Recent changes in directors' liability under Belgian law

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This article aims to provide an overview of recent changes in Belgian company and insolvency laws with regard to the provisions on directors' liability. The focus is on the new provision on wrongful trading in Belgian insolvency law and the differences with the English law concept of wrongful trading.

Introduction

As businesses are conducted increasingly in internationalised contexts, directors of financially distressed companies should be aware of the liabilities they could face in cross-border situations. In the recent *Kornhaas* decision of the Court of Justice of the European Union (CJEU), the court qualified a German statutory provision on directors' liability as falling under insolvency law and not company law.[1] As a consequence, and pursuant to the European Insolvency Regulation, companies in bankruptcy and that have their centre of main interests (COMI) in a certain Member State will be subject to that Member State's rules on directors' liability. Directors of a company that is incorporated in Germany or the UK (during the current leaving-the-EU transition period) but that has its COMI in Belgium can be held liable, for example, under Belgian laws on directors' liability. This article sheds a light on the recent Belgian company law and insolvency law reform and the changes it has made to directors' liability.

New evolution of directors' liability under Belgian law

The new Belgian Code on Companies and Associations (BCCA) entered into force on 1 May 2019 and repeals the existing Belgian Companies Code. While adopting the BCCA, the legislators decided to move certain grounds for directors' liability previously found in the Belgian Companies Code to the Belgian insolvency legislation. Doing so makes Belgian law aligned with the aforementioned CJEU decision in *Kornhaas* in which the court characterised Germany's statutory rules requiring reimbursement of payments that a director had made after insolvency – but before the opening of the insolvency proceedings – as rules governed by insolvency law.

Because of this change in the statutory provisions, the grounds for directors' liability can be found in both the law governing companies (the BCCA) and the law governing insolvency (Book XX of the Belgian Code of Economic Law). The grounds for directors' liability under the Code of Economic Law can be invoked only if a company becomes bankrupt. They concern a directors' liability for obvious gross negligence (*kennelijk grove fout* or *une faute grave et caractérisée*), wrongful trading, and non-payment of social security contributions. The grounds under the BCCA can be relied upon whilst the company is still in continuity or in bankruptcy. They concern the directors' liability for breach of management duties and violation of the BCCA or the company's articles of association.

Some changes in directors' liability highlighted

In this section, we will first highlight several noteworthy changes in Belgian legislation concerning directors' liability before we elaborate how the provisions on wrongful trading are implemented in Belgian insolvency law.

First, the BCCA now holds shadow directors and de facto directors (which are both qualified as *feitelijke bestuurders* or *administrateurs de fait* under Belgian law) liable also for all acts falling under a director's liability, and not only for acts of obvious gross negligence, which was stipulated in the Belgian Companies Code.

Belgian case law qualifies a de facto director as a legal or natural person who is involved – without any legal or contractual basis – in the company's management. A company's shareholder (whether it is controlling shareholder or not) should be cautious about involving itself in the running of the company as a court could qualify that shareholder as a de facto or shadow director, thus holding it liable as a director.

Second, the BCCA has now set a limitation or cap on the amount of a directors' liability. In claims against the company and third-party claims, the liability is capped at a maximum amount based on the company's turnover and balance sheet total. The Belgian legislators' purpose in setting this cap is to minimise the difference between the unlimited liability of a company's governing body and the limited liability of managers who are protected either by their employee status or by their self-employed status as they perform their acts and services through a limited liability company. This cap also aims to make the directors' liability more insurable. However, it is suggested in Belgian legal doctrine that the cap on directors' liability can lead to the danger of a moral hazard: directors can insure their liability up to the cap and they cannot be held liable for any sums exceeding the cap. Nevertheless, it should be noted that this cap does not apply to all cases of directors' liability. Directors can still be held liable without any limitation if they are found guilty of repeated negligence, gross negligence (*zware fout* or *faute grave*), intentional fraud, intent to cause harm, or defaulting on their social security and tax obligations.

Third, the BCCA now provides explicitly for a positive formulation of a director's task. It stipulates that each member of a company's governing body or an executive director must undertake towards the company to perform properly the task assigned to him or her. Previously, this obligation was inferred from the rules governing directors' liability. Although this amendment does not actually entail major changes, it can be argued that when a court assesses the facts of the alleged directors' liability, it will examine the negligence within the overall performance of his or her tasks instead of as an isolated act.

Further, the Belgian legislators made wrongful trading an explicit legal ground for directors' liability.

Wrongful trading anchored in Belgian insolvency law

Since 1 May 2018, a new rule on wrongful trading is in force in Belgium. It states that directors of a company in bankruptcy can be sued – and be held liable – for wrongful trading if they have unreasonably continued to run loss-making business activities at a time when bankruptcy is inevitable.

