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A Reconsideration of Directors' Liability for Wrongful Trading in the UK and the EU in the COVID19 Era

Hamiisi Junior Nsubuga*

Abstract/ Executive Summary

This article analyses directors' liability for wrongful trading in the United Kingdom (UK) and European Union (EU) (looking at Germany and France), and the temporary suspension to the wrongful trading rules in these jurisdictions in light of COVID19 induced measures. The article explores whether these temporary suspensions were desirable (at all) and considers their potential impact on directors' business decision-making during the COVID19 crisis period.

1. Introduction

The outbreak of the COVID19 pandemic caused havoc on a global scale not only to the heath sectors, but also to the economic and financial sectors of almost every sovereign State worldwide.[1] This created a sense of urgency for these States to put measures in place, not only to combat the spread of the virus, but also to safeguard against subsequent financial and economic impact or crises the pandemic might cause. The UK and some EU Member States, such as Germany and France, acted swiftly to put measures in place with a view of curbing/limiting the pandemic's aftermath. These measures included, *inter alia*, reviews of respective national laws and processes in the area of company and insolvency laws to ensure that businesses across these States were not heavily impacted by the pandemic.

Among the more notable changes were the temporary suspensions to the law/rule(s) on directors' liability for wrongful trading during the COVID19 crisis period. As the UK fast-tracked the passage of the Corporate Insolvency and Governance Act (CIGA) 2020[2] as a measure of mitigating the impact of COVID19 on its businesses and the economy at large, the Germany federal government passed the COVID19 Insolvency Suspension Act (*Covid-19-*

* PhD (Law), LLM, MA, LLB, FHEA. Lecturer in Law, School of Law, Middlesex University London, UK.

[1] D M Collins, "Insolvency Act 1986 Section 214: A Suspension" (2020) 31(8) *I.C.C.L.R*. 441, at 446.

[2] Corporate Insolvency and Governance Act, 2020, c.12.

Insolvenzaussetzungsgesetz COVInsAG),[3] while the French government passed the French Emergency Act 2020,[4] followed by Ordinance No 2020-341[5] and Ordinance No 2020-596,[6] which introduced amendments to insolvency laws during the pandemic period.

This article analyses directors' liability for wrongful trading in the UK and EU (looking at Germany and France), and the temporary suspension of trading rules in these jurisdictions in light of COVID19 induced measures. The article explores whether these temporary suspensions were desirable (at all) and considers their potential impact on directors' business decision-making during the COVID19 crisis period.

2. Wrongful trading – an overview

UK and EU company and insolvency laws embody a legal framework of duties that directors of companies ought to observe while in office. This is because the issue of directors' duties and the relationships between the company and external stakeholders is of paramount importance, not only in the solvent state of the company, but also the insolvent state. Therefore, both jurisdictions' legal frameworks on insolvency law prescribe, as a minimum, general duties which include *inter alia*, taking reasonable business decisions that would promote the success of the company by avoiding negligent conduct that might threaten the viability of the company.[7] This seeks to ensure that the interests of the company, and those of creditors, are protected.

In situations where the company is faced with the likelihood of insolvency, directors are specifically tasked with the obligation to take immediate steps with the view of minimalising loss for creditors, workers, shareholders and other stakeholders, and to have due regard to creditor and other stakeholder interests.[8]

During the solvent state of companies, directors are bound to execute their duties in accordance with certain statutory duties and obligations. As an example, in France, directors'

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[3] Act to Temporarily Suspend the Obligation to File for Insolvency and to Limit Directors' Liability in the Case of Insolvency Caused by the COVID-19 Pandemic (COVID-19- Insolvenzaussetzungsgesetz – COVInsAG) of 27 March 2020. (*COVInsAG*).

[4] Emergency Law No. 2020 -290 of 23 March 2020 to deal with the COVID19 Pandemic.

