The Directors' duty to File for Insolvency Proceedings in the European Commission's Proposal for Harmonising Insolvency Law: the Dutch Perspective

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1. Introduction

In the course of the past years, the EU has shown an increased legislative interest in insolvency law as a means to advance the Capital Markets Union (CMU). In 2015, the Commission stated, in its first Action Plan on building a CMU, that 'convergence of insolvency and restructuring proceedings would facilitate greater legal certainty for cross-border investors'.[2] In the same year, the European Parliament adopted a resolution in which it called to facilitate cross-border investment and indicated that insolvency laws must work better in a cross-border context in order for the CMU to function better.[3] In 2019 the Preventive Restructuring Directive was adopted, which (inter alia) aims at harmonisation in the specific areas of preventive restructuring measures and debt-discharge procedures.[4] In the CMU Action Plan launched in 2020, the Commission announced that it would take a legislative and non-legislative initiative with the aim of increasing convergence in targeted areas of non-bank corporate insolvency law.[5] According to the subsequent CMU communication of 25 November 2021, the overall objective is to make the outcome of cross-border investment more predictable with regard to insolvency proceedings.[6]
On 7 December 2022, the European Commission delivered on its announced initiative and issued the proposal for an EU Directive harmonising certain aspects of insolvency law (hereafter: 'Proposal').[7] The Proposal contains seven titles of various subject matters regarding insolvency law where harmonisation is promoted. Title V pertains to directors' duties and introduces a duty to file for the opening of insolvency proceedings. In the above-mentioned CMU Communication of 25 November 2021, reference was already made to harmonisation efforts concerning director duties during crisis time. The nature of the duties, however, was not yet substantiated. The promoted duty to file for insolvency proceedings, therefore, somewhat came as a surprise. This is, in particular, true for a minority of Member States that do not have a provision obliging directors to submit a request for the commencement of insolvency proceedings (or similar rules).[8] The Netherlands belongs to this minority. In this article, the proposed duty to file will be analysed from the perspective of Dutch law. As stated, Dutch law does not contain a duty to file, but has a more or less sophisticated set of rules mainly developed in case law that addresses director duties during (pre-)insolvency. Therefore, the research question to be answered in this article, is what use such a duty to file has in light of the stipulated policy objectives in the Proposal, and in that regard, if such a duty is necessary and desirable given the state of Dutch law concerning director duties.
First, the duty to file as promoted in the Proposal will be outlined. We will explore its policy aims and rationale as these can be inferred from the explanatory notes and the recitals of the Proposal as well as the impact assessment that preceded the Proposal. Second, we will highlight the uncertainties, ambiguities and omissions in the articles concerning the duty to file. Third, we will assess to what extent it is beneficial and necessary to introduce this duty and analyse the consequences of the introduction of a directors' duty to file for insolvency in Dutch law. We will conclude this article by answering the research question.

2. Duty to file for insolvency proceedings and liability for non-compliance

With the Proposal, the Commission aims to accomplish harmonisation in three key dimensions of corporate (non-bank) insolvency law.[9] These are: (i) ensuring that creditors can recover the maximum value from the liquidated company, (ii) the efficiency of insolvency procedures and (iii) the predictable and fair distribution of recovered value among creditors. All proposed measures should be considered in light of these policy objectives.

Title V of the Proposal concerns the ‘directors’ duty to request the opening of insolvency proceedings and civil liability’. Article 36 obliges Member States to ensure that, when a legal entity becomes insolvent, its directors are subject to the duty to request the opening of insolvency proceedings no later than 3 months after they become aware or can reasonably be expected to have been aware that the legal entity is insolvent. Pursuant to Article 37, Member States shall ensure that the directors are liable for damages incurred by creditors as a result of their failure to comply with the above-mentioned duty. Paragraph 2 of Article 37 stipulates that Member States are allowed to implement or maintain national rules on directors’ duties that are stricter towards directors.
Recitals 32 and 33 of the Proposal provide commentary on the proposed directors’ duty to file for insolvency proceedings and the corresponding liability provision. The commentary on the specific purpose and rationale of the duty to file and the attached liability is not particularly extensive. According to recital 32, the Commission considers directors as the first involved to realise whether a legal entity is approaching or surpassing insolvency (without defining the concept of insolvency, as we will discuss in section 3 of this paper). Directors oversee the management of the affairs of a legal entity and have the best overview of its financial situation, according to the Commission. This brings it to the finding that “a late filing for insolvency by directors may lead to lower recovery values for creditors”. In the explanatory memorandum, reference is made to “the obligation on company directors to file for insolvency without undue delay to avoid potential asset value losses for creditors”.[10] Consequently, we may infer that in the view of the Commission, a duty for directors to file for insolvency proceedings will enhance the recovery value of creditors. The corresponding liability provision as proposed in Article 37 should, according to the Commission, ensure that directors do not act in their self-interest by delaying the submission of a request for the commencement of insolvency proceedings despite indications of insolvency. Article 37 concerns the obligation of Member States to implement a rule on the civil liability of directors who do not comply with the duty to file such a request. With regard to the nature of the compensation, it refers to damages resulting from the deterioration of the recovery value of the debtor compared to the situation where the request was made on time[11] (the so-called ‘Quotenschaden’ (rate reduction loss)).
Based on the remarks in the recitals and as already mentioned, the Commission assumes that a duty to file for insolvency proceedings and an attached liability provision will lead to greater recovery values for creditors during liquidation.[12] In the impact assessment that is attached to the Proposal, the role of directors and managers in the vicinity of insolvency is emphasised with regard to asset recovery proceedings.[13] It is argued that recovery value is undermined if there are no rules or ineffective rules on ‘(i) when directors have to file for insolvency, (ii) whether their goal should shift to the creditors’ interest, or (iii) whether they are liable if it is found that they acted, prior to the advent of formal insolvency proceedings, with intent to defraud creditors’.[14] The answer to the question as to how a duty to file will lead to higher recovery values can be found in the comments referring to the desired early action that a duty to file with a corresponding liability will trigger, according to the policy makers.[15] For instance, on page 28 of the impact assessment, it is stated that procrastination in the start of the process, “including of attempts to engineer restructuring solutions early on” tends to reduce the recovery value. It becomes clear that, with the proposed duty to file and related liability, the Commission seeks to trigger early action from directors, which it expects to result in the preservation – or at least, preventing the depletion – of the value of the debtor’s assets. This reasoning pertaining to the need for early action is repeatedly mentioned throughout the impact assessment. For instance on page 40, where the different measures that have been considered in the preparation of the Proposal are discussed, it is mentioned that the duty to file aims to introduce “more discipline on timely filing of insolvency to avoid unnecessary value destruction in case of delayed filings”.[16] Further on in the document, under the heading ‘Benefits and costs of a targeted regime’ it is noted that the requirement for directors to file timely and the associated liability “would further limit value destruction in the vicinity of insolvency”.[17] In this regard, the impact assessment refers to the results of the public consultation which indicate that there is widespread support for minimum harmonisation at EU level of the duties and obligations of directors in the event of vicinity of insolvency or when the company is insolvent.[18] In particular, 71% of the respondents have pointed out that the most beneficial aspect of harmonisation would be to subject directors to a duty to file for insolvency proceedings once the company is insolvent.[19] Interestingly, footnote 138, which relates to the aforementioned result of the public consultation, mentions that “two thirds of the respondents supported a clarification that in the vicinity of insolvency directors should formulate plans to take preventive action”, thus not explicitly referring to a duty to file for insolvency.

