



**Evaluation of the Trustee in Bankruptcy (Further Measures) Act and
the Director Disqualification under Civil Law Act**

- Summary -

Authors

Ger Homburg
Sanne Berends
Ditte van Halen
Eva Mulder

Amsterdam, 21 juli 2023
Publication number 21080

©2023; Dutch Research and Documentation Centre (WODC) of the Ministry of Security and Justice. All rights reserved.
No part of this report may be reproduced and/or published by print, photocopy, microfilm, digital processing or in any other form
by any other means, without the prior written consent of the Dutch Research and Documentation Centre (WODC).

Summary

Renewal of bankruptcy legislation: pillar addressing bankruptcy fraud

In the legislative programme ‘Recalibration of Bankruptcy Law’ (*Herijking faillissementsrecht*) of 2012 adaptations to the bankruptcy legislation were announced. The programme pillar that addresses bankruptcy fraud contains three laws to strengthen the criminal and civil instruments to address bankruptcy fraud and irregularities before and during bankruptcies.

Evaluation of the Trustee in Bankruptcy (Further Measures) Act and the Director Disqualification under Civil Law Act

In this study, two of the three acts are evaluated: the Trustee in Bankruptcy (Further Measures) Act (*Wet versterking positie curator*, 2017) and the Director Disqualification under Civil Law Act (*Wet civielrechtelijk bestuursverbod*, 2016). Plan and process evaluations have been conducted for both laws. The plan evaluations provide answers to the following questions: what is the purpose of the act, which measures are deployed to achieve the objectives, and how should these measures lead to goal achievement (the intervention logic)? The process evaluations provide insight into the way the laws are carried out, which results are achieved with the laws, and which indications there are with respect to effectiveness. The plan evaluations have been conducted by means of document and literature study, supplemented by interviews with policy officers. On behalf of the process evaluations data have been used from the literature, reports, registrations, and interviews. The plan evaluation was conducted in the first half of 2022, the process evaluation in the following periods: between October 2022 and December 2022 (registrations and documents), between December 2022 and March 2023 (interviews process evaluation) and in May 2023 (expert meetings).

Research question

For this study, the following research questions were formulated.

Trustee in Bankruptcy (Further Measures) Act: objectives (plan evaluation)

1. What objectives were intended by the legislator with the Trustee in Bankruptcy (Further Measures) Act?
2. By means of which (new) powers should these objectives be achieved and how? What are the effective elements of the law?
3. What are the roles of the bankruptcy trustee (as intended by the legislator), the official receiver and the other chain partners?

Trustee in Bankruptcy (Further Measures) Act: implementation (process evaluation)

4. In practice, how do the new tasks (in particular the trustee’s role to identify fraud) and powers under the Trustee in Bankruptcy (Further Measures) Act relate to the general role of the trustee to manage and liquidate the estate?
5. To what extent are the intended objectives being met in practice?
6. What are the consequences of the establishment in law of the trustee’s role to identify fraud on the number of fraud reports, the estate, interests and proceeds of creditors, and the efforts made by the trustee, in time and (salary) costs?
7. What is the influence of the trustee’s role to identify fraud on the chance of arrest of bankruptcy fraud offenders and the efforts (in time) of the official receiver and the Public Prosecutor?

Trustee in Bankruptcy (Further Measures) Act: results and effectiveness

8. What is the effectiveness of the Trustee in Bankruptcy (Further Measures) Act in practice, in other words: how does the implementation in practice relate to the policy theory?
9. What are the success factors, bottlenecks and (unforeseen) side effects of the new set of instruments of the trustee and the trustee’s role to identify fraud?

Director Disqualification under Civil Law Act: objectives (plan evaluation)

10. What objectives were intended by the legislator with the Director Disqualification under Civil Law Act?
11. In which way should the law be implemented to achieve the objectives?

12. How do the powers of the Public Prosecutor to either criminally or civilly enforce a director's disqualification relate to each other? What is the intended added value of the director disqualification under civil law?

Director Disqualification under Civil Law Act: implementation (process evaluation)

13. How often has the director disqualification under civil law been invoked? How many legal procedures and how many director disqualifications and deregistrations from the trade register resulted from the set of instruments? What were the characteristics of the cases in which a director's disqualification was civilly requested or imposed?
14. What were the motives leading the trustee, the official receiver, and the Public Prosecutor to civilly request a director's disqualification? How do these motives relate to the motives of the Public Prosecutor when a director's disqualification is criminally enforced?
15. How many legal procedures have been initiated by a trustee by means of financing (from the estate)? How long did the legal procedures take, what were the costs involved (registry and trial costs, trustee salary costs) and how often and to what extent have the costs been recovered from the director?
16. What verdicts have been reached in courts on the requests and which circumstances have led to maximising or reducing the duration of a director's disqualification under civil law?