[5] Ordinance No. 2020 – 341 of 27 March 2020 adapting rules relating to difficulties of businesses and farms to health emergencies and amending certain provisions of criminal procedure. (Ordinance No. 2020-341).

[6] Ordinance No. 2020 – 596 of 20 May 2020 adapting rules relating to difficulties of businesses and farms to the consequences of the COVID19 Pandemic. (Ordinance No. 2020 596).

[7] C Gerner-Buerle and E P Schuster, "The Evolving Structure of Directors' Duties in Europe" (2014) 15 (2) *E.B.O.R.*, 191, 233.

[8] K J Hopt, "Directors' Duties? and Shareholders' Rights? in the European Union: Mandatory and/or Default Rules?" (2016) 61 *Rivista Delle Società*, 13 – 32.

duties, as codified in the French Commercial Code,[9] set out how directors should execute their duties and also provide applicable sanctions for any breaches of duties. In Germany, directors' duties, as codified in the Aktiengesetz (*AktG*)[10] and the Gesetz für Gesellschaften mit Beschränkter Haftung (*GmbHG*)[11] also set out duties for directors of both private and public companies to observe. Key amongst these, are the duties to act in good faith and diligence,[12] and to manage the company in line with the company's article of association and subsequent shareholder resolutions.[13] In the UK, directors' statutory duties are codified in the Companies Act 2006 (CA 2006), sections 171 – 177. These include duties to promote the success of the company[14] and to exercise reasonable care, skill and diligence.[15]

Overall, directors' duties in all three jurisdictions require the director to act diligently and with good commercial judgment so as to avoid negligent business decisions (equivalent to wrongful trading) which could affect the financial viability of the company that might lead to insolvent liquidation. If this were the case, the director might be liable for civil sanction of wrongful trading for breach of duties or mismanagement of the company business.

2.1 UK – Directors' liability for wrongful trading

When a company experiences financial difficulties, and is at risk of becoming insolvent in the UK, directors are expected to act swiftly to minimise potential losses to the company itself, and to creditors, by discontinuing to trade. A director who continues trading whilst the company is likely to enter into insolvent liquidation could be liable for civil sanction for wrongful trading as set out in the IA 1986, ss.214 and 246ZB.[16] Therefore if, at some point before the commencement of the winding up process, it is established (by the liquidator/receiver)[17] that a director knew, or ought to have concluded, that there was no reasonable prospect of the company avoiding insolvent liquidation, and the company continued to incur liabilities nonetheless, the court on the application of the

[9] Commercial Code, Articles L223-22 and L223-25.
[10] Stock Corporation Act of 6 September 1965, Federal Law Gazette I, Index No. 4121-1.
[11] Act on Limited Liability Companies, as consolidated and published in the Federal Law Gazette III, Index No. 4123-1.
[12] *GmbHG*, s.43, para.1.
[13] *AktG*, s.93.
[14] CA 2006, s.172.
[15] CA 2006, s.174.
[16] The former provides the rule for companies in (insolvent) liquidation while the latter for companies in administration.
[17] For example, under s.212(3).

liquidator/receiver, may declare the director to be personally liable to contribute to the assets of the company to the extent that it is worse off as a result of the continuation of trading.[18]

This liability, however, may be absolved where a director can show that at that moment in time, s/he took every step necessary, which any other diligent person ought to have taken, to minimise the potential loss to creditors.[19] Nevertheless, the decision to absolve liability is subject to an objective standard premised on reference to the knowledge, skills and experience of the director in question.[20]

Per Snowden J in *Re Ralls Builders Ltd (in Liquidation)*:[21]

> " [a] director who wishes to take advantage of the defence … needs to demonstrate not only that continued trading was intended to reduce the net deficiency of the company, but also that it was designed appropriately so as to minimise the risk of loss to individual creditors."[22]

Otherwise, liability may not be absolved under s.214(3), and the director may be ordered to contribute to the assets of the company.

