

**CONSULTATION ON AN EFFECTIVE INSOLVENCY FRAMEWORK
WITHIN THE EU
- COMMENTS OF INDEPENDENT RETAIL EUROPE -**

27 MAY 2016



1. Insolvency is an important topic for our membership, who frequently operates across borders with a wide variety of suppliers and contracts.
2. Our members are groups of independent retailers. One way in which independent/SME retail entrepreneurs can reach their full potential, whilst retaining their independence, is by joining a group of independent retailers. Such groups are often business cooperatives, characterized by a cooperative structure of independent retailers operating under one brand name, or symbol groups, characterized by a participative structure of independent retailers, including joint buying.
3. Where products are not directly purchased from the central wholesale/purchasing unit of the group, our members often use a system of centralised administration (an independent retailer orders and buys goods from a supplier in his own name and using his own account, the central office collects the payments and guarantees the payment of the independent retailer for the supplier). Similarly, an independent retailer can order and buy goods from the supplier in his name, on the account of the centralised body. These distinctive possibilities have specific relevance to our views on insolvency.
4. In both cases the group's central office has the function of a creditor. A stable and legally certain restructuring and insolvency environment is therefore of critical importance to their business models.
5. Besides this fact, the promotion of the members' interest is the basic principle in any group of independent retailers. It is for this reason that the group's central office has an increased interest in the well being of its members.
6. Before insolvency occurs, the ability to easily restructure is a top priority. Within our membership, any intervention by the central office in this respect depends on the willingness of the independent retailer to allow the central organisation to engage in this process. The retailers are, after all, independent entrepreneurs.
7. We also support wider concepts such as boosting entrepreneurship through a better second chance regime and reducing the severity of punishment following insolvency. However, a better second chance regime must operate in limited, objective circumstances to prevent moral hazard and fraud.

Restructuring

8. The independent retailers working within our member groups work closely with their group central offices. In certain business models, part of this cooperation is to monitor purchasing behaviour through the group's central buying function. This provides the central office of a group with a good indication of the health of an independent retailer's business. In this business model, if an independent retailer hasn't paid for his supplies bought centrally and if his accounts checks show discrepancies, the central office of a group can quickly intervene to avoid any serious problem.
9. These interventions can take the form of looking at the assortment of an independent retailer and modifying it to suit local market conditions, refurbishing a store to attract new customers, encouraging the independent retailer to design new promotions, other marketing efforts etc.

10. In the case of an independent retailer facing difficulties due to a change in market conditions such as the opening of a competitor in the locality of his store, the group central office can help by recommending competitive promotions, or restructuring the store format etc.
11. The store could even be closed and reopened elsewhere if conditions prevent a viable business from continuing.
12. In more severe cases where a bankruptcy is a real threat and the management of the store is an obstacle to the business being viable over the longer term, deeper restructuring may be needed and in such a situation, the central office of a group of independent retailers should continue to be allowed to buy the store and put it under its own management, or the management of another independent retailer. This must be done when the store is still viable and before a bankruptcy. This is also contingent on an independent retailer and its centralised group headquarters having an appropriate contractual framework to plan for this possibility.
13. Ultimately it is the independent retailer himself who would decide whether or not to engage in a restructuring plan.
14. In other business models, the centralised aspect of a group will notice changes to the health of an independent retailer's business in its role as a guarantor of payments. In less integrated business models, a "chain of escalation" exists from sending out reminders to the exclusion of the member from this system.
15. Where employees' liabilities are passed on to a party engaged in restructuring, this should be done in accordance with national labour laws and effective national solutions already exist (e.g. Germany).
16. Among our membership, as well as in many industries, it has become common practice to arrange for interim financing or similar to take into account seasonal / weather-related influences, in consultation with one's contractors. Refinancing forms can also include supplier credit, the use of credit terms or the agreement to alter mortgage payments. Their advantage is that they are flexible, quick use tools, which currently have a very high importance in the SME sector.
17. This should be promoted by such financing being given **a priority right in the case of insolvency such as a secured creditor status.**
18. In our members' specific context, this would mean in cases of restructuring, where the central office of a group of independent retailers has provided restructuring finance, this 'bail out money' should be protected and this creditor should be given absolute priority (including priority over the State) in recovery proceedings. This will improve legal certainty for creditors during a restructuring and encourage restructuring over bankruptcy.
19. An essential part of restructuring is to know the conditions for viability. It is difficult to regulate precisely for such conditions, given that all sectors have different specificities and business conditions. However, if general principles are made to define viability they must be clear and appropriate to determine whether or not a restructuring can take place.

Insolvency

Level of harmonisation

20. We support maximum harmonisation of EU insolvency rules. This would provide our members operating cross-border (and providing credit cross-border) with maximum levels of legal certainty, investor protection, and cost savings.

Order of recovery

21. Secured creditors should be given priority in insolvency proceedings. **We advocate that where the central office of a group of independent retailers has provided a form of credit (or guarantee) to one of the independent retailers belonging to its network then that central office should be the priority creditor.** In any case, creditors should have priority over the State in recovery proceedings.
22. We believe that State treasuries/tax authorities should not have priority over other creditors in a normal insolvency proceeding. From an economic point of view, the treasury can benefit in the long run if monies owed to it go into restructuring the insolvent company or paying other creditors who can then reinvest the money – a portion of which will ultimately benefit the State.

Retention of title

23. Security/property rights should be respected in any new EU insolvency legislation.

Procedures

24. The formal requirements for insolvency proceedings (claims, registration, etc.) should be as simple and efficient as possible. The German Insolvency Act procedure, which includes registration / examination of the claim directly with the administrator etc., appears to be a well-functioning system.

Costs

25. The costs of proceedings should be kept as low as possible. This can be helped by having a short process, shorter discussions/cheaper dealings with administrators.
26. International actions must become much cheaper, harmonisation should help with this.

Discharge periods/second chance

27. Discharge periods should allow an entrepreneur to return to economic life in a reasonable timeframe. There is a lack of retail entrepreneurs and we do not want to penalise an insolvent independent retailer if he has become bankrupt due to circumstances beyond his control such as a cheaper retailer moving into the neighbourhood, a hypermarket opening up by his smaller store etc.

28. In practice, situations are not always clear-cut. Facilitating discharge should therefore only happen under specific circumstances to avoid moral hazard as well as fraudulent bankruptcies. We believe that a set of objective criteria should be developed to determine when a facilitated discharge should be allowed. In addition, the risk of the chosen business model must be taken into account in such criteria. We note that where an independent retailer is affiliated with a wider network in a group of independent retailers, business failure rates are significantly lower. According to a 2011 study by CCI France (Chambres de Commerce et d'Industrie), retail SMEs working together within the same business structure are about twice as likely to survive the start-up phase of their business when compared to purely independent retailers.

Prevention of “double punishment”

29. Insolvencies of independent retailers belonging to a group can have very negative consequences. It can lead to the loss of a rare retail entrepreneur and at the same time it can potentially lead to the loss of a strategically important point of sale for the wider independent retail group causing a loss of market share etc. thus resulting in a double punishment.
30. This makes it particularly important that a group of independent retailers, with the agreement of the independent retailer, can make a quick intervention in a restructuring process, including if necessary, the buy-out of the point of sale.

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*Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for the main groups of independent retailers in the food and non-food sectors.*

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer.

Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 23 groups and their 364,500 independent retailers, who manage more than 571.000 sales outlets, with a combined retail turnover of more than 815 billion euros and generating a combined wholesale turnover of more than 315 billion euros. This represents a total employment of more than 5.885.000 persons.

More information about Independent Retail Europe under www.independentretaileurope.eu