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SERVICES

CORPORATE INSOLVENCY AND RESTRUCTURING: CURRENT POLICY ISSUES AND CHALLENGES

MARCH 2021



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1. INTRODUCTION

The insolvency profession faces almost constant regulatory and statutory change. Present times appear to be no different, with the return of HMRC to preferential status, potential for a single regulator, forthcoming Pre-Pack Regulations and a new Code of Ethics. Coupled with a global pandemic, Brexit and the ensuing increased demand for professional services and heightened media attention, the insolvency profession is working in eventful times.

Against this backdrop, researchers at the University of Glasgow and Insolvency Support Services conducted part one of a two-part survey among a representative sample of the insolvency profession in December 2020 and early January 2021. In this paper, Glasgow University's Yvonne Joyce and Insolvency Support Services' Eileen Maclean summarise and reflect on the key findings of this survey.



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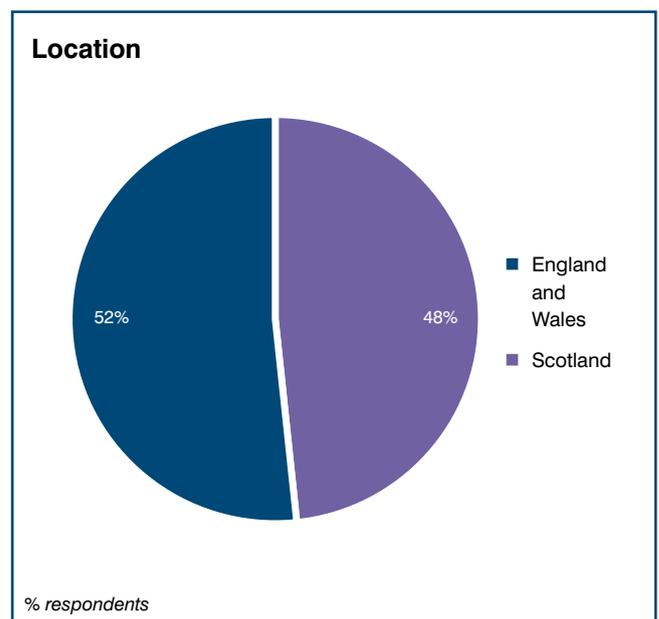
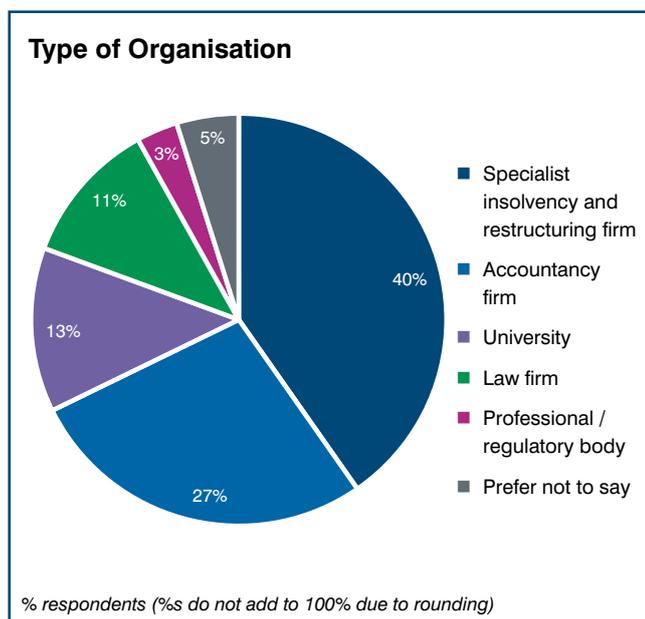
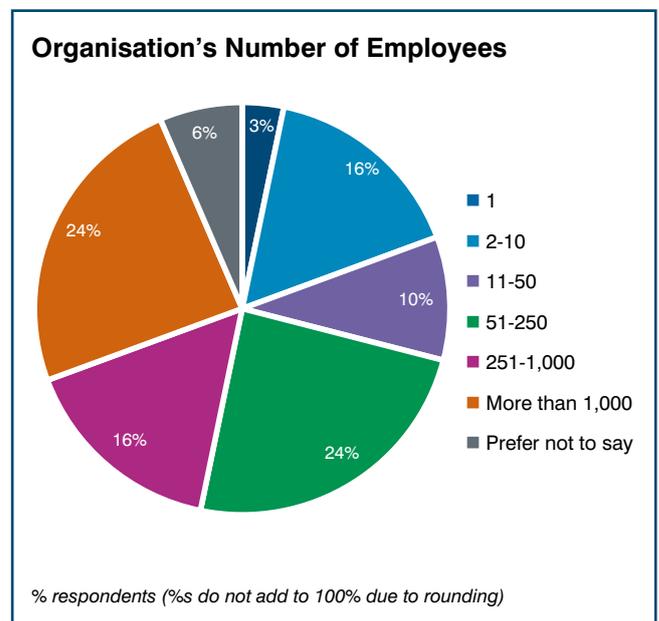
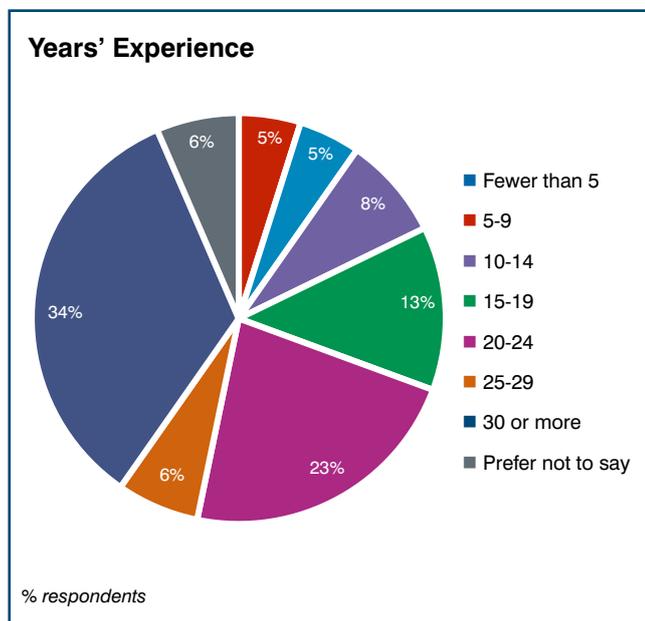
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2. PROFILE OF RESPONDENTS

A total of 67 respondents, all experts in insolvency, restructuring and distressed business advisory work, participated in the research. Their profile data represents the diverse nature of the insolvency profession, in terms of the range of size and type of organisations within which insolvency professionals work. Respondents are spread evenly across the UK, drawn from all sizes of organisation. The majority work in specialist insolvency firms, accountancy practices or law firms.