Director Disqualification under Civil Law Act: results and effectiveness

17. What are the results of the law in practice? What is its effectiveness?
18. What are the success factors, bottlenecks and (unforeseen) side effects?

Intervention logic of the Trustee in Bankruptcy (Further Measures) Act

The intervention logic of the Trustee in Bankruptcy (Further Measures) Act has a layered purpose. The 'higher', more abstract objectives are promoting a fairer trading environment and bringing about increased confidence in trade; the main objectives are combatting bankruptcy fraud and limiting the social damage of bankruptcies. The objectives should be achieved by means of a number of measures: stepping up the obligation of the director(s) of the bankrupt legal entity to cooperate and provide information, the obligation of third parties to put the accounts at the disposal of the trustee, and the extension of the scope of the obligation to cooperate and provide information to a larger group of people (all aimed at strengthening the information obligation), the obligation of the trustee to investigate irregularities, and the formulation of follow-up steps when irregularities are detected. The trustee has a central role in executing the law. His core task is to manage and liquidate the bankrupt estate with the ultimate aim to distribute any proceeds among the creditors. The Trustee in Bankruptcy (Further Measures) Act stipulates that the trustee should: investigate irregularities, confidentially inform the official receiver, and report suspicions of fraud to the competent authorities, if he deems this necessary. The official receiver can also report suspicions of fraud. The Public Prosecutor, the Fiscal Information and Investigation Service (FIOD), and the police have a role in following up on reports with criminal investigations; in addition, they can support the trustee with information about dealing with and redressing fraudulent bankruptcies.

Trustee in Bankruptcy (Further Measures) Act: implementation and results

The trustees and official receivers mainly regard the legal provisions on the information position of the trustee as a codification of the existing practice. The fraud task of the trustee has been generally adopted, but the impediments to executing this task have remained unchanged. Trustees often experience financial hurdles in the settlement of bankruptcies that hinder the execution of the fraud task. In addition, there are tactical and strategic considerations which lead to the fraud task taking second place.

After the law came into force on 1 July 2017, the absolute annual number of fraud reports has been lower than that of the years before the law came into force. However, the number of fraud reports cannot be attributed to the number of bankruptcies on a yearly basis, because fraud reports can be made in various stages of settlement of a bankruptcy and settlement may take more than one year. A further complication is that the number of declared bankruptcies shows a downward trend from 2013. In this study, the relation between the number of fraud reports and the number of bankruptcies has been estimated by means of moving averages. The number of fraud reports in relation to the number of

bankruptcies shows an upward trend. This trend had already started before the Trustee in Bankruptcy (Further Measures) Act came into force. The influence of the law on the chance of arrest of bankruptcy fraud offenders is absent. This chance is not determined by fraud detection and willingness to report, but by the priorities and capacity at the investigative bodies of the FIOD and the police, and at the Public Prosecutor that is in charge of criminal investigations. Trustees experience that most of the fraud reports they made have not led to actions (noticeable to them) of the competent authorities. Because trustees have little confidence that fraud reports are followed up on, they spend little time on them, and the quality is poor. The execution practice shows that the operational objectives to both strengthen the information position of the trustee and the legal institutionalisation of the fraud-detecting role of the trustee are hardly or not achieved. None of the interviewed trustees and official receivers observe that the main objectives of the law are being realised. Because so little has changed in the execution practice, there are no apparent effects on the estate, the interest and proceeds for creditors, and the efforts made by the trustee. All things considered, this means the law is ineffective. The main causes (and bottlenecks) of this are: a lack of funding for the fraud task of the trustee (especially fraud investigation, partly due to empty and insufficient assets and partly due to views on the primacy of the core task of management and liquidation of the estate), and a lack of confidence in the following up of reports.

Intervention logic of the Director Disqualification under Civil Law Act

The intervention logic of the Director Disqualification under Civil Law Act has a layered purpose; the main objectives are counteracting bankruptcy fraud and irregularities in bankruptcies, preventing fraudulent directors from continuing their activities unhindered, and limiting the social damage of bankruptcies. The objectives are pursued by the imposition of director disqualifications with a maximum duration of five years by the court at the request of the trustee or the Public Prosecutor. This prevents directors from continuing their fraudulent behaviour in a new or other legal person and the concomitant social damage that is caused. The law does not only attribute the power to start a legal procedure to impose a director disqualification under civil law to the trustee, but also to the Public Prosecutor. In addition, the Public Prosecutor has the competence to criminally enforce a director's disqualification in a criminal procedure.

