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Date: 2 October 2023

Re: **CERIL Statement 2023-2**

Reporters: Prof. Reinout

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Annex to Statement 2023-2 on the

**European Commission
Proposal for a Directive
Harmonising Certain
Aspects of Insolvency Law**

¹ This Statement is prepared by CERIL Working Party (WP) 20 on Harmonisation of EU Insolvency Law. The WP that discussed and contributed to this Statement consisted, in addition to Reporters, of the conferees participating in this [WP](#). The reporters would like to express their gratitude for their extensive contributions to the participants to the CERIL Survey.

We would also like to express our sincere gratitude to the Research Associates Gert-Jan Boon, PhD Researcher and Lecturer at Leiden University (the Netherlands), and Defne Taşman, PhD Researcher at University of Antwerp (Belgium) for preparing a preliminary study, conducting the survey, and for their assistance with drafting the text of this Statement.

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1. The EC Proposal

1.1 Introduction

On 7 December 2022, the European Commission published its long-awaited Proposal for a directive harmonising certain aspects of insolvency law (EC Proposal). The European Commission puts forward measures to further develop the Capital Markets Union, which includes the harmonisation of certain corporate insolvency rules across the EU, making them more efficient and helping promote cross-border investment.

The EC Proposal focuses on the harmonisation of substantive insolvency law and targets three main dimensions: (1) the recovery of assets in a liquidated insolvent estate, (2) the efficiency of procedures, and (3) the predictable and fair distribution of recovered value among the creditors. The EC Proposal, in short touches upon 7 main topics:

1. Avoidance actions;
2. Asset tracing;
3. Pre-pack proceedings;
4. Directors' duty to file;
5. Simplified winding-up proceedings for microenterprises;
6. Creditor's committees; and
7. Standard factsheet of national insolvency proceedings.

The key topic areas of the EC Proposal are briefly explained as follows:

1.2 Avoidance actions

Title II on avoidance actions (Articles 4-12) provides minimum harmonisation provisions with the aim of protecting the insolvent estate against unlawful removal of assets conducted prior to the opening of insolvent procedures. Currently, "the landscape in Member States is very differentiated, in all aspects of the conditions allowing for the avoidance of transactions" (Commission Staff Working Document Impact Assessment Report, SWD(2022) 395 final, p161). By adopting a principles-based approach and setting three avoidance grounds, the proposal aims to bring a minimum standard of protection relates to the voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors (SWD(2022) 395 final, p160).

1.3 Tracing assets belonging to the insolvency estate

Title III on asset tracing (Articles 13-18) facilitates the identification of misappropriated assets or their proceeds belonging to the debtor's estate. The proposal is to extend the scope of registers accessible by insolvency practitioners to provide access to bank account information, beneficiary ownership information and certain national asset registers, as will be listed in the proposed directive's annex. The text also requires insolvency practitioners appointed in other Member States to be provided with the same access conditions as practitioners appointed in the Member State where the asset register is located.

1.4 Pre-pack proceedings

Title IV on pre-pack proceedings (Articles 19-35) ensures that these proceedings are available in a structured manner in the insolvency frameworks of the Member States. Pre-packs are generally considered to be an effective procedure for early-stage value recovery for the creditors by selling the business (or part thereof) as a going concern, rather than by piecemeal liquidation. This procedure would allow for the sale to be prepared and negotiated before formal proceedings are opened in the “preparation phase”, followed by a short insolvency procedure where the court authorises the sale and the proceeds are distributed amongst the creditors “liquidation phase” (Explanatory Memorandum to the EC Proposal, p15).

1.5 Directors’ duty to request the opening of insolvency proceedings and civil liability

Title V on the directors’ duty to file (Articles 36-37) stipulates that directors need to file for insolvency proceedings no later than three months after the director became aware (or should have become aware) that the legal entity is insolvent, subject to the directors’ civil liability for damages that occurred as a result of the failure to comply with this obligation. This measure is part of the aim to maximise the value of the insolvent estate.

1.6 Winding-up of insolvent micro-enterprises

Title VI on winding-up insolvent micro-enterprises (Articles 38-57) introduces a new and simplified regime specifically for micro-enterprises (see also Commission Recommendation of 6 May 2003 concerning the definition of micro, small, and medium-sized enterprises, 2003/261/EC). The day-to-day business operation and assets remain under the control of the debtor (which makes the appointment of an insolvency practitioner an exception) and aims to save relatively more costs compared to an ordinary insolvency procedure.

1.7 Creditors’ committee

Title VII on the creditor’s committee (Articles 58-67) sets out the provisions to further enhance the protection of creditors’ interests and their position in the procedure through their representation in the creditors’ committees. This committee is established by the general meeting of creditors.

1.8 Measures enhancing the transparency of national insolvency laws (Standard factsheet)

Title VIII on transparency consists of one provision (Article 68) which obliges Member States to produce and regularly update a standard fact sheet with practical information on the main features of their national insolvency legislation in order to ameliorate the transparency of national laws on insolvency proceedings.

2. CERIL Conference and the Survey

2.1 Introduction

The EC Proposal inspired CERIL to organise an international 2-day conference on these topics which took place at Leiden University on 20-21 April 2023.² In preparation for the conference, CERIL drafted a survey (Survey; see Annex to this Statement), which it circulated among its conferees from all over Europe and across various sectors involved in restructuring and insolvency law, such as insolvency practitioners, judges, policy makers, academics etc. The Survey aimed to gauge the knowledge and appetite concerning the EC Proposal within the CERIL community in each of the conferees' jurisdictions regarding:

1. the need for harmonising each of the topics in the EC Proposal;
2. the further process for each such topic;
3. the necessity for implementation of the topics, and if so, whether that will be easy or difficult;
4. the need for expansion of the topics;
5. any envisaged inconsistency between the EC Proposal and the European Insolvency Regulation (EIR) recast and the Preventive Restructuring Directive, respectively; and finally,
6. the initial domestic reception of the EC Proposal.

The EC Proposal touches upon several topics that are proposed for EU-wide harmonisation. As a European independent and impartial think tank, CERIL has actively followed the development of the EC Proposal. In preparation of a CERIL Statement on the EC Proposal, CERIL has conducted a survey with the aim to involve the CERIL Conferees, Research Associates, as well as the wider public in sharing their perceptions towards and reception of the EC Proposal across Europe.

The survey is used as a Europe-wide 'radar' to collect and establish an inventory of the reception of the EC Proposal across Europe, and which may function as an impetus in the preparations for the CERIL Statement.

2.2 General Features of the Survey

The survey consists of four parts, with in total 10 questions (with sub-questions). It looks into (i) general information about the respondents; (ii) the need and room for the EC Proposal; (iii) the scope of the EC Proposal; (iv) potential for harmonisation of the topics in the EC Proposal; and (v) more specific (technical) aspects of the EC Proposal.

The survey was made available using the online survey tool 'Qualtrics'. The survey was announced on Saturday 18 March 2023 and was closed on Sunday 7 May 2023, allowing respondents a total of 56 days to participate and complete the survey.

The survey was circulated internally among CERIL Conferees and Research Associates, but also announced publicly on the CERIL Website, LinkedIn, and certain blogs to receive responses from the wider (legal) public.

² See for the CERIL Conference on harmonisation of EU insolvency law: <https://www.ceril.eu/news/first-lustrum-conference-of-ceril-on-harmonisation-of-eu-insolvency-law>.

The survey has resulted in 96 responses in total, out of which 64 have been used to prepare the analysis. The remaining responses to the survey were excluded from the analysis because the answer to 90% or more of the questions were left unanswered.

