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Netherlands: Rescue procedures in insolvency

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Netherlands

Phase: Management

Type: Rescue procedures in insolvency

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Native name:	**Faillissementswet; Wet Continuiteit Ondernemingen I; Wet modernisering faillissementsprocedure**
English name:	**Bankruptcy act; Continuity of enterprises act I; Bankruptcy procedure modernisation act**

Article

Article 40 and 213 of the Bankruptcy act; whole Continuity of enterprises act I; whole Bankruptcy procedure modernisation act

Description

Three different types of insolvency proceedings are defined in the Dutch Bankruptcy act (Faillissementswet). These are bankruptcy (faillissement), moratorium (surseance van betaling), and debt restructuring (schuldsanering).

- Bankruptcy proceedings require that the debtor is in a situation where he/she is no longer making payments to creditors because he/she is unable to do so. In this case, the debtor's assets are liquidated and used to pay off the creditors. Bankruptcy is applicable both to legal and natural persons.
- Debt restructuring requires that the debtor is in a situation where he/she can either anticipate not being able to make sufficient payments to creditors in the future, or he/she is no longer making payments to creditors. The debtor's assets are liquidated while at the same time the debtor is required to do his/her utmost in order to generate funds to repay the creditors. Debt restructuring, which is only applicable to natural persons, is seen as a way of giving the debtor an opportunity to start over.
- For moratorium, the aim of the measure is to help an enterprise to survive by weathering current but temporary financial difficulties. In essence, the measure entails a delay in payment by the enterprise to their creditors. A criteria for this type of procedure is that the financial difficulties are short term, and that the enterprise will be able to address these difficulties in the short term. A debtor must make the request to court to enter the moratorium procedure, while a creditor cannot do so. While an enterprise is within the moratorium procedure, they are also assigned a receiver (bewindsvoerder) who governs the finances of the enterprise and has a mandate to negotiate with creditors regarding payments on behalf of the enterprise. Moratorium is not applicable to natural persons, unless they are acting as entrepreneurs. As debt restructuring is not an option for legal persons, moratorium is the only rescue procedure defined in the Bankruptcy act that is available to corporations. The aim of moratorium is to restructure the business and temporarily ease the pressure of outstanding payments so that the company can continue operating. The debtor, in this case the company, applies for moratorium proceedings to be initiated. Creditors do not have the authority to initiate moratorium. A judge and a receiver are then appointed by the court. The judge oversees the case, while the receiver is tasked with supervising the debtor, ensuring his/her compliance, and managing the estate together with the debtor. Moratorium is limited to a maximum period of 18 months, though an extension can be granted under certain situations. Moratorium proceedings can be terminated either at the request of the debtor or through an agreement approved by the court.

Dutch companies and policy makers expected another option to become available to businesses when facing insolvency, as the Netherlands' House of Representatives adopted the Continuity of enterprises act I (Wet Continuiteit Ondernemingen I, WCO I) in June 2016. Initially, the expectation was that this law would enter into force in 2017. However, formal parliamentary questions and responses from social partners delayed the acceptance of this law. The senate intends to examine and consult further on this proposed law after a pending ECJ ruling (see more information below), together with the proposal for the law on transferring an enterprise during bankruptcy (Wet overgang van onderneming in faillissement). The act outlines an insolvency rescue procedure known as pre-pack, or 'silent administration', which has already been utilised to varying degrees in the Netherlands. The act would give the practice a statutory basis and ensure uniform implementation across the country.

Pre-pack and Continuity of enterprises act I (Wet Continuiteit Ondernemingen I, WCO I)

Pre-pack, short for pre-packaged insolvency, is an insolvency proceeding where a restructuring plan is set prior to a company declaring itself

bankrupt. A trustee, the silent administrator, is appointed to ensure the creditors are repaid as much as possible of the funds they are owed through, for example, the sale of assets or parts of the company considered viable, before the formal insolvency proceedings are initiated.

The act includes stipulations for employee safeguarding, as it requires the works council or staff representation to be involved in the pre-pack proceedings. However, the creditors' interests always take precedence, as the works council or staff representation can be excluded from the proceedings on the basis of this being contrary to the interests of the company and, thereby, the creditors. The act also outlines the inclusion of the employees' voices in the formal bankruptcy proceedings, as it states that a representative from the works council or staff representation is to be included in the creditors' committee, should the court decide to form such a committee.

The discussion of WCO I has been postponed by the senate because another bill, the 'Law on transfer of undertaking in bankruptcy' (WOVOF), is in preparation. The bill regulates the position of employees in the event of such a restart. The senators have pointed out that the bills are interrelated and therefore want to discuss them jointly. At the moment, there is only a preliminary ruling procedure pending before the Court of Justice of the European Union. The outcome of that procedure may influence how the WOVOF should ultimately look like.

