Netherlands and EU focus on business rescue

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In 2018, the focus of the Dutch and European legislatures will be on business rescue. We anticipate further discussion about the legislative proposal to facilitate pre-packed asset sale restructurings in the Netherlands. A new proposal for a bill introducing court confirmation for extrajudicial restructuring plans is also expected to be sent to the Dutch parliament this year. Meanwhile at EU level, the main points of discussion will be the proposal for an EU Directive on restructuring, and the consequences of Brexit for restructuring and insolvency proceedings.

This article is part of our Crystal Ball Gazing series, in which we look ahead at possible developments in 2018.

Dutch pre-pack – Continuity of Companies Act I

The Continuity of Companies Act I ("CCA I") introduces the formal (legislative) concept of a pre-packed restructuring into Dutch law. A company in distress can request the court to appoint the person who would become the company's trustee in the event of it going bankrupt. This person, known as an 'intended trustee', starts gathering information on the company and its business, while at the same time observing the company's preparation for a restart. As the appointment of the intended trustee is not published, third parties are not aware of the pre-pack proceedings. Once the company files for bankruptcy – typically within a few days of the appointment of the intended trustee – the company's restart through an asset sale is effected and completed by the intended trustee, who by then has been appointed 'actual' trustee. The main purpose of this pre-packed method of restarting a company is to prevent the loss in value that usually occurs when a company faces financial distress.

The CCA I has been on hold since 22 June 2017, when the European Court of Justice held that the exemption to the automatic transfer of employees to the buyer of the bankrupt company´s assets does not apply to a prepacked asset sale. The pre-pack in its current state is therefore no longer the favourable restructuring method it was intended to be. Dutch stakeholders have proposed changing Dutch legislation in order to allow the exemption to apply; the Dutch government has announced that he is willing to discuss this and maintains that the legislative process for the CCA I can be concluded this year.

Dutch court confirmation of extrajudicial restructuring plans – WHOA

In 2014, a public consultation was held for the Continuity of Companies Act II (CCA II). The original purpose of the legislative proposal was to introduce extrajudicial restructuring with the option of court confirmation to make the restructuring plan binding on all creditors (including shareholders) affected by the plan. The response to the consultation led to a comprehensive revision of the draft, resulting in the renamed draft Act on Court Confirmation of Extrajudicial Restructuring Plans to Avert Bankruptcy (WHOA). This proposal received a favourable response and is expected to be sent to the Dutch Parliament in mid-2018. For a detailed discussion of the draft act, see our Legal Alert and dedicated website.

European outlook

As for Europe, we expect further efforts to establish a business rescue.

For instance, the discussion at EU level of the proposal for a European Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures will continue. Adoption of the proposal by the end of 2018 is being pursued. The main purpose of the directive is to address financial distress at an early stage to prevent insolvency proceedings and preserve employment and business value. The current discussion focuses on a few instruments introduced by the proposal which are new to some of the member states, such as a cross-class-cram-down, and a viability test.

Finally, as the date for Brexit draws closer, we expect that attempts by the EU and the UK to reach an alternative to the EIR Recast, which entered into force last year, will become more urgent. Currently, in view of the termination of the applicability of the EIR Recast, the most viable solution seems to involve entering into a bilateral agreement between the EU and the UK, in order for to, for example, retain automatic recognition of insolvency proceedings. We will continue to provide updates on this as Brexit Day approaches.