The purpose of directors' duties in the insolvency context: a critical assessment based on empirical data from Austria and Netherlands

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The purpose of directors' duties in the insolvency context: A critical assessment based on empirical data from Austria and Netherlands

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Abstract

This paper examines the evolving discussions on directors' duties in the insolvency context within the EU, particularly in light of recent harmonisation initiatives such as the 2019 Directive on Restructuring and Insolvency and the 2022 Proposal mandating a duty to file for insolvency. Using empirical data from Austria—a jurisdiction with a duty to file—and the Netherlands, which lacks this duty, the study investigates the potential impact and practicality of such requirements. Findings reveal that while Austria and the Netherlands have different frameworks, similar issues in enforcement and compliance emerge in both. These results suggest that imposing stricter or more explicit norms on directors across the EU may not effectively achieve policy goals, especially if financial constraints on enforcement remain unaddressed. We advocate for a policy approach that focuses on practical outcomes and enforcement capacity.

1 | INTRODUCTION

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, the directive on restructuring and insolvency,[1] Article 19 on duties of directors where there is a likelihood of insolvency was one of the most controversially discussed provisions.[2] Also the latest European harmonisation initiative in the insolvency context, the Proposal to harmonise certain aspects of insolvency law,[3] includes provisions on directors' duties introducing an obligation to submit a request for the opening of insolvency proceedings with a filing period of 3 months (Articles 36 and 37 of the Proposal). It would not be surprising if also these provisions lead to controversial discussions during the legislative process, especially initiated by countries not providing a duty to file yet.[4]

The goals usually associated with provisions on directors' duties in the insolvency context are to achieve timelier action and to ensure (more) creditor protection (see in detail below Section 2.1).[5] It is unclear, however, whether and to what extent the above and similar expectations related to such provisions on directors' duties are in fact justified. In this article, we will explore these assumptions, 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 2,134 Dutch bankruptcy reports and a survey involving 177 Dutch bankruptcy trustees). Comparing a "duty to file-jurisdiction" such as Austria with a jurisdiction like the Netherlands not providing such a concept may bring valuable findings on the duty to file included in the Proposal, particularly on the question whether a duty to file throughout the European Union (EU) is desirable.

Following this introduction, this article is structured as follows. Section 2 provides an overview of the purpose of directors' duties in the insolvency context and the current regimes in Austria and the Netherlands. Section 3 contains the empirical studies conducted in both countries explaining their methodology (Section 3.1), summarising their results (Section 3.2) and making a comparison (Section 3.3). Remarkably, the results of the empirical legal research undertaken seem to be comparable in many aspects, although the Austrian and Dutch law provisions on directors' duties differ significantly. In Section 4, the authors will—based on the analysis made before—try to put the discussions held on insolvency related directors' duties so far into a new perspective. In Section 5, we conclude that implementing stricter or more explicit norms for directors in the vicinity of insolvency might not be the most effective method for accomplishing the intended objectives of those norms.

[1]Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 ("PRD 2019").

[2]See further below under Section 2.1.

[3]Proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, COM/2022/702 final ("Proposal").

[4]See, for example, Arpi Karapetian and Loes Lennarts, '"The Directors" Duty to File for Insolvency Proceedings in the European Commission's Proposal for Harmonising Insolvency Law: The Dutch Perspective' (2023) 3 *Tijdschrift voor Insolventierecht* Article 2023/15; see also Reinout Vriesendorp, Ignacio Tirado and Stephan Madaus, 'CERIL Statement 2023-2 on the European Commission Proposal for a Directive Harmonising Certain Aspects of Insolvency Law' (2023) <https://www.ceril.eu/news/ceril-statement-2023-2-on-the-european-commission-proposal-for-a-directive-harmonising-certain-aspects-of-insolvency-law> (Accessed: 28 March 2024).

[5]See, for example, Recital 22, PRD 2019.

2 | DIRECTORS' DUTIES IN THE INSOLVENCY CONTEXT[6]

2.1 | Purpose of directors' duties in the insolvency context

2.1.1 | EU and UNCITRAL

Generally, the purpose of directors' duties in the insolvency context is often compared with the metaphor of a "carrot" and a "stick."[7] The carrot, for example, provides directors with the ability and tools to reorganise the business and the stick represents the potential liability in case of non-compliance with their duties.[8] Both the carrot and the stick should encourage directors to take timely action, either to prevent insolvency or to limit the losses for creditors. A similar approach is made by the often-cited Legislative Guide on Insolvency Law Part Four: Directors' obligations in the period approaching insolvency published by UNCITRAL.[9] According to UNCITRAL, such duties are important to "protect the legitimate interests of creditors and other stakeholders" and:

> to provide incentives for timely action to minimize the effects of financial distress experienced by the enterprise.[10]

Recently, these purposes have been confirmed in the EU context with the above-mentioned Proposal. According to the Proposal, Articles 36 and 37 shall ensure that directors do not act in their self-interest by delaying a filing despite signs of insolvency (Recital 33). The assumption is that late filing may lead to lower recovery values for creditors (Recital 32). Therefore, in case of a delayed filing, directors should compensate creditors for the damages (Recital 33). The nature of the compensation is the damage that occurs due to the deterioration of the recovery value.[11] The European Commission assumes that a duty to file with a connected liability for non-compliance will encourage directors to take the necessary early action and therefore prevent the depletion of the recovery value.[12] One could argue that with the above-mentioned intentions stated in Recitals 32 and 33 of the Proposal, the duty to file included in the Proposal primarily focuses on the "stick" in order to achieve timely action and to protect legitimate interests of the creditors.[13]

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[6]This article focuses on duties of directors of limited liability companies (for Austria, the *GmbH* and the *AG*, for the Netherlands, the *BV* and the *NV*).

[7]Jaka Cepec and Mitja Kovac, 'Carrots and Sticks as Incentive Mechanisms for the Optimal Initiation of Insolvency Proceedings' (2016) 7(2) *DANUBE: Law, Economics and Social Issues Review* 79. See also Michele Reumers, 'The Business Rescue Craze in European Insolvency Law' (2017) 8/9 *Ondernemingsrecht* 534, paragraph 2.

[8]See for example, Neil Cooper, 'Foreword and Acknowledgment', in INSOL International, *Directors in the Twilight Zone V* (INSOL International, 2017), ii: '*carrot and stick to make the donkey move*'; see further Georg Wabl, 'To File, or Not to File: That Is the Question. Directors' Duties in the Company Crisis' (2019) 40(2) *Business Law Review* 49.

[9]UNCITRAL Legislative Guide on Insolvency Law, *Part Four: Directors' obligations in the period approaching insolvency (including in enterprise groups)* (2nd edn) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11273_part_4_ebook.pdf> (Accessed: 28 March 2024).

[10]ibid 3.

[11]Karapetian and Lennarts (n 4).

[12]Commission Staff Working Document, Impact Assessment Report, accompanying the document, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, SWD(2022) 395 final, 27–41 ("Impact Assessment").

[13]See Georg Wabl, 'To File, or Not to File: Is This the Right Question?' (2023) <https://www.linkedin.com/pulse/file-right-question-thoughts-new-proposal-com2022-702-georg-wabl/> (Accessed: 28 March 2024).

Introducing directors' duties in the insolvency context is, however, not without controversy. As mentioned, the provisions on directors' duties in the PRD 2019 sparked a debate showing controversy about the topic across Europe.[14] Article 19 of the PRD 2019 has led to discussions amongst the EU Member States on whether to implement a shift of fiduciary duties to the creditors,[15] which, for example, in Germany further turned into discussions on whether such a shift may be required in order to resolve the tension between shareholders and directors in the insolvency context.[16] As a result, the PRD 2019 on the one hand emphasises the importance that directors shall not be

> dissuaded from exercising reasonable business judgment or taking reasonable commercial risks. (Recital 70)

pointing to a concept of a safe harbour.[17] On the other hand, however, the PRD 2019 states that if

> the debtor is close to insolvency, it is also important to protect the legitimate interests of creditors. (Recital 71).

In comparison to the Proposal (see above), the PRD 2019 therefore took a more flexible approach including the focus on also the "carrot" in the form of providing debtors with preventive restructuring frameworks to restructure their companies.

2.1.2 | Austria

In contrast to the international approach by UNCITRAL and the EU, Austrian law partly aims to achieve different goals with its insolvency related duties of directors. The Austrian duty to file is an explicit creditor protection provision aiming to prevent the debtor from planlessly delaying insolvency[18] and to protect and compensate the general body of creditors as well as individual creditors (see in detail below Section 2.2). Additionally, the purpose shall be to remove insolvent companies from the markets and thereby protect those who would not have engaged with them in the first place.[19] Provisions like the Austrian prohibition of payments (see below Section 2.2) also aim to protect the assets of the debtor and intend to ensure the equal treatment of creditors (*par condicio creditorum*).[20] A provision like the Austrian duty to reorganise (see below Section 2.2) tries to combine a "carrot" (newly implemented reorganisation proceeding) with a stick (liability of EUR 100,000 if a director did not file for reorganisation proceedings and the company subsequently enters insolvency proceedings)—the liability provision should

[14]See Michelle van Haren, 'The Restructuring Directive and Its Impact on Directors' Duties and Liabilities in the Netherlands, Germany, and the United Kingdom', in Jennifer Gant (ed), *Harmonisation of Insolvency and Restructuring Laws in the EU* (INSOL Europe 2020) (38–50).

[15]See a summary on this English law concept comparing it with Austrian law concepts in Wabl (n 8).

[16]See in detail Georg Wabl, *Geschäftsleiterpflichten bei wahrscheinlicher Insolvenz* (Manz, 2023), 284 *et seq*. This discussion was also part of the preparations for the Proposal, for which see Karapetian and Lennarts (n 4), paragraph 2.

[17]See a detailed analysis in Wabl (n 16), 236 *et seq*.

[18]'*Weiterwursteln*', according to the Austrian Supreme Court 23 November 2000, 6 Ob 110/00w.

[19]See Austrian Supreme Court 20 March 2007, 4 Ob 31/07y and subsequent decisions and an overview in Wabl (n 8).