3. Analysis Survey Results

3.1 Question 1: Geographical Spread and Professional Background

Q1.1 What is your (primary) jurisdiction?

64 responses have been received, representing a wide geographical spread (see Figure 1). The respondents indicated the following 24 different countries (in alphabetical order) as their primary jurisdiction: Austria, Belgium, Canada, China, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, North Macedonia, Poland, Portugal, Romania, Serbia, Spain, Sweden, Türkiye, the United Kingdom, and Ukraine.

The majority of the respondents indicated Italy, Germany, the Netherlands, or Poland as their primary jurisdiction. These four jurisdictions make up 30 out of the 64 responses to the survey.

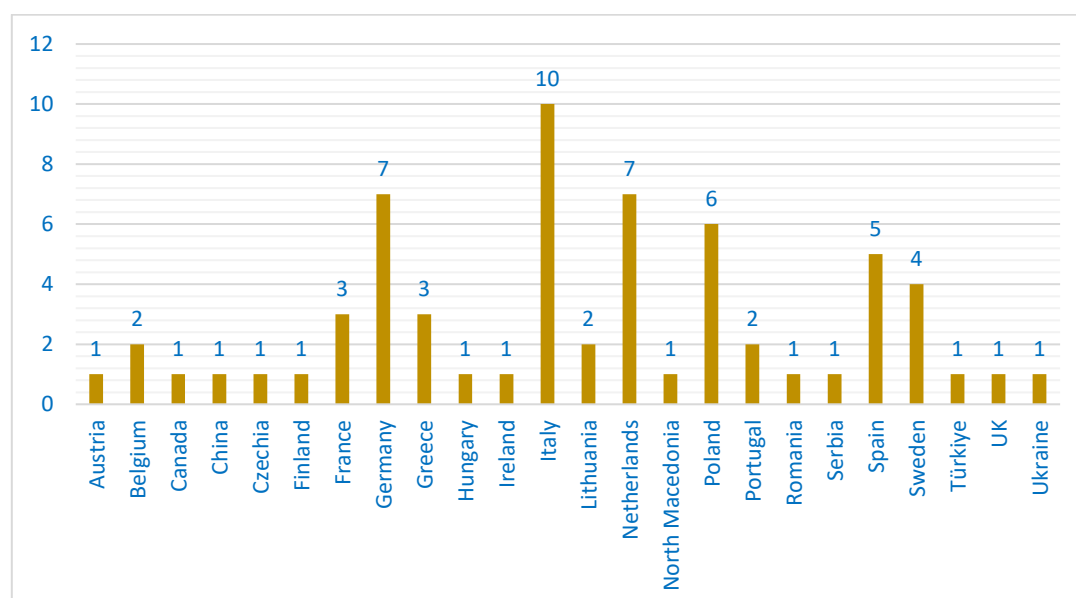


Figure 1 | Primary jurisdiction of respondents.

Q1.2 What is your (primary) profession?

A wide array of professional backgrounds has been registered (see Figure 2), although the majority of respondents (56%) are active in academia. This category consists mostly of university professors, but also of PhD researchers, post-docs, lecturers, and emeritus professors.

The second largest category (25%) consists of insolvency practitioners, legal counsel, and lawyers.

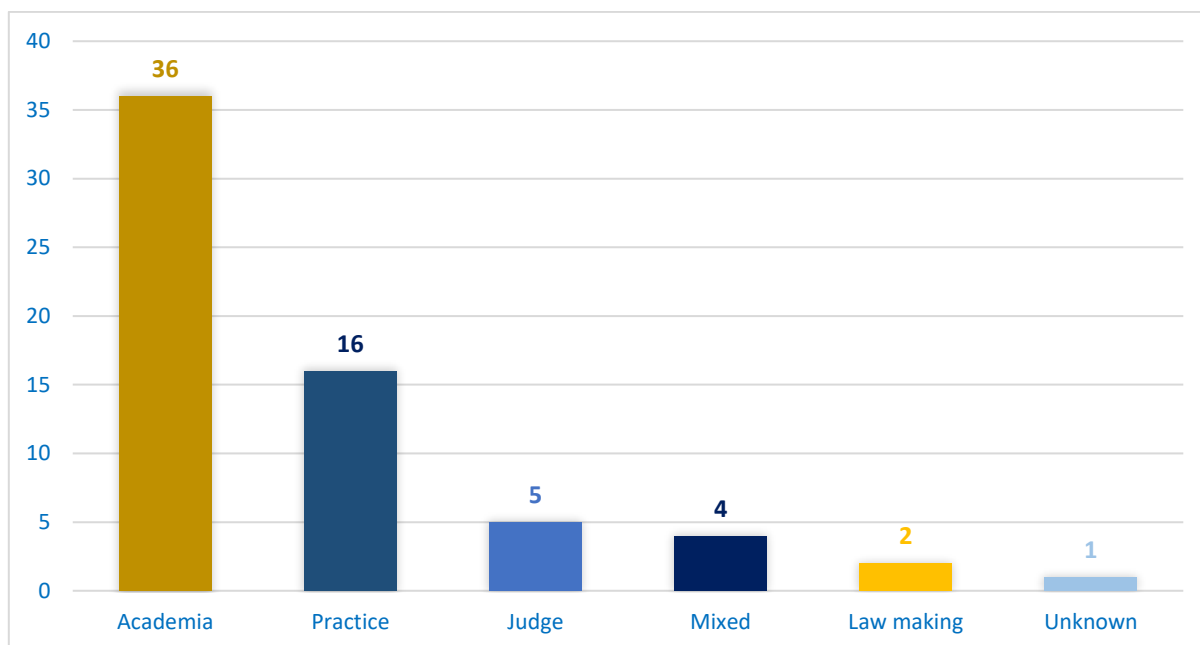


Figure 2 | Overview of (primary) profession of respondents.

Another fraction consists of judges (8%). However, it should be noted that some respondents are both judge and professor, or work both in practice and academia, resulting in a “mixed” category (6%). The smaller fractions are professionals working in law and policy making (3%) and law enforcement (2%).

3.2 Question 2: Background: CERIL Involvement and EC Proposal Familiarity

Q2.1 Are you involved in CERIL?

According to the results, more than 65% of the respondents are CERIL members. When the respondents indicated that they were CERIL members, they were asked to select to which CERIL category they belonged.

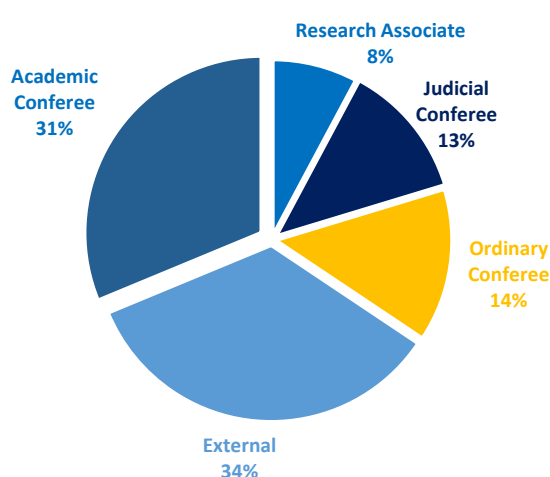


Figure 3 | Involvement of respondents within CERIL.

CERIL has three membership categories: Academic Conferee, Judicial Conferee, or Ordinary Conferee (see details [here](#)). The [Conferees](#) and [Research Associates](#) are active in [Working Parties](#) of CERIL, where ideas are exchanged and Statements and Reports are drafted.

Out of the 42 respondents who indicate their involvement in CERIL, 8 are Judicial Conferee, 9 Ordinary Conferee, 20 Academic Conferee, and 5 Research Associate (Figure 3).

