

Consultation on the future of European Insolvency Law

The Commission has put the revision of the Insolvency Regulation in its Work Programme for 2012. The revision is one of the measures in the field of "Justice for Growth" set out in the Commission's Action Plan implementing the Stockholm Programme. The revision links in with the EU's current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment, as set out in the Europe 2020 strategy, and to ensure a smooth development and the survival of businesses, as stated in the Small Business Act.

Insolvencies are an important issue for the European economy. About fifty percent of enterprises do not survive the first five years of their life. In 2010, a total of 220 000 businesses went into liquidation in the EU. This means that some 600 companies in Europe went bust every day. This trend continued in 2011. Given these figures, it is essential that insolvencies in Europe are governed by modern laws and efficient procedures. A modern insolvency law helps good companies to survive, encourages entrepreneurs to take risks and permits lenders to lend on more favourable terms. A modern insolvency law allows entrepreneurs to get a second chance. And if necessary, it provides an orderly way for businesses to close down.

European Insolvency Law is laid down in Regulation (EC) No 1346/2000 on insolvency proceedings (the "Insolvency Regulation") which applies since 31 May 2002. The Regulation contains rules on jurisdiction, recognition and applicable law and provides for the coordination of insolvency proceedings opened in several Member States. The Regulation applies whenever the debtor has assets or creditors in more than one Member State.

In general, the Insolvency Regulation has improved legal certainty and facilitated judicial cooperation in the treatment of cross-border insolvency cases. However, after ten years of application, important developments in national insolvency law and considerable changes in the economic and political environment call for a review of the Regulation:

Firstly, in most Member States bankruptcy laws have been modernised: besides traditional collective insolvency proceedings decided by the court on the basis of the debtor's insolvency, various pre-insolvency or hybrid schemes have been put in place. These protect the debtor from its creditors and allow the business to continue to operate. These procedures are also considered to be more effective at preserving jobs.

Furthermore, companies and the economic environment have changed. Companies are incorporated in international groups (parent company and subsidiaries), apply corporate governance rules and have access to capital in the global financial markets. Small companies increasingly operate cross-border. European companies have to adapt continuously to a changing business environment (globalisation, relocation of businesses, financial crisis), which increases the risk of financial difficulties.

Moreover, case-law and a number of academic publications point to certain difficulties in the practical application of the Insolvency Regulation. These difficulties result from the imprecision of some of the legal concepts and criteria in the text of the Regulation, the difficulty to strike a balance between the universality of the debtor's insolvency and the territoriality of proceedings, the variety and disparity of national bankruptcy laws, the relationship between insolvency law and other branches of law (procedural civil law, securities law, company law, labour law) and the limits of the coordination of proceedings.

In addition, in October 2011, the European Parliament published a report with recommendations on the revision of the Insolvency Regulation, in particular to improve the coordination of insolvency proceedings involving a group of companies. The report also recommends the harmonisation of specific aspects of insolvency law and company law and the creation of an EU register for insolvency cases.


Your answers to this questionnaire will help the Commission to determine whether and how the existing legal framework should be improved and modernised.


Questions marked with an asterisk * require an answer to be given.

Background Information

This consultation is addressed to the broadest public possible, as it is important to get views and input from all interested parties and stakeholders. In order to best analyse the responses received, there is a need for a limited amount of background information about you as a respondent

Please indicate your role for the purpose of this consultation *	
<input type="checkbox"/>	Private individual or self-employed
<input type="checkbox"/>	Company
<input type="checkbox"/>	Bank, credit institution or investment fund
<input type="checkbox"/>	Judge
<input type="checkbox"/>	Insolvency practitioner
<input type="checkbox"/>	Other legal practitioner
<input type="checkbox"/>	Public authority
<input type="checkbox"/>	Academic
<input checked="" type="checkbox"/>	Other


 Please indicate the size of your company: *	
<input type="checkbox"/>	large (more than 250 employees)
<input checked="" type="checkbox"/>	medium (less than 250 employees)
<input type="checkbox"/>	small (less than 50 employees)
<input type="checkbox"/>	micro (less than 10 employees)

 Please specify *	
<p>EU registration number: 46643241096-93.</p> <p>ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry, a business that includes interest rate, currency, commodity, credit and equity swaps, options and forwards, as well as related products such as caps, collars, floors and swaptions.</p> <p>ISDA has 830 member institutions from 59 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities.</p>	

Have you had practical experience with cross-border insolvencies and if so, in what capacity?

