

Harmonization of the Directors' Duty to Initiate Insolvency Proceedings?

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Harmonisation of substantive insolvency law is an ongoing challenge, and it has been approached from different perspectives. Divergence of national jurisdictions and insolvency philosophies, combined with the sensitivity of the issue, has long made it difficult to achieve success in this area. Over time, it has become clear that the convergence of legal systems will be a gradual process, limited to selected areas, rather than the creation of a comprehensive legal framework. The adoption of Directive 2019/1023 on Preventive Restructuring Frameworks (PRD 2019), together with the other factors, supported the acceleration of harmonisation efforts that finally resulted in introducing a proposal for a directive harmonising certain aspects of insolvency law (Proposal).

One of the areas addressed by the Proposal relates to the duties and liabilities of directors in the context of insolvency, specifically set out in Title V (Articles 36 and 37). Despite this area has often been identified as suitable for harmonization, it raises several questions that require further examination. The paper therefore seeks to critically analyse the proposed approach and framework by identifying key areas for exploration. Particular attention will be paid to assessing the effectiveness and legitimacy of harmonizing the obligation to initiate insolvency proceedings as proposed in Article 36. These assessments will be compared to the announced objectives of harmonization, including predictability, legal certainty and the enhancement of the value of the insolvency estate. In order to provide a comprehensive perspective, the paper will also examine the proposal's consistency with the principles underpinning the PRD 2019. This examination will be particularly relevant in the context of promoting a culture of business rescue, and potential improvements in this regard will be discussed. These considerations will be placed in a comparative framework, taking into account also recommendations and model rules of UNCITRAL and the World Bank. Finally, the paper will address the question, whether the harmonization of the obligation to open insolvency proceedings, as proposed in the analysed draft, is desirable and will achieve the expected degree of harmonisation.