CERIL is an independent non-profit, non-partisan, self-supporting organisation of persons committed to the improvement of restructuring and insolvency laws and practices in Europe, the European Union and its Member States

Q2.2 How familiar are you with the contents of the EC Proposal?

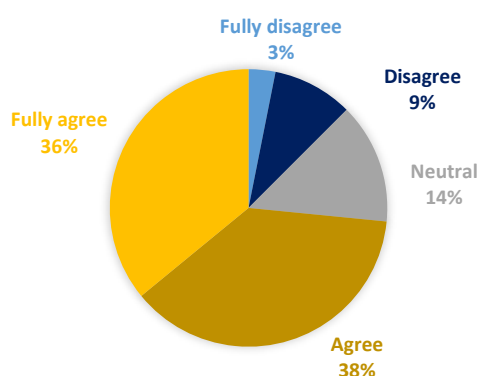
The familiarity with the EC Proposal is an important question, so as to evaluate the quality of the survey results, based on the respondents' self-assessments. More than 90% of the survey population (58 of 64) expressed having a deep or general knowledge, which is considered a sufficient level for responding to the survey. Whilst two individuals did not respond to this question, four respondents indicated limited familiarity to the survey. A separate analysis of their responses to the subsequent questions demonstrated that they possess a viable and consistent character, and their distribution is of a similar pattern to the overall results. Therefore, any influence they may have on the general results is deemed insignificant.

3.3 Question 3: Need for Harmonisation?

The following series of questions (Q3) delve into the details of the proposals, with the aim to collect the views of the respondents regarding the need for harmonisation of different topics of the proposal. As a general remark for all questions, the abstentions (no response) are not included in the graphic depictions, so not to distort the outcomes and confuse with the conscious neutral positions. On the other hand, the number of abstentions (if any) will be indicated in the explanatory texts.

Q3.1 In your view, is there a need to harmonise the following topics of the EC Proposal at the EU level?

Avoidance actions



The responses to this question show an agreement that there is need for harmonisation regarding avoidance actions with 74% of responses, and 14% staying neutral. 12% indicate an opposing position.

Figure 4 | Need for Harmonisation of Avoidance Actions.

Q3.2 In your view, is there a need to harmonise the following topics of the EC Proposal at the EU level?

Asset tracing

For asset tracing, there is a large majority for agreement on the need for harmonisation, reaching 85%. Merely 4% of respondents show disagreement, while 11% choose to stay neutral.

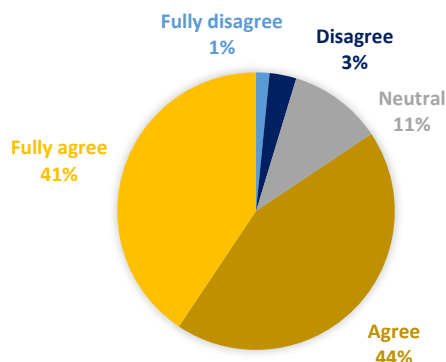


Figure 5 | Need for Harmonisation of Asset Tracing.

Q3.3 In your view, is there a need to harmonise the following topics of the EC Proposal at the EU level?

Pre-pack proceedings

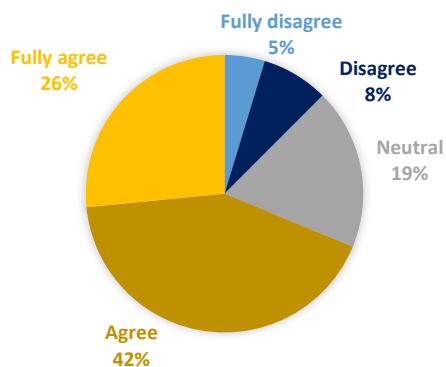


Figure 6 | Need for Harmonisation of Pre-Pack Proceedings .

The answers to the question of whether there is a need for harmonisation of Pre-pack Proceedings shows slight uncertainty, with less than 70% agreement and 13% opposition. 19% of respondents choose to remain neutral. The general tendency, however, indicates the need for harmonisation.

Q3.4 In your view, is there a need to harmonise the following topics of the EC Proposal at the EU level?

Directors' duty to file for insolvency

This chart shows that more than 70% view that there is need for harmonisation of the directors' duty to file. The opposing view is more than 15%. 8 respondents choose to stay neutral (13%), with one individual abstaining from responding.

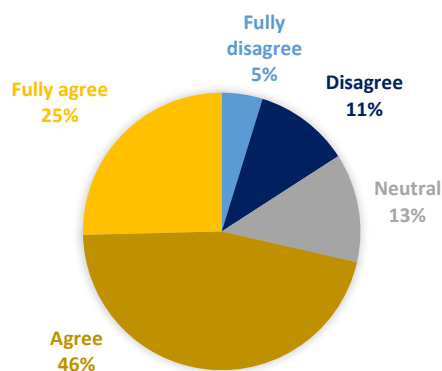


Figure 7 | Need for Harmonisation of Directors' Duty to File.

Q3.5 In your view, is there a need to harmonise the following topics of the EC Proposal at the EU level?

Simplified winding-up proceedings (SWP) for microenterprises (MIC)

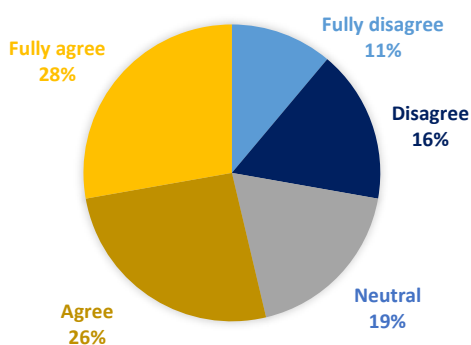


Figure 8 | Need for Harmonisation of SWP for MIC.

Although the survey shows a majority (54%) for need for a simplified winding-up proceedings for microenterprises, a disagreement rate of 27%, with 11% fully disagreeing, is notable. The observation is that the survey results shift towards a relatively stronger expressions of views, whilst 19% remain neutral.

Q3.6 In your view, is there a need to harmonise the following topics of the EC Proposal at the EU level?

Creditors' committees

The most notable observation regarding the need for harmonisation for creditor committees is the ratio of neutral responses. With more than 40%, neutral becomes the majority position. Agree receives the second position with 34% in total, with disagree having 25%. The survey shows a dispersed spread, with no significant penchant towards any side.

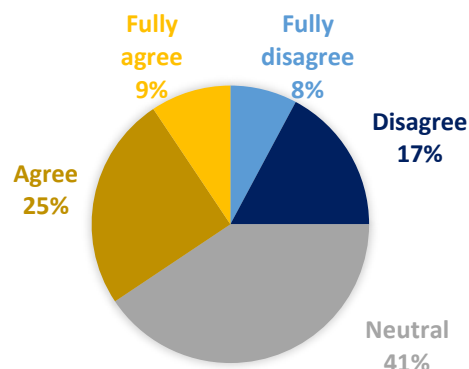
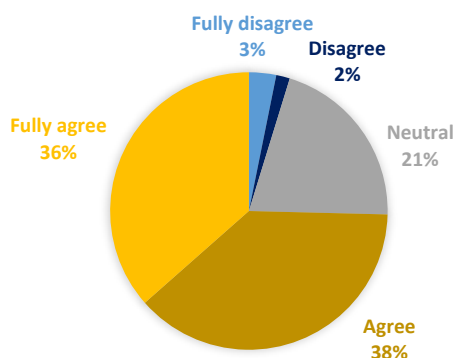


Figure 9 | Need for Harmonisation of Creditors' Committees.