Respondents have considerable experience in the field, with 63% having more than 20 years of experience, and a further 21% have between 10 and 20 years' experience. We were pleased to see more relatively recent entrants to the profession sharing their views too, with 10% of respondents having fewer than 10 years of insolvency experience. 68% of respondents are regulated by a Recognised Professional Body (RPB). Coupled with our years of experience data, it seems reasonable to conclude that many respondents hold senior posts in their organisation and licensed insolvency practitioner (IP) status.



3. CORPORATE INSOLVENCIES

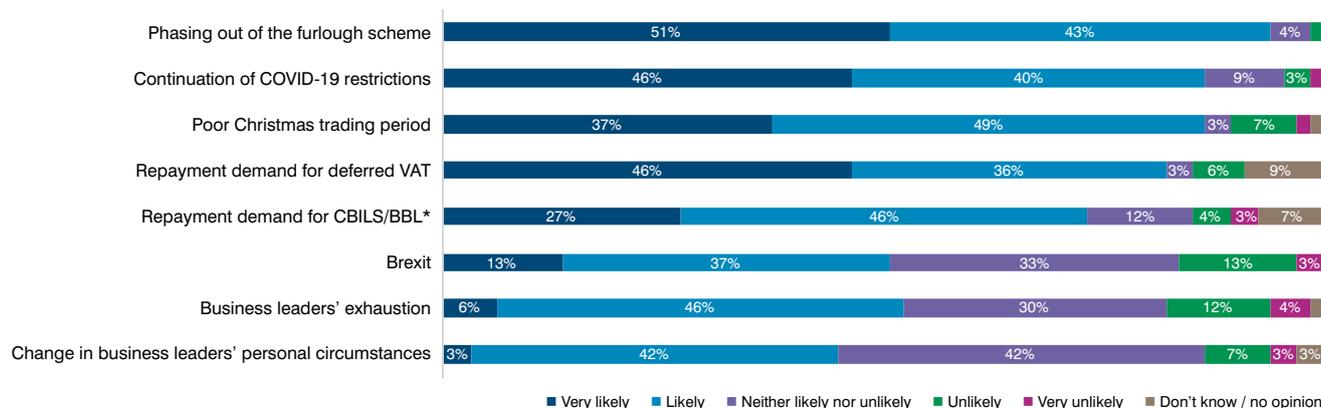
Insolvency triggers

Our survey started with an assumption that the number of insolvencies will increase in 2021 and invited respondents to state how likely several factors may be to cause the predicted increase. According to respondents, the top two triggers for a predicted rise in corporate insolvencies are the phasing out of the furlough scheme and the continuation of COVID-19 restrictions, with 94% and 86% of respondents respectively indicating these factors as likely or very likely to act as a trigger (Figure 1). Although these seem like opposing points, they both present particular challenges and uncertainties for business.

The Coronavirus Job Retention Scheme has supported a significant number of businesses through the pandemic and has been extended until the end of September 2021. However, as the scheme comes to an end, businesses will be making ‘visible’ the effects of their decision-making on employment and other operational matters. With the continuation of COVID-19 restrictions both in the UK and globally remaining highly uncertain, our findings perhaps reflect that the longer businesses are kept from their markets, the less likely they are to be able to pick back up again once lockdown eases (assuming their markets are still there and can be resuscitated).

Figure 1

In your opinion, how likely are the following factors to trigger directors to seek assistance and / or creditors to take action (assuming the COVID-19 restrictions are repealed)?



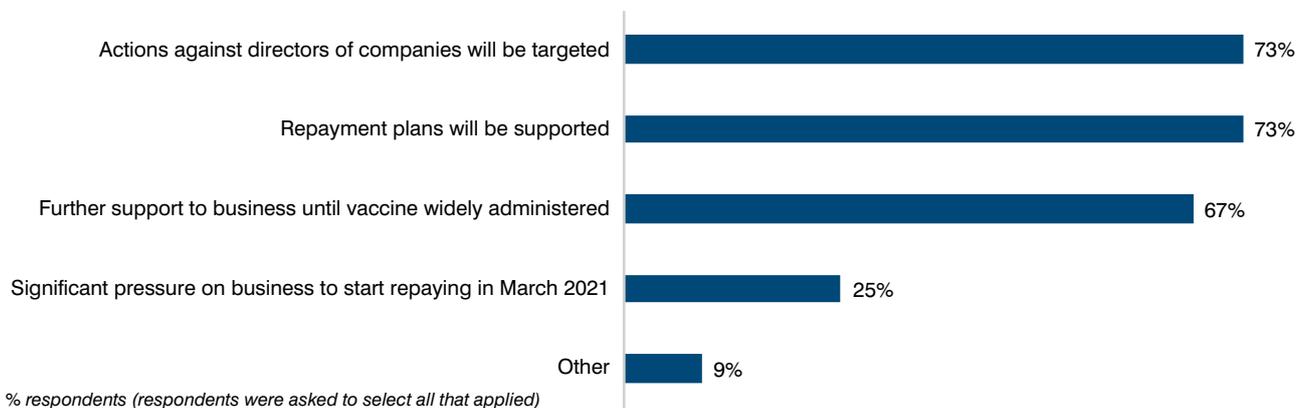
% respondents (some %s may not add to 100% due to rounding)
*Coronavirus Business Interruption Loan Scheme (CBILS) and Bounce Back Loans (BBL).

At the time of the survey, we anticipated the requirement to settle any deferred payments of VAT by the 31st March 2021, although this has since been extended. Our findings show that around four in five respondents (82%) believe a repayment demand for deferred VAT is likely (36%) or very likely (46%) to act as a trigger for a rise in corporate insolvencies. It may be welcome news for some businesses that the UK Government has recently introduced a payment scheme for VAT registered traders. 31st March 2021 also signals the end of the current, temporary restrictions on the use of statutory demands and winding-up petitions. Several respondents comment that the removal of these restrictions may trigger a rise in the number of winding-ups. All the options set as triggers are seen as more likely than not, and this includes business leaders' exhaustion and changes in their circumstances, to be contributing factors to an increase in insolvency numbers.

Collectively, these results suggest the potential for uplift in corporate insolvencies in 2021 and highlight the criticality of cash flow and cash flow planning in the immediate period. Just as crucial is how the repayment of deferred VAT, CBILS and bounce back loans will be managed by all parties, including HMRC and the Redundancy Payment Services (RPS) (Figure 2).