Yes

No

 If so, *

as a creditor

as an employee in a case of insolvency of my employer

as an insolvent debtor


as an over-indebted private individual or self-employed person

as a judge

as an insolvency practitioner

as other legal practitioner

other

 Please specify *

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Please indicate the country where you are located *

Austria

Greece

Portugal

Belgium

Hungary

Romania

Bulgaria

Ireland

Slovakia

Cyprus

Italy


Slovenia

Czech Republic


Latvia


Spain

<input type="checkbox"/> Denmark	<input type="checkbox"/> Lithuania	<input type="checkbox"/> Sweden
<input type="checkbox"/> Estonia	<input type="checkbox"/> Luxembourg	<input checked="" type="checkbox"/> United Kingdom
<input type="checkbox"/> Finland	<input type="checkbox"/> Malta	<input type="checkbox"/> Other
<input type="checkbox"/> France	<input type="checkbox"/> Netherlands	
<input type="checkbox"/> Germany	<input type="checkbox"/> Poland	

 Please specify*

ISDA has a deep and longstanding interest in the legal and regulatory framework across the globe. The EU framework is of significant relevance to markets across Europe and beyond. A particular focus of ISDA's work is in the insolvency law area.

 Please provide your contact information (name, address and email-address)*


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General Assessment

In your view, does the Insolvency Regulation operate effectively and efficiently to coordinate cross-border insolvency proceedings?

Yes

No

 If so, which main problems have you faced or noticed?

<p>We limit our observations to a few provisions in the EUIR that are of particular relevance to derivatives transactions, especially Article 6. Other industry bodies will make comments on the EUIR as a whole. We submit for consideration that Art 6 EUIR could benefit from further clarification to the current wording with regard to the coverage of netting agreements by this provision.</p>	
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Which principal changes, if any, would you suggest to improve the existing legal framework for cross-border insolvency in the EU?


<p>From a financial market perspective it is crucial to preserve consistency of the treatment of netting and collateral agreements across the insolvency regimes for the various types of market participants. These include corporates, financial institutions, insurance undertakings, public law entities etc. Various EU instruments (EUIR plus Winding-up Directives (Credit Institutions and Insurance Undertakings), Financial Collateral Arrangements Directive) currently address insolvency law issues from both the conflict of law as well as a substantive law perspective. A more harmonized EU legal framework across all types of market participants would be beneficial.</p>	
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Scope of the Insolvency Regulation

1. Types of proceedings covered


The Insolvency Regulation applies to collective insolvency proceedings which entail the partial or total loss of the debtor's control over his affairs and the appointment of a liquidator or administrator ("insolvency practitioner"). It contains a list of national procedures which fulfil these criteria. The Insolvency Regulation does not, in principle, cover national procedures which provide for the restructuring of a company at a pre-insolvency stage ("pre-insolvency proceedings") or leave the existing management in place ("hybrid proceedings"). However, such proceedings have recently been introduced in several Member States because they are considered to increase the chances of successful restructuring of businesses. Some of these proceedings are nevertheless listed in the Insolvency Regulation but the extent to which they are covered by it is subject to controversy. When the Insolvency Regulation does not apply, companies do not benefit from the automatic recognition of the effects of the procedure, for example, the suspension of payment obligations, throughout the EU. There is also no coordination with proceedings in other Member States.