Q3.7 In your view, is there a need to harmonise the following topics of the EC Proposal at the EU level?

A standard factsheet of national insolvency proceedings



There is a robust agreement on the need for a standard factsheet of national insolvency proceedings, with more than 70% of votes, spread between agreement and full agreement. The disagreement percentage is a low 5%, whilst about 20% remain neutral. One respondent chose not to answer this question.

Figure 10 | Need for Harmonisation of Standard Factsheet

3.4 Question 4: Ready for Adoption?

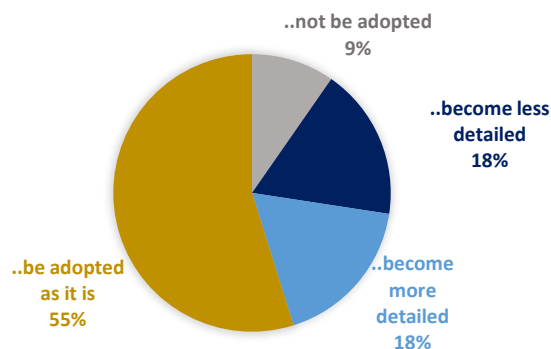
The following series of questions (Q4) are aimed to collect views as to what should happen with these main topics of the EC proposal in the legislative process.

Q4.1 In your view, what should happen with these topics of the EC Proposal in the legislative process?

Avoidance actions

Figure 11 | Avoidance Actions Should ...

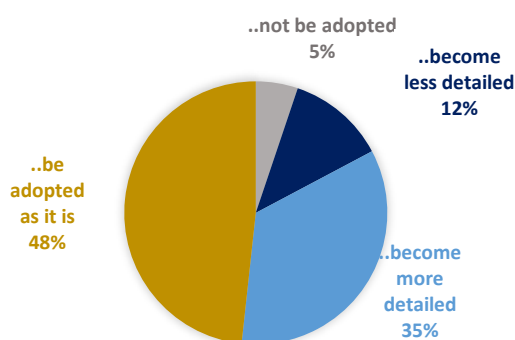
Just over half (55%) of respondents agree that the Avoidance Actions, as covered by the EC Proposal, should be adopted as they are, whilst 9% think that they should not be adopted. About 26% are of the view that they should be adopted after modifications, half of them being in favor of simplifications and the other half suggesting introduction of more details. There are 2 blank responses.



Q4.2 In your view, what should happen with these topics of the EC Proposal in the legislative process?

Asset tracing

Figure 12 | Asset Tracing Should...



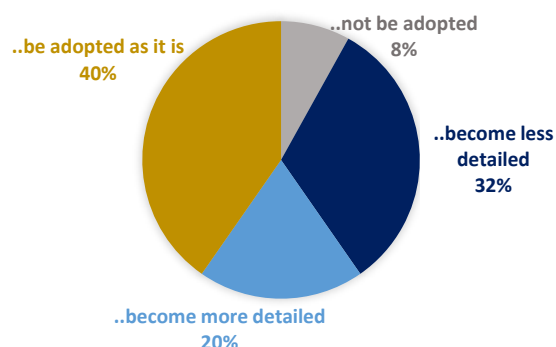
48% of respondents are of the view that the topic of asset tracing should be implemented as it is, whilst 47% are in the view that it needs to change with containing more details (35%) or less details (12%). Only 3 respondents (5%) think that it should not be adopted, and there are 6 blank responses.

Q4.3 In your view, what should happen with these topics of the EC Proposal in the legislative process?

Pre-pack proceedings

More than half (52%) of respondents are of the view that the Prepack Proceedings need to be adopted, but after modifications (32% with simplifications and 20% with inclusion of more details). 40% defend adoption with no changes, whereas 8% are for no adoption. There are 2 blank responses.

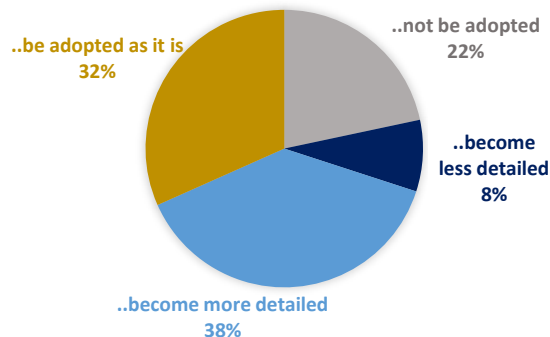
Figure 13 | Pre-Packs Should...



Q4.4 In your view, what should happen with these topics of the EC Proposal in the legislative process?

Directors' duty to file

Figure 14 | Directors' Duty to File Should...



In the Directors' Duty to File, there is a clear indication that the provisions need to be adopted, either after adding more details (38%) or as they are (32%).

Besides, 22% are in favor for not adopting them. Only 5 respondents (8%) raise need for simplification, and there are 4 blank responses.

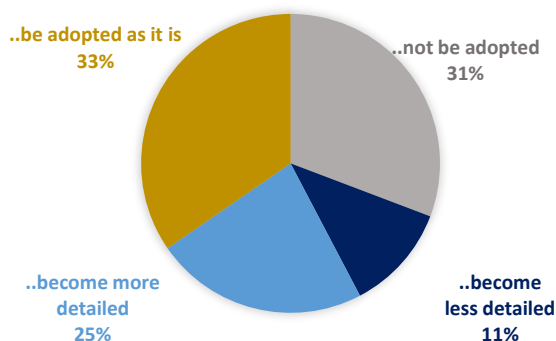
Q4.5 In your view, what should happen with these topics of the EC Proposal in the legislative process?

Simplified winding-up proceedings (SWP) for microenterprises (MIC)

A very diversified result is obtained for the winding-up proceedings for microenterprises, with almost equal partitioning of "should be adopted as it is", "should be adopted with modifications", and "should not be adopted".

A 2/3 majority of the respondents seeking modifications express need for more details, the 1/3 suggesting simplifications. There are 3 blank responses.

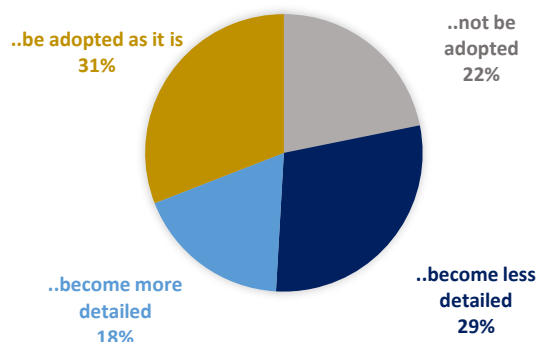
Figure 15 | SWP for MIC Should...



Q4.6 In your view, what should happen with these topics of the EC Proposal in the legislative process?

Creditors' committees

Figure 16 | Creditor's Committees Should...



Whilst almost 80% of respondents think that Creditor's Committees need to be adopted, a large majority (47%) seek modifications: 29% for simplifications and 18% for more details.

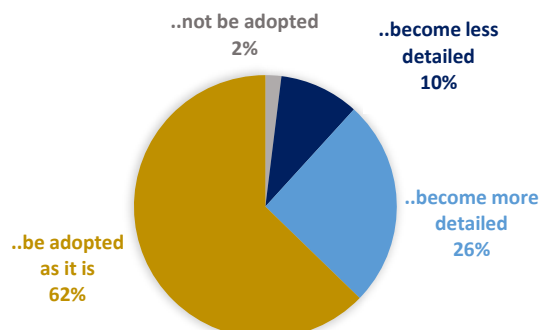
About 19% are for not adopting this part. There is also a notable abstention of 9 respondents.