However, this new rule is not that new, because the Belgian legislators have basically codified existing case law. In the past, directors have been held liable for wrongful trading on grounds of tort (*onrechtmatige daad* or *faute*) or obvious gross negligence, which is a specific ground for directors' liability if a company has become bankrupt. Whereas the claim value in an action based on tort is limited to the amount of harm or loss suffered by the plaintiff, the claim value in an action based on obvious gross negligence can amount to the total or partial value of the debt of the enterprise, up to the amount of the deficit.

Under the new provision on wrongful trading (Article XX.227 of the Belgian Code of Economic Law), directors can be held liable for continuing to run the enterprise or its activities if they knew or ought to have known – prior to the state of bankruptcy – that there was no reasonable prospect of maintaining the enterprise or its activities and avoiding bankruptcy, and if they, from that moment on, failed to act as a normally prudent and careful director would have acted in the same circumstances. An action on grounds of wrongful trading may be brought only by the insolvency practitioner (*curator* or *curateur*). Although individual creditors are not allowed to invoke the new provision on wrongful trading, they can still bring an action on grounds of tort or obvious gross negligence to hold directors liable for continuing the loss-making business activities.

In the past, directors have been held liable on grounds of tort or obvious gross negligence for continuing loss-making business activities. Such act is often accompanied by other erroneous acts, such as failure to keep adequate accounting records, failure to file annual financial statements, failure to take specific remedial measures, keeping the company artificially 'alive' while contravening all rules of effective management, etc. Whereas the plaintiff in an action on grounds of tort or obvious gross negligence will have to demonstrate the causal link between the fault and the damage or between the obvious gross negligence and the bankruptcy, respectively, the plaintiff does not need to prove the causal link in an action on grounds wrongful trading. Liability is found if the insolvency practitioner proves that the conditions for wrongful trading are fulfilled.

Inspired by the English law concept of wrongful trading

Even though the new provision on wrongful trading in Belgian law was inspired by the English law concept of wrongful trading (which is found under section 214 of the Insolvency Act), there are some differences.

For instance, England's Insolvency Act places a burden of proof on the director. The director must show that he or she took every step with the intention of minimising any loss that the company's creditors could possibly incur. This condition is not required under Belgian law though, as the burden of proof rests entirely on the insolvency practitioner.

Furthermore, England's Insolvency Act requires that the company be in a state of insolvent liquidation or be undergoing insolvent administration. The situation arises when the company's assets are insufficient to pay its debts, other liabilities, and the expenses from the winding up or administration (also called the 'balance sheet test').[2] Nonetheless, an action on grounds of wrongful trading under Belgian law will only be available from when the company enters in a state of bankruptcy. This situation is when the company has stopped paying its debts when they fall due (cessation of payment, *staking van betaling* or *cassation de paiement*) and it has lost its creditworthiness (*geschokt krediet* or *credit ébranlé*) so that it can no longer obtain credit from creditors or other parties. The cessation of payment corresponds to the 'cash flow test' under the English Insolvency Act. Meeting the cash flow test is not a condition for insolvent liquidation or administration, however.

In addition, and following from the above, the English insolvency practitioner (bankrupt estate's administrator) can sue on grounds of wrongful trading in the UK if it concerns a company that has entered insolvent administration (which is similar to the Belgian law concept of judicial reorganisation, *gerechtelijke reorganisatie* or *procédure de réorganisation judiciaire*) and not only when the company is in a state of bankruptcy, which is the case under Belgian law.

It should also be borne in mind that the Belgian legal rule on wrongful trading was inspired by the common law system concept, so it might not be sufficiently adapted to the specificities of the Belgian civil law system.

Conclusion

While it remains to be seen if more actions on grounds of wrongful trading will be brought by the invoking of the new provision in the Belgian Code of Economic Law, it should be remembered that the current Belgian laws can now hold various types of persons liable as directors, even though they might not generally be thought of as directors – and not only liable for obvious gross negligence. Nonetheless, the implementation of the cap may have a limiting effect on the intensification of directors' liability and might even lead to moral hazard. Even so, directors are still fully accountable for their repeated negligence or gross negligence.

Notes

1 Case C-594/14 *Simona Kornhaas v Thomas Dithmar als Insolvenzverwalter über das Vermögen der Kornhaas Montage und Dienstleistung Ltd* [2015].

2 Kristin Van Zwieten, *Goode on Principles of Corporate Insolvency Law* (Sweet & Maxwell, London, 2018), 158 and 767.

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