

Bestuurders van rechtspersonen en het ondernemingsbegrip: poging tot synthese na drie cassatiearresten

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1. INLEIDING

1. Innovatief toepassingsgebied – Een van de meest fundamentele innovaties van de grondige hervorming van het commerciële insolventierecht in 2017, waarbij Boek XX WER werd ingevoerd³, was het bijzonder brede toepassingsgebied: eenieder die kwalificeert als “onderneming” kan failliet worden verklaard⁴. Het was de bedoeling van de wetgever om het insolventierecht veel ruimer toepassing te laten vinden. Tegelijk wilde de wetgever meer rechtzekerheid creëren⁵. Wat betreft het vraagstuk of bestuurders van een rechtspersoon als onderneming kwalificeren en bijgevolg onder het toepassingsgebied van Boek XX WER vallen, is dit laatste evenwel vooralsnog niet gekluid.

2. Bestuurders onder Faill.W. en WCO – Onder de toepassing van de Faillissementswet⁶ en de Wet Continuïteit Ondernemingen⁷ was voormelde vraag niet aan de orde. De faillissements- en reorganisatiewetgeving greep toen immers in essentie terug naar de hoedanigheid van handelaar⁸. Het werd algemeen aanvaard dat het besturen van vennootschappen een burgerlijke activiteit was die de bestuurder geen kwalificatie als handelaar kon opleveren. Bestuurders bleven op die manier buiten de toepassing van het insolventierecht. Wanneer zij geconfronteerd werden met ernstige betalingsproblemen, dan dienden zij hun toevlucht te nemen tot de procedure van collectieve schuldenregeling voorzien in het Gerechtelijk Wetboek⁹.

3. Bestuurders onder Boek XX WER – Sinds de inwerkingtreding van Boek XX WER op 1 mei 2018¹⁰ ziet het

toepassingsgebied van het commerciële insolventierecht er echter geheel anders uit. Onder het ondernemingsbegrip, dat voortaan als afbakeningscriterium tussen commerciële en particuliere insolventie dient, geldt dat iedere natuurlijke persoon die zelfstandig een beroepsactiviteit uitoefent als een onderneming te beschouwen is¹¹. Al snel kwam daarbij de vraag op de proppen of ook bestuurders onder die brede noemer van Boek XX WER vallen. De relevantie van dit kwalificatievraagstuk moet worden gezien in het licht van een andere fundamentele vernieuwing die Boek XX WER heeft teweeggebracht: een aanzienlijke aanscherping van de *fresh start*-gedachte. Ondernemers die een handels-, een bedrijfs- of een ambachtsactiviteit of een vrije of zelfstandige beroepsactiviteit uitoefenen, kunnen blootstaan aan het risico op insolventie¹². Om tegemoet te komen aan dit (verhoogde) ondernemingsrisico wordt aangenomen dat natuurlijke personen-ondernemers een tweede kans moeten krijgen om een nieuwe start te maken en hun ondernemingsactiviteiten opnieuw op te zetten na een failliet. Omdat het meeslepen van een oude schuldenberg dergelijke initiatieven al te zeer zou belemmeren, bestaat het principe van de schuldkwijtschelding. Schulden die onbetaald zijn gebleven op het einde van de insolventieprocedure (zgn. “reestschulden”¹³), moeten niet langer worden voldaan. Bovendien zou het aanmoedigen van een snelle hervatting van de ondernemingsactiviteiten maar weinig effectief zijn, mochten de inkomsten die de ondernemer verkrijgt vanaf de opening van de insolventieprocedure nog moeten worden aangewend om diens oude schuldenberg af te lossen. In het Belgische commerciële insolventierecht vertaalt deze gedachtegang zich in de combinatie van

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2. Assistant Manager Accountancy, Bedrijfsfinanciering en Fiscaliteit en Instituut Financieel Recht UGent.

3. Wet 11 augustus 2017 houdende invoering van het Boek XX “insolventie van ondernemingen”, in het Wetboek van economisch recht, en houdende de invoering van de definities eigen aan Boek XX en van de rechtshandhavingbepalingen eigen aan Boek XX in het Boek I van het Wetboek van economisch recht, BS 11 september 2017.

4. Zie art. 1.23, 8°, 1.23, 7°/1 WER, jo. art. 1.1, lid 1, 1° WER.

5. Zie Parl.St. 54 2407/001, 37.

6. Faillissementswet 8 augustus 1997, BS 28 oktober 1997.

7. Wet 31 januari 2009 betreffende de continuïteit van de ondernemingen, BS 9 februari 2009.

8. Art. 2 Faillissementswet.

9. Zie art. 1675/2 e.v. Ger.W.

10. Art. 78 wet 11 augustus 2017.

11. Zie huidige art. 1.1, 1° a) WER.

12. Overn. (72) Richtl. (EU) 2019/1023 EP en Raad 20 juni 2019 betreffende preventieve herstructureringsstelsels, betreffende kwijtschelding van schuld en beroepsverboden, en betreffende maatregelen ter verhoging van de efficiëntie van procedures inzake herstructurering, insolventie en kwijtschelding van schuld, en tot wijziging van Richtlijn (EU) 2017/1132 (Richtlijn betreffende herstructurering en insolventie), Pb.L. 26 juni 2019, afl. 172/18.

13. Zie art. 1.23, 22° WER.

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Werner Berthold, Brita Eckart



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zugehörig erleben sie entscheidende historische Zsuren Das exponierte Wirken von Mennicke Cordemann und Wachenheim in der Sozialen Arbeit sowie deren Selbstdeutungen zeichnet Bourmer präzise und sensibel nach Ihre Interpretation besticht durch einen heraus kritischen Blick auf diese autobiographischen Erzählungen Im Ergebnis widerspricht die Autorin weiten Teilen des Fachdiskurses Sie plädiert für den konsequenten Abschied von immer wieder postulierten Identitätsidealen Die Thesen dieser Forschungsarbeit haben direkt Relevanz für in der Sozialen Arbeit Tätige für Profession und Disziplin sowie für die Gestaltung des Hochschulstudiums

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