

Country Reports

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Updates from The Netherlands, France, Russia, Czech Republic



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The Netherlands: Multidisciplinary approach to combat bankruptcy fraud; Fraud Consulting hours and the International Expert Centre for Bankruptcy Fraud

**Previously in Eurofenix
(Edition 57, Autumn 2014)
I reported that the Minister
of Security and Justice of the
Netherlands announced in
2012 a recalibration of the
Dutch Insolvency Law, among
which a multidisciplinary
approach to combat
bankruptcy fraud.**

The Dutch Minister's announcement of a multidisciplinary approach to combat bankruptcy fraud has led to a legislative programme that went into force last year, wherein the duty of the trustee is extended to combat bankruptcy fraud.

In that respect the trustee has to investigate and report irregularities (e.g. fraud) to the bankruptcy judge. The Trustee is obliged to report bankruptcy fraud to the public prosecutor when he or the supervisory bankruptcy judge find such action necessary. Additionally, when confronted with irregularities that lead to the conclusion of mismanagement (e.g. fraud) by the director, the trustee is given the authority to request the director's disqualification 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, the means to obtain information by the trustee have been reinforced, e.g. the group of persons who are obliged to provide the trustee with all relevant information regarding the bankrupt company is extended (based on case law).

The Dutch Minister's announcement of a multidisciplinary approach to combat bankruptcy fraud has also led to several initiatives in practice, for example consulting hours about insolvency fraud, during which trustees can address questions (in order to obtain information) to several chain partners (the public prosecutor, the representative of the tax authority, a supervisory bankruptcy judge and an experienced anti-fraud trustee) re combat the fraud (in order to retrieve assets and to report possible fraud).

In the meantime, all Dutch courts have successfully initiated such consulting hours, and thus this has become a permanent institute in the Netherlands. These consulting hours – among other consultations offered by the Dutch Courts – are proposed by the Platform 'Bankruptcy Fraud' that we have set up in the Netherlands. This Platform has now founded the 'International Expert Centre for Bankruptcy Fraud' (www.bankruptcyfraude.eu).

This international platform

aims to create an international community of professionals who in their profession deal with bankruptcy fraud, such as bankruptcy trustees, forensic accountants, criminal defence lawyers, law enforcement officers, (supervisory) judges, lawyers from the Ministry of Justice, representatives of the tax authority and the police departments.

One of the subjects that will be food for discussion in this Platform will be the *nemo tenetur* principle. In Eurofenix *Edition 57, Autumn 2014* I wrote that the Supreme Court of the Netherlands has rendered two judgements that limit the possibilities to coerce the information duties towards the trustee, based on the *nemo tenetur* principle. These judgements have also an impact on the multidisciplinary approach to combat bankruptcy fraud in general and are relevant for all European Member States.

For questions about the International Expert Centre for Bankruptcy Fraud, you can contact me via wvannielen@recoup.nl ■



**THE TRUSTEE
IS OBLIGED
TO REPORT
BANKRUPTCY
FRAUD TO
THE PUBLIC
PROSECUTOR**





JEAN-LUC VALLENS
Judge, Colmar Court of Appeal,
France

France: Latest judgements in insolvency matters rendered by the French Supreme court

Individual entrepreneurs

According to a recent case, the liquidator may be able to initiate a lawsuit against an individual entrepreneur debtor for avoiding the prohibition of seizure of his/her personal flat or home.

The court added that this action is possible but only if it can be demonstrated that legal publications are not valid (Cass. com., 15 Nov. 2016).

Transfer of a company as a going concern

A recent case illustrates the conditions in which the transfer of the troubled company or of a branch of its activities as a going concern may be valid.

Under French rules, only interested persons without any direct or indirect link with the company may file an offer (C. com., art. L.642-3). In other words, any affiliates or relatives of a debtor company or its managers are prohibited from purchasing that company. Against that

background, the *Cour de cassation* has recently ruled that the *former* manager cannot be qualified as a third party (Cass. com., 8th March 2017).