Q4.7 In your view, what should happen with these topics of the EC Proposal in the legislative process?

Standard factsheet of national insolvency proceedings

Figure 17 | Standard Factsheets Should...

There is general agreement (98%) for adoption of a Standard Factsheet of National Insolvency Proceedings, with only one respondent having an opposing view. 26% of responses indicate to a need for more details and 10% for simplification. There are 6 abstentions.



3.5 Question 5: Difficulty Level of Implementation

The following series of questions (Q5) aim to identify the potential issues regarding the implementation of the EC Proposal in the national jurisdictions.

Q5.1 In your jurisdiction, will it be (i) unnecessary, (ii) easy, or (iii) difficult to implement these topics?

Criteria for eligibility of a monitor/IP under the pre-pack proceeding (Articles 22 and 25)

More than 80% of respondents think that the criteria for eligibility of a monitor/IP under the pre-pack proceeding are either in existence (27%) or could easily be implemented (57%) in the national legislation. 16% think that it will be difficult to implement. There are two blank responses.

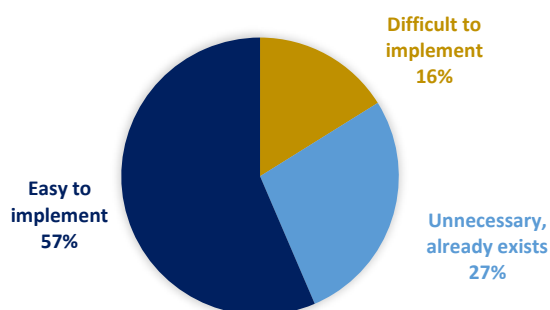


Figure 18 | Criteria for Pre-Pack Monitor

Q5.2 In your jurisdiction, will it be (i) unnecessary, (ii) easy, or (iii) difficult to implement these topics?

Assignment of executory contracts to the acquirer of the debtor's business in pre-packs (Article 27)

A 2/3 majority of respondents claim that the assignment of executory contracts in pre-packs exist (18%) or can be easily implemented (47%) in the national legislation.

An important 35% think that the implementation could be difficult. Two respondents decided to abstain.

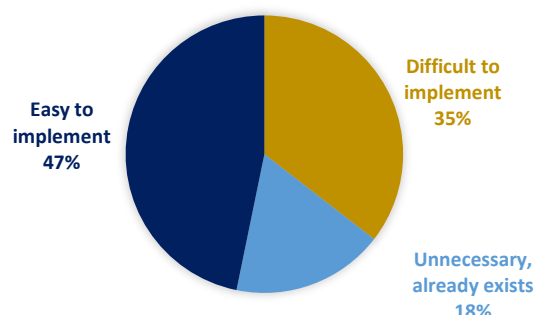


Figure 19 | Executory Contracts in Pre-Packs.

Q5.3 In your jurisdiction, will it be (i) unnecessary, (ii) easy, or (iii) difficult to implement these topics?

Acquisition of the debtor's business, free of debts and liabilities in pre-packs (Articles 28 and 34(3))

40% claim that it will be easy to implement this topic in the national legislation, and almost a quarter of respondents indicate that it already exists, while a substantial number (36%) predict difficulties in implementation. There are two abstentions.

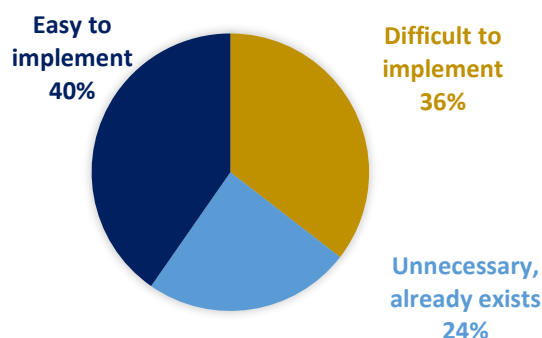
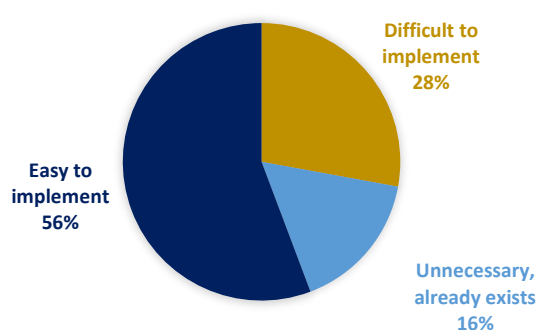


Figure 20 | Debt Free Business Acquisition in Pre-Packs

Q5.4 In your jurisdiction, will it be (i) unnecessary, (ii) easy, or (iii) difficult to implement these topics?

The provisions on protection of the creditors' interests in a pre-pack proceeding (Article 34)

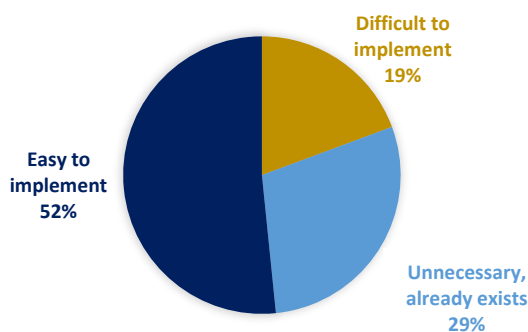


Whilst more than 70% of respondents state that the protection of creditors' interest in pre-packs already exists (16%) or could easily be implemented (56%) in the national legislation, 28% foresee difficulties in the implementation. Three abstained.

Figure 21 | Creditor Protection in Pre-Packs

Q5.5 In your jurisdiction, will it be (i) unnecessary, (ii) easy, or (iii) difficult to implement these topics?

The provisions on the closure of the simplified winding up procedure (SWP) when there are no assets in the insolvency estate (Article 49)

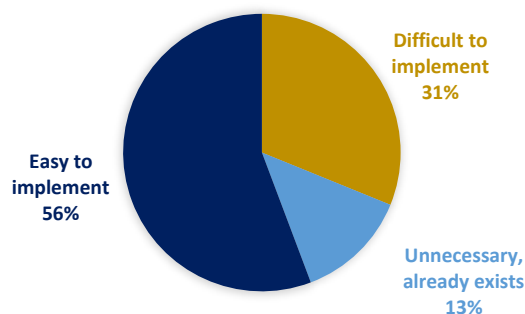


The closure of SWP when there are no assets appears to be easily implementable with 29% stating that it already exists. A further 52% claiming that it will be easy to implement. 19% predicts difficulties in implementation. Two abstained.

Figure 22 | Closure of SWP If No Assets

Q5.6 In your jurisdiction, will it be (i) unnecessary, (ii) easy, or (iii) difficult to implement these topics?

The debtor-in-possession (DIP) rule and the appointment of insolvency practitioners (IP) in simplified winding up of insolvent microenterprise procedures (SWP) (Articles 39 and 43)



56% of respondents see that a DIP rule and appointment of IP would be easily implemented and 13% claim that it is already implemented. On the other hand, 31% foresee difficulties in implementation. There are three blank responses.

Figure 23 | DIP and IP in SWP

3.6 Question 6: Topics omitted from EC Proposal (Part 1) (open question)

Question 6 (Q6) asks whether, next to the selection of main topics in its Proposal, the Commission omitted any further issues for harmonisation. Of the 52 respondents (excluding 2 who abstain), 33 (63%) choose that there were no further issues, whilst 19 (37%) state that some important issues were not included and giving their views on the missing elements. The following are the highlights of these stated elements, for potential future considerations:

General

- An elaboration on the purpose of Insolvency Law;
- The underlining of the recognition and enforcement of the non-EU judgements based on the UNCITRAL Model Law.

