish a more structure dialogue and negotiate their position particularly with creditors with greater bargaining power that are putting unnecessary pressure or those foreclosing their lending facilities to businesses they want to exit or consider toxic. However I find that sometimes this pre-action protocol is not complied with as sophisticated creditors call their contractual rights.

7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

The solutions available in the UK regime are very much focused on a formal insolvency framework, ie. Starting with the basic definition that insolvency is when the debtor is unable to pay debts when they fall due. The instruments accessible to Creditors to deal with bad debts are more widely and commonly used than those remedies available to debtors to deal with their financial difficulties for instance online monetary claims and CCJs, statutory and contractual demands, winding up petitions among others. I have observed that Debtors under pressure spend a lot of time and costs in trying to defend themselves focusing on passing the cashflow or balance sheet insolvency test rather than focusing on generation, continuity, promotion and stability of their business, particularly when they have to defence more aggressive and disruptive actions such statutory and contractual final demands, creditors business review which debtors have to pay and winding up proceedings. I don't think the commission's recommendation will make an impact that could improve on the current UK insolvency regime but it may open a new window for a complementary/supplementary legislation to be sought that will give an opportunity for the UK regime to explore a new framework away from its current insolvency regime which will give businesses and their owners in financial distress the chance and freedom to restructure and rescue themselves by negotiate better terms and work more closely in cooperation with all of its creditors. That I believe will improve hugely and nurture reasonable cooperation between commercial enterprises on a debtor/creditor relationship.

Facilitating Negotiations on Restructuring Plans

8. To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

9. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

10. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?

11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

Restructuring Plans

12. To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?

13

Only through formal insolvency process via a voluntary arrangement. I believe a Restructuring plan outside the insolvency process has to also be a realistic comparison of what can be achieved and so to persuade for creditors to consider options such as Debt for Equity swap even at smaller scale as is currently supported under the Companies Act 2006 regime. It should include some simplified guidelines for business owners to follow for example and among other things, objective of the proposal, type of proposed transaction, the sources and uses of funding as well as timescale of the process, workstream, people involved in the process and a summarised business plan. Although I agree with the process suggested it ultimately will depend on what is needed to be restructured but I think the recommendation as proposed by the commission mirrors pretty much the current CVA procedure which in effect is a formal insolvency process. Also the current UK regime takes more into account the application of the pari passu principle in so far as distribution rights are concerned though what the law says and what can be achieved in practice is a different debate. In my view the way is proposed it duplicates the existing CVA process which adds burden to a preventive intervention framework if it is outside the insolvency process so I am not entirely sure if this necessary, practical or helpful on a restructuring exercise really because if the debtor wants to carry the exercise itself and after all the work and time invested and if the court does reject the plan it will trigger insolvency so might just as well deploy what is already in use and consider a CVA in the first instance. It also contradicts with the principle that the restructuring process should be started without court intervention

Via the existing insolvency process: CVAs and IVAs

Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

I think involving creditors at an early stage is helpful as restructuring is only possible with the creditors active support, the question is if the creditors don't want to engage they might want to exercise their contractual rights to exit and trigger an insolvency process. I think this will be challenging on a preventive intervention framework and under the UK current formal insolvency regime some level of protection is already available for instance under the Administration regime. This is where I believe a strict compliance of a pre-action protocol will be most beneficial on a preventive restructuring framework to allow renegotiation of terms, cooperation, turnaround and achieve stability. If cram down takes place it may trigger higher interest rates, premiums or tighter and more onerous terms and more guarantees being passed onto other products to compensate creating potential problems elsewhere. It also mirrors what is already heavily criticised and complaint about from the pre-packs.

Protection for New Financing

15. To what extent does the UK regime already provide protection for new financing?

Protection for funding usually arises from the terms and conditions agreed between the contractual parties. The recommendation as suggested leaves more questions than answers, for instance what indemnity the restructuring investor will take in order to leverage their funding risk if restructuring is not successful and how creditors will feel about it or what future criticism this may arise from it.

16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

The financing supply market in UK is relatively open and there is more alternative funding for the distress sector available today than mainstream financing currently offers, that is if it is offers any at all. Since traditional banking lending has tightened their lending criteria new funding schemes have appeared to cater arising different markets here in the UK. However some funding scheme may not be regulated and business owners need to consider their options before committing and for exciting and shop around but sometimes this is not practical as time is of essence.

17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

Distress funding targets higher risk of adverse/poor or no credit rating worthiness so the indemnities and interest premiums are not necessarily cost effective or attractive but for a vast majority of business owners in financial distress with no credit worthiness or time these classes of lenders are is the only solution available to them. I think the key is to educate business owners to negotiate terms as much as they can at an early stage and with their existing creditors and plan for the debt exit strategies. Afterall one of the key benefits of restructuring to business owners, I believe, is more control, more understanding and learning from the past negative experiences that cause their business to be in the position they find themselves in so that will help them transform their business. I think protection should be offered to both funder and prospective debtor thru reasonable and fair contractual terms as well as possible remedies in the event of breach prior commitment so to encourage a healthy Distress funding sector.

5. Second Chance for Entrepreneurs

18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

Since the Enterprise Act 2002 was enacted (and 2013 reforms) the UK insolvency Regime has been more favourable to second chances for entrepreneurs and the current regime already delivers the recommendations described under paragraph 5.1 (a)

19. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

For Recommendations as described in paragraphs 5.2 (a) and (b) The existing regime already delivers this recommendation for discouraging through punishment under BRO/BRU and Directors Disqualifications provisions. Although these provisions are extremely important, however I believe the current regime could benefit from modernisation and broader understanding of decision making process and level of sophistication for some cases where the subjects are victims of circumstances rather than pre-meditation and intention

20. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

Although IVAs are maintaining their popularity in the UK I think the recommendations under 5.1(b) will benefit the UK regime so far that by shortening the period of IVAs from 5 to 3 years will certainly make a much more attractive solution and alternative to bankruptcy particularly where a business owner such sole traders who are still able to maintain some level of trading and income but carries heavy burden, for instance in the case of contractual personal guarantees, from their failed enterprises. I also believe the current UK regime does not meet recommendation as described in paragraph 5.2 (c). Although the current insolvency regime allows a bankrupt to retain his/her tools of trade, which I believe also needs modernisation not just the shovel, spade and the rusty screwdriver if you are lucky, from my observations there are no provision nor concessions to safeguard the livelihood of the family per se and certainly children, elderly, the ill/disable are not taken into consideration. Also bankrupts that are in extreme hardship and unable to obtain employment or financial stability are more vulnerable to repossessions particularly when their only assets such residential homes are forced to be sold if the partner of a bankrupt is unable to buy out the bankrupts share of equity. I think the current UK Regime should review this with a view to find a fairer and reasonable way of dealing with the bankrupt residential properties and more when bankrupt's credit worthiness is severed as a result of the bankruptcy and are unable to suitably rehome his/her family through private lettings and/or being forced to depend on the benefit system.

6. Forward Look

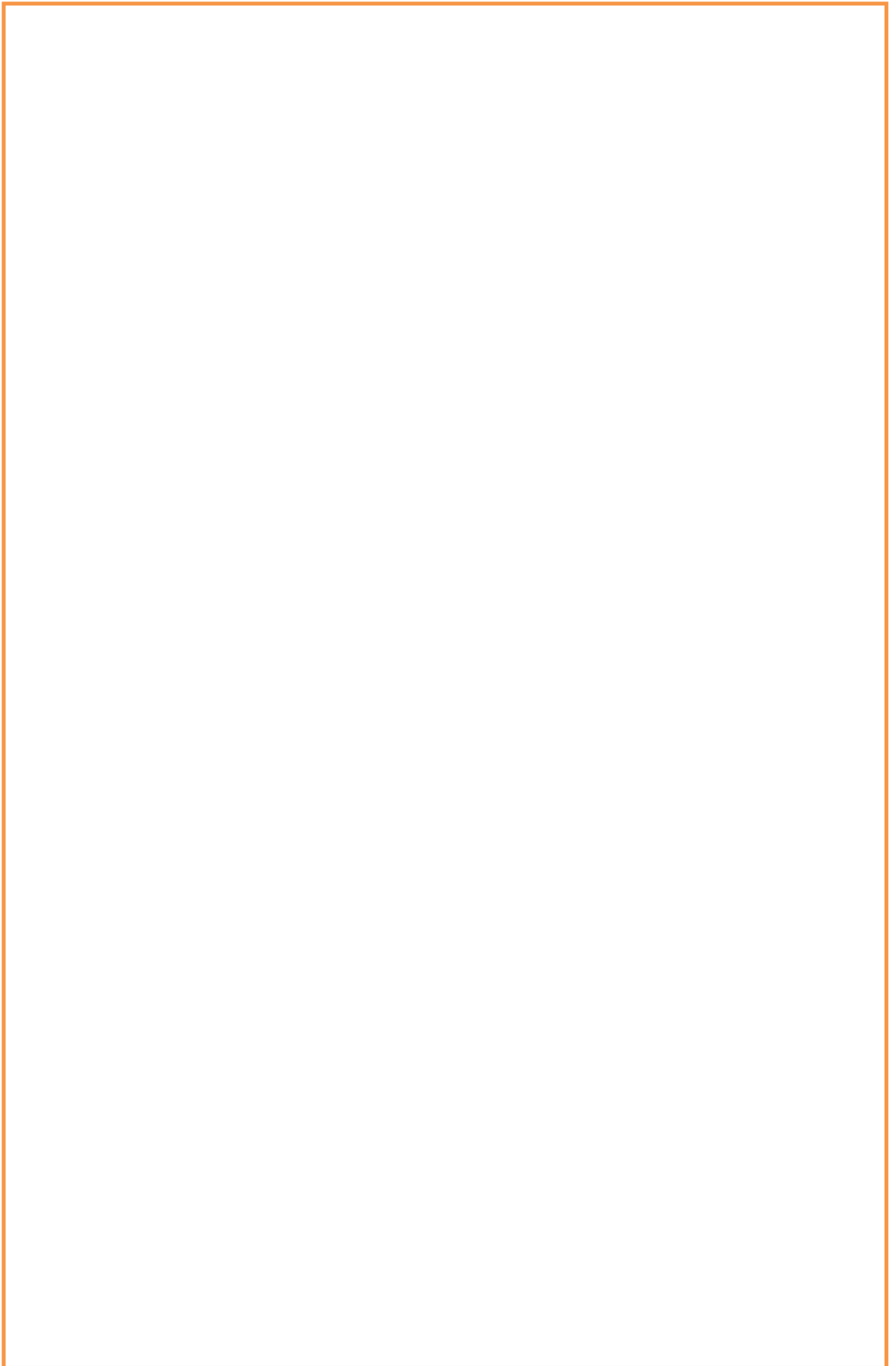
21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider?
For example:

- Developing EU principles for fast, efficient out of court rescue procedures for small companies.
- Developing the conditions for rescue finance.

If so, what should the Commission consider?

22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?



24. Do you have any other comments?



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Berg

1.4 If writing on behalf of an organisation, what is the size of your organisation?
(mark with an 'X' as appropriate)

0-9 employees (micro)	
10-49 employees (small)	
50-249 employees (medium)	X
250+ (Large)	

1.5 If writing on behalf of an organisation, what type of organisation do you represent?

Firm of solicitors that represents a large number of commercial clients that have suffered as a result of secured creditors forcing insolvency processes on them.

2. Introduction

1. In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

The objective is to “ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to **restructure at an early stage with a view to preventing their insolvency**, and therefore maximise the total value to creditors, employees, owners and the economy as a whole and to **give honest entrepreneurs a second chance across the union**.”

By implementing the Recommendations, in particular paragraphs 16 and 17, this would allow early intervention. And paragraph 13 would further unify the processes and allow greater understanding of procedures, processes and allow greater collaboration in addressing insolvency in a way that would allow genuine restructuring and recovery for SMEs.

3. Definitions

2. Are the terms used by the Commission that are explicitly defined, clear?

The definitions that are provided are clear. There are however other terms used that should be defined such as “bankruptcy” and “bankrupt entrepreneurs”.

3. Are any of the explicit definitions problematic in a UK context?

The definition of “debtor” meaning “any natural or legal person in financial difficulties when there is a likelihood of insolvency” may be confusing as it is not always the case that a debtor in the UK would be facing a likelihood of insolvency.

4. Are there any other terms, aside from ‘an honest bankrupt’ and ‘a second chance’, used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

The Recommendation refers repeatedly to **“Bankruptcy”** and **“bankrupt entrepreneurs”**.

This is confusing in that in the UK “bankrupt” is reserved for individuals (irrespective of their employment status) whereas companies are referred to as “insolvent” or “in liquidation” or “in administration” as appropriate.

The phrase “bankrupt entrepreneurs” may be taken to refer specifically to insolvent sole traders, or partners.

The recommendation seems to suggest that if a company is insolvent then the directors are also subject to insolvency (which in the UK at least is not the case).

“Debtor” should be better defined as “insolvent Debtor” meaning *“any natural or legal person in financial difficulties when there is a likelihood of insolvency”*

4. Preventative Restructuring Framework

Availability of a Restructuring Framework

5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

A6(a) The UK regime allows for early intervention and punishes directors who are too slow to identify when their company is likely to become, or is, insolvent. This can however have a negative effect in that it may encourage directors to avoid risk and stop trading too soon.

A6(b) The UK regime often fails to allow the debtor sufficient control over the day to day operation of its business .

We have seen a number of cases where companies have had to conduct pre-appointment sales (at market value) to third parties in order to preserve the value of an asset prior to entering into an insolvency process or formal restructuring rather than allow the asset to be dealt with by an insolvency practitioner ("IP". The general concern with our clients is that once IPs are appointed their costs inevitably expand to fill whatever limit of funds or realisations are available. Despite that this is normally more cost effective for the creditors, as the IP is appointed with funds already in place and no need to incur costs marketing or realising assets this does however open the directors (business entrepreneurs) to risk as it allows accusations of void antecedent transactions and/or personal liability.

A6(c) The UK regime allows for some protection to be granted by the court in terms of an interim moratorium. The standard protection that is obtained without the active participation of the court is by way of filing a Notice of Intention to Appoint an Administrator.

This only grants 10 days of protection and there are issues regarding the potential abuse created by repeatedly filing such notices. This forces companies to act with potentially undue haste in trying to effect a restructure. There are also issues regarding the vulnerability of the company at the expiry of each Noi period.

B13 This is similar to the stay referred to in B13 where it is recommended that any stay should be determined on the basis of the complexity of the anticipated restructuring. The current Noi system creates uncertainty for the company and the creditors.

C16 This differs from the current UK CVA model which allows only unsecured creditors to decide. It may be that a secured creditor is the only party affected by the restructuring and is prepared to agree. The Recommendation would allow this.

6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

No

7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

Yes, for example referring to the above points listed under answer 5

A16 would improve the UK regime in that it would require the current framework to be amended to allow for debtors to prevent insolvency by early intervention.

Likewise compliance with the Recommendations would achieve the Objectives and improve the UK regime.

Generally the UK regime is highly geared towards creditor rights (and particularly secured creditor rights) which is open to abuse as there are a lack of cost effective mechanisms to challenge inequitable conduct by a significant creditor (even where this affects other smaller creditors).

By meeting the Recommendations within the report the UK regime could be made fairer for both the Company (and those directors who have invested time and money into it) and also society in terms of avoiding unnecessary job losses, tax defaults, consequential losses to third parties.

Facilitating Negotiations on Restructuring Plans

8. To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

The UK regime allows for some, limited, time to be obtained by the Company in order to negotiate on restructuring plans. This is however incompatible with the Recommendations which suggest periods of protection for up to 4 months at a time (extendable up to 12 months) based upon the complexity of the restructure.

9. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

Nothing upon which we wish to comment at this time

10. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?

Yes. Additional protection for periods to allow genuine restructuring action to be taken would prevent rushed decisions and give the restructuring a greater chance for success.

11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

Yes. It would be advantageous and more cost effective for such restructuring to take place without direct court involvement however it is essential that such a framework be sufficiently transparent and accessible so as not to be open to abuse.

In our experience there is a sense, rightly or wrongly, in the wider business community as Insolvency being a highly complicated area (sometimes deliberately so) which allows those involved to manipulate the situation for the benefit of the professionals involved rather than genuinely for creditors.

Restructuring Plans

12. To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?

In principle the UK regime delivers all of the elements necessary in this section of the Commission's Recommendation though the Insolvency Service call for evidence the right of "affected creditors" to vote irrespective of whether they are secured or unsecured.

It depends on the definition of "affected creditors". Would a secured creditor who is not suffering a shortfall constitute an "affected creditor" unless the restructure has any bearing on the asset upon which his security is based?

If it is limited to creditors who unsecured or/are potentially suffering loss then the CVA system at present allows secured creditors to vote for any unsecured element.

13. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

The particular set up of CVAs differs from the Recommendations, in that it only relies upon the support of a single class, however it does achieve the overall objective of allowing a framework for early restructuring to avoid insolvency.

14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

It would in situations where the alternative is liquidation and a lower return however the ability to cram down an entire class would require very careful consideration and would need to be subject to scrutiny and transparency.

However allowing this, in a controlled manner, may well result in greater confidence in the ability to engage in enterprise and prevent a particular class from acting against the benefit of the whole.

This is particularly relevant where the level of secured debt has arisen purely due to the actions of the secured creditor and therefore in order to effect a fair and reasonable restructure in accordance with the Recommendation Objective.

It would however lead to a greater number of disputes on the statement of affairs and valuations which would become increasingly important.

It has been shown repeatedly that the secured creditors can often cause an insolvency and thereafter take advantage within the insolvency by reviewing the valuation on assets which inexplicably drop, sometimes over short periods, allowing the secured creditor to abuse the insolvency framework and take title to the asset at the "lower" value.

Protection for New Financing

15. To what extent does the UK regime already provide protection for new financing?

The UK regime allows the company to obtain new financing if the investor is willing to provide it.

There is often an issue as regards the provision of security but in theory, if the security is not subject to an existing charge, and the Company receives good value for the security it grants then, whilst it is likely to be reviewed, this is unlikely to be challenged as a preference if, on the facts, it benefits the creditors as a whole and the granting of the security can be shown to be a requirement of the facility and not something that the company desired to provide to put the new finance company into a better position.

16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

Nothing upon which we wish to comment at this time

17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

Only if it focuses the outcome on the "fair and reasonable" restructure for the benefit of the creditors AND to avoid insolvency.

There should be a requirement for the interests of the Company, directors and its suppliers, employees and customers and the wider economic impact to be considered.

5. Second Chance for Entrepreneurs

18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

It allows for a straight forward system of bankruptcy that allows for discharge within a relatively short period, subject to compliance with the Official Receiver and insolvency practitioners.

It provides a “clean slate” of sorts in terms of debts, though not in terms of credit referencing which may have longer impact upon the entrepreneur’s ability to start trading again.

There is no differentiation between sole traders or partnerships that are declared bankrupt and other individuals (“consumers” that are declared bankrupt.

19. Is there anything in the UK regime which is not in the Commission’s Recommendation but delivers the Commission’s objective?

Nothing upon which we wish to comment at this time

20. Where you believe the UK regime does not meet the criteria, would the Commission’s Recommendation improve the UK regime?

Whilst not directly addressed within the Recommendation potentially a differentiation between types of bankruptcy may prove useful.

A consumer bankruptcy and a business bankruptcy might be an option.

6. Forward Look

21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider? For example:

- Developing EU principles for fast, efficient out of court rescue procedures for small companies.
- Developing the conditions for rescue finance.

If so, what should the Commission consider?

The commission needs to consider not merely speed and efficiency but also fairness and reasonableness as criteria for any procedures.

The UK Regime, whilst complying broadly with the vast majority of the regulations, prioritises the needs of the creditors over all other considerations. This is true even in terms of allowing a single secured creditor the ability to take action to frustrate or any restructure to the detriment of the company, the directors, the employees, other creditors and even to its own detriment.

Often these secured creditors are financial institutions that do not need to take immediate action and can afford to wait (with their security in place) and allow attempts at a restructure to take place.

They often do not support such restructuring, motivated by internal policies or targets on recoveries, as well as a commercial desire to “cut losses” even if the resulting insolvency process removes any value from the Company that may have benefitted other creditors or allowed the restructure.

Given their security their own loss is often minimal (in relation to the size of their business) however they often don’t seek to scrutinise the additional professional costs of the IPs, lawyers, agents, valuers who are all instructed.

Sometimes these creditors may have an additional interest in obtaining the secured asset and can engineer a “default” through revaluations of the asset (reducing the value through the use of a “panel” valuer, paid for by the Company but answering solely to the creditor). This will often result in discovering a “breach” of the loan to value ratio and allow the secured creditor to either appoint receivers to sell the asset, at a distressed sale value, to an associated company to be sold on at a profit.

Alternatively, when a default has been engineered in this manner when the Company actually has a surplus of assets the Secured Creditor can still utilise the “breach” to allow the sale of a number of the assets at below market/ distressed values (with the professionals involved all benefitting from the fees and charges which are less scrutinised by a major institution) in order to achieve a repayment of its own debt to the detriment of the Company and other creditors rather than allow consideration of, and support to, a restructure that would allow the Company to survive.

Alternatively and/or additionally the “revaluation” will allow the creditor, pursuant to a floating charge, to appoint (or cause the directors to appoint) a “panel” insolvency practitioner as administrator.

In any of these scenarios the ultimate victims are not only the Company and directors (entrepreneurs) but also the other suppliers, employees, creditors etc. and the concept of early restructure to rescue businesses is ignored in favour of the recovery of one creditor’s debt and the added commercial benefit of utilising company funds to pay panel professionals (who in turn offer referrals etc. back to the creditor).

At present the UK regime provides too much emphasis upon the desires of the secured creditor in these situations and whilst some mechanisms exist for challenging the secured creditor’s actions they are generally expensive, complicated and time consuming.

It is therefore important that in order to balance the needs of the creditors against the whole body of creditors as well as the Company, directors, employees, suppliers, contractors and the public (in terms of unpaid tax that becomes irrecoverable as a result of formal insolvency, additional benefits sought, redundancy payments, lack of PAYE and NI contributions).

22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

Differing domestic insolvency laws inevitably create a barrier in so far as different insolvency laws create uncertainty and therefore, at the very least, the need for additional legal advice in respect of potential consequences of trading with people within different jurisdictions and also significantly increasing the potential costs of trading due to the increased risk analysis required.

Companies are going to be reluctant, particularly in difficult economic times, to take additional risk when the “exit strategy” is going to be uncertain and to be significantly different depending upon the jurisdiction.

23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?

Yes as it would prevent companies attempting to exploit the differences in the insolvency regimes in order to prejudice the creditors. It would reduce costs of seeking professional advice, create a greater sense of confidence and encourage the freedom to move between jurisdictions.

The risks are that the UK regime would need to change, again, though hopefully not significantly. The changes could be beneficial if utilised to address some of the issues with the disproportionate balance of power that is provided to the QFC at present.

A middle ground, that perhaps utilises some aspects of the previous German system for external control over the appointment of an IP would be to seek appointment of an IP from a rota (by either the court or the Insolvency Service/Official Receiver) in circumstances where the QFC/creditors and directors cannot reach agreement on an IP. This could still be utilised within the out of court route with the proviso that the proposed IP would maintain control for the short period until an appointment is made.

This would not affect a “pre-pack” scenario as these generally involve co-operation between the main creditor(s) and the directors in any event.

This would however dilute significantly the perceived “relationship” between the Creditor and his panel IP if they knew that the appointment could, without any real challenge or need to raise issues of conflict, be appointed elsewhere.

It would also reduce the perceived self-interest in any “Independent” Business Reviews (again “panel” insolvency practitioners instructed by the Creditor, but paid for by the Company) finding the company to be insolvent or requiring appointment of an Administrator secure in the knowledge that they are likely to receive the appointment.

24. Do you have any other comments?

We have a number of case studies which we are awaiting client confirmation to share with you. We can alternatively provide them anonymised.

Each of these is or was a client of ours that reflects the various scenarios that we have seen occur on a regular basis and that have created the pattern of abuse that we refer to within the existing UK framework and which should be addressed, and not ignored, in preference of speed and efficiency of potential restructures.

We are happy to provide any further information that is required

Please contact our Mr Edward Saidu should you have any further queries regarding this submission.

Bully Banks

We are writing on behalf of the members of Bully Banks, a lobbying group concerned with the effects of bank misconduct on SMEs in the UK. Our group consists of members that have been the victims of bank misconduct. Numerous members have been through insolvency, both personal and corporate, as a direct result of bank misconduct. The majority of evidence collected thus far has been through one on one meetings and members' questionnaires. It should be noted that a questionnaire related to insolvency is currently being distributed, and we will forward on the results of this in due course.

As an organisation representing SMEs that have lost their businesses and owners that have lost their livelihoods, we have identified key areas in which insolvency law is not able to address the current trend of creditor misconduct and forced insolvency.

In particular, there is no mechanism within corporate insolvency to readily restore a company to its pre-insolvency status, even when it has been proven that the secured creditor acted improperly and the subsequent insolvency was a direct result of this misconduct. On the contrary, the secured creditor can admit misconduct and still enjoy the full benefit and protection of Insolvency Law.

This is an area that needs to be addressed as a matter of priority. At this moment, there is no deterrent for banks putting companies or individuals into administration or formal insolvency proceedings. This is particularly true in cases where the banks are determined to reduce their own loan books at the cost of their client base.

Until such time as this issue is acknowledged and addressed, UK Insolvency Law will not be able to fulfill the current EC recommendations for business rescue and recovery. UK Insolvency allows for all focus to be on the benefit of the creditors and does little to encourage the secured creditor to engage in the rescue process.

As business owners and directors, our members have found themselves shifted to the side whilst their businesses, many of which were forced into insolvency due to either IRHPs or units such as RBS GRG, have been wound up, their assets sold and their livelihoods destroyed. As members and shareholders, they have no clear avenues of redress.

This issue is currently getting considerable attention as the full scope of the problem is being revealed in the press and in the courts. Both The Treasury Select Committee and The Business, Innovation and Skills Select Committee have voiced their concerns over the advantages that banks have within the insolvency process.

As we are currently undertaking a more rigorous analysis of our data, we would like to use this opportunity and call for evidence to highlight this issue and raise our concerns on behalf of our members. Once we have compiled our data, we will revert to you with further analysis.

In the meantime, we look forward to hearing from you and will watch the progress of this review with keen interest.

Kind Regards

Heather Buchanan

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10/1/3

15th March 2015

Nicholas Blaney
The Insolvency Service
4 Abbey Orchard Street
LONDON SW1P 2HT
England

Dear Mr. Blaney,

New approach to business failure

Our Committee, in its representative capacity for insolvency practitioners in Northern Ireland, has considered the February 2015 Call for Evidence (“the Paper”) issued by The Insolvency Service, London. The Paper has issued in the context of the European Commission assessment of the impact of its 2014 Recommendation on “A new approach to business failure and insolvency”.

The Recommendation’s outlines developments leading to, and the rationale for, a limited number of proposed changes to insolvency law. The emphasis is properly placed on the viability of businesses to be restructured. However, it should be acknowledged that not every business in financial difficulties, even if perceived at the start of the process to be viable, can be rescued. Indeed, were there a “rescue guarantee” in place, it is probable that some of those resuscitated businesses would then have unfair competitive advantages against their industry sector solvent peers.

Implementation of improvements to insolvency law in a consistent and practical manner at Member State level may well be dependent on changes to other parts of a country’s statutory framework – for example, employment law. Changes to, or new, administrative procedures may also be required.

Appropriate and consistent application of the revised law is reliant on effective enforcement structures – both courts and relevant supervisory authorities, and the availability of independent competent persons to administer and/or supervise the restructuring process in compliance with statute.

This Committee's detailed responses to the questions posed in the Paper are attached herewith.

Yours sincerely

A handwritten signature in black ink, appearing to read 'JBW', written in a cursive style.

John Bowen-Walsh
Secretary
Insolvency Technical Committee

cc. Sean Cavanagh – Chairman, ITC
Joan Houston -- JIC

INSOLVENCY TECHNICAL COMMITTEE RESPONSE TO FEBRUARY 2015 CALL FOR EVIDENCE RE. “A NEW APPROACH TO BUSINESS FAILURE

OBJECTIVES

Q.1 Do you think the Commission’s Recommendation, if implemented by the Member States, would meet the objectives as set out in Section 1 of the Recommendation?

A.1 The changes proposed represent an improvement on the current situation in some Member States.
However, as noted in our covering letter, other statutory and administrative changes “outside” national insolvency law will determine the consistent and practical application of these proposals.

DEFINITIONS

Q.2 Are the terms used by the Commission, that are explicitly defined, clear?

A.2 Yes, but clarification is required of the criteria “likelihood” within the definition of “debtor” to ensure consistent application by the Member States.

Q.3 Are any of the explicit definitions problematic in a UK context?

A.3 No.

Q.4 Are there any other terms, aside from “an honest bankrupt” and “a second chance”, used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

A.4 No.
However, we are not aware as to whether there exists currently a divergence between Member States as to where the burden of proof of “honest” rests. Does the debtor have to demonstrate this, or must the relevant authority prove he or she was “dishonest”?

PREVENTATIVE RESTRUCTURING

Q.5 To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

- A.5
- (a) Current practice on possible restructuring without entering a formal insolvency procedure, together with statutory earlier alternatives to liquidation, provide that opportunity to the debtor. The various procedures can be initiated and carried out without undue delay.
 - (b) In informal reconstructions and schemes of arrangement under the Companies Act, 2006, the debtor remains in control. In formal insolvency appointments the debtor cedes control.
 - (c) This facility, inclusive of safeguards for the interests of creditors, forms part of the formal restructuring procedures. We would query the appropriateness of extending the entitlement to informal arrangements where the debtor remains in control.
 - (d) UK requirements meet this.
 - (e) UK regulatory framework provides adequate protection for new financing.

Q.6 Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

A.6 No.

Q.7 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

A.7 Generally, we consider the UK regulatory framework meets the criteria. Please refer also to our response to Question 10.

Q.8 To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

A.8 As noted in the Call for Evidence, there are "... many restructuring plans negotiated outside of formal insolvency proceedings often with the assistance of insolvency practitioners ...". Accordingly, we consider the UK regulatory framework delivers the elements referred to above.

Q.9 Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

A.9 No.

Q.10 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime – for example by introducing additional options for a stay on enforcement action by creditors?

A.10 We consider the criteria are met. However, if the proposed automatic entitlement to a stay of enforcement (Paragraph 11 of the Recommendation) were to be adopted, the "significant amount" should be defined as a majority in value of at least two categories of creditors. Furthermore, the Court should receive a report by a competent independent person on the restructuring plan. The potential maximum period of twelve months stay of enforcement is excessive.

Q.11 Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

Q.11 Yes.

Q.12 To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

A.12 We consider the current UK insolvency framework meets the criteria set in Paragraph 15 of the Recommendation.

Q.13 Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

A.13 No.

Q.14 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to "cram down" classes?

A.14 N/A.

Q.15 To what extent does the UK regime adequately provide protection for new financing?

A.15 By enabling the finance providers to take a charge over the entity's assets. Restructuring proposals will disclose how the business is to be funded in the future and what security is to be given to the planned finance providers.

Q.16 Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objectives?

A.16 No.

Q.17 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

A.17 N/A.

SECOND CHANCE FOR ENTREPRENEURS

Q.18 To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

A.18 The current framework of UK bankruptcy law permits full discharge within three years. Clarification is required of the proposed obligation "... to maintain or introduce more stringent provisions ..." to allow the debtor to keep certain assets. Please refer also to our answer to Question 4.

As noted in responses to earlier consultation by the European Commission on this topic, the period of time needed by the trustee in bankruptcy to deal with the estate's assets could extend beyond the date upon which the debtor is discharged from bankruptcy.

Q.19 Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objectives?

A.19 No.

Q.20 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

A.20 N/A.

FORWARD LOOK

Q.21 In addition to the issues considered in the Recommendation are there other aspects of insolvency across the EU which the Commission should consider?

A.21 No.

Q.22 Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

A.22 Variations in administrative procedures and differences in business cultures between particular Member States can be as significant as national insolvency laws when seeking to restructure a group of businesses operating in several countries.

We are not aware of businesses citing differences in insolvency law as a key determinant when making cross-border investments.

Q.23 Should there be greater harmonisation of insolvency regimes across the EU?

A.23 Not at this time. A moratorium on further initiatives by the European Commission for a number of years would permit assessment by the various interested parties of the impact in practice (both successes and failures)

following application of this Recommendation and of the revised Regulation on Insolvency Proceedings.

Q.24 Do you have any other comments?

A.24 No.