Director Disqualification under Civil Law Act: implementation and results

It is not exactly known how often the director disqualification under civil law has been invoked. The intended register at the Chamber of Commerce has still not been realised. In the study, data on 46 legal procedures have been found in which a trustee (40 times) or the Public Prosecutor (6 times) requested a director's disqualification under civil law. The motive occurring most frequently among trustees, the Public Prosecutor, and the official receivers is that the directors involved frequently displayed fraudulent behaviour, not only during the bankruptcy, but also before, and that it is important to call a halt to this. Nearly all legal procedures in which the director disqualification was requested by the trustee were side claims to a directors' liability procedure or financed with (extra) means from two pilots of the ministry of Justice and Security (conducted by the Tax Authority) or the Public Prosecutor, which were established to stimulate use of the instrument by the trustee or the Public Prosecutor and to gain experience with the instrument. Without additional attention or extra funding few legal procedures have been carried out, certainly not separate from directors' liability procedures. As far as is known, and as far as verdicts have been given, the judge has imposed the director disqualification in all cases. In three cases the verdict deviates from the requested maximum duration of five years. In two cases, the director disqualification was enforced for three and two years respectively; in another case the duration was decreased to one year in the first instance and on appeal this verdict was transferred to a conditional director disqualification with a trial period of three years. There are no data on compliance with the director disqualification. The fact that the active elements have been put in place, does not mean that the objectives have been completely achieved. The number of director disqualifications enforced falls short of the expectation in the explanatory memorandum (several dozen per year). The lack of structural funding is the main bottleneck to the execution.

Active mechanisms in both laws limited in operation, objectives realised to a limited extent at most

The study shows that the measures of the Trustee in Bankruptcy (Further Measures) Act and the Director Disqualification under Civil Law Act are indeed carried out, but that their intended active

mechanisms have only to a limited extent been put into operation. Due to this, the main objectives of counteracting bankruptcy fraud, limiting the social damage of bankruptcies, and preventing continuing fraudulent activities have not or only to a limited extent been realised.

Relation between fraud task and core task

In the discussions during the legislative process, the relation between the fraud task and the core task of management and settlement of the estate received a lot of attention. This relation indeed turns out to be problematic. This is (usually) not prompted by fundamental considerations regarding the core task of the trustee, but financial and adjective circumstances. A possible negative influence on the director's readiness to cooperate with the procedure and on the realisation of settlements may lead to non-reporting of fraud cases and may also lead to non-enforcement of director disqualifications. Even more important is the lack of financial means on behalf of fraud investigations, reports, and director disqualifications in case of bankruptcies with empty or insufficient assets.

Follow-up affects execution of fraud task

In addition to funding, following up on fraud reports by the competent authorities is the severest bottleneck that is mentioned most frequently in the execution of the Trustee in Bankruptcy (Further Measures) Act. Whether reports with criminal investigations of the FIOD (serious and complex fraud cases) and the police (less complicated and less severe cases) led by the Public Prosecutor are followed up on, is determined by the capacity, priorities, and expertise at investigative services, and not by the number of reports. Trustees experience that most reports are not followed up on and according to them they receive little feedback. This has an influence on the readiness to report and the quality of the reports.

The central role of the trustee

In the Trustee in Bankruptcy (Further Measures) Act and the Director Disqualification under Civil Law Act the central role in identifying irregularities and fraud is assigned to the trustee. The minister's expectation in the explanatory memoranda to both laws that this central and vital role in the private domain can be executed as intended and without additional funding, is not fulfilled in practice. This leads to the following consequences: investigations into irregularities and fraud are carried out less frequently (and less extensively) than is desirable from the perspective of counteracting fraud; moreover, fewer reports of fraud cases are made to the competent authorities, and fewer director disqualifications under civil law are enforced and imposed than is socially desirable.

Cooperation and supporting policies: lack of unity

In all organisations that are, in a broad sense, involved in the implementation, a lack of unity of the policy (execution) is noticed. This lack of unity negatively influences the goal achievement of the laws. Trustees carry out the fraud task in different ways; among (and sometimes also within) court districts official receivers differ in their attitudes toward the fraud task; in the regional bankruptcy office hours (most of which have been inoperative for a good length of time) cooperation varies, the regions of the FIOD and the police units show differences in priority and capacity for follow-up; and the main creditor in many bankruptcies, the Tax Authorities, have a policy that is not carried out in the same way in all regions. Greater involvement in the fight against bankruptcy fraud, a willingness to carry out and follow up on measures, and thus the likelihood of greater goal achievement of the laws, would undoubtedly benefit from increasing the unity of policy and execution within and among the chain partners.

Points for improvement

In order to improve the goal achievement of both laws, consideration should be given to improvements in the field of funding of the trustee, following up on reports by the competent authorities, improved coordination of (the scope and content of) reports on selection criteria for follow up with criminal investigations by the FIOD and the police, the handling of director disqualifications under civil law by the Public Prosecutor; and agreements on more unity of policy and execution among and within chain organisations.



REGIOPLAN
BELEIDSONDERZOEK

Regioplan
Jollemanhof 18
1019 GW Amsterdam
T +31(0)20 531 53 15
www.regioplan.nl