Definitions

- A definition of (the concept of) Insolvency, and associated terminology;
- The concept of the likelihood of insolvency;
- A definition and harmonisation of the debts of the estate.

Commencement of insolvency proceedings

- Grounds for commencing insolvency proceedings;
- Persons entitled to request opening of insolvency proceedings;
- Harmonisation of insolvency triggers (e.g., Illiquidity, over-indebtedness...).

Governance

- Legal effects of the commencement decision (DIP or not);
- Status and duties of Insolvency Practitioners;
- Training of judges.

Creditors

- Executory contracts;
- The ranking of claims and privileges.

Other

- Details of Group Insolvency;
- A focus on emerging issues like digital assets and environmental claims.
- The liquidation proceeding for other than small enterprises;
- Pre-packs aiming at issues other than liquidation (like pre-pack restructuring);
- Pre-insolvency “safe harbour” for directors;
- Impact of Intellectual Property rights.

3.7 Question 7: Topics omitted from EC Proposal (Part 2) (closed question)

The below questions (Q7) aim to gauge the need for inclusion of some of the potential omissions.

Q7.1 Please indicate if you agree with the following statements:

The EC Proposal should include an exhaustive definition of grounds for “insolvency”

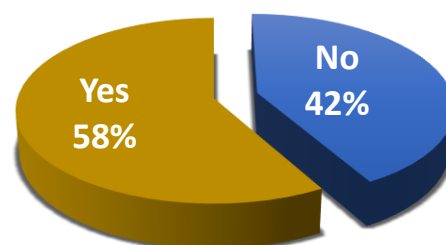


Figure 24 | Definition of "Insolvency"

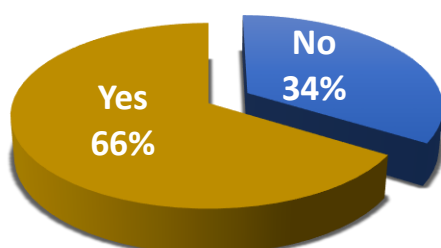


Figure 25 | Definition of "Insolvency Proceeding"

Q7.2 Please indicate if you agree with the following statements:

The EC Proposal should include a definition of "insolvency proceeding"

Two blank responses.

Q7.3 Please indicate if you agree with the following statements:

The EC Proposal should include a definition of (shadow) "director"

Three responses are blank.

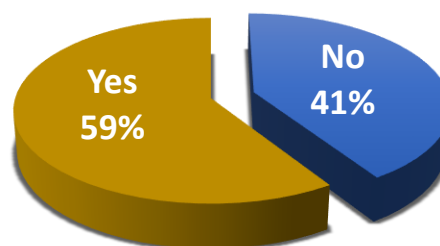


Figure 26 | Definition of (Shadow) Director

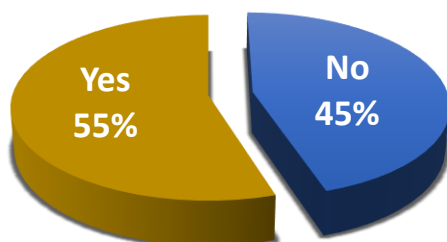


Figure 27 | Pre-Packs Should Be Optional

Q7.4 Please indicate if you agree with the following statements:

The provisions on pre-packs should be optional for all Member States

Two blank responses.

Q7.5 Please indicate if you agree with the following statements:

The provisions on microenterprises (MIC) should be optional for all Member States

There are three blank responses.

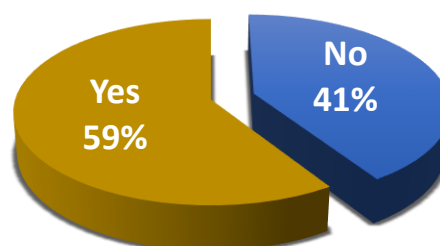
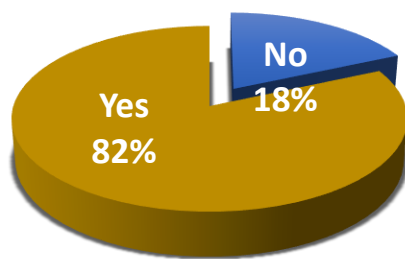


Figure 28 | MIC Provisions Should Be Optional



Q7.6 Please indicate if you agree with the following statements:

The provisions on pre-packs are useful but need refinements

Four responses are blank.

Figure 29 | Pre-Packs Provisions Need Refinements

3.8 Question 8: EC Proposal and the EIR Recast

The following question (Q8) asks: Do you anticipate any inconsistencies between the EC Proposal and the European Insolvency Regulation (EIR Recast 2015/848) and seeks clarifications if the respondent answers positively.

The majority (82%) does not anticipate inconsistencies. 7 respondents choose not to reply. The respondents having the view that there will be inconsistencies state the following (note that some statements may partially be overlapping):

- Cross-border asset tracing and the regime governing the law applicable in Pre-packs proceedings, especially regarding executory contracts needs coordination with other EU acts of judicial cooperation in civil and commercial matters.
- The informal phase of pre-packs and (non)applicability of the EIR 2015 (also in view of the recognition of the monitor under the EIR 2015 as an IP).
- Depending on the ambit of 'insolvency proceeding' covered by the Proposal, avoidance actions may also be instituted in proceedings like the Dutch suspension of payments, while that is not yet the case now; similarly with respect to the Dutch public out-of-court restructuring, which are both proceedings placed on Annex A of the EIR falling within the scope of application of the EIR.
- Danger of mixing up the monitor in pre-pack preparation with the insolvency practitioner in Art. 2 (5) EIR.
- Special regime for microenterprises without IP incompatible / impracticable with almost all EIR-regulations dealing with cross-border issues.

3.9 Question 9: EC Proposal and the PRD

This question (Q9) asks: Do you anticipate any inconsistencies between the EC Proposal and the Preventive Restructuring Directive (PRD 2019/1023) and seeks clarifications for the positive responses.

The same statistics of Q8 are repeated, but the positive (18%) and negative (82%) responses are not always coming from the same respondents. Similarly, 7 respondents opt for no response.

The respondents having the view that there will be inconsistencies provide the below issues (to note that some statements may partially be overlapping):

- The pre-pack is considered a liquidation procedure, in its second phase. But it could also be seen as a restructuring procedure or a measure being part of the restructuring framework.
- Discharge for consumers and entrepreneurs.
- The role of authorities should not be strengthened.
- Duties of Directors.
- Will depend on the way the final version of the EC proposal will be implemented by EU Member States. As Member States were in general reluctant to introduce 'radical' changes (depending on the level of 'sophistication' of their domestic law) resulting of the DRI (2019) not sure that they will be keen to go further after that implementation (except maybe on simplified proceedings).
- The Preventive Restructuring Directive aims for less court involvement, which may conflict with the special regime for microenterprises with an excessive court involvement and overload.
- Relationship between the Preventive Restructuring Directive and Pre-pack is unclear (dual track should be possible)

3.10 Question 10: Domestic Reception of EC Proposal

The final series of questions (Q10) concern the initial domestic reception of the EC Proposal by the respondents' home state legislations.

Whilst this report will give the overall statistics, there would be merit for the subject matter analysts to delve in the state-by-state responses, to see the impacts on specific legislation.

One observation worth stating is that, across the five questions of this series, about 40% of the respondents choose not to answer. Of the respondents, an average of 50% remain neutral. As can be seen from the charts below, the "neutral" category is often the most selected answer.

The overall distribution of the positives and negatives gives a very balanced picture. The below charts exclude the non-responses and recalculate the percentages of the remaining answers.