ITC/s/CfEapproachtobusinessfailure

RESPONSE OF CITY OF LONDON LAW SOCIETY INSOLVENCY LAW COMMITTEE TO THE INSOLVENCY SERVICE CALL FOR EVIDENCE ON THE EUROPEAN COMMISSION RECOMMENDATION ON A NEW APPROACH TO BUSINESS FAILURE AND INSOLVENCY

INTRODUCTION

1. We refer to the Insolvency Service Call for Evidence entitled "*European Commission Recommendation on a new approach to business failure and insolvency*" published in February 2015 (the **Consultation**) and to the related Commission Recommendation of 12 March 2014 (the **Recommendation**). This response has been prepared by the City of London Law Society (CLLS) Insolvency Law Committee.
2. The CLLS represents approximately 12,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments.
3. The CLLS responds to Government consultations on issues of importance to its members. The CLLS Insolvency Law Committee, made up of solicitors who are expert in their field, have prepared the comments below in response to the Consultation. Members of the working party listed in the Schedule attached will be glad to amplify any comments if requested.

STRUCTURE OF OUR RESPONSE

4. The Consultation asks whether any aspect of the Recommendation might improve the existing UK Insolvency regime. We have, in the main body of our response, highlighted a limited number of points raised in the Recommendation which may merit further detailed consideration, as they could potentially, with appropriate checks and balances, improve the existing UK Insolvency regime.
5. We have also taken the opportunity, pursuant to the invitation set out in Question 24 of the Consultation, to raise a number of related issues which were not directly addressed the Consultation, but which may also merit further detailed consideration, in order to ensure that the United Kingdom insolvency regime retains its competitive advantage in terms of efficiency and effectiveness.

6. We have set out in the Appendix our responses to the specific Consultation questions, but would emphasise that these should be read in the light of this response as a whole.

WHY MAY THE EXISTING UK INSOLVENCY REGIME REQUIRE REFORM?

7. It is important that any successful statutory regime dealing with restructuring and insolvency is kept up to date, and remains able to address the challenges posed by increasingly complex financial products and changing stakeholder dynamics. Gaps in the legislative framework can be papered over, to some extent, by innovative and inventive uses of existing legislative tools, but this is no substitute for amending the relevant legislation, where necessary, in order to ensure that it remains effective and retains its competitive edge.
8. As experts in the field of restructuring and insolvency, we are very aware that a failure to adapt to changing conditions can potentially cause what was once a market leading product to lose its attraction and thereafter to fade into comparative obsolescence.
9. It is notable, in this respect, that the American Bankruptcy Institute published a comprehensive “root and branch” review of the United States “Chapter 11 bankruptcy” regime at the end of 2014. The aim of this review was to establish whether what is often held out as a “model” bankruptcy regime needed to be amended, in the light of changes to market conditions since Chapter 11 was last comprehensively reviewed in the 1990s.
10. The United States is not alone in seeking to refresh and update its bankruptcy legislation. The Netherlands legislature is, for example, currently considering a draft bill on the continuity of companies (*Wet continuïteit ondernemingen II*) which is intended to create a “state of the art” restructuring procedure which borrows successful techniques and tools from international restructuring practices, drawing in particular on English schemes of arrangement and US Chapter 11 proceedings.

AREAS WHICH MAY BENEFIT FROM FURTHER CONSIDERATION

11. We are not advocating the making of comprehensive changes to existing United Kingdom insolvency legislation, as it generally provides effective and well understood tools with which to deal with companies facing financial distress or insolvency. We would, however, suggest that the following five points raised directly or indirectly in the Consultation may merit further, more detailed, consideration, particularly if these points are being debated in other EC Member States:
 - (a) whether those who no longer have any economic interest in a business should effectively be able to veto a viable restructuring proposal;
 - (b) as a linked point, whether, in the interests of transparency, legislation could set out some underlying principles for valuing distressed or insolvent companies;
 - (c) whether the increasing diversification of the creditor constituency may strengthen the case for a short statutory pre-insolvency moratorium while a restructuring plan is finalised;
 - (d) whether existing restrictions on contractual termination linked solely to the counterparty’s insolvency should be extended; and
 - (e) whether any actions could usefully be taken to encourage the provision of new lending to companies in financial distress.

12. These are all complex areas, in respect of which there are likely to be a range of (potentially conflicting) views. It may be the case that an informed debate would end up concluding that the existing UK insolvency regime already addresses these issues appropriately. It would, however, be unfortunate if a failure to solicit expert views, and thereby to explore these areas in greater detail, resulted in the UK regime lacking potentially valuable restructuring tools which were available elsewhere.

WHY MAY THESE POINTS REQUIRE FURTHER CONSIDERATION?

Cram-down mechanisms

13. Questions 12 to 14 of the Consultation relate to procedures for cramming down creditor claims. We have previously recommended in this context that the Insolvency Service may wish to consider whether those who no longer have any economic interest in a business (for example shareholders or out of the money junior creditors) should effectively still be able to veto a viable restructuring proposal which has the overwhelming support of those creditors who retain an economic interest in the business.
14. The lack of a statutory mechanism permitting the cram down/elimination of equity and out of the money debt claims is often cited as one of the key deficiencies when comparing United Kingdom schemes of arrangement with Chapter 11 and is therefore one of the areas where the UK may lose competitive advantage. The solution that has been developed by practitioners in the United Kingdom, in order to address this issue, has been to combine a scheme with a pre-packaged administration (to eliminate the equity and junior debt) but this can be unattractive, and it is not always, given the nature of the company's business, a viable option.
15. This is clearly a complex and potentially emotive issue which would require detailed consideration, but we believe that, subject to appropriate checks and balances being put in place, there may be merit in having a statutory mechanism which would:
- (i) limit the need for a company's business to be transferred, often by means of a "pre-pack sale", in order to deal with the claims of out of the money creditors; and
 - (ii) prevent the UK insolvency regime from being perceived (as a result of retaining a veto for out of the money creditors at a time when other EC Member States were potentially limiting this right), as assisting "ransom" creditors whose actions may place a business, and the jobs of its employees, in jeopardy.
16. We note in this respect that, in 2010, Australia adapted a statutory power allowing the court to eliminate the equity in a voluntary administration and Deed of Company Arrangement process. This power has been utilised in a couple of recent Australian restructurings.
17. We do not wish in any way to pre-empt debate on this issue, but one of the various options which might be considered could be to preserve the current status quo in relation to schemes of arrangement but to have a separate, enhanced, cram-down mechanism (similar to that used for schemes) where a company was in administration. In order to protect the new procedure from abuse, it might be that the enhanced cram-down mechanism, which would permit out of the money stakeholders to be disenfranchised, would only be available where an administrator could satisfy the court that implementing this procedure was the best way of satisfying his or her statutory duties. This is, however, only one of a number of potential options which might benefit from further consideration.

Valuation principles

18. While not specifically highlighted in the Consultation, the cram-down point discussed above is inevitably linked to the question of how a business should be valued in order to determine the respective rights and interests of its stakeholders. The issue of valuation remains a topical one and, as noted in our previous July 2010 response, crops up in a number of different contexts, including voting and fairness issues in schemes of arrangement and the price paid for the assets in a pre-packaged sale through an administration or receivership.
19. Notwithstanding the judgment in *IMO Carwash*, many valuation issues remain unresolved; indeed, the *IMO Carwash* case illustrates just how wide-ranging valuation evidence can be, in the absence of clearly defined guidance as to the assumptions that the valuation should be based on.
20. It may be, as previously noted, that these matters are best left to case-law, as each case turns to some extent on its own facts, but given the importance of the issue, we wonder whether, in the interests of transparency, some thought should be given to whether legislation could set out some underlying principles for valuing companies in financial distress.

Restructuring moratorium

21. The Recommendation argues that debtors should have the right to request that a court grants a temporary stay of individual enforcement action. Question 10 of the Consultation asks whether introducing such a stay would improve the existing UK insolvency regime.
22. Members of our committee were, when this issue was raised in 2010, divided in relation to whether a strong case could be made out for a temporary restructuring stay of this nature. Some members gave examples of restructurings where it was necessary to use the stay inherent in a formal insolvency process in order to bind dissenting creditors or where a restructuring almost failed as a result of last-minute creditor action. Others questioned whether the moratorium was the right focus for any legislative change, suggesting that the greater risk was not so much that individual creditors might threaten to destabilise a restructuring at the negotiating stage but that such creditors could derail a restructuring altogether by refusing to consent to it.
23. The position today may be somewhat different, particularly if this issue is being considered in a wider insolvency reform context, given the increasing diversification of the creditor base in many restructurings, and the resulting increased challenges faced by the company or representative creditor groups in communicating directly with the wider creditor constituency. In addition, creditors may have become more used, following the approach adopted in *BlueCrest Mercantile BV v Vietnam Shipbuilding Industry Group*, to courts using their case management powers to impose a short de facto standstill on hostile creditor action while a restructuring plan is finalised.
24. While it may be argued that the *BlueCrest* case represents a solution to some of the practical issues which have been identified, it had limited application. As a stay is entirely dependent on the court's discretion, it may be beneficial for this remedy to be made more certain and for it to be available on a statutory basis.

Extending existing restrictions on contractual termination

25. We noted in our 2010 response that the proposed stay would not prevent counterparties from exercising contractual termination rights. While we agreed that the proposed

restructuring moratorium should be no wider than the existing administration stay, and that any changes in relation to the administration moratorium would require extensive thought and consultation, we highlighted the fact that one of the greatest challenges to the successful operation of the existing administration moratorium was that counterparties were able to terminate key contracts simply because a company had gone into administration.

26. This point was reflected in the Insolvency Service's summary of responses to its 2014 consultation on the continuity of supply of essential services to insolvent businesses, which noted that

"When a company or individual running a business enters an insolvency procedure, some suppliers may have contractual rights entitling them to terminate the supply contract on account of the insolvency. Where those supplies are essential to the continuation of the business, termination may have an adverse impact on the prospects of a successful rescue of the business and thereby on the amount of money available for creditors."

27. The draft Insolvency (Protection of Essential Supplies) Order 2015 will partially address this concern by extending the existing statutory restriction on the exercise of contractual termination rights to the suppliers of essential IT and communications services.
28. There would, however, seem to be a good argument in favour of extending this restriction still further, so that (subject to agreed checks and balances, including safe-harbours for close-out netting and set-off in financial contracts), a company should not be deprived of its contractual rights simply because it has gone into administration, provided that (i) it is willing and able to carry on performing the contract in question and (ii) appropriate measures have been put in place to ensure that the contractual counterparty does not lose out financially, as a result of not being able to exercise its insolvency based termination right.
29. We do not, however, believe that such protective measures should include a requirement that an insolvency officeholder should provide a personal guarantee, given the practical and logistical issues surrounding the giving of such guarantees which were highlighted in our October 2014 response to the Insolvency Service consultation on continuity of supply of essential services to insolvent businesses.

New lending

30. Questions 15, 16 and 17 of the Consultation relate to new financing. In response to the specific issue raised in the Recommendation, we do not consider that legislative amendments are required in the United Kingdom to protect the providers of court sanctioned new finance from civil or criminal liability.
31. We do, however, believe that it would be worth considering further whether any additional steps could, or should, be taken to facilitate the creation of competitive DIP finance and exit finance markets in the United Kingdom, particularly as encouraging additional sources of essential ongoing funding for businesses which are being restructured would seem consistent with the emphasis contained in the Graham Review on pre-packs on ensuring the future viability of such businesses.
32. The need to consider this area further is growing, as new money has historically been provided by banks who were already creditors of the company in question. Today, those banks are increasingly selling their debt at an early stage in the restructuring process, with

the result that a company's creditors, once a restructuring is under way, increasingly comprise CLOs, hedge funds and bondholders who may be unwilling or unable to provide additional liquidity.

33. This issue is likely to become increasingly significant, as many companies are currently refinancing their debt through the issue of High Yield bonds. The holders of such bonds may be difficult to identify and, even if identified, may be reluctant to engage in the restructuring process, or, more specifically, in detailed discussions concerning the company's liquidity, if it involves them having to accept restrictions on trading their bonds. This is likely to make organising a new facility from existing lenders even more challenging than at present.
34. The potential availability (or lack of) of third party funding with which to address liquidity issues is therefore becoming an increasingly important issue and is sometimes cited as a reason why a Chapter 11 process should be preferred to a UK process for international groups.
35. We therefore believe that there may be merit in identifying any potential bars to the growth of a competitive third party funding market and considering whether any such bars could be addressed without causing any significant disruption to the existing financial markets, as increasing the number of potential sources of funding should benefit all stakeholders.
36. It is possible that one of the main bars to third party funding in a restructuring or insolvency context may be a lack of transparency, which makes it difficult for a prospective lender to identify or price potential opportunities. By way of example, in the US, it is possible to search the court docket for all the documents filed with the court in the context of US Chapter 11 proceedings, including any debtor-in-possession financing agreement, whereas, in the UK, it can often be difficult to get hold of a copy of the order placing the company into administration, let alone any of the agreements entered into by the administrator.
37. We therefore believe that it may be worth exploring with potential providers of third party funding whether lack of transparency is indeed an issue and, if so, whether any practical steps could be taken to address this issue. A dialogue of this nature may also identify other potential bars to third party lenders providing additional liquidity during the restructuring process.

APPENDIX

Question 1: In general do you think the Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Recommendation?

The Recommendation seeks firstly to “*encourage*” Member States to “*put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty*” and to provide for “*minimum standards on ... preventive restructuring frameworks.*”

This objective seems to assume that Member States do not already have in place statutory procedures which allow the restructuring of viable enterprises facing financial difficulties. In our experience such procedures already exist in most, if not all, Member States. Some of those procedures are perceived to work more effectively than others, but such differences are generally the consequence of (a) specific policy decisions taken in each Member State as to both the respective rights of each stakeholder group and the role of the court in the process; or (b) the pressures on the court system, which may mean that cases are not heard as promptly as they ought to be. We do not believe that the Recommendation would alter this position.

The Recommendation also seeks to encourage Member States to put in place a framework to “*give honest entrepreneurs a second chance*” and to provide for “*minimum standards*” on the “*discharge of debts of bankrupt entrepreneurs.*” In practice, the objective comes down to a proposal that, subject to specified restrictions “*entrepreneurs should be fully discharged of their debts which were subject of a bankruptcy after no later than three years*”.

Our views on this proposal were set out in our response, submitted in November 2013, to the Commission’s earlier consultation on “*a new European approach to business failure and insolvency*”. As stated in that response, setting a maximum length of time to obtain a discharge from bankruptcy seems sensible and three years should generally constitute a suitable deterrent, while also allowing the chance for rehabilitation/recovery.

It is, however, as indirectly acknowledged in Paragraph 32 of the Recommendation, very important to ensure that an officeholder should have the ability to extend this time period where the individual in question has failed to co-operate adequately with the officeholder in the insolvency proceedings, whether through refusing to provide information, failing to disclose assets or otherwise.

Questions 2 to 4 – Definitions

- **Are the terms used by the Commission that are explicitly defined, clear?**
- **Are any of the explicit definitions problematic in a UK context?**
- **Are there any other terms, aside from ‘an honest bankrupt’ and ‘a second chance’, used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?**

We consider that most of the terms used by the Commission, aside from ‘*an honest bankrupt*’, appear to be relatively clear, but that this conceals the complexity of the underlying concepts. In many cases, the terms used are sufficient to illustrate a general concept, but would require further refinement if it became necessary to pin down the detail of what is proposed in the Recommendation.

Turning to the four specifically defined terms:

- We would question the scope of the definition of “*debtor*” as this would, as currently drafted, include banks, insurance companies and entities to which special insolvency regimes apply, given the systemic importance of the business which they conduct. This was not, we assume from Recital 15 to the Recommendation, intentional. The definition may arguably also extend to over-indebted consumers rather than just entrepreneurs, depending on what constitutes their “*activity*”. We again assume, from Recital 15 to the Recommendation, that this was not intentional.
- A further issue inherent in the current definition of “*debtor*” is that it requires there to be “*a likelihood of insolvency*”. It is assumed that this means that there should be a likelihood that the relevant person would have to initiate formal insolvency proceedings, but this concept may not be appropriate where the proposed legislation would extend to individuals. It is also unclear what level of probability would be required for there to be a “*likelihood*” for these purposes.
- The definition of “*restructuring*” is extremely wide and could, for example, arguably catch a refinancing of a company’s existing debt. It is assumed that it was not the intention of those drafting the Recommendation that such day to day actions would fall within the scope of this proposed legislation.
- It is not entirely clear why there needs to be a definition of a ‘*stay of individual enforcement actions*’, given that this concept is, where it is used in Article 10 of the Recommendation, immediately redefined as a “*stay*”.
- “*Courts*” are defined as including “*any other body with competence in matters relating to preventive procedures*” It is not entirely clear what is meant, in this context, by “*preventive procedures*”. It may be preferable, in the interests of certainty, to use instead the second limb of the definition of “*court*” as it appears in the revised EC Regulation on Insolvency Proceedings, so that the application would have to be made to the judicial or other competent body which would ordinarily be empowered to open insolvency proceedings.

What is, perhaps, surprising is the omission of the concept of “*COMI*” from both the definitions section and the Recommendation as a whole.

Questions 5 to 7 – Availability of a restructuring framework

- **To what extent does the UK regime adequately provide for elements (a) to (e) of the Recommendation?**
- **Is there anything in the UK regime which is not in the Recommendation but delivers the Commission’s objectives?**
- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime?**

We agree with the view expressed in the Consultation that the UK already has a strong preventative framework, which is aimed at facilitating business recovery, where possible, rather than liquidation. Our experience would also support the view set out in the Consultation that existing UK procedures are generally considered to rescue businesses faster and at lower cost than many other regimes around the world. This is, however, not to say that the existing restructuring regime cannot be improved. Please refer to the five points summarised in Paragraph 11 of our response which may merit further, more detailed, consideration.

Questions 8 to 11 – Facilitating negotiations on restructuring plans

- **To what extent does the UK regime already deliver the elements in this section of the Recommendation?**
- **Is there anything in the UK regime which is not in the Recommendation but delivers the Commission's objective?**
- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?**
- **Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?**

We agree with the view expressed in the Consultation that the UK regime already offers great flexibility. We also agree that, as stated, implementing a lengthy stay of individual enforcement would be a move away from the existing domestic regime. We do, however, believe that, as noted in paragraphs 19 to 21 of our response, there may now be a case for reconsidering the merits of a short moratorium, particularly given the increasingly diverse nature of stakeholder groups, and the consequent challenges and time delays involved in consulting with them.

Questions 12 to 14 – Restructuring plans

- **To what extent does the UK regime deliver the elements in this section of the Recommendation?**
- **Is there anything in the UK regime which is not in the Recommendation but delivers the Commission's objectives?**
- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime, for example the ability to 'cram down' classes?**

We agree with the view expressed in the Consultation that implementing this aspect of the Recommendation would be a shift away from the existing domestic regime, but we believe that, as noted in paragraphs 13 to 15 of our response, there may be some merit in providing that the objections of certain classes could be overruled where the court is satisfied that the restructuring plan is viable and that the objecting creditor class no longer has any economic interest in the company.

Questions 15 to 17 – New financing

- **To what extent does the UK regime already provide protection for new financing?**
- **Is there anything in the UK regime which supports rescue finance which is not in the Recommendation but delivers the Commission's objective?**
- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime?**

The Recommendation highlights two specific risks, namely that (i) new financing agreed upon in the restructuring plan and confirmed by a court should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors and (ii) providers of new financing as part of a restructuring plan which is confirmed by a court should be exempted from civil and criminal liability relating to the restructuring process. Neither of these risks is considered

to be particularly relevant in a UK context, where new financing is being provided on arms length commercial terms to a company facing financial difficulties.

However, while the UK regime does not provide the means with which to challenge new bona fide financing, it does not necessarily provide a framework to attract and facilitate such financing. This point is discussed in paragraphs 26 to 29 of our response.

Questions 18 to 20 – Second chance for entrepreneurs

- **To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?**
- **Is there anything in the UK regime which is not in the Recommendation but delivers the Commission's objective?**
- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime?**

We agree with the conclusion reached in the Consultation that UK would not need to take any legislative action to implement the Recommendation on discharge, as in the UK a bankrupt individual is generally automatically discharged from the proceedings on the first anniversary of the bankruptcy order.

This relatively short period prior to discharge is one of the main reasons why the UK bankruptcy regime currently appears attractive to "bankruptcy tourists" from other EC Member States. While not necessarily advocating any change to the current legislation, as this is again a very complex issue which would require further careful and detailed consideration, we would note that such bankruptcy tourism would be likely to continue if the UK retained its current one year limit but other EC Member States adopted the potentially longer "*no later than three years*" discharge period contemplated by the Recommendation.

There is also no formal distinction in UK law between "*honest*" and "*dishonest*" entrepreneurs. As noted in our response submitted in November 2013, to the Commission's earlier consultation on "*a new European approach to business failure and insolvency*", there is an argument, in principle, for distinguishing between "honest bankruptcies" (where insolvency has been caused through no obvious fault of the individual) and other cases, where the individual is seen as having been, to some extent, at fault. Historical precedent and practical experience would, however, both suggest that creating any form of two-track bankruptcy regime would be likely to prove problematic in practice, not least because of the need to reach a consensus as to who would be categorised as an "*honest bankrupt*". The point is, however, largely academic from a UK perspective, given the general availability of a discharge within the period contemplated by the Recommendation.

Question 21 – Forward look

In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider? For example:

- **Developing EU principles for fast, efficient out of court rescue procedures for small companies.**
- **Developing the conditions for rescue finance.**

If so, what should the Commission consider?

We would not encourage the Commission to develop further pan-European insolvency related proposals at this stage. We would, however, encourage the Insolvency Service to consider further,

at a national level, the specific areas highlighted in our response, which include consideration of what steps could be taken in order to develop a competitive rescue finance market.

Questions 22 and 23

- **Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?**
- **Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?**

As previously noted, divergences in domestic insolvency legislation are the result of specific policy decisions taken in each Member State as to both the respective rights of each stakeholder group and the role of the court in the process. Questions such as whether (and if so, in what circumstances) the claims of secured creditors, employees or pension funds should be crammed down, or shareholders should be deprived of their equity, go to the very heart of the legal, social, political and economic policy considerations underpinning a Member State's insolvency regime.

We therefore agree with the view previously expressed by the Insolvency Lawyers Association that such matters should be left to national laws to address, not least because any attempt at standardisation would require comprehensive amendments to each Member State's restructuring and insolvency laws, extending into the law governing security and quasi-security techniques (and also, potentially into their company and tax legislation) which would be difficult and costly to implement.

Where there are significant differences which do not result from specific policy decisions, our observation would be that such differences already seem to be gradually disappearing, without the need for harmonisation at EC level, as Member States seek to ensure that their insolvency regime remains attractive for companies seeking to restructure their debts and to deter those companies from forum shopping. In many cases this process has already involved adopting ideas that appear to be successful in the insolvency regimes of other Member States.

We would also note that, even if harmonisation/convergence could be achieved, different cultural approaches and the different speeds with which courts in Member States progress insolvency processes would still create a divergence in practice.

The risk of creating uncertainty in the market by amending existing restructuring procedures which operate successfully, and which are well understood, should not be underestimated.

Question 24: Do you have any other comments?

Please refer to the five points raised directly or indirectly in the Consultation which may merit further, more detailed, consideration, as summarised in Paragraph 11 of our response.

16th March 2015

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Its contents should not be taken as legal advice in relation to a particular situation or transaction.

THE CITY OF LONDON LAW SOCIETY
Insolvency Law Committee

Individuals and firms represented on this Committee are as follows:

Hamish Anderson (Norton Rose Fulbright LLP) (Chairman)

Ms J. Marshall (Allen & Overy LLP) (Deputy Chairman)

Ms C. Balmond (Freshfields Bruckhaus Deringer LLP)

J. Bannister (Hogan Lovells International LLP)

G. Boothman (Ashurst LLP)

T. Bugg (Linklaters LLP)

A. Cohen (Clifford Chance LLP)

L. Elliott (Herbert Smith Freehills LLP)

S. Frith (Stephenson Harwood LLP)

I. Johnson (Slaughter and May)

B. Klinger (Sidley Austin LLP)

B. Larkin (Jones Day LLP)

D. McCahill (Skadden Arps Slate Meagher & Flom (UK) LLP)

B. Nurse (Dentons UKMEA LLP)

J.H.D. Roome (Akin Gump Strauss Hauer & Feld LLP)

P. Wiltshire (CMS Cameron McKenna LLP)

M. Woollard (King & Wood Mallesons LLP)

Response to a Call for Evidence: European Commission Recommendation

- 1. In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?**

There has already been an active promotion of restructuring and pre-insolvency procedures at a national level. We agree that the Commission's approach may encourage a further development of these objectives.

Definitions

- 2. Are the terms used by the Commission that are explicitly defined, clear?**

As the Recommendations are merely promoting minimum standards, and envisage national implementation, we think they are clear enough.

- 3. Are any of the explicit definitions problematic in a UK context?**

No.

- 4. Are there any other terms, aside from 'an honest bankrupt' and 'a second chance', used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?**

From a UK perspective, and given our view that the UK law already largely meets the objectives, we do not consider that these terms need further clarification.

Availability of a Restructuring Framework

- 5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?**

We are of the view that the UK regime already adequately provides for a regime that encourages restructuring, although certain specific aspects of the Recommendation may not be explicitly provided for.

- 6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?**

The legislation is just one aspect of a successful restructuring and insolvency regime. We also benefit in the UK from an industry of experienced professionals, and a predictable court system. It should also be recognised that many restructurings in the UK take place outside of a formal insolvency process, for example on a consensual basis or using a formal technique such as a scheme of arrangement. Schemes of arrangement have been used for many restructurings; they have been used to facilitate the restructuring of several international groups which would not have been feasible in other jurisdictions either outside of a formal process or at all. For example, our firm has been involved in restructurings in respect of several billions of Euros of debt over the last few years using schemes of arrangement, for example, most recently the APCOA Group and New World Resources.

7. **Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?**

The UK restructuring regime does not include a formal cram down mechanism which enables creditors to be cram downed across classes. There are techniques that have developed to enable this to take place in practice, i.e. the use of a pre-pack administration in combination with a scheme. Whilst it may be useful to explore the introduction of a cram down mechanism, we consider that it needs to be approached carefully and with the benefit of further research – not least because any changes in this regard would represent a significant shift in emphasis to restructurings in the UK. In particular the fact that at present significant restructurings tend to take place outside the formal insolvency setting.

Facilitating Negotiations on Restructuring Plans

8. **To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?**

See our response to question 5 above.

9. **Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?**

See our response to question 6 above.

10. **Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?**

Stays against individual creditor action are already available in the context of administration, small company arrangements and on a case by case basis upon application to the court. We consider that this should remain to be the position. Imposing a blanket stay may discourage investment.

11. **Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?**

Not in every case, sometimes early court involvement may be useful to ensure that the restructuring is proceeding on an appropriate footing. For example, in the context of schemes of arrangement, the court hearing to convene creditors' meetings is a useful way of focussing stakeholder interest in the proposed restructuring. However, generally speaking a consensual restructuring taking place outside of court is perceived to be more beneficial and cost effective than a formal court driven process.

Restructuring Plans

12. **To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?**

We consider that the UK regime already delivers these aspects of the Recommendation.

13. **Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?**

See our response to question 6 above.

14. **Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?**

See our response to question 7 above.

Protection for New Financing

15. **To what extent does the UK regime already provide protection for new financing?**

New finance provided on a commercial basis is generally not susceptible to challenge under the UK insolvency legislation.

16. **Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?**

Finance provided in the context of administration, is usually provided with a priority ranking as an administration expense.

17. **Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?**

No.

Second chance for entrepreneurs.

18. **To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?**

The promotion of rehabilitation, whether in the corporate sphere in the form of promoting rescue proceedings, or in an individual regime which allows for an automatic discharge after 12 months delivers the theme of a second chance.

19. **Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?**

No.

20. **Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?**

N/A.

Forward Look

21. **In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider? For example:**

- (a) **Developing EU principles for fast, efficient out of court rescue procedures for small companies.**
- (b) **Developing the conditions for rescue finance.**

If so, what should the Commission consider?

We are of the view that Member States are best placed to develop their own procedures and insolvency laws in keeping with their own substantive laws and cultures.

22. **Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?**

The differences in domestic insolvency laws have long been a feature of cross border restructurings and insolvency. The differences have been alleviated by the frameworks implemented at an EU level, in particular the European Regulation on Insolvency Proceedings (EUIR) which has encouraged recognition and co-operation between Member States. Given the proposed amendments to extend the scope of the EUIR to include pre-insolvency and rescue style proceedings we think that this will assist further in cross border cases.

23. **Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?**

As stated above, we consider that there has already been a natural convergence of insolvency regimes in the EU, and there is no immediate need for greater harmonisation or convergence. Certain limited aspects such as voting thresholds and insolvency triggers may be the most obvious aspects for further natural convergence.

We think that it is important to keep the UK restructuring and insolvency regime under review to ensure that it maintains its position as a leading jurisdiction facilitating efficient and predictable restructurings and insolvency processes both for UK businesses and international groups.

24. **Do you have any other comments?**

No.



The Insolvency
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Response Form:

European Commission Recommendation
on a new approach to business failure
and insolvency

February 2015

1. General Information

How to respond

1.1 This is a template response form. If you would like to use an alternative format please do so in writing.

1.2 Please send completed short form responses to:
policy.unit@insolvency.gsi.gov.uk, or post to:

Nicholas Blaney
The Insolvency Service
4 Abbey Orchard Street
London
SW1P 2HT

General Information

1.3 What is your name, or the name of the organisation you represent?

Ernst & Young LLP

Name of contact: Helen Smithson

1.4 If writing on behalf of an organisation, what is the size of your organisation?
(mark with an 'X' as appropriate)

0-9 employees (micro)	
10-49 employees (small)	
50-249 employees (medium)	
250+ (Large)	X

1.5 If writing on behalf of an organisation, what type of organisation do you represent?

2. Introduction

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2. Are the terms used by the Commission that are explicitly defined, clear?

3. Are any of the explicit definitions problematic in a UK context?

4. Are there any other terms, aside from 'an honest bankrupt' and 'a second chance', used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

4. Preventative Restructuring Framework

Availability of a Restructuring Framework

5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

Facilitating Negotiations on Restructuring Plans

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11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

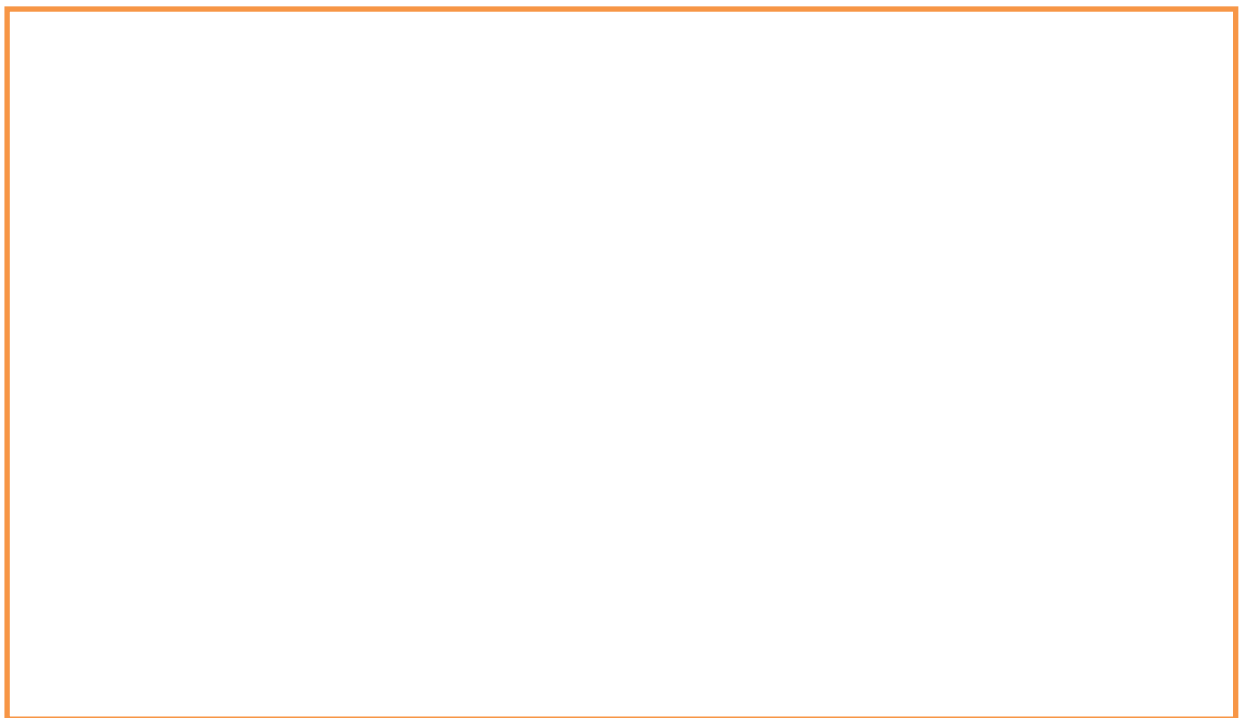


Restructuring Plans

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15. To what extent does the UK regime already provide protection for new financing?

