

DRAFT

INSOL EUROPE STATEMENT OF PRINCIPLES AND GUIDELINES
FOR INSOLVENCY OFFICE HOLDERS IN EUROPE

TEXT OF 29 OCTOBER 2014

as adapted for publication purposes

on 8 April 2015

Introduction

The text of this draft “INSOL Europe Statement of Principles and Guidelines for Insolvency Office Holders in Europe” is the result of an assignment by INSOL Europe to Leiden Law School in early 2013. In close collaboration with an Academic Committee and a Review & Advisory Group of insolvency practitioners and judges, Professors J.A.A. Adriaanse and I.S. Wuisman and Senior Researcher dr. Bernard Santen from Leiden Law School (Leiden University) designed the Statement. The process towards the Statement has been documented in three reports. These can be retrieved from www.TRI-Leiden.eu.

The draft text made available here contains 7 Principles, 33 Guidelines. These Principles and Guidelines are meant to serve as a sound benchmark for the profession, as a means to strengthen public confidence in the profession on the market, and as a focus for debate on possible future binding rules for IOHs on a European level. For the 83 Comments available to the Statement, the Leiden-team refers the interested reader to the www.TRI-Leiden.eu website.

The draft has been presented and discussed at the INSOL Europe annual conference in Istanbul in October 2014 and was well received. However, due to the limited feedback received from the INSOL Europe members, we decided not to be in a position to fully endorse the result of this study despite the valuable contribution and consolidation of certain matters related to officeholder functions.

The study remains open for discussion. Please address your remarks to IOH@law.leidenuniv.nl and copy these to carolinetaylor@insol-europe.org.

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The Executive of INSOL Europe

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Principle 1. Insolvency Office Holder

- 1.1 An Insolvency Office Holder ('IOH') is any person or body appointed either in corporate rescue oriented or in liquidation proceedings ('proceedings'), whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of its affairs.
- 1.2 In performing his/her duties an IOH is bound by the law including case law and other regulations that apply in the country of appointment, as well as by regulations and guidelines set by a widely recognised national or regional professional association of IOHs in that country.
- 1.3 An IOH is guided by this non-binding Statement of Principles and Guidelines ('Statement') unless and insofar as they contravene the aforementioned rules.

Guideline 1.1

An IOH is a member of a national or regional professional association of (nominee) IOHs in the country where his/her office is located. The aim of such an association is to promote the continuous improvement of the level of professionalism of an IOH by means of e.g. training, education, exams, disciplinary action and a complaints procedure, in order to facilitate efficient proceedings and to promote and maintain the trust of creditors and the market. If there is no such regional or national professional association, an IOH endeavours to establish one. An IOH encourages the association to publish an up-to-date list of members on its website, including the office addresses and names of the firms (if any) these members are associated with.

Guideline 1.2

An IOH refrains from any payment or any other valuable reward with a view to secure an appointment as an IOH in specific proceedings, either directly or through an intermediary.

Guideline 1.3

An IOH petitions the relevant court for the appointment of a single IOH in not-yet opened, but likely to-be-opened proceedings for group members or other closely related insolvent debtors if (s)he deems this in the interests of creditors of the estates involved. The petition explicitly explains (a) why the appointment would serve the interests of the estates involved, and (b) why the IOH is of the opinion that a conflict of interests, if it would arise, can be managed effectively.

Principle 2. Professional Standards

- 2.1 An IOH performs his/her tasks according to the state-of-the-art in insolvency practice, uses competent and trained personnel, occupies appropriate office space and applies adequate office equipment.
- 2.2 An IOH behaves diligently, with courtesy and consideration towards all parties involved, and avoids behaviour discrediting the profession.
- 2.3 At the moment of appointment and regularly thereafter, an IOH carefully evaluates whether (s)he is capable to handle an appointment, and if it appears that the appointment exceeds his/her capabilities, (s)he either takes appropriate steps to manage the situation and/or the assignment or (s)he does not accept the appointment or resigns.

Guideline 2.1

An IOH annually takes sufficient training in insolvency related matters organised or endorsed by a national or regional professional association in order to maintain the professional knowledge and skill at the level required.

Guideline 2.2

An IOH annually practices a sufficient amount of time in insolvency in order to maintain the professional knowledge and skill at the level required.

Guideline 2.3

An IOH discloses to the general public which training activities (s)he has attended, the experience (s)he has acquired and other qualities that may be relevant to the performance as an IOH.