The impact assessment discusses several policy options considered by the Commission. With respect to directors’ duties of care, in addition to the insolvency filing requirement, it mentions a second option. This concerns the stipulation of a general principle that would indicate the shift of fiduciary duties of directors in the vicinity of insolvency.[20] Accordingly, directors would be required to consider the interests of the creditors alongside the interest of shareholders. This would entail duties that go beyond a mere obligation to file for insolvency proceedings. It seems that this option ultimately did not end up in the Proposal because it was considered too intrusive to national laws. Such a principle would necessitate changes in other areas of national laws (i.e. company law) and would, accordingly, require additional legal clarity or adjustments of these issues, which the Commission, apparently, seeks to limit.[21] A similar consideration seems to have been made in the Preventive Restructuring Directive.[22] Article 19 of that Directive obliges Member States to implement rules that ensure that in case of likelihood of insolvency, directors have due regard to (among other) the interests of creditors (equity holders and other stakeholders). However, the issue from which moment on the directors must act primarily in the interest of the company's creditors was not touched upon in the context of this Directive. Apparently, the Commission still does not want to burn its fingers by touching such a shift in directors' duties.

At first glance, the introduced duty to file is less vague than the duties introduced in Article 19 of the Preventive Restructuring Directive and provides a more or less comprehensive policy objective, leaving aside whether or not the duty to file is fit to achieve that objective, as we will discuss later on in this paper. However, upon closer inspection, the proposed duty to file raises questions about the nature of the directors' obligation and, more fundamentally, its scope of application. The main reason for these questions is the lack of clarity in respect of key concepts used in Articles 36 and 37.

3. Uncertainties, ambiguities and omissions in articles 36 and 37 of the Proposal

Article 2 of the Proposal contains a list of definitions clarifying concepts referred to in various articles of the Proposal. This list does, however, not contain definitions of three important concepts referred to in Article 36: 'director', 'insolvency' and 'insolvency proceedings'. Only limited guidance on the interpretation of these concepts is offered by the Explanatory Memorandum and the recitals. It is not clear who has a duty to file, when the duty is triggered and which proceedings may be filed for in order to comply. Moreover, it is not clear from the Proposal who exactly Articles 36 and 37 aim to protect and who has standing to bring a liability claim in the event of non-compliance. All these issues will be discussed in the next paragraphs.

3.1 Who has a duty to file?

In respect of the term 'director', it is clear from the Explanatory Memorandum[23] as well as recital 32 that this term encompasses all persons who are in charge of making or do in fact make or ought to make key decisions with respect to the management of a legal entity. We observe that this description is considerably broader than the concept 'feitelijk bestuurder' (de facto director), in Dutch law, which refers to all (legal) persons who have defined the policy of the company as if they were a director.[24] In Dutch literature there is a debate between those advocating a stricter and those defending a broader interpretation of this definition. This debate is reflected in the case law of lower courts. The stricter interpretation requires that the formally appointed directors were actually set aside by the person(s) acting as de facto director. According to the broader interpretation it is sufficient that the formal directors accept that a de facto director also defines the day-to-day management, leading to the situation that both the formal directors and the facto director function alongside one another.[25] In a recent decision, the Supreme Court rejected the strict interpretation.[26] It is not necessary that the formal directors were – completely – sidelined by the de facto director. What is required is that the de facto director has usurped at least part of the formal directors' authority, thus (co-)determining the policy as if (s)he were a director. Where it may be doubtful whether this includes persons who 'are in charge of making' key decisions with respect to the management of a company, it is clear that this does not include persons who 'ought to make' such decisions. We believe that the 'definition' of 'director' suggested in the Explanatory Memorandum is too ambiguous. It increases the legal uncertainty that is inherent in the existing concept of 'feitelijk bestuurder' in Dutch law, because – as confirmed by the Supreme Court in its recent judgment – the qualification depends on all circumstances of the case. The concept referred to in recital 32 of the Proposal will be even more difficult for courts to apply in a uniform way than the current concept.

