Via E-mail: **JUST-CIVIL-COOP@ec.europa.eu**

European Commission
Directorate-general Justice
Unit A 1 Civil Justice Policy - Secretariat
Rue Montoyer 59, 2/74
1049 BRUSSELS, Belgium

Dear Sir/Madam

RE: CONSULTATION ON INSOLVENCY II
Focus: "Early Restructuring Procedure"

With reference to your aforementioned project I would, in the name of Turnaround Management Association Europe TMAE, make the following comments:

1. **Summary**
   TMAE strongly supports the EU-Commission's recommendations as contained in its paper issued on 12 March 2014 ("on a new approach to business failure and insolvency") and would recommend to add **guiding principles** for the regulators in each jurisdiction, complemented with a reference to some successfully proven **cross border mechanisms.** The position of TMAE is based on a wide consultation with our chapters across Europe and is meant to complement, not to substitute, the submissions currently under way by our chapters. We implemented a pan European working group with leading practitioners from across Europe to develop this joint view. The joint view represents the areas we could agree on and is therefore limited to the areas of consensus.

2. **Background of TMA Europe**

   TMA Europe represents the 12 European chapters, serving as a professional trade association for turnaround professionals facilitating interchange of ideas, supporting the evolution of turnaround regulation, establishing professional trainings and recognised certifications etc. just to name a few. TMA has appr. 1200 active members in Europe, organised in 12 national chapters, including senior professionals form leading law firms, banks and turnaround practitioners, providing an integrated view on turnaround and restructuring matters.

   The Turnaround Management Association (TMA) is the premier organisation dedicated to corporate renewal and turnaround management. More than 9,000 TMA members comprise a worldwide professional community of turnaround practitioners, attorneys, accountants,

investors, lenders, venture capitalists, appraisers, liquidators, executive recruiters and consultants, as well as academic, government and judicial employees.
Headquartered in Chicago, Illinois, TMA has 57 chapters spanning six continents – 32 in North America and 25 throughout the rest of the world.

3. Focus of this recommendation – "pre-insolvency restructuring mechanism"

3.1 Guiding Principles:

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a. Fairness
b. Efficiency
c. Certainty
d. Participation: Accessibility of the legislation
e. European: Cross border mechanism

Our written submissions on the corporate matters today refer to five guiding principles. The first are priority issues, which give way to issues of fairness. The second is the participation, or what we call governance, issues, which give rise to issues of accessibility and fairness competing with the issues of efficiency. The third is cross-border insolvency, which gives rise to accessibility and certainty issues; debtor-in-possession financing, which focuses on issues of efficiency and certainty, and interim receivership, which gives rise to issues of accessibility driven by uncertainty and fairness.

I would like to give an example of how we have used these Guiding Principles in examining this legislation and amendments. As an example of the importance of the Guiding Principles, we would like to briefly review our anecdotal experience with cross-border lending and insolvency matters. European professionals in large reorganization cases that straddle multiple jurisdictions view foreign system as frequently unpredictable, both in fairness and accessibility. This unpredictability results in uncertainty. This not only has an impact upon one professionals willingness to participate in a foreign reorganization regime, but also, arguably, upon a cross border optimisation of recovery or resolution to the benefit of national and international creditors and ultimately their willingness to participate in international exposures and respective debt and equity markets. The importance of attracting this capital to European markets should not be underestimated and should be incorporated into the harmonisation review in these circumstances, providing certainty to investors to deal with a cross border regime which does not fall back into mainly national regulation if a distressed situation arises. Structural barriers to a flow of capital from abroad include multiple securities regulation regimes, multiple personal property security regimes, multiple priority regimes, interprovincial priority regimes and the exercise of open-ended and unpredictable judicial decision-making in reorganization cases should be limited by either a cross border regime or a passport to apply regulation of the creditors COMI to its non-COMI jurisdictions.

All of these examples arguably impede this flow of capital to the European markets and equally impede the enhancement and growth of residential and capital markets. The relative scale of the European capital market to its American counterpart necessitates that Europe have a much more efficient and accessible system than the U.S. in order to attract, as opposed to discourage, this flow of capital. This capital is needed within the reorganization context specifically in order to support insolvent companies while they attempt their reorganization. The absence of this type of capital contributes to more liquidation and less reorganization. We believe that macroeconomic issues such as these should be studied in more detail than to date, and that the results of these studies should be factored into your harmonisation efforts. This is just one example of how the use of these Guiding Principles

helps to understand the implications of these recommendations that we wish to specifically draw to your attention.

3.2 Cross Border Mechanisms

Out of Court / Court Supported Mechanisms – Here we focus on the need of Moratorium and stand still which shall not trigger a covenants breech in existing loan agreements, allowing companies to initiate a restructuring discussion. Most loan documentation today triggers a default if early signs of distress are apparent or acknowledged by a company, preventing a pre-emptive focus on solving upcoming distress challenges in an out of court consensual way.

Pre insolvency consensual mechanisms – CVA or ISUG, just to name 2, provide for a voluntary framework though they lead to insolvency, these mechanisms need to be harmonised and ideally complemented with an exit option which does not automatically lead to an insolvency in case of failure of reaching an agreement. If it fails one possible answer needs to be that the company returns to the legal solvency status as per the day before the process was initiated.

Scheme of Arrangement Europe (Consensual Cram Down Mechanism in Company law) – Europe is in need of a cross border supra national scheme of arrangement which allow a selected group of creditors to voluntarily renegotiate the debt and cram down. The mechanism needs to allow qualified majority creditors within this group to outvote holdouts, preventing minority creditors from blocking an overall beneficial solution nor allowing minority debtors to hold majority debtors at ransom.

Passport – to apply regulation of the creditors COMI to its non-COMI jurisdictions – The jurisdiction which holds the COMI of a restructuring case shall have the option to impose its major ruling onto minority subsidiaries in other European jurisdiction. Whether this transport of mechanism is managed through a passport or a case by case reasonable acknowledgement by local courts or mediators, is yet to be seen. However, a passport or transport of one Jurisdiction over the other, applying one legal code to a case, would allow for much more harmonised and balanced treatment of cases.

Mediator and cross border arbitration – Mediators or arbitration may be an alternative or a complement to the passport allowing to use a reasonably harmonised treatment of claims and business or value creation driven flexibility and judgement in the interest of all stakeholders.

Strict separation of pre insolvency and insolvency certification and or qualification requirement for supervisory roles (i.e. IP not to engage in pre insolvency procedures due to possible conflict of interest).

4. Shortfalls of the current regime

We omit to comment on the shortfall and refer to the submissions of the individual chapters

5. Commenting on the Commission's Proposal

We omit to comment on the shortfall and refer to the submissions of the individual chapters

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We would encourage a face to face dialogue on these matters to further explore and contribute to a pan European optimisation or the regulatory framework, free flow of distressed capital and the certainty and predictability of dealings in distressed situation across borders.

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

Dr. Lukas Fecker
President TMA Europe