

Pre-packs in the Netherlands and in a European context

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Programme

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- *Estro* case and *Heiploeg* case
- Impact and the way forward

Background

- Pre-pack in the Netherlands: Dutch practice
- Main features of pre-pack in practice:
 - debtor requests court to disclose names of bankruptcy trustee and supervisory judge
 - (prospective) bankruptcy trustee and supervisory judge are ‘appointed’
 - debtor agrees sale with buyer, while prospective bankruptcy trustee and supervisory judge are monitoring this process
 - debtor is declared bankruptcy
 - bankruptcy trustee will conclude the sale while supervisory judge is supervising

Developments in practice and case law

- European Directive on Transfer of Undertakings and Protection of Employees (**TUPE**)
- Automatic transfer of employment contracts, except in case of bankruptcy (the ‘bankruptcy exception’)
- The bankruptcy exception:
 - the transferor is the subject of bankruptcy proceedings (or any analogous proceedings)
 - proceedings have been instituted with a view to the liquidation of the assets of the transferor
 - the transfer is under the supervision of a competent public authority

Estro case

- ECJ in *Estro* case: the bankruptcy exception does not apply:
 - pre-pack proceedings was not instituted for liquidation of the assets
 - pre-pack procedure was not supervised by a public authority, as it had no basis in Dutch law and prospective bankruptcy trustee and prospective supervisory judge had no formal power
- Result: use of pre-packs came to an almost complete halt

Heiploeg case: Dutch Supreme Court

- Preliminary view of the Dutch Supreme Court: bankruptcy exception applies to the *Heiploeg* case given that:
 - pre-pack was instituted with the purpose of liquidating assets of the transferor, and
 - pre-pack was conducted under the supervision of a competent public authority

Heiploeg case: Advocate General

- Advocate General Pitruzzella: *Heiploeg* pre-pack is not instituted with a view to the liquidation of the assets of the transferor, given that:
 - primary objective of a procedure aimed at continuation of the undertaking is the safeguarding of the undertaking concerned
 - legal uncertainty for case-by-case approach due to the absence of statutory or regulatory provisions governing the pre-pack procedure; and
 - no formal powers for the prospective bankruptcy trustee and prospective supervisory judge

Heiploeg case: ECJ

- ECJ: bankruptcy exception may apply:
 - necessary to verify in each particular case whether pre-pack and insolvency proceedings were being carried out with a view to the liquidation of the business
 - supervision by a competent court on the prospective bankruptcy trustee and prospective supervisory judge
 - however, ECJ agrees with the Advocate General that the lack of a legal framework for the pre-pack is an issue

Heiploeg case: ECJ (cont'd)

- ECJ: pre-pack is carried out with a view to the liquidation and under supervision of a competent authority, provided that:
 - transfer is prepared prior to insolvency proceedings with purpose of liquidation of assets,
 - its primary objective to facilitate a liquidation of the undertaking as going concern during the insolvency proceedings that satisfies a maximum disbursement to creditors and preserves employment to the extent possible, and
 - pre-pack procedure is governed by statutory or regulatory provisions (!)

Impact

- *Heiploeg* case re-opens the door for pre-packs → revival of pre-pack in the Netherlands
- Great addition to other restructuring tools in the Netherlands: pre-pack next to the Dutch scheme (*WHOA*)
- But practice is waiting for the Dutch legislature to take action

Way forward

- Dutch legislature to pick up the gauntlet:
 - draft bill ‘Act on Continuity of Enterprises I’ (*WCO I*)
 - draft bill ‘Act on Transfer of Undertaking in Bankruptcy’ (*WOVOF*)
 - legislative amendment (*novelle*) to *WCO I*
- What does this mean for other European countries?