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ARTICLE

An Assessment of the EC Proposal on Harmonisation of EU Insolvency Law

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Synopsis

On 7 December 2022, the European Commission presented its Proposal for a Directive Harmonising Certain Aspects of Insolvency Law (EC Proposal).[2] The Commission takes an important step forward to further harmonise substantive insolvency law. With no less than 73 articles (preceded by 63 recitals), the EC Proposal aims to strengthen financial and economic integration in the European Union (EU), to advance the Capital Market Union (CMU) by reducing divergences among Member States and promoting cross-border investment. The EC Proposal addresses seven distinct topics, which vary from avoidance actions and asset tracing to pre-pack procedures and rules to promote efficient winding-up of insolvent microenterprises. These topics touch upon many Member States' core rules on insolvency, including the director's duty to file for insolvency, harmonised rules on creditors' committees, and transparent information on domestic insolvency frameworks. Should all proposed provisions be accepted as they are, many national legislations would be ploughed up, which is reason enough to pay attention to these topics. They formed the outset for a two-day international conference in Leiden (the Netherlands) on Thursday 20 and Friday 21 April 2023. The Conference on European Restructuring and Insolvency Law (CERIL) organised this event to mark its 5th anniversary as an independent and non-profit think tank. The CERIL conference was attended by around 90 participants, from some 20 European countries.

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

Harmonisation of insolvency law across Europe has been one of the priorities on the European Commission's agenda for the past few years. In its efforts to further the development of a CMU, the Commission is proposing measures in several areas. One of them includes the adoption of a legislative instrument in the area of insolvency law. The harmonisation of certain core areas of corporate insolvency rules across the EU should bring convergence across the EU and reduce the barriers to cross-border investment.

In December 2022, following several rounds of (stakeholder) consultations, the Commission published its long-awaited EC Proposal. This was accompanied with an Impact Assessment elaborating on the policy choices in the EC Proposal.[3] According to this Impact Assessment, Member States' insolvency laws vary extensively, constituting legal uncertainties which are a significant obstacle for the achievement of the CMU.[4] In addition, the diverging domestic European insolvency regimes have several consequences, including varying degrees of cost and time efficiency. In particular, it results in more costly and lengthy insolvency proceedings.[5] These are the reasons why the EC Proposal targets two general objectives, namely "enhancing the efficiency of the allocation of capital in the economy and levelling the playing field among corporations in the EU capital markets".[6] Consequently, the overall focus of the EC Proposal is the harmonisation of substantive insolvency law, more specifically, its targets are

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1 The authors are organisers of the CERIL Conference on Harmonisation of EU Insolvency Law, see further: <https://www.ceril.eu/events/conference-on-harmonisation-of-eu-insolvency-law>, accessed 21 May 2023. The authors thank Luca Lavranos (student Leiden University) for his assistance in preparing this report, and Prof. em. Bob Wessels for his comments on an earlier draft.

2 Proposal for a Directive of the European Parliament and of the Council, harmonising certain aspects of insolvency law, 7 December 2022, COM(2022) 702 final.

3 Commission Staff Working Document, Executive Summary of the Impact Assessment Report Accompanying the document Proposal for a Directive harmonising certain aspects of insolvency law, 7 December 2022, SWD(2022) 395 final (Impact Assessment).

4 Impact Assessment, p. 6.

5 Impact Assessment, p. 18 and 34.

6 Issam Hallak, European Parliament Briefing, "EU Legislation in Progress, European Parliamentary Research Service (EPRS) Members' Research Service, Harmonising certain aspects of insolvency law in the EU" (PE 745.671 – March 2023). Available at: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/745671/EPRS_BRI(2023)745671_EN.pdf>, accessed 21 May 2023.

threefold: (a) the recovery of assets from a liquidated insolvent estate, (b) the efficiency of procedures, and (c) the predictable and fair distribution of recovered value among the creditors.[7] The EC Proposal touches upon seven main topics, which are as follows: (i) avoidance actions, (ii) asset tracing, (iii) pre-pack proceedings, (iv) director's duty to file for the opening of insolvency proceedings, (v) simplified winding-up proceedings for microenterprises, (vi) creditor's committees, and (vii) standard factsheet of national insolvency proceedings. The key topic areas of the EC Proposal are briefly explained below.

