

Directors' responsibilities where there is a likelihood of insolvency

Geschäftsleiterverantwortung bei wahrscheinlicher Insolvenz

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Abstract

The relationship between company law and insolvency law is one of the major issues in corporate law. While the two areas of law have traditionally been largely unrelated to one another, company law and insolvency law have been increasingly intertwined for some time. The implementation of the European Restructuring Directive 2019/1023 continues this development. The core of the Restructuring Directive is the introduction of a preventive restructuring framework, which will be available to companies when there is a likelihood of insolvency. The German answer was the Act on the Stabilisation and Restructuring Framework for Businesses (StaRUG). The framework's instruments are inspired by insolvency law but will yet be used in a non-insolvency context. This will have an impact on company law and, not least, the line between company law and insolvency law will be softened.

This thesis examines the consequences of this increasing interweaving of company and insolvency law for managerial responsibilities against the background of the European Restructuring Directive. So far, the obligation of directors of legal entities to file for insolvency, triggered by the occurrence of material insolvency (Section 15a (1) German Insolvency Code), marked the point in time at which the directors' obligations changed fundamentally. This is particularly true with regard to the creditors' protection regime. German law does not leave the creditors defenseless in the area of non-insolvency law, but protects them in a situation-specific manner. But creditors only have primacy at the point of material insolvency. So, if the opening of insolvency proceedings was previously seen as the turning point, which fundamentally changes the director's program of duties, the transition from one world to the other will be more fluid in the future. The key question of this thesis is therefore: Shouldn't this smooth transition also be reflected in the obligations of the directors? This thesis examines the question of whose interests the management is primarily committed to during this time. Without addressing this question directly, the Restructuring Directive itself gives rise to a debate about the obligation to take account of creditors' interests. According to Art. 19 lit. a of the Restructuring Directive, directors must have due regard to the interests of creditors when there is a likelihood of



insolvency. What is hidden behind this wording has the potential to initiate a paradigm shift: Should the interests of creditors move into the center of business decisions when there is a likelihood of insolvency? Such a shift of fiduciary duties, which is known from the Anglo-American law, is not yet known in German law. That almost changed in the course of the German implementation of the Restructuring Directive: According to Section 2 (1) of the StaRUG government draft, directors would have been obliged to consider the interests of all creditors. Only subject to this obligation should the directors also take the interests of the shareholders into account. In the literally last minute, the legal committee canceled the regulation and the StaRUG came into force on January 1, 2021 without the introduction of a shift of fiduciary duties. This thesis aims to find out whether there is a need for reform in this regard. In the course of this, it examines the question of the implementation of the Restructuring Directive in accordance with European law and, as a follow-up question, deals with the enforcement of an obligation to take account of creditors' interests.

This thesis compares German law to English and Austrian law as sources of inspiration. English restructuring law may on the one hand be seen as a blueprint for the European Restructuring Directive and, on the other hand, it knows a shift of fiduciary duties in favour of creditors in the vicinity of insolvency. With the *Unternehmensreorganisationsgesetz*, Austria also has experience with pre-insolvency proceedings. This thesis uses the findings from both legal comparisons by making reform proposals for managerial responsibilities when there is a likelihood of insolvency de lege ferenda.