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5. Second Chance for Entrepreneurs

18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

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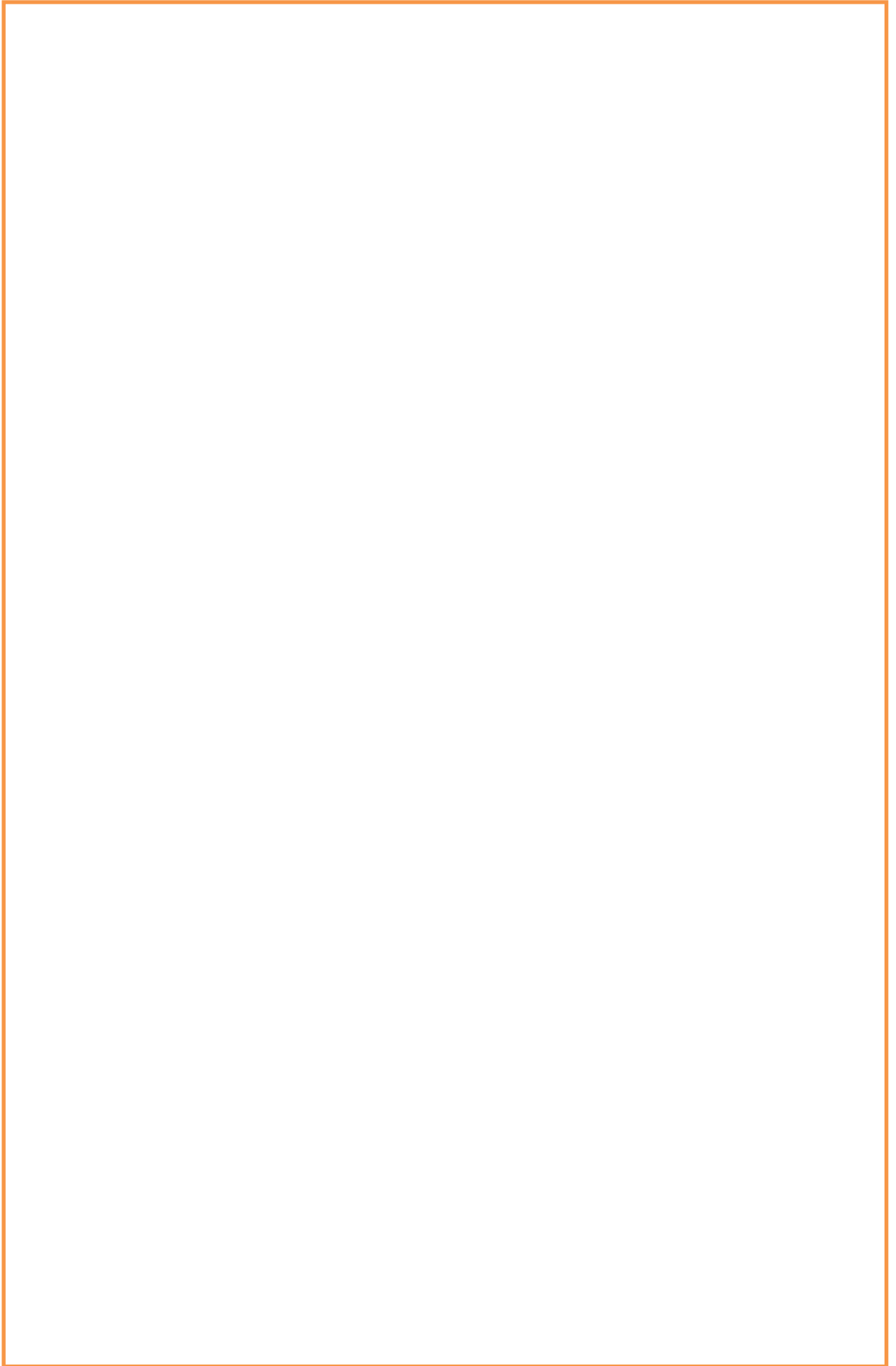
21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider?
For example:

- Developing EU principles for fast, efficient out of court rescue procedures for small companies.
- Developing the conditions for rescue finance.

If so, what should the Commission consider?

22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?



European Association of Certified Turnaround Professionals

We are writing on behalf of the European Association of Certified Turnaround Professionals (EACTP) in response to your invitation for views on the European Commission recommendations on a new approach to business failure and insolvency.

The EACTP is an independent organisation which has established the first European-wide accreditation programme for all turnaround professionals across the continent to provide an industry standard of quality in the practice of turnaround and restructuring. We do this by delivering a respected pan-European certification scheme based on the Turnaround Management Association (TMA) Global Certified Turnaround Professional (CTP) programme. The Global CTP programme has more than 650 members world-wide.

We currently have 46 members from Eire, Finland, France, Germany, Greece, Italy, Poland, Romania, Spain, Sweden, Switzerland and the UK. Leading turnaround professionals from across Europe sit on the EACTP's board and committees to set strict admission criteria and oversee the stringent certification process. This ensures only those practitioners able to demonstrate relevant academic qualifications, skills, experience at a significant and substantive level, and continuing practice are entitled to become and remain members. From next year all applicants will also need to pass professional examinations in addition to demonstrating their turnaround experience.

It is our opinion that the UK's current insolvency laws and regime work effectively once a company has been declared bankrupt, mainly because this regime operates with minimum court intervention.

What we would advocate introducing would be a formal pre-insolvency moratorium to give companies in difficulty, in the zone of insolvency, the chance to themselves originate a restructuring solution. This ought to be secured with an obligation on lenders and its creditors not to seize the opportunity to improve each of their own positions.

Such a moratorium would offer a distressed company the chance to restructure without having to alert other stakeholders and competitors that it is in difficulties as is the case with a CVA, which inevitably destroys much of its enterprise vale by eroding the good will of its customers, employees and creditors.

In order to ensure this process is not abused, we would recommend it would be mandatorily monitored by a suitably qualified professional who is not an Insolvency Practitioner or acting as an Insolvency Practitioner, for example an accountant with experience of restructuring.

We would also highlight the role that Certified Turnaround Professionals, who have met our programme's rigorous standards and have the requisite credentials for any turnaround or restructuring engagement, could play in the monitoring of such a pre-insolvency moratorium.

We hope you find these comments useful, and would be very happy to discuss them in more detail, or to give you more information about our association, if this would help.

Kind regards

Tyrone Courtman, President of EACTP

Alan Tilley, Chair of EACTP's Education and Training Committee

The commission's recommendations are sound in their objectives and should be widely enjoyed within the SME community we represent.

Sensibility to not curtail or preclude entrepreneurship from a result of 'honest failure' is a step forward.

Second chances in genuine cases of failure can often result in lessons learnt being the very reason the business person(s) succeed from being more financially astute in the future, but at present not without the battle to regain respect and trust on their own accord.

When starting new ventures, from concept to execution, a new business will often need financial support.

It is the basis of this financial support that causes concern alongside the archaic attitude of insolvency practitioners in assessing the reasoning the business failed.

When honest entrepreneurs are in need of funding they often look to organisations and lenders who require suitable security. Sometimes Joint & Several liability by way of guarantees; both personal and cross option, which when combined with Debenture taking can lead to an in-balance in Power at time of assessing solvency.

In cases where it is now proven the lenders did not disclose the true liabilities on which they executed their security (collateral) this leaves the question of

“what happens when the business failed as a result of the Creditors dishonesty ? ”

The best example of this is when banks have been able to position themselves to sell Derivatives to SME's under the guise of 'normal variable rate loans' that by the banks by their own admissions are 'missold' and simply not fit for purpose; deemed a 'missale' (no legal definition yet)

The current FCA voluntary review is curtailed to non-sophisticated businesses and the FCA detail some 2000 insolvent companies are in this review. Of course many were not affected by the missold irhp but a lot were from the end of 2008.

The current chain of events can represent a true 'honest bankruptcy / failure' ;
Debenture (or/and first charge) = Missale = Position to Abuse = Invalid Insolvency appointment

As a self-started entrepreneur exposed to this type of Abuse, they are exposed to the Debenture holder (bank) and find themselves being able to be positioned with no appeal process.

The Debenture holder can manufacture the business into a 'default' position and appoint their own selected insolvency practitioner (IP), often the same firm as may now carry out future Audit work or Advisory work for the bank.

This conflict of interest only comes home to roost and questioned when the bank admit it's wrongdoing by way of a missale.

Under current legislation the Debenture Holder is able to liquidate the company(s) assets and leave it facing the necessity to litigate with a willing IP and often no funds, be it LASPO carve out benefits assist the financial burden.

On a grass roots level it will be common that the Directors invest their wealth, full time and assets in new business ventures. Leaving the individual exposed to an in-balance of empowerment should the Debenture holder be able to have access to and unauthorised use of use the Entrepreneurs assets to 'missell' pre-designed products to make gain for their own position only.

So when we loo k at Restructuring being assets and liabilities at appoint of perceived insolvency, time needs to be given to not only the actions of the Directors, be them innocent or dishonest, but also the empowered Appointer be them first charge and/or Debenture holders in a position of empowerment through supporting legislation.

This is the role of the insolvency practitioner.



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The Insolvency Service
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SW1P 2HT

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1.3 What is your name, or the name of the organisation you represent?

Jon Welsby, Insolvency Assist Community Interest Company

1.4 If writing on behalf of an organisation, what is the size of your organisation?
(mark with an 'X' as appropriate)

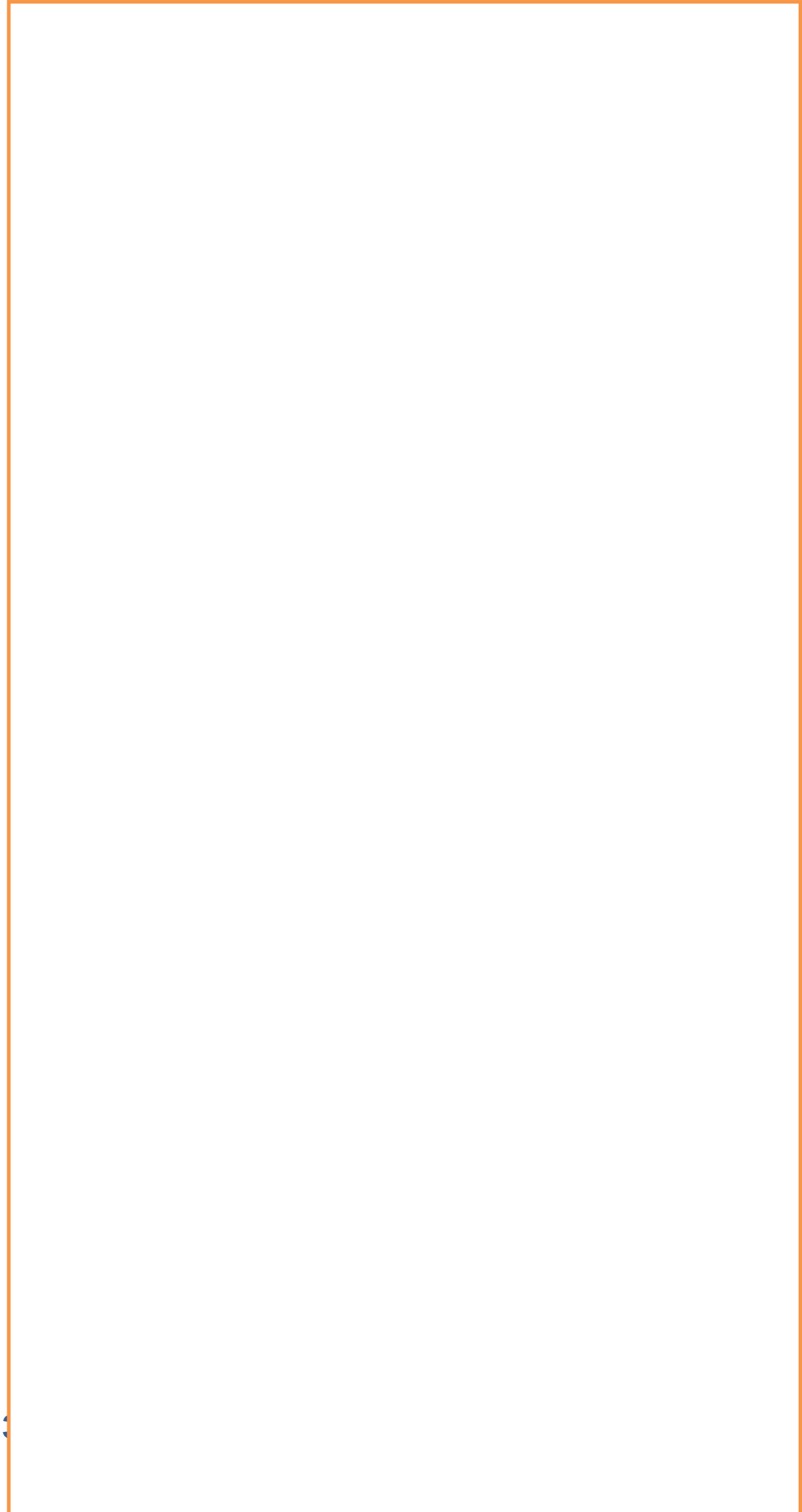
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he company's activities will provide benefit to companies who are about to or who have entered Administration or are Dissolved, with a claim for a miss sold financial product or a claim for inappropriate advice that may result in action to bring

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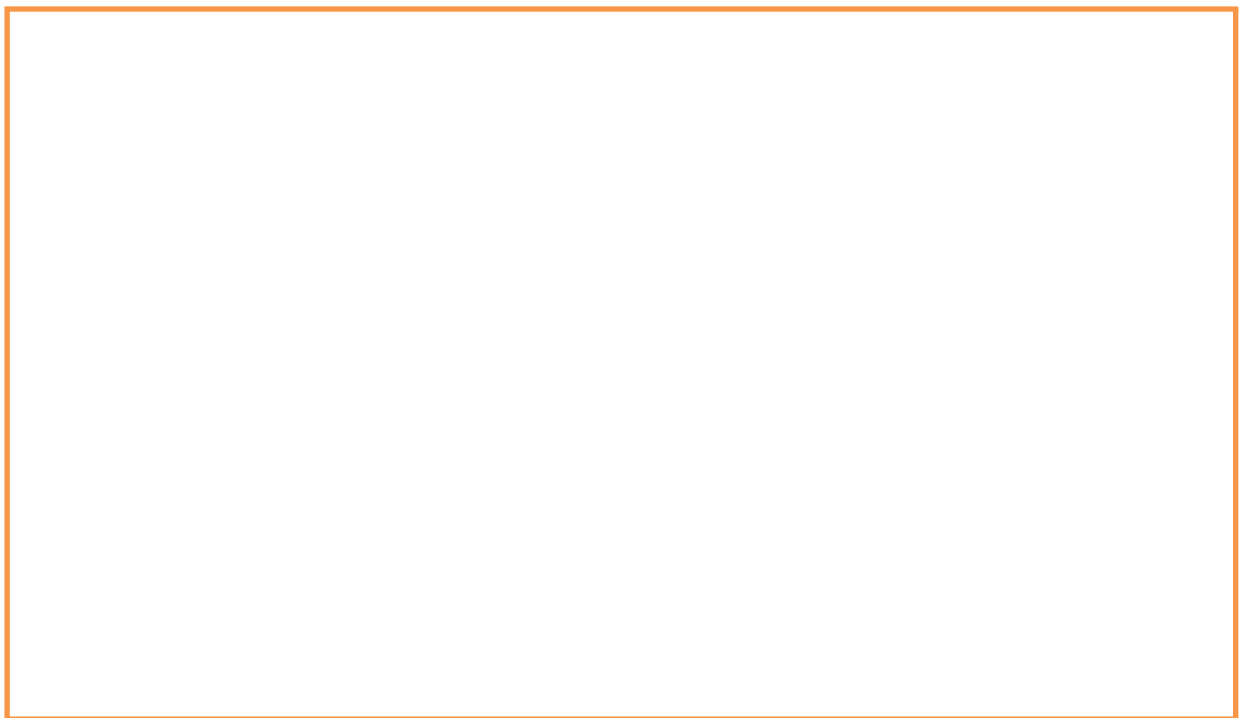


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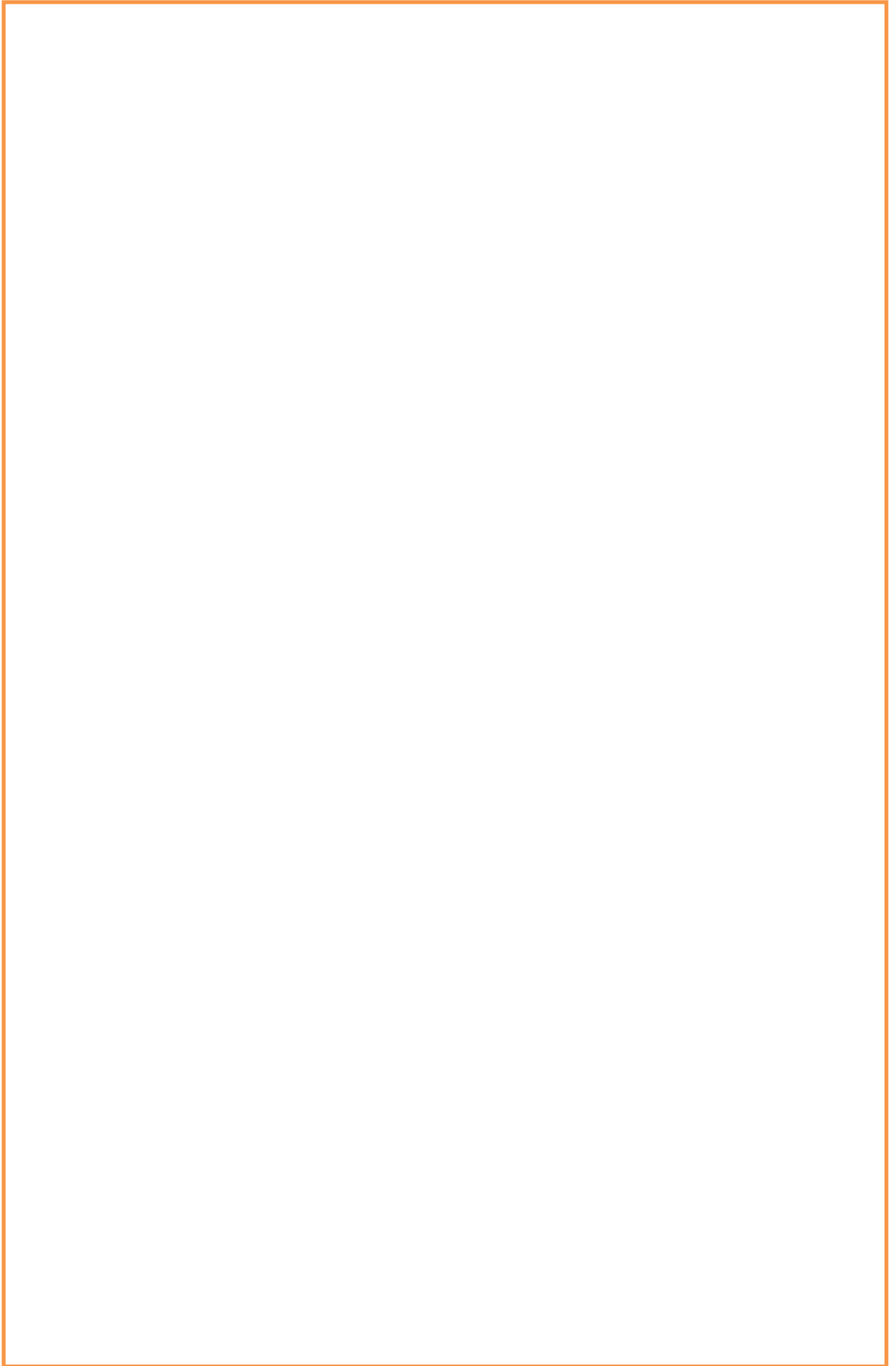
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EUROPEAN COMMISSION RECOMMENDATION ON A NEW APPROACH TO BUSINESS FAILURE AND INSOLVENCY.

RESPONSE OF THE INSOLVENCY LAWYER'S ASSOCIATION

This is the response of the Insolvency Lawyer's Association (the **ILA**) to the Call for Evidence - European Commission Recommendation on a new approach to business failure and insolvency (the **Recommendations**). By way of background, the ILA provides a forum for c 450 full, associate, overseas and academic members who practice insolvency law. The membership comprises a broad representation of regional and City solicitors, barristers and academics and overseas lawyers. The Technical Committee of the ILA (the **Committee**) is responsible for identifying and reporting to members on key developments in case law and legislative reform in the insolvency and restructuring market place and is often consulted by the UK Government in relation to insolvency law reform. This response is sent on behalf of the Committee.

General comments

The Committee welcomes the Government's call for evidence and the opportunity that this gives stakeholders to provide views both on the Recommendations and whether current UK insolvency and rescue laws meet the Recommendations. As an overall aside we note that the Insolvency Service continues its work to ensure that the UK insolvency and rescue procedures are: (i) meeting the needs of stakeholders; and (ii) remain competitive in the international arena. However, in this regard the Committee would point out that there has not been a root and branch review of UK insolvency laws for some time.¹ Over the last few years the economic landscape has changed dramatically. It therefore seems that the types of questions being posed by the Recommendations could serve as a catalyst for an overall pause for thought as to what it is stakeholders need from our insolvency laws and whether our laws are continuing to meet these needs in the most efficient way possible. While we continue to have a well understood market leading product in the UK, market leaders do not remain so if they stand still. In this regard we would note that the American Bankruptcy Institute published at the end of last year a comprehensive "root and branch" review of Chapter 11. The aim of the review was to establish whether what is often held out as a "model" bankruptcy regime needed to be amended in the light of changes in market conditions since it was last comprehensively reviewed in the 1980s. A similar review for the UK is, in the Committee's view, now overdue.

In the Committee's view the Recommendations raise three key issues for the UK. First, should a statutory moratorium be available in support of a scheme of arrangement (the **Moratorium**)? Secondly, should there be a restructuring framework that allows the restructuring plan to be adopted if it is adopted by a majority of creditors even if not all classes vote in favour of the restructuring plan (**Cram-down of a Class**)? Thirdly, should there be protection for new finance which is necessary for the implementation of a restructuring from insolvency claw-back challenges

¹ *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558 (The Cork Report)

(Protection of New Financing). At a high level the Committee's view is that: (i) subject to appropriate safe-harbours being put in place, the Moratorium may be useful in a limited number of cases and so the Committee would cautiously support such a change; (ii) the ability to Cram-down a Class would be beneficial to the ability to rescue a company (in particular it would, in certain cases, lower the cost of company rescue) – but thought would need to be given to both the appropriate basis on which a class could be crammed down and, once this is established, how to procedurally integrate this in the current English insolvency regime; and (iii) that, while the UK does not have a culture of providing rescue finance, insolvency claw-back of such finance is not a practical problem for the UK industry. The most important aspect is, in the Committee's view, the introduction of a Cram down of a Class. However, if the Moratorium was not introduced it should be made clear that the reason for this is that the English courts have the power to grant such a Moratorium² already (ie so as not to cause doubt on the validity of the court decisions referred to in this response).

Commission's objectives

In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

Overall we believe that the Recommendations are likely to assist in achieving the objectives set out in Section 1 of the Recommendations. Providing effectively "best practice" guidance on the essential elements of a preventive restructuring framework is, in the Committee's view, a proportionate response to assist Member States improve their legal frameworks. Further, were the basic features of preventive restructuring frameworks to be essentially standardised at a broad level (as the Recommendations anticipate) this should result in greater predictability for creditors as to outcome between Member States. The Committee welcomes the light touch approach of the Commission to these issues - a minimum standard as set out by the Commission which each Member State is free to implement in the manner that best fits that jurisdiction's legal system and culture seems a sensible route to achieving the objectives set out in the Recommendations.

Definitions

2. Are the terms used by the Commission that are explicitly defined, clear?

Given the fact that the Recommendations are not draft legislation, the Committee is of the view that the explicit definitions are, in a general sense, clear. While it would be possible to provide for more detailed and comprehensive definitions, in the Committee's view, this would be unnecessary. As it will be up to each Member State, including the UK, to decide how national law will need to be adjusted to meet the criteria set out in the Recommendations, we believe it will be possible to work within the broad concepts provided in the Commission's Recommendations.

² See the Bluecrest case referred to below.

3. Are any of the explicit definitions problematic in a UK context?

On the whole the explicit definitions fit well in a UK context. However, there are a couple of areas the Committee would question. First, it is not sufficiently clear that the definition of “court” in the Recommendations applies both to decisions to open preventive procedures as well as to matters arising once those procedures have been commenced. Given that administration is, in some circumstances, a preventive procedure this would give rise to the concern that the decisions by the company, directors or floating charge-holders to appoint administrators out-of-court would not fall within the scope of the definition of “court”. In the Committee’s view the definition of “court” from the EC Insolvency Regulation should be adapted to fit the Recommendations. The following definition could be used:

“courts” means the judicial body or any other competent body empowered to open preventive proceedings, to confirm such opening or to take decisions in the course of such proceedings”.

Secondly, both the definition of “debtor” and “restructuring” are very wide. The definition of “debtor” would include the types of entities that are proposed by way of recital 15 to the Recommendations to be excluded from the scope of the Recommendations and the definition of “restructuring” could be argued to catch a refinancing of a company’s existing debt. The Committee assumes such potential outcomes were not the Commission’s intention.

4. Are there any other terms, aside from ‘an honest bankrupt’ and ‘a second chance’, used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

The Committee is of the view that the term “honest bankrupt” would be a difficult term to apply in a uniform manner across the EU. In this respect, the Committee agrees with the approach in the Recommendation at paragraph 32.

The Committee would agree that in the UK the concepts of both “an honest bankrupt” and “a second chance” are already reflected in our laws for the broad reasons given in Call for Evidence.

The Committee would note that “entrepreneur” is not defined. While a definition of entrepreneur would be difficult, it is capable of restrictive and expansive interpretations. Therefore in the interests of consistency the Committee would like to see “entrepreneur” defined in a broad conceptual manner in the Recommendations – this would ensure that Member States were, at least, starting from the same page. At a broad level we would expect “entrepreneur” in the context of individual insolvency to mean sole traders and self-employed persons.

Preventive restructuring framework

5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

We agree that the current legislative framework in the UK goes a long way towards satisfying the areas covered in the Recommendations. We however note the following in relation to each element:

(a) Early stage restructuring: we believe that the UK framework does allow a debtor (in general) to restructure at an early stage. In fact many restructurings take place on a consensual basis outside a formal insolvency. Some regimes (broadly speaking, administration³) require the debtor to be or be likely to be unable to pay its debts. Other regimes (CVA and schemes of arrangement) do not require this.

(b) Debtor-in-possession: there are regimes which allow the debtor to stay in control of the day-to-day operations of the business (CVA and schemes of arrangement). In an administration the officeholder will take control of the debtor's operations.

(c) Temporary stay on enforcement: there are regimes which allow a temporary or indeed final stay on individual enforcement actions (administration and, where available, a CVA for company eligible for a moratorium) – albeit in administration the stay can be lifted with the consent of the administrator or the permission of the court. In administration the moratorium is automatic – so not at the debtor's request. In a CVA the debtor does request (where available) the small company moratorium. Consideration would have to be given as to whether to expand the threshold of when the CVA moratorium is available beyond its current limited scope (ie beyond the current small company definition). In the Committee's view any extension should be subject to suitable safe-harbours.

In a consensual restructuring a contractual standstill can provide the appropriate breathing spell to facilitate restructuring negotiations. There is, however, no mechanism provided for by the scheme legislation pursuant to which a debtor company in a scheme of arrangement process could request a stay. However, we have seen a temporary stay on enforcement action being granted by the court under its general case management powers in the Civil Procedure Rules (see *Bluecrest Mercantile BV; FMS Wertmanagement AÖR v Vietnam Shipbuilding Industry Group & Ors* [2013] EWHC 1146 (Comm)). Therefore, in certain cases where a stay would be beneficial to company rescue the English courts have been prepared to step in and assist. We would expect the court to continue this trend in appropriate cases. Careful consideration would therefore need to be given as to whether the ability of a debtor company to request a formal stay on individual enforcement actions would be a beneficial addition to schemes of arrangement or whether this would cause problems for any industry sectors (as discussed further below). However, on balance, the Committee is of the view that the availability of such a stay could be beneficial, if

³ Note that this is not required for an out of court appointment by the holder of a qualifying floating charge, but is required for a company or a director appointment or a court appointment on the application of the company, a director or a creditor (other than a qualifying floating charge holder).

there were appropriate protections and, potentially, combined with the ability for the court to lift the stay (see further our response to question 7 below).

(d) Cram down: there are two types of restructuring plan provided for by English legislation: the CVA under the Insolvency Act 1986 and a scheme of arrangement under the Companies Act 2006. The CVA proposal must be approved by more than 75 per cent by value of creditors who vote (in person or by proxy)⁴. A CVA is however unable to bind secured or preferential creditors (without their consent). A CVA is not confirmed by the court (unless there is a challenge and the court upholds the CVA). The CVA legislation therefore meets the Recommendations in part only.

In a scheme, the proposal must be approved by 75 per cent in value and more than 50 per cent in number of those voting (in person or by proxy) in each class. The scheme must also be sanctioned by the court. If one class does not approve the scheme, it will fail. There is no ability to override a dissenting class as a whole. The scheme legislation does therefore not currently meet the Recommendations.

Whilst the Committee strongly believes that the ability to cram down an entire class is currently lacking in the English restructuring toolkit (which risks putting the UK at a competitive disadvantage to other European regimes, such as the German insolvency plan or the Irish examinership and the US Chapter 11⁵). In the Committee's view, it is however necessary to address certain gating issues first, such as what should be the basis for class cram down – see question 7 below. Once the basis for class cram down is decided, thought would then need to be given as to how best to integrate this into the current English restructuring and insolvency regime.

(e) Protection of new financing: while there is no specific provision in UK insolvency law which provides that new financing necessary for the implementation of a restructuring plan is immune from insolvency claw-back risk, the risk that any such new money is subject to claw back is not generally an issue as value is provided to the company. Difficulties do arise in raising “rescue finance” as, for example, it is not possible to grant the provider of new finance a first ranking security on assets subject to a fixed charge, without the existing charge holder's consent.

As a consequence, new finance that allows the company to keep trading for the benefit of mainly unsecured creditors may only be forthcoming where the company has significant unencumbered assets. This makes it difficult, for example, to fund trading administrations, and more often than not the administrator will sell the business as a going concern shortly after his appointment under a pre-pack administration. However, on the whole, the Committee does not think that the lack of a “rescue funding” culture is impacting on a UK rescue culture to any large degree at least in large or larger mid-cap cases. In particular, many of the more significant restructurings are often able to procure more funding as part of the restructuring process.

⁴ There is also a sub-test to take account of connected parties.

⁵ It should be noted that the Dutch are implementing a scheme procedure which it is understood will include provisions for a Cram-down of a Class.

6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

One of the key aspects of the UK regime which assists in delivering the Commission's objective is the infrastructure which sits behind our laws. The UK's courts, professionals and culture are very much solution driven in goals and this leads the UK to be innovative in how our laws are utilised for the good of creditors as a whole and in granting companies (or the underlying business) a second chance. At a simple level the difficulties in obtaining a hearing date within a reasonable time of filing an action or the inability to obtain a final and binding judgment will be as off-putting to investing in a Member State as deficiencies in the underlying laws.

As such a key political imperative for the European Commission should be to focus on infrastructure as much (if not more than) the laws.

7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

Temporary stay in support of a scheme of arrangement: In the Committee's view even though: (i) an administration moratorium may be capable of providing the appropriate breathing spell for a company considering a restructuring; (ii) the English court is already able to provide protection on a case-by-case basis in relation to individual creditors to allow a scheme of arrangement to be considered as illustrated particularly by the *FMS Wertmanagement AÖR v Vietnam Shipbuilding Industry Group & Ors* decision; and (iii) in practice a contractual stand-still is often put in place preventing individual enforcement actions, there may be some cases where a court imposed stay would allow restructuring negotiations to take place without fear of being derailed by individual creditors. This is because: (i) the nature of the administration process itself, in particular the fact that it is a formal insolvency proceeding and displaces management, means that it undermines the debt restructuring process; (ii) the courts may be reluctant to exercise their inherent jurisdiction without further guidance from the legislature; and (iii) a contractual standstill can be time consuming and expensive to negotiate (and sometimes almost impossible to achieve).