CONFERENCE ON EUROPEAN RESTRUCTURING AND INSOLVENCY LAW

Q10.1 How is the initial domestic reception of the EC Proposal?

Legislator

The distribution of the 30 responses shows a penchant towards a negative (27%) reception, against 13% positive. 60% choose to remain neutral.

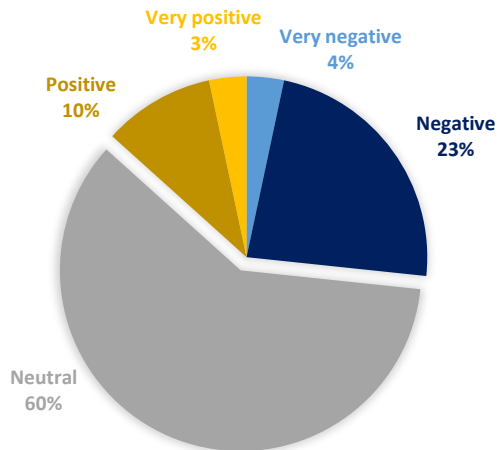


Figure 30 | Legislator's Reception

Q10.2 How is the initial domestic reception of the EC Proposal?

(Insolvency) practitioner

Of the 37 responses, 40% are negative and 20% positive. A total of 7 respondents express strong opinions (11% very positive and 8% very negative). 30% remain neutral.

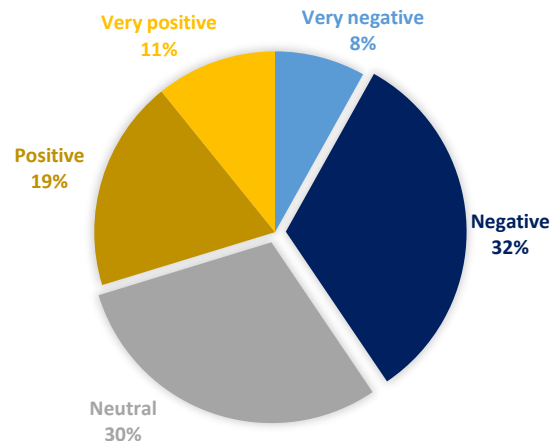


Figure 31 | IP's Reception

Q10.3 How is the initial domestic reception of the EC Proposal?

Judges

10 out of the 31 responses indicate a penchant towards a negative view (32%), against 13% positive. On the other hand, one respondent (3%) expresses a "very positive" view. 52% remain neutral.

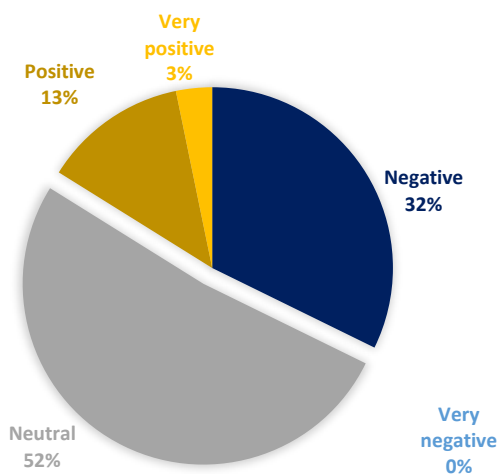


Figure 33 | Judges' Reception

Q10.4 How is the initial domestic reception of the EC Proposal?

Academics

Reception of Academics attracted the most responses, with 43 answers. 44% remaining neutral, there is a clear indication (37%) that the academic world welcomes the Proposal positively, to include 7% (3 respondents) seeing it "very positively". On the other hand, 12% are of the view that the academics react negatively, with no "very negative" reply.

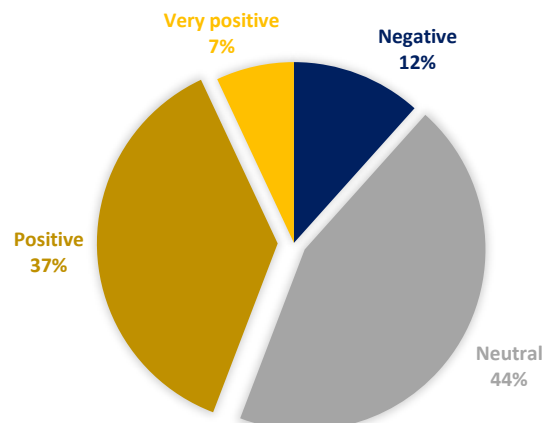


Figure 32 | Academics' Reception

Q10.5 How is the initial domestic reception of the EC Proposal?

Overall

Overall, the survey reaches a very balanced response, with 47% neutral, and 21% and 21% positive and negative responses, respectively.

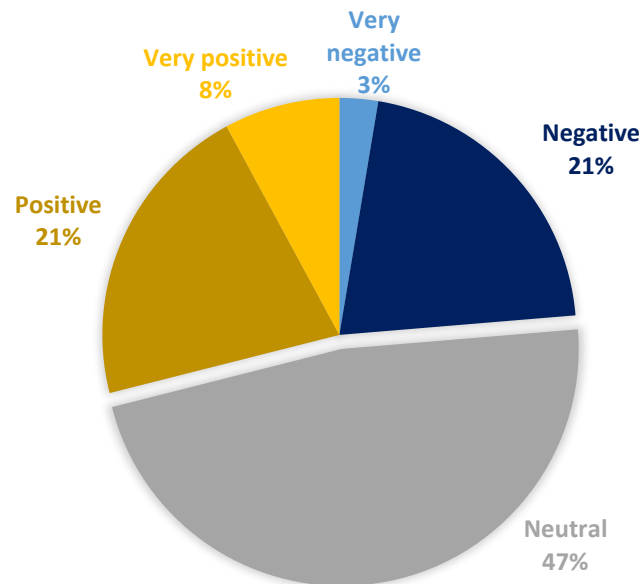


Figure 34 | General Reception

3.11 Final Comments on the Survey

The survey also offered a possibility for general comments.

Final Q: Are there other matters that CERIL should consider in a Statement on the EC Proposal?

A large majority of respondents express the view that the survey's coverage was satisfactory. On the other hand, several points are raised for CERIL to consider in the preparation of the Statement:

- Concern/ideas for overall coherence between Regulation, directive 2019/1023 and the 'certain aspects' proposal.
- The status of the preparation phase in the pre-pack procedure is somewhat unclear in terms of its private international law qualification. At the same time, a monitor appointed in the preparation phase can be considered an insolvency practitioner in the meaning of the EIR, provided he is included in Annex B. Therefore, there can be a situation where the procedure itself does not fall under the EIR Recast because it is confidential (whether it will then fall under Brussels I bis is an open question) while an IP can act under the EIR. I am also puzzled by Article 27 of the Proposal laying down the rule that law applicable to the assignment or to the termination of executory contracts shall be the law of the Member State where the liquidation phase has been opened. What is meant by law applicable to the assignment? Depending on interpretation, there can be inconsistency with Article 14 of Rome I

Regulation. Does the said article also seek to regulation third-party effects of the assignment of claims?

- The close connection of the EC Proposal with the Capital Market Union Policies. The functional role with respect to the improvement of company mobility (and consequently the need of the right coordination with EU acts in cross-border company law).
- Lack of clarity of Article 20(2) of the Proposal and its alignment with recent case law of the CJEU.
- Pros and cons of the Proposal in relation to cross-border situations; coordination with the ongoing implementation of the Directive on cross-border mobility of companies; digital assets involved in insolvency proceedings.
- Shifting the focus to organisational matters as they are more important for effectiveness of the national insolvency systems than ever-changing legislation: the way the IP profession is regulated; specialisation/experience of courts and state agencies (as regulators).
- Review of the implementation of the 2019 directive on restructuring (which, for instance, has not been fully implemented in Poland).

