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

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The stage of the vicinity of insolvency occurs between the usual, regular business operation of a company and the stage when the company is clearly insolvent. This stage presents a unique legal challenge since it lies at the intersection of company law and insolvency law, i.e. somewhere "in-between" these fields of law. Neither field is exclusively applicable, because company law's scope of application comprises solvent businesses, while insolvency law applies to insolvent companies. The main challenge for the creation of an appropriate legal response to this specific situation is finding the proper balance between two imperatives: 1) to enable the rescue of viable businesses, and 2) to protect the creditors' interests.

The recently published EU Proposal for a Directive harmonizing certain aspects of insolvency law aims to be fully coherent with other pieces of legislation in the policy area, including the EU Directive 2019/1023 on Restructuring and Insolvency. In view of desired coherence, the author will address in this paper the provisions relevant to the directors' liability in the vicinity of insolvency, namely Article 19 of EU Directive 2019/1023, which prescribes a broad and rather imprecise list of directors' duties when there is a likelihood of insolvency, and Articles 36-37 of the mentioned EU Proposal, that possibly introduce directors' duty to request the opening of insolvency proceedings, and concomitant liability. It follows that the future European solution of the vicinity of insolvency, if the legislative proposal at issue becomes formally adopted, will simultaneously use two different legal mechanisms from a comparative list of possible solutions to the issues present in the vicinity of insolvency (extension of directors' duties to different stakeholders and directors' duty to file). While the advantages and disadvantages of these two mechanisms have been thoroughly analyzed in the legal literature, the pros and cons of combining these instruments have not received enough scholarly attention. This combination of legal instruments and its effectiveness is precisely the main subject of this paper. The author will approach the subject of this paper through the analysis of several specific issues: a) the extent to which current and possible (future) EU solutions that deal with the vicinity of insolvency achieve the balance between corporate rescue policy and need to provide for credit protection, b), the possible negative consequences of non-existence in most European jurisdictions of clear rules and standards on the concept of the likelihood of insolvency (what is the trigger for this stage of business operation); this is particularly important since the future rules would have been based on clear distinction between directors' duties when there is only a likelihood of insolvency, and their duties in a case of insolvency, c) the consequences of the fact that national laws are not harmonized as regards the main notions underpinning the possible EU rules on the vicinity of insolvency (insolvency, likelihood of insolvency, director), d) the ability of analyzed rules to be applied in the context of pre-insolvency situations that concern group entities.