2.1.1 UK - COVID19 suspension on wrongful trading

Prior to the COVID19 outbreak, the UK government undertook consultations in 2016[23] and 2018[24] in a bid to reform its insolvency laws and rescue processes, as many of its insolvency laws and procedures had remained unchanged since 2004 and through the global financial crisis of 2007-2008.[25] These consultations were fast-tracked by the government and debated by parliament following the COVID19 outbreak in a bid to foster legislative changes to guide and support businesses during the COVID19 crisis period.[26] The debates led the UK government, to publish the Corporate Insolvency and Governance Bill (the Bill)[27] on 20

[18] IA 1986, s.214(1) and (2).
[19] IA 1986, s.214(3). See also, the reasoning in *Ralls Builders Limited (in Liquidation)* [2016] EWCH 1812 (Ch). (*Re Ralls Builders*).
[20] IA 1986, s.214(4).
[21] *Re Ralls Builders* [2016] EWCH 1812 (Ch).
[22] *Idem*, at 245.
[23] The Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on the Options for Reform*, (May 2016) (*Government Consultation*).
[24] "Insolvency and Corporate Governance" (Department for Business, Energy and Industrial Strategy, (March 2018).
[25] *Government Consultation*, Executive Summary, para 24, Per Sajid Javid.
[26] See for example, the press release to this effect by the UK Business Secretary Alok Sharma announced on 28 March 2020 at <https://www.gov.uk/government/news/regulations-temporarily-suspended-to-fast-track-supplies-of-ppe-to-nhs-staff-and-protect-companies-hit-by-covid-19.
[27] Corporate Insolvency and Governance HC Bill (2019-21) <https://services.parliament.uk/Bills/2019-21/corporateinsolvencyandgovernance/documents.html.

March 2020 with provisions intended to provide businesses with increased flexibility and opportunities to continue trading during the COVID19 period.

This Bill was granted royal assent and enacted into the Corporate Insolvency and Governance Act 2020 (CIGA 2020)[28] on 25 June 2020 implementing key insolvency and business measure to support and steer businesses and the economy through the COVID19 emergency period. One of the most notable provisions, introduced by the CIGA 2020, was the temporary suspension of liability on company directors for wrongful trading (between 1 March 2020 – 30 September 2020).[29]

The suspension period was reintroduced by the UK government to cover the period between 26 November 2020 – 30 April 2021 pursuant to The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020. The rationale behind this temporary suspension might be premised on the need to urge company directors to avoid irrational business decisions to file unnecessary insolvency proceeding during the COVID19 crisis period in fear of potential wrongful trading liabilities.

The suspension could also prevent directors from "shutting business doors" to the public too early, even when there is a likelihood that the company could trade out of its financial difficulties during the crisis period. Hence, the suspension could promote business continuity and economic sustainability during the crisis period. Additionally, there was concern that, during the COVID19 period, markets for going-concern sales of financially insolvent but viable businesses would be limited as the economy at large would be affected by financial ramifications. The government strategy was timely and welcome to avoid unnecessary insolvency filings which were costly even in non-crisis times.

This approach by the government was, however, met with varied reactions from academics and practitioners and questions were raised as to whether the suspension of wrongful trading rules would have significant impact on the business sector, and the economy at large, during the pandemic.[30] This is analysed below, following a discussion on Germany and France.

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[28] Corporate Insolvency and Governance Act 2020, c.12.

[29] CIGA 2020, s.12.

[30] D M Collins, "Insolvency Act 1986 Section 214: A Suspension" (2020) 31(8) *I.C.C.L.R.* 441, 446; E. Vaccari, "Changes to UK Insolvency Rules in the Wake of Covid-19: A Much-Needed Help for Businesses or an Unjustified Harm to the Rule of Law?" in: C. Ferstman, and A. Fagan, *Covid-19, Law and Human Rights: Essex Dialogues*, 127- 136.

