

Directors' Disqualification in the Netherlands

An International Comparative Re-Evaluation of an Amended Disqualification Proposal

Tom Reker*

1 Introduction

In view of the global financial crisis and the role of company directors in it, countries around the world have started revising their legislative arsenal as regards directors' liability. This is no different in the Netherlands, where both civil law and criminal law are being reformed to more effectively respond to fraudulent conduct. One of these initiatives concerns a proposal to introduce a civil law directors' disqualification instrument in Dutch insolvency law.¹ Because of the significant growth of bankruptcies as a result of the aforementioned crisis, the Dutch cabinet has proposed to strengthen the current civil law arsenal against fraudulent behaviour of directors with this more preventative sanction. The proposal is paralleled on a supranational level by a soon-to-be introduced possibility for Member States to join a Union-scaled register of disqualified directors, which is to contribute to further the efficiency of national disqualification instruments.²

The introduction of this civil law disqualification instrument raises several questions. Dutch criminal law already allows for the disqualification of directors in certain circumstances, which are moreover limited to criminal acts within the context of a bankruptcy. Because of this, it is interesting to question how the proposal can be considered innovative and to what extent it specifically differs from the sanction in Dutch criminal law. By extension, one might wonder whether the proposal adds any value to the current arsenal at all and to what extent it might require alteration. This final question can, in my opinion, best be answered from an international-comparative perspective.

As a result of heavy criticism from public consultative bodies, private juridical organizations and legal scientists and practitioners, certain key aspects of the pre-

liminary draft³ of the proposal have been altered significantly. These alterations beg the question whether the current version of the proposal – which has been submitted to the Dutch Senate in June 2015 – can be considered either an improved or a less necessary and ineffective instrument.

This article will first examine the recently altered Dutch proposal to create a civil law directors' disqualification instrument in the event of a bankruptcy. Following this, it will proceed to compare the proposal on civil law disqualification with the Dutch criminal law counterpart. After that, several possible alterations to the proposal will be discussed, based on differences between the proposal on the one hand and its British, American, Australian and German equivalents on the other, taking into account the recent alterations made to the proposal. The question whether a Dutch civil law directors' disqualification instrument can be considered desirable will be a recurring theme in these examinations. This article will end by concluding that the necessity of the proposal in its current form can be considered doubtful. Whereas the instrument proposed in the preliminary draft had a certain separate value *vis-à-vis* the criminal law equivalent (even though certain aspects might be better off in criminal law), the current proposal seems to have lost value due to the aforementioned alterations, which may result in an overlap of the civil law and criminal law instruments. Consequently, there is a more pressing need for demarcation and reallocation of certain aspects of the proposal.

Although this article examines the Dutch proposal, it is in no way limited to it. In fact, through examining the proposal, comparing it with its domestic counterpart and foreign equivalents, as well as proposing alterations, this article attempts to contribute to sketching a general model of an effective directors' disqualification instrument, which may be used to further improve existing legal arsenals against fraudulent conduct.

2 The Dutch Proposal and Its Alterations

In order to fully understand the proposal and to place it properly in already existing Dutch law, it is important to first examine the background, context and objectives

* Tom Reker recently graduated from the Leiden Law School, Leiden University, Leiden, The Netherlands. Email: tomreker_1@hotmail.com. An article concerning the preliminary draft of the proposal to introduce a civil law directors' disqualification (*i.e.* the proposal prior to the alterations which are the focus of this article) was published as T. Reker, "Unqualified Directors in Insolvency: A Comparative Study on the Desirability of Civil Law Directors' Disqualification in the Netherlands", *International Insolvency Review* 23, 2014, pp. 144-169.

1. Hereinafter referred to as: 'Proposal'.

2. Ministry of Security and Justice, reference No. 34 011, No. 6, p. 13.

3. Hereinafter referred to as: 'Preliminary Draft'.

of the proposal. After that, the content of the proposal will be set out.

2.1 Background: The Winter Report

Although the Explanatory Memorandum⁴ to the proposal makes no explicit reference to it, the proposal seems to be influenced by the 2002 report on a modern regulatory framework for Company Law in Europe of the High Level Group of Company Law Experts (the so-called ‘Winter Report’).⁵ This report addresses certain elements of corporate law which require legislative attention, since it is observed that company law in Europe has not kept up with certain developments.⁶ Because of this, the report provides a framework for legislators to modernize company law in Europe by outlining certain recommendations regarding subjects such as capital formation, corporate governance, corporate restructuring and groups of companies. As regards corporate governance, it is noted that criminal law and civil law sanctions present some weaknesses, whereas directors’ disqualification across the EU is an alternative sanction which may be easier to effectuate and has a powerful deterrent, as well as a longer disabling effect.⁷ Therefore, although appropriate sanctions for misleading financial and other key non-financial statements should generally be determined by Member States, the report urges the European Commission to:

(...) review whether director’s disqualification can be imposed at EU level as a sanction, at least for misleading financial and key non-financial disclosures or more generally for misconduct.⁸

The connection between the Winter Report and the Dutch proposal follows from governmental research regarding civil law directors’ disqualification in the Netherlands, which dates back to 2003. In this year, the Dutch Commission on Corporate Governance published its Dutch Corporate Governance Code.⁹ This initiative was based on the Winter Report’s recommendation to every EU Member State to draft its own Corporate Governance Code.¹⁰ Although the Dutch government refused to include a directors’ disqualification instrument into a proposal regarding financial oversight at that time, it did pledge to create a commission to research this matter further.¹¹ In 2006, the Minister of Justice announced that this commission had finished its report. This report would eventually lead to the expansion of the applicability of the criminal law instrument outlined below, as well as the introduction of the proposed civil law equivalent.¹²

4. Hereinafter referred to as: ‘Explanatory Memorandum’.

5. High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe 2002.

6. *Ibid.*, p. 1.

7. *Ibid.*, p. 9.

8. *Ibid.*, pp. 69-70.

9. Ministry of Justice, reference No. 29 449, No. 1, pp. 17-18.

10. *Ibid.*, p. 7.

11. *Ibid.*, pp. 17-18.

12. Ministry of Justice, reference No. 17 050, No. 319, pp. 6-7.

2.2 Economic Background

Although – when announcing the report of the aforementioned commission in 2006 – the Minister spoke of a directors’ disqualification instrument in general terms, the current Dutch proposal specifically targets bankruptcy-related conduct. The reason for the introduction of such a specific instrument, as opposed to a general civil law sanction, appears to be the more pressing need for a disqualification instrument regarding insolvency-related conduct by directors because of the damage it has caused. Both in his letter to the Dutch House of Representatives¹³ and in the Explanatory Memorandum, the Minister directly refers to the conclusions of Statistic Netherlands 2010, which state that economic decline and its effects on bankruptcy tendencies in the Netherlands have reached a historic high.¹⁴ In 2010, unpaid debts after bankruptcy reached an amount of almost 4 billion euros, approximately 18 percent of which concerned cases of criminal conduct.¹⁵ These tendencies have sparked attention within the media and concerns within Dutch politics as regards the fight against fraudulent behaviour¹⁶ and its incorporation into a legal framework.¹⁷ These political concerns stem from the presumption that fraudulent behaviour within the context of bankruptcy undermines the trust, which is necessary for effective trade, while it furthermore disturbs competitiveness and causes financial harm to injured parties.¹⁸ To counteract these threats, the proposal incorporates an instrument that realizes a more effective fight against fraudulent behaviour, while it also contributes to preventing fraudulent directors’ attempts in bypassing contemporary law, which would otherwise result in a factual continuation of this behaviour.

2.3 Broader Context

The Dutch proposal can be considered as part of a larger initiative to change Dutch insolvency law as a whole.

13. Ministry of Security and Justice, reference No. 326963 (hereinafter referred to as: ‘Letter from the Minister’).

14. Letter from the Minister, p. 2 and Explanatory Memorandum, p. 1.

15. Explanatory Memorandum, pp. 1-2 and House of Representatives, supplement No. 828. Doorenbos however notes that this calculation includes non-criminal conduct such as voidable preferences and directors’ liability, see Doorenbos 2014, p. 21.

16. It should be noted that the proposal uses a very broad definition of ‘fraudulent behaviour’, including irregularities within the context of a bankruptcy (e.g. voidable preferences and directors’ liability); see Doorenbos 2014. This appears to be contrary to the original intention of the Minister to fight fraudulent conduct as defined in criminal law, as has been set out in the Letter of the Minister (which also followed from the Explanatory Memorandum to the Preliminary Draft). As follows from the previous footnote, however, the original so-called criminal conduct which justified the Proposal in the first place seems to include these irregularities. This article uses the same broad definition of ‘fraudulent’ as in the Proposal, which thus also encompasses the aforementioned irregularities. The introduction of a civil law disqualification instrument against such irregularities may be justified, and this is also presumed in this article. However, it does appear as if the ministry uses the hot topic of criminal law fraudulent conduct to legitimize a civil law instrument which has a broader range than just criminal conduct. The call in this article to demarcate between the civil law and criminal law instrument is partly rooted in the necessity to distinguish between criminal law fraudulent conduct and the irregularities.