[20]See Austrian Supreme Court 26 September 2017, 6 Ob 164/16k and an overview in Wabl (n 16), 104 *et seq*.

thereby actually "effectuate" the proceedings by putting pressure on the directors, which in the end did not prove to be effective.[21]

2.1.3 | Netherlands

Dutch provisions on directors' duties in the vicinity of insolvency differ quite substantially from the Austrian ones even though they seem to have similar goals. Although the Dutch legal framework does not entail a duty to file, certain directors' liability rules aim to prevent the debtor from delaying insolvency (see in detail below Section 2.3). Dutch provisions on directors' liability aim first and foremost, however, on compensating the (joint) creditors and the company for improper behaviour by the management of the company (see in detail below Section 2.3). Provisions like the Dutch transaction avoidance also aim to protect the assets of the debtor and intend to ensure the equal treatment of creditors (*par condicio creditorum*)[22] (see in detail below Section 2.3). It is argued that Dutch liability rules are already in line with the goals of the Proposal because these rules "ensure that directors do not carelessly continue trading when insolvency had occurred or is imminent" (see in detail below Section 2.3).[23]

2.1.4 | Summary

In summary, the following main categories on the purpose of directors' duties in the insolvency context can be identified:

- Achieving timelier action;
- Avoiding damages for creditors (especially due to a lower recovery);
- Protecting the equal treatment of creditors; and
- Achieving actual creditor compensation.

In the next section, the current regimes in Austria and the Netherlands on directors' duties in the insolvency context will be discussed in more detail.

2.2 | Current regime in Austria[24]

2.2.1 | Duties

General

Austrian law provides for a comprehensive regime on insolvency related duties of directors. Under the general duty of care (*allgemeine Sorgfaltspflicht*) owed under corporate law, directors

[21]See legislative materials ErläutRV 734 BlgNR 20. GP 85 and further in Wabl (n 16), 62 *et seq*.

[22]In the Netherlands the term *paritas creditorum* is often used instead of *par condicio creditorum*.

[23]Karapetian and Lennarts (n 4), paragraph 4.2.

[24]See also an overview in Georg Wabl, 'Duties of Directors Where there is a Likelihood of Insolvency', in Gant (ed) (note 14) (206–216); and details in Wabl (note 16), 10 *et seq*.

owe their duties to the company and must always act for the company's benefit (*zum Wohl des Unternehmens*). Other interests such as the interests of employees, creditors or the public can and potentially also have to be considered if and as long as it is for the benefit of the company.[25] If there is a clash between external interests and the interests of the company, the benefit of the company prevails.[26]

There is no concept such as a shift of fiduciary duties to creditors under Austrian law in case of an imminent insolvency.[27] Still, in the crisis and insolvency context, specific duties come into play (see the following sections).

Insolvency prevention

There are several duties aiming to prevent insolvency. First, the above-mentioned general duty of care also requires directors to always have an adequate and up-to-date overview over the financial situation of the company and in this context to identify crisis and insolvency indicators once objectively visible (so-called *Insolvenzprophylaxe*).[28] This usually leads to a duty to prepare and if possible set countermeasures in order to overcome a crisis (so-called responsibility or duty to restructure—*Sanierungsverantwortung/-pflicht*).[29] Those duties are still part of the general duty of care.

Second, since the implementation of the PRD 2019, the above-mentioned corporate law duties have been supplemented by an explicit provision in the Austrian Restructuring Code (*Restrukturierungsordnung*, ReO) by and large using the language of Article 19 of the PRD 2019.[30]

Third, the Austrian Business Reorganisation Act (*Unternehmensreorganisationsgesetz*, URG) provides for a potential liability of directors of companies subject to mandatory auditing up to EUR 100,000. If certain accounting figures are met,[31] directors may be liable if they did not apply for reorganisation proceedings under this Act and insolvency proceedings were initiated later (in the context of this article also called duty to reorganise—*Reorganisationspflicht*).[32]

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[25]This is only partly stated in law for directors of Austrian stock corporations (Article 70 (1), AktG), but the Austrian Supreme Court (e.g., 9 January 1985, 3 Ob 521/84) made clear that also directors of limited liability corporations must consider certain external interests if and as long as this is for the benefit of the company.

[26]See for example, Austrian Supreme Court 11 June 2008, 7 Ob 58/08t.

[27]See in detail Wabl (n 16), 57 *et seq*., 301 *et seq*.

[28]See in detail Clemens Jaufer, *Das Unternehmen in der Krise* (4th edn) (Verslag Österreich, 2022), 221 *et seq*.

[29]The Austrian Supreme Court does not explicitly refer to this duty but implicitly confirms such a concept in several decisions for example, 9 January 1985, 3 Ob 521/84; 17 November 1987, 3 Ob 520/86; 1 December 2005, 6 Ob 269/05k; and 15 September 2004, 9 Ob 33/04z; see further in Wabl (n 16), 46 *et seq*.

[30]See translation on Article 1, paragraph 3, ReO: When there is a likelihood of insolvency, directors must set steps to avoid insolvency and to ensure viability; thereby, the interests of creditors, shareholders and other stakeholders must be adequately considered; see in detail on this provision Wabl (n 16), 277 *et seq*. The Austrian legislator still made clear that this does not change but does rather only concretise (*konkretisiert*) the duties owed under existing corporate law (see legislative materials ErläutRV 950 BlgNR 27. GP 4).

[31]In short: company's equity ratio below 8% (Article 23, URG) and expected term for debt repayment above 15 years (Article 24, URG).

[32]See in detail Wabl (n 16), 62 *et seq*.

Duties linked to insolvency

Finally, there are duties linked to actual insolvency (being illiquidity[33] and over-indebtedness[34]). First, a duty to file for insolvency proceedings within 60 days at the latest (*Insolvenzantragspflicht*) once illiquidity and/or over-indebtedness are objectively visible.[35] The duty to file protects the general body of creditors from a possible quota deterioration (*Quotenschaden*) as well as individual creditors (mainly) from their reliance loss (*Vertrauensschaden*) suffered through contracting with an insolvent debtor.[36]

Second, a prohibition of payments (*Zahlungsverbot*)[37] which is triggered as soon as a company is illiquid and/or over-indebted and which intends to protect the assets of the company as well as the principle of *par condicio creditorum* (equal treatment of creditors) by restricting directors from making payments or disposals decreasing the value of the assets and favouring individual creditors to the detriment of the general body of creditors (certain exceptions apply, e.g., for payments necessary for the continuation of the business).[38]

Third, there are certain criminal offences (such as deliberate preferential treatment of creditors),[39] which are not further analysed in this article. Other than, for example, in Germany, the negligent delayed filing for insolvency as such is not a criminal offence under Austrian law.

In summary, the following categories of insolvency related duties of directors under Austrian law can be distinguished (duties owed under criminal law excluded):[40]

- Duty to restructure derived from the duty of care (no explicit trigger; now supplemented by duties where there is a likelihood if insolvency);
- Duty to reorganise (triggered with accounting figures);
- Duty to file for insolvency including not to cause a quota deterioration and not to incur new unpaid liabilities (triggered with actual insolvency); and
- Prohibition of payment mainly protecting the *par condicio creditorum* (triggered with actual insolvency).

2.2.2 | Liability

In general, and also in the insolvency context, directors must meet the objective standard of a prudent businessman (*objektiver Sorgfaltsmaßstab*) which can already be violated in case of

[33] *Zahlungsunfähigkeit*, which according to case law in a nutshell means that there is a liquidity gap of more than 5% of due debts which can also not be closed within the next 2–3 months (see Austrian Supreme Court 19 January 2011, 3 Ob 99/10w and subsequent decisions, which only serve as a guideline and not as a general rule, though).

[34] *Überschuldung*, which according to case law in a nutshell means that the liabilities of the company exceed the assets based on liquidation values (*negativer Vermögensstatus*) and the forecast on the company's continued existence (*Fortbestehensprognose*) over a period of usually 2–3 business years is negative (see Austrian Supreme Court 3 December 1986, 1 Ob 655/86 and subsequent decisions, which only serve as a guideline and not as a general rule, though).

[35] Article 69 (2), Austrian Insolvency Code (*Insolvenzordnung*, IO); see in detail on this provision Wabl (n 16), 75 *et seq*.

[36] See Section 2.1 above and further (with reference to case law) Wabl (n 16), 102 *et seq*.

[37] Article 25 (3) n2, Austrian Act on Limited Liability Corporations (*Gesetz über Gesellschaften mit beschränkter Haftung*, GmbHG); Article 84 (3) n6, Austrian Stock Corporation Act (*Aktiengesetz*, AktG).

[38] This provision is very technical in the details, but in recent case law, the Austrian Supreme Court 26 September 2017, 6 Ob 164/16k answered some until then disputed questions; see in detail Wabl (n 16), 104 *et seq*.

[39] Especially Article 156, Austrian Criminal Code (*Strafgesetzbuch*, StGB).

[40] See Wabl (n 24).

slightly negligent conduct.[41] Austrian law explicitly provides for a business judgement rule offering a safe harbour for directors if they take business decisions based on adequate information without extraneous interests being *ex ante* to the benefit of the company.[42]

As the duties are generally owed to the company, directors are also primarily liable to the company for the damage/loss caused by non-compliance (so-called *Innenhaftung*),[43] which generally also applies in the crisis and insolvency context.[44] If directors violate explicit creditor protection provisions such as the duty to file for insolvency, they can also be directly liable towards creditors (so-called *Außenhaftung*); this can be liability towards the general body of creditors (so-called *Altgläubiger*) for the so-called quota damage[45] (see Section 2.1.2. on the duties linked to insolvency) as well as towards newly contracting individual creditors (so-called *Neugläubiger*) for individual damages usually represented by their reliance loss.[46]

2.2.3 | Enforcement

Liability claims are rarely enforced outside of insolvency proceedings and if so, enforcement is usually made by the company (through its new directors). In insolvency proceedings, liability claims of the company form part of the insolvency estate meaning that the insolvency administrator is in charge to determine and if possible (and promising) to enforce liability claims in the interest of the general body of creditors.[47]

In case of insolvency related duties such as the duty to file and the prohibition of payments (see above), there may be a "competition" between the insolvency administrator and creditors in relation to liability claims against directors. Therefore, Austrian law stipulates that creditors (more precisely the above-mentioned "old creditors" jointly forming the general body of creditors) cannot enforce their claims due to a deterioration of the insolvency quota during insolvency proceedings of the company,[48] but damage claims shall rather be enforced by the insolvency administrator who shall recover the claims and at the same time ensure that the *par condicio creditorum* is respected.[49] Individual damages of so-called "new creditors" (usually the reliance loss of creditors contracting with an already insolvent debtor) are not restricted in enforcement, though (here, a competition between the administrator and individual creditors can therefore not be excluded).[50]

[41] Article 25, GmbHG; Article 84, AktG; see well established case law in Austrian Supreme Court RIS-Justiz RS0026773 and RS0049456, with one of the most recent decisions dated 25 November 2020, 6 Ob 218/20g.

[42] Article 25, paragraph 1a, GmbHG; Article 84, paragraph 1a, AktG; although these provisions have only been implemented in 2015, there is already relatively well-established case law starting with Austrian Supreme Court 23 February 2016, 6 Ob 160/15w.