Figure 2

HMRC and RPS will have a pivotal role in insolvencies commencing on or after 1 December 2020. HM Treasury is likely to be a significant guarantor creditor in relation to CBILS and BBL. What do you think the UK Government authorities' approach to corporate insolvency will be?

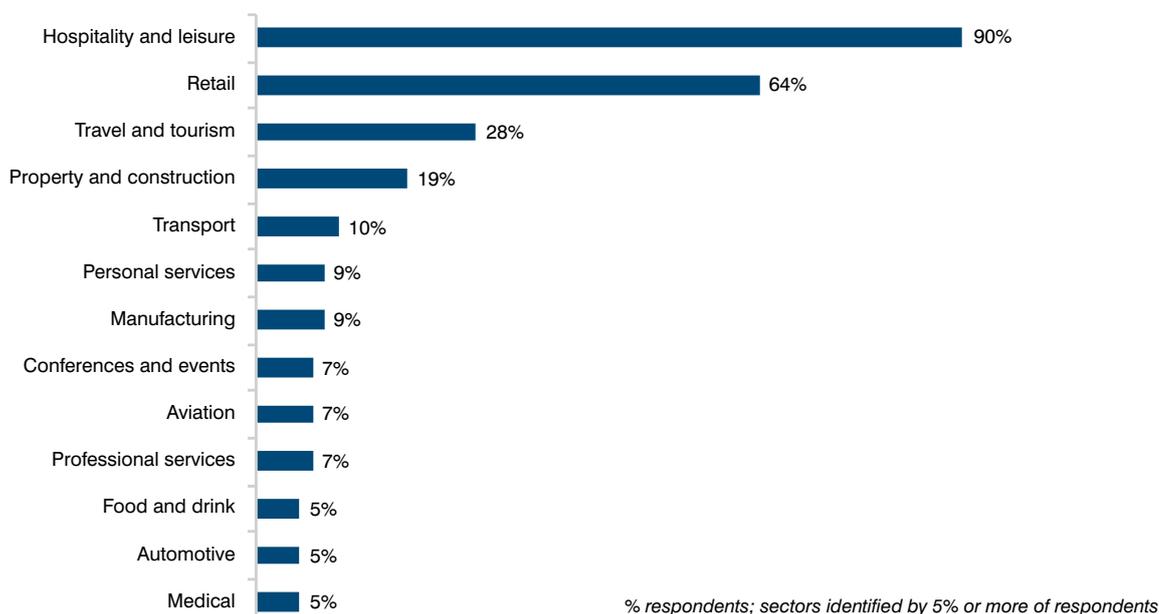


Sectoral impact

Unsurprisingly, respondents' top two most badly affected sectors (based on their experience) are hospitality & leisure and retail, with 90% and 64% of respondents respectively identifying these sectors (Figure 3). Of interest is the range of sub-sectors identified within each, including pubs, restaurants, coffee shops, catering, cinemas, theatres, animal parks, gyms, soft play areas, sports, clothing, gifts, and non-essential retail. 'Cultural' sectors are also noted, including the creative sector, education, arts, and publishing. Overall, 24 different sectors are identified by respondents, highlighting the wide-reaching consequences of lockdown and COVID-19 restrictions in the UK on all aspects of the economy.

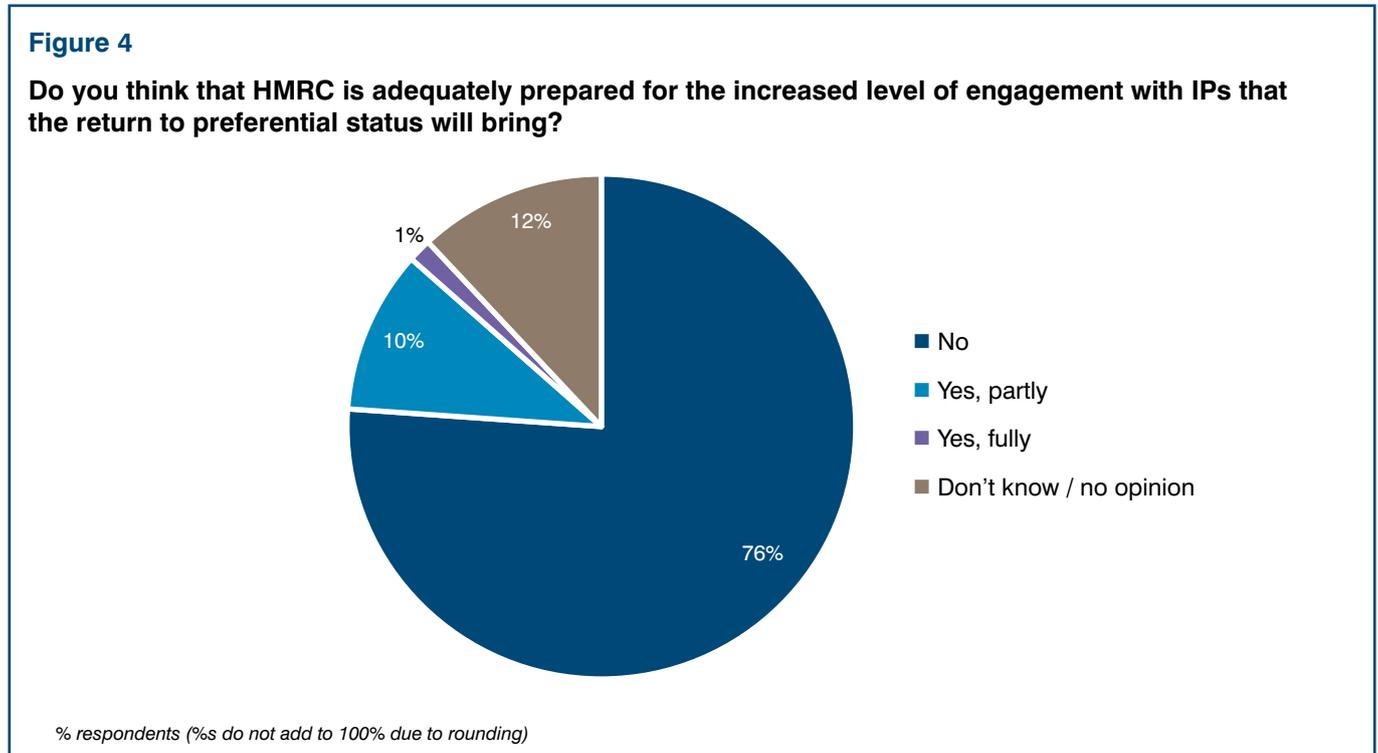
Figure 3

Based on the companies you personally have been working with this year, which industry sectors have been most badly affected by COVID-19?