17. Letter from the Minister, p. 2.

18. *Ibid.*, p. 1 and Explanatory Memorandum, p. 1.

For example, the proposal is part of a tendency to strengthen the liquidator's¹⁹ role in insolvency proceedings (by allowing a liquidator to request a disqualification order).²⁰ It is furthermore an element of a policy to increase the effectiveness of supervision as regards insolvency fraud and promoting transparency, *e.g.* by introducing registers that contain information as regards directors' disqualification.²¹ It also parallels the legislative proposal to revise criminal law legislation with respect to the subject of insolvency fraud.²² These national legislative developments are paralleled (but also brought about) by tendencies within EU policies, specifically by the recent initiative to research²³ and drastically change European bankruptcy regulations such as the 2012 proposal to amend the Insolvency Regulation.²⁴ The convergence between the national and supranational level manifests itself in initiatives such as the above-mentioned possibility of a Union-scaled register with respect to directors' disqualification and the mutual recognition of disqualification orders within the EU.²⁵ After all, these proposals are (partly) meant to ensure the effectiveness of the aforementioned Dutch national legislative developments.

Moreover, the introduction of a civil law disqualification instrument (to complement its criminal law counterpart) may be considered as part of a general trend to remove the stigma from insolvency (partly by decriminalizing it). Within bankruptcy law, this trend may manifest itself in the form of a distinction between bankruptcies, based on the impact of the bankruptcy and the intention behind it. Within the context of this distinction, instruments may be allocated accordingly (*i.e.* based on impact). On the one hand, there are bankruptcies which have a significant impact on society and which were caused by bad faith or criminal intent. On the other, we find bankruptcies which have less impact while being caused by bad faith, or cases which are not caused by bad faith at all. A quintessential example of this distinction is the recent focus within EU policy on the differentiation between 'honest' and 'dishonest' bankruptcies.²⁶ The aim of this distinction is to give 'honest' bankrupts a second chance by *e.g.* giving them access to supportive programmes for starting up new businesses (from which 'dishonest' bankrupts are barred), thereby taking away part of the stigma of insolvency.

Another manifestation of anti-stigmatization of insolvency is the current European-wide legislative attention for reorganization and debt restructuring.²⁷ These ini-

tiatives aim to offer alternatives to bankruptcy procedures, partly due to their stigmatizing effect. In fact, the fear of this stigma appears to be one of the reasons for fraudulent behaviour in the first place, which calls for alternative instruments to prevent such behaviour.²⁸

Regardless of the manifestation, however, the general trend is clear: destigmatization of insolvency as a whole by expansion of its arsenal and differentiation within that arsenal, reserving criminal law for the worst bankruptcy cases. The introduction of a civil law disqualification instrument in the Netherlands shows traits of both manifestations: not only is the legal arsenal against fraudulent behaviour expanded, it also allows for a differentiation within bankruptcy cases in general and disqualifications specifically, by aiming to introduce an alternative to the stigmatizing criminal law counterpart. In fact, the Minister has explicitly referred to EU policy of differentiating between honest and dishonest directors and notes how the proposal is in accordance with the said policy in this regard.²⁹

2.4 Objectives

Contrary to the criminal law sanction, the civil law directors' disqualification instrument does not aim to stigmatize directors. Moreover, the proposal differs from the already existing civil law arsenal against fraudulent behaviour in bankruptcy cases by adding an instrument with a different nature than the current means to counteract such behaviour. To elaborate, the current civil law instruments can be limited to dismissing a director, internal company investigation,³⁰ dissolution of the company as a whole due to its violation of public order,³¹ directors' liability³² and voidable preferences.³³ Whereas these instruments are focussed on restoration and supervision in retrospect, the civil law disqualification instrument has a more preventive nature and takes future repercussions into consideration.³⁴ It aims to thwart further harm to trade by temporarily excluding the person concerned from directorship or any position within a company, which has a significant influence on its policies. The director concerned is thus cut off from any position with limited liability, the nature of which seems to be one of the primary incentives for his behaviour in the first place.

2.5 The Content of the Proposal

The proposal consists out of five new articles (Articles 106a-106e), which are – due to the bankruptcy-specific nature of the instrument – to be incorporated in the Dutch Bankruptcy Act. In this subparagraph, the substantive elements of the proposal will be analyzed first, after which the procedural elements will be set out.

19. In this article, the term 'liquidator' will be used to refer to the person responsible for administering insolvency proceedings. Other titles for this function are: 'administrator', 'receiver', 'insolvency representative', 'curator', 'trustee', and 'supervisor'.

20. Explanatory Memorandum, p. 1.

21. Letter from the Minister, pp. 5-11.

22. Ministry of Security and Justice, reference No. 33 994, No. 2.

23. For example, Hess, Oberhammer & Pfeiffer 2012.

24. European Commission, COM(2012) 744 final.

25. See Ministry of Foreign Affairs, reference No. 22 112, No. 1554, p. 6 and Ministry of Security and Justice, reference No. 32 317, pp. 13-14.

26. European Commission, COM(2012) 742 final, p. 5.

27. Wessels 2014, pp. 8-9, see also Parry 2004, p. 2.

28. European Commission, COM(2007) 584 final, see also European Commission (2014/135/EU), recital 20.

29. Explanatory Memorandum, p. 2.

30. Dutch Civil Code (hereinafter referred to as: DCC), Arts. 2:244 and 2:344-359 DCC.

31. DCC, Art. 2:20.

32. DCC, Arts. 2:138 and 2:248.

33. Bankruptcy Act (hereinafter referred to as: BA), Arts. 42 and 47.

34. Explanatory Memorandum, pp. 2-3.

According to the proposal, the court can impose a disqualification from directorship and membership of the Supervisory Board for a maximum of five years if the director³⁵ (or all those who are equated to his office):

- has been judged liable for his conduct or negligence within the context of the same legal person;
- has consciously transferred assets or paid debts to a creditor before the bankruptcy, which transactions have significantly harmed other creditors and have been voided by a court as unfair preferences (voidable preferences);
- has, despite a request by the liquidator, severely failed to perform his legal duties to inform or otherwise cooperate with the liquidator;
- was, either as a director or in another professional capacity, at least twice involved in a bankruptcy of a legal person, for which he can be personally blamed; and
- has been subject to a fine for specific tax offenses, *e.g.* due to paying no or less taxes than required or paying too late (the same applies when the bankrupt legal person has been subject to the said fines).³⁶

Before the alterations to the proposal, the preliminary draft included an openly formulated criterion for disqualification, followed by a non-limitative list of scenarios which automatically implied that the criterion was fulfilled.³⁷ It also included an exculpation criterion.³⁸ Both have been removed in the current proposal. These changes will be subject of discussion in paragraphs 4.1 and 4.2, respectively.

The proposal targets not only those who were directors at the time of the bankruptcy order but also those who were appointed during the three years prior to the order. Thus, it is prevented that directors resign prior to bankruptcy in order to avoid disqualification.³⁹ The period of three years prior to the bankruptcy order (both within the context of the disqualification criterion and that of the appointment of directors) is a reference to the same period for directors' liability within Dutch insolvency law.⁴⁰ Furthermore, not only formally appointed directors can be subject to disqualification. Individuals who have no *de jure* position within the corporation may nevertheless have a significant influence on its general policy and are, therefore, often (partially) responsible for the fraudulent conduct of (members of) the Board of Directors. Examples include proxies, majority shareholders and influential advisors, although the Explanatory Memorandum emphasizes that the designation of *de facto* policy makers will depend on the circumstances of a specific case.⁴¹ In order to facilitate the conviction

of such *de facto* policy makers, the proposal equates all those who have (partially) determined the policy of the company involved by acting as if they were directors with actual directors.⁴² The terminology of this clause is identical to the criterion for directors' liability in current Dutch insolvency law.⁴³ Since the consultation phase, the current proposal also forbids disqualified individuals from acting as *de facto* policy makers.⁴⁴

As mentioned in paragraph 2.2, the proposal aims to prevent fraudulent directors' attempts to bypass contemporary law using certain constructions. One of these constructions concerns covering up fraudulent conduct by assigning corporations as directors of other corporations, thereby creating a system that makes it difficult to detect the said conduct. In order to counteract these constructions, the range of the directors' disqualification is expanded to natural persons who can eventually be traced back as original offenders.⁴⁵ This equation shows similarities to a provision in Dutch directors' liability law, which facilitates the liability of natural persons behind legal person-directors.⁴⁶

Executives of sole proprietorships and general partnerships have been equated with directors of legal persons.⁴⁷ Consequently, these executives can also be excluded from director positions in any legal person with limited liability, if they have committed any of the conduct outlined above within the context of sole proprietorship or general partnership.⁴⁸ No one may be disqualified from being an executive of the latter enterprises, however, since the proposal only aims to prevent the misuse of limited liability.⁴⁹

Any appointment contrary to the disqualification is legally considered null and void.⁵⁰ The court can adjust the length of the disqualification in order for it to proportionally reflect the circumstances of a specific case. The disqualification applies to all director positions and memberships of Boards of Commissioners of the person concerned in other legal persons and can therefore be considered as a universal sanction against the appointment to (or continuance of) all corporate managing positions. Nevertheless, the court is authorized to exclude certain positions from the disqualification when such positions do not harm public interest, in order for it to more adequately reflect personal circumstances.⁵¹

Both the liquidator and the Public Prosecutor are authorized to file for a directors' disqualification request.⁵² The liquidator requires permission from a supervisory judge before filing for the request.⁵³ Although the legal text of the proposal does not mention

35. In the event of a distribution of directors functions between executive and non-executive directors, executive directors are equated with directors and non-executive directors are equated with commissioners; Explanatory Memorandum, p. 30.