[43] See well-established case law of the Austrian Supreme Court for example, dated 30 August 2016, 8 Ob 62/16z.

[44] See Wabl (n 16), 57 and 73 (with further references).

[45] See Austrian Supreme Court RS0023910.

[46] See Wabl (n 16), 102 (with further references).

[47] This is part of the duties of insolvency administrators under Articles 81 and 81a, paragraph 2, IO to administer the insolvency estate based on the objective standards of a professional expert (*Sachverständiger*) and to identify the status of the insolvency estate, including potential receivables such as liability claims.

[48] See Article 69, paragraph 5, IO.

[49] There is a dogmatic discussion on the legal basis for administrators to enforce such claims which can be left out within this article; see in detail Wabl (n 16), 103 *et seq*.

[50] ibid 104.

2.3 | Current regime in the Netherlands

2.3.1 | Duties

Directors' duties in the Netherlands are based on open norms. Directors have a general duty to manage the company with due care and to consider the interests of all stakeholders involved.[51] In the performance of their duties, directors shall be guided by the best interests of the company (*vennootschappelijk belang*) and the undertaking connected with it.[52]

Directors' duties are deliberately formulated openly and broadly, to make sure that directors do not dissuade from exercising reasonable business judgment or taking reasonable commercial risks.[53] Directors are considered to be autonomous decision makers and therefore specific duties are not formulated *ex ante*.[54] The standardisation of directors' duties is mainly established *ex post* via directors' liability case law.[55] Logically, therefore, there is no express provision in Dutch law that imposes specific duties on directors in the vicinity of insolvency. The Dutch legal framework for example does not—like the German or Austrian provisions do—provide for a duty for directors of an insolvent company to file for insolvency or to open a pre-insolvency proceeding to prevent insolvency.

It could be argued, however, that directors implicitly have an obligation to take reasonable steps to avoid insolvency as the directors should manage the company with due care and should perform their tasks in the interest of the company and the undertaking connected to it. Some authors are of the opinion that directors are obliged to adjust their course of action in the vicinity of insolvency and that directors have the obligation—because of their fiduciary position towards the company and the creditors—to take steps to rescue the company and/or to limit the damage for the creditors.[56] The obligation of directors to take the interests of the creditors into account when insolvency is approaching is broadly acknowledged and can under circumstances be enforced (see Section 2.3.2 below).[57]

2.3.2 | Liability

Dutch case law on directors' liability provides some guidance for directors on how to act in the vicinity of insolvency. The most important grounds for the enforcement of directors' duties are

[51]Article 2:129/239 (5), Dutch Civil Code (DCC) and Article 2:9, DCC; Bastiaan Assink and Wiek Slagter, *Compendium Ondernemingsrecht* (Part One) (Kluwer, 2013), 875; Peter van Schilfgaarde et al., *Van de BV en de NV* (Kluwer, 2022), 183; Dutch Supreme Court 4 April 2014, ECLI:NL:HR:2014:804, paragraph 4.2.1 (*Cancun*).

[52]Article 2:129/239 (5), DCC.

[53]Dutch Supreme Court 20 June 2008, ECLI:NL:HR:2008:BC4959, paragraph 5.3 (*Willemsen/NOM*).

[54]Assink and Slagter (n 51), 903; Dutch Supreme Court 13 July 2007, *NJ* 2007, 434 (*ABN Amro*); Dutch Supreme Court 9 July 2010 (*ASMI*).

[55]See Mieke Olaerts, *Vennootschappelijke beleidsbepaling in geval van financiële moeilijkheden: de positie van bestuurders en aandeelhouders* (Intersentia, 2007), 352; Assink and Slagter (n 51), 1003–1007.

[56]Theo Hanssen, 'De taak, verantwoordelijkheid en persoonlijke aansprakelijkheid van een bestuurder van een kapitaalvennootschap in financieel zwaar weer jegens een crediteur' (2015) 6 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 186; Assink and Slagter (n 51), 955–956; Lucas van Eeghen, *Het schemergebied vóór faillissement. Een onderzoek naar de wenselijke verdeling van verhaalsrisico's van de onderneming vóór faillissement* (Boom Juridische uitgevers, 2006), 34; Maurice Canisius and Philippe Hezer, 'Bestuurlijk ingrijpen bij onzekere toekomstige verplichtingen' (2016) 3 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 90.

[57]van Haren (n 14), 40.

directors' liability for mismanagement (Article 2:9 of the Dutch Civil Code (DCC)), liability based on tort (Article 6:162 of the DCC) and specifically in bankruptcy, directors' liability for improper management that caused the bankruptcy (Article 2:138/248 of the DCC). Liability in the context of insolvency can also be based on unlawful distributions to shareholders (Article 2:216 of the DCC) or liability for unpaid tax debts (Article 36 of the Tax Collection Act).

First, directors' liability can be based on the general duty of care that directors owe towards the company (Article 2:9 of the DCC). The board of directors is collectively liable towards the company if they do not manage the company properly and the mismanagement can be qualified as a serious reproach (*ernstig verwijt*). In an insolvency, the company is represented by the bankruptcy trustee who can file a claim based on the general duty of care on behalf of the company.

Second, directors' liability can be based on tort (Article 6:162 of the DCC, wrongful act). For directors to be held liable towards third parties, such as creditors, for a wrongful act, the director's behaviour must (again) qualify as a serious reproach (*ernstig verwijt*). Case law has distinguished two norms, which, when violated, may give rise to a serious reproach.[58] First, a director is personally liable towards a creditor when the director enters into a new obligation on behalf of the company while he knew or should have known that the company would not be able to meet that obligation in a timely manner (insufficient liquidity) and is unable to provide sufficient resources (insufficient solvency), the so-called *Beklamel*-norm.[59] Second, a director is personally liable towards a creditor when the director frustrates the payment of that creditor.[60]

Paying related creditors at the cost of other creditors in the vicinity of insolvency might be a reason to hold the director liable. Case law settled that, when a company belonging to a group of companies has decided to cease its activities and does not have sufficient funds to pay all its creditors, the company can in principle not exclusively pay the creditors belonging to its group—other than on grounds of priority recognised by law—with priority over creditors not belonging to its group. The director will only act lawfully if the preferential treatment of creditors belonging to the group can be justified on the basis of special circumstances, to be put forward by the company and to be proven in the event of a dispute.[61] Although Dutch law does not provide for a general rule that obliges directors to file for insolvency, in practice, the threat of personal liability for wrongful acts might incentivise directors to file for an insolvency proceeding, whether suspension of payment or bankruptcy.[62]

A specific form of tort liability is the so-called "*Peeters/Gatzen*-claim." Based on case law:

> the bankruptcy trustee is also authorized to represent the interests of creditors in cases where creditors are disadvantaged by the debtor. Under certain circumstances in such cases, the trustee may also assert a claim against a third party involved in the disadvantage of creditors, even though such a claim obviously did not belong to the debtor.[63]

[58]Dutch Supreme Court 8 December 2006, ECLI:NL:HR:2006:AZ0758 (*Ontvanger/Roelofsen*).
[59]Dutch Supreme Court 6 October 1989 (*Beklamel*).
[60]Dutch Supreme Court 13 August 2001 (*New Holland Belgium*).
[61]Dutch Supreme Court 12 June 1998 (*Coral/Stalt*).
[62]van Haren (n 14), 45–46.
[63]Dutch Supreme Court 14 January 1983, *NJ* 1983, 597. See also Dutch Supreme Court 8 November 1991, *NJ* 1992, 174; Dutch Supreme Court 23 December 1994, *NJ* 1996, 627; Dutch Supreme Court 23 December 1994, *NJ* 1996, 628; Dutch Supreme Court 15 September 1995, *NJ* 1996, 629.

Third, directors can be held liable towards the bankrupt estate for improper management that caused the bankruptcy (Article 2:138/248 of the DCC). This claim can only be enforced by the bankruptcy trustee. The board of directors is (jointly) liable towards the estate for the entire bankruptcy deficit when

1. the board have performed its task manifestly improperly; and
2. it is likely that the improper management is a significant cause of the bankruptcy.

The criterion of manifestly improper management is met when:

> no other reasonably acting director would have acted in the way the director acted.[64]

For the criterion of significant cause of the bankruptcy to be met, it is insufficient that the improper management has contributed to the bankruptcy in some extent, but it is not necessary that there are no other causes of the bankruptcy.[65]

The burden of proof is quite high. However, there are two statutory evidentiary presumptions to lower the burden of proof for the bankruptcy trustee.[66] If the board of directors has either violated its duty to keep a proper (financial) administration (Article 2:10 of the DCC) or the duty to file and publish its financial report timely (Article 2:394 of the DCC), it is irrefutably presumed that the board of directors has performed its duties manifestly improperly and it is (refutably) presumed that the improper management is an important cause of the bankruptcy.[67] If the two conditions are met, the directors are automatically liable for the entire bankruptcy deficit.

Due to the severity of this sanction, the court may reduce the amount for which the directors are liable if the court considers liability for the entire deficit excessive, in view of the nature and severity of the improper management, other causes of the bankruptcy of the way the bankruptcy was settled (Article 2:138/248 (4) of the DCC). The court may also reduce the amount for which an individual director is liable if that director was not in office as such for the whole period of the improper management (Article 2:138/248 (4) of the DCC).

Fourth, there are certain criminal offences (such as the preferential treatment of creditors)[68] which are not further analysed in this article.[69]

In summary, case law does provide some additional guidance for directors in the vicinity of insolvency. The following categories of insolvency related duties under Dutch law can be distinguished:

- Duty to take measures to avoid insolvency derived from the general duty of care and the duty to act in the best interest of the company (no trigger);

[64]Dutch Supreme Court 8 June 2001 (*Panmo*).

[65]Dutch Supreme Court 21 December 2018 (*Geocopter*).

[66]Article 2:138/248 lid 2, DCC.

[67]See for ways to refute the presumption that the improper management is an important cause of the bankruptcy Dutch Supreme Court 9 July 2021 (*Mobile Services*).

[68]Title XXVI, Dutch Criminal Code (*Wetboek van Strafrecht*).

[69]For more information, see Arpi Karapetian, *Bestuurdersaansprakelijkheid uit onrechtmatige daad* (Kluwer, 2019), Chapter 7.

- Prohibition to enter into a new obligation (triggered with insufficient liquidity and insufficient solvency); or
- Prohibition of preferential payment to related parties (triggered with the decision to cease the activities).