Following some 60 recitals and the introductory Title I with general provisions on the EC Proposal's scope and definitions, Title II deals with avoidance actions.[8] It regards minimum harmonisation with the aim of protecting the insolvent estate against illegitimate 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".[9] By adopting a principle-based approach and setting three avoidance grounds, the proposal aims to introduce minimum standards of protection relating to the voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors.[10]

Title III on asset tracing[11] facilitates the identification of misappropriated assets or their proceeds belonging to the insolvency estate. The EC Proposal aims to extend the scope of registers accessible by insolvency practitioners by providing access to bank account information, beneficiary ownership information and certain national asset registers, as listed in the annex to the proposed Directive. It is required to provide insolvency practitioners appointed in other Member States with the same access conditions to registers as the practitioners appointed in the Member State where the asset register is located.

Title IV on pre-pack proceedings[12] ensures that these proceedings are available in a structured manner in the insolvency frameworks of all 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 a part thereof) as a going-concern, rather than by piecemeal liquidation. The EC Proposal distinguishes between two phases, the 'preparation phase' and the 'liquidation phase'. The pre-pack proceeding would allow for the sale to be prepared and negotiated in the preparation phase before the formal insolvency proceedings are opened. This is followed by the liquidation phase where an insolvency proceeding is opened in which the court authorises the sale and transfer of the estate, after which the proceeds are distributed amongst the creditors.[13]

Title V on directors' duty to file a request for the opening of insolvency proceedings and civil liability[14] 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 has become insolvent. This is subject to director's civil liability for damages that occurred as a result of the failure of directors to comply with this obligation. This measure is part of the aim to maximize the value of the insolvent estate.

Title VI on winding-up insolvent micro-enterprises[15] introduces a new and simplified regime specifically for microenterprises.[16] Under this regime the day-to-day business operation and the debtor's assets remain under the control of the debtor – providing for a so-called 'debtor-in-possession' – while the appointment of an insolvency practitioner would become an exception. This measure in the EC Proposal aims to increase the efficiency of winding up microenterprises by reducing the costs and time involved, in particular, compared to ordinary insolvency procedures which are not tailored to microenterprises.

Title VII on the creditor's committee[17] sets out provisions to further enhance the protection of creditors' interests and their position in insolvency proceedings through representation in the creditors' committees. There can be one or more committees of (groups of) creditors, which are established by the general meeting of creditors. When there are multiple creditors' committees, they will not be charged with looking after the interests of the general body of creditors, but only the group of creditors that they will represent.

Before a section with the final provisions, Title VIII proposes measures enhancing the transparency of national insolvency laws consists of one provision. Article 68 EC Proposal regards a duty for Member States

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7 Impact Assessment, p. 37.
8 EC Proposal, Articles 4-12.
9 Impact Assessment, p. 161.
10 *Ibid.*, p. 160.
11 EC Proposal, Articles 13-18.
12 *Ibid.*, Articles 19-35.
13 Explanatory Memorandum to the EC Proposal, p. 15
14 EC Proposal, Articles 36-37.
15 *Ibid.*, Articles 38-57.
16 This is defined, according to EC Proposal, Article 2(j), in line with Commission Recommendation of 6 May 2003 concerning the definition of micro, small, and medium-sized enterprises, 2003/361/EC.
17 EC Proposal, Articles 58-67.

to produce and regularly update a standard factsheet with practical information on the main features of their national insolvency legislation in order to ameliorate the transparency of national laws on insolvency proceedings.

Setting the scene for insolvency harmonisation

The conference took off with a welcome address by Prof. Em. Bob Wessels (CERIL Chair, the Netherlands). He emphasized that from its inception, CERIL has been a voluntary organisation with the aim to contributing to critical and constructive dialogues on restructuring and insolvency laws at the European level, in order to further the discussions on insolvency as an independent think-tank.

Wessels' welcome address was followed by the keynote address of Dr. Ondřej Vondráček (European Commission, Team Insolvency of Directorate General Justice and Consumers). He addressed the background, as well as the 'why, what, and how' of the EC Proposal. Vondráček emphasised the legal landscape in which the EC Proposal was placed, stressing the still widely differing insolvency regimes between the Member States and the problems that arise from these differences. These have not been sufficiently reduced or addressed by prior EU legislation resulting from neither the European Insolvency Regulation 2015/848 (EIR 2015)[18] nor the Preventive Restructuring Directive 2019/1023 (PRD 2019).[19] In fact, substantive insolvency regimes are currently an area that is not harmonised at the EU level. However, within the scope of the CMU – and the 2020 CMU Action Plan[20] – the Commission has reviewed barriers to cross-border investment, drawing upon the barriers created by inefficient and widely diverging insolvency laws among Member States.