36. Proposal, Art. 106a(1).

37. Preliminary Draft, Arts. 106a(1) and 106a(2).

38. Preliminary Draft, Art. 4.

39. Explanatory Memorandum, pp. 14-15.

40. Ministry of Security and Justice, reference No. 34 011, No. 6, p. 20.

41. Explanatory Memorandum, p. 30.

42. Proposal, Art. 106d(1).

43. As formulated in DCC, Art. 2:248(7).

44. Proposal, Art. 106d(2); see also Explanatory Memorandum, pp. 30-31.

45. Proposal, Art. 106a(2); see also Explanatory Memorandum, pp. 22-23.

46. DCC, Art. 2:11.

47. Proposal, Art. 106a(4).

48. Explanatory Memorandum, p. 23.

49. *Ibid.*, p. 5.

50. Proposal, Art. 106b(1).

51. Explanatory Memorandum, p. 25.

52. Proposal, Art. 106a(1).

53. Explanatory Memorandum, pp. 3-4.

it explicitly, the Explanatory Memorandum states that the liquidator is to deliberate with the creditors.⁵⁴ It also states that creditors may request the liquidator to file for a disqualification order. If the liquidator refuses, the creditors may request the supervisory judge to order the liquidator to file for disqualification.⁵⁵ The reasons for the decision to authorize the liquidator are as follows: the liquidator is, in practice, the first to recognize the sanctioned behaviour due to his position as well as his access to all of the information concerned as the administrator of the procedure. The liquidator almost always initiates procedures concerning the conduct, which is sanctioned by the proposal, or is involved in such procedures. The authorization is furthermore in accordance with the Dutch cabinet's intention to expand the competence of the Dutch liquidator in insolvency proceedings.⁵⁶ The authorization of the Public Prosecutor is, in my opinion, consistent with its position as initiator of insolvency proceedings. This is confirmed by the criterion which is required in order for the Public Prosecutor to file for directors' disqualification: initiation must be in accordance with public interest (which is the same standard for the initiation of the bankruptcy procedure by the Public Prosecutor).⁵⁷ The authorization is, therefore, in accordance with the task of the Public Prosecutor of safeguarding public interest. Furthermore, it is interesting to note that the underlying considerations and terminology with respect to the competence of the Public Prosecutor to file for a request for disqualification are similar to those of the equivalent request for the dissolution of an association⁵⁸ and the dismissal of directors of a foundation.⁵⁹

The disqualification order is enforced in two ways. As regards the disqualification from formal appointments, the former director is removed from the Trade Register of the Dutch Chamber of Commerce, while the disqualification order is registered in the same register forthwith.⁶⁰ To prevent appointments of disqualified persons, civil law notaries are to consult this register when establishing a new legal person.⁶¹ Disqualified persons cannot enrol in the register during their disqualification. As regards enforcing disqualification from *de facto* positions, the former proposal was altered to authorize the court to impose a non-compliance penalty for all those disqualified who refuse to fulfil their obligations under the order.⁶² Other consequences (such as possible conditions which may lead to early termination of the order) are to be determined by the court.⁶³

As mentioned earlier, the order in principle involves disqualification from all legal persons. To facilitate their

involvement and to safeguard their right to be heard, the proposal prescribes the liquidator and the Public Prosecutor to enclose with the disqualification request an excerpt of the Trade Register concerning these legal persons.⁶⁴ It is essential that they are heard during the disqualification procedure, since the procedure might result in a situation where they might end up without directors or commissioners. To prevent such situations, courts are authorized to temporarily appoint directors or commissioners to the legal person concerned, the latter being responsible for remuneration of these officials.⁶⁵ Courts are also allowed to suspend the director during proceedings.⁶⁶ A request for suspension, coupled with a possible appointment of a substituting director or commissioner, can be filed at any time during the procedure.⁶⁷ Both measures take effect after approval and last until the end of the procedure.⁶⁸

From the above analysis, several similarities in terminology and underlying considerations to that of existing Dutch insolvency law or corporate law in general have been detected, which indicate that the proposal should not be considered as a radical change from already existing Dutch law. This is the case even taking into account that the criteria for disqualification and exculpation in the preliminary draft showed much more similarities with already existing directors' liability law than the alterations in the current proposal, since most of the criteria for disqualification refer to conduct which is regulated in already existing insolvency law. The civil law directors' disqualification instrument thus seems to fit in the already existing legal framework against fraudulent behaviour. The fact that a criminal law directors' disqualification instrument exists within this framework might support that argument. However, it might also be considered an assertion to the contrary. In fact, the mere existence of this criminal law instrument might make one wonder if a civil law equivalent adds any value to the Dutch arsenal in the fight against fraudulent behaviour at all. Therefore, the Dutch criminal law instrument will be analyzed in the following paragraph and compared later on in this article, in order to find this possible added value.

3 Disqualification in Dutch Criminal Law

Disqualification of directors is a sanction for two types of criminal conduct: unwillingness to inform the liquidator (Article 194 Dutch Penal Code; 'DPC') and *bankbreuk* (Articles 340-344 DPC). The former requires little explanation: aside from a fine or prison sentence, an

54. Explanatory Memorandum, p. 3.

55. Explanatory Memorandum, p. 4.

56. Explanatory Memorandum, p. 3.

57. Wessels 2012, paras. 1256-1257.

58. DCC, Art. 2:20.

59. DCC, Art. 2:298.

60. Proposal, Art. 106b(3).

61. Explanatory Memorandum, pp. 5-6 and 25.

62. Any confiscated sums are to benefit the bankruptcy estate, or – in absence of an estate – to the State; Proposal, Art. 106b(5).

63. Explanatory Memorandum, p. 24.

64. Proposal, Art. 106c(1).

65. Proposal, Art. 106c(3).

66. Proposal, Art. 106c(4).

67. Proposal, Art. 106c(5).

68. Except if the court decides to revoke its decision, preceding the end of the procedure; Explanatory Memorandum, p. 29.

offender (*e.g.* a director of a bankrupt legal person) may be disqualified from his profession if he violates his legal duties by consciously failing to appear before – or refusing to inform – a liquidator or by consciously misinforming the said liquidator. The latter (*bankbreuk*) is more complicated. It covers a range of violations which have in common that bankruptcy occurs – and creditors are harmed – not due to economic adversity or an unfortunate state of affairs, but due to deliberate or misleading conduct or omission. Such violations include failing to keep accounts and excessive spending prior to bankruptcy. More relevant for this article, however, is that it also covers selling assets below their worth and favouring a creditor at the expense of other creditors prior to or during bankruptcy. In both cases, the offender must have accepted the considerable chance that the creditors may be damaged, even though no actual damage to creditors is required to be sentenced.⁶⁹ As with the other violation, the offender risks not only a fine or prison sentence but also disqualification, when it violates a *bankbreuk* provision.⁷⁰

Neither types of criminal law disqualification are limited to directors: both criminal law disqualification provisions mention the disqualification from the ‘profession’ of the offender, which includes directorship. It should be mentioned, however, that two *bankbreuk* provisions (Articles 342 and 343 DPC) specifically target directors and commissioners, whereas the remaining *bankbreuk* provisions target bankrupts (*i.e.* natural persons, legal persons and professionals). Because of this formulation, the range of the criminal law sanction seems to be of a more limited nature: the offender can only be excluded from the profession he used to cause the bankruptcy and to (potentially) damage the creditors of the estate.⁷¹ As mentioned earlier, the Dutch proposal also disqualifies fraudulent executives of a sole proprietorship and general partnerships from acting as a director or commissioner of *de facto* policy maker in legal persons. Also, even though directors and commissioners are jointly mentioned in Articles 342 and 343 DPC, these offices are not explicitly equated to each other, so in theory, a criminal offender who is disqualified as a director might still be appointed as a commissioner and *vice versa*.

The range of the criminal law sanction is limited in another way: the disqualification has to be imposed for at least two years and for a maximum of five years.⁷² In contrast, the proposed civil law equivalent lacks a minimum sentence, since the proposal only formulates a maximum sentence of five years.