2.3.3 | Enforcement

The Dutch legal framework relies highly on the enforcement of directors' duties by the insolvency practitioner. During insolvency, the insolvency practitioner is the first to assess directors' conduct in the vicinity of insolvency. The 2017 amendment of the Dutch Bankruptcy Act obliges the insolvency practitioner to investigate the causes of a bankruptcy by reason of public interest and to investigate whether any irregularities occurred in the vicinity of insolvency (insolvency cause investigation/*oorzakenonderzoek*).[70] If the insolvency practitioner is of the opinion that irregularities occurred, he can submit a reasoned request to start a directors' liability proceeding to the supervisory judge.[71]

During bankruptcy, the insolvency practitioner has the exclusive power to enforce a liability claim for improper management of directors (based on Article 2:138/248 of the DCC or Article 2:9 of the DCC) and has the power to challenge transactions that were entered into before the commencement of the insolvency proceeding.[72] In addition, the bankruptcy trustee has the possibility to, as part of the liability proceeding or as a separate claim, ask to ban the director from acting as a director for a certain period of time ("*bestuursverbod*," director's disqualification).[73] The bankruptcy trustee is expected to report eminent cases of fraud to the competent authorities.

The bankruptcy trustee also has the option to enforce using the Peeters/Gatzen-claim on behalf of the joint creditors (Article 6:162 of the DCC). This claim, however, is not exclusive.[74] Individual creditors can also enforce their claims based on tort (see above, Section 2.3.2). This could result in a competition between the bankruptcy trustee and the individual creditors. Hence, according to Dutch case law, ensuring the appropriate resolution of a bankruptcy may involve prioritizing the trustee's claim followed by that of the individual creditor.[75]

In the next section, we will describe the two empirical studies conducted in Austria and the Netherlands. We will start with explaining the methodology (Section 3.1), followed by the results of the empirical studies (Section 3.2). In Section 3.3, we will compare the relevant findings.

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[70]Article 68, Dutch Bankruptcy Code (DBC).

[71]INSOLAD, *Best practice rules for insolvency practitioners* (2019), Chapter 5.1. <https://www.insolad.nl/regelgeving/praktijkregels/>; 'Recofa-guidelines for bankruptcies and suspensions of payments' (2021), 8 <https://www.rechtspraak.nl/SiteCollectionDocuments/recofa-richtlijnen-voor-faillissementen-en-surseances-van-betaling-2021.pdf> (Accessed: 28 March 2024); Article 64, DBC.

[72]Article 42 and 47, DBC.

[73]Het Staatsblad van het Koninkrijk der Nederlanden (2016), 205.

[74]Dutch Supreme Court 21 December 2001, *NJ* 2005, 95 (*Lunderstädt/De Kok*); Dutch Supreme Court 21 december 2001, *NJ* 2005, 96 (*Sobi/Hurks II*).

[75]Dutch Supreme Court 21 December 2001, *NJ* 2005, 95 (*Lunderstädt/De Kok*).

3 | EMPIRICAL STUDIES ON DIRECTORS' DUTIES IN THE INSOLVENCY CONTEXT

3.1 | Methodology

3.1.1 | Austria[76]

General

As mentioned in the beginning, a survey was conducted involving Austrian insolvency administrators. The goal of the survey was to get more clarity on the actions of directors of Austrian companies in the crisis and insolvency context and to identify whether the existing Austrian regime on directors' duties (at the time before the Austrian implementation of PRD 2019) was actually fit for practice.

Against this background, a seven-page long questionnaire was prepared and circulated to all insolvency administrators (*Insolvenzverwalter*) listed in the publicly available list of administrators (*Insolvenzverwalterliste*)[77] (cut-off date 4 February 2019) registered in Vienna or Austria.[78] On the cut-off date, 792 insolvency administrators were on that list and therefore formed the population.

The questionnaire was sent out by e-mail on 3 March 2019 and a reminder was sent out by e-mail on 2 April 2019. In total, 107 insolvency administrators from all 9 Austrian states participated in the survey representing a response rate of 13.51% (Figure 1).[79,80]

Insolvency administrators were selected as respondents as Austrian insolvency law requires them to investigate on the pre-insolvency decision-making and acting of the involved directors within their own duties (as already described in Section 2.2 above). The assumption was therefore that administrators should be the best source of knowledge in this context.

Questions

The questionnaire included 13 quantitative questions and 6 rather qualitative questions (on the latter also asking the respondents on their personal assessment and opinion). Where the questions were supplemented by given answer options, such answer options were prepared based on the sources analysed in the course of the research and related practical experience.

Starting point of the questionnaire were two research theses relating to the purpose of crisis related duties of directors inspired by two goals expressed by UNCITRAL (highlighting added by the authors):[81]

[76]A short summary of the methodology has been included in Wabl (n 24), 209 *et seq*. The full survey has been published in German in Wabl (n 16), 120 *et seq*. The results are part of the dissertation of one of the authors.

[77]See: <www.iv.justiz.gv.at>.

[78]The differentiation is explained through the public list of insolvency administrators where administrators can be registered for specific states but also for whole Austria. The survey included administrators registered in Vienna and in whole Austria, but not administrators only registered in other states than Vienna.

[79]In the response rate it must be taken into account that the list of insolvency administrators was not entirely up to date anymore as (i) after the first e-mail, more than 70 delivery errors were received, some of the administrators were listed twice and some of them were already retired. Further, nine persons on the list answered the e-mail but stated that they actually do not act as insolvency administrators anymore and therefore cannot give any relevant responses.

[80]Figure 1 has been published in Wabl (n 24), 210 *et seq*. KSV is the Austrian Public Creditor Protection Association also collecting data on insolvency proceedings.

[81]UNCITRAL Legislative Guide (n 9), 1; Wabl (n 16), 122.

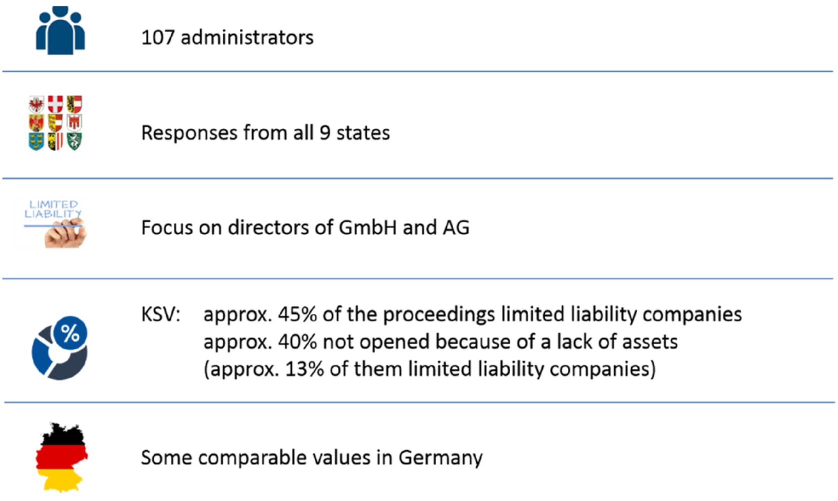

FIGURE 1 Overview of the methodology (AT). *Source:* Authors' own data.

> *The aim of imposing such obligations, which are enforceable once insolvency proceedings commence, is to* ***protect the legitimate interests of creditors and other stakeholders*** *and to* ***provide incentives for timely action to minimize the effects of financial distress experienced by the enterprise****.*

Research thesis 1 (summarised): Directors' duties in the crisis context shall lead to timelier action of directors in order to preserve values and prevent assetless insolvency estates and/or low recovery rates. At the same time, duties shall not be too strict in order to leave directors enough room to manoeuvre despite liability risks.

Research thesis 2 (summarised): Directors' duties in the crisis context shall protect legitimate interests of those being particularly at risk, particularly creditors and other stakeholders. Duties and related liability shall therefore have a certain deterrent effect. If directors are still non-compliant, insolvency administrators should be in the position to enforce liability claims and recover damages caused by non-compliant directors.

The questionnaire consisted of four parts with the following topics:

> Part 1: Taking stock on breaches of duties within the last year before the opening of insolvency proceedings;
> Part 2: Duties of directors in order to ensure timely action;
> Part 3: Duties of directors in order to protect legitimate interests; and
> Part 4: Considerations on the implementation of Article 19 of the PRD 2019.

In the course of processing the data, a further Part 5 was added summarising individual comments of respondents.

Limitations

The survey was part of a PhD thesis applying traditional methodology of legal academic research; the survey itself followed basic principles of empirical research to the extent necessary and within the limitations of the overall research. Also, the questions therefore only focused on legal aspects relevant for the research (general aspects usually collected in empirical surveys such as location, average age or sex of the respondents were therefore not collected). If respondents did not answer all questions, this was taken into account in the calculations when evaluating the data.

As the results can obviously only give information on insolvency proceedings already initiated (only in such, insolvency administrators are appointed), in some parts of the survey such as particularly the percentage of identified breaches of duties may in reality be higher. Insolvencies not even initiated due to a lack of cost covering assets are therefore not represented in the results.[82] Generally it may be assumed that in insolvency proceedings not even initiated due to a lack of cost covering assets, in more or less all cases breaches of duties occur.[83]

3.1.2 | The Netherlands

The empirical studies conducted in the Netherlands were part of a research project on the role of the bankruptcy trustee in dealing with irregularities before and during bankruptcies.[84] The aim of the study was to identify the challenges hindering bankruptcy trustees in addressing irregularities and to propose recommendations that would better support and enable trustees in combating such irregularities. The research project consisted of three empirical studies, namely,

1. an interview study amongst bankruptcy trustees;
2. a document analysis of bankruptcy reports; and
3. a survey amongst bankruptcy trustees.

In the context of this article, only the document analysis and the survey are relevant and will be elaborated upon in the following sections.

Document analysis

The main goal of the document analysis was to get insight on the number of irregularities that occurred in bankruptcies and to find out to what extent they are enforced by the bankruptcy trustees. In order to get insight into these numbers, 2,134 Dutch bankruptcy reports were investigated. Bankruptcy reports are drawn up periodically (in general, every 3 months) by the bankruptcy trustee in every bankruptcy and in recent years have been freely accessible via the online Central Insolvency Register (CIR), which contains information on every bankruptcy in the Netherlands.[85] For this research, a sample[86] was used consisting of reports of bankruptcies

[82]In 2018, the year before the survey was conducted, the publicly available Austrian insolvency statistics show that around 40% of all company insolvencies were not opened due to a lack of cost covering assets ("only" around 13% of those refer to GmbH or AG, though). The statistics are available at: <www.ksv.at/insolvenzentwicklung/insolvenzstatistik-2018-final> (Accessed: 28 March 2024).

[83]With reference to comparable German sources, see Wabl (n 16), 122 *et seq*.