Vondráček discussed the objectives of the EC Proposal against the problems identified by the Commission. The key problems relate to both costly and lengthy insolvency proceedings, which are resulting in low recovery values for creditors. In addition, there is a low predictability of insolvency proceedings across Europe, leading to high information costs and weaker price discovery, constituting a barrier for cross-border investment and business operations within the EU. Moreover, this results in inefficient allocation of capital as well as in less risk sharing through capital and credit markets, negatively impacting the single market.

To address these problems, the Commission makes proposal for minimum harmonisation based on Article 114(1) Treaty on the Functioning of the European Union on the establishing of an internal market: '…. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market'. The EC Proposal aims to contribute to the achievement of two objectives in this regard. First, it aims to improve the conditions for debt recovery and ensure the free movement of capital in the internal market. Second, the EC Proposal aims to ensure a level playing field for all economic operators in the EU concerned with insolvency regardless of their location, size, and critical mass.

In his address, Vondráček also elaborated on the scope of the EC Proposal itself. In the preparations leading up to the EC Proposal, already several topics had been mentioned. He explained why some topics were included in the EC Proposal, and how consultations during the preparatory process have informed the Commission on the choices made in the final EC Proposal.

The keynote address was followed by intensive discussions on various aspects of the EC Proposal. Vondráček emphasised the Commission's decisions regarding the scope of recent and successive legislative initiatives, drawing in particular on the distinction between restructuring and insolvency proceedings. Whereas the PRD 2019 is mostly limited to matters of (preventive) restructuring and post insolvency (with the discharge for entrepreneurs), the current EC Proposal has a different scope and focuses on insolvency, more specifically on the core matters of national insolvency law in Member States.

Panel 1: What is, what isn't, and what should be harmonised?

The first panel discussion of the conference, chaired by Nora Wouters (Belgium), discussed what is, what is not, and what should be harmonised with regards to four selected topics: (1) the definition of insolvency, (2) the ranking of creditors' claims, (3) the debts of the estate, and (4) the rules for practitioners in insolvency proceedings.

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18 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), *O.J.* L 141/19.

19 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, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), *O.J.* L 172/18.

20 Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions a Capital Markets Union for People and Businesses-New Action Plan, 24 September 2020 (COM/2020/590 final).

Ass. Prof. Tomáš Richter (Czech Republic) discussed the absence of a clear definition of 'insolvency' and 'insolvency proceeding' in the EC Proposal. He pointed out that within the EU, insolvency law is lagging behind the market and stated that it is important to have a common definition for both forward-looking (when to file for insolvency?) and backward-looking purposes (when can directors be held liable?). However, for neither of these two purposes the EC Proposal give a clear definition of insolvency law. He concluded that the persistent divergences among Member States on how insolvency is defined will remain an impediment for an effective harmonisation of insolvency laws in the EU. During the discussions, it was reiterated that it would be beneficial if a more objective standard would be developed for legal practice and, by extension, cross-border investment.

Ranking of creditors' claims was addressed by Prof. Em. Christoph Paulus (Germany). This was one of the topics that was expected to be included in the EC Proposal, as it was part of successive preparatory documents. However, this topic s not included in the final EC Proposal. Paulus discussed the question of whether ranking of creditors should have been included, taking into account that foreign investors are now confronted with 27 different insolvency regimes when investing across Europe. Due to the different insolvency regimes, it differs per country how much of the investment can be recovered in insolvency. Paulus also emphasized that the ranking of claims is a highly political topic, touching upon taxation regimes and social preferences of the Member States. During the discussion, it was suggested that clear and straightforward dialogues, especially between Member States, may provide a better indication for which areas could be subject to harmonisation. This would lead to a better insight for the application of the subsidiarity principle e.g. which topics should be left to Member States and which should be addressed at the EU level.