These range differences cannot, in my opinion, be considered as legitimate reasons to introduce a civil law directors’ disqualification instrument, since the current criminal law instrument can be altered accordingly without harming criminal law principles. Other differ-

ences are therefore required for a more justified introduction of a civil law instrument.

Before the alterations to the preliminary draft, two differences between the draft and the criminal law sanction contributed to this justified introduction. First, the criminal law disqualification did not explicitly mention the equation of *de facto* and *de jure* directors, which led to disqualification problems with respect to the former policy makers.⁷³ *De facto* policy makers could be criminally convicted without being actual directors (Article 51(2) sub 2 DPC allows *de facto* executives to be equally convicted). However, due to the aforementioned terminology in the disqualification provision (‘profession’), these factual policy makers could not be disqualified from a director or commissioner position, simply because they were not legally acknowledged as such. This problem in criminal law will apparently be resolved in the near future, since the Dutch cabinet has submitted a proposal⁷⁴ to the House of Representatives to modernize the *bankbreuk* provisions, which includes a provision which equates *de facto* directors to *de jure* directors.⁷⁵ Second, one of the more interesting (and justifying) differences between the preliminary draft and the criminal law instrument concerned the general exculpation criterion of the draft versus specifically formulated criminal law exculpations. These specific exculpations are inherent to criminal law and do not allow additional tailor-made exculpations for a certain offense. The exculpation in the draft was removed in the current proposal after consultation. This removal, as well as its alternative in the current proposal, will be subject of paragraph 4.2. For now, it can be said that one of the most significant differences between the proposal and the criminal law instrument disappeared with the removal of the general exculpation.

Some justifying differences remain, however. One of these differences concerns the direct consequence of the proposed civil law directors’ disqualification. According to the proposal, any appointment contrary to a disqualification order is legally considered null and void.⁷⁶ It is therefore legally impossible for the person involved to be appointed as a director for the duration of the disqualification order.⁷⁷ It is unclear whether the same applies for the criminal law disqualification, because – contrary to the proposal – this instrument does not mention explicitly the automatic voiding of such an appointment.⁷⁸ Because of this, one might argue that

69. Dutch Supreme Court 9 February 2010 (ECLI:NL:HR:2010:BI4691), 16 February 2010 (ECLI:NL:HR:2010:BK4797), 11 May 2010 (ECLI:NL:HR:2010:BL7662) and 5 April 2011 (ECLI:NL:HR:2011:BP4391).

70. Dutch Penal Code (hereinafter referred to as: ‘DPC’), Art. 349.

71. Doorenbos 2008, p. 124.

72. DPC, Art. 31.

73. Doorenbos 2008, p. 124.

74. Ministry of Security and Justice, reference No. 33 994, No. 2.

75. Interestingly, this provision is not introduced for the violation of duties towards a liquidator, which still results to the aforementioned problem within this context.

76. Proposal, Art. 106b(1).

77. Explanatory Memorandum, p. 24.

78. Keijzer seems to suggest the further need to expand the civil law consequences of a criminal law disqualification in this regard, see Keijzer 2015.

any decision of a legal person to appoint a disqualified person as a director is not automatically null and void.⁷⁹ Another difference concerns the involvement of other legal persons in the disqualification procedure. Because of the repressive nature of the criminal law disqualification instrument – which is inherent to criminal law instruments in general⁸⁰ – criminal court judges are not authorized to hear legal persons who share the same director as the legal person involved (unless as a witness) or to appoint temporary directors. Since positions within criminal law proceedings are restricted to the Public Prosecutor, the accused (and his counsel) and (since recently) the victim(s),⁸¹ such an appointment by a criminal court with respect to legal persons who are not involved in the criminal law procedure would be inconsistent with the criminal law system. In contrast, such authorization for civil law judges – such as in the proposal – can be considered as a characteristic element of civil proceedings. This difference between the two instruments, which is inherent to the nature of their respective legal contexts, indicates the usefulness of similar disqualification sanctions in both civil law and criminal law.

The existence of the aforementioned unchangeable differences thus contributes to the assertion that the introduction of a separate civil law disqualification instrument can be considered as useful. However, the removal of certain justifying differences downplays the necessity of the proposed civil law disqualification sanction.

4 Comparison with Foreign Disqualification Instruments and Suggestions

The following subparagraphs will focus on similarities and differences between the Dutch proposal on the one hand and its British ('CDDA'),⁸² American ('Securities Act' and 'Securities Exchange Act'),⁸³ Australian ('Corporations Act')⁸⁴ and German ('StGB', 'GmbHG' and

'AktG')⁸⁵ counterparts on the other, by describing possible improvements these differences might indicate.

4.1 The Disqualification Criterion

One of the most significant changes to the preliminary draft concerns the disqualification criterion. The preliminary draft included an openly formulated criterion, followed by a non-limitative list of scenarios which automatically implied that this criterion was met.⁸⁶ This non-limitative list was highly similar to the limitative list which contains the criteria for disqualification in the current proposal.

During the consultation phase, many legal experts criticized the choice for an openly formulated criterion.⁸⁷ The main argument was that such a criterion might result in legal uncertainty for directors: for them, it would be uncertain in what cases a disqualification might be expected. Legal uncertainty was moreover to be expected because the criterion was highly similar to that of directors' liability. Because of this, the open criterion was removed in the proposal, and the non-limitative list of scenarios was transformed in a limitative list of disqualification criteria.⁸⁸

It is fair to question whether by removing the open criterion for this list of criteria, directors will no longer have to fear legal uncertainty, since one might question whether the current list is limitative at all. After all, one of the criteria for disqualification in the proposal is that the director is judged liable for his conduct or negligence. But the directors' liability criterion is itself openly formulated, similar to that of the preliminary draft. Therefore, it may be possible that a director of such a legal person is judged liable for conduct or negligence other than voidable preferences, non-cooperation, bankruptcy recidivism or tax fines and subsequently disqualified. In fact, although the Explanatory Memorandum does not explicitly accept this possibility, it does mention that combined proceedings (*i.e.* to hold a director liable and to disqualify him) are to be expected due to their similar nature.⁸⁹ Disqualifying a director on

79. Appointment contrary to a criminal law disqualification is, however, a separate criminal offense and can result in a fine or prison sentence according to Art. 195 DPC.

80. Corstens & Borgers 2011, pp. 1-2.

81. *Ibid.*, pp. 55-149.

82. Company Directors Disqualification Act 1986 (hereinafter referred to as: CDDA 1986).

83. Securities Act of 1933 and Securities and Exchange Act of 1934, respectively (hereinafter referred to as: SA 1933 and SEA 1934, respectively).

84. Corporations Act 2001 (hereinafter referred to as: CA 2001).

85. Strafgesetzbuch (Penal Code), Gesetz betreffend die Gesellschaften mit beschränkter Haftung (law concerning the German equivalent to the private company limited) and AktienGesetz (law concerning the German equivalent to the public limited company), respectively. Aside from disqualification based on the StGB (Berufsverbot), the GmbHG and AktG both contain a list of violations which form separate grounds for disqualification. The disqualification instrument in the German Trade Regulation (Gewerbeordnung, 'GewO'), will not be addressed in this article, due to the limited size of the article, as well as due to the fact that the nature of the aforementioned German instruments are more insolvency-related.

86. Preliminary Draft, Art. 106a(1)-(2). The criterion which had to be fulfilled in order for the court to approve the request was as follows: the director (or all those who are equated with this office) must have manifestly fulfilled his function in an improper manner, either during the insolvency procedure or three years preceding the said procedure. The terminology used in this criterion showed similarities with that of the criterion for directors' liability under Dutch company law.

87. Explanatory Memorandum, p. 11.

88. Furthermore, the terminology of the scenarios was altered to compensate for the removed exculpation criterion (this will be the subject of the next subparagraph), *Ibid.*, pp. 11-12.

89. Explanatory Memorandum, p. 3.

other grounds than listed in the 'limitative' list via a detour might therefore be possible.

An even more interesting question is whether a certain flexibility (either by an explicit open criterion or by the aforementioned detour) is really undesirable. Foreign instruments show many examples of open criteria or court discretion in determining whether a director should be disqualified. The grounds for disqualification in the British CDDA can be categorized into automatic, discretionary and mandatory grounds.⁹⁰ The criteria for automatic (*e.g.* undischarged bankrupts) grounds have been clearly demarcated and fulfilment leads to automatic disqualification.⁹¹ In the case of mandatory grounds, courts must impose a disqualification order when the director involved fulfilled his function at a company which has at any time become insolvent (whether while he was a director or subsequently), while his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company.⁹² This ground therefore includes both objective (closed/demarcated) and subjective (open) criteria, although the courts must have a particular regard to certain aspects as set out in a schedule⁹³ accompanying the CDDA (*e.g.* the extent of the director's responsibility for the causes of the company becoming insolvent).⁹⁴ Finally, discretionary grounds allow the courts full discretion.⁹⁵ These grounds have mostly been clearly demarcated (*e.g.* conviction due to failure to file returns), but one ground has been formulated so openly (*i.e.* the court must find that the director's conduct in relation to the company makes him unfit to be concerned in the management of a company) that it allows the court broad discretion to disqualify directors in cases not covered by other grounds. The German instrument lists a limitative amount of offenses, the violation of which results in automatic disqualification (*e.g.* failure to comply with the legal duty to apply for insolvency proceedings).⁹⁶ The courts are nonetheless given broad discretion, since they are allowed to impose a *Berufsverbot*, which disqualifies professionals from their profession, when the court finds that the person involved has been convicted for committing an unlawful act by misusing his profession or trade, or by acting in violation of his related duties.⁹⁷ Such disqualifications are only justified when the court finds that there are indications that the director/board mem-

ber will further his unlawful acts or breaches of duty within the context of his profession or trade. The US instruments both specify a single provision, which includes a openly formulated criterion (unfitness).⁹⁸ The court is to decide whether the conduct of the director involved classifies him as 'unfit' to manage a corporation, after it has been found that the offender has violated specific provisions of the Security Act or the Security Exchange Act.⁹⁹ It does not include a list of offenses which lead to automatic disqualification (thereby facilitating broad discretion for the courts).