Accordingly, serious consideration should be given to providing for such a stay in UK legislation. However, the fact that the moratorium provided for in the Recommendations could be applied to secured creditors means that the Committee are of the view that caution would need to be exercised in any decision to implement such a moratorium. Any moratorium should not impact negatively on financial collateral arrangements and/or transactions which are typically structured and rated on the basis that the secured creditors will not be subject to any significant delay in their ability to realise security (such as capital market transactions, including structured finance transactions – for example securitisations). This is because any such delay would affect timely payment to lenders/note holders. While the Committee consider a stay on the enforcement of security to be potentially problematic from a structured finance perspective, in general, some comfort is drawn from the fact that the Recommendations contain factors which may operate to mitigate any disruption in such deals. For example, Recommendation 11 suggests that such a stay may be made subject to creditor support (which, in the securitisation context, should not be

provided in the context of SPV chargors given their usual agreement not to take action in respect of the SPV).

As a result of the above, in order to avoid creating significant issues for structured finance transactions, it would be necessary for sufficient protections (along the lines of Recommendation 11 and potentially wider) to be pursued and adopted alongside any moratorium such that the corresponding stay would not affect the ability to enforce the security in the context of relevant transactions. If these issues are not addressed, we would expect the rating agencies typically involved in such transactions to apply a stressed rating analysis, which would likely result in a reduced rating level in respect of the securities and, as a result, to stressed pricing and liquidity. Therefore, if the Government were minded to implement such a moratorium, serious consideration should be given as to whether, as well as the specific protections in the Recommendations, specific safe harbours for certain capital market transactions should be included (possibly along the lines of those already included for administrative receivership and for the small companies moratorium). The Committee also note that there is no suggestion in the Recommendations that the moratorium could be lifted to allow for the enforcement of a specific action or enforcement of security by a secured creditor. Such a feature should, in the Committee's view, be considered by the Commission (or the UK Government if it were minded to implement such a moratorium).

It should also be noted that it is not just the UK market which is a source of securitisations. Securitisations are carried out in a number of other Member States, including Germany, France and Italy. Accordingly any moratorium which would impact negatively on such transactions should be approached with caution at an overall EU level.

Cram down: as highlighted in the response to Question 5, the Committee is of the view that the ability to cram-down a class of creditors would be beneficial to the UK regime. For various reasons, the inability to cram-down a class of creditors currently makes dealing with out of the money stakeholders (for example shareholders or those creditors under water as to where value breaks) more complex than it should be. Essentially the inability to cram-down a dissenting minority in an out of the money class or to be able to use a transfer scheme (partly because of the decision in *MyTravel*⁶) forces a tactical use of a pre-pack administration to implement a restructuring by way of a sale of the underlying viable business to a newco.

With this in mind, in the Committee's view, the UK is falling behind in having a restructuring regime that is fit for purpose to deliver on stakeholder requirements. As noted above, restructuring regimes in other Member States and, notably, Chapter 11 have regimes allowing for the cram-down of a class and other jurisdictions, for example the Netherlands, are, we understand, legislating to provide for this.

As noted above, the ability to cram-down a class does though give rise to two further policy questions. The first is on what basis should a class be able to be crammed down. Is it only those classes that do not have an economic interest in the company

⁶ *Mytravel Group plc v Fidelity Investments International and others* [2004] All ER (D) 221

that should be able to be crammed-down? If this is the case what valuation criteria should be applied in assessing which creditors have an economic interest in the company? The Recommendations appear to assume the use of a comparator of what creditors would have received in a liquidation of the company, but there are other possibilities such as the “bargaining and litigation” approach used in Chapter 11 or an approach based on a pricing methodology as recently developed by the American Bankruptcy Institute. Such policy considerations are key in influencing how capital structures will develop in the UK market and the cost and availability of credit to UK companies.

Protection of new financing: given that the Recommendations envisage claw back as the major impediment to the funding of a restructuring, this issue in itself does not require special amendments to be made. However, the opportunity could be used to carefully analyse, after discussions with stakeholders, whether there is merit in introducing a different funding regime, such as the DIP funding in the USA.

Facilitating negotiations on restructuring plans

8. To what extent does the UK regime already deliver the elements in this section of the Commission’s Recommendation?

No court proceedings required: a corporate debtor can enter a restructuring process without the need for court proceedings in two ways: first, a CVA can be implemented without court involvement (although the implemented CVA can be challenged in court). Second, a consensual restructuring can be achieved out of court. However, other forms of restructuring, ie a scheme of arrangement or an administration (possibly with a pre-pack) require a court process. This can be minimal (in the case of an out of court appointment of administrators) but can be extensive (in a scheme of arrangement where two court hearings are required). While the UK regime therefore meets the Recommendations in respect of CVAs, the involvement of the court in schemes at an early stage is outside the regime envisaged by the Recommendations. However, in the Committee’s view this is not a material departure from the overall thrust of the Recommendations.

Temporary stay of enforcement action: see the comments made in response to question 7. While the period suggested by the Recommendations is for up to an initial maximum period of four months, extendable to a maximum period of 12 months, it is to be welcomed that the Recommendations provide flexibility as to the duration of the stay; only setting a maximum rather than a minimum period. This should allow a balance to be struck between the interests of creditors seeking to bring individual enforcement actions and the interests of a restructuring ultimately benefitting all creditors and the company / its business. It may be that in the context of a scheme of arrangement a stay for a much shorter period than four months would be perfectly sufficient and accordingly the Committee welcomes the fact that the length of the required stay will be a fact sensitive issue. As highlighted above the Committee also welcomes the safeguards to be satisfied when obtaining a stay.

9. Is there anything in the UK regime which is not in the Commission’s Recommendation but delivers the Commission’s objective?

In respect of the temporary stay of enforcement actions the ability and willingness of the English courts to grant such a temporary stay as mentioned above does, to an extent, step in to deliver the Commission's objectives. On a consensual basis, standstill agreements also often perform the same function.

10. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?

As highlighted above we believe that the ability to grant a stay on enforcement actions by creditors would improve the UK insolvency regime (although only around the margins). While many restructurings will not require a formal stay, the availability of such a stay would provide a better back drop to negotiations. Essentially the fact that creditors will know that a stay could be applied for and that this is provided for in legislation may prove a useful stick in driving a scheme through, even if an actual stay is not ultimately required. The conditions specified in the Recommendations in relation to a stay seem sensible and accord with what the courts have, as a matter of court practice, broadly already used as guidelines (see *Bluecrest*).

11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

There is nothing to prevent consensual restructurings being pursued if the unanimous support can be achieved.

Where consensus cannot be achieved, a court process can add to the costs of a restructuring. However, where it is intended that a restructuring plan is ultimately sanctioned by the court (as the UK scheme of arrangement currently is) it does make sense to involve the court at an early stage – to avoid having spent a great deal of time and effort on a restructuring plan which the court will not be prepared to sanction and/or to flush out any fundamental objections or concerns at an early stage. A court process gives creditors the forum for presenting objections and for being heard in an objective way and ensures that all parties are treated fairly. It adds transparency and a structure to the restructuring plan which is beneficial. For example, the court's involvement in an English scheme, while adding costs, is one element which provides substantial comfort to foreign creditors who are subject to an English scheme, in particular in relation to the early scrutiny that can be afforded by the court to what is being proposed.

The CVA process does not envisage any court involvement (save for when the CVA is challenged). A half way house of court sanction but only late court involvement may not work so well.

As a matter of principle the Committee is of the view that a court need not necessarily be involved at an early stage of a formal restructuring proceeding. It is very much a matter of balance. What is necessary is that creditors have recourse to the courts to challenge what is being carried out (whether that is how classes of creditors are arranged or the overall restructuring proposed or approved). Therefore the Committee agrees that a restructuring plan process could legitimately be commenced without court approval, but that recourse to the court should always be available.

Restructuring plans

12. To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?

Contents of restructuring plan (Recommendation 15): the current regime in the UK reflects the Recommendations here. In a CVA the Insolvency Rules 1986 set out the contents of the proposal (rule 1.3). This broadly includes the detail mentioned in the Recommendations. There is no requirement to set out the position taken by affected creditors on the restructuring plan or to set out the plan's potential to prevent the insolvency. However, where creditors do not believe that the CVA has merit they may not vote it through (for example the failed Oddbins CVA). In a scheme of arrangement the Companies Act 2006 requires an explanatory statement to be sent to creditors which will broadly cover the content of the plan set out in the Recommendations.

Adoption of the plan (Recommendations 16 to 20): the UK scheme of arrangement meets most of the Recommendations outlined – bar one. A scheme of arrangement allows a restructuring plan to be adopted which binds secured and preferential creditors (Recommendation 16). Creditors are divided into classes reflecting their rights – not their interests (broadly Recommendation 17, with the substitution of rights for interests). Creditors enjoy a level playing field regardless of where they are located and distance voting is generally allowed (Recommendation 19). A scheme does not need to bind all creditors and the scheme company can choose who it wishes to scheme (Recommendation 20).

Where the current UK regime fails to meet the Recommendations is that for a scheme of arrangement all classes must approve the scheme (with the requisite majorities). There is no possibility to cram down across classes (Recommendation 18).

Note that a CVA does not meet the Recommendations outlined. There is no ability to bind secured creditors and creditors are not divided into classes. This lack of flexibility in a CVA can impact on SMEs. As a general rule, the Committee does not think that there is a large problem in the UK concerning the rescue of SMEs or with creditors losing out in proceedings concerning SMEs. This is because, in the main, the UK's liquidation (both compulsory and creditors' voluntary) CVA and administration (including out of court appointment) regimes are providing sufficient flexibility to meet needs of the market. However, that flexibility can be improved by considering amending the CVA regime (in particular in relation to binding secured creditors)⁷. A more flexible CVA procedure could allow SMEs to access a procedure which is less administratively burdensome and less costly than a scheme of arrangement and therefore may provide advantages in the SME sector.

Court confirmation (Recommendations 21 – 23): a scheme of arrangement must be sanctioned by the court – to this end it meets Recommendation 21. The Recommendations set out the conditions under which a court can confirm the plan.

⁷ Improvements may also be obtained by administrators having the right to disclaim onerous contracts/property.

While the conditions are not set out in statute, broadly, these are met by the UK courts when deciding whether or not to sanction a scheme. However, a UK court does not have the express ability to reject a scheme which does not have any prospect of preventing the debtor's insolvency. The UK court will however accept that a creditor is the best judge of his commercial interest. Therefore it would be unusual to find that creditors agree to a haircut where they perceive that the debtor is bound to fail regardless.

A CVA does not meet the Recommendations as it is not sanctioned by the court (save in circumstances where it is challenged).

Rights of creditors (Recommendation 24): the proponent of a scheme is encouraged to send a practice statement letter explaining the scheme and the classes that creditors are proposed to be divided into. Creditors have the right to attend court and make representations at both the convening and the sanction hearing. Creditors also have the right to appeal. In the recent *Apcoa*⁸ case, the parties dealt with the time between the first instance judgment and the appeal (which ultimately settled) by agreeing not to implement the scheme until the appeal had been determined. This seems a sensible route which the court could be encouraged to take going forward. In a CVA creditors can challenge a CVA before the court on the basis of unfair prejudice.

Effects of the plan (Recommendations 25 and 26): once sanctioned a scheme binds all affected creditors. Once approved a CVA will bind all CVA creditors.

13. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

Nothing of particular note has been identified by the Committee.

14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

Yes. We believe that the ability to cram down across classes (one of the key items set out above where the current UK regime does not meet the standards set out in the Recommendations) would make the UK restructuring landscape more attractive. Most other EU Member States have (since the downturn) improved their restructuring and insolvency regimes and the ability to cram down classes exists in a number of Member States (e.g. examinership in Ireland, *Insolvenzplan* in Germany and will, we understand, exist shortly in the Netherlands). With the right minority protections attached this would prevent companies being held to ransom by hold out creditors and would allow majority creditors to effect a restructuring more quickly (and therefore be likely to have a less damaging effect on the company). We note though that prior to any proposals to introduce a cram down mechanism across classes further consideration will need to be given as to the correct bases on which to cram down a class. Once this is established, further thought will need to be given as to how best to incorporate the concept of cram down of a class into the current English insolvency and restructuring framework.

⁸Re *Apcoa Parking Holdings GmbH* and other companies [2014] EWHC 3849 (Ch)

Protection for new financing

15. To what extent does the UK regime already provide protection for new financing?

Where new financing is provided as part of a restructuring there is generally no concern in the UK that this will be set aside. A transaction can be set aside if it is at an undervalue or a preference (or a transaction to defraud creditors) and a specific regime looks at consideration provided for the grant of a floating charge. New financing will not fall foul of any of these provisions as it will be for consideration (subject to it filtering down to the relevant company) and will not usually put a creditor into a preferential position. The issue in the UK is thus currently not claw back risk but the fact that new money cannot benefit from higher ranking security and that there is no ability to trump existing security. Hence unless a company has unencumbered assets or has not granted a comprehensive security net (or where existing secured lenders agree to be subordinated), it will be difficult to take meaningful and first ranking security.

16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

Where an administrator borrows money during the course of an administration it ranks as an expense of the administration which aids the provision of financing while a purchaser is found.

The Recommendations do not provide for enhanced and super priority security to be given to new money. This is not currently reflected in the UK either but would deliver the Recommendations in facilitating new money.

17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

The concerns raised by the Commission in this part are not the major concern from a UK perspective (see above).

Second chance for Entrepreneurs

18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

The Committee considers that the approach to discharge in the UK already meets the approach set out in the Recommendations.

The Committee agrees that the length of time it takes for a bankrupt to be discharged from his/her debts is crucial to enabling the bankrupt to embark on a second chance. Getting the balance right for the period and scope of the discharge is crucial. Too short a period (and, for that matter, too wide a discharge) could encourage reckless behaviour on the part of the debtors, while too long a discharge period (with limited scope) will severely restrict the scope for rehabilitation/recovery of the debtor.

The Committee's view is that setting a maximum length of time to obtain discharge seems sensible and that the three year maximum period suggested in the Recommendations is both a suitable deterrent, while allowing the chance for

rehabilitation/recovery. A three-year maximum period should also remove some of the incentives for bankruptcy tourism which have been a rightful concern on the part of a number of EU Member States.

Further individual voluntary arrangements (IVAs) allow individuals (including sole traders and self employed individuals) to be given a second chance without being subject to bankruptcy proceedings (with any stigma bankruptcy may have).

As an additional overall point the Committee would point out that the UK, unlike a number of Member States, does not have a split insolvency regime for individuals (ie a separate regime for “entrepreneurs” by which we would mean sole traders or self-employed individuals and a separate regime for consumers). However, this does not mean that the UK regime does not deliver a second chance for entrepreneurs and the Committee would not advocate a split regime for individuals in the UK.

19. Is there anything in the UK regime which is not in the Commission’s Recommendation but delivers the Commission’s objective?

As highlighted above IVAs provide an excellent mechanism by which entrepreneurs are able to write-off debt and obtain a second chance.

20. Where you believe the UK regime does not meet the criteria, would the Commission’s Recommendation improve the UK regime?

As highlighted above the UK regime in the Committee’s view meets the criteria in the Recommendations. However, again as highlighted above, there may be some merit in conducting further research in the UK to consider if the automatic one-year discharge has been beneficial to the economy and in creating the right kind of enterprise culture.

Looking forward

21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider? For example, developing EU principles for fast, efficient out of court rescue procedures for small companies; developing the conditions for rescue finance. If so, what should the Commission consider?

Given that the Committee’s view is that harmonisation is best left to the market rather than law makers, the Committee is of the opinion that, currently, there are no additional measures which the Commission should be considering. A pause should be taken at an EU level on insolvency related issues while the reforms to the EC Insolvency Regulation bed in and Member States use the Recommendations as “inspiration” to reform their own domestic laws.

22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

Rather than the different domestic insolvency laws on an overall basis creating problems in practice for certain Member States, it is often the lack of an adequate procedure in a Member State to provide a solution to a debtor’s problems. It is not therefore a harmonised law which is needed but a harmonisation of broad principles with a robust rescue culture at the heart of these principles. As such the

Recommendations, in the Committee's view, strike the appropriate balance; encouraging Member States to implement proper pre-insolvency rescue procedures, while leaving the detail to the Member States in question.

Further and importantly, the infrastructure in a Member State is just as important as a Member State's laws. As highlighted in question 6 above, a Member State could have the perfect insolvency/restructuring laws, but if there is not the culture, the court system or the practitioners to apply and deliver the law, then the perfect law will struggle to deliver on its objectives.

23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?

The Committee is of the view that the best way to achieve harmonisation across the EU is through the broad convergence of the relevant national laws, rather than through the harmonisation of laws implemented via EC directives or regulations. This would allow national governments to be able to gauge the pace and scope of such convergence. Essentially, the current ability for Member States to choose the aspects that they think will improve their system (based on how they perceive things to be working successfully in other Member States or otherwise) is in our view the best way forward. It should be noted that, where there is a pressing need for harmonisation, the market will ensure that this happens. For example, due to a need in the market for early intervention restructuring procedures, there has already been some convergence of national laws especially in the development and introduction of pre-insolvency/restructuring procedures – for example proceedings inspired by the English scheme of arrangement have been implemented in Spain and are coming in the Netherlands. In addition, there has also been, in certain Member States, including in the UK, changes to legislation that have embraced the fresh start approach, the introduction of shorter automatic discharge periods for bankrupts, out of court administrations, availability of CVA moratoriums for small companies and director disqualification undertakings.



RESPONSE TO CALL FOR EVIDENCE ON EC
RECOMMENDATIONS ON A NEW APPROACH TO
BUSINESS FAILURE AND INSOLVENCY

THE INSOLVENCY SERVICE

Introduction

1. The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents around 20,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK and we have an in-depth knowledge and expertise of insolvency law and procedure. .
2. ICAS's Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and protect their interests. In the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.
3. ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all of the implications and that alleged failings within the process are supported by evidence.
4. ICAS is pleased to have the opportunity to submit its views in response to The Insolvency Service (the Service) call for evidence in relation to the European Commission Recommendation on a new approach to business failure and insolvency.

Key Messages

5. We are supportive of the principles and objectives underpinning the EC Recommendations.
6. We consider that the current UK regime supports the policy objectives of the EC Recommendations although there are areas where we consider that further amendments could be made to UK insolvency legislation to strengthen this support. These areas are expanded on within our detailed response.
7. We consider that the definitions used within the Recommendations could be made clearer in order to avoid potential unintended consequences and to provide greater clarity to the scope of the Recommendations.

Detailed Response

8. Our detailed responses to the questions contained within the Call for Evidence are provided in Appendix 1.

17 March 2015

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TEL: +44 (0)131 347 0242

Appendix 1 – Response to specific consultation questions

1. In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

We agree, in general, that the removal of discrepancies between national restructuring frameworks would assist with creating a more efficient and smooth functioning market for the restructuring of viable enterprises in financial difficulty.

2. Are the terms used by the Commission that are explicitly defined, clear?

We agree that the defined terms can be broadly understood, although the use of terminology such as “a likelihood of insolvency” within the definition of ‘debtor’ is subjective and therefore could benefit from being made clearer.

Despite the Recommendation seeking to address issues with business failures and entrepreneurs, the definition of ‘debtor’ does not limit the scope to natural or legal persons who are in business.

3. Are any of the explicit definitions problematic in a UK context?

The definition of ‘restructuring’ is very wide and would appear to encapsulate s110 Insolvency Act 1986 arrangements. We would wish to ensure that there were no unintended consequences for this type of de-merger arrangement being included within this definition.

4. Are there any other terms, aside from ‘an honest bankrupt’ and ‘a second chance’, used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

We would suggest that a definition of ‘entrepreneur’ would be helpful. It is unclear whether this is intended to cover only a debtor who trades on their own account or whether the persons intended to come within the scope of ‘entrepreneur’ include those who may for instance be a controlling party or mind within other entities such as a partner in a partnership, significant majority shareholder or director in a limited company, etc.

We also consider that a definition of ‘bankruptcy’ would be useful. For example, it is unclear whether the provisions relating to a ‘second chance for entrepreneurs’ are intended to cover arrangements such as IVA's and trust deeds which although are not ‘bankruptcy’ are insolvency procedures which may hinder the ability of entrepreneurs to obtain a ‘second chance’.

We would also suggest that it would be beneficial to define ‘business’ – for example, it is unclear whether this is intended to cover not for profit, trusts and other types of operations in addition to commercial business activities.

5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

The UK regime provides a framework which meets or exceeds the majority of the elements (a) to (e) within the Recommendation. We would suggest however that the UK regime could be strengthened through the introduction of a statutory debt payment plan for non-natural legal persons which would allow full repayment of debts with protection against individual enforcement actions. Similar schemes such as Debt Relief Orders in England and Wales and Debt Arrangement Scheme in Scotland exist in relation to natural persons only.

6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

No.

7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

Yes.

8. To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

We believe that the UK regime already delivers a significant number of the elements within the Recommendation relating to facilitating negotiations on restructuring plans. The ability to stay individual enforcement actions could however be strengthened within the UK regime (see Q10).

9. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

No.

10. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?

The ability to stay individual enforcement actions could however be strengthened within the UK regime. The current UK regime only provides for a stay of enforcement action in limited circumstances and where formal insolvency appointments are anticipated through CVA (small companies only) and administration. The ability to stay enforcement action where a restructure out with a formal insolvency procedure may be possible (for example repossession of a key piece of equipment while a refinancing is completed) would strengthen the current UK regime.

The UK regime could also be strengthened by extending the moratorium provisions under CVA to medium and large companies. In most circumstances where a CVA is envisaged a medium or large company will first have to enter administration in order to benefit from a moratorium and thereafter exit administration via a CVA. The extension of a CVA moratorium to medium and large companies would streamline the restructuring process.

11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

Subject to satisfactory safeguards and protection for those involved in the restructuring plan and adequate disclosure of commencement of a process, we agree that a restructuring plan should be commenced wherever possible without court involvement.

12. To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?

We consider that the UK regime delivers the elements of the Recommendation relating to content and adoption of restructuring plans with some exceptions (see Q14).

13. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

No.

14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

In addition to Schemes of Arrangement which require all classes of creditors to agree to a restructuring plan as identified in the Call for Evidence, we consider that provisions relating to CVA's in Scotland may not currently deliver the Commission's Recommendation.

For a CVA to be approved by creditors in Scotland there is a two stage test required – firstly that unsecured creditors as a whole approve the arrangement and secondly that the arrangement must be approved by unsecured creditors excluding persons connected with the company. This can mean that in circumstances where a connected party is owed the majority of debt, a restructuring plan can be rejected by a minority of creditors, albeit the connected party may appeal to the court. The Recommendation contains provisions where dissenting creditors are affected by a restructuring plan that the restructuring plan can be confirmed by the court. While, as noted above, the current UK regime contains provisions for the court to confirm the arrangement, the provisions relate to a consenting creditor rather than a dissenting creditor and it may be that this structure does not aid the objectives of the Recommendations.

15. To what extent does the UK regime already provide protection for new financing?

The current UK regime provides protection for new financing, including the selling of certain assets, to varying levels. A number of provisions are contained within the Insolvency Act 1986 allowing an office holder in an insolvency procedure to challenge prior transactions or the validity of security granted. While in general these include safeguards for transactions undertaken which could be described as being for bona fide reasons, no provisions are made to exclude transactions which are undertaken as part of an approved restructure plan.

16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

No.

17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

We consider that the Commission's Recommendation would improve the UK regime by providing clarity to the current statutory defences.

18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

We consider that the UK regime, in general, supports the Commission's Recommendation to deliver a 'second chance' for entrepreneurs but that there are some circumstances where the UK regime does not support the principles set out in the Recommendation. (see Q20)

19. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

No.

20. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

Depending on the definition of 'bankruptcy' (see comments in Q1), we consider that IVA's in England and Wales and Trust Deeds' in Scotland may not comply with the Recommendations. The discharge period may, in certain circumstances, exceed the three year period where the debtor has not acted dishonestly or in bad faith and has complied with the repayment plan. This is as a result of the debtors not being discharged from the respective processes until the repayment plans have been completed (or longer where there may be outstanding property to be dealt with in Scotland), with the repayment plans lasting typically 5 years for IVA's and 4 years for trust deeds.

We agree that the Commission's Recommendation will assist with promoting a second chance for entrepreneurs.

21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider?

n/a

22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

We do not consider that different domestic insolvency laws across the EU create a particular barrier to cross-border trade and investment in the EU. It does however create problems in practice for insolvency practitioners dealing with insolvency stakeholders in different countries who are unfamiliar with procedures in other countries. This can result in significant time being incurred to the cost of creditors in resolving issues arising from different treatment of matters in domestic insolvency law.

23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?

We would support the harmonisation of insolvency regimes across the EU in order to reduce 'insolvency tourism' and 'COMI shifting'. Businesses would also benefit from understanding the impact and processes involved should a customer or supplier become insolvent.

24. Do you have any other comments?

No.



The Insolvency
Service

Response Form:

European Commission Recommendation
on a new approach to business failure
and insolvency

February 2015

1. General Information

How to respond

1.1 This is a template response form. If you would like to use an alternative format please do so in writing.

1.2 Please send completed short form responses to:
policy.unit@insolvency.gsi.gov.uk, or post to:

Nicholas Blaney
The Insolvency Service
4 Abbey Orchard Street
London
SW1P 2HT

General Information

1.3 What is your name, or the name of the organisation you represent?

James Cowper Kreston

1.4 If writing on behalf of an organisation, what is the size of your organisation?
(mark with an 'X' as appropriate)

0-9 employees (micro)	
10-49 employees (small)	
50-249 employees (medium)	X
250+ (Large)	

1.5 If writing on behalf of an organisation, what type of organisation do you represent?

Accountants & Business Advisors

2. Introduction

1. In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

See attached

3. Definitions

2. Are the terms used by the Commission that are explicitly defined, clear?

See attached

3. Are any of the explicit definitions problematic in a UK context?

See attached

4. Are there any other terms, aside from 'an honest bankrupt' and 'a second chance', used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

See attached

4. Preventative Restructuring Framework

Availability of a Restructuring Framework

5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

See attached

6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

See attached.

7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

See attached

Facilitating Negotiations on Restructuring Plans

8. To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

See attached

9. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

See attached

10. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?

See attached.

11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

See attached

Restructuring Plans

12. To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?

See attached

13. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

See attached

14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

See attached

Protection for New Financing

15. To what extent does the UK regime already provide protection for new financing?

See attached

16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

See attached

17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

See attached

5. Second Chance for Entrepreneurs

18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

See attached

19. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

See attached

20. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

See attached

6. Forward Look

21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider?

For example:

- Developing EU principles for fast, efficient out of court rescue procedures for small companies.
- Developing the conditions for rescue finance.

If so, what should the Commission consider?

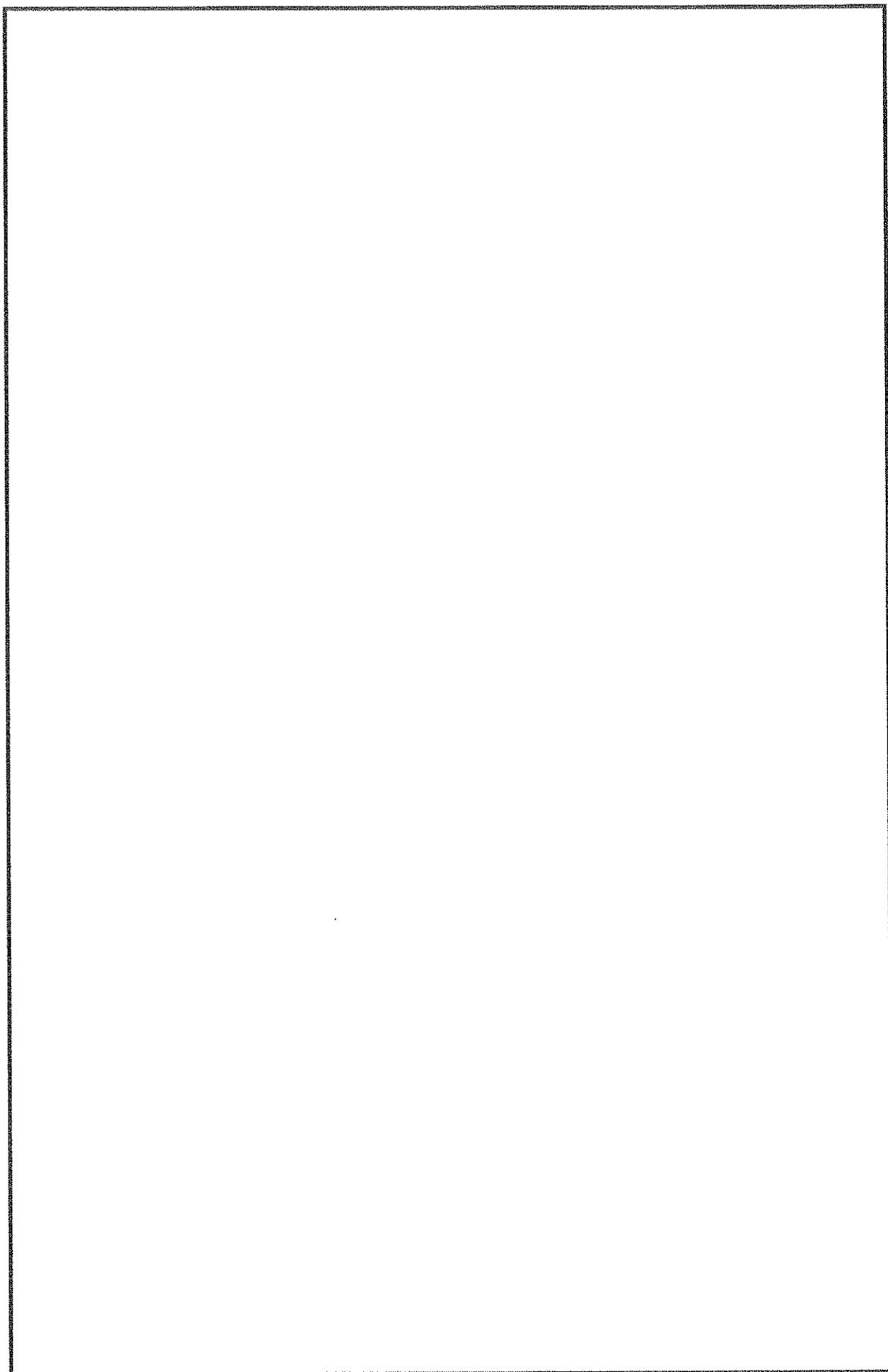
See attached.

22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

See attached

23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?

See attached



Call for Evidence on European Commission Recommendation

The objective of the EC Recommendation was: “

- To encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty.
- To give honest entrepreneurs a second chance.

The Government invites industry experts and other stakeholders to consider two main points throughout the call for evidence:

- Whether implementation of the minimum standards set out in the Recommendation, by member states, would really have the effect the Commission desires.
- How the UK currently compares against the minimum standards set out.

The Recommendation is in five parts:

- Objectives and Subject Matter
- Definitions
- Preventative restructuring framework
- Second chance for entrepreneurs
- Supervision and reporting

Consultation question	Whether implementation of minimum standard would have desired effect	How UK currently compares against minimum standards
<p><u>Introduction</u></p> <p>1. In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?</p>	<p>This depends on what type of framework is being contemplated. As the UK Government acknowledges in its paper on this subject, the use of pre-pack administrations can be a valuable tool in business rehabilitation. This does not appear to fit with EC definition of restructuring in the current context.</p>	<p>We believe that the UK experience has been that administrators, by facilitating an expeditious sale, offer a better way to restructure a business than the more protracted alternative of a company voluntary arrangement.</p> <p>Also, administration retains the possibility for a review of the conduct of the business in the lead up to its insolvency to establish whether there are any grounds for disqualification or</p>

Consultation question	Whether implementation of minimum standard would have desired effect	How UK currently compares against minimum standards
Definitions		
2. Are the terms used by the Commission that are explicitly defined, clear?	Regrettably, the answer to this is not in every case. The definition of debtor and court - being the easier definitions - appear clear. The definition of restructuring, however, may not be wide enough - see below.	n/a
3. Are any of the explicit definitions problematic in a UK context?	n/a	In the UK currently, a restructuring might involve a creditor in possession procedure such as administration which might not fit within this definition. Likewise, under English administrations it is possible to secure a stay without recourse to a Court order by the expediency of a filing. It would be unfortunate to lose this.
4. Are there any other terms, aside from 'an honest bankrupt' and 'a second chance', used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?	The term 'honest bankrupt' has been proposed before. As a concept, however, it contains a potential flaw. A bankrupt is not able to honour commitments which he or she has entered into and whilst this failing may not spring from dishonesty, it may stretching the notion too far to suggest that creditors could accept that they are entirely blameless (and therefore honest) in most cases.	