[84]The research was part of the dissertation of one of the authors, see Jessie Pool, 'De rol van de curator bij de aanpak van onregelmatigheden: een empirisch-juridisch onderzoek naar de rol van de curator in de praktijk bij de aanpak van onregelmatigheden voor en tijdens faillissement' (Issue MI-392) (Meijer, 2022).

[85]The Dutch Insolvency Register is available at: <https://insolventies.rechtspraak.nl/#!/> (Accessed: 28 March 2024).

[86]The CIR does not have a search function with which closed bankruptcies can be filtered. Moreover, bankruptcy reports in the CIR are only accessible for a maximum of six months after the bankruptcy has ended, which means that it is not possible to obtain a large dataset of bankruptcies that were completed some time ago. Therefore, it was not possible to manually compile the dataset.

that ended between April 2018 and December 2018. This start date was chosen because a standardised bankruptcy report was used in almost all bankruptcies from April 2018, making the bankruptcy reports easily searchable and comparable. The end date is based on practical considerations, including the time it took to manually code the bankruptcy reports.

To analyse the data, the reports were converted into numerical data by examining the standardised paragraphs in the bankruptcy reports in which the bankruptcy trustee describes the cause of the bankruptcy and accounts for the insolvency cause investigation (section 1.7 and section 7 of the reports). The content of these two paragraphs has been coded to provide an overview of the identified types of irregularities and the enforcement actions initiated by the trustee. Because bankruptcy trustees usually mention in the bankruptcy reports when there is a lack of redress possibilities, it was possible to gain insight into this additional factor that influence the bankruptcy trustee's decision to redress. The data were analysed using bivariate analysis, which examines the relationship between two variables and regression analysis, which aims to model the relationship between one dependent variable (the outcome or response variable) and one or more independent variables (prediction variables).

Survey study

In addition to the document analysis, to investigate how often bankruptcy trustees enforce irregularities and what factors[87] impede them by doing so, a survey study was conducted amongst Dutch bankruptcy trustees. It is unclear how large the total population of bankruptcy trustees is, because there is no public list with an overview of all bankruptcy trustees. In order to make such an overview, a list with Dutch bankruptcy trustees was manually compiled.[88] Based on that list, the expectation is that around 511 bankruptcy trustees were active in The Netherlands during the research period (beginning of 2022). The bankruptcy trustees were approached in various ways. First, the bankruptcy trustees were approached by e-mail and via messages on public websites such as LinkedIn. Second, the bankruptcy trustees have been made aware of the survey via newsletters of various professional associations (INSOLAD, the Dutch insolvency practitioners' association and JIRA, the junior insolvency practitioners' association).

A total number of 197 respondents completed the survey. Responses from respondents that indicated that they did not act as bankruptcy practitioner and responses with many missing values were excluded from the sample. The final sample consists of 177 Dutch bankruptcy trustees and 139 respondents completed the full survey ($N = 511$). This means that over 27% of the total population completed the entire survey.

The respondents were between 25 and 71 years old, with an average age of 46 years. Most of the respondents were male ($n = 153$), a smaller proportion were female ($n = 37$) or non-binary ($n = 1$). Six respondents did not answer the question about their gender. The respondents had an average of 20 years of experience as a lawyer (varying between 1 and 44 years [$SD = 10.8$]) and 17 years of experience as a trustee (varying between 0 and 43 years [$SD = 11.2$]). The majority (79%) of the respondents are members of INSOLAD ($n = 156$). Table 1 provides an overview of the district(s) in which the respondents are appointed as bankruptcy trustees, the

[87]These factors resulted from a Grounded Theory Study on interviews with 33 Dutch insolvency practitioners, for which see Pool (n 84), Chapter 4.

[88]To compile the list, the website <curatoren.nl> (Accessed: 28 March 2024) and websites of Dutch law firms were used.

TABLE 1 Characteristics of the respondents (NL).

District	Size of the office	Kind of bankruptcies ("benoemingslijst")
Amsterdam ($n = 55$)	1 lawyer ($n = 6$)	Natural persons ($n = 39$)
Den Haag ($n = 49$)	2–5 lawyers ($n = 24$)	Small companies ($n = 54$)
Gelderland ($n = 30$)	6–20 lawyers ($n = 84$)	Medium-sized companies ($n = 78$)
Limburg ($n = 12$)	21–50 lawyers ($n = 42$)	Big or complex bankruptcies ($n = 47$)
Midden-Nederland ($n = 42$)	51–100 lawyers ($n = 25$)	Other ($n = 23$)
Noord-Holland ($n = 24$)	101 or more lawyers ($n = 16$)	I do not know ($n = 37$)
Noord-Nederland ($n = 22$)		
Oost-Brabant ($n = 17$)		
Overijssel ($n = 24$)		
Rotterdam ($n = 35$)		
Zeeland-West-Brabant ($n = 17$)		

Source: Authors' own data.

size of the office where the respondents work and the kind of bankruptcies that are usually assigned to them.

The respondents are in charge of a varying number of bankruptcies. For example, at the time of completing the survey, the respondents were actively involved as trustees in between 0 and 100 bankruptcies, with an average of 11 bankruptcies ($SD = 10.9$). The respondents indicated that (on average) they handle between 0 and 30 bankruptcies per year, with an average of 7 ($SD = 4.7$). The type of bankruptcy that the respondents usually deal with is also different. The most common types of bankruptcies discussed by the respondents are retail ($n = 99$), hospitality ($n = 91$), industry ($n = 89$), construction ($n = 81$) and services ($n = 74$). A number of the respondents indicated that they were sometimes named in fraudulent bankruptcies ($n = 88$).

The survey consisted of seven parts covering the following topics:

1. Introduction and general questions;
2. Number and the nature of the settled bankruptcies by the bankruptcy trustee;
3. Task of the bankruptcy trustee;
4. Insolvency cause investigation;
5. Irregularities in bankruptcies;
6. Enforcement of irregularities in bankruptcies;
7. Relationship with the supervisory judge; and
8. Financial situation of the (office of the) bankruptcy trustee.

The survey combined questions on a five-point Likert scale (completely agree—completely disagree) with questions on how often bankruptcy trustees experience something, such as how often they encountered irregularities in bankruptcies. The data were analysed using bivariate and regression analyses.

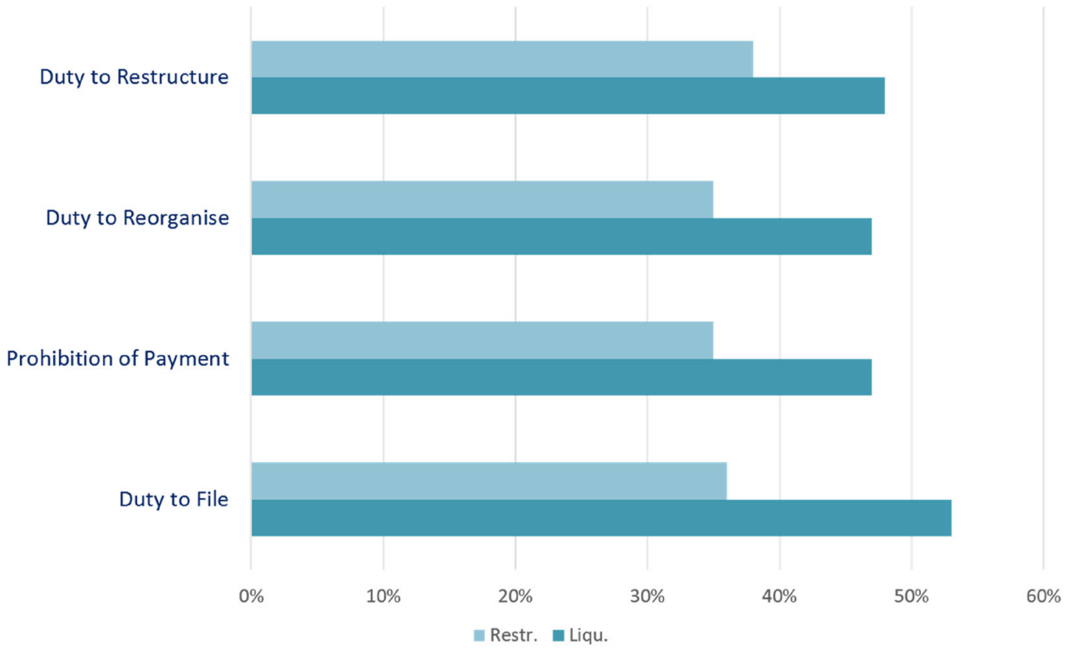

FIGURE 2 Breaches of crisis related duties (AT). *Source:* Authors' own data.

3.2 | Results

3.2.1 | Austria[89]

How often are breaches of duty identified in bankruptcy proceedings?

In order to take stock on breaches of duties within the last year before the opening of insolvency proceedings, administrators were asked in how many of "their" insolvency proceedings, breaches of crisis related duties (on the existing duties, see Section 2.2 above) occur. Answers were split into bankruptcy proceedings (*Konkursverfahren*) and restructuring proceedings (*Sanierungsverfahren*), being the two types of insolvency proceedings available for companies under the Austrian Insolvency Code.

As Figure 2[90] shows, the respondents identify very similar percentages of breaches in all categories, leading to breaches in around every second liquidation and in around every third restructuring proceeding.

The data mainly show that there is no significant difference between duties explicitly stipulated by law such as the duty to file and the prohibition of payments and a "duty to restructure" which is usually triggered much earlier and which was at the relevant time[91] "only" derived from the general duty of care by case law and literature.[92] This might indicate that it may not really make a difference whether a duty is explicit or implicit which could potentially mean that

[89]The results have been published with full details in Wabl (n 16), 131 *et seq*. Part of the results, including the graphics also used in this article, have also been published in Wabl (n 24), 210.

[90]Figure 2 has been published in Wabl (n 24), 211; Wabl (n 16), 134.

[91]In the meantime, this duty is explicitly implemented in Article 1 (3), ReO (implementing Article 19, PRD 2019).

[92]See Wabl (n 24), 210.