Guideline 2.4

After any new appointment and at least annually thereafter, an IOH explicitly calculates in terms of total assets and foreseeable risks whether the existing professional liability insurance coverage e.g. policy, caisse de garanti, bonds, can be reasonably deemed sufficient or would need adaptation.

Principle 3. Ethical Standards

An IOH performs with

- (a) integrity, meaning that an IOH is straightforward and honest;
- (b) objectivity, including impartiality and independence, meaning that an IOH does not allow bias, conflict of interests or undue influence of others to override professional or business judgments and is solely guided by the interests of the estate;
- (c) confidentiality, meaning that an IOH complies with the confidentiality of information acquired as a result of the appointment and avoids the abuse of confidential information.

Guideline 3.1

An IOH resigns immediately if it turns out that his/her family members, those of his/her (former) spouse or a comparable person, a personal relation, or a professional relation of him/her or a professional office member over the past 12 months, appear as the insolvent debtor in the insolvency proceedings (s)he is appointed in.

An IOH considers whether to resign immediately when his/her family members, those of his/her (former) spouse or a comparable person, a personal relation, or a professional relation of him/her or a professional office member over the past 12 months, appear as a material creditor in the insolvency proceedings (s)he is appointed in.

If an IOH decides not to resign, (s)he informs the appointing and/or the supervisory authority about the decision.

Guideline 3.2

An IOH considers to resign immediately once a conflict of interests has occurred or is likely to occur. A conflict of interests has occurred or is likely to occur when an IOH knows, or should have known, of a transaction, legal or actual act in which (s)he takes part, will take part, or arranges others to take part and which creates a (future) advantage for that IOH and/or (one of) his/her personal relations or a professional relation of him/her or a professional office member over the past 12 months.

If an IOH decides not to resign, (s)he informs the appointing and/or the supervisory authority about the decision.

Principle 4. Administration of the Estate

- 4.1 An IOH is responsible for determining and continuously adapting the adequate strategy for the administration of the specific insolvency proceedings (s)he is appointed on and carefully evaluating the various options the law provides.
- 4.2 In administering an IOH acts expeditiously, efficiently and transparently. (S)he continuously keeps in mind the overriding duty to protect and preserve the estate and to act in its best interests, while taking into account the effects of his/her decisions on the legitimate interests of all parties involved.

Guideline 4.1

Whenever possible, an IOH petitions for or claims a moratorium or a stay on all the debtor's assets in order to preserve the estate and to be able to do research on the validity of the alleged claims.

Guideline 4.2

An IOH decides on the release of assets to creditors with an alleged security right or another preferential right on the assets according to the law where the assets are located as soon as reasonably practical in the circumstances of the case.

Guideline 4.3

An IOH investigates whether there are alleged detrimental legal acts of the debtor to be reversed as soon as reasonably practical in the circumstances of the case. (S)he discusses the findings with the supervisory authority at regular intervals agreed with the supervisory authority and presents the steps to be taken.

Guideline 4.4

As soon as reasonably practical in the circumstances of the case and preferably within a month after appointment an IOH: (1) prepares a survey of all the debtor's material contracts duly classified and prioritized according to the financial risks involved; and (2) informs the counterparty and other relevant parties concerned expeditiously on his/her decision to either perform or not to perform a contract.

The decision to continue or to terminate a contract must be capable of justification.

Guideline 4.5

An IOH investigates the existence of any liability of board members, shadow directors and others as soon as reasonably practical in the circumstances of the case. (S)he discusses the findings with the

supervisory authority at regular intervals agreed with the supervisory authority and presents the steps to be taken.

Principle 5. Communication

5.1 An IOH recognises the importance of swift, timely, proper, clear and open communication and communicates accordingly with all parties involved.

5.2 An IOH refuses to provide information only if disclosure would clearly harm the interests of the estate or those of others.

Guideline 5.1

An IOH communicates in the language of the country where (s)he has been appointed. An IOH communicates with foreign citizens involved in the proceedings in English or, if feasible, in another language that is likely to be understood by the recipient and only as far as necessary to adequately inform that party.

Guideline 5.2

An IOH discloses:

- *on the internet and in the first communication to all parties involved the name of the debtor and his/her trade name(s), by whom and the point in time when (s)he has been appointed;*
- *on the internet and in all communications his/her contact information, including an office address and an email address;*
- *on the internet and in all communications the internet address the IOH uses to communicate public information on the insolvency proceedings;*
- *on the internet and in all communications his/her membership of a regional, national or international professional organisation of IOHs.*

Guideline 5.3

Within four weeks after appointment, an IOH informs all known parties involved in the insolvency proceedings about:

- *the appointment of an IOH and the commencement of the insolvency proceedings;*
- *the mandate, i.e. whether the aim is liquidation or restructuring of the company.*

Guideline 5.4

An IOH applies Article 40 EIR to all creditors: national and international.