<p>In your view, has it created problems that the Insolvency Regulation does not, in principle, apply to pre-insolvency or hybrid proceedings and that the effects of such proceedings are therefore not recognised EU-wide?</p>		
<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input checked="" type="checkbox"/> No opinion

	<p>If so, please give examples of cases where problems have arisen or could arise</p>
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Should the Insolvency Regulation accommodate national legal procedures which provide for the restructuring of a company at a pre-insolvency stage or which leave the existing management in place?		
<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input checked="" type="checkbox"/> No opinion

 If so, which type of pre-insolvency or hybrid proceedings should be covered by the Insolvency Regulation and recognised in other Member States?		

In recent years, new procedures for dealing with over-indebtedness of private individuals and self-employed persons have been put in place in many countries. Most of these schemes are not covered by the Insolvency Regulation because they do not fulfil the Regulation's conditions for insolvency proceedings because the debtor often maintains full control over its assets and not all Member States provide for the appointment of an insolvency practitioner. Moreover, certain of the Insolvency Regulation's provisions are not adapted to deal with "private bankruptcy".

Should the Insolvency Regulation be applicable to over-indebted private individuals and self-employed persons?		
<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input checked="" type="checkbox"/> No opinion

 If so, how could the Insolvency Regulation be amended to accommodate the recognition and coordination of civil bankruptcy procedures in different Member States?		
	No comment	

2. International dimension of insolvency proceedings

In geographical terms, the Insolvency Regulation is limited to the recognition and coordination of cases within the European Union. It contains no provisions on the recognition of or coordination with insolvency proceedings commenced outside the European Union if there are assets located or litigation pending in a Member State. Likewise, the Insolvency Regulation does not govern the coordination of insolvency proceedings commenced in parallel inside and outside the EU. The effects of the foreign proceedings in these cases are currently determined solely by national law.

In your view, has it created problems in practice that the Insolvency Regulation does not contain provisions for the recognition of insolvency proceedings outside the EU or the coordination between proceedings inside and outside the EU?

Yes

No

No opinion



If so, should the Regulation be amended to address these problems?

The UNCITRAL Model Law on Cross-Border Insolvency provides for a comprehensive framework to deal with foreign proceedings. It appears preferable to have a harmonized framework in place across all EU member states as well as third countries. This might facilitate proceedings across all of the EU member states as well as non-member state jurisdictions in Europe as well as regions beyond. Currently, five EU member states have enacted the UNCITRAL Model Law.

Competent court to open insolvency proceedings


The Insolvency Regulation provides that only the courts of the Member State in which the debtor has the centre of its main interests ("COMI") have jurisdiction to open main insolvency proceedings. In the case of a company or a legal person, the centre of its main interests is presumed to be at the place of the debtor's registered office unless it can be shown that the debtor "conducts the administration of its interest on a regular basis and in a manner ascertainable by third parties" in a different Member State. The concept of "COMI" has given rise to controversy and is a frequent source of litigation. There have also been cases where debtors have transferred their COMI in order to benefit from a more favourable insolvency regime.


In your view, is it appropriate that jurisdiction for opening main insolvency proceedings is determined by the location of the debtor's centre of its main interests ("COMI")?

Yes


No

No opinion

 If so, how should it be amended?	
No comment	

Does the interpretation of the term "COMI" by case-law cause any practical problems?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No
 If so, please describe these problems	
No comment	

Is there any evidence of abusive relocation of "COMI" by the debtor to obtain a more favourable insolvency regime?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No

 If so, please give examples, and suggest how such abuse could be prevented.	
No comment	

The Insolvency Regulation is silent on whether the court competent for opening insolvency proceedings also has jurisdiction for insolvency-related proceedings. Case-law has established that the court opening proceedings also has competence to hear and determine actions that "derive directly from insolvency proceedings and are closely linked to them". Jurisdiction for all other actions is not determined by the Insolvency Regulation but by Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so called "Brussels I Regulation").

Are there problems with the interaction of the Insolvency Regulation with the Brussels I Regulation which have not been solved satisfactorily by case-law?

Yes

No



If so, how should the Regulation be amended?

