Summary

Background, research question and scope

The appointment of the bankruptcy administrator is part of the bankruptcy order pronounced by the court (Article 14 of the Dutch Bankruptcy Act (Fw)). The administrator is charged with winding up and settling the insolvent estate. One of the administrator's duties is to investigate the cause of the bankruptcy. The conclusion of such an investigation may be that the bankruptcy is (partly) caused by manifest improper management or that there is evidence of fraudulent conveyance or transfer (faillissementspauliana). In that case the administrator has the option to sue the director of the company or the third party involved in fraudulent conveyance or transfer and in this way add to the estate's funds. However the insolvency estate is not always sufficient to be able to pay the cost of the administrator's investigation and any legal actions that may arise from this. In cases in which the estate is insufficient, the Guarantee Scheme Bankruptcy Administrators 2012 provides financial support to the administrator to take legal action on grounds of director's liability or fraudulent conveyance or transfer and to start a preliminary investigation or to investigate the possibility of taking such legal action.

The Guarantee Scheme was amended in 2012 further to an evaluation study conducted in 2006. The number of administrative acts has been decreased and the supervisory role of the examining magistrate reduced. The ratio between the maximum amount of the guarantee requested and the amount of the debts has been relaxed to 1:2. In the meantime thought has been given to how the Guarantee Scheme should develop in the future. This evaluation study is a result of this.

The study has three main questions:

1. To what extent has the Guarantee Scheme 2012 proved to be effective and efficient?
2. Can the Guarantee Scheme be brought into line with the Government Guarantee Framework while continuing to optimise the objectives of the scheme, and if so, how might this be achieved?
3. How does the Guarantee Scheme relate to the Act Enhancing the Position of Administrators and the Company Directors Disqualification Act and to an extension of the scheme to include liability proceedings brought by the administrator against third parties or natural persons and partnerships (as referred to in the Gesthuizen motion)?

The evaluation study is divided into two parts. Part I serves to answer the first main question and aims to provide insight into how the Guarantee Scheme has been implemented and has worked since the scheme was amended in 2012. Part II comprises three research topics. The first topic is the integration of the Guarantee Scheme in the Government Guarantee Framework. The Government Guarantee Framework sets requirements relating to 'risk regulation' and the question is whether these requirements are in line with the nature and objective of the Guarantee Scheme. The second topic regards the question of whether it is desirable to bring a company directors disqualification action within the scope of the Guarantee Scheme and if so, what the consequences of this will be for the use of and the long-term sustainability of the Guarantee Scheme. The third research topic is the Gesthuizen motion. We investigate what consequences the proposed extended scope of the Guarantee Scheme will have.

The data for this study have been collected by way of documents analysis, analysis of the implementing Justis department, file studies, questionnaires among administrators and examining magistrates and in-depth interviews with key informants.

I The effectiveness of the Guarantee Scheme 2012

Policy theory

The study of the effectiveness and efficiency of the Guarantee Scheme was conducted in two phases. In the first phase we investigated the objectives of the Guarantee Scheme and the assumptions on which the intended effect was based. Two final objectives can be derived from the establishment history of the scheme.

1. 'combating the abuse of legal entities'
2. 'protecting the interests of unsecured creditors'.

Since 2012 the first objective has been formulated more often as 'combating bankruptcy fraud'. This would suggest, at any rate in terminology, a shift from a purely civil law perspective to include a criminal law approach as well.

In the legislator's line of thought, the two objectives are more or less in line with each other. It is part of the administrator's core task to generate as much money as possible for the creditors, also by suing the directors of the bankrupt legal entity if there are reasons to do so. By doing so, the administrator makes an ipso facto contribution to combating the abuse of legal entities. The Guarantee Scheme aims to make this easier: the scheme is intended to "make it easier to lay claim to the private assets of fraudulent directors of legal entities in the event of abuse of the legal entity under their control".

However, policy theory lacks a conclusive argument to support the relationship between the intended prevention of abuse of legal entities and the chosen means of (civil) liability of directors in the event of bankruptcy. This relationship is less plausible than it seems at first sight. Legally the administrator's scope is limited when it comes to combating bankruptcy fraud. Case law recognises that combating this is a social interest that the administrator can take into account, but this should not cause the administrator to diminish more than slightly the interests of the joint creditors. 'Protecting the interests of unsecured creditors' is central to the Guarantee Scheme's design. The administrator can only invoke the scheme if suing a director or a third party involved in fraudulent conveyance or transfer benefits the estate.

Use and effect

A central part of the study involved charting the use of the Guarantee Scheme, including costs and proceeds. The following picture emerges.