2.2 Germany

Germany is one of the EU Member States affected by the COVID19 pandemic and it acted promptly in revising its insolvency and company laws to guard against the financial/economic impact which the pandemic presented to its economy. There are two main legislations in the German legal system that deal with public and private companies, and directors' duties. These are the Aktiengesetz (*AktG*)[31] and Gesetz für Gesellschaften mit Beschränkter Haftung (*GmbHG*).[32] Both sets of legislation provide distinct rules on directors and the pursuance of their duties. Under s. 93, for example, the *AktG* mandates company directors must act in good faith by observing the provisions of the company's articles of association, and shareholders' resolutions so that company and shareholder interests are upheld and protected. The *GmbHG*, under s.43(1), also mandates company directors must act in good faith and diligently in the execution of their duties.

However, under insolvency settings, the most prominent sanctions on directors for negligent actions or/business decisions are mandated in the Insolvenzordnung (*InsO*).[33] Under s. 15(a), a company director may be sanctioned for "insolvenzverschleppung": failing to file for insolvency proceedings within 3 weeks of inability to pay/honour outstanding debts upon demand from creditors. This sanction is also parallel to s.823, para. 2 of the "Bürgerliches Gesetzbuch BGB", the (German Civil Code),[34] which provides for a civil sanction for failure to observe legislative procedure enacted for the protection of other constituents. A director who intentionally, or by gross negligence, fails to or postpones the filing of insolvency proceedings is denied relief from these sanctions and therefore, held liable.[35]

In addition to civil sanctions, a director may also be liable for criminal sanction for criminal conduct related to the insolvency of the company under the Strafgesetzbuch (*StGB*) (German Criminal Code). Sections 283 - 283d of the *StGB* prescribe a personal criminal liability upon a director where damages are incurred by the company due to the director's negligent or reckless business conduct. Therefore, similarly to the UK provisions, these German legislative provisions, both civil and criminal, are designed to ensure that directors act diligently to avoid negligent business decisions which might impact the company's viability.

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[31] Stock Corporation Act of 6 September 1965, Federal Law Gazette I, Index No. 4121-1.

[32] Act on Limited Liability Companies, as consolidated and published in the Federal Law Gazette III, Index No. 4123-1.

[33] Insolvency Statute of 5 October 1994 (Federal Law Gazette – Index 311-13).

[34] Civil Code promulgated on 2 January 2002, Federal Law Gazette (Bundesgesetzblatt).

[35] *InsO*, s.290, para. 1.

2.2.1 Germany - COVID19 suspension on wrongful trading

Germany also acted swiftly to review its company and insolvency laws to support companies through the COVID19 crisis period. Consequently, on 27 March 2020, the federal government passed the Covid-19 Insolvency Suspension Act *(COVInsAG)*.[36] This Act came into force with retrospective effect as of 1 March 2020. The most significant impact of the *COVInsAG* is the temporary suspension of the obligation on company directors to file for insolvency proceedings as originally mandated under s.15a of the *Insolvenzordnung* (*InsO*) and under s.42, para.2 of the *Bürgerliches Gesetzbuch,* the (German Civil Code), between 1 March 2020 – 30 September 2020.[37]

This suspension is only invoked where directors can prove that: (i) the insolvency state of the company was triggered by the effects of the COVID19 pandemic; and (ii) there was a real prospect of the company overcoming these financial difficulties. Provided that the director or managers of the company can prove that the company was not insolvent as of 31 December 2019, they can successfully utilise the provision to suspend their obligation to file for insolvency proceeding, which may then provide some breathing space for the company to navigate through its financial challenges.

The tangible benefit of this suspension is that, during this period, company directors are not liable for any sanctions arising out of their failure to file timely insolvency proceedings. In addition, directors and managers would be absolved of liability arising from violation of statutory payments prohibitions made during the ordinary course of business, courtesy of the German Limited Liability Companies Act (*GmbHG*),[38] and the German Stock Corporations Act (*AktG*).[39] As such, payments would be considered to facilitate the going-concern operation of the business during the COVID19 crisis period.