4. CERIL's Reception

It is noteworthy that there was a large turnout and that many CERIL Conferees (65% of the total respondents) enthusiastically studied the EC Proposal and was willing and able to complete the Survey that was conducted between 18 March and 7 May 2023, without noticeable differences between the responses before and after the CERIL conference took place.

The widely dispersed domestic backgrounds of the participants provide a rich variety of responses to the Survey. Although one might have expected that the Conferees would assess the EC Proposal mainly based on their own domestic experiences, to the surprise of the reporters, it turned out that the Survey reflects a variety of opinions across Europe with varying appreciations of the EC Proposal. Save for some responses indicating disapproval of certain topics of the EC Proposal which were deemed 'red buttons' in certain Member States, the Conferees generally expressed appreciation and support.

It is worth noting that the results indicate that there is no expectation for drastic changes, particularly in jurisdictions where the EC Proposal provisions are already in existence within the domestic legal system. In addition, some of the new provisions introduced by the EC Proposal are predicted to be implemented without (serious) difficulties. Although responses are generally positive, opinions tend to differ where the EC Proposal brings significant alterations to (parts of) the domestic legal systems of some Member States, for the sake of EU harmonisation in the field of insolvency and restructuring. Some Conferees clearly express a need for further refinement of the proposed rules as highlighted in the Annex. Nonetheless, most CERIL Conferees acknowledge the 'greater good' of further harmonisation.

With the Survey and its international conference in April this year, and with its unique independent perspective, CERIL expects to contribute to a deeper empirical assessment of the EC Proposal for harmonizing certain aspects of insolvency law. Notwithstanding the need for further refinement of the proposed rules as highlighted in more detail in the Annex, CERIL, as a non-profit, non-partisan, self-supporting organisation with the geographical spread of its Conferees representing over 30 jurisdictions and committed to the improvement of restructuring and insolvency laws and practices in Europe, the European Union, and its Member States, broadly supports the initiative taken by the European Commission.

Annex: Text of the Survey

CERIL Survey on EC Proposal for a Directive harmonising certain aspects of insolvency law

Introduction

..

Welcome!

On 7 December 2022, the European Commission presented its long-expected proposal for a **Directive harmonising certain aspects of insolvency law** (EC Proposal).

The EC Proposal, in short touches upon 7 main topics:

1. Avoidance actions
2. Asset tracing
3. Pre-pack proceedings
4. Directors' duty to file
5. Simplified winding-up proceedings for microenterprises
6. Creditor's committees
7. Standard factsheet of national insolvency proceedings

CERIL is preparing a statement to analyse the EC Proposal. This survey intends to inventorise the reception of the EC Proposal among its Conferees and Research Associates.

Your response will be processed anonymously.

We thank you for your input.

CERIL

Reinout Vriesendorp, Stephan Madaus, Ignacio Tirado

Gert-Jan Boon, Defne Taşman

General questions

Q1. What is your (primary) jurisdiction?

.. What is your (primary) profession?

Q2. Are you involved with CERIL?

☐ Yes (1)

☐ No (2)

Skip To: ... If Q2 = No

.. What is your involvement in CERIL?

☐ Ordinary Conferee (1)

☐ Judicial Conferee (2)

☐ Academic Conferee (3)

☐ Research Associate (4)

... How familiar are you with the contents of the EC Proposal?

(Select the answer that most closely reflects your understanding of the EC Proposal)

☐ I have **much understanding** of the **full EC Proposal** (1)

☐ I have a **general understanding** of (certain parts of) the EC Proposal (3)

☐ I have **limited understanding** of the EC Proposal (5)

Part II | Exploring the need and room for harmonisation

Q3. In your view, is there a **need to harmonise** the following topics of the EC Proposal at the EU level?

	Yes, fully agree (1)	Agree (2)	Neutral (3)	Disagree (4)	No, fully disagree (5)	N/A (6)
Avoidance actions (1)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Asset tracing (2)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Pre-pack proceedings (3)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Directors's duty to file (4)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Simplified winding-up proceedings for microenterprises (5)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Creditors' committees (6)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Standard factsheet of national insolvency proceedings (7)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Q4. In your view, what should happen with the **main topics of the EC Proposal** in the legislative process?

(Select the answer that most closely reflects your view)

	Become more detailed (1)	Adopted as it is (2)	Become less detailed (3)	Not be adopted (4)	N/A (5)
Avoidance actions (1)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Asset tracing (2)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Pre-pack proceedings (3)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Directors' duty to file (4)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Simplified winding-up proceedings for microenterprises (5)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Creditors' committees (6)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Standard factsheet of national insolvency proceedings (7)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Part III | Specific topics of the EC Proposal

Q5. In your jurisdiction, will it be **(i) unnecessary, (ii) easy, or (iii) difficult to implement** the following topics will be:

	Unnecessary, it already exists (1)	Easy to implement (2)	Difficult to implement (3)
Criteria for eligibility of a monitor/IP under the pre-pack proceeding (<i>Articles 22 and 25</i>) (1)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Assignment of executory contracts to the acquirer of the debtor's business during pre-packs (<i>Article 27</i>) (2)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Acquisition of the debtor's business, free of debts and liabilities in a pre-pack proceeding (<i>Articles 28 and 34(3)</i>) (3)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The provisions on protection of the creditors' interests in a pre-pack proceeding (<i>Article 34</i>) (4)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The provisions on the closure of the simplified winding up procedure when there are no assets in the insolvency estate (<i>Article 49</i>) (5)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The debtor-in-possession rule and the appointment of insolvency practitioners in simplified winding up of insolvent microenterprise procedures (<i>Articles 39 and 43</i>) (6)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Q6. The Commission has selected seven main topics for harmonisation.

Are there any topics that the EC Proposal fails to cover?

☐ Yes (please state which topics are missing) (1)

☐ No (2)

Q7. Please indicate if you **agree with the following statements:**

	Yes (1)	No (2)
The EC Proposal should include an exhaustive definition of grounds for " insolvency " (1)	<input type="radio"/>	<input type="radio"/>
The EC Proposal should include a definition of " insolvency proceeding " (2)	<input type="radio"/>	<input type="radio"/>
The EC Proposal should include a definition of (shadow) " director " (3)	<input type="radio"/>	<input type="radio"/>
The provisions on pre-packs should be optional for all Member States (4)	<input type="radio"/>	<input type="radio"/>
The provisions on microenterprises should be optional for all Member States (5)	<input type="radio"/>	<input type="radio"/>
The provisions on pre-packs are useful but need refinements (6)	<input type="radio"/>	<input type="radio"/>

. Comment (optional):

Part IV | Reception of the EC Proposal

Q8. Do you anticipate any **inconsistencies** between the EC Proposal and the **European Insolvency Regulation (2015/848)**?

☐ Yes (please explain) (1)

☐ No (2)

.. If yes, please explain:

Q9. Do you anticipate any **inconsistencies** between the EC Proposal and the **Preventive Restructuring Directive (2019/1023)**?

☐ Yes (1)

☐ No (2)

.. If yes, please explain:

Q10 How is the **initial domestic reception** of the EC Proposal?

	Very negative (1)	Negative (2)	Neutral (3)	Positive (4)	Very positive (5)	N/A (6)
Legislator (1)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(Insolvency) practitioners (2)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Judges (3)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Academics (4)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Overall (5)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Part V | Final question

Concluding:

We are at the end of this survey

Are there any other matters that CERIL should consider in a Statement on the EC Proposal?

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