Consultation question	Whether implementation of minimum standard would have desired effect	How UK currently compares against minimum standards
<p><u>Preventive Restructuring Framework</u></p> <p>5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation? (below)</p> <p><i>Debtors should have access to a framework which allows them to restructure their business with the objective of preventing insolvency. The framework should contain the following elements:</i></p> <p><i>(a) the debtor should be able to restructure at an early stage, as soon as it is apparent that there is a likelihood of insolvency;</i></p> <p><i>(b) the debtor should keep control over the day-to-day operation of its business;</i></p> <p><i>(c) the debtor should be able to request a temporary stay of individual enforcement actions;</i></p> <p><i>(d) a restructuring plan adopted by the majority prescribed by national law should be binding on all creditors provided that the plan is confirmed by a court;</i></p> <p><i>(e) new financing which is necessary for the implementation of a restructuring plan should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.</i></p> <p><i>The restructuring procedure should not be lengthy and costly and it should be flexible so that more steps can be taken out-of-court. The involvement of the court should be limited to where it is necessary and proportionate with a view to safeguarding the rights of creditors and other</i></p>	<p>It is probably fair to say that the creation of the moratorium for smaller companies has not been enthusiastically embraced by the UK insolvency profession. This is because the supervising IP carries an unfair burden of risk for actions of the directors during the moratorium period. In reality, therefore, the only way for a company to obtain a moratorium ahead of proposing a voluntary arrangement is through administration which is a much more intrusive procedure. This is not a problem in relation to individuals wishing to propose a voluntary arrangement as the moratorium regime for personal insolvency is not so onerous on the IP acting as nominee.</p> <p>There is a risk that if any voting to approve a plan is by simple majority, without safeguards, secured and/or connected creditors could bind arm's length creditors in way that might be considered prejudicial.</p> <p>New financing is an issue in restructuring plans implemented pursuant to statute in the UK. In the 1990s there was a proposal for such funding to be afforded super-priority but this stumbled because of opposition from clearing banks to the erosion of their security which was an understandable concern.</p>	<p>Voluntary arrangements (and this may apply to schemes of arrangement) do offer the debtor the opportunity to restructure at an early stage - whilst retaining day-to-day control. Arguably one drawback of the voluntary arrangement, however, is that, unless the controlling mind(s) have identified and understood the historical problems at a relatively early stage, the restructuring is less likely to succeed.</p> <p>English law does not meet the requirement for the plan to be approved by a simply majority (by value) as the threshold for approval is 75%. We understand that this reflects the principle of English law that three quarters of a class are required to approve a change to the rights of the class.</p> <p>A further complication is the requirement that even if the 75% requirement is obtained, the proposal for a VA is not approved if more than 50% of creditors by value (who are not secured or connected creditors) vote against. Although cumbersome to administer, this provision does appear to protect against abuse and ought, therefore, to be replicated across all jurisdictions. Provided the requisite majority is secured, in the UK no court participation is normally required - contrary to EC recommendation (d). We would be reluctant to see this changed.</p>

Consultation question	Whether implementation of minimum standard would have desired effect	How UK currently compares against minimum standards
<i>interested parties affected by the restructuring plan.</i>		<p>Our view is new financing which is provided on an arm's length basis in the UK should not be vulnerable to challenge as the law stands but there is a very limited market for the provision for such finance because of inter alia problems with taking security.</p> <p>Currently many voluntary arrangements run for five years. In our view this is far too long - and is one of the reasons why so few arrangements are proposed, approved and run their course. The demand for five year arrangements largely stems from HMRC.</p> <p>As noted above, Court involvement in voluntary arrangements is in the UK is currently kept to a minimum.</p>
6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?	n/a	<p>The UK regime currently provides for the authorities to take disqualification proceedings against directors whose conduct makes them unfit to be concerned in the management of a company. The disqualification can be for between 2 and 15 years - though the enforcement of disqualification orders and undertakings does not appear to be adequate. A similar regime exists to restrict the business activities of individuals whose conduct has been unacceptable.</p> <p>Beyond this, there is nothing to preclude an honest business person from having a second (or even a third, fourth or fifth chance, or more) albeit by starting-up again rather than by restructuring an existing entity.</p>

Consultation question	Whether implementation of minimum standard would have desired effect	How UK currently compares against minimum standards
		<p>That said, we consider that the operation of S216 of the Insolvency Act 1986 is perverse and to this extent it does act as an unnecessary obstacle to honest business people continuing to trade using an established business name. The perversity of S216 is that buyers of the business of a company which is liquidated, seek to acquire the name to avail themselves of the customer goodwill - not to deceive creditors of the old company who stand not be paid.</p>
<p>7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?</p>	<p>The UK experience is not without flaws. As noted elsewhere, although voluntary arrangements appear to offer an opportunity in the manner which the EC envisages, they represent a small proportion of UK insolvencies.</p> <p>Reasons for this might include the public nature of the arrangement which enables competitors to take advantage of the restructuring company's financial weakness; the duration demanded by some creditors - notably HMRC who often look for an arrangement to last five years; the damage to the company's credit rating of being in a formal arrangement and issues with motivating management over such a protracted period.</p>	<p>Broadly speaking it would appear that the UK regime already meets most of the criteria - other than for greater Court involvement. On balance we would prefer to keep Court participation in restructuring to the current levels rather than increase it.</p>

Consultation question	Whether implementation of minimum standard would have desired effect	How UK currently compares against minimum standards
Facilitating Negotiations of Restructuring Plans		
8. To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?	We concur with the Government's assessment.	
9. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?	We have not identified anything in the UK regime which is not in the EC Recommendation but delivers its objective.	
10. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?	We are not persuaded that the EC Recommendation would improve the UK regime.	
11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?	In a voluntary arrangement, the process already starts without Court participation.	
12. To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation as follows? <i>(a) clear and complete identification of the creditors who would be affected by the plan</i> <i>(b) the effects of the proposed restructuring on individual debts or categories of debts;</i> <i>(c) the position taken by affected creditors on the restructuring plan;</i> <i>(d) where applicable, the conditions for new financing; and</i> <i>(e) the potential of the plan to prevent the insolvency of the debtor and ensure the viability</i>	<p>Based on UK experience, it is difficult to see how it would be possible to garner secured creditors' support for a restructuring plan unless that plan did not inhibit in any way the secured creditors' rights. As the UK Government appears to acknowledge, the Recommendation about classes of creditors would represent a departure from the UK voluntary arrangement regime which is currently in force.</p> <p>We would also have misgivings about greater Court involvement.</p>	<p>The VA regime does provide for the disclosure of creditors who would be affected and for the impact of the VA to be estimated on categories of creditors.</p> <p>It is not always possible, however, to obtain assurance about the completeness and accuracy of the amounts which might be owed to certain claimants.</p> <p>Given that acceptance or rejection of the proposal is determined at a creditors meeting, the requirement to disclose the position of creditors (presumably to a Court) would not</p>

Consultation question	Whether implementation of minimum standard would have desired effect	How UK currently compares against minimum standards
<i>of the business</i>		appear to be relevant to voluntary arrangements which are unchallenged.
13. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?		There is no regulatory requirement to disclose terms of new finance but if this was likely to be a material factor affecting creditors' voting decisions the terms ought to be disclosed.
14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?		Assessing the viability of a plan is a subjective matter but the UK regime does require the IP to comment on the plan and whether it is reasonable to expect creditors to concur.
15. To what extent does the UK regime already provide protection for new financing?		It is hard to see that the UK regime provides any such protection.
16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?		No.
17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?		No.
Second Chance for Entrepreneurs		
18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?		See 6 above.
19. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?		See 6 above
20. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?		No.

Consultation question	Whether implementation of minimum standard would have desired effect	How UK currently compares against minimum standards
Forward look		
<p>21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider? For example:</p> <ul style="list-style-type: none"> o Developing EU principles for fast, efficient out of court rescue procedures for small companies. o Developing the conditions for rescue finance. <p>If so, what should the Commission consider?</p>	<p>None that we have been able to identify.</p>	
<p>22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?</p>	<p>No.</p>	
<p>23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?</p>	<p>Greater harmonisation would, on the face of it, be attractive. That said, it is our impression is that the UK's regime is one of the most progressive in the EU - hence its ranking in the top 7 worldwide. Harmonisation probably carries more risk, therefore, rather than benefit for the UK. For instance, see comments above about greater Court involvement.</p>	
<p>24. Do you have any other comments?</p>	<p>No.</p>	



**THE LAW SOCIETY
of SCOTLAND**
www.lawscot.org.uk

Consultation Response

European Commission Recommendation on Business Failure and Insolvency

The Law Society of Scotland's response

March 2015

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Insolvency, Company and Banking Law sub-committee ('the committee'). The committee is comprised of senior and specialist lawyers (both in-house and private practice) and legal academics.

The Law Society of Scotland welcomes the opportunity to comment on these European Commission proposals.

We agree that greater harmonisation of the laws and procedures of member States in the area discussed in the Recommendation would be beneficial. As BIS will be aware, Scots law differs in several respects from the law applicable in the other UK jurisdictions, particularly in personal bankruptcy, which includes the bankruptcy of partnerships. At this stage in the matter, however, we believe that those differences do not have a significant impact on the principles of the EC's proposals. We would wish to be consulted further if and when specific proposals to change the law emerge.

Many of the questions in the BIS paper are more appropriate for comment by those involved in commerce rather than the legal aspects which are our principal concern. Subject to that, however, we are in agreement, in general terms, with the comments of BIS in the Call for Evidence. The UK has developed a robust system for facilitating the rescue of a viable business in legislation from the Insolvency Act 1986 and subsequent legislation.

We have the following comments to make:

Section 3 - Definitions

In 3.1(a) 'likelihood of insolvency' is in need of more precise definition. By what criteria is that 'likelihood' to be assessed, and by whom? What exactly is meant by 'insolvency'? Recent UK court cases have drawn attention to the distinction between 'absolute' insolvency (total assets less total debts producing a negative result) and 'practical' insolvency (inability to meet debts as they fall due) and the extent to which it is necessary to include contingent claims.

In 3.1(b) 'restructuring' should include the restructuring of the debtor as well as his/its assets and liabilities, e.g. under the Companies Act 2006 Part 26.

In 3.1(c) 'stay' should include a moratorium under the Insolvency Act 1986 Sch. B1 para 44 (as noted in paras 4.10/4.11 of the BIS 'Call').

At 3.2 we agree with BIS that the terms 'honest debtor' and 'second chance' are unclear and problematic, and believe that they should be abandoned.

The definitions in the Recommendation do not use the term 'bankrupt'. Definition 3.1(a) refers to a 'person in financial difficulties', which seems preferable.

We believe that the term 'honest bankrupt' is simplistic and meaningless. A bankrupt who is not 'honest' should be dealt with under the criminal law. Both the EC Recommendation and the law in the UK jurisdictions recognise that a bankrupt individual should be free from his debts and restored to his former legal status after an appropriate period, subject only to those restraints which are justifiable having regard to the degree of culpability of his conduct in contributing to the creditors' losses.

We also believe that 'second chance' is simplistic and meaningless. The important point, which the EC Recommendation seems to recognise, is that the laws and procedures of member states should be designed to ensure, so far as possible, that the viable elements of an insolvent business are 'rescued', in the interests of its employees, suppliers and

customers and more widely the community at large. This is not necessarily (and indeed extremely rarely) achieved by granting the insolvent business a 'second chance'.

In connection with para 3.6 we would ask BIS to note that Insolvency Act 1986 s. 360 does not apply in Scotland. Approximately similar provision is made in the Bankruptcy (Scotland) Act 1985 s. 54 (as amended) which does not, however, contain a direct equivalent to s.360(1)(b) (relating to a bankrupt's business).

Section 4 - Preventive Restructuring Framework

We agree with the BIS comments on this section.

In relation to para 4.15, the Companies Act 2006 s.895 permits particular classes of creditor to agree and implement a 'scheme of arrangement' affecting their class and not others.

In addition to the above comments we would like to provide an answer to question 20.

Q 20 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

In relation to 'entrepreneurs' it should be noted that the personal bankruptcy regimes in Scotland differ from the rest of the UK both in the applicable law and procedures, including 'discharge' from bankruptcy. Also, the Scottish personal bankruptcy regime applies to partnerships constituted under the Partnership Act 1890.



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The Insolvency
Service

Response Form:

European Commission Recommendation
on a new approach to business failure
and insolvency

February 2015

1. General Information

How to respond

1.1 This is a template response form. If you would like to use an alternative format please do so in writing.

1.2 Please send completed short form responses to:
policy.unit@insolvency.gsi.gov.uk, or post to:

Nicholas Blaney
The Insolvency Service
4 Abbey Orchard Street
London
SW1P 2HT

General Information

1.3 What is your name, or the name of the organisation you represent?

PricewaterhouseCoopers LLP

1.4 If writing on behalf of an organisation, what is the size of your organisation?
(mark with an 'X' as appropriate)

0-9 employees (micro)	
10-49 employees (small)	
50-249 employees (medium)	
250+ (Large)	X

1.5 If writing on behalf of an organisation, what type of organisation do you represent?

PricewaterhouseCoopers LLP is the UK partnership of the international accountancy and advisory firm, PwC. It provides advisory services to businesses in distress in the UK and Europe including restructuring and reorganisation advice. Partners and directors of the firm also take appointments under the UK Insolvency Act 1986.

2. Introduction

1. In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

The Commission's Recommendation deals with setting up a legal framework to support restructuring and rescue of distressed businesses. In member states where no such framework currently exists, implementation of the Recommendation will undoubtedly assist in meeting the Commission's objectives.

However, it is important to note that these legal rules and processes form only one part of what is required for an effective restructuring regime. Other elements include: the availability of suitably qualified and experienced restructuring professionals; the quality and commerciality of the courts which oversee the rules; and the general business and commercial culture. In addition, other areas of law such as contract, security rights, employment, tax and company law can have a significant impact on successful restructuring and should be considered to be part of the restructuring regime; these elements are not addressed by the Recommendation.

A possible consequence arising from the Recommendation may be a move towards "debtor in possession" proceedings. We do not think that such a shift would necessarily improve the number, quality and ease of restructurings over the current UK regime.

3. Definitions

2. Are the terms used by the Commission that are explicitly defined, clear?

(a) “debtor” means any natural or legal person in financial difficulties when there is a likelihood of insolvency. This definition appears clear.

(b) “restructuring” means changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or part, of the debtors’ activity. It is not clear to us whether this necessitates the continuation of the activity by the debtor itself, or whether it also encompasses the continuation of the activity by a third party, eg following a going concern sale or a hive down. In the UK regime, administrations and CVAs (both insolvency processes) and schemes (companies act process) are regularly used as part of a restructuring. We would not want to see a definition for restructuring apply in such a way that use of these processes are restricted in the context of a restructuring.

(c) “stay of individual enforcement actions” means a court ordered suspension of the right to enforce a claim by a creditor Presumably this relies on the wide definition of court in (d) below

(d) “courts” includes any other body with competence in matters relating to preventative procedures to which the member states have entrusted the role of the courts and whose decisions may be subject to an appeal or review by a judicial authority. This definition is similar to but slightly different from the wide definition of court contained in the European Regulation on Insolvency Proceedings. We would suggest that it would be less confusing to use the exact same words as in the Insolvency Regulation.

3. Are any of the explicit definitions problematic in a UK context?

The definition of stay would appear to exclude any automatic moratorium that would arise on entering a process (eg the automatic stay on filing a notice for administration or on entering administration), as it requires an order of a court (widely defined). Provided that the wide definition of “court” will include the party making the appointment, it may be possible simply to add an additional line onto the forms filed with an option to start a stay or not. This would be closer to the application for a moratorium in the small companies CVA. Alternatively, it could mean that administrations are purely seen as insolvency procedures rather than possible restructuring processes. Administrations were designed as a support for a rescue culture.

4. Are there any other terms, aside from 'an honest bankrupt' and 'a second chance', used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

4. Preventative Restructuring Framework

Availability of a Restructuring Framework

5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

Throughout our response to this and the following questions, unless stated otherwise we have assumed that the "UK regime" should be interpreted widely to include the custom and practice, particularly with regard to consensual restructurings undertaken outside of any formal process. We think that the majority of the restructurings undertaken on large corporates in the UK are done outside of a formal process, through consensual agreement following a negotiation process.

This consensual approach is underpinned by:

- long established custom and practice, including use of the London Approach and the Insol Principles ;
- a strong body of experienced professional advisers, most of whom are members of professional bodies which operate a regulatory or quality function over their members;
- law concerning debtors who are approaching insolvency which allows flexibility to take a variety of steps provided these are done "in the best interests of the creditors as a whole", but with potential penalties for directors if these are not adhered to (including personal liability for credit incurred and disqualification as a director etc); and
- the relative ease for filing for administration acts as a powerful incentive for stakeholders to reach a consensual solution.

(a) The debtor should be able to restructure at an early stage, as soon as it is apparent that there is a likelihood of insolvency.

The consensual approach, scheme of arrangement CVA and administration all allow a debtor to restructure at an early stage prior to insolvency, although administration does require that the debtor face a realistic prospect of impending insolvency.

In the UK there are well established and respected organisations of turnaround and restructuring professionals. Such professionals facilitate early stage restructuring, through good stakeholder management, mostly without resorting to an insolvency process.

For companies approaching possible insolvency, UK law has considerable flexibility on what can and cannot be done, based on principles of treating the stakeholders (and particularly the creditors fairly) and recognising the fact that certain stakeholders may enjoy much greater commercial leverage. Thus directors who continue to trade and incur credit are protected from personal liability providing they can show this is not to the detriment of the creditors as a whole and have taken the appropriate professional advice. However, there are penalties available if directors do not follow this (disqualification / personal liability etc). The law therefore works to guide the directors to act responsibly when a company is financial distress, without forcing it into a formal insolvency within a narrow time frame. Creative solutions can be used whilst a restructure is put in place (for example the use of trust accounts to protect creditors). This brings considerable benefits to the UK regime.

It is relatively easy to put a company into administration and this can be used either to provide the protection of a moratorium or to effect a pre-packaged sale. The loss of control by management, the additional cost and the potential for value destruction can all act as a powerful incentive for stakeholders to agree a consensual restructuring at an early stage.

A CVA could be preferable for a debtor, in that management retain control of the business, but the lack of moratorium (other than for small companies, which means it is only available for a fraction of restructuring situations) means the goodwill of creditors is needed to forebear on enforcement whilst proposals are formulated and considered by creditors.

A scheme similarly lacks a moratorium, but it is helpful in restructuring (particularly groups and complex financing structures) in that it is not classed as an insolvency procedure being available under the Companies Act.

The UK non-insolvency restructuring procedures do not provide for a cost effective moratoriums within which the debtor can plan and propose a restructuring, hence the planning and preparation tends to be undertaken on a confidential basis with a formal process only used to implement the restructuring in the event a consensual arrangement is not possible.

(b) The debtor should keep control over the day to day operation of its business.

The existing UK regime is lender friendly. In particular, the UK regime gives considerable powers to a floating charge holder (a form of security unknown in most of Europe).

Consensual restructuring, CVA and schemes all allow management to stay in control of the business. Stakeholders may insist that the debtor's management is strengthened through the appointment of turnaround or restructuring professionals, whether at board level or otherwise. Accordingly, management do remain in control of the business in many larger restructurings.

Unless there is a formal insolvency appointment, which is regarded as very much a last resort in the UK restructuring culture, the debtor always retains control, not least because of concerns about other stakeholders being deemed a shadow director. It has become increasingly common for a turnaround director/chief restructuring officer to be appointed to boards to facilitate operational and/or financial restructuring: again the debtor is in control of day to day operations.

(c) The debtor should be able to request a temporary stay of individual enforcement actions.

The UK regime has an automatic moratorium once a notice of intention to appoint an administrator has been filed with the court or on the appointment of an administrator. The stay of enforcement can be overcome by agreement of the administrator or by order of the court. The stay on the filing of a notice of intention to appoint an administrator automatically terminates after 10 business days unless an administrator is appointed – it is therefore of very limited use in providing a breathing space for restructuring negotiations to take place or a plan to be drawn up.

A stay on enforcement actions is also available on application for CVAs by companies which meet the small company criteria, but not for larger companies. We think that the option of a stay in the period up to the adoption of a CVA at the creditors' meeting for larger companies would be a useful addition to the UK procedures and could make the CVA a more effective tool for delivering restructurings.

With the exception of the brief moratorium on the filing of a notice of appointment of an administrator, in UK law a stay is always accompanied by the appointment of an independent person to protect the interests of the creditors. The combination of a stay with management remaining in control would be a major shift in the UK regime; any proposals for this should be subject to extensive consultation as to how the oversight would be managed on a basis that is realistic and practical. In this regard, we note that the existing small companies' moratorium is little used due to the risk of personal liability of the nominee required to monitor the company's management during the period of the stay without having any control over management.

Restructurings are more effective in preserving the value of a business if they are kept confidential. We cannot see that a stay could be confidential, so it is unavoidable that a stay will damage confidence in the business, but it could be made more effective if the creation of it did not automatically trigger termination clauses in contracts. The ability in chapter 11 proceedings in the USA to be able to oblige continuation of valuable contracts (adoption) in return for curing any defaults in them would make the moratorium more effective in terms of increasing the chance of business rescue.

If the option of a new stay was to be introduced outside of the existing procedures, it would have to be clear whether this would cut across the current powers afforded to floating charge holders; otherwise it could have the unintended consequence of changing our security structures in the UK and potentially the cost of debt.

(d) A restructuring plan adopted by the majority prescribed by national law should be binding on all creditors provided that the plan is confirmed by a court.

The existing scheme of arrangement would meet these criteria. Large businesses, particularly those with complex financing arrangements, are well served by the scheme of arrangement. It is a strength that mitigates claims of unfair prejudice that creditors are divided into classes of similar interest for voting.

In a CVA, the proposals are voted on by the creditors but there is no subsequent confirmation by the court. Even if "court" is interpreted widely, the above phrase suggests that confirmation should be undertaken by a body separate from the creditors' meeting. Unless it is possible for the UK to interpret the phrase such that the approving creditors' meeting can also act as the confirming court, the CVA would not meet these criteria. In schemes, creditors can object to the court prior to it approving the scheme, and in CVAs it is possible for affected stakeholders to apply to court to overturn the approved plan on unfair prejudice or material irregularity grounds. It helps with the cost effectiveness of the CVA that there is no requirement to involve the court unless an appeal is deemed necessary.

In addition, a CVA requires the consent of secured creditors affected by the proposals. It is not automatically binding on all creditors therefore, unless it is possible to interpret this carve out as being "the majority prescribed by national law". We do not recommend that the CVA be extended to bind all minority creditors whether they are secured or not with the current single pool of voting system as that could be detrimental to the ability of UK businesses' ability to raise debt finance. The CVA could usefully be amended to require voting by classes including secured creditors (but grouped by those having the same or similar security rights). This would probably need court involvement in agreeing the classes (as for schemes) given that the setting of classes is usually a contentious issue, unless a way of simplifying the setting of classes can be found. However, for cost effectiveness it would be helpful to retain the pre-eminence of the creditors' decision on whether to adopt the plan and file their decision in court without the court's scrutiny, continuing to rely upon the right of appeal that creditors have on unfair prejudice or material irregularity grounds.

New financing which is necessary for the implementation of the restructuring plan should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors.

There is no specific provision in UK insolvency law for super priority financing during an insolvency process, so it can only be arranged in limited circumstances e.g. as working capital funding secured upon new trading assets acquired.

New lending in consensual restructuring situations conventionally has super priority status as, unlike some jurisdictions, there is no legislation that is problematic in this respect (such as used to be the case in Germany, Spain, etc). In consensual restructurings, priority status of new lending can either be delivered through charges on free assets, or through agreement amongst the creditors. The prevalence of floating charges in the UK covering all of the assets of the debtor means it is frequently the case that there are no free assets available to support new funding.

In administrations, there does however need to be protection for new money in order to encourage financing at this stage of a restructuring.

6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

The 'specific' objectives behind the recommendation are:

- 1. Increase the number of viable firms being successfully rescued**
- 2. Reduce the costs of rescue in Member States with inefficient rescue procedures**
- 3. Reduce the costs of cross border restructuring of groups of companies**
- 4. Reduce costs for creditors resulting from relocation of the corporate debtors**
- 5. Reduce costs for creditors resulting from relocation of entrepreneurs which are debtors**

The overarching strength of the UK system is not so much in the UK legal framework, but in the deep experience of delivering pragmatic solutions – knowledge which cannot be built up or replaced overnight. This is underpinned by professional organisations backing the restructuring and insolvency processes, (including newer Turnaround professional organisations) which set professional standards and investigate and regulate the quality of their work. In addition, there are courts which are experienced and commercial and therefore are able to deal pragmatically and fairly with restructuring matters brought before them. We think that building the capacity of local professionals and courts in all member states will be as important as establishing minimum standards for a legal framework; this will take time.

In the UK it helps that accountants, with a greater commercial mind-set compared to lawyers, tend to lead restructurings. The rescue of a viable business usually also requires some degree of operational restructuring as well which suitably experienced turnaround professionals, together with able management, are best placed to achieve.

The fundamental objective underpinning the UK insolvency regime is to achieve the best outcome for creditors as a whole; provided actions are taken with a realistic view to achieving this objective, the options available to the debtor and professionals for a restructuring and the insolvency practitioner in a formal process are wide ranging and flexible, allowing creative commercial solutions to be applied.

For example, an important factor in the success of UK turnaround is that directors are able to avoid a charge of wrongful-trading if they have good reason to be able to believe in the success of a turnaround/rescue plan (the test is less onerous than, for example, in the German and French systems). Another example is the flexibility allowed to an administrator in being able to follow local priorities for paying creditors of an establishment in another EU state and thereby saving the cost and complexity of having a secondary proceeding.

The UK pre-pack administration procedure saves a very significant number of businesses, as it minimises the risk of third party loss of confidence in the business and is cost effective.

7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

The Commission's Recommendation as summarised in the impact statement is:

1. Early restructuring possibilities – the procedure must be available when the debtor is in financial difficulties and there is a risk, actual or potential, of insolvency

The UK regime does meet this in that the debtor does not have to be in financial difficulty at the time, , although for administrations there needs to be a realistic of insolvency.

2. Improve chances of negotiations – a moratorium is granted on request by the debtor, of limited (short) duration

The UK regime does not strictly meet this in that a moratorium arises automatically on filing of a notice of intention to appoint administrators, or the company enters administration. The small company CVA moratorium arises on the administrative filing with the court of an application containing a declaration by the nominee, but would not normally result in a court hearing or order. There is no means of a debtor company requesting a moratorium outside of these processes. We think the large company CVA procedure would benefit from the option of a moratorium whilst plans are drawn up and presented for voting upon. We understand that the definition of 'short' per the Recommendation is 3 months extendable to 12 months. Practically that should suffice for most restructurings but large groups (particularly with complex financing structures involving multi jurisdictions) will often need more time.

3. Facilitating the continuation of operations – debtor remains in possession, but courts may appoint on a case by case basis a mediator or supervisor

The debtor remains in possession in consensual restructurings, CVAs and schemes. A supervisor is present in a CVA and usually in a scheme. As long as the wide definition of court is used, the UK regime would appear to meet this point.

What the UK does not have is any formal mediation process to assist in driving a restructuring outside a formal process. For the reasons set out elsewhere in this response, we consider that the existing custom and practice delivers informal / consensual restructurings efficiently, backed up by the threat of administration as a less desirable plan B. Given this, we see no need for a confidential mediation process to be added to the UK restructuring framework.

4. Disallow a minority of creditors to jeopardise the restructuring effort – a minority of creditors can be bound by the plan by a majority in the same class; all classes of creditors are bound, including secured creditors + Member States may provide that no voting process needs to formally take place

The UK regime currently meets this in that minority creditors can be bound by majorities either by class in a scheme or by a single vote in CVAs (save as mentioned previously in relation to secured creditors in CVAs). Class voting could improve the fairness of the CVA procedure, but could also add to complexity and therefore cost. Binding in minority secured creditor interests by class voting with other secured creditors having the same or similar security interests would be welcome (but practically, for smaller businesses this will be a secured class of 1).

5. Encourage new financing – exempt new financing contained in the restructuring plan from avoidance actions. Member States may also provide for super-priority status to new financing

The UK regime largely exempts new financing from avoidance actions – particularly where new money is provided. The one exception to this is the possible challenge to a floating charge where this does not simply secure new money (eg as security to an overdraft facility, which will not always be fully drawn down).

There is currently no provision for forcing super priority status for new funding. To a certain extent this is possible in an administration where new funding is repayable as an expense of the administration prior to non-fixed charge creditors.

The existence of the floating charge covering all assets of the company means that there are frequently no uncharged assets available to secure new funding. To be effective, super-priority status would therefore have to be able to over-reach the floating charge; this would constitute a serious change to the basis of UK security arrangements and could have knock on effects on the cost of debt financing. In practice, the priority afforded to new funding is achieved through consensual negotiation in informal restructurings in the UK.

6. Reduce the involvement of courts – a flexible framework, which allows court involvement to be limited to granting a moratorium and confirming the plan + requiring courts to rule in principle in written procedure

The UK regime is already light touch regarding court involvement and the effect of the above could actually be to increase court involvement in UK restructurings.

Facilitating Negotiations on Restructuring Plans

8. To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

Debtors should be able to enter a process for restructuring their business without the need to formally open court proceedings.

CVAs and most administration proceedings start out of court, and consensual restructurings do not involve the court, so the UK meets this part of the recommendation. However, schemes do require an application to court to start them.

The appointment of a mediator or supervisor by the court should not be compulsory, but rather be made on a case by case basis where it considers such appointment necessary.

There is no formal independent mediator position on a consensual restructuring, albeit a lender may play a lead role under the London Approach, or a professional may play a role mediating or coordinating the stakeholder negotiations.

A nominee, then supervisor is appointed in a CVA although not by a court, unless "court" is very widely defined. Similarly, it is not unusual but not compulsory for there to be a supervisor for a scheme, and the appointment of the supervisor arise under the scheme which is sanctioned by the court.

Outside of these procedures there is no process for appointing a formal mediator or supervisor. Please see our comments on this point in the answer to question 7 above.

The debtors should have the right to request a court to grant a temporary stay of individual enforcement actions lodged by creditors, including secured and preferential creditors, who may otherwise hamper the prospects of a restructuring plan. The stay should not interfere with the performance of on-going contracts.

A stay is available on the filing of a notice of intention to appoint an administrator or the appointment of an administrator, but this is automatic and occurs without a request to the court. Creditors can apply to the court (or to the administrator) to lift the stay in relation to their particular action. There is therefore a process by which a stay can be put in place, but (other than the very short period afforded by the notice of intention to appoint an administrator) this requires the opening of an insolvency process which is likely to be value destroying.

A stay is also available on application by the company directors in a small company CVA. However, this is rarely used as it requires that the nominee to provide a statement of opinion that the company has sufficient funding to continue trading during the period of the stay – in the circumstances where the company has sufficient funding it is unlikely to require a stay and vice versa. In addition, the nominee is required to monitor the company during this period without having any real power other than to withdraw, yet creating a potential risk for the nominee.

The Recommendation states that the stay should not interfere with the performance of ongoing contracts, which is the correct approach. However, many contracts have clauses which allow termination on insolvency and it is likely that these would be widened to incorporate any stay. If the stay could be made such that it did not automatically trigger termination clauses in contracts (like the ability in chapter 11 proceedings in the USA to be able to oblige continuation of valuable contracts (adoption) in return for curing any defaults in them) it would make the moratorium more effective in terms of increasing the chance of business rescue.

9. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

[The operational objectives on facilitating negotiations on restructuring plans are:

- **Improve chances of negotiations by allowing the debtor a breathing space from enforcement actions**
- **Facilitating the continuation of the debtor's business**
- **Allow for limited court involvement]**

Debtors in the UK are able to use the UK regime without use of the courts in the vast majority of cases due to (a) the turnaround culture and expertise that the UK has developed and (b) the provisions regarding wrongful trading not being too restrictive so that they sensibly allow directors to cause a company to continue to trade where they reasonably believe there is the prospect of avoiding insolvent liquidation. It is beneficial to turnaround that there is a light touch approach regarding court involvement.

The ease of putting a company into administration combined with the possibility of undertaking a pre-packaged sale of the business and assets immediately post administration provide a powerful back-up tool for preserving the business as a going concern should it be clear that consensual / informal restructuring negotiations will not deliver a rescue of the company itself.

In the UK, the court is not involved in a supervisory capacity for a CVA which is cost effective and also appropriate, given the safeguard that there is the ability to appeal to the court if there is unfair prejudice or material irregularity. Similarly, the court is only lightly involved in schemes again, without a supervisory function barring a review for unfair prejudice.

10. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?

We think that a key advantage of the consensual / informal approach to restructuring is that it can be carried out confidentially. If a stay is put in place, then it is inevitable that the publication of this will mean that confidence in the business will be damaged. The stay could be more effective if law could provide that the creation of the stay did not automatically trigger termination clauses in contracts. The ability to be able to oblige the continuation of valuable contracts in return for curing any defaults in them could make the stay more effective in terms of increasing the chance of business rescue.

We think that the obvious place for a stay to be introduced and strengthened is with regard to CVAs. The introduction of a moratorium for CVAs on larger companies would enable the breathing space for these to be used more frequently to deliver viable restructurings.