3.2 When is the duty to file triggered?

A more serious problem is that the Proposal leaves it to the Member States to define the concept of 'insolvency'.[27] This is especially problematic in respect of Articles 36 and 37, because 'insolvency' is what triggers the directors' duty to file. Where some Member States' laws define insolvency on the basis of a cash flow test ('inability to pay debts as they fall due') other Member States – additionally – apply a balance sheet test of insolvency ('debts exceed the assets' or 'Überschuldung'). Examples of Member States in which the duty to file for insolvency proceedings is also triggered in case of balance sheet insolvency are Germany and Austria. § 15a of the German Insolvenzordnung provides for a duty for directors of a legal person to file without culpable delay and at the latest 1) within three weeks after the legal person has become cash flow insolvent[28] or 2) eight weeks[29] after the legal person has become balance sheet insolvent.[30] Similarly, § 69 of the Austrian Insolvenzordnung provides for a duty to file for a legal person's directors without delay after the legal person has become cash flow or balance sheet insolvent, however ultimately within sixty days after the legal person has become cash flow insolvent

Article 36 does not only leave the choice of the insolvency test(s) to be applied to the Member States. It also leaves considerable scope for differentiation by merely providing that filing should *ultimately* take place three months after the directors became aware or can reasonably be expected to have been aware that the legal entity is insolvent, without specifying what directors should do within this maximum period. This hands-off approach is all the more striking, having regard to the fact that many Member States' laws already provide for directors' duty to file for insolvency proceedings and the fact that Article 37 (2) expressly allows Member States to have stricter rules in place. We have shown that both

Germany and Austria currently provide for – considerably – shorter maximum filing periods, but note that they have chosen different periods. We add that, under both German and Austrian law, directors may only rely on the maximum period to the extent that they engage in serious restructuring efforts. This is the area where the duty regulated in Article 36 and 37 of the Proposal connects to Article 19 of the Preventive Restructuring Directive. This connection deserves more attention in the next steps of the legislative process.
It is evident that the hands-off approach reflected in the superficial nature of Articles 36 and 37 may lead to considerable differences in the application of the duty to file among Member States, thus calling into question the justification of the harmonisation objective of Articles 36 and 37.

3.3 Insolvency: a slippery concept

We suspect that the Commission has – again[31] – shied away from defining 'insolvency' because insolvency is – to put it mildly – a slippery concept. As aptly phrased by Mokal in a recent article: "Insolvency is a scalar attribute, that is, it is a matter of degree". He rightly points out that what the law requires of a debtor's decision makers – in particular: to attempt to trade the debtor out of its difficulties and/or to propose a restructuring or to seek to wind up the debtor – may depend on the degree of insolvency.[32] We agree with this observation and we also agree with the second point that Mokal raises in respect of the concept 'insolvency': it is also "epistemically vague". Although the criteria applied to determine insolvency may – in principle – be made precise, it will in practice often be difficult to establish on the basis of the chosen criteria whether or not the debtor is actually insolvent at a given time.[33] As Mokal observes, "debtors may move along the solvency/insolvency spectrum in a continuous rather than quantized matter".[34]
The scalar and vague nature of insolvency is reflected in the ongoing debate among legal scholars across Member States about the way the various insolvency tests should be applied in practice. This is perhaps best illustrated by the ongoing debate in Germany, in spite of attempts of both the legislature and the Bundesgerichtshof to achieve a certain degree of precision in the two tests that are used to determine insolvency. The application of the balance sheet test has been the subject of heated debate ever since it was introduced.[35] Without going into detail, we mention that the German balance sheet test of insolvency is more than a balance sheet test: apart from a balance sheet test bases on liquidation values it also involves carrying out a going concern forecast over a period of twelve months starting from the date when a balance sheet based on liquidation values shows an excess of liabilities over assets.[36] The debtor is only balance sheet insolvent in case of a negative balance sheet test *and* a negative going concern forecast. Drafting the going concern forecast, which in practice involves a cash flow-based prognosis of the probability of the company becoming illiquid within 12 months, is not an easy exercise, especially in a world that is affected by one major crisis after another, negatively impacting many (otherwise viable) businesses. In this respect, we mention that the German legislature recently shortened the going concern forecast to four months for the period starting on 9 November 2022 and ending on 31 December 2023, months. The maximum period for filing after Überschuldung was extended from six to eight weeks. These changes were adopted in view of the repercussions of the Russian war against Ukraine on the German economy.[37] The amendments reflect the fluid nature of the concept 'insolvency' determined on the basis of a balance sheet test, tempting legislatures to intervene when they realise that economic circumstances create difficulties for those in charge of businesses to assess their solvency in the longer term.[38]
The fluid nature of insolvency determined on the basis of a cash flow test can be illustrated by the ongoing debate about the guidance given by the German Bundesgerichtshof on the application of this test in practice. The BGH clarified in older case law that cash flow insolvency exists when the debtor does not have sufficient funds to pay at least 90% of its mature debts over the next three weeks. This does leave the question of how exactly this is to be established. In 2022, the Bundesgerichtshof rendered a judgment in which it held that the determination of inability to pay does not require the drafting of a so-called Liquiditätsbilanz, but can also be determined by other means, notably by liquidity statements showing that on four different moments within the three week period the debtor was illiquid without the prospect of closing the liquidity gap.[39] Even after this latest judgment of the Bundesgerichtshof, the debate on the cash flow test is still going on.[40] This shows how hard it is to develop a cash flow test that offers legal certainty in practice and does not suffer from too much complexity.
It is disappointing that the Commission has refrained from touching on the issue of how to determine insolvency in practice. We recommend the commissioning of a study of the application in practice of the various insolvency tests (and corresponding directors' filing duties) applied in the Member States before a final version of the Insolvency Directive is adopted. Such a study also seems necessary having regard to Article 38 of the Proposal, which obliges Member States to set out the conditions under which a microenterprise is deemed to be generally unable to pay its debts as they mature and ensure that these conditions are clear, simple and easily ascertainable by the microenterprises concerned.[41]
On the concept of insolvency, finally, we wish to draw attention to the fact that whatever the definition will be and how much precision the Commission or the national legislators seek in the process of defining, it is likely that the application in practice will lead to litigation. It does not take much imagination to envision that directors against whom a liability claim has been brought based on non-compliance with their duty to file, will take the position that the company's 'insolvency' had not yet occurred.