Like the UK instrument, the Australian counterpart specifies several offenses which, when violated, automatically lead to disqualification (*e.g.* undischarged bankrupts).¹⁰⁰ There are also grounds which grant the courts discretion in imposing the disqualification, but contrary to the UK instrument, these grounds are all specifically formulated (*i.e.* no 'unfitness' criterion is included).¹⁰¹ However, the Corporations Act specifies quite explicitly that in determining whether disqualification for the said offenses is justified, the courts may have regard to the person's conduct in relation to the management, business or property of any corporation and "any other matters that the Court considers appropriate".¹⁰² So even though no 'unfitness' equivalent is included, the courts are nonetheless given broad discretion in imposing a disqualification order.

Taking into account that these foreign instruments all in some way include an openly formulated criterion or option for disqualification, the choice for an open criterion (either explicitly or via a detour) need not in itself be unacceptable. An open criterion does not always imply legal uncertainty: the British, American and German instruments include open criteria combined with or based on demarcated offenses (while the Australian instrument allows disqualification on demarcated offenses but leaves the court very broad discretion). In a way, the same applies for the aforementioned disqualification via detour: directors' liability is based on (but not limited to) the failure to meet bookkeeping obligations or to timely publish annual accounts, or other conduct which is further elaborated upon in a long history of case law.

The usefulness of directors' liability case law for disqualification instruments is confirmed by a 2013 study on Directors' liability and duties,¹⁰³ in which disqualification instruments around the globe have been analyzed

90. See Girgis 2009.

91. CDDA 1986, Sections 11, 12 and 12A (Undischarged bankrupts, failure to pay under county court administration order and Northern Irish disqualifications).

92. CDDA 1986, Section 6 (Duty of court to disqualify unfit directors of insolvent companies), see also CDDA 1986, Section 1(1).

93. CDDA 1986, Schedule 1.

94. CDDA 1986, Section 9(1).

95. CDDA 1986, Sections 2-5, 8 and 10 CDDA (Disqualification due to conviction of indictable offence, persistent breaches of companies legislation, fraud and other offenses in winding up, on summary conviction, after investigation of the company and participation in wrongful trading, respectively).

96. GmbHG, § 6 II 2 No. 3 and AktG, § 76 III 3 No. 3.

97. StGB, § 70.

98. SA 1933, Section 20(e) and SEA 1934, Section 21(d)(2).

99. It concerns the offenses specified in SA 1933, Section 17(a)(1) and SEA 1934, Section 10(b).

100. CA 2001, Sections 206B(1)-(6). These provisions include the conviction of an offence that concerns the making of decisions that affect the whole or a substantial part of the business of the corporation, or concerns an act that has the capacity to affect significantly the corporation's financial standing; undischarged bankrupts and disqualification from being a director of a foreign company or from being concerned in the management of a foreign company under an order made by a court of a foreign jurisdiction that is in force.

101. CA 2001, Sections 206C, 206D(1), 206E, 206EEA, 206EA and 206EB.

102. CA 2001, Sections 206C(2), 206D(3), 206E(2) and 206EAA(3); Competition and Consumer Act 2010, Sections 86E(2) and 248(2); ASIC Act, Section 12GLD(2).

103. Gerner-Beuerle, Paech & Schuster 2013.

on their effectiveness from a cross-border comparative perspective. This study concludes that the effectiveness of the UK sanction is realized by, among other factors, case law which concerns directors' liability in general. These arguments might relativize the matter of legal uncertainty.

Of course, one might assert that a director may only be disqualified due to fulfilling the directors' liability criterion when this liability is based on the other disqualification criteria (*i.e.* voidable preferences *etc.*), and not on other grounds. However, the Explanatory Memorandum clearly explains that liability due to *e.g.* the failure to meet bookkeeping obligations may result in disqualification.¹⁰⁴ Also, if this argument were true (and no additional grounds may be found in the detour of the directors' liability criterion), the usefulness of a civil law disqualification instrument would be significantly downplayed, since a large part of the criteria would also be covered by the criminal law equivalent. This I will explain in the following subparagraph. For now, it can be said that the proposal will benefit from a certain non-limitative criterion and that its usefulness is dependent of it.

4.2 The Exculpation Criterion

Another significant change to the preliminary draft concerns the removal of the exculpation criterion. In the draft, a director was able to evade disqualification if he could prove that the conduct concerned was beyond his blame, while it could also be confirmed that he had taken the appropriate measures to prevent the consequences of the said conduct.¹⁰⁵

Like the disqualification criterion, the exculpation criterion was heavily criticized during consultation. Since the director was to substantiate that he had acted in accordance with the exculpation criterion, the proof was reversed to the director. Critics asserted that this burden of proof was too heavy for such a drastic instrument and advised to drop the criterion.¹⁰⁶ The Dutch cabinet shared this opinion and removed the criterion and so reversed back the proof to the plaintiff. Moreover, due to the drastic nature of the disqualification instrument, the burden of proof for the plaintiff was further increased by raising the threshold for each individual disqualification criterion.¹⁰⁷ To elaborate, whereas in the preliminary draft, the violation of provisions concerning voidable preferences was sufficient for disqualification, the proposal now requires this voidable transfer to have taken place consciously. In the words of the Explanatory Memorandum, the violations must now

include an element of personal blame to the director, in order to disqualify him.¹⁰⁸

By parting with the exculpation criterion, the proposal seems to generally mirror its foreign counterparts. The UK, US, Australian and German legislations contain no tailor-made exculpations in order to form a separate exception for disqualification. The director seems to have to disprove the allegations (*i.e.* the grounds for disqualification) in general, while the burden of proof rests on the plaintiff. Within the context of the German instruments (both the automatic grounds and the *Berufsverbot*), which are mostly based on criminal law offenses, a plea based on general criminal law exculpations can also be considered to be within the range of possibilities, although courts are to impose a *Berufsverbot* on directors who are not convicted only due to an insanity plea.¹⁰⁹ On the other hand, German courts may only impose this sanction when there are indications that the director will further his unlawful acts or breaches of duty within the context of his profession, trade, *etc.*¹¹⁰ This additional requirement may give a German offender more possibilities to fight disqualification than an English, American or Australian director charged with the same allegations.

The Dutch proposal after alterations thus seems to more adequately reflect thoughts on burden of proof and exculpation within the context of directors' disqualification instruments abroad. The removal of the exculpation criterion and the reversal of proof might therefore in that context be considered a valid alteration. However, the consequences of this alteration for the necessity of a civil law disqualification instrument should also be considered within the context of the grounds for disqualification itself.

As mentioned earlier, the removal of the exculpation criterion was compensated by raising the thresholds of the individual disqualification criteria. This compensation has direct consequences for the relation between the proposed civil law instrument and its criminal law counterpart. It has been set out that this counterpart covers non-cooperation with the liquidator, as well as selling assets below their worth and favouring a creditor at the expense of other creditors prior to or during bankruptcy. The latter two *bankbreuk* violations are similar to voidable preferences in Dutch civil law.¹¹¹ In fact, it appears the civil law and criminal law instrument can be imposed for the same conduct. This might have been considered more doubtful at the time of the preliminary draft, because the Dutch Supreme Court has ruled that conviction due to *bankbreuk* is not possible unless the criteria for its civil law equivalent (*i.e.* voidable preferences) have been fulfilled.¹¹² A later judgement of the

104. Explanatory Memorandum, p. 17. A recent policy document from the Ministry of Security and Justice seems to further confirm the aforementioned 'detour', since it also appears to allow for a civil law disqualification on the grounds of directors' liability due to irregular bonus policies. See Ministry of Security and Justice, reference No. 34 011, No. 6, p. 2.

105. Preliminary Draft, Art. 106a(4). Much like the criterion for disqualification in the draft, this exculpation was identical to its equivalent in directors' liability law, that is: DCC, Arts. 2:138(3) and 2:248(3).

106. Explanatory Memorandum, pp. 16-17.

107. *Ibid.*, p. 17.

