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2025 International European Insolvency Symposium

Cross-Border Debates

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OCTOBER 26-28, 2025

CROSS BORDER DEBATES

Filing Requirements and Director Liability

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CROSS BORDER DEBATES - Starting point



- 7 December 2022: European Commission presents draft Directive on the harmonization of certain aspects of insolvency law
- Objective: to align insolvency procedures by setting minimum standards across EU Member States
- Deems it essential part of the action plan to establish a capital markets union
- Encourage cross border investment within the single market through a targeted harmonisation of insolvency proceedings






Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law



Article 36 - Duties of directors

- (1) Member States shall ensure that, where a legal company becomes **insolvent**, in accordance with **national law**, its directors have the duty to submit a request for the opening of insolvency proceedings, [...]. In Member States where Regulation (EU) 2015/848 applies, the duty to submit a request for the opening of insolvency proceedings refers to proceedings set out in Annex A to that Regulation [...].
- (2) The request as referred to in paragraph 1 shall be submitted to the court or the authority competent for the insolvency proceedings **within 3 months** of the directors having become aware or being reasonably expected to have become aware that the company is insolvent in accordance with national law.

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Jurisdiction / Insolvency regime	 			
Insolvency test	<ul style="list-style-type: none"> Cashflow & Balance sheet tests Examinership- "is, or is likely to be unable to pay its debts" Deemed insolvency 	<ul style="list-style-type: none"> s.123(1) IA 1986 Cashflow test s.123(2) IA 1986 Balance sheet test 	<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> § 17 InsO – Illiquidity (cash flow test) § 18 InsO – impending Illiquidity § 19 InsO – over-indebtedness (balance sheet test)
Mandatory filing requirement	No	No	No	§§ 17, 19 InsO
Shift in directors' duties	<ul style="list-style-type: none"> Must have regard to the interest of creditors, the need to take steps to avoid insolvency and the need to avoid conduct that threatens the viability of the company Duty owed to the company 	<ul style="list-style-type: none"> Solvent – shareholders Risk of insolvency – shareholders and creditors Bordering on insolvency - creditors 	<ul style="list-style-type: none"> Duties are always to the Company, but who the residual beneficiary of the value of the Company may shift if insolvent 	<ul style="list-style-type: none"> Certainly after mandatory filing requirement happened. Before? Somewhat heated debate - ongoing

Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law



Brisoth, 7.12.2022
COM(2022) 762 final
2022/0400 (COD)

Proposed for a





DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

harmonising certain aspects of insolvency law

Article 37 - Civil liability of directors

- (1) Member States shall ensure that the directors of an insolvent company are liable, in accordance with national law, for damages caused to creditors as a result of their failure to comply with the duty referred to in Article 36
- (2) Member States may provide that such liability is excluded where and to the extent that the directors can demonstrate, on the basis of objective circumstances, that the measures taken could reasonably be expected to avoid damage to creditors, ensuring a level of protection of the general body of creditors which is equivalent to the protection provided by the duty referred to in Article 36(1).

2025 INTERNATIONAL EUROPEAN INSOLVENCY SYMPOSIUM

Jurisdiction / Insolvency regime				
Director sanctions	<ul style="list-style-type: none"> • Definition of director? • Restriction/disqualification • Personal liability • Reckless and fraudulent trading • Misfeasance 	<ul style="list-style-type: none"> • Personal financial liability • Disqualification • Criminal liability 	<ul style="list-style-type: none"> • Personal financial liability. • Many ways to develop process to minimize. 	<ul style="list-style-type: none"> • Personal financial liability • Disqualification • Criminal liability
Final word	<p>Early warning tools</p> <p>Viable restructuring options readily available</p>	<p>Good governance is essential not optional</p>	<p>With good governance and process, directors are well protected</p>	<p>Convergence of legal systems?</p>

Faculty

Michael Murphy is a partner with McCann FitzGerald LLP in Dublin and heads the firm’s Dispute Resolution and Litigation Group. Specializing in complex restructuring and insolvencies, he has played a key role in the most significant restructuring cases in this jurisdiction over the last 20 years, frequently involving cross-border issues. Mr. Murphy is a member of INSOL Europe and has written and lectured extensively on corporate restructuring, as well as on Ireland as a restructuring destination. He received both his Bachelor of Civil Law in 1996 and his LL.M. in commercial law from University College Dublin.