2.3 France

France is another EU Member State with an established modern insolvency law regime that enshrines the principles of corporate rescue and business continuity as mandated in the Company Rescue Act, No 2005-845 of July 26, 2005, and its decree No 2005-1677 of December 28, 2005 which came into force on January 1, 2006. This ensures that companies

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[36] Act to Temporarily Suspend the Obligation to File for Insolvency and to Limit Directors' Liability in the Case of Insolvency Caused by the COVID-19 Pandemic (COVID-19- Insolvenzaussetzungsgesetz – COVInsAG) of 27 March 2020. (*COVInsAG*).
[37] *COVInsAG* 2020, s.1.
[38] GmbHG, (2020), s.64, sentence 1.
[39] *AktG* s.92, para 2.

experiencing financial difficulties have, at least, three preventive insolvency procedures at their disposal to utilise before descending into formal insolvency. These include: the safeguard procedure (*procédure de sauvegarde*) with two variants; the accelerated financial safeguard (*sauvegarde financière accélérée*)[40] and the accelerated safeguard (*sauvegarde accélérée*).[41]

The safeguard procedure also incorporates a debtor-in-possession (DIP) mechanism so affording the company (directors) opportunities to initiate pre-insolvency restructuring mechanisms prior to formal insolvency (*en cessation de paiements*).[42] The second procedure is the ad hoc mandate (*mandat ad hoc*),[43] and the third is the conciliation (*conciliation*).[44]

To utilise these procedures, the company and its directors must observe certain obligations, such as those arising from directors' duties to act faithfully in promoting the success of the company and from directors' duties to avoid negligent business decisions that might affect the viability of the company.[45] It should be noted that, under French law, company directors are under an obligation to file for insolvency proceedings within 45 days upon cessation of payment (*en cessation de paiements*).[46]

Company directors risk liability for wrongful trading when they continue trading in circumstances where the company is unable to pay its debts/invoices when presented by creditors for more than 45 days.[47] These directors could be ordered to compensate creditors for any additional losses that they incur as a result of continued trading.[48] In addition, directors may also face liability for granting or extending credit to a company which faces imminent insolvency in a situation where the directors are endeavouring to continue trading, rather than filing for insolvency.[49]

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[40] Law No 2010-1249 of 22 October 2010.
[41] Ordinance No 2014-326 of 12 March 2014.
[42] C Dupoux and D Marks, "Chapter 11 à la Française: French Insolvency Reforms" (2004) 1 *I.C.R* 74.
[43] Commercial Code, Articles L611-1 to L611-16.
[44] Ibid.
[45] P Omar, "French Insolvency Law: Remodelling the Reforms of 2005" (2009) 6 *I.C.C.L.R*. 225.
[46] Commercial Code, Article L631-1.
[47] C Dupoux and D Marks, "Chapter 11 à la Française: French Insolvency Reforms" (2004) 1 *I.C.R*, 74.
[48] On this aspect see; P Omar, "Defining Insolvency: the Evolution of the Concept of 'Cessation de Paiements' in French Law" (2005) 16 *Eur. Bus. L. Rev.* 311.
[49] F Baumgartner and A Dupuis, "Chapter 9: France" in D S Bernstein, *The Insolvency Review* (Law Business Research 2019) at 103, 111.

2.3.1 France - COVID19 suspension on wrongful trading

Following the outbreak of the COVID19 pandemic, on 23 March 2020, the French government passed the French Emergency Act[50] to address the potential impact and aftermath of the pandemic, including *inter alia*, the impact on the business sector. Pursuant to this Act, the French government enacted Ordinance No 2020-341[51] and Ordinance No 2020-596[52] which introduced amendments to insolvency laws during the pandemic period.