108. *Ibid.*, p. 17. A recent policy document from the Ministry of Security and Justice refers to the expansion of the criteria as 'extra qualifying elements'; see Ministry of Security and Justice, reference No. 34 011, No. 6, p. 18.

109. StGB, § 70(1).

110. StGB, § 70(1).

111. BA, Arts. 42 and 47.

112. Dutch Supreme Court 2 November 2004 (ECLI:NL:HR:2004:AP4229).

Supreme Court – that accepting the considerable chance that the creditors may be damaged fulfils the subjective criteria of the *bankbreuk* offenses¹¹³ – seems to put the instruments of *bankbreuk* and voidable preferences (and by extension: the disqualification instruments) dangerously close together.¹¹⁴ This is because the Supreme Court has also ruled that the certain knowledge that creditors are to be harmed by the transaction is in itself insufficient to void a transaction due to voidable preferences.¹¹⁵

At the time of the preliminary draft, one might still have asserted that the former ruling of the Supreme Court does not allow the criminal law disqualification to be imposed just as easily as the civil law instrument. However, since the thresholds of the disqualification criteria (as regards the scienter of the director) in the proposal have now been raised, this argument can no longer be maintained. Due to this alteration, the (proposed) civil law and criminal law disqualification seem to overlap.¹¹⁶ The same seems to apply as regards the failure to cooperate with the liquidator. In fact, the Explanatory Memorandum sets out that this violation may result not only in civil law disqualification but also in criminal law fines and prison sentences, referring to Article 194 DPC.¹¹⁷ As explained earlier, violations of these provisions may also result in criminal law disqualification.

The raising of the aforementioned thresholds thus constitutes an unacceptable overlap between instruments, which violates the criminal law principle of *ultimum remedium*: because criminal law implies the use of sanctions that touch some of our most fundamental rights – such as freedom, property and private life – it is considered to be a remedy of last resort in the fight against breaches of justice and should therefore only be considered when instruments of other legal domains prove insufficient.¹¹⁸ The alteration of raised thresholds furthermore supports the argument that a flexible disqualification criterion contributes to the proposal having any added value to the already existing arsenal against fraudulent conduct by directors. Otherwise, the civil law disqualification can be imposed on five limitative grounds, two of which are also covered by a criminal law instrument.

113. See note 69.

114. De Weijjs & Reker 2014, pp. 325-332.

115. Dutch Supreme Court 20 November 1998, NJ 1999, 611 (ECLI:NL:HR:1998:ZC2784) and 29 June 2001, JOR 2001/220 (ECLI:NL:HR:2001:AB2435).

116. In a recent policy document from the Ministry of Security and Justice to the House of Representatives, the relationship between the disqualification instruments is addressed further. Although the document states that both instruments are qualitatively different and that the question whether the civil law disqualification instrument can be requested must be viewed separately from the question whether criminal conduct is involved, it does not deny that certain conduct may result in either a civil law or criminal law disqualification. In fact, the document expressly states that a civil law disqualification does not exempt one from a criminal law disqualification and seems to imply that certain behaviour might result in both. See Ministry of Security and Justice, reference No. 34 011, No. 6, p. 7.

117. Explanatory Memorandum, p. 20.

118. Crijns 2012, p. 11. Compare Ashworth & Horder 2013, p. 33.

The necessity of different grounds for disqualification instruments of different legal domains also follows from efficiency considerations. One of the conclusions of the aforementioned 2013 study on Directors' liability and duties¹¹⁹ is that "(...) disqualification is particularly effective where the sanction is also available outside insolvency and for management mistakes that do not amount to a criminal offence".¹²⁰

Disqualification sanctions outside criminal law are therefore desirable, but the conclusion of the 2013 study implies that a certain demarcation between grounds of respective disqualification instruments is necessary to safeguard an effective disqualification arsenal. An overlap between grounds for disqualification of different disqualification instruments is therefore inefficient and unnecessary.

4.3 Out-of-Court Institutions

The aforementioned overlap may be eliminated by simply removing the similar criteria from the proposal. However, it is to be expected that the Dutch cabinet prefers these criteria to remain in the proposal, in order to fight these violations insofar they do not justify a criminal response. Because of the raised criteria, any violation which fulfils either criterion may also result in a criminal law sanction. Due to the severe nature of disqualification, lowering the thresholds does not appear to be an option. So how to best solve this problem? The answer lies in a reallocation of cases between civil law and criminal law institutions. This is in my opinion achieved best by introducing an out-of-court institution, which has the added benefit of a decrease in workload of the courts and an overall more effective disqualification arsenal.

Such an institution is found in the CDDA, the Securities Act and Securities Exchange Act, as well as the Corporations Act, which all authorize institutions to impose and enforce disqualification orders before any court involvement. The CDDA authorizes the Secretary of State of the Department of Trade and Industry ('SSDT'),¹²¹ The US Securities and Exchange Commission ('SEC')¹²² and the Australian Securities and Investment Commission ('ASIC')¹²³ have similar powers.

The nature of the out-of-court procedures is different in each of these legislations. The UK out-of-court procedure shows similar traits to a settlement: a 'disqualification undertaking' is made between the SSDT and the director involved, provided that the director voluntarily agrees with its conditions.¹²⁴ When there is no consensus between the SSDT and the director, the SSDT may still initiate a subsequent court order.¹²⁵ The US sanctions show many similarities with their UK equivalent,

119. See Gerner-Beuerle, Paech & Schuster 2013.

120. *Ibid.*, p. 207.

121. CDDA 1986, Section 1A.

122. SA 1933, Section 8A(f) and SEA 1934, Section 21C(f).

123. CA 2001, Section 206F.

124. CDDA 1986, Section 7.

125. Bras & Winter 2004, p. 328.

but they differ in that they have a far more unilateral nature. This is because the sanctions are part of the SEC authority to impose an order to cease and desist,¹²⁶ which does not require mutual agreement.¹²⁷ When a director refuses to agree to an undertaking in the UK, the SSDT may initiate court proceedings, whereas the SEC imposes a cease-and-desist order, and the director involved is allowed to start court proceedings.¹²⁸

Contrary to the UK and US instruments, the ASIC has a limited authority to impose a disqualification order, in comparison with the Australian courts: the ASIC may only disqualify a person for a maximum of five years, and only when the person has been an officer of two or more corporations, during which term (or within 12 months after the person ceased to be an officer), each of the corporations was wound up, while a liquidator lodged a report about the corporation's inability to pay its debts.¹²⁹ This sanction appears to lean more towards the US disqualification instrument as regards the out-of-court procedure, since it seems to be unilateral in nature: like the cease-and-desist authority of the SEC, the ASIC imposes disqualification without requiring a settlement-like agreement with the director involved. The director may then file for an appeal.¹³⁰

The introduction of an out-of-court institution in the Netherlands might contribute to the effectiveness of the proposal and the disqualification arsenal in general. This is indicated by the effects of the introduction of disqualification undertakings in the UK. Since its introduction, the disqualification undertaking procedure has proved to be popular.¹³¹ When the procedure was introduced by the Insolvency Act 2000, the amount of disqualification orders increased substantially and disqualifications via undertaking make up a substantial number of the total amount of disqualifications each year: whereas in 2001, more than 68 percent of the total number of disqualifications were undertakings, this number increased to 80 percent in 2012.¹³²

Fletcher notes the following with regards to the contribution by out-of-court institutions to the effectiveness of the UK disqualification instrument:

(...) the reforms enacted by the Insolvency Act 2000, empowering the Secretary of state to accept a disqualification undertaking by a director in lieu of pursuing court proceedings has greatly accelerated the process and reduced the drain on public resources

expended in discharging this key policy of our corporate insolvency law.¹³³

It may therefore be interesting to create or authorize a Dutch institution to mirror the approach of the aforementioned countries.¹³⁴ Not only would this decrease the workload of the courts, it would also allow a governmental institution to act as a financial regulatory authority. Furthermore, the introduction of such an institution might make the Dutch proposal more in line with the position of the liquidator in Dutch law, who's primary focus is the interest of the creditors and not the prosecution of fraudulent directors.¹³⁵ The liquidator may nevertheless have a more limited role (*e.g.* informing the out-of-court institution of any violations which justify disqualification). The authority of a Dutch out-of-court institution may be limited in comparison to the powers of the courts in this regard, such as similarly to the authority of the ASIC (*i.e.* by setting a lower maximum for imposed disqualification by the institution). This limitation may contribute to a policy where more serious cases are allocated to the courts, while less serious cases are first to be treated by the out-of-court institution.