No comment

Group of companies

Although a large number of cross-border insolvencies involve groups of companies, the Insolvency Regulation does not contain specific rules dealing with the insolvency of a multi-national enterprise group. The Insolvency Regulation treats each individual member of the group as an independent entity for which main proceedings can be opened. There is no compulsory coordination of the independent insolvency proceedings opened for a parent company and its subsidiaries which would allow maximising both the value of the group's assets and the prospects for successful restructuring.

Several recommendations have been put forward in legal literature to cater for the insolvency of groups of companies in the Insolvency Regulation. Some suggest to maintain the principle that main insolvency proceedings can be opened for every member of the group, but want to improve the communication and coordination of the independent insolvency proceedings, and/or strengthen the powers of the insolvency practitioner in the insolvency proceedings of the parent company to intervene in the proceedings of the subsidiaries, for example, by proposing a restructuring plan. Others advocate a more far-reaching modification of the Insolvency Regulation by recommending that there be only a single insolvency proceeding for the entire group at the place of the parent's registered office.

In your view, does the Insolvency Regulation work efficiently and effectively for the insolvency of a multinational group of companies?

Yes

No



If so, how could the insolvency of a multinational group of companies be dealt with in the Insolvency Regulation?

It might be helpful to keep in mind that UNCITRAL are looking into the treatment of cross-border enterprise groups at the moment in the context of the UNCITRAL Legislative Guide on Insolvency. It appears worthwhile looking into the possibility of creating an insolvency regime for cross-border enterprise groups that is not confined to the EU region.

Coordination between Main and Secondary proceedings

Under the Insolvency Regulation, main insolvency proceedings have EU-wide effect and aim at encompassing all of the debtor's assets. In addition, the Insolvency Regulation permits the opening of secondary proceedings which run in parallel with the main proceedings in order to protect the interests of local creditors or to facilitate the administration of complex cases. Secondary proceedings can be opened in any other Member State where the debtor has an establishment.


The Insolvency Regulation provides for the coordination of proceedings opened in several Member States by obliging the insolvency practitioners to communicate information and cooperate with each other. It does not contain a duty of communication and cooperation between insolvency practitioners and the courts involved in a case or between the courts themselves. Such communication could be useful, for example, in order to ensure that the judge in the main proceedings is informed of relevant developments in the secondary proceedings before deciding on further actions.

Finally, the Insolvency Regulation grants the insolvency practitioner in the main proceedings certain powers, for example, to request a stay of liquidation in the secondary proceedings or to propose the closure of the proceedings by a rescue plan. Some commentators argue that these powers should be strengthened.

Has the system of secondary proceedings in general been helpful to protect the interests of local creditors or to facilitate the administration of complex cases?

Yes

No


 If so, how could it be changed?

No comment

Does the coordination between main and secondary proceedings work satisfactorily overall?

Yes


No

 If so, how could it be improved?


No comment

Does the duty to cooperate between insolvency practitioners work efficiently and effectively?

<input type="checkbox"/> Yes	<input type="checkbox"/> No
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 If so, how could cooperation be improved?	
No comment	

Has it created any problems that the Insolvency Regulation does not contain a duty of cooperation between the insolvency practitioners and the foreign court or between the relevant courts themselves?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No

 If so, on which issues and how should communication take place?	
No comment	

Applicable Law

As a general rule, the applicable law is that of the State where the insolvency proceedings in question are being conducted. However, certain legal relationships are governed by a different law. For example, in order to protect employees and jobs, the effects of insolvency proceedings on the rights and obligations arising out of employment contracts are determined by the law applicable to the contract.

Similarly, the opening of insolvency proceedings in one Member State does not affect creditors with security interests in moveable or immovable property (rights in rem) located in another Member State. Rights in rem continue to be governed by the law of the State where the property is situated. This rule protects the value of security interests in property, thereby enabling companies and individuals to obtain credit under conditions which could not be offered without this kind of guarantee. However, the rule has been criticised for causing a somewhat imbalanced situation between the interests of secured creditors and other creditors because it may in certain situations protect secured creditors not only from the effects of a foreign insolvency law but also from the effects of their domestic law.