These legislative provisions temporarily suspended the duty on the debtor (directors) to file insolvency proceedings in circumstances where the company suffered cash-flow insolvency between 12 March 2020 and 24 August 2020. They also reinforced protective measures for a debtor undergoing proceedings, such as conciliation,[53] to adapt moratoria protection from creditor recovery actions (up to until 31 December 2020) and facilitating the rescheduling of debts with creditors.[54]

As a result of these temporary suspensions, financial difficulties experienced by companies during this period were not procedurally deemed “cash-flow insolvency”, invoking obligations onto directors to initiate insolvency proceedings within 45 days. The main advantage of these temporary suspensions was the avoidance of unnecessary commencement of insolvent liquidation proceedings by directors. This afforded directors the flexibility to assess the financial position and viability of the company in order to assess whether to continue trading the business without fear of liability for wrongful trading.

3. Were the suspensions necessary?

The key objectives of the UK, Germany and France suspension of the wrongful trading provisions in their respective national laws was no doubt, of good intentions. This was to support business continuity and corporate rescue by limiting unnecessary insolvency filings due to directors’ fear of potential liability for wrongful trading in the COVID 19 crisis period. However, the suspensions ought to have been approached with caution, especially, from the perspective of unsecured creditors, whose debt recovery rights, might be impacted by mechanisms such as moratoria protection by the debtor upon corporate insolvency.

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[50] Emergency Law No. 2020 -290 of 23 March 2020 to deal with the COVID19 Pandemic.

[51] Ordinance No. 2020 – 341 of 27 March 2020 adapting rules relating to difficulties of businesses and farms to health emergencies and amending certain provisions of criminal procedure.

[52] Ordinance No. 2020 – 596 of 20 May 2020 adapting rules relating to difficulties of businesses and farms to the consequences of the COVID19 Pandemic.

[53] Commercial Code, Articles L611-1 to L611-16.

[54] Ordinance No. 2020 – 596, Art.2.

There are concerns that the suspensions may encourage directors, who would otherwise be risk-averse[55] in the COVID19 crisis period, to "let loose" knowing that whatever business decisions they make during this period, no sanctions for wrongful trading would apply. This would arguably amount to abuse of the rule of law already established and tested in their respective domestic legal systems. This might affect possible debt workouts or renegotiations between the company and creditors for new debts (investment) or debt extensions, if creditors are aware that directors may not be held liable for negligent/reckless business decisions during the suspension period that could impact their investment.

It is arguable that in the UK there was good intention in the government's suspension of the wrongful trading rules to promote corporate rescue and continuity during the pandemic crisis period. However, questions arise as to why the government opted to suspend wrongful trading rules but not other potential sanctions for directors' breach of their duties, such as those for fraudulent trading under s.213 of the IA 1986. The government also did not impose a temporary suspension to the operation of s.212 of the IA 1986 (misfeasance action), notwithstanding that this provision is as broad in scope as s.214.[56]

Under s.212, past or present officers[57] of a company may be compelled by court (on application of the official receiver or liquidator, etc.,) to make a contribution to the assets of the company by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.[58] The term "other duty" is a wider concept which may include, *inter alia*, the duty of care, such as that under s.174 of the Companies Act 2006, to exercise reasonable care, skill and diligence which resonates with claims based on negligence on the part of the director which may include wrongful trading.[59] Consequently, where a director continues trading in circumstances where there is no reasonable prospect of avoiding insolvent liquidation, and a claim is brought against the director for negligence or breach of duty under s.212, the director may still be personally liable.

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[55] A "risk-averse" company is one that chooses to invest in business transactions with known risks that may provide low returns than unknown risks with higher predictable returns.

[56] D M Collins, "Insolvency Act 1986 section 214: A Suspension" (2020) 31(8) *I.C.C.L.R* 441, 446.

[57] The term officer is defined in IA 1986 s.251 as "Officer, in relation to a body corporate, including a director, manager or secretary". This is, arguably, a broad definition which would include "[any] person who in the affairs of the company exercises a supervisory control in the running of the company, or the general administration of it, within the meaning of management." See, (*Re a Company (No.00996 of 1979)* [1980] Ch. 138 at 144).