Prof. Lorenzo Stanghellini (Italy) discussed the question of whether there should be a common notion for debts of the estate. He first noted that, while there is a common denominator regarding the debts of the estate, there is also a certain degree of ambiguity on the perimeter of the subject. As a common denominator, debts which arise for the purposes of advancing the goals of the procedure (e.g. new money for restructuring purposes), are debts of the estate. He distinguished between three types of debts of the estate, depending on when they arise. These include (i) debts incurred by an insolvency practitioner during the insolvency proceedings, (ii) debts that were incurred by a debtor in possession in prior failed restructuring attempt and are brought within subsequent insolvency proceedings, and (iii) debts that are incurred by a debtor in possession in a restructuring proceeding. Preferential treatment can be justified if such debts arise for the purpose of advancing the proceeding. He pointed also at other important issues, in particular attracting credit as new or interim finance. The capacity for debtors in possession during a restructuring, or insolvency practitioners in insolvency proceedings, to have access to credit depends strictly on the procedural rules regulating debts of estate, which are the (i) guarantees, (ii) ability to recover claims due and payable, as well as (iii) avoidance rules. To date, harmonisation of debts of the estate is limited, which can only be found in Articles 17 and 18 of the PRD 2019, which deal with protection of new and interim finance, as well as exemptions from avoidance actions. Every other related topic, such as the treatment of debts contracted by the insolvency practitioners or the treatment in insolvency proceedings of debts incurred by the debtors in failed restructuring proceedings, remain within the domain of the Member States and, as a result, are not harmonized. Nevertheless, there is a degree of convergence for the debts contracted by insolvency practitioners, which must be paid with a priority over pre-existing debts (i.e. post-commencement privilege). However, significant differences remain for crucial topics, *inter alia* the means of enforcement and the ranking of priority of secured claims, which constitute an unnecessary impediment to the CMU. As Stanghellini pointed out, reducing the disparities of the rules on debts of the estate by means of harmonisation may, in particular in view of new and interim finance, provide a stepping stone for promoting access and better *ex-ante* risk assessment for cross-border investing.

The last panellist was Ms. Rita Gismondi (Italy). She outlined the next steps in regulating the profession of insolvency practitioners. Gismondi drew on her Italian experience, under the new Italian Crisis and Insolvency Code (2022). She stated that insolvency practitioners are facing problems regarding the eligibility criteria and the actual expertise required to handle both restructuring and insolvency cases. As a remedy for some of the problems in this regard, Gismondi considered that harmonisation could assist in paving the way towards more clear rules by regulating professions. However, the EC Proposal only touches upon this topic scantly, with the exception of the monitors and insolvency practitioners in respectively the informal, preparatory phase and the formal, liquidation phase of pre-pack proceedings (Articles 19-35 EC Proposal). For the monitors, the EC Proposal provides rules on their appointment, eligibility, and remuneration, whilst for insolvency practitioners, it regulates their role and liabilities. Furthermore, other instruments are also relevant for these actors. Consider to Articles 1(12) PRD 2019 defining practitioners in the field of restructuring and Article 26 PRD 2019 on appointment, eligibility and training of practitioners in general. In addition, for practitioners, Article 2(a) EIR 2015 defines the 'insolvency practitioner' for the purpose of cross-border insolvency. These provisions are not necessarily aligned, and further detail in the EC Proposal would be pivotal to create a clearer and more uniform framework for practitioners.

Panel 2: Stakeholder perspectives on the EC Proposal - preliminary results of the CERIL survey

The second panel, chaired by Prof. Elina Moustaira (Greece), revolved around the question of how to make harmonisation of insolvency law work. In this session, Prof. Reinout Vriesendorp (the Netherlands) and Dr. Paul Omar (United Kingdom) discussed the interim results of a survey conducted by CERIL and the implications that may have for next steps in the harmonisation process. The preliminary results of the survey, based on 54 responses coming from 20 different jurisdictions, provide a broad appraisal by insolvency experts of the EC Proposal.[21] The majority of respondents (59%) are active in academia, followed by insolvency practitioners (26%). There were also responses from policy makers, judges, and other stakeholders. Vriesendorp and Omar discussed a part of the survey's results per topics of the EC Proposal, drawing in particular on whether respondents (i) see a need for harmonisation, (ii) agree on including it in the EC Proposal, and (iii) to what extent the proposed provisions could already be adopted (or would require more or less detail).

