ABSTRACT

DEFENSIVE BEHAVIOUR IN THE LAW AND PRACTICE OF DIRECTOR LIABILITY - GOOD CORPORATE GOVERNANCE?

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Dutch company law places top managers in a position of trust and power, involving considerable discretionary authority to govern the corporation's interests. This dependence gives rise to the concern that while top managers are key actors in generating the company's wealth, they may also be the source of the company's erosion.

In Dutch company law, director liability is considered an important instrument of corporate governance aimed at amending behaviour through the threat of sanction. However, if company directors become an ever-growing moving target for litigation, they will be inclined to avoid risky decisions that may benefit sustainable growth and innovation, as well as any other corporate goals. Evidence from business practice, court rulings, and reforms in director liability law reveals that defensive practices are employed to mitigate director liability risks. These practices can be argued to reduce the imperfections of director liability. In this research, I will demonstrate why the co-existence of director liability and defensive practices is good corporate governance aimed at furthering the corporate interest. First, I consider director liability law as an instrument of corporate governance. Second, I will complement the underlying deterrence/rational framework of director liability law by means of a deterrence/trust perspective. Adding trust to the analytical framework enables us to understand why the business community and judges persistently place trust in company directors, and are susceptible to defensive practices to further the corporate interest.