Guideline 5.5

Each communication from an IOH containing a decision is sent without delay to the party concerned, whenever possible by ordinary mail and by email. If the party is established in another

country, the mail should also be sent by the fastest form of postal delivery possible if the term of appeal to the decision is subject to a deadline. Any such communication should clearly mention the appeal deadline as well as the appeal tribunal and its address.

Guideline 5.6

An IOH avoids implying guilt or innocence of any party before a court has made such a determination.

Guideline 5.7

Immediately after submission to the relevant supervisory authority, an IOH places public reports on the internet address meant in Guideline 5.2. An IOHs endeavours to post new facts on the proceedings on the internet address.

Guideline 5.8

In reporting on the progress of the insolvency proceedings and on specific issues concerning the estate, the IOH seeks to provide (a) consistency of the reports i.e. one report should connect to the former, and (b) transparency i.e. the information should outline which steps the IOH has undertaken and to which end, while preserving secrecy and confidentiality.

Principle 6. Coordination and cooperation

IOHs coordinate their actions and cooperate to the maximum extent possible with each other and with courts involved in the insolvency proceedings, in order to

- (a) promote the orderly, effective, efficient, and timely administration of the proceedings;
- (b) provide for timesaving procedures to avoid unnecessary court proceedings or unnecessary costs; and
- (c) secure and enlarge the collectivity of assets.

Guideline 6.1

An IOH explicitly considers the use of an agreement or protocol in order to achieve the objectives of Principle 6. In that agreement or protocol an IOH considers the inclusion of this Statement, either entirely or for specific parts.

Guideline 6.2

When assets will be sold an IOH cooperates to the maximum extent possible with other IOHs as well as with all parties involved, in order to obtain the maximum aggregate value for the assets of the insolvent debtor as a whole, across legal entities and across national borders. If this cooperation would turn out to be detrimental to a specific estate, the concerned estate(s) will be offered full compensation for the consequences of cooperation from the other estates that are better off by the cooperation.

Guideline 6.3

An IOH does not accept fees or compensation from nor charges fees or compensation to IOHs in relation to coordination and cooperation activities, unless agreed upon beforehand and (1) if the activities take substantial time, or (2) if the activities otherwise cause loss to the estate. Any such fee or compensation is accounted for in the estate.

Guideline 6.4

An IOH may inform the supervisory authority of another IOH (s)he seeks coordination or cooperation with, on any attempt from his/her side to communicate or to seek coordination or cooperation, if that other IOH does not adequately communicate with the IOH.

Principle 7. Insolvency governance

An IOH recognises the utmost importance of insolvency governance for the benefit of the estate as well as the professional quality, the profession's prestige and the trust in the profession on the market and therefore gives priority to all insolvency governance related activities.

Guideline 7.1

An IOH properly documents all acts during the insolvency proceedings. (S)he is responsible for proper bookkeeping of all the estate related financial facts according to the standard valid for entities with a total of assets in the range of that of the estate.

Guideline 7.2

An IOH takes care that the internet address used to communicate public information on the insolvency proceedings as mentioned in Guideline 5.2. remains accessible for the general public for at least a year after termination of the proceedings.

Guideline 7.3

Immediately after termination of the proceedings, an IOH discloses a summarized but sufficiently detailed and transparent survey of the financial outcome of the proceedings on the internet address used to communicate public information on the insolvency proceedings.

Guideline 7.4

If the fee is based on time spent on the proceedings, an IOH accounts for the time spent in units of not more than 10 minutes and includes a short description of the activity mentioning subject, name, file, person, asset or discussion, as appropriate. These time recordings are only available to the supervisory authorities and the creditors' committee.

Guideline 7.5

An IOH executes the payment of his/her fees and his/her expenses only after written approval of a supervisory authority. An IOH does not charge a fee that is unreasonable either in relation to the amount of work done, or to the accomplished results.

Guideline 7.6

Requests of a supervisory authority for information are given immediate care of and are responded to with priority. An IOH hands over information related to insolvency proceedings to a supervisory

authority if legally obliged to and so requested, provided the information falls within the period of appointment.

Guideline 7.7

An IOH encourages the national or regional professional organisation of which (s)he is a member, to establish a disciplinary procedure including an appeal procedure and the option to suspend or cancel a member, open to all parties involved in the proceedings.