Kyle J. Ortiz is a partner with Herbert Smith Freehills Kramer LLP in New York and has represented debtors in some of the most complex corporate restructurings of the last decade, including Endo Pharmaceutical, LATAM Airlines, Greensill Capital, Trident Holding Company, Synergy Pharmaceutical, Pacific Drilling and Westinghouse. He brings nearly 15 years of corporate restructuring experience to his work advising debtors, creditors and other parties in interest in both in-court and out-of-court restructurings. In his creditor-side work, Mr. Ortiz represents creditors and lenders, particularly in restructurings across a variety of sectors. Recently, he represented a group of creditors in obtaining approval of a creditor-sponsored chapter 11 plan in the Eletson Holdings chapter 11 cases. Mr. Ortiz has been named in *Chambers USA New York* for Bankruptcy/Restructuring since 2021, and as a “New York Metro Super Lawyer” in *Bankruptcy: Business* since 2017. He is a 2018 ABI “40 Under 40” honoree and dedicates significant time to *pro bono* work focused on housing, immigration and reproductive rights, for which he has been recognized by both the Legal Aid Society and the New York State Bar Association. Prior to beginning his legal career, Mr. Ortiz founded Operation ASHA Cambodia, an affiliate of Operation ASHA Worldwide, a global tuberculosis treatment organization. He received his M.P.P. in 2006 from the Harris School of Public Policy at the University of Chicago and his J.D. in 2009 from the University of Chicago Law School, where he was an Edmund Spencer Scholar.

Stefan Proske has been a partner with HEUKING KÜHN LÜER WOJTEK in Berlin since 2012. He provides comprehensive legal advice and representation on all legal aspects of crisis/reorganization/insolvency. Besides representing creditors, Mr. Proske regularly advises companies in reorganization, namely their directors and investors in distressed situations. Previously, he worked for various law firms in the areas of insolvency administration and pre-insolvency consultation. Mr. Proske regularly publishes on various insolvency topics, lectures for several organizations and holds client seminars. He received his J.D. from the University of Mannheim.

Frank Tschentscher is a Corporate/M&A partner with Deloitte in Hamburg, Germany, which he joined on July 1, 2021. He advises on German and international restructuring and insolvency law, and he has more than 23 years of experience in negotiating and implementing complex restructuring projects in Germany and abroad. Mr. Tschentscher regularly represents groups of international financial creditors and/or bank consortia in the out-of-court restructurings of (partly listed) companies, and also does debtor work. Before joining Deloitte Legal, he worked for many years as a restructuring and insolvency partner at leading law firms in Germany and England. He is also admitted as a Solicitor.

tor in England and Wales, and has many years of experience advising clients on English insolvency and restructuring law, including corporate proceedings such as the Scheme of Arrangement. Mr. Tschentscher is the author of numerous publications in German and English and regularly speaks on insolvency law and restructuring related topics at domestic and foreign conferences. *The Best Lawyers* has recommended him in its restructuring and insolvency law and mergers and acquisitions categories since 2019, and the *JUVE Handbook* lists him as a frequently recommended lawyer in its “Restructuring and Insolvency” category. He is also listed in the *Legal 500 Germany*. Mr. Tschentscher is the immediate past president of INSOL Europe. He received his LL.M. from Nottingham Trent Univ. and wrote his Master’s thesis on English and European insolvency law.

Jordina Walker is a director for CSC Global Capital Markets in London and heads the restructuring business in EMEA. She provides a variety of services to support companies going through a restructuring process, including trustee and agency services, SPV management, directorships and financial accounting. Ms. Walker previously served as head of the London trustee desk at Intertrust, where she focused on special situations and complex new trustee transactions. Prior to this time, she worked in the London structured finance team of Paul Hastings and started her career as a lawyer at Norton Rose Fulbright, spending seven years advising trustees, originators, corporate issuers and service-providers across new money deals and restructurings. Ms. Walker is a member of The Law Society of England and Wales. She received her LL.B. from the London School of Economics and her LL.M. from Birkbeck University.