4. HMRC'S PREFERENTIAL STATUS AND RESCUE

HMRC returned to preferential status in December 2020 in relation to deducted tax (PAYE, NIC, VAT and Construction Industry Scheme) without time or financial limit. Clearly worthy of note here is that only 1% of respondents believe HMRC is fully prepared for the increased level of engagement with the insolvency profession that is expected from being a preferential creditor (Figure 4). Just over three-quarters (76%) of respondents do not believe that HMRC is adequately prepared for this role.

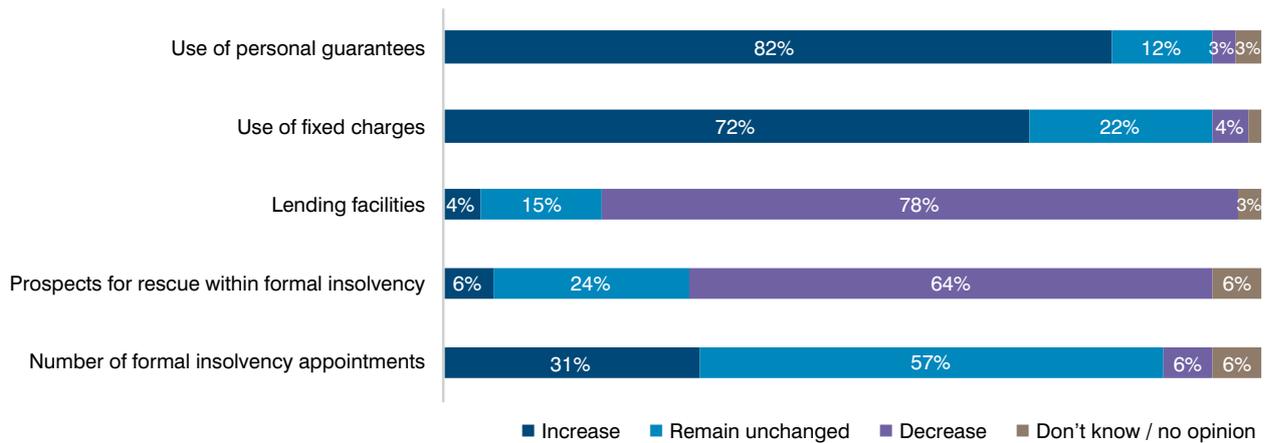


Therefore, although there is a general consensus that the UK Government's continued support measures have helped to prevent or stall a significant uplift in corporate insolvency cases and provided some form of stability in that regard, our results suggest major concerns in the formal insolvency arena going forward. 64% of respondents believe that prospects for rescue within formal insolvency will decrease because of HMRC's return to preferential status (Figure 5). There is a consensus view that HMRC's return to preferential status will also lead to negative consequences for future lending and the availability of capital. Specifically, 78% of respondents believe there will be a reduction in lending facilities, 82% believe the use of personal guarantees will increase and 72% believe the use of fixed charges will increase, following HMRC's return to preferential status.



Figure 5

As a consequence of HMRC's return to preferential status in December 2020, how do you expect the following to be affected?



% respondents

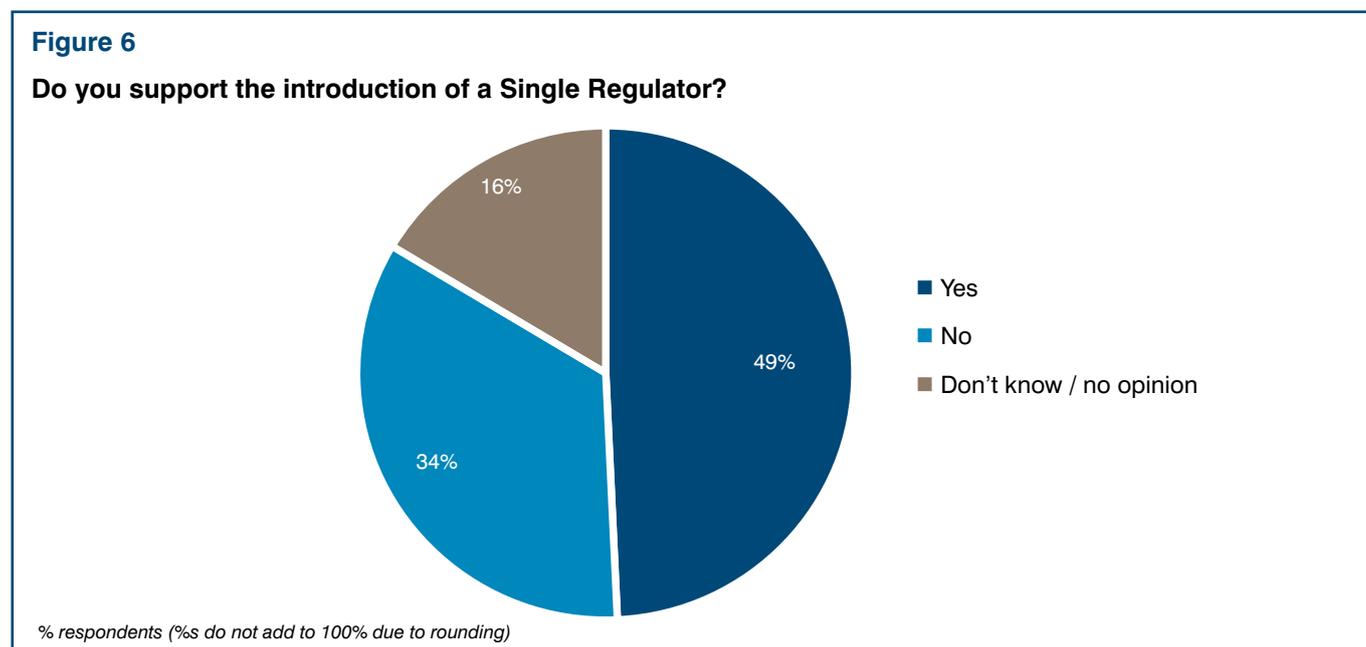
These findings should be considered against the backdrop of businesses laden with COVID-debt or lending and the cash flow issues we highlighted earlier. It is surprising therefore that a majority (57%) do not think that HMRC's return to preferential status will have an impact on appointment numbers, while only 31% expect to see an increase.

Any developed insolvency regime plays an important role in supporting capital markets, lowering the cost of debt (bank lending and trade credit), and encouraging enterprise and productivity. Therefore, beyond the immediate short-term issues noted earlier, our survey results may reflect longer-term concerns over the ability of HMRC as a key component of the UK insolvency regime to facilitate the rescue of viable entities and hence on productivity levels and enterprise more broadly.



