

The Dutch approach to combating bankruptcy fraud

Willem van Nielen asks if the Dutch approach is threatened by the *nemo tenetur* principle



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Preface

In 2012 the Minister of Security and Justice of The Netherlands announced a recalibration of the Dutch Insolvency Law, especially a multi-disciplinary approach to combat bankruptcy fraud. This announcement has led to several initiatives in practice, for example, the introduction of consulting hours about insolvency fraud during which bankruptcy trustees can seek information from several chain partners (public prosecutor, representative of the tax authority, a supervisory judge and a bankruptcy trustee experienced in combating fraud) to combat the fraud. Several Dutch courts have successful experience with such consulting hours.

In order to further such a multi-disciplinary approach, the Minister of Security and Justice has published a draft Act wherein the duty of the bankruptcy trustee will be extended to combat bankruptcy fraud. In that respect the bankruptcy trustee is to investigate and report irregularities (e.g. fraud) to the supervisory judge. The supervisory judge is given the authority to oblige the bankruptcy trustee to report bankruptcy fraud to the public prosecutor. Additionally, when confronted with irregularities that lead to the conclusion of mismanagement (e.g. fraud) by the director, the bankruptcy trustee is given the authority to request disqualification of a director in civil proceedings. As soon as this request is approved by the court, the director's disqualification (for a maximum

period of five years) will be published in a public register. Furthermore in the draft Act, the means to obtain information by the bankruptcy trustee have been reinforced, e.g. the group of persons who are obliged to provide the bankruptcy trustee with all relevant information regarding the bankrupt company is expanded (based on case law).

Meanwhile, the Supreme Court of The Netherlands has recently rendered two rulings that limit the possibilities to coerce these information duties of the bankrupt or the bankrupt's

director vis-à-vis the bankruptcy trustee based on the *nemo tenetur* principle. These judgements also have an impact on the multi-disciplinary approach to combat bankruptcy fraud in general and have relevance for all European Member States.

The Supreme Court of The Netherlands

In The Netherlands, a person who has been declared bankrupt or the director of a bankrupt company has the legal obligation to provide the bankruptcy trustee

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with all relevant information regarding the bankrupt company – either asked for or unasked for. The bankruptcy trustee has the legal authority to coerce this obligation by requesting the supervisory judge to order the remand in custody of the person concerned. More often, in practice such a person will try to avoid detention by invoking the *nemo tenetur* principle with reference to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as the obligation to provide information relating to fraudulent acts may lead to self-incrimination.

In that respect, Dutch case law provides that coercing the bankrupt or bankrupt's director to provide such legal information by detention in principle yields no violation of article 6 ECHR, because coercing these duties by detention has no punitive nature but is aimed at inducing the person concerned to fulfil his or

her legal obligation for the purpose of the liquidation of the bankruptcy.

However, according to earlier judgements of the European Court of Human Rights (ECtHR), article 6 ECHR is violated if (i) it cannot be ruled out that the information requested will be used in a 'criminal charge' against this person and (ii) this information is obtained through methods of coercion without the safeguard that such information will not be used in criminal proceedings against this person (ECtHR 17 December 1996, no 19187/91 (Saunders/United Kingdom)). Article 6 ECHR is not violated regarding information that exists independently of the will of the person concerned.

The Supreme Court of The Netherlands concludes in its judgements of 12 July 2013 and 24 January 2014 that Dutch law does not include such a safeguard. Therefore, with reference to the ECtHR case law the Supreme Court of The Netherlands has judged that the supervisory judge has to include a restriction clause in his order for remand in custody (to coerce the person concerned to comply with these information duties). This restriction clause entails that information material that depends on the will of the person concerned may be used exclusively for the benefit of administration and liquidation of the bankruptcy. Following on the judgements of the ECtHR, the Supreme Court rules that coerced declarations consisting of material that is independent of the will of the person concerned, yield no violation of article 6 ECHR. When, despite the restriction, the coerced information is used in criminal proceedings, the criminal judge is to assess about the consequences.

The Supreme Court does not answer the question when information is to be qualified as 'information dependent on the will of the person concerned'. According to the ECtHR judgements, this includes: (i) statements – either oral or in

writing (ECtHR 17 December 1996, no 19187/91 (Saunders/United Kingdom)); (ii) documents of whose existence is uncertain (ECtHR 25 February 1993, No. 10828/84 (Funke/France)); (iii) documents that are not clearly specified (ECtHR 3 May 2001, no. 31827/96 (J.B./Switzerland)).

Conclusion

To successfully combat bankruptcy fraud, an international and multi-disciplinary approach is essential. In view of the *nemo tenetur* principle, the legislator, supervisory judges, bankruptcy trustees and criminal prosecutors all have to be aware (i) that the bankruptcy trustee is able to coerce valuable information from the person (or director of the company) that has been declared bankrupt and (ii) which information the bankruptcy trustee can (voluntarily) deliver to the criminal prosecutor and (iii) which information can be used in criminal fraud proceedings.

In order to uphold the strong position of the bankruptcy trustee (and a successful multi-disciplinary approach of combating fraud), it is essential that his primary duty of liquidation of the assets on behalf of the creditors does not become a duty focused on facilitating the public prosecutor's task in a criminal bankruptcy fraud case. ■



DUTCH CASE LAW PROVIDES THAT COERCING THE BANKRUPT OR BANKRUPT'S DIRECTOR TO PROVIDE INFORMATION BY DETENTION IN PRINCIPLE YIELDS NO VIOLATION OF ARTICLE 6 ECHR