With respect to avoidance actions, more than 75% of the respondents stated that there is a need for harmonisation. In addition, 90% also agrees that the provisions on avoidance actions are included in the EC Proposal should be adopted, with even 62% supporting the adoption of the provisions on avoidance action as they are currently proposed. For asset tracing, 85% of the respondents indicate to a need to harmonise this topic. 94% state that the proposed provisions should be adopted in the EC Proposal, of which a third would support inclusion of more detailed provisions. Regarding pre-pack proceedings, the results were more mixed: less than 70% of the respondents see a need for harmonisation. 94% state that this can be achieved with the EC Proposal, although there is broad support that modifications would be necessary (making the provisions either more or less detailed). Aspects that were considered difficult to implement include: (i) assignment of executory contracts to the acquirer of the debtor's business, (ii) acquisition of the debtor's business, free of debts and liabilities, and (iii) protection of the creditors' interests.

On the director's duty to file for insolvency, 75% of the respondents indicate a need for harmonised rules and agree with its inclusion in the EC Proposal. Noticeably, nearly half of the respondents seek more detailed provisions. With respect to simplified winding-up proceedings for insolvent microenterprises, the results are more diverse. About half of the respondents indicate that this topic requires harmonisation, but nearly 30% seeing no need to do so. The opinions on the proposed provisions are also varied: 35% support adoption of the proposal as it is, 23% want a more detailed proposal, 11% want the provisions to become less detailed, and 31% do not want the provisions to be adopted. Similar to the provisions on pre-packs, a majority also supports that the provisions on microenterprises should become optional under the EC Proposal. For creditor committees, one-third of the respondents think it is necessary to harmonise this topic. Neither is their clear support for the proposed provisions in the EC Proposal 32% of the respondents support adopting the provisions as they are, whereas 19% wish the provisions to be more detailed, 30% opt for less detailed provisions, and a further 19% say the provisions should not be adopted at all. Finally, on standard factsheet of national insolvency proceedings there is a more coherent view: 75% of the respondents indicate that there is a need to harmonise this. Almost all responses support the proposed provisions are adopted, with 25% preferring even more detailed provisions.

It was stated that some parts of the EC Proposal could technically be enacted already tomorrow and could work well in many jurisdictions. However, this would not be the case for pre-packs, the rules on micro-enterprises, and those for creditor's committees. It is also important to realise that for several topics, it follows that some Member States will require a thorough reform to implement the proposed provisions. There are some indications that in economically more developed parts of the EU, there might be more willingness to adopt the provisions of the EC Proposal. In jurisdictions that have had less exposure to the new developments, resistance may be higher. All in all, it seems that the initial reception of the proposal is generally positive, although a closer look already reveals that there can be various comments made for every topic of the EC Proposal.

Examining the EC Proposal

The second day of the conference was opened by Prof. Ignacio Tirado (Italy/Spain). In considering the need for harmonisation of insolvency, he noted that there is no real reason to differentiate insolvency law from other fields of law, which have been substantially harmonised at the EU level before, referring to banking and corporate law. Taking an outsiders' view may help to realise, as Tirado argued, that the question should therefore not be 'why do we need a directive to harmonise insolvency law?', but rather 'why is there not yet a directive in this area?' That proved to be a good starter for the discussions in the next panels.

Notes

21 It should be noted that the final report on the results of the survey will encompass the responses received after the cut-off date for preparing the draft results presented at the CERIL Conference.

Panel 3: Pre-pack proceedings and microenterprises

Prof. Catarina Serra (Portugal) chaired the first panel of the day, on a European regime for pre-packs and microenterprises, with discussions by Dr. Patryk Filipiak (Poland), Dr. Jennifer Gant (United Kingdom) and Prof. Stephan Madaus (Germany).

Madaus introduced the key provisions and mechanisms the Commission proposes in order to achieve a common European minimum harmonised framework for both pre-pack proceedings and the winding-up of insolvent microenterprises. The key issue with pre-pack proceedings, according to Madaus, is finding the right balance between the aim of making the proceeding as confidential as possible and the fact that the market must be involved for a pre-pack to succeed. Furthermore, he commends that the EC Proposal fails to sufficiently address how pre-packs proceedings should be shaped, for instance, it lacks detail with regard to shaping the sales process.