5. SINGLE REGULATOR

The Small Business, Enterprise and Employment Act 2015 introduced the power of the Secretary of State to create a single insolvency regulator for IPs. This power expires in October 2022. Just under half of respondents (49%) support a single regulator, 34% do not and 16% either don't know or have no opinion (Figure 6). If we exclude the 'don't knows', then a majority (59%) support a single regulator, with 41% against.



Looking at those who do support a single regulator, we find that 64% belong to an RPB. For those who do not support a single regulator, 78% belong to an RPB. Interestingly, our results also show a preference for a single regulator from those working in specialist insolvency and restructuring firms, with 68% of those respondents supporting a single regulator. This finding may reflect the historical processes of two or more RPBs having oversight of some IPs in practice, such as those regulated for accountancy professional body membership and separately for insolvency work. The split by organisation type of those not in favour was more evenly spread (34% working in an accountancy firm and 30% working in a specialist firm).

A further point of note relates to the number of years' experience in insolvency respondents have. We find that for all experience bands up to 29 years, more respondents are in favour of the single regulator. When experience reaches 30 plus years, more respondents are against the single regulator (62% against compared with 29% for).

The single regulator could be a new body established by regulations or a body already in existence (such as one of the current RPBs or an existing regulator outside the insolvency profession). Of those in favour of a single regulator, 50% of respondents prefer a new entity to be established. Perhaps the pithy view of one respondent that "the Regulatory Bodies will never agree which one should be the single regulator" best reflects this finding.

Our findings highlight clear structural differences of opinion and therefore a need for further research in this area to gain a more in-depth understanding of the reasons for supporting or not supporting a single regulator. At the level of individual RPB, we do not have sufficient data to provide meaningful statistics. However, we would suggest that analysis at this level may be informative to identify different or similar views between and amongst the RPBs. Further, recognising our earlier point about the diverse nature of the insolvency profession along with potential changes to the demographic profile of the profession due to retirement and new recruitment, the 'voices' of the next generation of insolvency professionals also should be more extensively canvassed.

6. PRE-PACK REGULATIONS

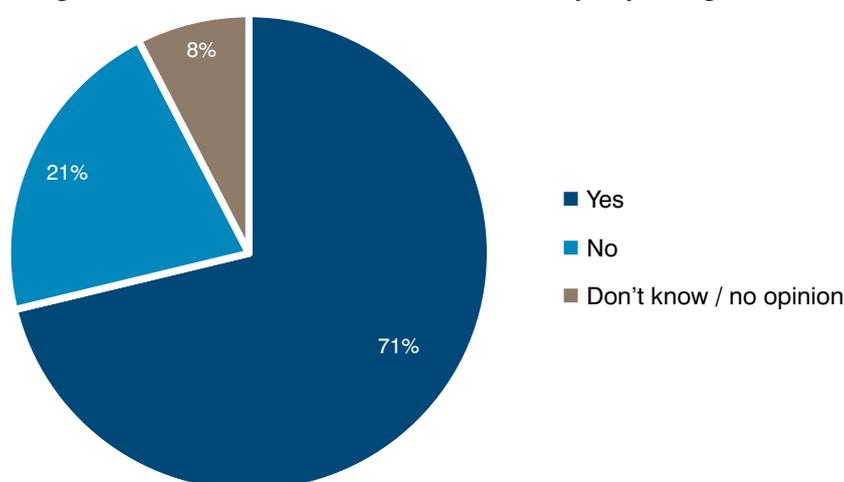
Our survey turned next to the draft Pre-Pack Regulations, introduced with the purpose of ensuring that all connected party transactions are subject to the scrutiny of an independent 'evaluator' in the absence of creditor approval. We asked respondents for their views on the regulations as they stood at the end of 2020.

Definition of a pre-pack

There is very clear support for the Regulations to provide a definition of a pre-pack, with 71% in favour (Figure 7). The Regulations do not include a formal definition, yet SIP 16 contains one, which the profession supports. The UK Government's reluctance to commit a formal definition to statute thus does not appear to be shared by the profession.

Figure 7

In your opinion, should the Regulations contain a formal definition of a pre-packaged sale?



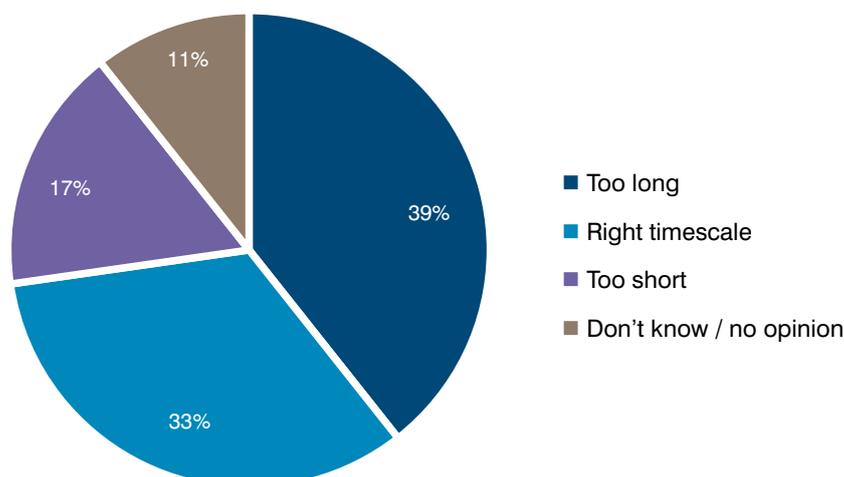
% respondents

Timescale

Opinion on the proposed timescale of eight weeks for a substantial disposal to a connected party to fall within the proposed Pre-Pack Regulations is fairly evenly divided (Figure 8) between those who consider it too long (39%) and those who consider it the right amount of time (33%). Only 17% consider it too short.

Figure 8

What is your opinion of the period of 8 weeks?

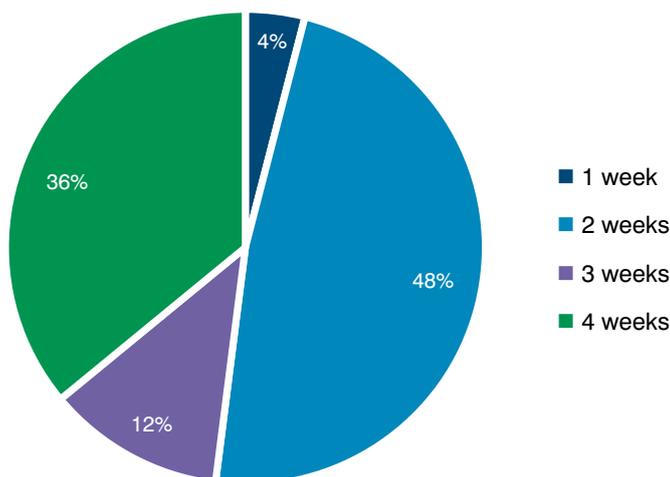


% respondents

Of those who feel the eight-week period is too long, support is fairly evenly split between a preference for two weeks and four weeks, with all respondents here selecting an option of four weeks or less (Figure 9). This suggests that four weeks is seen as the 'limit' of when a transaction might be considered a pre-pack. This also indicates that respondents may be much less concerned about timescale as opposed to other aspects of the draft Regulations.