The most obvious candidate for a Dutch out-of-court institution, who is also able to facilitate the aforementioned reallocation of civil law and criminal law cases and to prevent the overlap between the proposed civil law and criminal law disqualification instrument, is – in my opinion – the Dutch Public Prosecutor. This institution is, after all, not only the initiator of criminal law procedures in the Netherlands, but also authorized to request for a disqualification in the proposal. The overlap can thus be prevented because the Public Prosecutor can create a policy to determine when to impose a disqualification itself and when to bring the case before a civil law or criminal law court. This disqualification by the Dutch Public Prosecutor could then be fitted within the context of the so-called *strafbeschikking*,¹³⁶ which is the – limited – authority of the Public Prosecutor to impose criminal sanctions or measures without court involvement.¹³⁷ The defendant is allowed to object against the *strafbeschikking*,¹³⁸ which – similarly to the US cease-and-desist order – opens the way to a court

126. SA 1933, Section 8A(a) and SEA 1934, Section 21C(a).

127. Bras & Winter 2004, p. 328.

128. SA 1933, Section 9(a) and SEA 1934, Section 25(a).

129. Provided that the ASIC has given the director involved a notice requiring him to demonstrate why he should not be disqualified, and that the ASIC is satisfied that the disqualification is justified. Disqualification is only possible when the requirements have been met within seven years prior to the handing of the notice. See CA 2001, Section 206F.

130. CA 2001, Part 9.4A.

131. Girgis 2009, p. 694.

132. Compare The Insolvency Service, *Annual Report & Accounts 2001-2002*, p. 8 and The Insolvency Service, *Annual Report & Accounts 2011-2012*, p. 30.

133. Fletcher 2009, p. 730.

134. There are, however, concerns as to whether this is financially possible in the current Dutch economic climate. See Keijzer & Lennarts 2014, p. 152. However, such concerns have also been raised with respect to the current authority of the Dutch Public Prosecutor in the proposal. See Ministry of Security and Justice, reference No. 34 011, No. 6, p. 5-6.

135. Lennarts 2013, p. 26.

136. An alternative would be to authorize the Public Prosecutor to disqualify directors within the context of civil law. However, the powers of the Public Prosecutor are far more limited within Dutch civil law, whereas its powers within criminal law have substantially increased over the last decades. The in 2008 introduced authority of the Dutch Public Prosecutor to prosecute without court involvement is an example of this. The authorization of this institution to disqualify directors in Dutch criminal law would therefore be more in line with current legal developments in the Netherlands.

137. As specified in Dutch Code on Criminal Procedure (hereinafter referred to as: 'DCCP'), Sections 257a-257h.

138. In accordance with DCCP, Section 257e.

review. This expansion of powers of the Public Prosecutor can be formally realized by including this authority in the Dutch Code of Civil Procedure as a separate measure which may be imposed via a *strafbeschikking*.

This alteration implies a system of demarcation through (re)allocation based on the nature of specific cases, not only between the Public Prosecutor and criminal law courts but also between the criminal law and civil law disqualification instruments: particularly serious cases of insolvency violations which can be categorized within the current criminal law provisions should at all times be dealt with by criminal law courts, serious cases which do not merit this 'top bracket' could then be dealt with by the Public Prosecutor, while less serious cases and cases that cannot be categorized under any criminal law provision can be dealt with by civil law courts. Such a system would not only counteract the earlier mentioned overlap but also result in an overall more effective usage of the disqualification instruments.

4.4 (Layered) Differentiation between Sanction Levels

To further promote the demarcation between the proposed civil law and existing criminal law disqualification instruments, it may be interesting to change the maximum level of one or either of the sanctions, in order for them to more adequately reflect their nature. It is important to differentiate between the level of sanctions imposed within the respective legal areas. After all, since both sanctions can currently be imposed for a maximum of five years, not altering this aspect might result in the undesirable situation where two persons – one subject to the criminal law sanction and one to the civil law sanction – may be disqualified for the same amount of years even though the seriousness of their offenses might differ. Changing the maxima may result in a policy where, based on the seriousness of the allegation, a civil law sanction might no longer be considered sufficient in certain cases, and criminal law sanctions might be more appropriate. Other factors, such as whether it can be expected that the offender will continue his fraudulent conduct, may also play a role in such a policy. This policy can especially develop when an (out-of-court) institution is authorized to request (or impose itself) a disqualification order in both civil law and criminal law (as has been suggested) and can contribute to determining what cases are to be dealt with by a (criminal law or civil law) court and what cases can (first) be dealt with by the out-of-court institution. This sanction hierarchy between (and within) civil law and criminal law disqualifications can be coined as 'layered differentiation'.

Inspiration for layered differentiation can be drawn from multiple examples from the foreign counterparts. The CDDA includes a broad disqualification sanction range. The court is to determine the appropriate disqualification period in view of the seriousness of the offense.¹³⁹ Two (the minimum amount for 'unfitness')

to five years are to be imposed for cases which are considered 'not very serious', whereas six to ten years are imposed for 'serious cases which do not merit the top bracket', and 'particularly serious' cases amount to ten to fifteen years (the maximum amount).¹⁴⁰ Mitigating circumstances in this regard concern, for example, the director's personal health, his age, his reputation, the duration of his appointment and the admission of fault.¹⁴¹ In the US, both the courts and the SEC may impose conditional disqualifications and have full discretion with respect to the duration of the disqualification, which allows them to permanently exclude persons from directorship.¹⁴² Unlike its UK equivalent, the US sanction lacks a clear hierarchy: no explicit guidelines regarding years of disqualification have been formulated, although permanent disqualification is only to be imposed when future violations are to be expected.¹⁴³ The Corporations Act appears to combine the UK and US solutions: courts may impose insolvency-related disqualifications for a maximum of twenty years,¹⁴⁴ while other grounds allow disqualification for a period 'the court considers appropriate'.¹⁴⁵ This, too, has resulted in certain guidelines¹⁴⁶ which constitute a disqualification period hierarchy.¹⁴⁷ These guidelines are based on factors such as the seriousness and nature of the violation, the chance of recidivism, the extent of the damage to society, the structure and nature of the corporation, the director's personality and the interests of shareholders, creditors and employees. A disqualification can be imposed for a maximum of three years in cases of self-enrichment which are followed by attempts to wholly or partially repay the unlawfully obtained financial gain, while the person involved no longer aspires a position in corporate management. A disqualification of seven to twelve years is imposed in cases of serious incompetence and irresponsibility, substantial losses, deliberate attempts to self-enrichment at the cost of others and the absence of (a sense of) guilt, with a possibility of rehabilitation. Disqualification for 25 years or longer is reserved for cases which involve very serious financial losses, considerable chances of recidivism, the absence of (a sense of) guilt, dishonesty or deliberate fraudulent conduct.¹⁴⁸ Finally, the German disqualification, based on the *Berufsverbot* must be imposed for at least one year and for a maximum of five years. If the court however expects that this maximum term is insufficient to ward off the impending danger of the offender in the future, it may disqualify the director permanently. Automatic dis-

139. Compare *Re Westmid Packing Services Ltd; Secretary of State for Trade and Industry v. Griffiths* [1998] 2 ALL ER 124.

140. *Re Sevenoaks Stationers (Retail) Ltd.* [1991] Ch 164.

141. Möser 2011, pp. 324-368.

142. SA 1933, Sections 8A(f) and 20(e) and SEA 1934, Sections 20(e) and 21C(f).

143. *SEC v. Posner*, 16 F.3d 520 (2d Cir. 1994).

144. CA 2001, Section 206D.

145. CA 2001, Sections 206C, 206E and 206EEA.

146. Du Plessis, Mc Convill & Bagaric 2005.

147. Bras & Winter 2004, pp. 328-334.

148. For both the factors and hierarchy they are based on, see *Santow J in ASIC v. Adler & 4 Ors* (30 May 2002) NSWSC 48.

qualification has been set to five years and cannot be adjusted by the courts.¹⁴⁹

When drawing inspiration for layered differentiation from these foreign counterparts, it is important that the sanctions should conform general considerations inherent to Dutch sanctions. The most important is that (civil law) disqualification is to be regarded as an exceptional sanction, which should not be an automatic response to bankruptcy.¹⁵⁰ Due to its exceptional nature, it is my opinion that permanent disqualification goes against these considerations.

5 Conclusion

In response to the effects of economic decline on bankruptcy tendencies and fraudulent behaviour within that context, the Dutch proposal introduces a civil law disqualification sanction which – contrary to its criminal law equivalent and existing civil law instruments – aims to prevent further misconduct of directors. Due to recent criticism from both public and private advisory bodies and legal experts, the proposal has been altered significantly. These alterations are coupled with a proposal to equate *de facto* directors to *de jure* directors within the context of the criminal law equivalent. The most prominent alterations to the proposal itself concern the conversion of an openly formulated disqualification criterion with a non-limitative list of fulfilling scenarios to a limitative list of criteria and the removal of an exculpation criterion, followed by raising the thresholds of the aforementioned disqualification criteria. These changes to the proposal and its criminal law equivalent raise doubts as regards the question whether the proposal has any added value to the existing legal arsenal. Because of the alterations to the proposal, its substantive elements move further away from Dutch directors' liability law and towards the criminal law equivalent, resulting in an overlap between the two instruments. This overlap goes against anti-stigmatizing tendencies in insolvency law and the aim of the proposal to introduce a non-stigmatizing sanction.

