

## LEGAL UPDATE

### EU Implementation Act: Amendments to the Dutch Bankruptcy Act in 2023

Date: 5 January 2023

The Dutch Act implementing the EU Restructuring and Insolvency Directive (*Implementatiewet richtlijn herstructurering en insolventie*) (the "Implementation Act") entered into force at the beginning of this year. It amends the Dutch Bankruptcy Act (*Faillissementswet*) ("Bankruptcy Act") in line with the European Restructuring and Insolvency Directive ([Directive \(EU\) 2019/1023](#)) (the "Directive"). The purpose of the Directive is to harmonize the EU Member States' individual restructuring and insolvency procedures, thus enhancing legal certainty, efficiency and the transparency of European restructuring and insolvency law. This Legal Update outlines the most important changes for you.

#### The changes at a glance

The Directive covers four main topics, all of which are addressed in the Implementation Act.

#### Preventive restructuring framework

The first component requires Member States to provide for a preventive restructuring framework that enables companies in financial difficulties to restructure their debts. In the Netherlands, this obligation was largely fulfilled by the implementation of the [Dutch Act on Court Confirmation of Extrajudicial Restructuring Plans \(\*Wet homologatie onderhands akkoord\*\)](#) ("CERP") on January 1, 2021. However, lawmakers have used the Implementation Act to amend/ update certain elements of the CERP.

One key amendment pertains to the use of the CERP to SME-debtors. Since the Implementation Act entered into force, SME-debtors cannot be drawn into CERP-proceedings against their will any longer. The law now explicitly requires the consent of the SME-debtor before CERP-proceedings can be initiated. There are also amendments that make it easier for the debtor to acquire Debtor-in-Possession ("DIP")-financing. For instance, by extending the scope of legal acts for which Section 42a of the Bankruptcy Act can offer third party's protection against avoidance actions in subsequent bankruptcy proceedings. From only providing a safe harbor for legal acts deemed necessary for the continuation of the business, Section 42a can now also be invoked to protect third-parties against the risks borne from a wide range of legal acts related to the preparation, voting and court approval of the restructuring plan.

#### Mandatory warning to Works Councils

The Implementation Act also introduces a new obligation that requires a company's Works Council to be forewarned in case of (impending) insolvency. Under current Dutch bankruptcy law, directors are already required to take timely steps to limit losses and prevent insolvency in the event of imminent bankruptcy. The Implementation Act now provides that the Works Council must also be involved at an early stage in this process. For example, the auditor is now required to send an adverse audit opinion to the Works Council, and the Works Council must be informed as soon as possible of the start of proceedings under the CERP.

#### Discharge scheme for entrepreneurs

The Netherlands has long had a scheme under which a natural person's debts can be cancelled after the person in question has gone through a debt restructuring process governed by the Debt Restructuring (Natural Persons) Act (*Wet schuldsanering natuurlijke personen*) ("DRNA"). The Implementation Act has amended one aspect of the DRNA. Previously, courts had the discretion to extend the discharge period for three to five years when they saw fit. From now on, the discharge period may only be extended if the nature of the debts so require or the debtor is unable to fulfil particular obligations arising from the debt-restructuring scheme.

## Other topics

Finally, the Directive also addresses two other issues, including increasing the efficiency and transparency of restructuring and insolvency proceedings. The Implementation Act imposes conditions on the appointment and dismissal of insolvency practitioners (i.e. trustees, administrators, restructuring experts and observers). These include requirements regarding such practitioners' expertise, the option for debtors to request a practitioner's resignation, and the mandatory appointment of a bankruptcy judge in every proceeding. The [requirements](#) that entered into force on 1 January 2023 are set out on [www.rechtspraak.nl](http://www.rechtspraak.nl) (in Dutch).

If you have any questions or you would you like to find out more about the Implementation Act or insolvency law, please feel free to contact one of our specialists.

This is a Legal Update by Rhea Bask.

For more information:

Rhea Bask  
+31 (0)30 25 95 567  
[rheabask@vbk.nl](mailto:rheabask@vbk.nl)