Figure 9

Which of the following timescales would you most prefer for a substantial disposal?



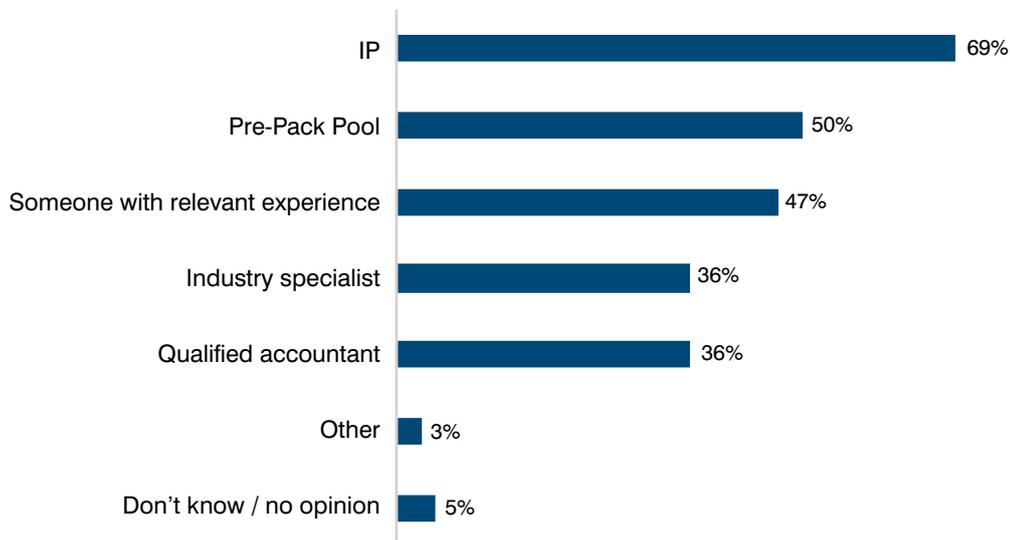
% respondents

The Evaluator

Turning to who might be the 'evaluator' (the independent party who would review the connected party pre-pack in the absence of creditor approval), the most popular choice is an IP (Figure 10). However, there is also strong support for the Pre-Pack Pool or someone with relevant experience. Respondents would also be prepared to use a qualified accountant and industry specialists but to a lesser extent.

Figure 10

Which of the following would you consider using as an evaluator?

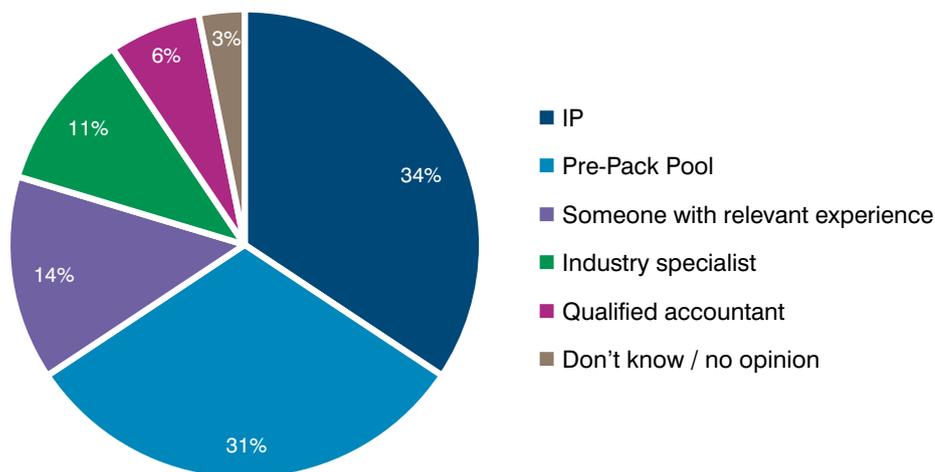


% respondents (respondents were asked to select all that applied)

When asked to choose just one, respondents' first choice is fairly evenly split (Figure 11) between an IP (34%) and the Pre-Pack Pool (31%). This is likely to reflect that both an IP and the Pre-Pack Pool benefit from expertise and experience of knowing what is required in the circumstances and the given timescale. The Pre-Pack Pool also has the potential benefit of greater perceived independence of the transacting parties. Of course, a formal definition of the 'evaluator' could help here.

Figure 11

If you had to choose just one option to act as evaluator, who would it be?



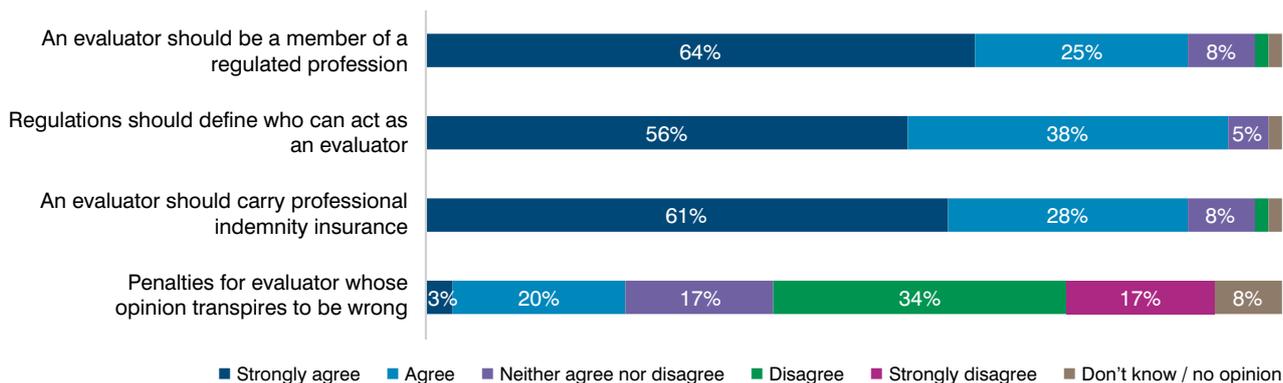
% respondents (some %s do not add to 100% due to rounding)

The role of evaluator is not universally accepted. One respondent comments that IPs are highly qualified and regulated, with a focus on maximising recovery for creditors, and that a pre-pack deal is already open to scrutiny and challenge in the event that stakeholders are not happy with the terms of the deal.