During the research period 2012-2017 1,315 applications were made in total. The number of applications, weighed for the number of bankruptcies, increased annually during the period. Of the applications submitted 29 were withdrawn, bringing the number of applications assessed to 1,286. The number of guarantees granted was 1235, 96% of the number of applications. The studied sample of a hundred files included eight rejections. Two of these applications were rejected because the amount of the guarantee requested exceeded ¼ of the expected yield of the estate. Most of the guarantee applications were for a preliminary investigation or an investigation into the possibility of taking legal action. In roughly a quarter of the cases, the applicant applied for an increase. Applications for an increase were usually for financing legal action, in particular on the basis of directors' liability. Four of the hundred initial applications and one application for an increase were for a guarantee for legal action brought under the scope of the Guarantee Scheme in 2012 on the basis of Article 47 Fw (fraudulent conveyance or transfer). Incidentally, in none of those cases was legal action under Article 47 Fw actually initiated.

The Guarantee Scheme is used to very different extents by administrators. Some administrators make a lot of use of the Guarantee Scheme, many administrators make little or no use of it. The Netherlands has 707 registered bankruptcy administrators. During the study period 516 different administrators

(73% of the total number) submitted an application for a guarantee at least once. Of the administrators who applied to the Guarantee Scheme 46 (6.5%) did so six times or more. Contrary to this, 229 administrators (44%) only made one application during the six years of the study. From the questionnaire and from interviews with administrators it emerged that there are several barriers to making more intensive use of the Guarantee Scheme. The administrative burden was named first and foremost, despite the simplifications introduced in 2012. Another barrier regards the requirements relating to the expected proceeds: the ratio between the guarantee and expected proceeds of up to 1:4 and, to a lesser extent, the ratio between the guarantee and debts of up to 1:2. The examining magistrates also consider the 1:4 requirement in particular to be not easily workable.

Justis systematically tests applications against the criteria set out in the scheme, including the requirements of 1: 4 regarding expected recovery and 1:2 regarding the size of the debts. Justis is not in a good position to assess the legal merits of possible legal action based on a directors' liability claim or fraudulent conveyance or transfer. The examining magistrate is better placed to do this. Before 2012, an application for the Guarantee Scheme had to be accompanied by a reasoned opinion from the examining magistrate. This requirement ceased with the amendment of the Guarantee Scheme in 2012. However this does not mean the claim escapes the opinion of the examining magistrate. Interventions by the examining magistrate in the application of the Guarantee Scheme continue to be embedded in their general supervisory function. As a rule, therefore, the examining magistrate has examined the feasibility of a claim before approving an application to the Guarantee Scheme. The supervision by the examining magistrate of a proper allocation of public funds by the administrator takes place as part of the supervision of the handling of the bankruptcy proceedings in general.

According to Justis, the sum total of all initial applications for a guarantee during the study period was € 24,351,617; that is an average of € 18,532 per application. In the same period, an amount of € 23,957,739, or an average guarantee of € 19,399 per case, was granted (including granted requests for increase). It can be concluded from the survey among administrators that in these cases the administrator making the application would almost never have undertaken activities related to directors' liability without the support of the guarantee.

The granted guarantee is only collected if the administrator's activities have added no or insufficient funds to the estate. According to Justis' registration, the estate remained empty in half of the cases and Justis had to cover the deficit. This involved an amount of € 5,411,892 during the study period. On average this is € 5679 per guarantee granted. In many of these cases the guarantee was limited to a preliminary investigation or an investigation into the possibility of taking legal action. The general picture is that of the more than € 23.5 million in guarantees granted during the research period, some € 5 million was actually paid out.

The total estate proceeds (money that was added to the estate with the help of the guarantee) from guarantees granted and settled during the study period amounted to € 23,559,137, which is an average of € 24,773 per settled guarantee. The spread around this average is very considerable: the standard deviation is € 88,618. The highest registered estate proceeds amounted to € 1.4 million and ten cases ended with proceeds of more than € 300,000. This is offset by a large number of cases with no proceeds.

The implementation costs of Justis amounted to € 4,196,773 over the entire study period, or an average of € 699,462 per year. The total costs associated with the Guarantee Scheme for Justis - or in other words for the State - are the implementation costs plus the total of € 5,411,892 in amounts paid out to cover deficits. This adds up to € 9,608,665. This is offset by estate proceeds. The total costs amounted to 41% of the total estate proceeds. In other words, for every euro that the State put into the Guarantee Scheme, the estate was increased by almost two and a half euros. However, the estate proceeds of more than € 23.5 million did not fully benefit the creditors. Part of these proceeds were spent on the costs incurred by the administrator in order to create the estate proceeds. These costs

can be estimated in total at an amount in the order of € 5 million. This left an amount of € 18.5 million for the creditors. In other words, for every euro that the State put into the Guarantee Scheme, the proceeds for the creditors increased by € 1.90

Regarding the fight against bankruptcy fraud: the available data and statistics are insufficient to establish a link between the number of guarantees and the number of reported and registered cases of bankruptcy fraud. We do know, however, that in the period 2012-2017 in total the administrators reported 1,924 cases of bankruptcy fraud to the Centraal Meldpunt Faillissementsfraude and 108 cases were registered there.