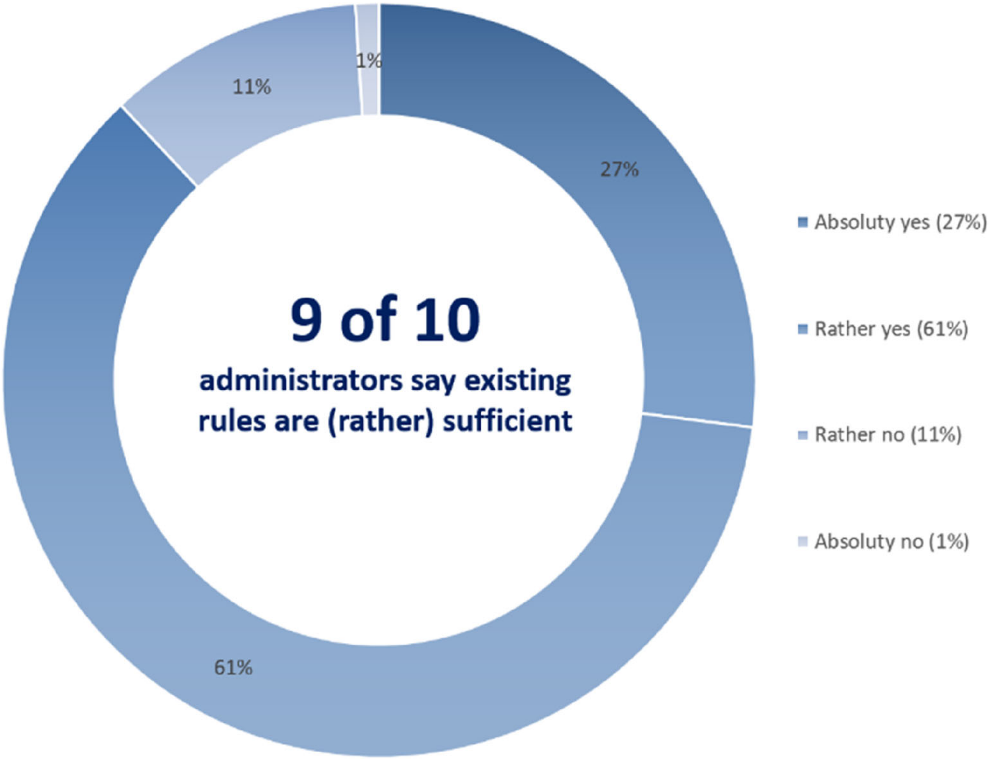

FIGURE 3 Are existing rules sufficient in order to enforce claims? (AT). *Source:* Authors' own data.

also a "stick" through an explicit duty to file may not bring significant improvements when trying to achieve timely action.[93] Further, the result that in restructuring proceedings, significantly fewer breaches occur, might indicate that the "carrot" of a well-functioning restructuring tool may work.[94]

How often are identified breaches enforced?

As can be seen in Figure 3, around 9 out of 10 respondents considered the at that time existing rules on directors' duties (rather) sufficient in order to enforce claims against non-compliant directors and recover damages caused by them.[95]

Still, as shown in Figure 4, according to the respondents, more than every third liability claim is not enforced in liquidation as well as in restructuring proceedings.[96]

Although legally, there are arguably sufficient instruments to identify and enforce liability claims against directors, there is a significant lack of enforcement caused by other circumstances.[97]

[93]See Wabl (n 13), paragraph 4.a; Wabl (n 16), 134, 144 *et seq*.

[94]See Wabl (n 13), paragraph 4.a.; Wabl (n 24), 210. A possible hindsight bias affecting those results cannot be excluded, for which see also Wabl (n 16), 135 (n 930).

[95]Figure 3 has been published in Wabl (n 24), 212; Wabl (n 16), 141 *et seq*.

[96]Figure 4 has been published in Wabl (n 24), 212; Wabl (above n 16), 143 *et seq*.

[97]See Wabl (n 24), 213; Wabl (n 16), 143 *et seq*.

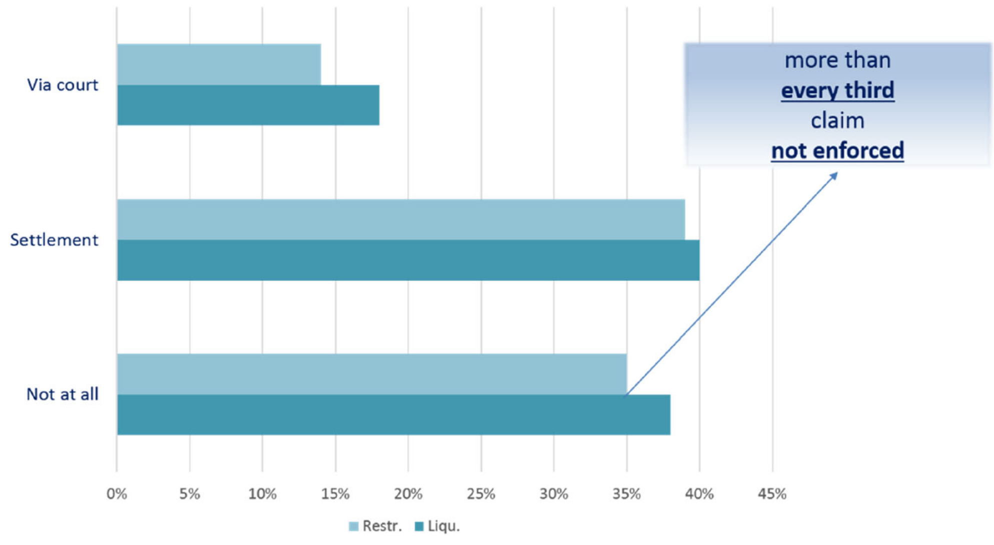

FIGURE 4 How often are liability claims enforced? (AT). *Source:* Authors' own data.

Why are breaches not enforced?

Figure 5 may give an answer to the above-identified lack of enforcement of liability claims. According to 95% of the respondents, the main reason for not enforcing liability claims is the non-collectability of such claims. This indicates relatively clearly that in many cases, the company's insolvency apparently also leads to financial difficulties or insolvency of directors.[98]

Having in mind the Article 19 of the PRD 2019 requirement that directors have due regard to the interests of creditors, shareholders and other stakeholders, the respondents were asked for their opinion on in whose interest directors actually act in crisis situations. As shown in Figure 6, more than 9 out of 10 administrators answered that directors act in their "own" interests, whereby in the question especially personal liability due to sureties or granted security was mentioned in order to describe the directors' situation.[99]

Although the Austrian regime on directors' duties provides for tools legally sufficient to enforce claims and recover damages against directors, there is a significant lack of enforcement. The actual effectiveness of the Austrian regime therefore seems to be impaired by factual difficulties arising from the financial situation of the directors and other factual implications such as a lack of facts or lack of time. What all of those factual difficulties have in common is that they have nothing to do with directors' duties as such.[100]

3.2.2 | Netherlands

How often are breaches of duty identified in bankruptcy proceedings?

To get insight into the number of identified irregularities in bankruptcy trustees, a document analysis was combined with a survey study. Both the survey study and the document analysis show that irregularities occur in almost half of the bankruptcies (Figure 7).

[98]Figure 5 has been published in Wabl (n 24), 213; Wabl (n 16), 143 et seq.

[99]Figure 6 has been published in Wabl (n 24), 213; Wabl (n 16), 143 et seq.

[100]See Wabl (n 24), 213 *et seq*.; Wabl (n 16), 143 *et seq*.

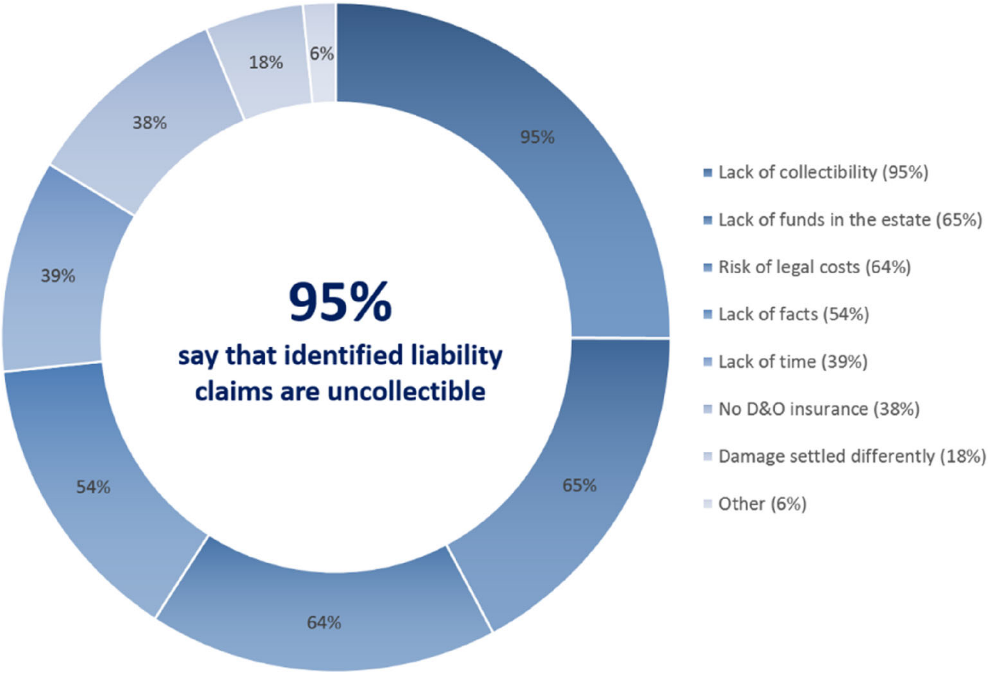

FIGURE 5 Why are liability claims not enforced? (AT). *Source:* Authors' own data.

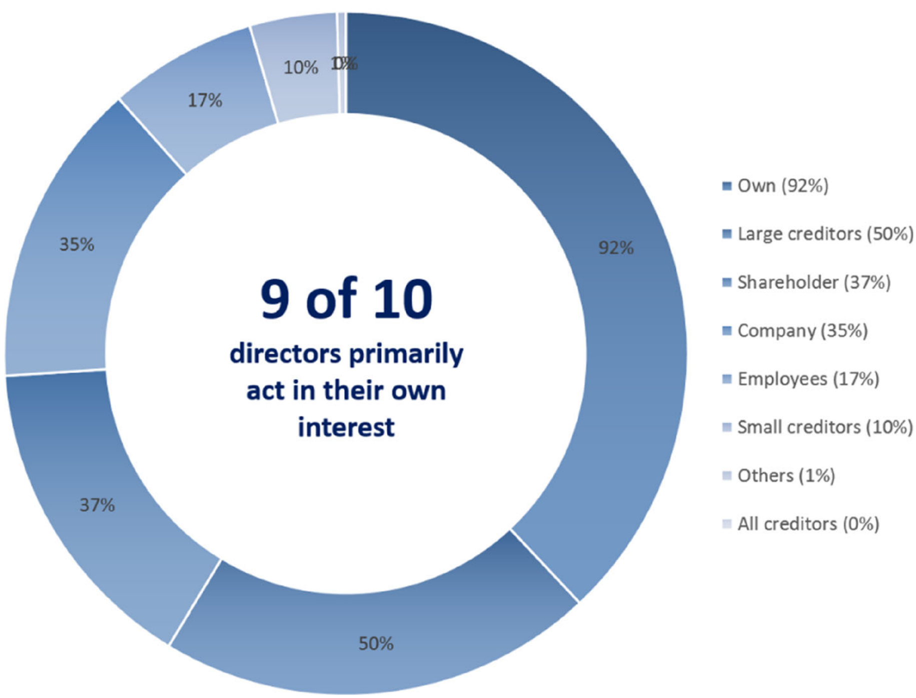

FIGURE 6 In whose interest do directors act in crisis situations? (AT). *Source:* Authors' own data.