However, if we are going to have them, 89% of respondents agree or strongly agree that an evaluator should be a member of a professional body, 94% agree or strongly agree that Regulations should define who can act as evaluator, and 89% agree or strongly agree that the evaluator should carry professional indemnity insurance, a provision which has since made it into the re-drafted Regulations (Figure 12). Having said that, only 23% agree or strongly agree that penalties are appropriate where the evaluator's opinion transpires to be wrong.

Figure 12

To what extent do you agree with the following statements about an evaluator?

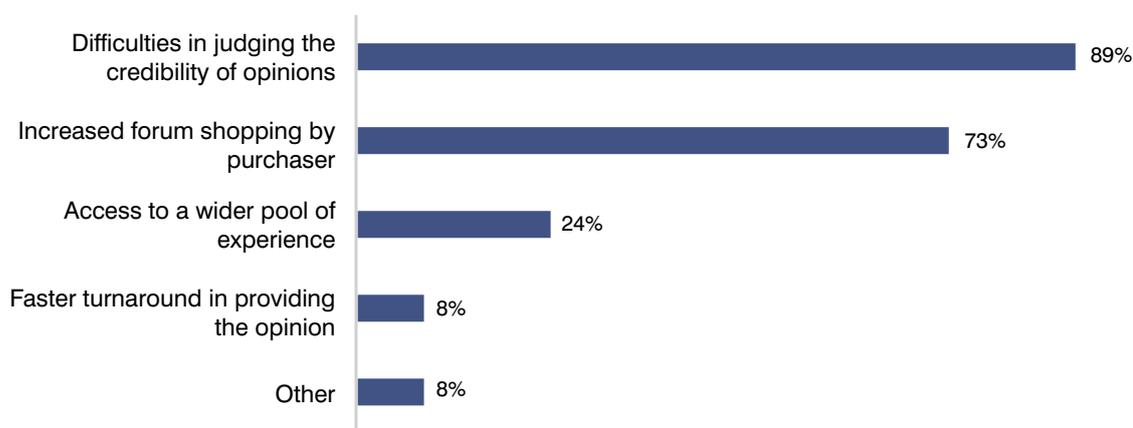


% respondents

The importance of the evaluator belonging to a regulated profession is borne out further by our findings that difficulties in judging the credibility of opinions and increased forum shopping on the part of the purchaser are thought likely consequences of the evaluator not belonging to a regulated profession (Figure 13). Respondents feel that it is more important to have regulated and insured evaluators rather than have a wider pool of non-regulated experience. Nor is speed of response considered to be a benefit of having non-regulated evaluators. Respondents voiced concerns that the system would be “open to abuse”, with a “lack of safeguards” otherwise. It may be a corollary of the regulated background experienced by IPs that leads respondents to expect the same degree of regulatory oversight in relation to evaluators.

Figure 13

What do you think may be the consequences of an evaluator not belonging to a regulated profession?



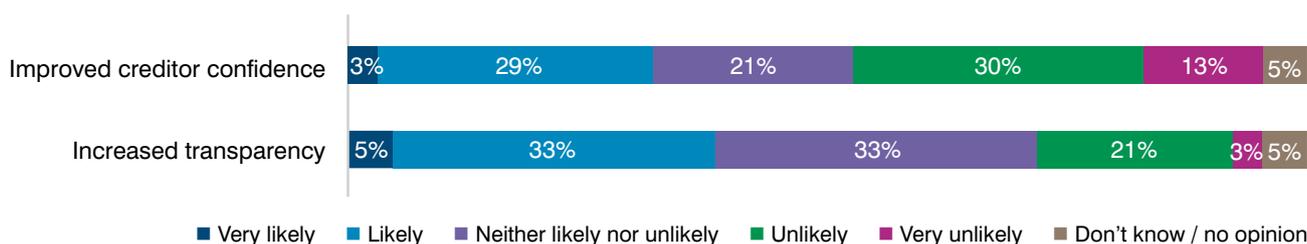
% respondents (respondents were asked to select all that applied)

Impact and consequences

Nearly one-third (32%) think the draft Pre-Pack Regulations will improve creditor confidence, while 43% believe they will not. Almost two in five respondents (38%) think the Regulations will increase transparency, while close to a quarter (24%) believe they will not (Figure 14). Of significance is the large minority who appear ambivalent towards the suggested improvements and a clustering of responses in the ‘likely’ / ‘unlikely’ categories as opposed to ‘very likely’ / ‘very unlikely’. These results perhaps support anecdotal evidence that the proposed regulations are thought unlikely to have much meaningful impact or, as one respondent comments, there could be a lack of support for the ‘concept’ of an evaluator and their proposed role.

Figure 14

How likely do you think it is that the new legislative requirements will result in the following regarding connected party pre-packs?

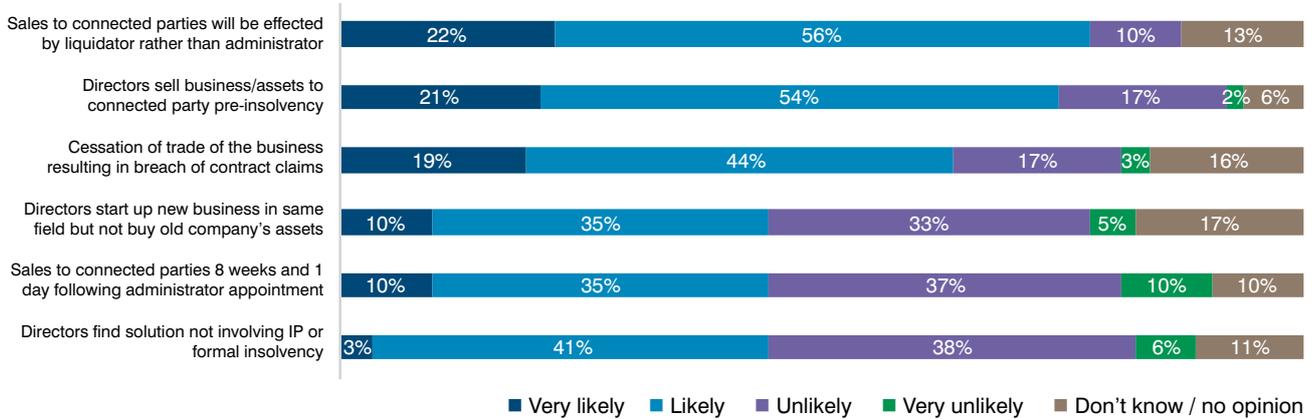


% respondents (%s do not add to 100% due to rounding)

Possibly of greater concern is evidence of the ‘unintended consequences’ of introducing regulations in this area (Figure 15). In this case a significant majority believe it is likely or very likely that sales to connected parties will be effected by a liquidator rather than an administrator (88%), or directors will sell the business or its assets to a connected party pre-insolvency (75%). What this seems to indicate is that pre-pack sales will be conducted through alternative means (the directors themselves) or processes (liquidation), therefore bypassing the intention of the draft Regulations. Government may wish to give this finding particular attention. Of the other options posited as possible consequences, respondents are more or less evenly split as to whether directors will simply start up again without taking over the insolvent undertaking, sales will exceed eight weeks, or directors will avoid a formal insolvency.