In response, Gant pointed at the extensive social dimension of the pre-pack, notably for employees. She expressed the vulnerability of employees during pre-packs. Stating that the default rule under the Transfer of Undertakings Directive (2001/23) (TOU 2001) will not be applicable to all pre-pack proceedings, due to the general applicability of the bankruptcy exception under Article 5(1) TOU 2001.[22] She elaborated in this regard on the difference between the decisions of Court of Justice of the European Union (CJEU) in the *Smallsteps*[23] and the *Heiploeg*[24] cases concerning the aim of pre-packs. Gant mentioned that the CJEU has adopted over time a fact specific approach. Applicability of the bankruptcy exception is possible, but this relates to specific facts of the case, requiring a case-by-case assessment on whether the requirements of the exception have been satisfied.

Gant questioned whether the proposed approach of the Commission in Article 20(2) EC Proposal is possible as this provides for an opt-out from the TOU 2001, by stating that 'for the purposes of Article 5(1) of Council Directive 2001/23/EC40, the liquidation phase shall be considered to be bankruptcy or insolvency proceedings instituted with a view to the liquidation of the assets of the transferor under the supervision of a competent public authority'. She commented that it is doubtful whether a standalone directive – the EC Proposal – can be used to exempt itself from the application of another directive (TOU 2001).

Filipiak expressed – in agreement with Madaus – that there is a clash of two sets of values in the EC Proposal. In the EC Proposal, the Commission tries to combine both non-market and market values, which conflict with each other. He also expressed concerns that the Commission has extensive confidence in the insolvency practitioner in pre-pack proceedings. However, it can be doubted whether the involvement of a practitioner will succeed to resolve the concurrence of different and competing interests.

Madaus continued with an introduction of the provisions on winding-up of insolvent microenterprises. He pointed out that the central idea of such proceedings providing for simplified liquidation proceedings for insolvent microenterprises is to enable a discharge for the business. A noticeable feature of the EC Proposal is that it adopts the so-called debtor in possession principle, according to which the debtor is left fully in control over its assets and affairs during the course of the proceedings. However, it will be debated whether the proposed framework for winding-up of insolvent microenterprises can function without the involvement of insolvency practitioners. Madaus pleads that this would not be the end of the insolvency practice (especially considering the loss of fees for practitioners) but could offer a solution for some cases, including those with empty estates.

Filipiak expressed general support for the Commission's choice to include this topic on the winding-up of insolvent microenterprises in the EC Proposal. He pointed out that the Commission has much trust in debtors to conduct the proceedings. However, there is no clear legal and moral justification for letting debtors benefit from a discharge while they do not bear the costs. While this could work in those cases where the creditors trust in the debtor's honesty. From an economic perspective, however, it may be a good approach, as it can support the aim to preserve value for the general body of creditors. At the same time, giving extensive control to courts will not work in practice, as that does not fit within their role. However, leaving the debtors fully in possession may result in cases of fraud. Therefore, According Filipiak, there is added value in the involvement of insolvency practitioners.

Panel 4: Shaping the role of actors in insolvency

The fourth panel discussed the impact of the proposed harmonisation on the role of actors. This panel was chaired by Prof. Joeri Vananroye (Belgium), with Mr. Jasper Berkenbosch (Netherlands), Ms. Mylène Boché-Robinet (France), Ms. Kathlene Burke (United Kingdom), Prof. Carlos Mack-Castelletti (Italy) and Dr. Georg Wabl (Austria). Mack-Castelletti started the panel discussion with a general overview of how the EC

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22 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

23 CJEU 22 June 2017, ECLI:EU:C:2017:489 (*FNV c.s./Smallsteps*)

24 CJEU 22 April 2022, ECLI:EU:C:2022:321 (*Heiploeg*)

Proposal will impact practitioners, stressing that it may result in reducing the role of insolvency practitioners in general. While the Commission's Proposal may have beneficial economic effects, it may have tremendous impact on the governance in insolvency. Leaving most of the control in both pre-pack proceedings and micro-enterprises with the debtor, the design of the legal frameworks will impact whether the proceedings will or will not be abused. He concludes with the statement that a sensible approach is needed for a more balanced protection of the rights and duties of debtors and creditors. The introduction of a pre-pack proceeding is an attempt to bring more balance between the costs and efforts spent on small insolvency cases and the achieved value of the estate to be distributed to the creditors.