The law of the State of the opening of proceedings also determines the conditions under which the insolvency practitioner can attack transactions at an undervalue (so-called "detrimental acts"). However, the person benefitting from the detrimental act can, under certain circumstances, oblige the court to apply the law applicable to the transaction instead. This rule has been criticised as creating significant legal uncertainty.

Do you consider that the Insolvency Regulation's provisions on applicable law are in general satisfactory?

Yes

No



If so, what are the main problems?

One of the exceptions to the general choice of law rule in the EUIR is contained in Art.6 (Set-off) according to which the commencement of insolvency proceedings does not affect the rights of creditors to set off their claims against the claims of the debtor provided that such a set-off is permitted by the law applicable to the debtor's claim. This exception is of particular relevance when entering into financial transactions with a corporate counterparty.

Derivatives transactions are generally entered into under netting agreements. Many such transactions are in place between financial institutions and corporates as well as among two corporates. Although certain EU directives (e.g., on the winding-up of credit institutions and insurance undertakings (Art.23/25), on financial collateral arrangements (Art.7)) address the issue of netting agreements and the law applicable by including certain safeguards, there is no equivalent provision in the EUIR. Also, the concepts of set-off and close-out netting are not entirely identical. Many jurisdictions in Europe and across the globe have introduced specific netting legislation to reflect this (please also see the UNIDROIT Draft Principles on Netting (Doc. 13, April 2012); UNCITRAL Legislative Guide on Insolvency (Chapter H). The European Commission is currently developing a draft EU law instrument on netting. It would be most helpful if the wording in Art.6 EUIR could be clarified to also extend to close-out netting. Currently, 25 out of 27 EU member states provide for some form of specific netting legislation (albeit with a certain amount of differences remaining as to scope. Hence the need for the abovementioned Commission project on an EU instrument on netting).

With regard to the law applicable to set-off one could consider clarifications in the EUIR as to what the meaning is of "permitted by the law applicable to the insolvent debtor's claim". Does this refer to the contractual set-off rules or the insolvency set-off rules of the relevant jurisdiction?

In particular, are the exceptions to the general rule justified by the need to protect legitimate expectations and the legal certainty of transactions?

Yes

No




If so, what would need to be amended?

No comment


Does the provision on rights in rem operate satisfactorily in practice?

Yes

No

 If so, how should it be amended?	
No comment	

Does the provision on detrimental acts operate satisfactorily in practice?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No


 If so, how should it be amended?	
No comment	

Recognition and enforcement

The Insolvency Regulation provides that the decision opening main insolvency proceedings is recognised in the other Member States without further formalities; Member States can only refuse recognition of this decision on grounds of public policy. Decisions concerning the course and closure of proceedings are enforced according to the procedure for the recognition and enforcement of foreign decisions set out in Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation" as amended) which specifies additional grounds on which recognition and enforcement of a foreign decision can be refused.

The Insolvency Regulation presumes that insolvency proceedings are always opened by a court's decision. However, there are certain insolvency proceedings under national law where the effects of insolvency are set in place upon the filing of the case and there is not necessarily a court order intervening. Some national procedures also provide for the nomination of a provisional administrator prior to the opening of insolvency proceedings. In such cases, it is currently unclear whether and at what time the opening of such proceedings is to be recognised in the other EU Member States.


Are there any problems of recognition of the decision opening the proceedings or with the recognition and enforcement of further decisions during the proceedings?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No

 Please specify
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No comment	
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Are you aware of cases where a Member State has refused to recognise insolvency proceedings or to enforce a decision on the grounds of public policy?


<input type="checkbox"/> Yes	<input type="checkbox"/> No
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 Please specify

No comment	
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Should the definition of the decision "opening insolvency proceedings" be amended to take into account national legal regimes where there is not or not always an actual court decision opening the proceedings?

<input type="checkbox"/> Yes	<input type="checkbox"/> No
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 If so, how could this be done?


