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# Harmonization of the Directors' Duty to Initiate Insolvency Proceedings?

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## Introduction

- The idea of harmonizing substantive insolvency law has been a longstanding matter of concern on the EU Level.
  - Duties and liability of directors is one of the areas where harmonisation was found both desirable and feasible.
- **EC Proposal for a directive harmonising certain aspects of insolvency law** (Proposal) – Title V *Directors' Duty to Request the Opening of Insolvency Proceedings and Civil Liability*



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## Article 36 of the Proposal

### *Duty to request the opening of insolvency proceedings*

*„Member States shall ensure that, where a legal entity becomes **insolvent**, its **directors** are obliged to submit a request for the opening of **insolvency proceedings** with the court no later than 3 months after the directors became aware or can reasonably be expected to have been aware that the legal entity is insolvent.“*



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# Methodology and Aims of the Proposal

- Methodology:
  - ✓ The proposal aims for **minimum harmonization** in targeted areas.
  - ✓ Creating **common standards** across all Member States.
- Aims:
  - ✓ **Reduce differences in national insolvency laws** (increase predictability, reduce costs, support cross-border investments).
  - ✓ Stimulate an **early action** and **maximise the value of the insolvency estate**.



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## Existing EU Legislative Framework

- EPRS Briefing (March 2023): „*The proposal partly complements but also differs from two recently adopted pieces of legislation...*“ (PRD 2019, EIRR 2015)
- Chapter 5 of the PRD 2019 – *Duties of directors where there is likelihood of insolvency*



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## Key Issues to Discuss

- Effect and legitimacy of harmonization of the directors' duties.
- Achievability of the goals set up by the Proposal.
- Consistency with the idea of developing a corporate rescue culture (PRD 2019)?



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# Effectivity and Legitimacy of Harmonization

- Duty to open insolvency proceedings **is already enacted** in 19 Member States.
- The **high degree of variability** in the concepts of insolvency and their interpretation is not subject to harmonization.





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# Consistency with the Idea of Corporate Rescue

- Risk of premature filing for insolvency (worse position for the creditors).
- **How the directors may be supported in their rescue efforts?**



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## Concluding Remarks

- Introducing a harmonized obligation to initiate insolvency proceedings may be considered useful and justified.
- The vague and ambiguous wording of the proposal will make it difficult to achieve the desired degree of harmonization.
- Differences in national legislation are unlikely to diminish.
- It's uncertain whether the maximization of the insolvency estate's value can be achieved.



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Thank you! Questions?

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