Burke provided a comparative historic view from the emergence of harmonised insolvency laws in the United States at the end of the 19th century. She drew interesting parallels between the current EC Proposal and the USA approach regarding the compromises that were made between the debtors and creditors' interests. The first permanent Bankruptcy Act was adopted in 1898, in part because all parties in bankruptcy could see the benefits of federal legislation. Some of the topics back then, such as the duty or right to file for insolvency, as well as preferences and avoidance actions, bear resemblance to topics that are considered for harmonisation in the EU today.

Boché-Robinet discussed the role of the creditor's committee under the EC Proposal, drawing on its role, composition and rights. Explaining the new concept of creditors' committee introduced in the EC Proposal. A creditor's committee is established upon decision of the general meeting of creditors or by decision of the court, reflecting the different interests of creditors or groups of creditors. She also explained the French perspective, which is one of the more debtor-friendly regimes in Europe, which also offers several tools for creditor involvement. Boché-Robinet mentioned that the creditors' interests are already sufficiently protected under the French regime by way of the mandatory appointment of a *mandataire judiciaire* in some proceedings. In addition, up to five creditors may be appointed as *contrôleur* and be designated with a supervisory role. She then argued that introduction of creditor's committee could be implemented by extending the current rules on the *contrôleur*. She concluded that the developments at the EU level are positive steps ensuring a minimal level of representation and involvement of creditors in the proceedings. However, she noted that the true benefits of harmonisation may not be unleashed with the current EC Proposal, as the mandatory introduction of a creditor's committee will create a minimum harmonisation, with ample room under which divergences will remain.

Berkenbosch introduced the provisions on the director's duty to file for insolvency from the angle of legal practice, drawing on current approaches in Germany and the Netherlands. Berkenbosch questioned whether this particular topic is suited for harmonisation. He stated that the Netherlands, along with a few other Member States, do not have a director's duty to file for insolvency proceedings. Instead, a form of wrongful trading rule is applied to be able to hold directors liable for continuing to trade while they knew or should have known that the debtor would not be able to satisfy new obligations nor could provide for any recourse to the creditors.[25] Germany takes a very different approach and has a statutory duty for directors to file for insolvency proceedings. For implementing such rules also in the Netherlands, further clarification would be necessary to define in particular both the concept of 'insolvency', as well as '(shadow) directors'.

Wabl reflected also on the duty to file, drawing on his recent research. The Austrian legal regime has a long-standing directors' duty to file for insolvency, which aims to ensure that there is adequate respect for the principle of *paritas creditorum* and that insolvent companies are at one point 'eliminated' from the market. However, he doubts whether introducing these provisions across Europe would help in achieving the goals stipulated by the Proposal, such as e.g. ensuring the timely filing for insolvency. His empirical results in his PhD show that despite the existence of a provision for a duty to file in certain national frameworks, it is a duty that is regularly violated by directors. Instead of harmonising broad concepts such as a duty to file, Wabl therefore suggests to rather look how specific goals can actually be achieved by specific measures, using as an example the protection of the general body of creditors from the damage caused by the debtor whilst delaying insolvency as well as the protection of individual creditors from a possible damage resulting from contracting with insolvent debtors. His research shows that e.g. the latter may not be equally protected in all European countries.

Panel 5: Impact of the EC Proposal on the financing and restructuring market

The last panel of the conference dealt with the impact of the EC proposal on the financing and restructuring market. Prof. The Hon Lady Sarah Wolffe (Scotland) chaired a group of insolvency practitioners and bankers consisting of Mr. Ferdinand Hengst (the Netherlands), Mr. Ángel Alonso Hernández (Spain), Mr. Tom Vickers (United Kingdom), and Mr. Bas van Weert (the Netherlands).

Notes

25 See *Beklamel* case (HR 6 October 1989, ECLI:NL:HR:1989:AB9521, *NJ 1990, 286*).

The overriding perspective of this panel discussion was to examine selected provisions from the EC Proposal and provide a review of their impact on the financing and restructuring processes. The panel discussion focused on Article 36 (the duty to file for insolvency proceedings), Article 33 (the value maximisation and credit bidding in pre-pack proceedings), Article 27 (the assignment and termination of executory contracts in pre-pack proceedings), and Article 24 (principles applicable to the sales process) EC Proposal.