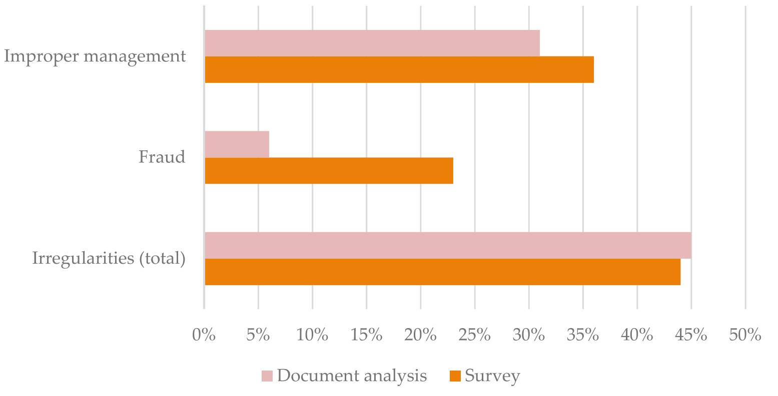

FIGURE 7 Breaches of directors' duties in the vicinity of insolvency (NL). *Source:* Authors' own data.

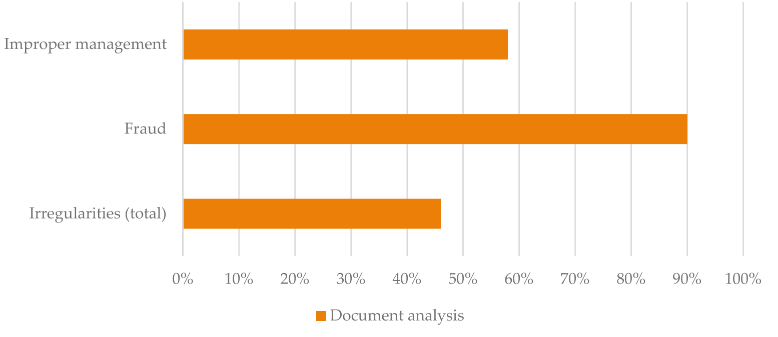

FIGURE 8 How often are claims enforced by the bankruptcy trustee? (NL). *Source:* Authors' own data.

The results of the document analysis and the survey study seem to be comparable, except for the results related to fraud. The discrepancy between the results may arise due to the reluctance of the bankruptcy trustee to explicitly mention fraud in the bankruptcy report if they choose not to take action regarding the matter.[101]

How (often) are identified breaches enforced?

Figure 8 gives insight into the number of breaches that were enforced by the bankruptcy trustee. The results of the document analysis show that around 46% of breaches are enforced.

That means that more than half of the irregularities that bankruptcy trustees identify remain unsanctioned. Identified fraud, however, is almost always sanctioned according to the information in the bankruptcy reports. By interpreting this result, it is nevertheless important to keep in mind that the bankruptcy trustee might not explicitly mention fraud in the bankruptcy report if they choose not to enforce.

The Dutch legal framework offers bankruptcy trustees several enforcement options (see Section 2.3.3). Figure 9 shows how trustees enforce in bankruptcy proceedings.

[101]This finding is in line with the INSOLAD Best Practice Rules (n 71), paragraph 5.3., which states that the bankruptcy trustee should exercise care and restraint when making public statements regarding whether or not there are irregularities.

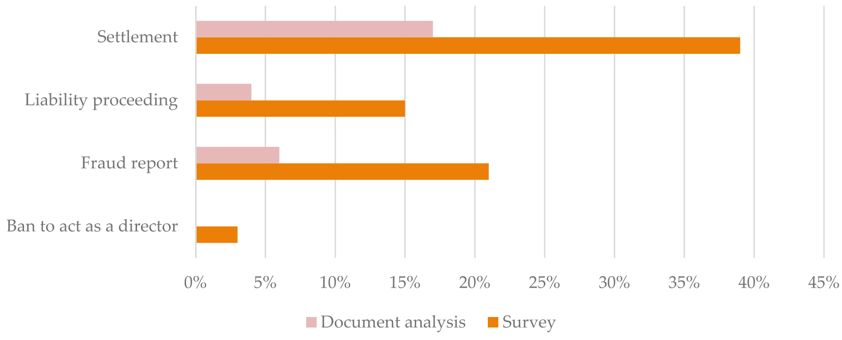

FIGURE 9 Enforcement options (NL). *Source:* Authors' own data.

Both the results of the document analysis and the survey show that bankruptcy trustees are more likely to choose a settlement over a liability proceeding, mainly because a settlement usually offers a faster and more cost-effective solution compared with lengthy litigation.[102] The option to enforce a claim based on the possibility to ban the director from acting as a director (director disqualification/*bestuursverbod*) does not seem to be a very popular option for bankruptcy trustees.

Why are breaches not enforced?

There are various reasons why bankruptcy trustees do not enforce breaches of directors' duties. It appears that the willingness of trustees to enforce is influenced by

1. the financial situation in the specific bankruptcy;
2. the personal characteristics of the bankruptcy trustee; and
3. the opinion of the court supervising the settlement of the bankruptcy.[103]

The financial situation in a specific bankruptcy: The trustee assesses per bankruptcy whether it is opportune to enforce breaches. Although trustees have the statutory duty to deal with irregularities and often are willing to investigate whether there have been irregularities, they are sometimes limited by the—limited and sometimes missing—resources available in the bankruptcy estate. After all, unless the trustee finances or pre-finances the investigation, no (extensive) investigation can be carried out without resources into possible irregularities, which reduces the chance that irregularities will be detected. Moreover, without resources it can be difficult for trustees to take action against irregularities that have been detected, because money must be spent for those actions. The financial condition of the estate in a specific bankruptcy is therefore a relevant factor, which has an obstructive effect in the absence of (sufficient) resources.

The personal characteristics of the bankruptcy trustee: Each bankruptcy trustee appears to have its own view on how and under which circumstances he should redress irregularities. I have discovered four regularly recurring characteristics of trustees that influence the willingness of trustees to deal with irregularities.

[102]See Pool (n 84), paragraph 4.4.5.
[103]ibid Chapter 4, where these categories are based on an extensive Grounded Theory interview study.

The first characteristic is the financial situation of the trustee as an entrepreneur. It appears that compensation is not always available for all activities that the trustees perform in bankruptcies: an average of 30% of the hours worked must be written off by the trustees. This means that trustees in bankruptcy regularly receive not enough or even no remuneration for the work they perform. The trustee and his office bear the risk of these write-offs. For this reason, trustees in bankruptcy must allocate their time efficiently over the activities in bankruptcies and must always assess whether a certain time investment—given the chance of being reimbursed for that time—is desirable.

The second characteristic is the trustee's perception of his duties. Tackling irregularities has been a statutory duty of the trustee in bankruptcy since 2017. Before that time there was an implicit duty to tackle irregularities. However, not every trustee seems to agree with this task, especially not when it competes with the size of the dividend pay-out to the creditors. Only 58% of the participants in the survey study agreed with the statement that tackling irregularities is their duty. Job perception appears to be related to the willingness to deal with irregularities. If the trustee is, on the one hand, of the opinion that fraud prevention is expressly part of his task, he is more willing to deal with irregularities. If, on the other hand, he does not see fraud prevention as a specific part of his task, then that willingness decreases accordingly.

The third characteristic related to the willingness of trustees to deal with irregularities relates to their perception of the tools available to them to effectively deal with irregularities. Only 54% of the participants of the survey study agreed with the statement that they have enough tools to tackle irregularities.

The fourth and final factor is the trustee's experience with reporting fraud. Many trustees indicated that they are discouraged by the fact that nothing or not enough is done with their fraud reports by the competent authorities. They see the inadequate follow-up of their fraud report as a major discouraging obstacle in tackling irregularities, considering only 17% of the trustees agree with the statement that something valuable happens with their reports.

The opinion of the court supervising the settlement of the bankruptcy: When a bankruptcy is declared, an insolvency judge of the district court appoints one or more trustees (Article 14 of the DBC). One of the (fellow) insolvency judges is appointed as supervisory judge and is charged with supervising the settlement of the bankruptcy (Article 64 of the DBC). The court and its supervisory judges also play an important role in dealing with irregularities. After all, the trustee must inform the supervisory judge confidentially about the cause investigation. Moreover, the supervisory judge co-determines whether irregularities will be reported—he can even compel the trustee to do so—and the supervisory judge must give permission for directors' liability proceedings.

It is not surprising that the court's view of the approach to irregularities appears to play a role in the willingness of the trustees to deal with irregularities. The trustees in bankruptcy are more willing to deal with irregularities if they think that the court and/or the supervisory judge consider(s) this approach important. Moreover, the court seems to have a direct influence not only on the willingness of the trustees to deal with irregularities, but also on the perception of the duties of the trustees and thus indirectly, on the willingness of the trustees to deal with irregularities. If the trustee thinks that the court considers tackling irregularities important, the trustee mirrors this and is more likely to believe that tackling irregularities falls within his task; and vice-versa. This means that the court can be an important stimulus in tackling irregularities.