3.4 What is an ‘insolvency proceeding’ for the purpose of articles 36 and 37?

Given the fact that the Commission has shied away from defining insolvency, it is hardly surprising that the Commission also leaves it to the Member States to define which national proceedings qualify as ‘insolvency proceedings’ for the purpose of Articles 36 and 37. However, the fact that the Commission’s choice is hardly surprising does not make it any less problematic, given the range of proceedings existing in EU Member States that may be opened in respect of debtors that are sliding down the (in)solvency scale. The Explanatory Memorandum offers only limited guidance in respect of what is an ‘insolvency proceeding’ for the purpose of Article 36 and 37. The statement that the minimum harmonisation standards of the Preventive Restructuring Directive “only apply to businesses that are not yet insolvent and pursue the very aim of avoiding insolvency for businesses that can still be returned to viability” and “do not address the situation where a business becomes insolvent and has to undergo insolvency proceedings” could be understood as implying that ‘insolvency’ proceedings are to be distinguished from ‘*pre*-insolvency’ proceedings.[42] This would mean that the Proposal is not about *pre*-insolvency, but about insolvency proceedings. However, this still leaves us with the question of what defines an insolvency proceeding in the sense of the Proposal. The Proposal targets the three key dimensions of insolvency law: “(i) the recovery of assets from the liquidated insolvency estate; (ii) the efficiency of proceedings; and (iii) the predictable and fair distribution of recovered value among creditors”.[43] This could be understood as implying that only proceedings aimed at *liquidation* of the insolvent debtor’s assets are covered by the Proposal. However, the first sentence of recital 3 acknowledges that insolvency proceedings can also be proceedings aimed at *restructuring* rather than liquidation: “Insolvency proceedings ensure the orderly winding down or restructuring of companies or entrepreneurs in financial and economic distress”. Assuming that *pre*-insolvency proceedings aimed at restructuring are – exclusively – covered by the Preventive Restructuring Directive, it would be logical to assume that only those reorganisation proceedings that are opened after the court has established that the debtor *is actually* insolvent are covered by Article 36. But this assumption ignores that certain insolvency proceedings aimed at reorganisation, such as the Dutch suspension of payments proceedings, may be opened when the debtor *foresees that it will become insolvent*.[44] Such proceedings may therefore also be characterised as pre-insolvency proceedings because they are opened (at least in theory) before the debtor becomes insolvent. Perhaps the most pragmatic way – from a Dutch perspective – to interpret the concept of ‘insolvency proceedings’ used in Article 36, would be to assume that, as long as the debtor company is not yet unable to pay its debts as they fall due, its directors can use all ‘pre-insolvency’ options available, ranging from trying to reach an out-of-court settlement with (certain) creditors (which may – if necessary – be made binding on non-consenting creditors and shareholders by court confirmation of a restructuring plan in so-called WHOA-proceedings[45]) to filing for suspension of payments. However, once it is clear that the company has stopped paying its debts as they fall due, the directors will be under a duty to file for ‘faillissement’, which is aimed at liquidation of the assets (which may take the form of a going concern asset sale with or without a preparatory phase (pre-pack)). The problem inherent in this pragmatic approach is that the options available to directors that wish to comply with their filing duty under Article 36 will be defined – and limited – by ‘insolvency’, which – as we have argued is a scalar and vague concept.

The Proposal also contains provisions obliging Member States to ensure the availability of so-called pre-pack proceedings (Articles 19-35 Proposal)[46] as well as simplified winding-up proceedings for microenterprises (Articles 41-45).[47] The Proposal does not clarify whether these proceedings qualify as insolvency proceedings for the purpose of Article 36 and 37. In respect of pre-pack proceedings, the fact that these are split up into two phases – a preparatory and a liquidation phase – could cast doubt, especially in view of Article 20, which provides that the *liquidation* phase qualifies as an insolvency proceeding as defined in Article 2 point 4 EIR. We believe, however, that this does not imply that directors cannot comply with the duty to file prescribed by Article 36 by requesting the opening of the preparatory phase. This request is ultimately aimed at the opening of insolvency proceedings involving a liquidation phase. Therefore, directors can comply with their duty to file by filing for a pre-pack. In respect of the simplified winding-up proceedings, there can be little doubt that these qualify as ‘insolvency proceedings’ for the purpose of Article 36 and 37, given that Article 38 expressly provides that these proceedings must be available to microenterprises that are *insolvent*, which must – pursuant to Article 38 – be assessed exclusively on the basis of a cash flow test.