The requirement of the nominee in a small company CVA to make a statement that in their opinion the company has sufficient funding to continue trading during the moratorium means that in practice an application for a moratorium is rarely sought; whether or not the company has sufficient funding is often subject to factors outside the control of the debtor or knowledge of the nominee, such as whether contractual counterparties will terminate contracts or whether business confidence collapses. We think this could be replaced with a more general statement of opinion that the moratorium and proposed arrangement represent a better outcome for creditors as a whole than would be likely if the company was to enter liquidation.

Aside from the requirement for the nominee's opinion on funding above, we think that a process similar to the existing application for a moratorium under the small companies CVA could be used for initiating a stay: filing specified information with the court, following which the moratorium is automatic, subject to appeal by creditors to the court.

The recommendation envisages the stay being available for up to 4 months and extendable by the court for up to 12 months. The small companies moratorium lasts for up to 28 days whilst meetings of members and creditors are called and can be extended by up to 2 months with the agreement of the members and creditors. In the context of a CVA, the existing periods seem reasonable as the aim is to stabilise the business whilst already drafted arrangements are considered by the members and creditors.

Where a moratorium is required prior to drafting of a proposed arrangement, administration is currently available to facilitate this.

Because of the effect of the loss of business confidence that would be caused by the publication of a moratorium, we don't think there is a case for expanding the availability of a stay other than for CVAs.

11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

Yes.

Court involvement in the UK, particularly where it involves hearings in front of a judge, is very expensive. If there are professionals involved who are already bound by professional codes of conduct to act correctly with regards to restructuring arrangements, the involvement of a court to instigate or oversee such a process adds little of value whilst costing a lot. Involvement of the courts should therefore be the exception where a party has a genuine concern that they are being unfairly prejudiced by the proposed restructuring.

We consider that the involvement of the court being limited to the filing of prescribed documents to instigate proceedings or protections is a cost effective and efficient approach.

Restructuring Plans

12. To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?

The recommendation sets out the following on the contents of restructuring plans:

15. Member states should ensure that courts can confirm plans expediently, and in principle in written procedure. They should lay down clear and specific provisions on the content of restructuring plans. Restructuring plans should contain a detailed description of the following elements:

- i. Clear and complete identification of the creditors affected**
- ii. the effects of the restructuring plan on individual debts or categories of debts**
- iii. the position taken by affected creditors on the restructuring plan**
- iv. if applicable, the conditions for new financing**
- v. the potential of the plan to prevent insolvency of the debtor and ensure the viability of the business**

Whilst schemes are sanctioned by the court, consensual restructurings, CVAs and administrations are not. If the definition of court is widely defined to include meetings of creditors and members, then the UK regime for CVAs and administrators proposals would meet this requirement. However, the wording suggests that any restructuring plan must have two stages: agreement by creditors and confirmation by court, which would seem to disallow the possibility of the creditors meetings themselves acting as a confirmation by court.

If it is necessary to bring in a confirmation by court for the UK procedure, we think this should be automatic on the filing with the court of the report of the agreement of the CVA by the creditors and members meetings, or the creditors' approval of the administrators proposals, subject to the right of appeal to the court by creditors affected. It is possible that the requirement for court sanction in a scheme could move to written approval to cut costs, but it is likely that hearings will still be needed for complex cases.

The recommended information disclosures are already reported upon in restructurings via administration/CVA/scheme by virtue of best practice and professional regulations where not prescribed by law.

Paras 16 – 20: adoption of restructuring plans by creditors

This recommends voting on a plan by both unsecured and secured classes of creditor by majority voting within the classes, and need for court sanction if that is obtained.

This already exists in schemes. Class voting does not exist in CVAs but could usefully do so to make the voting process fairer and less at risk of challenge; if class voting was introduced then it would be a sensible safeguard to introduce court supervision of the construction of the classes as that is usually a contentious area. The downside of introducing classes into CVAs is that it could unduly complicate the procedure and add to the expense and the time to put the procedure in place.

Paras 21 – 22: Court confirmation of the restructuring plan and rights of creditors

Restructuring plans which affect the interests of dissenting creditors or make provision for new financing should be confirmed by a court in order to become binding.

The conditions under which a restructuring plan can be confirmed should include the following:

- **It protects the legitimate interests of creditors**
- **All creditors likely to be affected have been notified**
- **Dissenting creditors are not worse off than in a liquidation or going concern sale scenario**
- **Any new financing does not unfairly prejudice dissenting creditors**

This already exists for schemes except (i) schemes also bind affected creditors that may not have been notified, which is a strength when dealing with contingent liabilities with unknown populations (e.g. product liability, insurance run-off schemes) and (ii) in practice distressed schemes usually only compare to liquidation.

As noted above, a court approval process does not exist for CVAs, but creditors have a right to appeal the approval decision on the grounds of unfair prejudice or material irregularity. The introduction of a formal sanctioning process would add to the costs of a CVA. However, for cross border cases, the option of a formal court judgment on a restructuring plan is likely to make it easier for the plan to be recognised in other jurisdictions.

Overall, we would not want to see court confirmation of plans already approved by creditors introduced and made mandatory as a result of this Recommendation, as it would add cost and delay and make the process less effective.

Paras 23 – 24: The courts should be able to reject a plan that clearly does not have any prospect of preventing the insolvency of the debtor. Affected creditors have the right to formulate objections and an appeal mechanism. Implementation of the plan should not in principle be held up pending appeal.

The concept of a court rejecting a restructuring plan that appears unlikely to avoid insolvency does not exist in a CVA. That decision is for creditors as the affected stakeholders. Sometimes creditors will agree to a high risk (of insolvency) CVA on the basis that if the debtor business continues for a period it will at least allow them more time to prepare their own affairs to mitigate the impact of potential failure of the debtor. In other cases the CVA is not used as a restructuring tool but as a distribution mechanism. The CVA procedure does already have a creditor appeal mechanism.

Whilst a court is involved in supervising a scheme it does not scrutinise the likelihood of ultimate business failure as it basically follows the decisions of the creditors who will generally be better placed to assess this. Instead the court reviews the composition of the creditor classes at the first hearing and that there is no unfair prejudice in the agreed plan at the second hearing.

Para 25 – 26: the restructuring plan should be binding on all affected creditors where adopted by unanimity. Restructuring plans sanctioned by the courts should be binding on all identified, affected creditors.

The CVA process does not require court sanction whether or not there is unanimity and in both eventualities the 28 day right of appeal exists. Scheme requires courts sanction whether or not there is unanimity.

13. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

The Commission's key operational objective relevant to this section is: disallow minority creditors to jeopardise restructuring effort.

One of the key objectives for the statutory purpose of administration is to achieve a better outcome for the creditors as a whole than would be achieved in a liquidation of the company. This principle also underlies the ability to trade a business on outside insolvency protection whilst seeking to negotiate a restructuring plan. Having a principle to guide the restructuring process rather than a rigid set of rules allows debtors, professionals and courts to be commercial, practical and creative in arriving at restructuring solutions, and this is a key feature in the success of the UK in restructuring businesses.

The trading administration procedure creates a moratorium whilst a CVA, scheme, sale or a liquidation type exit is considered.

The scheme has the ability to deal with unknown contingent creditors.

14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

The UK regime does meet the EC recommendation already except it has less court involvement than the EC envisages.

There is already strong ability to swiftly cram down creditors using either pre pack administrations, CVAs or Schemes.

Protection for New Financing

15. To what extent does the UK regime already provide protection for new financing?

There is no specific protection for interim new financing in the UK regime in either the pre insolvency or insolvency process phases. New financing can be safely raised post the implementation of a restructuring plan typically either (i) through an entity whose creditors have been crammed down, or (ii) through a new entity set up for the purpose.

An administrator does have the power to raise or borrow money and grant security over the property of the company under Schedule B1 Insolvency Act 1986 but as noted above, there is no specific protection for a lender. Funding raised by the administrator is repayable as an expense of the administration in priority to non-fixed charge creditors.

In consensual restructurings it is customary for there to be agreement between lenders granting priority to new funding.

16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

Not at the interim stage where a restructuring plan has not yet been agreed. New interim finance only tends to be raised:

- From existing lenders as a strategy to protect their historic positions (i.e they are willing to risk not recovering the new finance but in the circumstances it is usually very limited to bridge a short timeframe), or
- To acquire new (typically working capital) assets that can be proffered as security.

New finance does tend to be raised for most restructurings but only subject to and upon execution of an agreed restructuring plan whereby creditors are crammed down or the business sold into a new 'clean' entity which can safely raise finance.

17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

As noted above, raising finance once a restructuring plan has been agreed and implemented is already commonly arranged, so the EC recommendation to allow funding following an agreed restructuring plan is not fixing a problem that exists.

The difficulty is with raising new interim finance when a restructuring has not yet been agreed and implemented. If the EC recommendation addressed this by exempting new financing from void or unenforceable challenges etc. that would be welcome by both debtors and the lending community alike. In the USA for example, there is a very active market in providing debt to distressed companies and many of those lenders are also common to the UK, so there is clearly an appetite. In return for protecting new financing there need to be safeguards for existing creditors who should not be unfairly prejudiced.

5. Second Chance for Entrepreneurs

18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

The UK personal insolvency regime does deliver a second chance for entrepreneurs by a range of provisions. These include a choice of insolvency process to accommodate different individual circumstances, the availability of early discharge (usually after 12 months), and provision for debtors to retain certain assets and a reasonable proportion of their earnings, to support themselves and their dependants.

The UK personal insolvency legislation was heavily revised in 2004, and there have been further changes since (eg the introduction of Debt Relief Orders in 2009). These changes have reduced or removed some of the restrictions on debtors and barriers to their future financial success. In particular, discharge periods were shortened from 3 years to 12 months, where there is no evidence of wrongdoing. The discharge period was amended in England and Wales in April 2004, whereas Scotland moved to a 12 month discharge more recently (2008), which was agreed after full debate and taking into consideration the impact – positive and negative - the same measure had made in England and Wales.

The UK's 12 month automatic discharge period is well within the 3 year period suggested by the Commission's recommendation, and no additional sanctions or extended discharge periods are imposed against honest debtors who fail more than once. Nor does discharge require the involvement of the court, and even where a debtor requests a certificate of discharge (which is rare) this can be dealt with by the court (the Accountant in Bankruptcy in Scotland) under an administrative process. The position is very different in some other EC Member States, which has been a factor in the emergence of 'bankruptcy tourism' in the UK in recent years, and is possibly a factor in the Commission's aim of seeking greater harmony between Member States.

There is flexibility within the UK regime for debtors to use the Individual Voluntary Arrangement ('IVA') or Protected Trust Deed ("PTD") process to avoid some of the strictures imposed by bankruptcy, or to retain certain assets or continue trading. Creditors will usually expect something in exchange for supporting such an arrangement, which may involve deferring the debtor's discharge from his liabilities, and the risk that failure of the IVA or PTD may result in bankruptcy. For example: under an IVA or PTD, payment of income contributions may run for longer than the 3 year period that applies under bankruptcy, to give a better return to creditors. The Commission's suggested aim of debtors being fully discharged within 3 years might conflict with such arrangements, and leave debtors with a reduced range of options.

A key aim of the current UK regime is to maintain an appropriate balance between giving debtors a second chance, and dealing effectively with those guilty of misconduct either before or after they became insolvent. On the whole, this balance is achieved. Sanctions are available, through measures like suspension/deferral of discharge, Bankruptcy Restrictions Orders/Undertakings ('BROs/BRUs) and Suspected Offences Reports, to regulate the conduct of those found to have been irresponsible, reckless or otherwise culpable. There is, however, concern that the numbers of restrictions obtained or prosecutions taken is limited because of resource constraints within the relevant government agencies, and that the punishment of wrongdoers could be more effective. There is also a lack of clarity around how those subject to bankruptcy restrictions are monitored to ensure the penalties are effective.

In establishing a regime more conducive to entrepreneurial behaviour, there are instances where the powers of the Trustee have been weakened, potentially to the detriment of creditors. For instance, there can be a conflict between the 12 month discharge and the 3 year period over which income contributions are usually collected. When a debtor fails to maintain income payments, it can be more costly and difficult to enforce the debtor's cooperation after discharge has been granted.

It should also be noted that there are factors outside the ambit of the UK insolvency regime that can adversely affect a debtor's ability or appetite to take a second chance. It may be difficult for a debtor to open a bank account, or obtain credit even years after discharge. Insolvency remains a stigma and, in certain professions, it can still be a bar to employment.

19. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

The structure of the UK regime, which allows a minimum insolvency period of 12 months, the ability to obtain an automatic discharge from debts after that period without the need for a court application, and the provisions which deal with the sanction of a debtor in relation to conduct both prior to and after the date of insolvency, appear to be broadly in line with the Commission's objective to provide a second chance for entrepreneurs.

In the UK, during the period in which the debtor is undischarged from their debts, the debtor is unable to act in the formation, promotion or management of a limited company. In the event that the period of bankruptcy is extended by the Court, if a Bankruptcy Restriction Order is made by the Court, or if a Bankruptcy Restrictions Undertaking is entered into by the debtor, the period during which the debtor is unable to be involved in the management of a limited company is also extended, and this also acts as an effective deterrent to discourage entrepreneurs who have acted dishonestly or in bad faith either prior to or post their bankruptcy, particularly where the debtor has had a former involvement in the management of a corporate entity.

The UK regime also allows a Trustee to remain in office beyond the point of the debtor's discharge to ensure that the estate is realised in full, without affecting the debtor's discharge and the ability of an entrepreneur to establish themselves in business again.

Furthermore, legislation changes in Scotland, which come into force in April 2015, remove the provision for the automatic discharge of a debtor altogether and make the debtor's discharge entirely dependent on his/her conduct both prior to and post the date of bankruptcy.

20. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

As set out above, the UK regime currently appears to meet the Commission's criteria. It offers entrepreneurs an opportunity to discharge their debts, in the event that there have been no matters of misconduct or dishonesty, in 12 months, which is well within the period recommended by the Commission. As noted above, the various processes whereby the debtor can be subject to conditions which prevent their ability to continue in business where dishonesty is proven or the debtor has acted in bad faith, are available to deter such behaviour.

6. Forward Look

21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider?

For example:

- Developing EU principles for fast, efficient out of court rescue procedures for small companies.
- Developing the conditions for rescue finance.

If so, what should the Commission consider?

22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

The different domestic insolvency laws do create problems for cross border insolvencies and restructurings. For example, where conducting a restructuring of a group with operations across Europe, a significant part of the cost incurred resulted from the need to take legal advice in each of the jurisdictions involved.

Key differences in the insolvency laws create problems for practitioners dealing with a cross-border insolvency. For example, the different underlying objective for the different insolvency regimes, ranging from the UK at the creditor friendly end, to jurisdictions which are much more debtor friendly, or where there is priority in preserving jobs and employment. Tensions between these underlying priorities of the insolvency laws make it difficult to deal with pan EU groups which are subject to insolvency proceedings under more than one jurisdiction.

Another example where there remains considerable variance is in the priority of creditors. There is considerable scope for simplification of creditor priority, particularly in removing layers of preferential claims in certain states.

The European Regulation on Insolvency Proceedings and the possibility of shifting COMI to take advantage of more efficient insolvency regimes has had a significant impact in improving insolvency regimes across the EU. This competitive effect results from the differences in regimes and means states will need to continue to develop their insolvency regimes to keep them competitive; this competitive tension could help a more rapid development of insolvency law than would otherwise be the case, including in the UK.

23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?

As noted above, the competitive tension between different regimes resulting from the introduction of the European Regulation on Insolvency Proceedings has resulted in greater harmonisation and significant improvement in many of the domestic laws across the EU. Keeping the differentials means that there is greater competitive incentive to keep improving and developing the various insolvency and restructuring regimes. Harmonisation could bring greater certainty for investors and creditors and lower the cost of doing business, but it would also require greater agreement on the purpose of insolvency (return to creditors / saving debtors/ protecting employment). In addition, other legal, regulatory or cultural differences could mean that the impact of harmonisation would be less than expected.

If there is a desire to drive harmonisation forward, then this could be delivered more quickly by putting in place a parallel EU insolvency process for cross-border businesses, with a choice of either using a domestic proceeding or the EU proceeding available to debtors with cross border operations. This would be likely to accelerate harmonisation towards the EU process. Clearly this would require a great deal of thought prior to implementation, not least as it could materially affect fund raising on capital markets in the EU.

24. Do you have any other comments?



EUROPEAN COMMISSION RECOMMENDATION ON A NEW APPROACH TO BUSINESS FAILURE AND INSOLVENCY

Response by the Association of Business Recovery Professionals ('R3') to the Call for Evidence issued by The Insolvency Service in February 2015

Introduction

1. R3 represents insolvency practitioners authorised to practise in all jurisdictions of the UK. Over 97% of licensed insolvency practitioners are members of R3. R3's membership also includes insolvency lawyers and other professionals who work in the field of insolvency and corporate recovery.
2. The Commission's Recommendations follow a consultation on broadly the same subject issued in July 2013. In some of our answers to the questions posed in the Call for Evidence we draw on our response to the earlier Commission consultation.

Summary

3. As noted in the Call for Evidence, the UK already has an insolvency regime which is highly regarded, and is generally considered to rescue businesses faster and at lower cost than many other regimes. This is evidenced by the World Bank's annual *Doing Business* reports. Previously the UK has ranked at the 7th best according to the World Bank. Although the 2015 report places the UK in 15th position, this appears to be the result of a change in methodology that gives greater weight to the adoption of Chapter 11 type procedures. The 2015 World Bank data still shows the UK in 6th position as regards returns to creditors, and 7th in terms of the time taken to complete the process.
4. According to a ComRes survey, in 2012 the UK insolvency profession rescued approximately 6,100 businesses and saved some 750,000 jobs.¹
5. We believe that in most respects the UK regime already meets, or exceeds, the criteria for a good insolvency and rescue framework set out in the Commission's Recommendations. The exceptions would be the recommended full debtor in possession procedure, and the cramdown of dissentient classes, which we comment on further below.

¹ *The Value of the Insolvency Industry*, ComRes, May 2013

Answers to specific questions

Q 1 In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

The Commission's Recommendations deal primarily with rules and procedural matters. However, the success of any formal regime for insolvency and restructuring depends on a number of other factors.

First, insolvency law does not exist in isolation, but rests on a body of other laws which govern fundamental issues such as security rights, contract law, company law, the law of trusts, tax and employment law, and a whole host of other relationships. These other areas of law also affect the ability to restructure outside of a formal insolvency process.

Secondly, the effectiveness of a legislative regime depends not only on the rules themselves, but also on the quality of the courts which enforce them, the ability of the practitioners who implement them, and the general prevailing commercial and business culture. These vary considerably across the various EU member states.

Thirdly, the emphasis on rescue should not obscure the need to recognise that in an open market economy, enterprises that destroy value should be allowed to fail and their resources redeployed for more productive use elsewhere (rather than risk distorting free market competition). Rescue cannot be viewed in isolation from insolvency.

These important points are not addressed in the Commission document. In so far as the Recommendations are intended to be of benefit in cross-border situations the effects are therefore likely to be helpful, but not a panacea.

See also our answer to Question 22 below.

Q 2 Are the terms used by the Commission that are explicitly defined, clear?

'Likelihood of insolvency' is in need of more precise definition. By what criteria is 'likelihood' to be assessed, over what period, and by whom?

Q 3 Are any of the explicit definitions problematic in a UK context?

Presumably (c) is intended to refer not just to court actions for recovery, but also to self-help remedies such as distraint and commercial rent arrears recovery.

Q 4 Are there any other terms, aside from 'an honest bankrupt' and 'a second chance', used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

We agree with the comments set out in the Call for Evidence on the use of these terms. In our response to the Commission's consultation on this subject issued in July 2013 we pointed out that in the UK the test of culpability is essentially a negative one: processes exist for disqualifying directors and imposing bankruptcy

restrictions orders, and in the absence of such sanctions there is a presumption that a person is fit to continue in business.

Q 5 To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

As noted in the Call for Evidence, the UK already has a strong preventative framework, much of which operates outside formal insolvency. In addition, Companies Act schemes of arrangement ('Schemes') (which is a non-insolvency process), administrations and company voluntary arrangements (both of which are formal insolvency processes) all provide mechanisms for successful restructurings.

The effectiveness of the UK regime can be seen most clearly by examining Schemes. Schemes are extremely flexible, and can be used in a wide variety of situations. They can be used to modify the rights of individual classes of creditors, including secured creditors and creditors which would enjoy preferential status in formal insolvencies, and can bind dissenting creditors, thereby avoiding the problems that can be caused by 'hold-outs'. They can also be used in conjunction with formal insolvency processes where the circumstances make this advantageous, for example to obtain a stay against creditor action.

The attraction of schemes can be seen by the number of foreign companies which use the UK regime for restructuring. A recent text book includes a table showing that in the years from 2009 to 2013 over £20 billion of corporate debt was restructured using schemes implemented in relation to companies incorporated throughout Europe and further afield.²

As far as timing is concerned, all the UK statutory processes can be implemented with minimal delay. We therefore think that the UK regime already adequately provides for objective (a). The position as regards (b) and (c) is less straightforward.

Objective (b) is already largely met in the case of informal restructurings and Schemes, but not in formal insolvency appointments. Objective (c) is provided for in administrations, and effectively in CVAs after the arrangement is approved. On the other hand the promulgation of a Scheme does not in itself lead to a stay on creditor action (unsurprisingly, as most Schemes are implemented by companies which are not insolvent), but a moratorium may be achieved by using administration or provisional liquidation in conjunction with the scheme in appropriate circumstances. There have also been cases where the court has ordered a stay of proceedings to avoid jeopardising a Scheme.³ Objective (c) is therefore already provided for under the UK regime to some extent. More problematic is the coexistence of objectives (b) and (c) within a single statutory process.

The UK practice has broadly been that where a debtor is protected by a stay against creditor enforcement action, the interests of the creditors need to be protected by the appointment of an independent third party. The imposition of a stay while leaving existing management in control of the business, except in the case of consensual standstill arrangements or the very limited stay when notice of appointment of an

² *Schemes of Arrangement in Corporate Restructuring*, C Pilkington, 2013

³ *Sea Assets Ltd v PT Garuda Indonesia (No2)* 27 June 2001 (unreported); *Bluecrest Mercantile BV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm.)

administrator is filed or in the CVA context (discussed below) where an insolvency practitioner acts as nominee during the promulgation of the arrangement and takes over as supervisor afterwards, is a relatively alien concept in the UK. Any move to introduce a system involving the coexistence both of objectives (b) and (c) will need to be subject to extensive consultation.

The moratorium for small companies planning a CVA is a form of hybrid system in which there is a stay on creditor action, while requiring an independent nominee to monitor the company's management and affairs. This carries the risk of exposing the nominee to liability for matters over which he has no control, and the process has been little used.⁴ The Insolvency Service consulted on a proposal to extend such a scheme in 2009, but this has not been pursued further.⁵

With regard to the binding of creditors, UK law allows for the binding of dissenting creditors within the affected class(es) in Schemes, and to that extent already provides for objective (d). One of the benefits of Schemes is that they can be used to modify the rights of specific classes of creditors while leaving other classes unaffected. The cram down of out of the money classes has its attractions, but there would need to be adequate safeguards. See further our answer to Question 14.

A CVA, by contrast, cannot modify the rights of secured or preferential creditors without their consent, although all unsecured creditors are bound by the terms of the arrangement if it comes into effect, so is partially consistent with objective (d).

As far as we are aware, the UK regime adequately provides for objective (e).

Q 6 Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

As stated in our response to Question 1 above, other factors contribute to a successful restructuring and insolvency regime. In the UK we benefit from an effective and efficient court system with an experienced judiciary. The court system operates on a transparent basis and provides stakeholders with predictability and certainty. We also have the benefit of experienced practitioners to facilitate and implement the various restructuring and insolvency tools. These tools have been tried and tested over a significant period of time; the importance of having an established regime which is recognised (including on an international level) should not be underestimated.

Q 7 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

We believe that the UK regime already meets the criteria to a considerable degree,

⁴ Of the respondents to an R3 survey conducted in 2009, 55% gave unacceptable risk to the nominee as a reason why the existing moratorium procedure is not used, and 62% said that they thought this would also apply in the case of medium and large companies. Of other reasons given for the limited use of the moratorium procedure, 36% thought that it was because the directors did not deem it necessary as there was no imminent threat from creditors, 25% thought that it was because the directors did not want to incur the associated costs, and 22% suggested that it was because the directors did not want details of the moratorium published.

⁵ *Encouraging Company Rescue – A Consultation*, The Insolvency Service, June 2009

but it does have some shortcomings. For example, there can be disadvantages in running a Scheme with a pre-packaged administration, notably the risk of termination of contracts in administration. A cramdown mechanism might help to overcome this, but as noted above careful thought would need to be given to its design. The Commission Recommendation seems to assume that the use of a cramdown procedure is in itself a useful and meaningful insolvency comparator, without any explanation as to why this criterion was selected.

Q 8 To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

We agree with the assessment of the Call for Evidence. Companies can formulate a plan without court involvement in the case of Schemes and CVAs, although in Schemes court approval is needed to call a creditors' meetings. We believe this early access to courts at the leave to convene stage is beneficial.

Q 9 Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

Early access to the courts for confirming classes so that a Scheme does not proceed on a basis which is bound to fail.

Q 10 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?

No. See our comments in answer to Question 5 regarding a stay on enforcement actions.

Q 11 Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

See comments in answer to Question 8 above.

Q 12 To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?

As regards the detailed contents of restructuring plans, we believe that the UK already complies with the Commission's recommendations. The information required to be provided in Scheme documentation, CVA proposals and administrators' proposals easily satisfies, or even exceeds, the recommended requirements.

As for the binding of creditors, we agree with the Government's assessment that to allow certain classes of creditor to bind other dissentient classes would be a move away from the existing domestic regime, but as we have suggested above it is an idea that might be worth considering further. In the case of Schemes it would be important to retain the ability to make Schemes binding on certain classes only while leaving other classes unaffected, as the majority of Schemes are implemented by solvent companies for reasons which have nothing to do with financial distress, for example for capital restructurings.

Q 13 Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

No.

Q 14 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

The cramdown of out of the money classes has until now only been possible in the UK by means of a pre-pack sale of the business and assets through an insolvency process, which can be a rather blunt tool which carries a number of transaction risks (such as contract default, licence terminations, etc). To facilitate more restructurings (and survival of the corporate entity) it may be better to develop a wider cramdown power; however, before doing this there needs to be wider research and consultation on the impact – such as how the value-break is determined, how abuses of the process can be minimised, and the impact on competitiveness in the free market economy, in particular in relation to any impact this might have on access to finance and the cost of that finance.

Q 15 To what extent does the UK regime already provide protection for new financing?

We suggest that the UK regime already deals satisfactorily with this question. In administrations, new finance is payable as an expense of the administration out of the assets of the company. This is supported by the charge on floating charge assets provided by paragraph 99 of Schedule B1 to the Insolvency Act 1986. As administrator also has power to grant security over the company's assets. In the case of a CVA, the terms of the proposal must provide how the business is to be financed during the course of the arrangement, what security, if any, is to be provided, and the rights of an existing secured creditor cannot be compromised without their consent.

Q 16 Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

No.

Q 17 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

No.

Q 18 To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

The section of the Recommendations dealing with discharge is expressed in similar terms to the Commission's consultation document issued in July 2013. In our response to that consultation we pointed out that the concept of 'discharge' has no meaning in the context of corporate insolvency, and we assume that the discharge recommendations are intended to apply only to personal bankruptcies. As far as the period of disqualification for delinquent directors is concerned, we believe it would be undesirable to limit it to three years.

We also pointed out that it is important to distinguish between the period of discharge, i.e. the period of time after which the debtor is released from his bankruptcy debts and ceases to be subject to the restrictions of bankruptcy, and the period of time which it takes for the trustee to deal with the assets comprised in the estate. This is unrelated to the period of discharge, and may be a longer or a shorter time. It is neither appropriate nor desirable to place a statutory time limit on the administration of insolvent estates. The circumstances of the case may make it impossible to comply without applying for an extension of time, and it may act against the interests of the creditors by impeding protracted realisations or the pursuit of litigation.

As noted in our answer to Question 4 above, in the absence of any sanctions under the directors' disqualification or bankruptcy restrictions order regimes, there is no impediment in the UK to a director or former bankrupt from continuing to operate in business.

Q 19 Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

No.

Q 20 Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

The Commission recommends a three year maximum period for discharge from bankruptcy. At present in England and Wales bankrupts are automatically discharged after one year, except in cases where discharge is suspended because of the conduct of the debtor.

Prior to 2004, the standard term of bankruptcy in England and Wales was three years, but was reduced to one year following the introduction of the Enterprise Act 2002. This change was introduced with the aim of promoting entrepreneurship by allowing those who had accrued debts through their business ventures to be swiftly rehabilitated and re-entered into the economic cycle. However, given that the vast majority of bankruptcies since 2004 have been domestic consumers rather than entrepreneurs in need of swift rehabilitation, it is difficult to see how a 12 month term of bankruptcy can still be justified. R3 has suggested elsewhere⁶ that the standard discharge period in England and Wales should revert to three years, to help redress the balance between bankrupt individuals and their creditors. This should be capable of extension to a maximum of 15 years for the most culpable. This would be in line with the Commission's Recommendations, and might also help to discourage bankruptcy tourism by making the UK regime slightly less appealing to foreign debtors.

It should be noted that the personal bankruptcy regime in Scotland differs from the rest of the UK both in the applicable law and procedures, including discharge. Also, the Scottish personal bankruptcy regime applies to partnerships constituted under the Partnership Act 1990.

In Scotland, as in England and Wales, bankrupts are currently automatically discharged after a period of one year. This was reduced from three years in 2008.

⁶ *The Personal Insolvency Landscape – A Way Forward for Formal Debt Relief*, January 2014
https://www.r3.org.uk/media/documents/policy/policy_papers/personal_insolvency/R3_Personal_Insolvency_Landscape_Jan_2014.pdf ; *Redressing the Balance: Strengthening the Bankruptcy Process and Recognising Prior Behaviour*
https://www.r3.org.uk/media/documents/policy/policy_papers/personal_insolvency/Redressing_the_balance.pdf

However, for bankruptcies commencing after 1 April 2015 the trustee will have to provide information about the conduct of the bankrupt to the Accountant in Bankruptcy after ten months. It will then be for the Accountant in Bankruptcy to decide whether discharge should be granted, and it will no longer be an automatic process. If the bankrupt cannot be traced, then the discharge can be deferred indefinitely. For debtors with minimal assets the discharge period will be six months.

Q 21 In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider? For example:

- **Developing EU principles for fast, efficient out of court rescue procedures for small companies.**
- **Developing the conditions for rescue finance.**

If so, what should the Commission consider?

We believe that the EU should try to minimise the differences between process and law for SME and large corporate as it inevitably leads to complications and weaknesses at the margin. Well-designed procedures should be suitable for all companies: simple enough for use by SMEs at appropriately low cost, and flexible and powerful enough to cater for all the complexities of larger and more difficult cases. Where procedures depend on the size of the company there will always be difficulties in the areas around the cut-off points, with potential for manipulation of the system.

Q 22 Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

Restructuring professionals seeking to save (and when unavoidable, liquidate) businesses and groups of companies operating in more than one Member State do have to consider carefully the different criteria which exist in each State. This can make it more difficult to coordinate cross border restructuring. However, the experience of our members is that differences in national laws are something that can be managed reasonably effectively, as: (a) they are just one set of factors that require such coordination; and (b) many businesses are not just limited to entities operating and established in European Member States.

Q 23 Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?

As noted in our answer to Question 1 above, insolvency law does not exist in isolation but rests on a foundation of other laws, most of which are not primarily insolvency related. There are many areas where harmonisation of insolvency law would not be possible without also harmonising some of these underlying areas of law. Furthermore, the success of any formal regime also depends on other factors, such as the effectiveness of the courts and practitioners. In view of the difficulty of achieving harmonisation in these areas, any harmonisation of insolvency or restructuring law in the near future is likely to be confined to relatively straightforward procedural matters.

Q 24 Do you have any other comments?

No.

Association of Business Recovery Professionals
16 March 2015



The Insolvency
Service

Response Form:

European Commission Recommendation
on a new approach to business failure
and insolvency

February 2015

1. General Information

How to respond

1.1 This is a template response form. If you would like to use an alternative format please do so in writing.

1.2 Please send completed short form responses to:
policy.unit@insolvency.gsi.gov.uk, or post to:

Nicholas Blaney
The Insolvency Service
4 Abbey Orchard Street
London
SW1P 2HT

General Information

1.3 What is your name, or the name of the organisation you represent?

Glen Bullivant FCICM

The Chartered Institute of Credit Management

1.4 If writing on behalf of an organisation, what is the size of your organisation?
(mark with an 'X' as appropriate)

0-9 employees (micro)	
10-49 employees (small)	
50-249 employees (medium)	
250+ (Large)	

1.5 If writing on behalf of an organisation, what type of organisation do you represent?

Charity/Social Enterprise

2. Introduction

1. In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

Insolvency legislation, be it for an individual or a corporate entity, is an important part of a thriving economy based on credit. The remedies available to creditors and debtors must be realistic and have a purpose other than retribution. In addition, insolvency legislation cannot be reviewed in isolation. Different countries have widely different approaches to credit facilities, company incorporation, director and individual responsibilities and the way that the legislation is enforced.