II Possible developments in the future

Based on the evaluation of the Guarantee Scheme 2012, three options for amendment or further development of the Guarantee Scheme have been analysed. These are: a possible amendment of the Guarantee Scheme in line with the government guarantee framework; extending the Guarantee Scheme's scope to include Company Directors Disqualification; and finally, extending the scope of the Guarantee Scheme as suggested in the Gesthuizen motion. Although these are very diverse amendments to the Guarantee Scheme, a common element can be found in the ex ante analysis of all these measures that is relevant for the assessment of all the proposed amendments. The central tenor is that the Guarantee Scheme is by its nature a hybrid policy instrument, leaning on two lines of thoughts. On the one hand, it is a means that supports the administrator in defending the interests of the unsecured creditors. If this objective is emphasised, a market-oriented approach to the Guarantee Scheme under private law is central. On the other hand, it is a means to combat bankruptcy fraud (in particular through the abuse of legal entities) and to control malicious and reckless directors. If this objective is central, serving the recovery interests of creditors is secondary and it is more about serving a public interest.

Bringing the Guarantee Scheme into line with the Government Guarantee Framework.

The 2016 budget of the Ministry of Security and Justice mentions the intention to bring the Guarantee Scheme into line with the government guarantee framework. In particular, this would imply that the Guarantee Scheme should be funded from a cost-effective premium. The introduction of a cost-effective premium is in line with the market-oriented side of the Guarantee Scheme. The Guarantee Scheme then becomes a kind of insurance for desirable but relatively risky entrepreneurial behaviour. The reason that the government provides or guarantees such an insurance as a back-to-back guarantee is that the market is unable to provide such insurance. The conclusion of the analysis in this research is that there are good reasons why the Guarantee Scheme should not be converted into an insurance-like provision with a cost-effective premium. Firstly, the risk that the Guarantee Scheme poses to government finances is very low, both in absolute terms and in comparison with other risk schemes. Secondly, a feasible premium scheme cannot be designed. There is no end-user that can reasonably be seen as the risk bearer. In most variants of a premium scheme, the premium would be so high that it practically nullifies the objectives of the Guarantee Scheme. Thirdly, there are fundamental objections to burdening one estate for costs incurred for another estate.

Expanding the scope to include Company Directors Disqualification

Including the option of taking legal action to impose company directors disqualification in the Guarantee Scheme, on the other hand, emphasises the public interest that the Guarantee Scheme aims to serve: to protect future participants in public (commercial) dealings. Legal action to impose company directors disqualification does not in itself add anything to the estate. After all, company directors disqualification is not intended to make good a disadvantage in the possibilities for recovery or other types of damage, but to protect participants in public (commercial) dealings in the future. Therefore when funds are provided to take such legal action we cannot refer to these as a guarantee but as a subsidy. Company directors disqualification is currently hardly if ever sued for by bankruptcy administrators. It is uncertain whether extending the scope of the Guarantee Scheme would change this.

Extending the scope in accordance with the Gesthuizen motion

Extending the scope of the Guarantee Scheme as suggested in the Gesthuizen motion would mean that the administrator can also request a guarantee for (investigation into) a claim based on an unlawful act on the part of the joint creditors against third parties involved in this disadvantage (the so-called Peeters/Gatzen claim). The Guarantee Scheme can then facilitate, where appropriate, recovery from persons other than from the directors and contractual parties involved in the disadvantaging of creditors in the case of fraudulent conveyance or transfer. Examples are (majority) shareholders or consultants who have contributed to the creditors' detriment by bankruptcy. The inclusion of the Peeters/Gatzen claim in the Guarantee Scheme serves the recovery interests of the joint creditors. There are no reasons not to include the Peeters/Gatzen claim within the scope of the Guarantee Scheme. The doctrine has in the meantime been sufficiently established in the case law so there is no need to fear any indiscriminate claims by the administrators on the grounds of an unlawful act.

With the extension of the scope of the Guarantee Scheme to include bankruptcies of natural persons and partnerships, the original aim of combating abuse of the limited liability of legal entities is abandoned. Natural persons, after all, have unlimited liability for their debts and creditors of partnerships can take redress against the partners in private. Natural persons and partnerships can, however, abuse legal entities. However, this is a different form of abuse than the one for which the Directors Liability during Bankruptcy Act (WBF) and the Guarantee Scheme were established. Because, in practice, creditors' detriment also occurs among natural persons and partnerships, it is understandable that the administrators are in favour of extending the Guarantee Scheme to include bankruptcies of natural persons and partnerships. In this type of bankruptcy they could then obtain financing for (investigation into) legal action based on creditors' detriment with regard to recovery. It is unclear how often creditors' detriment occurs among natural persons and partnerships and what the budgetary consequences of an extension of the scope of the Guarantee Scheme would be. As a result, it is also difficult to argue whether or not such an expansion is desirable.