3.5 What is the nature of the duty to file and who should have standing to bring a liability claim in the event of non-compliance?

A final issue that we wish to address in this section is: who has standing to bring the claim for violation of the duty to file: the insolvency practitioner (IP) and/or individual creditors? This question is related to the nature of the duty to file, which is not clear from the Proposal. Should the duty to file be qualified as a duty owed to the body of creditors as a whole or is it – also – a duty owed to individual creditors, in particular those who entered into a contract with the company after it became insolvent? Recital 33 offers a clue, where it is stated: “In that case directors should compensate creditors for the damages resulting from the deterioration in the recovery value of the legal entity compared to the situation where the request would have been submitted on time”. This sentence exclusively refers to the damage suffered by creditors who were already on board. It does not refer to the damage suffered by creditors in respect of whom the company incurred contractual obligations after it became insolvent. These so-called ‘new’ creditors will wish to be placed in the situation that would have existed if the company had refrained from entering into the contract. This means that they will claim to be compensated for reliance loss, not just the difference in recovery compared to the situation of timely filing (so-called ‘Quotenschaden’). We believe that the exclusive focus of the Proposal on a claim for Quotenschaden is not justified. New creditors should be compensated for the reliance loss they suffered. Moreover, the prospect of recovery of reliance loss (to the extent that the defendant offers recourse) can be a real incentive for new creditors to bring a claim. In comparison, there will be little incentive for individual creditors to bring a claim for Quotenschaden, because they will only be able to recover part of what is owed to them. There is also little incentive for the IP to bring this claim because a considerable amount of time and effort may be involved in showing what the recovery rates would have been in case of timely filing. That this can be a daunting task[48] seems to have been overlooked by the drafters of the Proposal.

4. Benefits of, need for and consequences of the introduction of a director’s duty to file for insolvency?

The Netherlands is one of a minority of Member States lacking a statutory duty for directors of legal persons to file for insolvency proceedings when the legal person has become insolvent. Nor does Dutch law contain a specific provision aimed at preventing wrongful trading. Dutch directors’ liability law regarding (pre-)insolvency predominantly consists of what could be viewed as open norms that have their origin in either statutory rules or case law. Although case law – to a greater or lesser degree – provides guidance for directors as to how to act, the liability standard remains open, in the sense that ultimately the specific circumstances of the case will decide whether or not the director is liable. Given the fact that directors have an interest in clear standards for their behaviour during (pre-)insolvency, and open norms by their very nature leave room for different considerations (and discretion to courts), it can be argued that a duty to file comprising a straightforward obligation to act in a certain way will alleviate a director’s burden when the company is insolvent. In our view, this reasoning is unconvincing for two reasons.

4.1 The proposed duty does not lead to increased legal certainty and may harm the creditors’ interests

First, as we discussed above in paragraph 3, the proposed duty to file is not so clear-cut at all. It is left to the Member States to define the core components of the duty to file, which are the moment that a duty to file is triggered (‘insolvency’) and the type of proceeding that qualifies as ‘insolvency proceeding’. We have argued that with regard to the moment that the duty is activated, the ongoing discussion in Germany,[49] where a duty to file has been part of the law for a long time, illustrates that it is a difficult task to formulate a definition of insolvency that on the one hand encourages early intervention for the sake of creditor’s interests and on the other hand must guard against directors giving up to too early, which can be harming to creditors’ interests as well. In fact, we believe that, given that a company’s state of financial affairs is rather a continuum with fluctuations than a quantified matter of static calculations,[50] a likely consequence of a hard and fast rule to file will be that directors will file too early in order to avoid a perceived risk of personal liability, thus leaving unexploited promising opportunities for restructuring. Especially, if we juxtapose the rather vaguely defined director duties laid down in Article 19 of the Preventive Restructuring Directive against a hard and fast rule like the proposed duty to file, there is a likelihood that directors will opt for the safe route by complying with the duty to file. In this way, the desired early intervention can turn out to be detrimental to creditors’ interests. This will particularly be the case if no escape options, in the form of justification or exculpation grounds in case of non-compliance, are provided in respect of the duty to file. In the absence of such grounds, a duty to file has the potential to harm creditors’ interests, and will run counter to the policy objectives of the Preventive Restructuring Directive.

4.2 Is a duty to file necessary from the perspective of Dutch law?

Second, Dutch law already provides for different rules that aim to restrain directors’ behaviour in case of (deepening) insolvency. As we observed above, most of these rules entail open norms which leave room for a differentiated assessment of directors’ course of conduct. However, these norms have been substantiated in a significant volume of case law. Moreover, if the proposed duty to file is to take effect exclusively when the debtor is insolvent (which, as we argued above, is particularly difficult to determine), Dutch law regarding directors’ liability provides for rules that activate duties to consider creditors’ interests already before the moment of insolvency (regardless of how this is defined). In light of the stipulated purpose of the proposed duty to file – which is, as we discussed in paragraph 2, to stimulate early action – the Dutch rules for directors’ liability seem more fit to serve that purpose. We just mention the main grounds of liability that may be invoked against directors of insolvent companies.[51] These concerns in the first place claims for the full deficit brought by the liquidator, typically based on a number of provisions simultaneously (Article 9 Book 2, Article 138/248 Book 2 and Article 162 Book 6 of the Dutch Civil Code). The essence of these claims is that the company has been mismanaged. Secondly, there is the so-called *Beklamel*-claim for reliance loss brought by ‘new creditors’ on the basis of tort law.[52] These are creditors who entered into agreements with the debtor after the director knew or should have known that the debtor would