Figure 15

In your opinion, how likely are the following to happen as a result of the draft Pre-Pack Regulations introducing the mandatory scrutiny of a pre-pack transaction to a connected party?

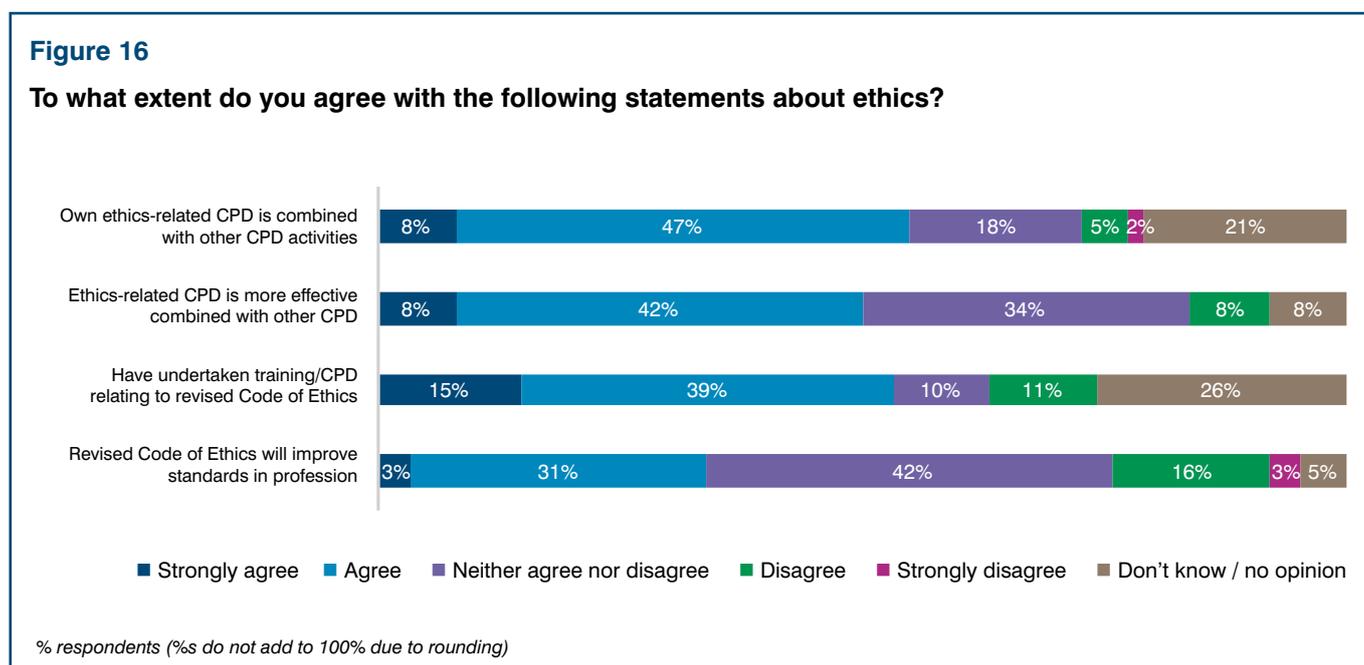


% respondents (%s do not add to 100% due to rounding)



7. CODE OF ETHICS

The revised Insolvency Code of Ethics came into effect from 1st May 2020, based on the International Ethics Standards Board for Accountants (IESBA) Code. Although the over-arching responsibility to act in the public interest and the fundamental principles remain the same, new sections have been added and existing sections expanded or revised. Our results indicate that just over half (54%) of respondents have undertaken some training in this area (Figure 16). It is possible that those who have not yet undertaken training may have been impacted by the timing of UK lockdown restrictions from March 2020. With the current (and likely continuing) spotlight on insolvency and the insolvency profession, continuing professional development (CPD) in this area seems critical. Furthermore, with 73% of respondents believing that HMRC will target actions against directors (see Figure 2), for example for misuse of the furlough scheme or CBIL/BBL applications, arguably the NOCLAR provisions (non-compliance with laws and regulations) may become more pertinent to IPs and their teams.



Despite the amendments made to several provisions, including those relating to the IP as an employee, inducements, hospitality and gifts, referral fees and commissions, the use of specialists and NOCLAR, our findings show that only 34% of respondents believe the revised Code will likely or very likely improve standards within the profession. This may suggest that respondents do not view the amendments and new provisions as significant changes or additions, or that the prior Code was adequate in this regard, or, maybe more worryingly, respondents may not see value in Codes of Ethics in general as a way of enhancing standards in the profession.

Content and delivery of ethics-related CPD may therefore require some critical reflection bearing in mind these findings, together with our finding that half of respondents agree or strongly agree that ethics-related CPD is more effective when embedded and combined with other forms of CPD. 34% could neither agree nor disagree here, maybe reflecting some uncertainty on the most effective methods of ethics-related CPD. Interestingly, ICAS introduced the requirement for compulsory ethics CPD from 1st January 2021 for its CA membership, with the aim of acting as a reminder to members of their ethical responsibilities. Although this may create practical issues over the recording or logging of types of CPD (particularly where ethics-related CPD is embedded in other types of CPD, as it is for 55% of respondents), this move signals the importance of ethics and continual professional development in this area.



We are hugely grateful to everyone that took the time to respond to our survey and provided their considered thoughts on so many current issues facing the insolvency profession. We hope too that you have enjoyed reading the results. The findings will be fed back to the relevant stakeholders, including HMRC, the RPBs, the Insolvency Service and R3.

Many thanks also to David Wallace of Wallace Marketing for his advice and support throughout this research project.

Please look out for the second survey in Spring 2021 where, one year after the UK entered its first lockdown, we seek your views on issues relating to how the insolvency and restructuring profession may have changed and the continuing effects of COVID-19 on professional working practices.

If you have any questions about this research, please contact us.

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