Reflecting on the director's duty to file for insolvency, Van Weert stated that there are different options provided for in different jurisdictions. Focusing on a 'duty to file' may not be helpful, as Van Weert noted, because directors should rather be urged to find ways to restructure their businesses timely. Alonso Hernandez responded by stating that debtors are engaging more and more in managing the creditors. He emphasized that there should be sufficient time to negotiate with the stakeholders. This must be considered in conjunction with a pre-insolvency framework.

Hengst noted that the EC Proposal seems rather strict in imposing a duty to file for insolvency, alongside civil liability if the debtors fail to comply. A debtor has 3 months to file for insolvency proceedings after the moment when a debtor becomes insolvent. Introducing a duty to file without clarifying what is to be understood by 'insolvency' under the EC Proposal, can lead to many different interpretations. This could only be resolved by formulating a clear definition of insolvency. From the UK perspective, Mr. Vickers considers that the duty to file provision will put directors in a difficult position. In fact, the persisting uncertainty surrounding the definitions may lead directors to filing for the opening of proceedings earlier than necessary and, hence, missing potential opportunities for rescuing their businesses.

Regarding Article 33 EC Proposal, which concerns the measures to maximize the value of the debtor's business, Tom Vickers stated that it covers a lot of ground albeit without much detail. For example, it is unclear whether this would only apply to a pre-pack proceeding. Article 33 EC Proposal also provides the option to overwrite contractual provisions, however, will could provide a clear conflict with the principle of *pacta sunt servanda*. While noting this conflict, Alonso Hernandez also pointed at the need for restructuring business debts, as various business is overleveraged.

Another point raised by Wolffe concerned Article 24 EC Proposal on the principles applicable to sales processes. This provision stipulates that the sales process during the preparation phase needs to be competitive, transparent, fair and meet market standards. Hence, if the sale process involves only one binding offer, it is deemed to reflect the business market price. Wolffe questions the effectiveness of this provision and whether it will further transparency will be achieved.

During the panel, some discussion arose, in particular, around the interrelation with provisions from the PRD 2019 on the requirement for national legislators to stay a duty to file. According to Article 7 PRD 2019, if the national law stipulates an obligation on a debtor to file for the opening of insolvency proceedings which could end in the liquidation of the debtor, arises during a stay of individual enforcement actions, that obligation shall be suspended for the duration of the stay. When transposing the PRD 2019, Germany introduced such exception in the StaRUG. Accordingly, when a debtor has entered a preventive restructuring framework and has been granted a stay of enforcement actions. This may become an incentive for debtors – both microenterprises and large enterprises – to pursue a restructuring timelier and more effectively.

Causes for Celebration: Presenting the book CERIL Collection I

The conference concluded with the presentation of the CERIL lustrum book, which marks its 5th anniversary. Prof. Reinout Vriesendorp, CERIL Secretary and Treasurer, presented the work conducted by CERIL in the last five years, and emphasized the importance of this book containing the results of 12 projects. He described how these various projects resulted in Statements and Reports, contributing to the further development of European restructuring and insolvency law. The work of CERIL has been cited and/or quoted by legislators and policy makers, academics, as well as by judges in case law. Prof. Em. Bob Wessels, CERIL Chair, presented the first copies of the book to Justice Sacha Prechal (CJEU, who also decided on the *Heiploeg* case) and Mr. Giorgio Corno Esq. (founding member of CERIL, Italy). In her short address upon receiving the first copy of the book, Justice Prechal reflected on the growing role that EU harmonisation is playing in the European legal domain. She reiterated that while insolvency and restructuring law remains an area with limited harmonisation, the PRD 2019 already has and the EC Proposal will provide an important impetus for legal debates, both in practice and academia. From these legislative initiatives, albeit bringing minimum harmonisation only, a shared legal body emerges in Europe. This provides valuable common ground for substantive legal debate, already now and possibly more in the future.

This conference celebrated CERIL's 5th anniversary, providing a first pan-European platform to discuss in detail the promises and perils of EC Proposal. As Prof. Reinout Vriesendorp pointed out while thanking all speakers and organisers in his closing address, the EC Proposal brings about engaging and extensive discussions, which have only just begun.

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