In the survey, bankruptcy trustees were asked to rank the above-mentioned (practical) limitations for enforcement based on its level of importance in influencing their decision-making

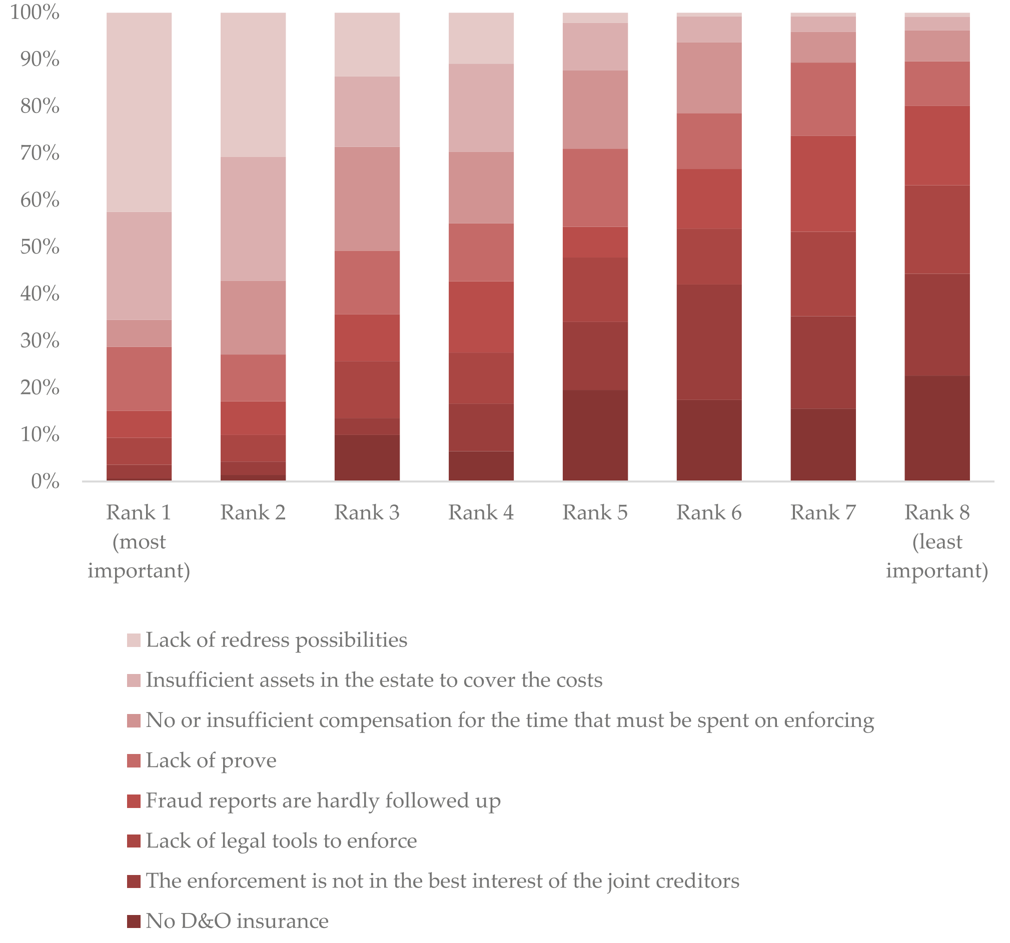

FIGURE 10 Limitations to enforcement (NL). *Source:* Authors' own data.

process and ability to take enforcement actions. The results of this ranking exercise are visualised in Figure 10.

Clearly, financial factors seem to be the main reason why breaches are not enforced. Other limitations, such as a lack of proof or the absence of D&O insurance seem to be significantly less important. The regulatory framework on directors' duties does not seem to be the (main) issue in why breaches are not enforced.

3.3 | Comparison

Despite the differences in Austrian and Dutch law provisions on directors' duties in the insolvency context, our empirical research revealed a surprising similarity in the amount of both identified and enforced breaches of duties by the bankruptcy trustees. In both Austria and the Netherlands, breaches of duties are identified in around every second bankruptcy.

The identification of breaches in such a significant proportion of bankruptcies raises questions about the effectiveness of the regulatory framework on directors' duties in the insolvency context as one of the purposes of those duties is to encourage directors to act in compliance with the existing duties (see above Section 2.1). The number of breaches that are not enforced adds further weight to the questions about effectiveness of the regulatory framework in both Austria and the Netherlands. In Austria, the results indicate that more than every third identified breach is not enforced, whereas in the Netherlands the number is even higher with almost half of the identified breaches not being enforced.[104]

At the same time, the findings indicate that in both countries, the root for the above results might not be the quality of, or loopholes in the liability regime as such, but rather lie somewhere else. In fact, the findings suggest that despite the divergent regulatory approaches to insolvency related directors' duties, bankruptcy trustees appear to face similar challenges in enforcing such directors' duties. Our research shows that the limitations to enforcement are not primarily related to the liability regime itself, but rather stem from financial constraints on the side of the directors or within the bankruptcy estate. By far the most important factors hindering bankruptcy trustees from enforcing liability claims are:

1. the lack of collectability: if directors are not able to provide recourse, starting complex legal proceedings may cause more costs for the creditors than benefit; and
2. the lack of funds in the bankruptcy estate to cover the costs of the trustee, the enforcement or even the bankruptcy proceedings as such.

Those are issues which cannot be resolved by different or stricter liability provisions but should in our view rather—as will be shown in the next section—be tackled at their roots.

4 | IMPLICATIONS: A NEW PERSPECTIVE ON THE PURPOSE OF DIRECTORS' DUTIES IN THE INSOLVENCY CONTEXT?[105]

Coming back to the purpose usually associated with directors' duties in the insolvency context described in Section 2 above, the results of the empirical research may indicate that a new perspective is necessary in order to achieve the desired goals.

4.1 | Achieving timelier action

Whether provisions on directors' duties lead to timelier action cannot be clearly answered based on the performed research. Still, the results indicate that insolvency related directors' duties as such may not suffice (see below under 4.2). The Austrian results seem to suggest that "carrots" like functioning restructuring tools can lead to fewer breaches of duty, implying that directors tend to act timelier *because* such restructuring tools are available. Additional research is required, however, to investigate how to encourage directors to act in time (besides the

[104]Given that the numbers in Austria do not reflect insolvency proceedings which are not initiated in the first place due to a lack of cost covering assets – a concept which does not exists in the Netherlands – the actual number of unenforced beaches may be very similar.

[105]For a similar analysis focusing on the Austrian and EU context, see Wabl (n 13), paragraph 4 (with further references).

described "carrot," e.g., also whether more enforcement of directors' duties [the "stick"]—see further in the coming sections—may lead to timelier action).

4.2 | Avoiding breaches of duty

The results from both jurisdictions suggest that more or stricter provisions on insolvency related directors' duties might not necessarily lead to more compliance. Although Austrian law provides arguably stricter and definitely more explicit duties for directors (especially an explicit duty to file for insolvency, while Dutch law, for example, may arguably only provide for an implicit duty to file), the numbers of breaches identified by trustees/administrators in both countries are broadly comparable. One might therefore argue that "sticks" such as explicit liability provisions may also not suffice for encouraging directors to comply with existing rules (see further in the coming sections).

4.3 | Avoiding damages for creditors (especially due to a lower recovery rate)

When comparing the two jurisdictions it can be observed that both regimes aim to protect the general body of creditors as well as individual creditors. While there are technical differences on the trigger point (definition of "actual insolvency"), the damage calculation (especially quota damage vs. bankruptcy deficit) as well as the question on who can enforce liability claims (company, trustee or also creditors themselves), it seems fair to say that in both countries, the liability provisions should in theory be sufficient to compensate damages caused to the company and to creditors. The results show that in practice, however, breaches of duties are not consistently enforced (see next section).

4.4 | Protecting the equal treatment of creditors

Equal treatment of creditors in the context of directors' duties (despite other measures such as avoidance or clawback provisions) usually means that directors are liable if they cause damage to the general body of creditors by treating individual creditors preferentially. This usually has two implications.

First, if an obligation towards an individual creditor is paid by the company, this is usually balance sheet neutral and does therefore not lead to a loss for the company but it usually lowers the recovery fund and therefore the quota expectations of creditors. An efficient liability regime must in our eyes provide tools to recover such damage which is in Austria ensured through the enforcement of the quota damage by the insolvency administrator and in the Netherlands through the enforcement of the damage for causing the bankruptcy by the bankruptcy trustee claiming the bankruptcy deficit or the damage caused by the directors, or by enforcement by individual creditors.

Second, it should be ensured that damage caused to the collective creditors is also actually compensated to the benefit of the collective creditors. In both countries, this is—technically different but with similar results—ensured through the channelling of liability claims through the insolvency estate which is in Austria supported by a provision restricting creditors from enforcing their claims due to a deterioration of the insolvency quota during insolvency proceedings of the company (individual enforcement actions of creditors with damages going beyond the quota deterioration can still impair the principle of equal treatment). Similar to the previous section, however, the results of the studies show that the issue may not necessarily stem from the theoretical possibilities to safeguard equal treatment, but rather from the practical challenges in enforcing such breaches.

4.5 | Achieving actual creditor compensation

The results show that, despite the fact that both liability regimes in a large number of bankruptcies lead to identified breaches of duty, a large number of liability claims is not enforced. This is in both countries mainly owed to twofold financial implications. *First*, liability claims are often not collectible due to financial difficulties or private insolvency of the directors. *Second*, there are not enough funds in the estate to enforce liability claims. These problems are inherently rooted in financial constraints and cannot be resolved solely by implementing even the most sophisticated and comprehensive liability regimes. Instead, they require addressing their underlying causes, which may particularly lie in the stronger entanglement of company and private insolvency procedures and in the funding of insolvency proceedings.

4.6 | Summary

The findings presented above underscore the need for a more nuanced perspective when evaluating the feasibility of the goals of directors' duties in the insolvency context. While the general importance of such duties is widely acknowledged throughout Europe, it seems questionable whether provisions such as a "duty to file" can be the most effective tool to achieve improvements and modernisation of national regimes on directors' duties.

When identifying weaknesses and loopholes in insolvency frameworks, the initial reaction often tends to be to call for more stringent and clear duties of directors. However, upon closer examination of the feasibility of the goals of those stringent provisions, it becomes evident that, in many instances, improvements may only be achieved by (also) addressing problems elsewhere, as exemplified by the challenges related to enforcement of duties.

The attempt to resolve practical issues, which could be addressed more effectively at their roots, by imposing stricter rules on directors may not only be ineffective but could even be counterproductive as it may deter or distract directors from their actual duties.[106] Before stricter rules on directors are implemented, it should therefore in our eyes be first assessed which purposes can effectively be served by such implementation.

5 | CONCLUSION

Since the adoption of the PRD 2019, discussions on directors' duties in the insolvency context have remained a constant topic of debate on both European and national levels. With the inclusion of a duty to file for insolvency in the Proposal, those discussions can be expected to

[106]See Wabl (n 13), paragraph 6.

continue. Empirical legal research conducted in Austria and the Netherlands suggests that harmonisation efforts may be more effective if they specifically target identified issues and gaps in national legal frameworks. Attempting to transplant general legal concepts like a duty to file into legal frameworks where they may not align naturally may not be effective if they do not address problems elsewhere, as exemplified by the challenges related to enforcement of duties in this article.

In both the national and European contexts, we believe that it is recommendable to focus on a result-oriented policymaking by identifying the actual objectives that policymaking aims to achieve in the context of insolvency related directors' duties and by exploring the most effective approaches to achieve those objectives. The results of our research show that for directors' duties, more stringent or explicit norms might not necessarily be the most effective approach.

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