

DIRECTOR LIABILITY AND RECKLESS TRADING: THE CRIMINAL LAW AS A TOOL OF CORPORATE GOVERNANCE

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Abstract

Changes in corporate governance have often been in response to high profile failures. The European banking crisis again highlighted the potential for risks taken by company directors to cause harm. This crisis has resulted in a renewed focus on the decision making of directors and their potential criminal liability. Criminalising the actions of company directors is not new, numerous crimes exist for actions taken within companies such as fraud or interfering with the integrity of the market. However, what has traditionally not been criminalised in common law jurisdictions is business decisions which lack the elements necessary for fraud but that meet the criminal standard of recklessness – the conscious taking of substantial and unjustifiable risks. The problem with criminalising reckless risk taking in companies is that much of corporate law is designed to encourage risk taking. Separate legal personality and limited liability ensure that the personal assets of directors and members are protected from the claims of company creditors. This separation serves, among other things, to encourage the investment and the entrepreneurial risk taking necessary for companies, and ultimately a market economy, to be successful. If the criminal law inhibits such risk taking it could undermine corporate law and stifle corporate activity. This paper will explore the legal tensions between encouraging entrepreneurial risk taking and deterring reckless risk taking in companies. It will do this by analysing recent legal reforms and proposed legal reforms in England and Ireland.