Employer organisations are generally in favour of the WCO I, with the following caveats:

- The court should shortly but thoroughly examine whether a pre-pack would be beneficial to creditors, the company and its employees;
- The pre-pack should only be applicable if this is the case;
- It should not be an exclusionary condition if the company filing for a pre-pack is not able to pay current creditors, as this would render the pre-pack obsolete.

Ruling of the European Court of Justice (ECJ)

On 22 June 2017, the European Court of Justice (ECJ) made the long-awaited verdict in the Estro case. Questions were raised to the ECJ for a preliminary ruling on the applicability of the labour law rules of transition of company to the pre-pack that has been applied by most Dutch courts since 2011. Well-known examples in which pre-packs have been used are the bankruptcies of Royal Imtech, Schoenenreus, Heiploeg, Neckermann and Marlies Dekkers, and in the Estro case, a former childcare company (Estro) with approximately 3,600 employees whose activities were taken over by Smallsteps in 2014 through a pre-pack sales transaction. Smallsteps offered 2,600 employees a contract of employment. Four workers who did not receive a contract of employment, as well as the Federation of Dutch Trade Unions (FNV), have subsequently appealed against Smallsteps, invoking the protection provisions of Directive 2001/23/EC (hereinafter 'Directive').

In summary, the ECJ held that the labour rules of transfer of company apply to pre-pack prepared prior to bankruptcy that is a pre-pack arrangement made prior to bankruptcy with the 'aim' to be declared bankrupt and ensure a restart (including conditions).

The ECJ hereby explains article 5 (1) of the directive in such a way that both the 'bankruptcy procedure' and the 'similar procedure' must comply with the conditions of

- the liquidation of assets and
- authorised supervision.

The ECJ then finds that the transaction prepared prior to the bankruptcy implies in fact bankruptcy so that the transaction may fall under the term 'bankruptcy proceedings' within the meaning of the directive. However, according to the ECJ, the other two conditions for applicability of article 5 (1) are not met.

The ECJ does not rule out the existence of a certain overlap between the liquidation and continuity objective, but considers that if the main purpose of a proceeding is the maintenance of the undertaking concerned, that proceeding seeks to pursue the activity of the company.

Businesses entering pre-pack deals must keep in mind that they will not be able to choose which employees they would like to take, but that all the employees involved in the company are to be included in the transfer. This could make a restart less attractive to a new buyer.

Consequences

Currently in 2021, a draft law is being developed and consulted upon, regarding the transition of an enterprise into bankruptcy (Wet overgang van onderneming in faillissement). This would be an adjustment to Continuity of enterprises act I (Wet Continuiteit Ondernemingen I).

Some more general changes include the establishment of a central, national insolvency register for enterprises. This central register replaces locally held registers in an effort to make the information collection by courts across the country more efficient.

Comments

The Bankruptcy law has been modernised since 1 January 2019. In terms of the main provisions of the law, not much has changed, and the different types of bankruptcy procedures are still in place. However, the process has been made more efficient through the introduction of, for instance, a central register for bankruptcies. Furthermore, curators are allowed slightly more influence and decision-making power when it comes to the order of paying off debts to different claimants, and in selling assets of below €2,000 in value to help a debtor to pay off their debts. Additionally, the modernisation includes a time limit for creditors to register their claim: if the creditor has not registered their claim within the time frame decided upon by the examining magistrate (rechter-commissaris), the creditor loses their right to claim payments. The idea behind this change is to make the bankruptcy procedure quicker.

In 2021, two laws are still in development and are being consulted upon. These concern the position and protection of workers during the transition of an enterprise into bankruptcy (Wet overgang van onderneming in faillissement). This would be an adjustment to Continuity of enterprises act I (Wet Continuiteit Ondernemingen I).

Cost covered by

Not applicable

Involved actors other than national government

Works council

Other

Involvement others

Court, creditors, staff representative

Thresholds

No, applicable in all circumstances

Sources

- Bankruptcy procedure modernization act (Wet modernisering faillissementsprocedure)
- Bankruptcy act
- International insolvency
- Eerste Kamer Statengeneraal (2019), Consultatieversie voorstel van we : Wet overgang van onderneming in faillissement
- Eerste Kamer: Wet continuïteit ondernemingen I
- Wet modernisering faillissementsprocedure
- Osborne Clarke (2018), De faillissementswet wordt per 1 januari 2019 gewijzigd
- AKD (2017), The end of pre-pack: transition of company applicable to Dutch pre-packs
- Van Doorne (2016), Pre-pack legislation adopted by House of Representatives
- De Brauw, Blackstone, Westbroek (2013), Options for a speedy restructuring through bankruptcy
- Gewijzigde Wet continuïteit ondernemingen in consultatie (2021)

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Contact us

Eurofound, Wyattville Road, Loughlinstown, Co. Dublin, D18 KP65, Ireland

Phone: (00) 353 1 2043100

E-Mail: information@eurofound.europa.eu

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