[58] See, particularly, IA 1986, s.212(3).

[59] Per the reasoning in *Re D'Jan of London Ltd* [1993] B.C.C. 646.

Liability for misfeasance under s.212 may be absolved if a director's actions were drawn on professional advice, such as from certified accountants or business consultants. One example of this is where, during the course of proceedings for negligence or breach of duties or trust, the court is satisfied that such a director acted honestly, reasonably and, in the circumstances, ought to be absolved of liability.[60] The rule in s.212 may be employed to ensure that directors properly exercise their duties.[61] Changes to the rule in s.214 also ought to have been extended to the rule in s.212.

In Germany, the temporary suspension by the *COVInsAG* of the rule requiring directors to file insolvency within three weeks of any inability to pay debts under s.15a of the *Insolvenzordnung* (*InsO*) did not provide for a comprehensive exemption from liability for other directors' breaches of duties. As an example, sanctions for criminal liability on a company director for damages or loss incurred by the company due to a director's negligent or reckless business conduct under s.283 of the *StGB* remained in operation and were not suspended.

It was the same in France, where amendments to French insolvency law courtesy of Ordinance No 2020-341 and Ordinance No 2020-596 generally suspended the obligation upon the debtor (directors) to file insolvency within 45 days, but left other sanctions for directors' breaches operative.

4. Conclusion

The timely suspension of the rules for wrongful trading by the UK, Germany and France, as analysed in this treatise, is intended to safeguard these economies from the pandemic's *unknown* impact. However, questions/discussions arise as to whether the suspensions provided the right balance to corporate continuity and rescue, *vis-a-vis* creditor protection. The suspension raises concerns that some company directors may recklessly undertake negligent business transactions with impunity, since potential liability for such negligent business decision-making is temporarily suspended which might have negative consequences for businesses and general commercial morality.

In addition, there is no definitive timespan for when the COVID19 pandemic will be overcome which causes uncertainty in the corporate/business world. This presents challenges in assessing the overall impact the pandemic would present to businesses. This perspective

[60] CA 2006, s.1157.

[61] On this perspective, see the reasoning in *Re Continental Assurance Co of London plc (No.4)* [2007] 2 B.C.L.C. 287.

may be evidenced by the decision by the UK government to reintroduce the suspension of liability for wrongful trading on directors between 26 November 2020 – 30 April 2021, that had previously ended on 30 September 2020.

In Germany, although the duty on company directors of illiquid companies to file for insolvency within 3 weeks was retrospectively suspended until 30 September 2020, that of directors of over-indebted[62] companies was suspended until 31 December 2020. However, this has now been extended until 31 January 2021 provided;

a- The company had filed an application for state aid in the period 1 November to 31 December 2020 and is waiting an outcome, or
b- For legal or factual reasons, the company was eligible to apply for state aid but was unable to submit an application within the period of 1 November 2020 – 31 December 2020.

Therefore, the sum of all these uncertainties calls for a balanced approach to business recue/continuity, *vis-à-vis* creditor protection during the COVID19 crisis period. The concern is that although the suspension/relaxation of the wrongful trading liability was in no doubt, for good intentions, leaving other sanctions for directors' breach of their duties operative during the COVID19 crisis period may send mixed messages to both company directors and the business/corporate world.

On the other hand, the outbreak of the COVID19 pandemic occurred around the time Directive 2019/1023/EU on preventive restructuring frameworks (PRD) was adopted.[63] Art. 19 of the PRD tasks company directors with the duty to avoid negligent decision-making (equivalent to wrongful trading under s.214 in the UK) that may heavily impact the company's business stability, leading to insolvency. However, it remains to be seen what impact Art.19 will have upon directors' liability for wrongful trading in EU Member States once fully implemented and harmonised, either during or after, the pandemic crisis period.

[62] Pursuant to *Ins0*, s.19.
[63] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, [2019] OJ L 172/18-55.(PRD).