not be able to perform and would not offer recourse for damages arising from non-performance. Next to these grounds of liability, we mention a third category, tort claims brought by the liquidator or by individual creditors against directors for making ‘selective payments’ on behalf of the company. The latter pertains to preferential payments of debts by the director which may qualify as unlawful and give rise to the directors’ personal liability to pay damages if certain requirements are met. It is particularly this ground of liability that can activate a duty for the director to consider creditors’ interests before insolvency – understood either as cash flow insolvency or balance-sheet insolvency – has occurred. For instance, in cases where selective payments were made to creditors related to the debtor, Dutch courts have held directors liable when at the time of the payment the directors had to seriously consider the possibility of insolvency or liquidation proceedings (‘faillissement’).[53]
In addition to these general rules that may lead to director liability in insolvency, we do not want to leave unmentioned a (fourth) specific liability rule that contains a notification duty for the director as well. Article 36 of the Tax Collection Act (TCA) enables the tax collector to bring a specific liability claim against de jure and de facto directors in respect of unpaid tax debts owed by the company. Directors are jointly and severally liable if non-payment of taxes owed by the company is due to ‘manifestly improper management’, with the possibility of individual exculpation. The ‘manifestly improper management’ must have occurred in the period of 3 years preceding the notice of inability to pay taxes (‘melding betalingsonmacht’) or, if they have not given such notice, 3 years before the company’s first default in payment. In case directors have failed to timely and correctly notify the tax collector of the company’s inability to pay, directors are presumed to be liable, unless they prove that they cannot be blamed for the failure to give notice and for the failure to pay the taxes that were due.[54] Although the notification duty is directed towards a specific creditor – the tax authorities – and thus does not entail the filing of formal proceedings, Article 36 of the Tax Collection Act shows that Dutch law already contains an obligation for the directors to notify a third party about the debtor’s distress, and by doing that de facto disclose the debtor’s inability to pay to the outside world.

The mentioned liability rules aim to ensure that directors do not carelessly continue trading when insolvency has occurred or is imminent. The rules contain to a greater or lesser degree specified duties for directors to take into account creditors’ interests in case of deepening insolvency. They do not force directors to file for the opening of (specific) insolvency proceedings but leave room for out-of-court workouts, thus offering more flexibility. Although most duties are more or less specified, the open character of the norms enables directors to bring forward facts and circumstances that can justify their course of conduct or exculpate them. This allows courts to achieve a judgement that takes into account all circumstances of the case. This seems particularly reasonable regarding the issue we are dealing with, where ‘the moment of truth’ is difficult to determine and if it is determined, it is akin to a rather arbitrary fixation on the state of affairs of the debtor.

4.3 What are the consequences of a duty to file for Dutch law?

Based on the foregoing analysis, we argue that a duty to file as proposed in the Proposal is not beneficial for Dutch law, and we believe that Dutch law does not require such a rule to reach the policy objectives set forth in the Explanatory Memorandum of the Proposal and the attached impact assessment. However, if a duty to file as proposed is to be implemented in Dutch law, aside from what we already have noted, we foresee the following issues that the Dutch legislature should take into account.

- Article 136 respectively 246 Book 2 Dutch Civil Code provide that, unless otherwise provided in the articles of association,[55] the board of directors of a public respectively private limited company does not have the authority to file for insolvent liquidation proceedings (‘faillissement’) without being so instructed by the general meeting. The Proposal does not give any guidance in respect to the question of how the interests of creditors and shareholders are to be balanced when Member States implement Articles 36 and 37.[56]
- It is not clear how a duty to file relates to case law concerning Article 19 section 4 Book 2 Dutch Civil Code, which deals with the dissolution of a legal person without subsequent liquidation proceedings in the event that the legal person does not have any assets while there are still unpaid debts (the so-called ‘turbo’ liquidation). In 2015, the Dutch Supreme Court held that if a company has no or almost no assets left, the company is required to use the route that is enabled by Article 19 section 4 Book 2 Dutch Civil Code. In this case, filing for liquidation proceedings (‘faillissement’) can constitute abuse of power.[57]
- It is not clear how a duty to file relates to the Supreme Court’s judgement in the *Geocopter* case.[58] It has been argued that in this case, the Dutch Supreme Court has left room for the judgement that filing for liquidation proceedings (‘faillissement’) under certain conditions can amount to ‘mismanagement causing the company’s liquidation’, which may lead to the director(s)’ personal liability for the full deficit on the basis of Article 248 Book 2 Dutch Civil Code. The conditions would be that the director(s) knew or ought to know that filing for liquidation proceedings (‘faillissement’) would harm creditors’ interests.[59] Along this line of reasoning, it is possible that the filing of liquidation proceedings itself may – in certain circumstances – be contrary to the interests of the creditors.

5. Conclusion

Twenty years ago, the EU Commission endorsed the introduction of a European framework rule on wrongful trading in its Communication 'Modernising Company Law and Enhancing Corporate Governance in the European Union – a Plan to Move Forward'.[60] The Commission was inspired by the High Level Group of Company Law Experts, who had recommended the development of a wrongful trading rule, whereby directors would be personally accountable for the consequences of the company's failure, if it is foreseeable that the company cannot continue to pay its debts and they do not decide either to rescue the company and ensure payment or to put it into liquidation.[61]

It is hard to fathom whether the Commission intends to move away from this more flexible approach with the directors' duty to file for insolvency proceedings that it currently proposes. It *is* possible to read into Article 36 and 37 a – in comparison with the wrongful trading rule – more strictly defined duty, that aims to incentivise directors to file for insolvency proceedings that may lead to liquidation once the legal person has become insolvent. But it is not clear whether this is a correct interpretation of the Commission's intentions, because the concept of 'insolvency proceeding' is not clarified. Equally, an explanation is missing of whether and to what extent insolvency proceedings as referred to in Article 36 fundamentally differ from the *pre*-insolvency proceedings that are the subject of the Preventive Restructuring Directive that was adopted only four years ago.

