

The purpose of directors' duties in the insolvency context

A critical assessment based on empirical data from Austria and the Netherlands

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Duties of directors in the insolvency context are subject to constant discussions in academia, practice as well as in terms of policy setting. In the last insolvency law related European harmonisation act, Directive (EU) 2019/1023 on restructuring and insolvency, Article 19 on duties of directors where there is a likelihood of insolvency was one of the most controversial discussed provisions. Also the latest EU harmonisation initiative in the insolvency context, Proposal for an EU Directive harmonising certain aspects of insolvency law dated 7 December 2022, COM(2022) 702 final (the "Proposal"), includes provisions on directors' duties introducing an obligation to submit a request for the opening of insolvency proceedings with a filing period of three months (Articles 36 and 37 of the Proposal). It would not be surprising if also these provisions lead to controversial discussions during the EU legislative process, especially initiated by countries not providing a duty to file yet.

The idea behind provisions on directors' duties in the insolvency context is the aim to promote early action and to ensure protection and compensation of creditors (see e.g. Recitals 32 and 33 of the Proposal as well as previous work e.g. from UNCITRAL). It is expected that a duty to file (and related liability risks) will encourage directors to take timely actions.

In this paper, we will analyse whether the above or similar expectations related to such provisions on directors' duties are in fact justified, based on the results of empirical legal research performed in Austria (through a survey involving 107 Austrian insolvency administrators) as well as the Netherlands (through the analysis of 2134 Dutch bankruptcy reports and a survey involving 177 Dutch bankruptcy trustees).

Remarkably, the results of this empirical legal research seem to be comparable in many aspects although the Austrian and Dutch law provisions on directors' duties differ significantly. Analysing the Austrian and the Dutch legal frameworks on insolvency related directors' duties supported by the mentioned empirical data may allow us to put the discussions held in this context so far into a new perspective.

Comparing a 'duty to file-jurisdiction' such as Austria with a jurisdiction such as the Netherlands not providing such a concept may also bring valuable findings on the duty to file included in the Proposal, particularly on the question whether a duty to file throughout the EU is in fact desirable.

Based on the above, we hope and expect that our paper can bring valuable new findings in terms of directors' duties in the insolvency context.