Whilst the overall aims and objectives are to be applauded in broad terms we are not convinced that the detail will meet the objectives. The objectives seem to suggest more court involvement whereas insolvency in England & Wales is trying to move away from court involvement. The objectives refer to the rights of dissenting creditors not being diluted. I can see this leading to litigation and legal argument resulting in a lack of positive action.

3. Definitions

2. Are the terms used by the Commission that are explicitly defined, clear?

The definitions used in **II. Definitions** of the Commission recommendation are clear.

3. Are any of the explicit definitions problematic in a UK context?

We cannot think of anything that causes any immediate problem.

4. Are there any other terms, aside from 'an honest bankrupt' and 'a second chance', used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

We do not believe so.

4. Preventative Restructuring Framework

Availability of a Restructuring Framework

5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

We believe that the UK regime reflects the wishes of the Commission's recommendations. Experience and legislation within the UK system has enabled the Administration process to develop and mature over the years to meet the needs of all parties ensuring engagement with, and responsibility for, actions from all parties.

Specifically for Element (b): Only the CVA procedure gives the corporate debtor full control during the process.

We do however believe the current regime to be appropriate and proportionate.

6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

Pre-pack administrations, in practice, can meet the 'second chance' objective.

7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

N/A

Facilitating Negotiations on Restructuring Plans

8. To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

The UK broadly meets the recommendations of the Commission although the recommendation that the debtor can use the process without the need for application to the court does cause concern. Any such process should involve a 3rd party such as an Insolvency Practitioner to prevent an abuse of the process.

9. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

Pre-pack administrations, in practice, can meet the 'second chance' objective.

10. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?

If a stay on enforcement action by creditors is required then the UK system provides sufficient options for the debtor. Creditors should expect a stay of execution to be for a reasonable period of time and the recommendation refers to the stay being no more than 4 months but can be extended up to 12 months. We believe this to be too long, and any stay needs to be "short and sharp" with a definite period of expiry to prevent abuse. The definition of "a significant amount of claims" is worthy of attention to provide consistency between procedures.

11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

There does need to be some court involvement to offer a “check and balance” to prevent abuse. The UK system seems to work well with a light touch involvement by the court in most procedures. This is something that should not be excluded. If processes are allowed to start without court involvement then substantial creditor agreement should be a pre-requisite.

Restructuring Plans

12. To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?

The UK regime broadly meets the recommendation of creditor involvement and acceptance of the wishes of the majority over the minority.

13. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

The CVA provides a solution that does not require court involvement and meets the objectives.

14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

We do not believe the ability to 'cram down' classes would improve the UK regime and would not support the recommendation. It would be likely introduce unnecessary layers and procedures likely to delay the implementation of rescue and restructuring plans.

Protection for New Financing

15. To what extent does the UK regime already provide protection for new financing?

The UK regime already provides protection, in my opinion, for new financing where that financing is clearly outlined in the rescue plan.

16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

We do not believe so.

17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

N/A

5. Second Chance for Entrepreneurs

18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

The UK insolvency regime provides a second chance for entrepreneurs. This philosophy is at the heart of the insolvency legislation and has developed over the years to provide the opportunity for people to “have a second chance” whilst retaining the power to prosecute the offender.

19. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

We do not believe so.

20. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

N/A

6. Forward Look

21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider?

For example:

- Developing EU principles for fast, efficient out of court rescue procedures for small companies.
- Developing the conditions for rescue finance.

If so, what should the Commission consider?

If harmonisation is the objective, there needs to be greater consistency across borders. Bankruptcy tourism and similar concepts need to be avoided and prevented.

22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

There is a problem with “bankruptcy tourism” for both corporate and personal insolvencies where debtors will move to take advantage of the “best” legislation for their purposes. We are not aware of this being a barrier to cross-border trade and investment.

23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?

We believe that some insolvency appointment office holders are not recognised by all European courts. Recognition of an insolvency office holder’s status across the EU would be beneficial and enable creative and appropriate solutions for financially distressed businesses.

Do you have any other comments?

The UK insolvency regime has much to commend it and the EU should recognise this in developing the system and procedures across Europe.



INSOLVENCY SERVICES CONSULTATION ON EU RECOMMENDATIONS

ICAEW welcomes the opportunity to comment on the call for evidence *European Commission Recommendation on a new approach to business failure and insolvency* issued by the Insolvency Service on 4 February 2015 a copy of which is available from this [link](#).

This ICAEW response of 19 March 2015 reflects consultation with the ICAEW Insolvency Committee which is a technical committee made up of Insolvency Practitioners working in large, medium and small practices. The Committee represents the views of ICAEW licence holders.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 144,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

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MAJOR POINTS

1. We believe that the UK's insolvency regime already meets the objectives set out in paragraph (1) of the Recommendation, namely to enable the efficient restructuring of viable enterprises in financial difficulty and to give honest entrepreneurs a second chance.
2. It is important to note that, in the UK, enterprises are free to seek help on restructuring at any time before they become formally insolvent, that we have a variety of alternative procedures and that there is a pool of skilled and experienced advisors available to assist them.
3. Different member states have fundamentally different approaches to insolvency and different social and legal frameworks, including on matters such as security rights and contract and employment laws. Attempts to harmonise particular aspects of insolvency on an EU wide basis may, therefore, adversely affect the coherence and efficiency of national regimes. There is an inherent risk of unintended consequences where laws or approaches of other member states are introduced into the UK's regime in a piecemeal way.
4. The UK's regime is well respected globally. While that is not a reason for the UK's approach to be adopted elsewhere, it is a reason for the UK government to adopt a cautious approach regarding changes that might affect the coherence of the UK's approach.
5. To the extent that the Recommendation is intended to result in a more debtor friendly regime, it should be noted that it may result in a reduced willingness of lenders and suppliers to extend credit in the first place. Making second chances easier may be at the expense of a first chance. The balance between debtors and creditors and, indeed, between different classes of creditor is a policy matter which we believe is best left to member states to determine and we do not comment further on that.
6. We are not convinced that this is an area where further harmonisation is in the interests of the UK. We are therefore commenting in a relatively general way on the assumption that the UK government will seek to preserve the current regime in the UK so far as possible.
7. The various insolvency procedures in the UK have different qualities which collectively afford a wide choice and flexibility for businesses and individuals to restructure. It is unclear to us whether the Recommendation applies to the procedures viewed collectively or individually.
8. In particular, it is unclear to us how the Recommendation on moratoriums would apply in the UK context in every case. In general, we would not favour extending moratoriums without careful consideration in the particular context. There is a risk that assets will be reduced to the detriment both of creditors and the prospects for continuing business. The Recommendation does not appear to provide safeguards or supervision in the moratorium period.
9. As regards discharge periods for bankrupt entrepreneurs (or, indeed, any individuals), there is a one year period for discharge from bankruptcy in the UK, but realisation and distribution continues after that time. It is important to distinguish between the release of the debtor from bankruptcy and the administration of the bankrupt estate. Administration of the estate may continue after three years (i.e. release of the debtor) and we see no reason to prevent that. As regards repayment plans, the parties involved may wish to agree a period longer than three years. We see no reason to preclude this. We also see no reason why courts should not be able to impose penalties for dishonest or reckless conduct which prevent discharge for a longer period.
10. With regard to Article 32(c) of the Recommendation, refers to provisions to safeguard the livelihood of the entrepreneur and his family by allowing them to keep certain assets. To the extent that this allows flexibility in relation to any discharge cut –off times, it is perhaps unproblematic, but it should not create any presumption that debtors would be entitled to keep any particular assets, such as private residences of families.

RESPONSES TO SPECIFIC QUESTIONS

Introduction

Q1: In general do you think the Commission's Recommendations if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

11. We do not think that the Recommendations can be considered independently from the legal framework in which they would apply which, as noted above, vary in a number of material ways between members states. The quality or effectiveness of infrastructure, such as courts also varies between member states so that the effects of the Recommendations on cross border insolvencies are likely to be limited.

Definitions

Q2: Are the terms used by the Commission that are explicitly defined, clear?

12. We do not believe that all the terminology used in the Recommendation would be suitable for legislative purposes, but as this is only a Recommendation, we do not comment in detail. As a general observation, UK government needs to be prepared to depart from language used in EU publications where this is necessarily to take account of existing legislation. Language should be precise and its meaning clear. The use of the term 'honest bankrupt' is therefore unhelpful. Our regime provides for director disqualification or bankruptcy restriction orders, or undertakings in lieu, in defined circumstances which may, or may not, involve 'dishonesty'.

Q3: Are any of the explicit definitions problematic in a UK context?

13. See answer to Q2 above.

Q4: Are there any other terms, aside from 'an honest bankrupt' and 'a second chance', used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

14. See answer to Q2 above.

Preventative Restructuring Framework

Q5: To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission's Recommendation?

15. We agree with the general observations made in the consultation document about the efficiency of the UK regime as a whole. It is unclear whether the 'framework' referred to means that a single insolvency procedure (or every insolvency procedure) should contain all the elements (a)-(e) or whether the framework could encompass a variety of alternative procedures which collectively contain the elements. The UK provides for a variety of approaches which collectively appear to meet the objectives. We would expect the UK government to be concerned should the Recommendation result in a reduction of the variety of approaches in the UK.
16. The Companies Act regime for schemes of arrangement provides a flexible tool for a variety of purposes, including restructuring of companies in financial difficulty, but is not a formal insolvency processes; this regime is widely used by foreign companies. In addition administration and company voluntary arrangements provide mechanisms for restructuring. Each has different features.

17. With regard to (b) it should be noted that, in an administration, while the company (ie the debtor as defined) keeps control of day-to-day operation of its business, the company is operated by the insolvency practitioner not the directors. CVA's would not appear to meet (b).
18. Schemes of arrangement may not involve a stay on creditor action. These arrangement are used in a variety of contexts, not just for companies in financial difficulty. Objective (c) would appear to be met in administrations and CVAs, but, except in limited circumstances, the existing management is not left in control of the business. Any proposals to change this to require both objectives (b) and (c) to be met by the same procedure would involve material changes to established UK law and practice and we trust would not be accepted by the UK government without more consideration and extensive consultation.
19. The Call for Evidence refers to a moratorium for small companies planning a CVA. We are unclear how this could be expected to work in practice.
20. As regards objective (d), the UK's schemes of arrangement regime provides that dissenting creditors, by class, may be bound whilst also leaving other classes unaffected. [*cram down of out of money classes?*] A CVA, however, cannot modify the rights of secured or preferential creditors without their consent although all unsecured creditors are bound.

Q6. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

21. See answer to Q5 above. Schemes of Arrangement, while not an insolvency procedure, are capable of delivering some elements of the Recommendation.

Q7. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

22. We do not believe that the UK regime should be changed merely because of any discrepancy between it and the Recommendation. Any concern at EU level would need to be scrutinised carefully regarding potential impact on the UK's insolvency regime as a whole, bearing in mind the effectiveness of our regime as a whole in meeting the underlying objectives of the Recommendation. See answer to Q5 above.

Facilitating Negotiations on Restructuring Plans

Q8. To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?

23. We agree with the general observations made in the consultation document about the flexibility of the UK regime. Again, the Recommendation does not seem to take into account the variety of options available to companies (and creditors) in the UK. [For instance, a scheme of arrangement does not involve any stay, but is a useful tool for companies.] As noted, administration involves the appointment of the official receiver or insolvency practitioner.

Q9. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

24. See Q8

Q10. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?

25. Although we consider that the UK regime in total does meet the criteria, we believe that if any elements of the Recommendation were to be introduced then it would be necessary to consult extensively to ensure that there are safeguards in the process. In the US there is a substantial degree of court supervision of a debtor in possession process which does not seem to have been fully considered here.

Q11. Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?

26. Yes, but a moratorium should require supervision.

Restructuring plans

Q12. To what extent does the UK regime deliver the elements in this section of the Commission's Recommendation?

27. We believe that the information required for schemes of arrangement, CVA proposals and administration proposals delivers the requirements for content of restructuring plans.
28. We agree with the assessment in the consultation document regarding the binding of creditors. In particular, there may be good reasons why schemes of arrangement may be designed to affect certain classes only. Any changes to the UK regime in this respect would require careful consideration.

Q13. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

29. We do not think so.

Q14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

30. Cram down may be helpful but should be subject to safeguards.

Protection for New Financing

Q15. To what extent does the UK regime already provide protection for new financing?

31. We believe that the UK regime provides a high level of protection, although each individual case will, of course, depend upon its facts..

Q16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

32. [New financing provided to administrations is an administration expense and therefore has priority over creditors. This supports rescue finance. However, security can only be granted if the existing secured creditors agree.]

Q17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

33. We do not believe so.

Second chance for entrepreneurs

Q18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

34. There is a short (1 year) term for non-culpable bankrupts. Directors of insolvent companies, unless pursued for misconduct, are free to take up new positions. We consider that the UK

delivers the Commission's objectives in this regard and indeed may be more flexible than is required, indeed it may be that the UK should review whether the effect of reducing the standard term of bankruptcy from three years to one year has met its objectives.

35. Of course, culpable directors may be disqualified for more than three years; it would be undesirable for the UK lose any discretion to set penalties of this kind.
36. The period of discharge referred to above should be distinguished from the time it takes for the trustee to deal with the assets from the estate. This is a separate matter and would be undesirable to impose statutory time limits on this as the time taken to recover assets may vary according to the circumstances.

Q19. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?

37. We do not believe so.

Q20. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

Forward look

Q21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider? For example:

Developing EU principles for fast, efficient out of court rescue procedures for small companies.

38. We do not support different procedures for small companies. The UK process is sufficiently flexible to deal with all sizes of companies.

Developing the conditions for rescue finance.

39. The UK seems to manage this well. It may be helpful to consider whether some form of "priming" so that rescue finance can take first ranking security would improve the provision of finance, but in general it is our experience that where there is a reasonable prospect of rescue the existing lenders are prepared to provide support. It is also worth noting that supply of credit to small businesses in the UK is influenced by many factors, not just the insolvency regime.

If so, what should the Commission consider?

40. N/A

Q22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

41. Cross-border insolvencies can give rise to complex issues for insolvency practitioners, but differences in insolvency laws themselves are only one aspect of this. Different languages, culture and practices as well as varying employment and other laws all need to be taken into account. International insolvency practitioners experience these issues globally not just in the EU.

Q23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?

42. Insolvency law relies on elements of almost every other area of law. Unless these are converged, insolvency law cannot be. We do not consider that harmonisation is necessary as the existing EU Insolvency Regulation (in its revised form) allows for an over-arching method of co-ordinating cross-border insolvencies within the EU.

Q24. Do you have any other comments?

43. No



The Insolvency
Service

Call for Evidence:

European Commission Recommendation on a new approach to business failure and insolvency

February 2015

1. General Information

1.1 This call for evidence will be of interest to entrepreneurs, business owners and directors, investors, financial institutions, insolvency practitioners, rescue professionals and the legal profession.

How to Respond

1.2 When responding, please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the call for evidence response form and, where applicable, how the views of members were assembled.

1.7 The responses to this call for evidence will be used to inform the UK's response to the Commission's review of the Recommendation, which is likely to occur in autumn 2015. The responses will also be used to inform the Government's contribution to any further discussions the Commission may seek to have on business failure and insolvency in the EU.

A BIS SERVICE

response to call for evidence from

Mira Makar MA FCA (Miss), witness
member SME Alliance Ltd



London 17 March 2015
www.inthepublicdomain.net

1. In general do you think the Commission's Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Commission's Recommendation?

1.1. No they would not and plainly so. Further they can be predicted to give rise to perverse effects. The Commission is stated to seek to predict human behaviour but has no empirical data on which to base such behavioural theory. Recommendations are not law. They must be compatible with the laws of each of the nation states respectively. They should not be like "guidelines" which co-exist with the law yet allow the law to be ignored with purported impunity. "Recommendations" sound very much like "guidelines".

1.2. To date the October 2012 EU directive aimed inter alia at the victims of the "insolvency regime" has not been brought into UK national law. This European protection is running two and a half years late with no sign of being enacted domestically. It is perverse to be promoting opportunistic wrongdoers exploiting the status quo during this time lag. These should be the ones curtailed. They are the ones from whom the state is obliged to provide protection.

DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

National Statistics

1.3. The relevant statistics fall into two categories. The first are those relating to loss of opportunity (including employment) and comparative measurements of returns to each of productive and financial capital. The second are those relating to the ease with which private sector wrongdoers can retain the proceeds of offending by locking into various devices that block come-back, with the risk disappearing in the global underwriting market. The mechanisms for achieving this are not mapped out (documented) by prosecutors. They continue unfettered. Consequently systemic breakdown has not been explicitly identified with the result that the aggregate "loss of opportunity" remains wholly unevaluated, both nationally and internationally.

1.4. Loss of opportunity in the current context manifests itself in enhanced returns to financial capital at the expense of returns to productive capital. Indicators are:

- the unlawful and irregular "pulling down" of personal and business estates (unchallenged) using straw "trustees", "receivers" or "administrators" with no standing, such that the risk of "come-back" can be extinguished (passed round the market anonymously until fully absorbed);
- the removal of barriers to change of ownership, "as though" estates have been abandoned and can be picked up by others who can register new title or permit such;
- the unchallenged theft of gross revenue streams involving bifurcating (contingent) liabilities, accounting on a "what you can get away with basis", together with the effective cancellation of the mandatory obligation to have a demonstrably independent audit;
- the complicity of limited liability partnerships (LLPs) with no assets at risk including those registered in places as Delaware, Caymen, BVI and with financial interest in the pre-determined outcome of transactions using financial instruments to defeat the statute of limitation, and
- disguised equity (or risk capital) wrongly branded as "debt", used to facilitate exit by dumping on the public market, together with insistence by government that debt is good and restorative.

1.5. BIS/IS produces its own statistics rather than using the professional services of the Office for National Statistics. The underlying data is not captured. This includes from HMCTS which calls IS a “stakeholder”. Those with no standing can use IS, the courts and property market anonymously to launder the proceeds of crime. The IS publicly measures its success by the speed of liquidating its targets and the reported returns to the aggressors, yet publishes that the courts are responsible. Wrongdoers are protected by the IS from having to prove a claim by the mechanism of ensuring that it is a private sector person who is notionally “appointed” by the IS (an indemnified agent of the aggressor). It runs a secret bank account (reported as being with RBS), provides details only to its advertised asset stripping private investigators (“IPs”). These are networked to international bailiffs, fronted by those masquerading as law firms (in fact no more than a front for a bank, insurer or both), and otherwise neither financially independent nor independently audited.

The victims are blocked from knowing about this bank account. They have no route to find out from the IS who is behind the aggression. The IS ensures that it does not formally know or record. It claims this data is with HMCTS. It claims data controller privileges it does not properly have. HMCTS asserts this identification is “personal data” and refuses to divulge it. It has now anonymised payers of court fees by facilitating “accounts”. BIS refuses to pay heed to its own staff and directors (PROSPECT) even where preferred by PAC, that state policing obligations cannot be funded by estates of the innocent public. BIS/IS staff salaries are paid from the proceeds of these activities.

No behavioural theory or empirical evidence

1.6. The purported belief of the Commission is stated by BIS to be:

‘The discrepancies between national restructuring frameworks, and between the national rules giving honest entrepreneurs a second chance lead to increased costs and uncertainty in assessing the risks of investing in another Member State, fragment conditions for access to credit and result in different recovery rates for creditors. They make the design and adoption of consistent restructuring plans for cross-border groups of companies more difficult. More generally, the discrepancies may serve as disincentives for businesses wishing to establish themselves in different Member States.’

1.7. The problems therefore, as perceived by the Commission, are not properly analysed. Before starting, these should ask the question, what behavioural theory is there to support the propositions made and what is the empirical evidence? There is no international law that means this sort of cross-border legal arrangements could either be defined, introduced or implemented. The purpose of this call for response from witnesses is not clear. The exercise has been branded as a call for evidence to “hear from the horses mouth”. BIS should publish publicly what the experience of the public has been, including those operating in multiple jurisdictions or supplying to them.

By calling for evidence on a solution to an unidentified problem, it has not complied with the Equalities Act. This exercise effectively endorses and prolongs the current status quo, rather than exposing it on grounds of perversity and aiming to throw out those aspects of BIS/IS operations which have neither appeared in a manifesto, nor properly been passed by Parliament. The identity and experience of the Chief Inspector of Companies must be published. The Companies Investigation Branch must be clearly identified, branded and benchmarked, with monthly progress reports published on clearing its prosecution backlog from at least the last decade.

2. Are the terms used by the Commission that are explicitly defined, clear?

“For the purposes of the Recommendation the Commission laid out the following definitions”:

(a) 'debtor' means any natural or legal person in financial difficulties when there is a likelihood of insolvency;

(b) 'restructuring' means changing the composition, conditions, or structure of assets and liabilities of debtors, or a combination of those elements, with the objective of enabling the continuation, in whole or in part, of the debtors' activity;

(c) 'stay of individual enforcement actions' means a court ordered suspension of the right to enforce a claim by a creditor against a debtor;

(d) 'courts' includes any other body with competence in matters relating to preventive procedures to which the Member States have entrusted the role of the courts, and whose decisions may be subject to an appeal or review by a judicial authority.

3.2 Government seeks to understand whether any of the terms used in the Recommendation are unclear, or problematic, from a UK perspective. In particular, two concepts that have been highlighted as being potentially unclear or problematic are:

a) 'an honest bankrupt'

b) 'a second chance'

3.3 It is the Government's view that the UK system already makes some distinction between bankruptcy cases. If a bankrupt's behaviour is deemed to have been dishonest or blameworthy, they can be made subject to a Bankruptcy Restriction Order (BRO). This can extend some of the conditions of bankruptcy for up to fifteen years and the BRO is placed on a public register¹.

3.4 When a company enters into administration or liquidation, office holders have a duty to report upon the conduct of the director(s) to the Secretary of State. If a director's conduct is deemed 'unfit' they can be disqualified, for a specified period, from becoming a director of a company, or directly or indirectly being concerned or taking part in the promotion, formation or management of a company without permission from the court.

3.5. It is also the Government's belief that the UK insolvency system is strongly focused on giving entrepreneurs 'a second chance'. In personal insolvency, the restrictions laid upon a bankrupt are normally lifted and debts generally discharged in full after 12 months.

2.1. Definitions of words and terms are neither clear nor correct. A definition “for a purpose” also makes no sense. Making a recommendation based on definitions which are neither clear nor correct in natural language is to resort to “make belief”.

2.2. “Make belief” is dangerous but has had a dominant role in the UK. This is where “statements of insolvency practice” or “SIPS” have been invented, used in examinations run by examining bodies which have no standing, and administered by those bodies whose by-laws are not compatible with such statements and whose members can neither take part nor condone in others. The IS term “grandfathered in” recognizes the absence of license.

2.3. A “debtor” is a country, organisation, person, company or individual who owes money. If the debt is in the form of a loan from a financial body, the *debtor* is referred to as a borrower. If the debt is in the form of securities, such as bonds, the *debtor* is referred to as an issuer. There is no inference of “financial difficulty”. Any employer who pays salaries and pensions at the end of a month is a debtor and the staff creditors (before month end payroll).

2.4. “Restructuring” is a corporate law and management term for the act of reorganizing the legal, ownership, operational, or other structures of an enterprise or estate for some purpose. Restructuring may be associated with segregating parts of business including in anticipation of sale of part and retention of part. The form of restructuring should always be the subject of proper tax accountant input to ensure that retained earnings are sufficient and that the transaction is properly accounted for in regard taxation, corporate and employment law. Gammie and Ball “Tax on Company Reorganisations” 1981 remains the seminal text on a systematic analysis of restructuring and what is lawful and what is not.

2.5. The term “restructuring” has been hijacked for a plethora of alternative uses. The empirical evidence in regard the pernicious and destructive nature of such transactions has been the subject of a series of reports from the Office of Fair Trading (“OFT”) from at least June 1010. The response of BIS (a prosecutor) has been to close down the OFT, taking with it its prosecution powers. Consequently there is (i) no baseline of empirical evidence from which to measure “loss of opportunity” to the economy and neither (ii) curtailment nor (iii) accountability of offenders.

2.6. Importantly junior minister Jo Swinson has continued her and Jennie Willott’s promotion of corporate raiders, vandals, asset strippers, opportunistic scavengers, private investigators and bailiffs (now privatized by MoJ). Where these have gained control over lucrative lines of business, using their plethora of BIS sponsored devices, BIS will assist them by the maintenance of continuity of essential supplies, such as energy. A retrospective veneer of purported legitimacy is given to that which cannot otherwise be countenanced in law. The devices are represented by various forms of surrogacy together with action to block “come-back” by owners, contingent creditors, as employees, tax authorities, victims, and others interested and/or prejudiced.

2.7. BIS has continued its aggressive push to exclude the courts and judiciary. It publish the identity of some of the targets on the privatized London Gazette, in contravention of TNA’s contract, and its own website. It asserts that the “courts” are administering the liquidation of the estate, whereas the true position is that BIS itself is both the facilitator and the driver. BIS remains uncurtailed, with irreversible loss of opportunity to the economy and entrepreneurship.

2.8. It promotes the disingenuous but intended mixing-up of “liquidity” (insolvent) with that of insufficiency of capital (bust); brands subordinated risk capital or capital/income contribution as a “loan”; and allows the (mis)-use of various forms of (pseudo) attachments with no true substance.

2.9. There is no proper concept of “restructuring” the estate “of the debtor”. The restructuring of the estate of a person or persons is a matter for those persons solely without BIS intrusion. Importantly the formal schemes of the past as section 425 Companies Act 1985 permitted capital restructuring such that debenture holders could agree with equity holders that their debentures would be converted to equity: this would apply for example where there is exploration for resources and the need for site development before a return is realized. Terms of continued support may need to be altered or restructured part through if timescales slip. Change is controlled by the owners.

2.10. Regretfully the DTI was broken up in the haste to create a free-for-all without accountability. Skimming on “transactions” to change ownership and rights is called by the IS “business services to IPs”. It issues secret “sanction notices”. These activities massacre the provisions of the Companies Acts, making a further nonsense of that of 2006.

The relevant explanatory notes read:

COMPANIES ACT 2006

Part 26: Arrangements and Reconstructions¹¹⁶⁵.

The provisions of this Part enable companies to apply to the court for an order sanctioning an arrangement or reconstruction agreed with a majority of members or creditors. They restate sections 425 to 427 of the 1985 Act.

In addition to drafting changes resulting from the re-arrangement of the provisions, there are two changes of substance.¹¹⁶⁶Section 899(2) makes clear that the persons who may apply for a court order sanctioning a compromise or arrangement are the same as those who may apply to the court for an order for a meeting (under section 896(2));¹¹⁶⁷Section 901 requires a company to deliver to the registrar a court order that alters the company’s constitution.

It also requires that every copy of the company’s articles subsequently issued must be accompanied by a copy of the order, unless the effect of the order has been incorporated into the articles by amendment. These changes are included for consistency with other provisions in the Act concerning such orders.

2.11. In other words, by court order, the DNA of the company (its constitution) can be altered. This is the corporate equivalent of a child born of more than two parents, almost impossible to understand. The opportunism this opens up is manifest. Rather than a “scheme” being to facilitate a re-ordering of what is there, in circumstances where the status quo is not sustainable (eg debenture holders become equity holders), the “schemes” now facilitate transactions in which controlling stakeholders can oust the minorities. The rigours of a share re-purchase are bypassed. The courts are used to provide a veneer of pseudo legitimacy. A “challenge” requires a masterly understanding of corporate law, independent of the vested interests (scheme promoters), who are also the controllers of access to the courts.

2.12. “Stay of individual enforcement actions” purportedly by a court is another made-up term. Courts are empowered to grant STAYS, i.e. OBLIGED to grant them, where the relevant circumstances prevail and are pointed out. The IS has no right to be heard.

2.13. There is no concept of “pooling”. If there is an amount owing to each of the gas provider and phone provider, there is no mechanism for these two suppliers to get together, exchange personal data they hold on the user and mount a collective enforcement exercise. One is enforcing a gas bill and the other a phone bill. These are two different parties with two different contracts. Debts must come to trial to be proven in separate not “pooled” action. Avoiding proving should block enforcement regardless of mechanism deployed. It does not.

2.14. BIS has continued to promote “the majority of creditors”; private sector private investigators operating to liquidate valuable estates by by-passing the obligation to prove a debt; and new forms of structure as “protected cell companies” which shelter assets from disbursement by ring-fencing them. Disasters as City-Link proliferate, with no accountability of scheme manufacturers, promoters and vendors. They follow in the wake of tax evasion and other arbitrage product which activity remains wholly uncurtailed (eg Eclipse 35).

2.15. BIS has been seen operating in the Chancery Division, supported by the Chancery Bar, actively seeking to circumvent due process including when a STAY is requested or granted. BIS/IS/OR (Official Receiver) have, for reasons understood by them and no-one else, intercepted the process of such requests. They lobby, without standing, for immediate advantage, “just in case” (i) an appeal is not successful; (ii) there is a state of bankruptcy; (iii) there is a creditor who has proven his debt; (iv) there has been attendance for means testing; and (v) compromise has been exhausted. The terrified public are lambs to the slaughter.

2.16. There are no circumstances under which this approach can be lawful or acceptable. BIS comes out with UNDERTAKINGS, the effect of which are that contraventions give rise to penal sanctions (prison). Their targets must provide affidavits (which require a notary and are expensive); and make commitments to complete intrusive illegal questionnaires. This includes being compelled to sign documents TO WHOM IT MAY CONCERN giving (a) personal data access rights; and (b) rights of access to (i) personal bank accounts; and (ii) personal tax records. The choice given to the victim boils down to abandoning their standing or facing prison.

Without an UNDERTAKING, BIS threatens arrest by police (a target can be held for 36 hours without charge); and public XX on means. It runs a secret SANCTIONS department that authorises lawyers and barristers, fronting the major banks to secure orders for forced eviction, forced sale of property, the court stepping in to “order” that the asset strippers can with impunity give a good receipt contrary to their own websites. The public can rely only on the judicial system to protect it from BIS/IS and its abuse of judicial law enforcement.

2.17. No member state can designate a forum, which is not already a court, as a court. The creation of a plethora of tribunals and other artificial constructs has meant that those who should properly have been charged with indictable offences have not been. The prosecution backlog has consequentially and predictably grown exponentially, as “what you can get away with” has taken over as a preferred implicit accounting standard and policy.

2.18. There is no such person as a “bankrupt” per se. An individual cannot be born a “bankrupt”. By contrast, a notional corporate can be fraudulently trading from inception, e.g. where it has sought to “incorporate” without accounting for fatal contingent liabilities and filed a VAT tax indemnity to which it and those responsible are not properly entitled.

2.19. “Honesty” does not currently feature in the published activities of BIS/Insolvency Service “policy” and “legal” teams. If it did, “dishonesty” would also feature and so would the duty on BIS prosecutors to prosecute wrongdoing including by the vested interests. BIS would have long since filed for the compulsory winding up of R3, mafia of asset strippers, as well as those operations masquerading as law firms and their auditors which are in fact facades for insurers, underwriters, banks and international bailiff operations. Oddly, R3’s CEO refuses to explain the qualifications of R3 members which are advertised on R3’s web-site.

2.20. BIS (/IS) currently has difficulty distinguishing between “debtor” and “creditor” and in turning up in court when required to so do by court order, on time or at all.

2.21. Instead it classifies the creditors of bust businesses and individuals as “bankrupt”. It threatens these with arrest by police, to be publicly cross examined on means, including months and years after the real bankrupts have been required to attend for means testing. It does not file for compulsory winding up in regard those reported to it as fraudulently trading or those who are part of mafia style gangs including those advertised by it and working for BIS as private investigators, masquerading as “trustees” on behalf of the state, yet hired by no-one.

2.22. Both state organs (BIS/IS and the courts they use) operate in contravention of DPA laws. They traffic large amounts of personal data on secret electronic communications, purportedly “sanction” private investigators listed as “IPs” but not VAT registered, therefore accountable to no-one. This is to “investigate” including the estates of the dead, the dying, the voiceless, the unknowing as well as of foreigners with no connection to the UK. These can be plundered without objection from owners by means of their exclusion and/or purported representation by the state (Official Solicitor/ Public Guardian/ Official Receiver/ private sector “trustee”).

2.23. The “sanction” includes authorized use of international networks of lawyers (LLPs) operating in the Crown Dependencies, Delaware and tax havens, facilitating the disappearance of estates plundered from under the control of international banks. They include forced evictions and sale of UK properties in secret or layered chain operations, skimming on the turn represented by the difference between notional “drive past” valuations and the true transaction values after laundering through the London property market.