The overlap and the limitative nature of the criteria of the proposal highlight the relatively few remaining grounds for civil law disqualification. This could be counteracted by introducing a flexible and openly formulated disqualification criterion based on specifically formulated offenses, such as in the foreign counterparts. Contrary to criminal law – which is bound by the principle of *lex certa* – civil law allows for such openly formulated criteria. The proposal appears to do this by leaving in the implicit flexible criterion of disqualification due to directors' liability, which liability is subject to an openly formulated criterion, similar to that of the disqualification criterion prior to the alterations. However, this detour is not explicitly recognized in the pro-

posal or its Explanatory Memorandum. The acceptance of this detour is in my opinion crucial for the proposal to add any true value. To resolve the overlap, foreign equivalents offer two important solutions to further demarcate between the instruments: reallocation of disqualification cases by introducing an out-of-court institution and (a policy regarding) sanction differentiation. It has been asserted that the Dutch Public Prosecutor would be the ideal candidate for this position, since it is authorized to request a disqualification order before both the civil law and criminal law courts. It could thus create a policy for determining what sanction (in years) is appropriate and, by extension, what sort of cases are to be tried for what sort of court (and what cases it could address itself).

In formulating these considerations, this article has attempted not only to provide suggestions to improve the Dutch proposal but also to contribute to a general model of an effective directors' disqualification instrument. The presence of disqualification instruments in more than one legal domain increases the effectiveness of each instrument and the legal arsenal against fraudulent conduct in general, but there should be a clear demarcation between the disqualification instruments in order for them to conform to civil law and criminal law principles, specifically the concept of criminal law as an *ultimum remedium*.

6 Bibliography

- A. Ashworth & J. Horder, *Principles of Criminal Law*, Oxford, Oxford University Press, 2013.
- M. Bras & J. Winter, "Het bestuursverbod", *Tijdschrift voor Ondernemingsrecht*, 2004, p. 121.
- G.J.M. Corstens & M.J. Borgers, *Het Nederlands strafprocesrecht*, Deventer, Kluwer, 2011.
- J.H. Crijns, "Strafrecht als ultimum remedium. Levend leidmotief of archaisch desideratum?", *Ars Aequi*, 2012, p. 11.
- D.R. Doorenbos, "Het bestuursverbod", *Ondernemingsrecht*, 2008, p. 124.
- D.R. Doorenbos, "Het civielrechtelijk bestuursverbod voor faillissementsfraudeurs: een ambivalent voorstel", *Ars Aequi*, 2014, p. 1.
- J.J. du Plessis, J. Mc Convill & M. Bagaric, *Principles of Contemporary Corporate Governance*, Cambridge, Cambridge University Press, 2005.
- R.J. de Weijts & T. Reker, "Civiel recht als ultimum remedium? Over de verstoorde verhouding van de bankbreuk tot de pauliana", *Maandblad voor Vermogensrecht*, 2014, p. 12.
- European Commission, "A New European Approach to Business Failure and Insolvency", COM(2012) 742 final.
- European Commission, "Commission Recommendation of 12 March 2014 on a New Approach to Business Failure and Insolvency" (2014/135/EU).
- European Commission, "Overcoming the Stigma of Business Failure – For a Second Chance Policy. Implementing the Lisbon Partnership for Growth and Jobs", COM(2007) 584 final.
- European Commission, "Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings", COM (2012) 744 final.

149. GmbHg, § 6 II 2 no. 3 and AktG, § 76 III 3 no. 3.

150. Explanatory Memorandum, p. 3.

- I.F. Fletcher, *The Law of Insolvency*, London, Sweet & Maxwell, 2009.
- C. Gerner-Beuerle, P. Paech & E.P. Schuster, *Study on Directors' Duties and Liability, prepared for the European Commission DG Markt*, London, 2013.
- J. Girgis, "Corporate Directors' Disqualification: The New Canadian Regime?", 46 *Alberta Law Review* 3, 2009.
- B. Hess, P. Oberhammer & T. Pfeiffer, *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings*, Hart Publishing, 2012. Available at <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf> (last accessed 9 May 2015).
- C.M. Hilverda, *Faillissementsfraude, Onderneming en Recht* series Vol. 53, Deventer, Kluwer, 2009.
- House of Representatives, *Document Issued by the House of Representatives*, supplement No. 828, dated 2012–2013.
- F.E. Keijzer, "Het Wetsvoorstel civielrechtelijk bestuursverbod: een placebo met bijwerkingen", *Ondernemingsrecht*, 2015, p. 30.
- F.E. Keijzer & M.L. Lennarts, "Het civielrechtelijk bestuursverbod: geen medicijn maar een placebo", in D. Busch (ed.), *Wet continuïteit ondernemingen (delen I en II) en het bestuursverbod, preadvies van de Vereniging 'Handelsrecht'*, Zutphen, Paris, 2014.
- M.L. Lennarts, "Boeven vangen op kosten van de boedel? De curator als hoeder van het algemeen belang? Geen goed plan!", *Tijdschrift voor Insolventierecht*, 2013, p. 4.
- Ministry of Foreign Affairs, "Letter from the Minister of Foreign Affairs to the House of Representatives", reference No. 22 112, No. 1554, dated 25 January 2013. Available at (in Dutch) <<https://zoek.officielebekendmakingen.nl/kst-22112-1554.html>> (last accessed 9 May 2015).
- Ministry of Justice, "Letter from the Minister of Justice to the House of Representatives", reference No. 29 449, No. 1, dated 1 March 2004.
- Ministry of Justice, "Letter from the Minister of Justice to the House of Representatives", reference No. 17 050, No. 319, dated 23 January 2006.
- Ministry of Security and Justice, "Explanatory Memorandum to the Preliminary Draft to Amend the Bankruptcy Act Concerning the Introduction of a Civil Law Directors' Disqualification". Available at (in Dutch) <www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/03/29/memorandum-van-toelichting-wet-civielrechtelijk-bestuursverbod.html> (last accessed 9 May 2015).
- Ministry of Security and Justice, "Explanatory Memorandum to the Proposal to Amend the Bankruptcy Act Concerning the Introduction of a Civil Law Directors' Disqualification". Available at (in Dutch) <<https://zoek.officielebekendmakingen.nl/dossier/34011/kst-34011-3?resultIndex=4&sorttype=1&sortorder=4>> (last accessed 9 May 2013).
- Ministry of Security and Justice, "Letter from the Minister of Security and Justice and the State Secretary of Security and Justice to the House of Representatives", reference No. 32 317, dated 29 May 2013. Available at (in Dutch) <<https://zoek.officielebekendmakingen.nl/behandelddossier/32317/kst-32317-CU?resultIndex=36&sorttype=1&sortorder=4>> (last accessed 9 May 2015).
- Ministry of Security and Justice, "Letter from the Minister of Security and Justice to the House of Representatives", reference No. 326963, dated 27 November 2012. Available at (in Dutch) <<http://t.co/KnxSk5F4>> (last accessed 9 May 2015).
- Ministry of Security and Justice, "Policy Document on Account of the Report of the Commission of Security and Justice", reference No. 34 011, No. 6.
- Ministry of Security and Justice, "Preliminary Draft to Amend the Bankruptcy Act Concerning the Introduction of a Civil Law Directors' Disqualification". Available at (in Dutch) <www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/03/29/wetsvoorstel-civielrechtelijk-bestuursverbod.html> (last accessed 9 May 2015).
- Ministry of Security and Justice, "Proposal to Amend the Bankruptcy Act Concerning the Introduction of a Civil Law Directors' Disqualification". Available at (in Dutch) <<https://zoek.officielebekendmakingen.nl/kst-34011-2.html>> (last accessed 9 May 2015).
- Ministry of Security and Justice, "Proposal to Revise the Penalization of Bankruptcy Fraud", reference No. 33 994, No. 2.
- K. Möser, "Berufsverbote für Geschäftsleiter – Überlegungen zur Weiterentwicklung der deutschen Regelungen der §§ 6 II 2 No. 2 und 3, 3 GmbHG, §§ 76 III 2 No. 2 und 3, 3 AktG vor dem Hintergrund des englischen Companies Directors Disqualification Act 1986", *Zeitschrift für Vergleichende Rechtswissenschaft*, 2011.
- R. Parry, "Introduction", in K. Gromek Broc and R. Parry (eds.), *Corporate Rescue. An Overview of Recent Developments from Selected Countries in Europe*, The Hague/London/New York, Kluwer Law International, 2004.
- "Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels", 4 November 2002. Available at <http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf> (last accessed: 9 May 2015).
- The Insolvency Service, *Annual Report & Accounts 2001–2002*, London, The Stationary Office, 2002.
- The Insolvency Service, *Annual Report & Accounts 2011–2012*, London, The Stationary Office, 2012.
- B. Wessels, *Faillietverklaring*, Wessels Insolventierecht series Vol. I, Deventer, Kluwer, 2012.
- B. Wessels, *Teaching and Research in International Insolvency Law: Challenges and Opportunities*, Valedictory lecture, Leiden, 14 April 2014.