It would be regrettable if the Commission indeed aims to move away from a more flexible approach, by mandating a duty to file for insolvency proceedings that may lead to liquidation once the company is insolvent. The options available to directors of debtors that are in financial crisis should not be defined – and limited – by 'insolvency', which is a scalar and vague concept (which explains the Commission's reluctance to define it in the Proposal). A likely effect of a (seemingly) hard and fast rule to file for insolvency proceedings will be that directors – in order to avoid the risk of personal liability for non-compliance with the filing duty – will choose to file instead of making a justified attempt at restructuring. This would run counter to the objectives of the Preventive Restructuring Directive and would lead to a suboptimal outcome for the creditors.

The lack of a definition of the key concepts of 'insolvency' and 'insolvency proceedings' challenges the suitability of Articles 36 and 37 as a basis for achieving (even a minimum level of) harmonisation of directors' duties in insolvency. The articles are so vague that it is most likely that the considerable number of Member States that already have – widely differing – filing duties in place can simply maintain these – including provisions that are stricter than mandated by the Proposal. Therefore, the harmonising effect will be negligible.

Finally, there can be doubts about the creditor protection that can be achieved by the introduction of a duty to file, if the directors' liability for non-compliance is limited to the damage suffered by creditors that were already 'on board' when the duty to file was triggered. Director liability for the reliance loss of those creditors with whom the legal person entered into agreements after the triggering date may be more effective in protecting creditors. Such liability already exists in the Netherlands.

Voetnoten

[1]

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[2]

COM/2015/0468 final.

[3]

European Parliament resolution of 9 July 2015 on Building a Capital Markets Union (2015/2634(RSP)).

[4]

Directive (EU) 2019/1023.

[5]

COM(2020) 590 final.

[6]

COM/2021/720 final.

[7]

COM(2022) 702 final.

[8]

See Gerard McCormack, Andrew Keay, Sarah Brown and Judith Dalgreen, *Study on a new approach to business failure and insolvency ' Comparative legal analysis of the Member States' relevant provision and practices*, Tender No. JUST/2014/JCOO/PR/CIVI/0075, available at https://op.europa.eu/en/publication-detail/-/publication/3eb2f832-47f3-11e6-9c64-01aa75ed71a1/language-en This study, published in 2016, was commissioned by the European Commission in the preparatory phase leading to the adoption of the Restructuring Directive. According to the table on p. 49-50 of the report, only Cyprus, Denmark, Hungary, Ireland, Italy, Malta, The Netherlands, Sweden and the UK (no longer a Member State) do not provide for a directors' duty to file for insolvency in their laws.

[9]
https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7349?idp=LegalIntelligence

[10]
COM(2022) 702 final, p. 12.

[11]
See recital 33.

[12]
It should be noted that the Commission does not bring forward empirical data to support this assumption. Member States that already have such a duty would be well suited for such research.

[13]
P. 28 impact assessment.

[14]
P. 28 impact assessment.

[15]
P. 28 impact assessment

[16]
P. 40 impact assessment. See also p. 41.

[17]
P. 47 impact assessment.

[18]
P. 41 impact assessment.

[19]
P. 41 impact assessment.

[20]
P. 43 impact assessment.

[21]
P. 49 impact assessment.

[22]
Directive (EU) 2019/1023.

[23]
P. 17 Proposal.

[24]
Dutch law does not distinguish between 'de facto' and 'shadow' directors; the concept 'feitelijk bestuurder' includes persons who pull the strings behind the scenes.

[25]
Asser/Maeijer/Van Solinge & Nieuwe Weme 2-IIb 2019/194.

[26]
HR 24 March 2023, ECLI:NL:HR:2023:445.

[27]
See par. 4.1 of the contribution to this special issue by Jessie Pool and Reinout Vriesendorp.

[28]
For the definition of cash flow insolvent see § 17 (2) InsO.

[29]
This period is temporarily in force until 1 January 2024, due to a recent amendment of the InsO discussed below. Before the amendment, the period was six weeks.

[30]
For the definition of balance sheet insolvent, see § 19 (2) InsO.

[31]
See art. 2 (2) Preventive Restructuring Directive, which leaves it to the Member States to define both 'insolvency' and 'likelihood of insolvency'.

[32]
Riz Mokal, 'What is an insolvency proceeding? *Gategroup* lands in a gated community', *InternationalInsolvencyReview* 2022, p. 421.

[33]
Mokal, *loc. cit.*

[34]
Mokal, *op. cit.*, p. 422.

[35]
For recent criticism of the current balance sheet test, see Marcus Oehlrich, 'Die Insolvenzantragspflicht bei Überschuldung – eine ökonomische Analyse', *NZI* 2022, 593 et seq. His criticism concerns the fact that German law requires the balance sheet must be drawn up on the basis of liquidation value instead of market values. This means that many businesses that are still viable would be under a duty to file, in the absence of a corrective mechanism. This mechanism has taken the form of the going concern prognosis. All in all, this leads to a very complex mechanism. Oehlrich submits that the two-step test can be abolished. It is sufficient to assess the solvency on the basis of a balance sheet based on market values. This involves a degree of subjectivity, but the going concern prognosis is equally subjective.