2.24. Transparency International UK’s recent report “Corruption on your doorstep: how corrupt capital is used to buy property in the UK” published in March 2015, provides the “tip of the iceberg” statistics that BIS (/IS) has omitted to collate and publish. Further BIS/IS cannot now do this since the OFT has been shut down, including without public consultation under the Equalities Act, or indeed by inclusion in any manifesto. The statistics and prosecution void that has been created has left no-one charged with protecting the public and estate owners or even curtailing wrongdoers. “Investigation” has replaced prosecution.

2.25. TI's website reports:

Corruption on your Doorstep looks at how corrupt money is used to buy property in the UK

The research – analysing data from the Land Registry and Metropolitan Police Proceeds of Corruption Unit – found that **75% of properties** whose owners are **under investigation for corruption** made use of offshore corporate secrecy to hide their identities.

Key statistics

- **£180m+** worth of property in UK have been brought under criminal investigation as the suspected proceeds of corruption since 2004. This is believed to be only the tip of the iceberg of the scale of proceeds of corruption invested in UK property. Over **75%** of the properties under criminal investigation **use offshore corporate secrecy**
- The **average price** of a property under criminal investigation in the UK is **£1.5m**. The minimum is £130,000, the maximum is £9m and the median is £910,000. 48% of properties investigated were valued at over £1m
- **36,342** London properties totalling 2.25 sq miles **are held by offshore haven companies**. Of these, 38% in the British Virgin Islands, 16% in Jersey, 9.5% in Isle of Man, and 9% in Guernsey
- Almost one in ten properties in the City of Westminster (9.3 per cent), 7.3 per cent of properties in Kensington & Chelsea, and 4.5 per cent in the City of London are owned by companies registered in an offshore secrecy jurisdiction. TI-UK has launched an **interactive map of London** which reveals the statistics for each borough – ukunmaskthecorrupt.org
- In **2011** alone, **£3.8bn** worth of UK property was **bought by British Virgin Islands-registered companies**
- According to the latest figures, which cover October 2013 to September 2014, **estate agents contributed to only 0.05% of all Suspicious Activity Reports (SARs) submitted**. This figure does not match the risks posed by money launderers to the UK property market

Transparency International makes 10 recommendations for reform, calling for buy in from the UK Government, lawyers, and estate agents to ensure that the UK property market is no longer a safe haven for corrupt funds. Action from the British Overseas Territories is also necessary to end this crisis.

2.26. BIS does not (i) publish statistics on the laundering of the proceeds of crime through the property markets; the courts; the official receiver; or (ii) measure the loss of opportunity in terms of the estates pulled down. It should, or better, ask ONS to do it, for the protection of the public including from BIS and its agencies, including its unelected anonymous policy staff.

3. Are any of the explicit definitions problematic in a UK context?

3.1. Yes. All the advertised definitions of BIS and its agencies, the Insolvency Service, the Land Registry, Companies House, its websites, and those of outsourcers through others such as the Ministry of Justice. There is particular offensiveness at the Land Registry where the world is carved up in two, being “solicitors” and everyone else. The first are absolved from statements of truth; are labeled “customers”; and can operate on secret letters without application. The regime allows anyone to place a claim on property. If the owner does not object in time (eg they are overseas), the property is lost. Seemingly BIS thought this was a good approach in anticipation of privatization, deferred only to post election. Unfettered “ownership” is not understood or respected, nor is the right to respect for private life.

3.2. The IS has adopted “branding” as a methodology. A person is a “creditor”, “debtor”, “bankrupt”, “administrator”, “auditor”, as though one were born as one of these categories. It has pursued these delusions into the courts by inventing its own forms and adding “IN THE HIGH COURT OF JUSTICE” with a purchased court number. This concoction has been given to the private sector, with permission to add “crown copyright” and use in the courts, supported by its illegal website “*the court is administering these bankruptcies*”. It will be forced to bring this website down on the first massive claim against the Permanent Secretary.

4. Are there any other terms, aside from ‘an honest bankrupt’ and ‘a second chance’, used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?

4.1. Definitions need to come from the Oxford English Dictionary not from BIS policy staff. This required curtailment applies in particular to those who do not put their name, grade and contact details on their work. They are currently allowed to preside over a “regime” that recasts creditors as debtors and seemingly cannot tell the difference.

5. To what extent does the UK regime adequately provide for elements (a) to (e) of the Commission’s Recommendation?

5.1. Not at all. The creation of a regime which contradicts the law and operates in parallel to it, such that the law can be effectively ignored with purported impunity, is plainly wrong.

6. Is there anything in the UK regime which is not in the Commission’s Recommendation but delivers the Commission’s objectives?

6.1. No.

7. Where you believe the UK regime does not meet the criteria, would the Commission’s Recommendation improve the UK regime?

7.1. No. Recommendations have no part to play in company law.

8. *To what extent does the UK regime already deliver the elements in this section of the Commission's Recommendation?*

8.1. Not at all. BIS does not publish statistics on the laundering of the proceeds of crime through the property markets; the courts; the official receiver; or the loss of opportunity in terms of the estates pulled down. In the absence of statistics, no country by country comparison can be made.

8.2. The UK landscape has stopped the obligation on enterprises to have sufficiency of capital (going concern basis of valuation). This means that suppliers (including employees); customers; and others have no certainty of continuity. The public is not protected. The outcome is unpredictable.

9. *Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objective?*

9.1. No. The UK "regime" needs to be thrown out and restarted based on the Bankruptcy Act 1914. It is not fit for purpose. It deliberately obfuscates between INSOLVENCY (meaning illiquidity) and INSUFFICIENCY OF CAPITAL (meaning bust).

10. *Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?*

10.1. A "recommendation" has no standing. The sovereign states respectively are those responsible for national law. Europe cannot and does not interfere in national law.

10.2. The question of a "stay on enforcement" "by creditors" is an important one because of the illegality of the operations of BIS and its unsupervised agency the IS. Those pulling down others are absolved from "proving" any entitlement. So long as a notional "majority" agree, they can plant their own straw man. BIS will put its whole force behind them. A STAY means a STAY from BIS and its intrusion into the private lives of its victims. The IS admits the large number of council tax driven "bankruptcies" it processes. Regretfully it takes no responsibility to tell local authorities that driving people to suicide to get their homes is not the correct way to calculate the proper amount due, if any, including after reliefs, nor is outsourcing delivery of core obligations (like help with filling in forms and housing benefits), including to "charities" and others siphoning public money without any duty to deliver or means to be held accountable.

11. *Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?*

11.1. There are two pillars of a democracy, an elected Parliament and an independent judiciary. Excluding the independent judiciary means democracy is abandoned: this requires introduction in a manifesto as it cannot properly be executed otherwise (but will not be accepted). It would not succeed not least because the courts are here to stay. The UK public has no protection from BIS and its policy and internal legal teams, seemingly scrambling to bury wrongdoing and fete the wrongdoers whilst pillorying entrepreneurs, SMEs, estate owners and whistleblowers.

12.1. Not at all. It is destructive, not constructive. It presumes that returns to financial capital (vested interests) are more valuable than returns to productive capital (entrepreneurs, SMEs, self-employed, quoted companies outside financial sector etc). It collects and publishes no empirical data on loss of opportunity. It has no protections like support for Citizens Advice, or OFT. The UK regime does not provide commodity banking services delivered by those who are not loaded with the costs of compensation schemes and can survive.

12.2. The UK landscape is based on secrecy, lack of transparency, fatally flawed change of control reporting and relies on the creation of contaminated evidence laundered through lawyers, examined after six years have passed, whilst the underlying wrongdoing is buried.

12.3. Confidence in the regime is undermined by the focus on destruction, corruption, wastage and inefficiency. It speaks volumes that the informative statistics were collected privately over three years and that BIS had not itself commissioned these vital informative statistics from ONS or OFT, nor had NAO provided them. The empirical evidence is published in ***The Elephant in the Room: An Evidence Based Study of Government Waste, Error and Inefficiency***, 31 January 2015 by Eamonn Hamilton. The description reads (Extract): "...Government waste is caused by fraud, error and inefficiency, and this first evidential study into the subject has identified that, in the five-year period reviewed, government wasted over GBP230 billion of taxpayers' money. This astronomical figure would meet the NHS budget for two years, so when you read about Cameron, Milliband or Clegg offering to increase the NHS budget by GBP1 billion, the sheer scale of waste can be seen in perspective. This book is evidence-based and is believed to be the first book to approach the issue on such a basis. Nine hundred Public Accounts Committee and National Audit Office reports were examined, of which 78 were selected for deeper research. It is these 78 reports which are examined in depth and which together account for the loss of over **GBP230 billion of taxpayers' money**. The book is apolitical, but because of the period examined researches projects mostly initiated by New Labour."

12.4. Decision-making on an informed basis must be supported by published empirical data. Ad hoc statistics by the private sector are not good enough in a developed country, let alone one which is purporting to export its own toxic "insolvency regime", based (i) on how quick and efficient it is in liquidating its targets (those with a valid cause of action who can hold wrongdoers to account); and (ii) how much it realizes. Whether what the "regime" is doing is right or wrong, or even properly considered, is not reported. The burial of OFT and PROSPECT reports including those to Parliamentarians and PAC, as well as the closure of the reliable, independent and highly respected OFT, are not hopeful indicators. This approach by BIS/IS and those unidentified and unelected staff in "policy", is neither fit for purpose nor therefore can it be recommended or used as a robust UK path-finder for export to Europe.

13. Is there anything in the UK regime which is not in the Commission's Recommendation but delivers the Commission's objectives?

13.1. No.

14. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime, for example the ability to 'cram down' classes?

14.1. No.

15. To what extent does the UK regime already provide protection for new financing?

15.1. Not at all. The regime aims to target new finance. New capital is risk capital, or equity. It includes use of accumulated retained earnings after any new capital is injected. The "regime" such as it is, involves a plethora of devices and attachments to extract value (rather than de-risk enterprise), including free of the tax which would properly be due on alternative exits.

15.2. The "regime" promotes contravention of company law on sufficiency of distributable earnings; unlawful financial assistance; and involves the complicity of auditors (LLPs) on (i) "what you can get away with" accounting policies, reporting with qualifications (in place of adverse reports); (ii) "rotating" rather than resigning; and (iii) accepting accounts of operations which are in fact merely a façade for another; financially unstable; or a "virtual operation".

15.3. BIS does not publish statistics on the laundering of the proceeds of crime through the property markets; the courts; the official receiver; or the cumulative loss of opportunity in terms of the estates pulled down. It should. Perhaps if told often enough, it might.

16. Is there anything in the UK regime which supports rescue finance which is not in the Commission's Recommendation but delivers the Commission's objective?

16.1. There is no such thing as "rescue finance". There is risk capital.

17. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

17.1. No. The UK does not (but should) oblige agents to (i) be licensed in accounts preparation, (ii) reveal the identity of their principals, (iii) record independence verification or (iv) sign their reports in their own name. This is the basic protection of the public by the state. The state omitting to deliver that protection is where it all goes wrong. State obligations cannot be outsourced or left to the private sector.

BIS allows Chartered Accountants (independent) to be "IPs" (agents) despite the fundamental contravention of the respective institute's by-laws. It permits disciplinary to be carried out by those being disciplined or their colleagues (the vested interests). It has created micky mouse "tribunals" which permit auditors to sign off on mixing of client monies by banks. Tribunals have allowed barristers to invent the notion of an "HONEST MISTAKE", which under FSMA 2000 or the Companies Act would be reckless or knowing conduct.

17.2. None of this has brought BIS credibility, nor has allowing “Limited Liability Partnerships” to facilitate arbitrage including globally; raising the threshold for audit; or not filing for compulsory winding-up of manufacturers and vendors of tax evasion product. There is no certainty that wrongdoers are prosecuted, or curtailed with proceeds of crime disgorged.

17.3. The signals are of a wholesale abdication of the obligation of the state to protect, regressing the country to before the jailing of the directors of the City of Glasgow bank, 1879. It was not necessary to prove beyond reasonable doubt that they had personally made each entry in the books for them to be found guilty. The reports of Chartered Accountants were relied on. The case gave certainty of outcome on financial statements which were false.

17.4. One hundred and thirty five years later, the “regime” is operating in reverse: instead of holding wrongdoers to account, including for false accounting by banks and insurers thereby giving confidence to all concerned, “policy” has been (i) to paper over what is there; (ii) operate illegal bail-outs without any theoretical basis for expecting them to stabilize anything; and (iii) run like fury to promote asset stripping the nation. The only conceivable purpose is to create balance sheets for banks and “insurers” that do not otherwise exist, by incentivizing those agents “skimming” through layered securitization, without audit or ownership trail.

17.5. In one fell swoop, confidence in banking systems and the public market has gone with equities trading now virtually obsolete. A central bank (BoE) that admits to the Treasury Select Committee its variance in Central Bank reserve requirement could be 1/3 trillion pounds and would take over six months to establish, is one which is saying “we do not know”.

17.6. It is against this background that the dogged determination to “pull down” and exclude the voice of objectors (estate owners and those interested) must be considered.

17.7. The danger of the approach adopted by authors of this “consultation” is in ignoring this context and instead to forge ahead with promoting the government taking over the courts; turning them into gambling casinos; with “probability outcomes” underwritten by the estate of the “loser”, using “lawyers” who are in fact financially interested transaction managers.

17.8. With all that has been thrown out and ex MoJ policy staff now resourcing the post of CEO of the Insolvency Service, the required independence of the judiciary has effectively all but gone. The process is unstoppable. Judiciary are resourced from barristers who themselves experienced this industry as indemnified agents and function no differently.

17.9. As a result the basic principles of access to law and findings of contempt, when access is blocked, have gone, the very principles that in 1900 were very well known and certain.

17.10. BIS must stop and re-think, if confidence is to be restored and earned by certainty.

The Lord Justice-Clerk's Charge.

The VERDICT was recorded as follows :—“The jury unanimously find the panels Lewis Potter and Robert Summers Stronach guilty of the first, second, and third charges, as libelled, and find them not guilty of the remaining charges; and find the panels John Stewart, Robert Salmund, William Taylor, Henry Inglis, and John Innes Wright, guilty of using and uttering, as libelled, under the first, second, and third charges, and find them not guilty of all the remaining charges.”

Lord
Justice-Clerk.

The LORD JUSTICE-CLERK (to the Jury)—I have to thank you for the great attention you have paid to this very important case; and to announce that in respect of your service on this occasion you will not again be required to act as jurymen for the next five years.

The LORD JUSTICE-CLERK then intimated that sentence would be pronounced next day at half-past ten o'clock.

At the meeting of the Court on the following day, the LORD JUSTICE-CLERK, addressing Lewis Potter and Robert Stronach, said—Lewis Potter, Robert Stronach, the jury, after a long investigation, and after full deliberation, have found you guilty on the first branch of the three charges of falsifying and fabricating the balance sheets of the Bank. I think it is proper to say, in explanation of the sentence which must now follow upon that verdict, that, had the other two charges contained in the indictment, or either of them, been proved to the jury, it would have imposed upon us the duty of inflicting a very severe punishment, because not only would these charges have inferred a crime of very great magnitude, but they would have brought into the case the element of personal advantage as the motive of the act which you committed; and I am desirous to say that, as the case now stands, the act which was done by both of you did not necessarily involve, and probably was not actuated by, any design or desire of personal advantage, but was a criminal act committed, as you thought, for the benefit of the Bank. That does not remove it from the category of crime—very far from it—but it does remove from the crime of which you have been convicted the element, as I have said, of corrupt personal motive for personal ends. That consideration has weighed with the Court in the sentence which I am now to pronounce, being short of one of penal servitude. The sentence of the Court on you, Lewis Potter, and on you, Robert Stronach, is that you be imprisoned for the period of eighteen calendar months.

The LORD JUSTICE-CLERK (addressing the other prisoners)—The jury have found all of you guilty, not of fabricating or falsifying the balance sheets, but of uttering and publishing them, knowing them to be false. We have considered also your case, and looking to the crime of which you have been convicted,

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Clerk LJ “.....the jury have found all of you guilty, not of fabricating and falsifying the balance sheets, but of uttering and publishing them, knowing them to be false.”

The City of Glasgow Bank Trial.

Lord Justice-Clerk. and the distinction that may be drawn between you and the other two prisoners, and considering that you have been in jail now since the month of October, the sentence of the Court is that you be further imprisoned for eight calendar months.

The Lord Justice-Clerk added—It has been represented to me that, in my observations in charging the jury yesterday, I made some remarks upon the officials of the Bank that might be misunderstood. Some of the gentlemen who were witnesses, at least one who was a witness at the trial—I mean Murdoch—it has been said, might possibly feel hurt, and might be injured if my remarks were intended to apply to him, and I wish it, therefore, to be clearly understood that in the remarks that I made about the officials of the Bank I referred to three of the witnesses, viz., Morison, the accountant; Morris, the private clerk; and Turnbull, who gave the false return to the Inland Revenue.

Raymond v Honey [1981] UKHL 8 (04 March 1981)

URL: <http://www.bailii.org/uk/cases/UKHL/1981/8.html>

Lord Wilberforce :

“ In considering whether any contempt has been committed by the appellant, there are two basic principles from which to start.

First, any act done which is calculated to obstruct or interfere with the due course of justice, or the lawful process of the courts, is a contempt of court. These are the well known words of Lord Russell of Killowen C.J. in Reg. v. Gray [1900] 2 Q.B. 36, 40.

Since 1900, the force of this principle has in no way been diminished. In A.-G. v. Times Newspapers Ltd. [1974] A.C. 273, Lord Diplock, with whom Lord Simon of Glaisdale agreed, clearly stated that to inhibit suitors from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced by courts of law, could amount to contempt of court (1.c. p.310): whether the particular action there involved had that effect is immaterial to the present case. The principle has been strongly affirmed by the European Court of Human Rights in the case of Golder (1980) 1 E.H.R.R. 524. The court there decided that access to a court was a right protected by Article 6 of the European Convention, and, while not expressly ruling upon the compatibility with the Convention of Rules 33, 34 and 37 of the Prison Rules 1964 (as to which see below), and while accepting that the right might be subject to limitations, applied this ruling to a convicted United Kingdom prisoner, who (inter alia) wished to direct proceedings against a member of the prison staff, and to a hindrance of a temporary character.

Secondly, under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication—see Reg. v. Board of Visitors of Hull Prison [1979] 1 Q.B. 425, 455 and Solosky v. The Queen (1979) 105 D.L.R. (3d) 745, 760, Canadian Supreme Court per Dickson J.

.....The action of the appellant was clearly such as to deny, albeit temporarily, the respondent's right of access to the court and, on the principle above stated, constituted a contempt. “

18. To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?

18.1. Not at all. Entrepreneurs are amongst the targets of the current landscape, not least because revenue streams and goodwill are the subject of unlawful and irregular trade. Track-record and relationships take three decades to develop especially in private wealth, and inter-generation. Without exception, vast sums paid by the banks to become private banks to target the wealthy has created customer and staff attrition, discontinuity and failure.

18.2. This is not entrepreneurship. It is transaction based skimming, set on “guaranteeing” there is no come-back. Those harmed are not an organized group, not informed and cannot fight back. The public is not protected. The public will not be protected until prosecutors prosecute on sight of sufficient evidence (unless informants/covert human intelligence are at work, “public interest”) and give up on their own made-up additional discretionary test (that there is no prosecution unless the prosecution is “in the public interest”). Prosecution on sufficiency of evidence is not the same as no prosecution unless a discretionary arbitrary hurdle is overcome. This is a perverse form of certainty, that entrepreneurial rewards (return to productive capital) will attract the vultures (return to financial capital) yet the DPP, the AG and BIS will do nothing to protect the former from the latter. Equity fund managers are not entrepreneurs. The landscape is a free-for-all with no rules or accountability. No-one is responsible. The law requires certainty of outcome. A decision dependant on an incumbent decision-maker, with the baggage of their own limitations and competence, prejudice, experience, interests, etc. simply does not do it.

18.3. Instead of addressing this worrying lack of protection, the IS has actively marketed bankruptcy: it has no commensurate plan for those harmed as a result, including from big players in debt as Reichmann with billions dumped on the market (1998). There is no mechanism to stop the IS, apart from to close it down and redeploy valuable staff usefully.

19. Is there anything in the UK regime which is not in the Commission’s Recommendation but delivers the Commission’s objective?

19.1. No. The UK’s “regime” such as it is, requires throwing out and open recognition that its operations are perverse and its systems are both legacy and contravene the DPA. It is not acceptable that perversity is severally and collectively facilitated by the Official Receiver; HMCTS; the London property market; the supply chain to prosecutors and that to so-called “regulators”; purported “independent” “experts”; those mandated to enforce orderly conduct; each hoping the independent judiciary will “legitimize” that which should be stopped. This laundering and layering “permits” the vested interests to profit to the total exclusion of owners and those entitled. Enforcement against wrongdoers is blocked.

19.2. The DTI, the OFT and the Chief Inspector of Companies should all be reinstated. The BIS policy and legal teams need review. BIS prosecutions must cut its toxic dependence on a supply chain comprising the vested interests, with a stake in the outcome of transactions and no regard to public duty (caveat of hope: Parker J Administrative Court, re KPMG, 24.4.15).

20. Where you believe the UK regime does not meet the criteria, would the Commission's Recommendation improve the UK regime?

20.1. No. These are human rights issues. Since OBG v UK was decided, the landscape in the UK has been most bleak. The result says that agents or catalysts have no responsibility whatsoever for accepting "appointment" (see also Brandon Barnes v CPS etc, Supreme Court). Banks are able to move assurances given to one party "A" in respect of another "B" (no underlying debt), to a third "C". C can pull down the principal, B, draining cash, and liquidate itself, with no come-back whatsoever. ECHR will only check to see if the law exists on paper, not that it is operationally effective in the courts, the true obligation. ECHR does not like to be seen to "interfere" in national courts. The "effective" criteria, means it is entitled to conduct an operational audit of how and why a case went wrong. It does not do this.

20.2. UK judges feel most comfortable with examples on which to build their experience, and routinely have regard to Strasbourg jurisprudence. MoJ policy bureaucrats attempt to restate this as excessive control by Europe, giving rise to the BALANCE OF COMPETENCIES consultation by a deadline of mid January 2014. This attracted few contributions which were not published until 22 July 2014, as Parliament and courts were closing for the summer.

<https://www.gov.uk/government/consultations/balance-of-competences-fundamental-rights-review>

Review of the balance of competences fundamental rights evidence: individuals

published: 22 July 2014 PDF, 345KB, 55 pages – **ref: 12 pages from page 43 to page 54 inclusive**

(last) para 40: *"The current judicial system in the UK has given new meaning to humiliating and degrading treatment and proves that, in the UK at least, there is no such thing as the sanctity of human life, and respect for the citizen including by the state. Only ECHR can come to the rescue of UK citizens."*

21. In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider?

For example:

o Developing EU principles for fast, efficient out of court rescue procedures for small companies.

o Developing the conditions for rescue finance.

If so, what should the Commission consider?

21.1. Rescue is as old as the hills. It does not require meddling by bureaucrats and cannot be improved by them.

21.2. "Rescue finance" means equity risk capital. The principle is, if it is too hot in the kitchen, stay out.

21.3. The courts have now effectively been replaced by the "regime" involving financing arrangements, speculation, and "winner/loser" criteria, rather than law enforcement. If the courts are not accessible as law enforcers, an "improved" surrogate can never succeed.

There is little that can be added to the glee of the litigation financiers, championed by Justice Minister Lord Faulk:

<http://www.litigationfutures.com/news/litigation-much-optional-activity-says-justice-minister-defence-court-fee-rises>

21.4. The assets of any financially independent person or SME are fair game for grabbing yet owners and those interested are excluded, i.e. not heard, even if attending and speaking. Under the “regime” the financially independent are vulnerable to their estate being used by their suppliers (informed of the true standing) to underwrite the outcome of transactions against them: opportunists operate on what is not theirs, thus have “nothing to lose” even if caught. SMEs are already identified as losers, along with employment and injury claims.

Article Litigation Futures (extract) 5 March 2015

Litigation is ***“very much an optional activity”***, says justice minister in defence of court fee rises House of Lords: strong criticism

Justice minister Lord Faulks yesterday defended the imminent court fee increases by stressing to peers that litigation is ***“very much an optional activity”***, and suggesting that solicitors should help their clients by advancing them the money.

Meanwhile, leading administrative law QC Lord Pannick expressed confidence that the judicial review of the increases would be successful.

In a debate on the statutory instrument to introduce the increases – to which Lord Pannick sought to attach a ‘motion of regret’ – criticism rained in from other peers, with a focus on the difficulties they will cause in bringing mid-size claims, such as those brought by SMEs and people suing over personal injuries or clinical negligence.

The new fees are set to come into force on Monday. Lord Faulks suggested that the current fees are ***“very modest”***, adding: ***“It is also worth bearing in mind that litigation is very much an optional activity. Anybody who is deciding whether or not to sue will have all sorts of factors that they bear in mind.”***

“There are plenty of reasons for not bringing proceedings, one of which is uncertainty of outcome. Anyone advising a claimant will probably need to satisfy that claimant that there is at the very least a better than even – probably a 75% – chance of success before they commence proceedings. Another relevant factor is the solvency of the defendant or the likelihood of recovery.”

“All those are matters that will inhibit somebody in deciding whether or not to sue. Of course, there is also the factor of the cost and extent of their lawyers’ fees. What is important is that the court fees generated here would be recoverable from any defendant in the event of a successful claim.”

He said this was relevant both to the question of access to justice ***“and also as to whether a solicitor will feel able, as is often the case in personal injury or clinical negligence cases, to provide assistance with the upfront costs on the basis that they will be recovered in the fullness of time”.***

Similarly he thought after-the-event insurers could help in personal injury claims. ***“In appropriate cases where an insurer thinks that a claim has merit, it enables court fees to be incurred, which are, as I said earlier, recoverable from the other side.”***

The minister also highlighted the fee remission provisions and that the government did listen to consultees by amending some of its proposals. He insisted that it bore in mind the wider choice of jurisdictions that international claimants have. ***“[We] are satisfied, having consulted widely, that this is a reasonable and proportionate increase for these large claims.”***

Asked about the 80% fall in employment tribunal claims since fees were introduced, Lord Faulks agreed with the comments of crossbencher Lord Brown of Eaton-under-Heywood, who in a speech otherwise hostile to the rises, said that while the tribunal fees had ***“no doubt”*** discouraged a number of meritorious claims, ***“I suspect that it has discouraged at least as many unmeritorious claims – speculative claims, which used regularly to be brought and then bought off or settled because, frankly, that was a cheaper option for the defendant employers than successfully resisting them and then being left to bear their own costs, which were quite likely to be very substantially more”.***

Lord Pannick notion of litigation as an optional activity. ***“As the minister well knows from his experience as a very successful barrister, for many people – those suing for debts or to recover compensation for personal injury – litigation is often a necessity to keep your business alive or to maintain any quality of life...”***

“The fee remission provisions to which the minister, perhaps somewhat desperately, referred are not going to assist other than in exceptional cases.” The power to charge court fees at above cost price is contained in section 180 of the Anti-social Behaviour, Crime and Policing Act 2014. Lord Pannick asked: ***“But is it a fair, reasonable or proportionate exercise of that power? Plainly not. For litigants to have to pay such substantial sums in advance of bringing a legal claim will inevitably, in practice, deny access to the court for many traders, small businesses and people suing for personal injuries.***

“The government have suggested that court fees will be a small fraction of the legal expenses which a claimant will incur, but many claimants will not have to pay their legal expenses at the outset of proceedings. They will not have such a substantial sum of money available at the outset of the case, or they may be able to pay these court fees only by doing without competent legal representation.”

He said section 180 does not alter the Lord Chancellor’s legal duty under section 92 of the Courts Act 2003 to ***“have regard to the principle that access to the courts must not be denied”***.

Lord Pannick argued: ***“The courts will interpret the powers conferred by section 180 as not intended to authorise regulations which impose an unreasonable or disproportionate barrier to access to the courts...”***

“If you wrap yourself in Magna Carta, as Mr Grayling sought to do last week at the Global Law Summit, you are inevitably and rightly going to invite scorn and ridicule if you then throw cold water over an important part of our legal heritage.”

22. Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?

22.1. At present the UK is said to lead the world in terms of an easy regime which facilitates transactions that could not otherwise happen. This “advantage” is economically destructive. Brits looking to do business elsewhere in order to escape the hostile UK environment in particular for entrepreneurs, eg SMEs and self-employed, find it very hard because other countries usually prefer to buy locally, if they can. A non UK investor into the UK now needs to consider how risky the UK is, and how easy it is to lose your shirt, because someone else decides that it should be theirs and the state supports them, without asking who owns what.

23. Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?

23.1. No. Where an international group goes down, the individual subsidiaries each appoint their own administrators: these protect the position locally and have no commercial interest in joint activity to save a central function which sprawls the group, such as a telecoms network operating centre (“NOC”). An example is Carrier 1 which went down post millennium. The operation had not been profitable at gross profit level.

23.2. In circumstances such as this, it is necessary to consider what happened from the start, such as excessive exit profit-taking by an equity house as a principal on float. Unstable trading with false financials post float and thereafter is inevitable (colloquially, “dumping”).

23.3. It becomes clear that the problem is that the market is being used for short term profit-taking. This creates instability. Its “success” is totally reliant on there being an “auditor” who is not truly independent and who believes there will be no “come-back” in practice.

23.4. That which is being cast as an “international problem” is in fact a national one. Destabilizing excessive upfront profit-taking is allowed; the market is misused to “dump”, thereby creating the need to pull down vehicles just before the six year limit under limitation law (eg sale of DMG (Direct Marketing Group) to European Home Retail (Farepak) by Barclays private equity in 2000, pulled down October 2006, with the auditor and IP the same party).

23.5. The UK has yet to provide proper protection for private estates and businesses including SMEs from the UK “insolvency regime” and the Insolvency Service. This includes those operators who function without accounts preparation license, VAT number or service address, effectively private investigators, with an interest in liquidation and trading the turnover and goodwill that is up for grabs (conversely warding off fatal risks by conversion and spread) as well as profiting from selling the target’s tangible property to pay themselves.

23.6. The threat of a referendum on Europe post election means that pan European planning is not a good use of effort at present. The UK “insolvency regime” must be ended not exported.

24. *Do you have any other comments?*

24.1. Yes. The outstanding work of the OFT from 2010 has not been used nor has the evidence of PROSPECT, senior management or regional operations in the definition of the problem; formulating the questions; or indeed evaluating the evidence, including making it public immediately.

24.2. In 2014 the Insolvency Service ran two consultations on the Rules and another on the industry. It did not mention that, after these closed, it would publish reports by a “strategic adviser to Baker Tilly on its relationship to government” the procurement of which was shrouded in secrecy. This promoted “pre-pack administrations”. A second report by private sector consultants with vested interests branded “University of Wolverhampton” paid for by R3 provided false statements of law.

24.3. This work refers to IPs as the agents of the banks, proving that operations are about asset stripping. It highlights that BIS has done nothing to warn off the public from any engagement or compelled the IS to stop giving out IP numbers “as though” it had vetted the people and could quote copy ACCOUNTS PREPARATION LICENCE and VAT number. To the extent such indemnified agents are holding themselves out as performing a public function (imposing duty), they will be adversely affected by the ruling by Parker J (Administrative Court 24 April 2015). This is in regard Barclays Bank compensation in respect of consequential losses on interest rate swap mis-selling. Permission against KPMG, the bank’s agent evaluating compensation, has been granted.

24.4. Under the EQUALITIES ACT BIS must consult those adversely affected: not only has it not done

so but it has run irrelevant consultations whilst there was another secret agenda to be revealed piecemeal after the first closed. It was stated to be “independent” yet independent it was not.

24.5. BIS has miscalculated. It must now quietly come to terms with the fact that the public is not stupid. It should not rely on and resort to only QCs, as “professionals” to think, read, write and speak.



Mira Makar MA FCA (Miss), witness
member SME Alliance Ltd
London
17 March 2015 (minor updates April 2015)

About the witness:

The witness has operated in the rescue market since 1982, mainly as principal, with exits on the unlisted and main market quoted list. Sector specialization has been operating systems in central government, telecoms, space (ground control, simulations), defence, intelligence, trust and fiduciary, administrative, pharma, private banking. Principal customer sites include UK, Germany, Netherlands, Brussels, Switzerland, Crown Dependencies, Hong Kong.

She has been a witness to the Companies Investigation Branch of the DTI from September 2005, from which time many of the developments described above have matured and become ever more toxic and anonymised.

Royal Charter of the 11th May 1880

Victoria by the Grace of God

of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith

TO ALL TO WHOM THESE PRESENTS SHALL COME GREETING!

That the Profession of Public Accountants in England and Wales is a numerous one and their functions are of great and increasing importance in respect of their employment in the capacities of Liquidators acting in the winding-up of companies and of Receivers under decrees and of Trustees in bankruptcies or arrangements with creditors and in various positions of trust under Courts of Justice as also in the auditing of the accounts of public companies and of partnerships and otherwise.