No comment	
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Publication of insolvency proceedings and the lodging of claims

The good functioning of cross-border insolvency proceedings relies on the exchange of information between insolvency practitioners, courts and creditors. In particular, a court opening insolvency proceedings needs to know whether the company is already subject to insolvency proceedings in another Member State. However, the Insolvency Regulation leaves it up to the insolvency practitioners to decide whether to request publication of the

opening judgment in another Member State. At present, EU law does not contain an obligation to publish the opening of insolvency proceedings in an insolvency register nor does it provide for a way to search insolvency registers in other Member States.


Do you agree that the absence of mandatory publication of the decision opening insolvency proceedings is a problem?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No

 If so, how would you like the situation to be improved?			
<input type="checkbox"/> Member States should be required to register the opening judgment in a public register.	<input type="checkbox"/> Member States should be required to register the opening judgment in a specific insolvency register.	<input type="checkbox"/> Member States should be required to register the opening judgment in an insolvency register based on a common set of entries to facilitate cross-border searches and the interconnection of national insolvency registers. If so, please specify which type of information should be registered.	<input type="checkbox"/> Other


 Please specify	
No comment	

The Insolvency Regulation guarantees creditors the right to equal access to insolvency proceedings opened in another Member State. It obliges the court opening the proceedings or the insolvency practitioners to inform all known creditors of the conditions for lodging their claims. The information is to be provided in the language of the Member State of the opening of proceedings. Foreign creditors may lodge their claims in their own language but be ready to provide translation upon request.

Are there any problems in general with the lodging of claims in another Member State or the treatment of foreign creditors?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No

 Please specify	

Are there any difficulties with the Insolvency Regulation's rules on languages for information to creditors and the lodging of claims? In particular, have you experienced difficulties with lodging claims in a foreign language, for example, delays or high translation costs?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No


 Please specify	

Differences in national insolvency laws

The Insolvency Regulation contains rules on jurisdiction, recognition and enforcement and the law applicable to insolvency proceedings. It does not, in principle, harmonise substantive insolvency law. National insolvency laws vary widely among Member States and, according to recent studies, these disparities can create obstacles to the proper administration of cross-border insolvencies and difficulties for companies having cross-border activities or assets in the EU.

Studies have also analysed the relation between the efficiency of national legal regimes on insolvency and entrepreneurial activity and have highlighted that a number of inefficiencies in insolvency law can hamper doing business in the country in question. At the same time, an expedited national insolvency procedure may not sufficiently grant the parties the possibility to contest decisions taken by the court, thereby preventing them from asserting their rights.

In your view, do the differences in national insolvency law create obstacles to the proper administration of cross-border insolvency proceedings or difficulties for companies having cross-border activities or assets in different Member States?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No

 If so, what are the main areas where common rules would be useful in the EU?
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No comment	
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In your view, are there important inefficiencies in your national insolvency law?


<input type="checkbox"/> Yes	<input type="checkbox"/> No
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 If so, should these inefficiencies be addressed at EU level?

No comment	
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Do you consider that your national insolvency law strikes an adequate balance between the need for efficient proceedings and the parties' right to an effective remedy?

<input type="checkbox"/> Yes	<input type="checkbox"/> No
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 Please specify

No comment	
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Cost of Proceedings

In your view, are the costs of cross-border insolvency proceedings disproportionate with respect to the debt?


<input type="checkbox"/> Yes	<input type="checkbox"/> No
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 If so, what are the most problematic cost elements and how could they be reduced?	
No comment	

In your view, are the costs of cross-border restructuring or reorganisation disproportionate?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No

 If so, is this an obstacle to reorganisation and continuation of business? How could they be reduced?	
No comment	

Should there be simplified insolvency regimes at reduced costs for certain debtors, in particular self-employed persons and SMEs?	
<input type="checkbox"/> Yes	<input type="checkbox"/> No

 If so, what kind of regime would you propose?	
No comment	

Other Issues

Is there any other aspect which should be addressed in the context of the revision of the Insolvency Regulation?

No comment

Do you want to upload a file?