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**Between rescue culture and creditor protection:
current and possible European rules on directors'
liability in the vicinity of insolvency**

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- Vicinity of insolvency as a unique legal challenge
- Vicinity of insolvency at the intersection of company law and insolvency law



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- The main challenge for the creation of an appropriate legal response to the vicinity of insolvency is finding the proper balance between two imperatives:
 - a) to enable the rescue of viable businesses, and
 - b) to protect the creditors' interests.



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- The main legal mechanisms:
 - a) change in the regime of directors' duties,
 - b) the concept of “wrongful trading”,
 - c) duty to file once the company is insolvent,
 - d) duty to hold a general meeting aiming to promote recapitalisation or liquidation,
 - e) additional legal mechanisms established in company law, insolvency law, general civil law, and criminal law.



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- The legal systems may use a combination of two or more mechanisms to address the issues present in the vicinity of insolvency.
- These mechanisms may belong to different fields of law.
- They are functionally interdependent, and form more or less coherent and systematic answer of each jurisdiction to the problems existing during the vicinity of insolvency.



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Current EU legal mechanism

- Change in the regime of directors' duties

Possible EU legal mechanism

- Change in the regime of directors' duties + duty to file



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Current EU rules

- Art. 19 of the EU Directive on Restructuring and Insolvency
- A broad and rather imprecise list of directors' duties



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Possible EU rules

- Art. 36 - 37 of the Proposal for a Directive harmonizing certain aspects of insolvency law
- Duty to request the opening of insolvency proceedings + liability for a failure to do so



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Questions

- Is the possible combination of two legal mechanisms coherent?
- Is this combination efficient?
- Does it create new uncertainties as regards directors' decision making?
- Does it promote unrestrained, prudent and timely decision making?

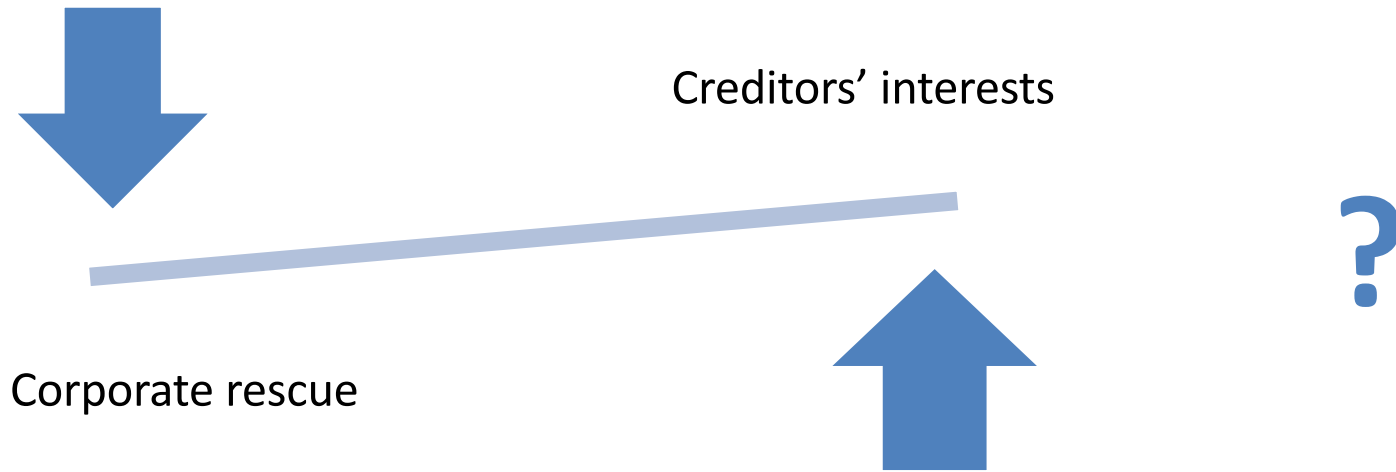


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Underpinning notions of the possible EU regime

Insolvency

Likelihood
of
insolvency

Director



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Underpinning notions

Matter for the national laws

Possible different results in interpretation



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Corporate groups

- Interest of the group
- Certain members of the group in the vicinity of insolvency - any legal consequences?



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Conclusions?

Thank you for your attention!

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