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Contact:

Prof. Reinout Vriesendorp
Leiden Law School
PO Box 9520
2300 RA Leiden
The Netherlands
E: info@ceril.eu
W: www.ceril.eu

Date: 6 July 2022

Re: CERIL Statement 2022-2

Reporters: Profs. Stephan Madaus
and Bob Wessels¹

CERIL Statement 2022-2 on Cross-Border Effects in European Preventive Restructuring:

identifying and assessing the benefits and shortcomings of selecting the European Insolvency Regulation 2015 to govern proceedings in preventive restructuring frameworks

CERIL addresses the policy issues of identifying (and possibly selecting) the regulatory cross-border framework for new procedural options introduced in most EU Member States when implementing preventive restructuring frameworks flowing from Directive (EU) 2019/1023 on restructuring and insolvency.²

¹ This Report is prepared by CERIL Working Party (WP) 11 on Matters regarding the European Insolvency Regulation 2015 (EIR 2015). The WP that discussed and contributed to this Report consisted, in addition to Stephan Madaus (co-chair) and Bob Wessels (co-chair), of the conferees participating in this WP, see www.ceril.eu/working-parties/wp-11-matters-regarding-the-european-insolvency-regulation-2015. The reporters would like to express their gratitude for their insightful contributions to Petr Sprinz (Czech Republic), Jessica Schmidt, Reinhard Bork (Germany), Elina Moustaira, Stathis Potamitis, Alexandros Rokas (Greece), Zoltán Fabók (Hungary), Stefania Bariatti, Giorgio Corno, Rita Gismondi, Antonio Leandro, Luciano Panzani, Patrizia Riva, Caterina Macchi, Renato Mangano, Lorenzo Stanghellini (Italy), Michal Barłowski (Poland), Catarina Serra (Portugal), Djuro Djuric (Serbia), Ivan Ikrényi (Slovak Republic), Adrián Thery, Iván Heredia, Francisco Garcimartín (Spain), Michael Veder and Reinout Vriesendorp (The Netherlands).

² Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt ('Restructuring Directive').

In 2021 CERIL published guidance regarding the scope of the European Insolvency Regulation³ with respect to the scope of the Brussels Ibis (or Judgment Regulation)⁴ for annex actions.⁵ The relationship between both Regulations is also the underlying subject of this Report.

The Existing Legal Frameworks are Inadequate and Create Legal Uncertainty

Overall, CERIL finds that to date no tailor-made framework exists which could facilitate the cross-border effects of preventive restructuring proceedings.

The rules of the EIR 2015 are largely based on the basic notions of the original Regulation of 2000. Their basic design is geared towards traditional asset-oriented insolvency proceedings that include the mandatory creation and administration of an estate, the verification of claims and the realisation and distribution of value, provided for by a court-appointed insolvency practitioner. These characteristics are not core features of preventive restructuring proceedings. Even worse, secondary proceedings are capable of frustrating any restructuring effort.

The rules of the Brussels Ibis Regulation are not able to work as a resort. First, they might not even encompass preventive restructurings due to its exclusion of bankruptcy or analogous proceedings. Second, its rules are geared towards bilateral civil litigation and therefore provide a framework that is only partially able to efficiently regulate preventive restructuring proceedings, especially with regard to questions of jurisdiction and applicable law.

Finally, the current national cross-border law of Member States is not capable to fill the legislative gap at the EU level. CERIL found that restructuring practice can barely rely on specific national rules as a cross-border restructuring framework remains to be established yet either by case law or law reforms. Often national law mirrors the duality of cross-border rules on insolvency law and on civil procedure with largely diverging requirements for recognition across the EU.

The Need for Legislative Action

As legislative action is needed, CERIL identified three instances of initiatives for legal reform:

³ Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) ('EIR 2015').

⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Ibis Regulation').

⁵ CERIL Report 2021-1 on identifying annex actions under Art. 6(1) EIR 2015, available at: www.ceril.eu.

1. As the European Commission is asked to review the application of the EIR 2015 by 27 June 2027 according to Article 90(1) EIR 2015, CERIL argues that the critical assessment of the adequacy of the EIR 2015 approach of merely extending the scope of the EIR 2015 to cover restructuring proceedings with no regard to their specific needs should form a central topic of this review.

2. CERIL welcomes any earlier, if not immediate, action of the European Commission towards the adoption of a special cross-border framework for restructuring proceedings that could be included (as a specific chapter) in the EIR or take the form of a separate Regulation. The content of the special framework should include rules on jurisdiction, applicable law and automatic recognition that reflect the needs and best practice of modern preventive restructuring practice in the global restructuring market, and should, as much as possible, align with the definitions and themes of the Restructuring Directive.

3. While CERIL prefers the European Commission to initiate steps leading to an autonomous, standalone regulation which would aim at a special framework for restructuring (only) proceedings, CERIL invites all Member States to timely review their legal cross-border framework in order to enable or facilitate the recognition of foreign preventive restructurings, bearing in mind that such a framework is essential also with regard to preventive restructuring procedures opened in third countries (e.g. the United Kingdom, Switzerland or Norway).

Concluding Note

The full Report is available as Report 2022-2 on CERIL's website www.ceril.eu. This site also informs about the organisation of CERIL and its activities.

In the meantime, co-reporter Prof. Stephan Madaus (stephan.madaus@jura.uni-halle.de) welcomes the opportunity to further inform about this Statement and Report.

For further information regarding CERIL, please contact Prof. Reinout Vriesendorp (Secretary; info@ceril.eu).

On behalf of the CERIL Executive,

Bob Wessels
Chair