[36]
See § 19 Insolvenzordnung.

[37]
Gesetz zur Abschaffung des Güterrechtsregisters und zur Änderung des COVID-19-Insolvenzaussetzungsgesetzes, *BGBl*. I S. 1966, which entered into force on 9 November 2022. Article 9 of this Act contains amendments to the COVID-19-Insolvenzaussetzungsgesetz, that was introduced in 2020 in order to mitigate effects of the Covid-19 crisis.

[38]
Whether the German legislature's intervention really helps debtors and their directors can be questioned because four months can still be a very long period for directors who have to factor in many uncertainties.

[39]
BGH 28 June 2022, *NZI* 2022, 787.

[40]
See the casenote by Gutmann, *NZI* 2022, 789-790.

[41]
The concept of cash flow insolvency is also central to article 6 of the Proposal on preferences, see the contribution to this issue by Niels Pannevis.

[42]
P. 3 Proposal.

[43]
P. 12 Proposal.

[44]
Article 214 Dutch Bankruptcy Act.

[45]
The nature of the Dutch WHOA-proceedings is rather complicated. It has been argued that the WHOA-proceedings are to be characterized as 'insolvency proceedings'. See N.W.A. Tollenaar, 'Het Wetsvoorstel Homologatie Onderhands Akkoord onder de loep genomen', *TvI* 2019/32. Tollenaar's reasoning is not based on the entry requirements of the proceedings, but on the fact that the scheme of arrangement in the WHOA-proceedings essentially entails recourse against the assets of the debtor by the finance providers. He refers to the Explanatory Memorandum of the WHOA, where the proceedings are rendered 'insolvency proceedings'. See *Kamerstukken II* 2018/2019, 35 249, nr. 3, p. 6, 31 and 71. Aside from this, it should be noted that WHOA-proceedings may be used to reach a plan by court confirmation that is aimed at liquidating the assets of the debtor. This raises the rather fundamental question whether it is possible to draw a meaningful distinction between 'pre-insolvency' and 'insolvency'- proceedings. If 'pre-insolvency' – proceedings are to be understood as aiming at the restructuring of the debtor while 'insolvency'- proceedings provide for its liquidation, then most proceedings are likely to qualify as hybrids comprising restructuring as well as liquidation components. We will not address this question here, but wish to point out that the distinction between 'pre-insolvency' and 'insolvency'-proceedings requires attention on a principle level.

[46]
See the contribution to his issue by Van Zanten.

[47]
See the articles 41-45 in the Proposal.

[48]

Klöhn, MünchKomm InsO 15a, Rn. 184, referring to “extreme difficulties” involved in the calculation of Quotenschaden. Therefore, German IP’s choose to bring claims based on § 15b InsO instead. This provision allows the IP to recover all non-ordinary course of business payments made by directors after the legal person became cash flow or balance sheet insolvent. It is upon the director(s) to prove that payments after the critical date were made in the ordinary course of business.

[49]

Discussion is also ongoing in Austria, where a directors’ duty to file in case of both balance sheet and cash flow insolvency also exists. For a critical comparison of the Austrian system to the UK wrongful trading rule, see Georg Wabl, ‘To File or not to File: That is the Question. Directors’ Duties in the Company Crisis’, *Business Law Review*, Volume 40, Issue 2 (2019), p. 49-55.

[50]

We refer to the following quote by Mokal that we mentioned above: “debtors may move along the solvency/insolvency spectrum in a continuous rather than quantized matter” (Riz Mokal, ‘What is an insolvency proceeding? *Gategroup* lands in a gated community’, *InternationalInsolvencyReview* 2022, p. 422).

[51]

For a comprehensive overview see: Loes Lennarts, ‘Preventive restructuring and Directors’ Duties and Liabilities in the Twilight Zone: The Dutch Perspective’, *NVRII Report 2017 – Directors in the Twilight Zone*, available at: https://naciil.org/2021/08/19/reports-2017-directors-liability-in-the-twilight-zone/.

[52]

Dutch Supreme Court 6 October 1989, *NJ* 1990, 286 (*Beklamel*).

[53]

See the case law mentioned in A. Karapetian, *Bestuurdersaansprakelijkheid uit onrechtmatige daad* (diss. Groningen), Deventer: Wolters Kluwer 2019, p. 360-362.

[54]

A similar liability regime applies in respect of unpaid social security premiums and pension premiums payable to pension funds covering an entire industry.

[55]

Clauses deviating from the default rule of article 2:136/246 Dutch Civil Code are extremely rare in practice.

[56]

This issue is also noted by the interdepartmental working group on the ‘Beoordeling van Nieuwe Commissievoorstellen’ (Assessment of new Commission Proposals) at p. 6 of BNC-fiche 3: *Beoordeling Richtlijn materieel insolventierecht*, 2023Z01871, 3 February 2023, available at https://open.overheid.nl/documenten/ronl-5c06013edf7d652555e5354dca75a95259e11999/pdf.

[57]

Dutch Supreme Court 18 December 2015, ECLI:NL:HR:2015:3636.

[58]

Dutch Supreme Court 21 December 2018, ECLI:NL:HR:2018:2370.

[59]

For an extensive analysis see M.L. Lennarts, ‘(Waar) hoort voorzienbaarheid van benadeling van schuldeisers thuis in het toetsingskader van article 2:138/248 BW?’, *TvI* 2021/9.

[60]

COM (2003) 284 final, 21 May 2003.

[61]

Op. cit., p. 16