The French Supreme court has then reminded a very important rule which is subject only to very limited exceptions (e.g. agricultural activity). Indeed, it is important to note that the law provides an exemption from this general ban. This option is however available only in very specific cases, at the request of the public prosecutor, after having heard the views of the creditors acting as “contrôleurs” and only on the basis of a well-motivated judgment.

Emphasis on rights of secured creditors

In several cases delivered by the *Cour de cassation*, secured creditors were granted legal certainty.

Retention of title

Under French rules (C. com., art.L.624-9), the seller of a movable tangible property secured by a retention of title is legally authorised to file for getting back the encumbered asset in case of insolvency proceedings. A legal time limit is however provided by

the law: no longer that 3 months after publication of the order for opening insolvency proceedings.

On 9 March 2017, the *Cour de cassation* has considered that such a time limit complies with the law, and in particular with property rights (Com. 9 March 2017).

Validity of an assignment of a financial claim securing a loan concluded during the suspect period

The second decision relates to the secured rights of banks. On 22 March 2017, the *Cour de cassation* ruled that the assignment of a financial claim aiming at securing a loan cannot be qualified properly as a “payment”.

By way of consequence, the *Cour de cassation* held that such an assignment cannot be avoided even if it was concluded during the suspect period, meaning before the opening of insolvency proceedings (Com. 22 March 2017). ■



**ANY AFFILIATES
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**Russia:
Directors of insolvent
companies to face
increased liability risks**

Russian insolvency law provides that directors (and other controlling persons) can be held liable for the failure to file for insolvency in a timely manner and for actions (or inaction) that prevented full repayment of the creditors' claims.

The amendments to the insolvency law, introduced by the Federal Law No. 266-FZ on 29 July 2017 further systematize rules on directors' liability, elaborate them and provide for effective tools to fight abusive and opportunistic managerial behavior.

The number of claims filed against directors of failed companies in Russia has been on the rise in recent years. While in 2014 there were only 2,090, in 2016 their quantity exceeded 2,800. The rate of satisfied liability claims has also increased from just 4% at the end of 2014 to 20% in the first half of 2017. Despite this trend, the general insolvency recovery rate remains incredibly low, barely surpassing 3%. The need to stimulate efficient resolution of insolvency cases has triggered the reform of rules on directors' liability, which is now specifically addressed in a new Chapter III.2 of the Russian insolvency law.

Controlling person

Chapter III.2 introduces the term "controlling person" (CP), which encompasses any legal or natural person who has the right to give mandatory instructions to the debtor or otherwise determines its actions.

Apart from CEOs, majority shareholders (50%+) and board members, the notion of CP may include persons acting on the basis of a power of attorney, chief accountants, CFOs and those benefiting from illegal or bad faith actions of the mentioned persons. Thus, the law expands the category of potentially liable



persons. As part of the reform, Chapter III.2 targets real, as opposed to nominal directors. The latter are given a chance to escape or decrease liability, if they help reveal a real CP (who usually has deeper pockets).

Liability presumption

In certain scenarios, it is presumed that bankruptcy has resulted from the actions (inaction) of CPs. For instance, such a presumption exists when a CP concluded fraudulent or preferential transactions, or when the accounting information is missing or otherwise distorted.

Under the amended law, in addition to these, the liability presumption has been extended to cover situations of missing documentation (mandatory under securities or corporate law) and incomplete information about the debtor in federal registers. The last point is particularly topical, as the amended insolvency law obliges CEOs to publish a

notification in the public register (Fedresurs), whenever the signs of bankruptcy appear. This new obligation should inform creditors on the debtor's financial difficulties.

Procedural guarantees

Chapter III.2 provides additional procedural guarantees to creditors, who can now file their claims against CPs at any stage of insolvency.

The time limit is three years (instead of one year) after the discovery of liability grounds, but maximum three years after the end of insolvency proceedings. Such claims can be launched outside formal insolvency proceedings provided that the latter ended or were terminated due to lack of funding ("insolvent insolvencies"). ■



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Czech Republic: Debt relief under the amended Czech Insolvency Act

On 1 June 2017, a significant and extensive amendment to the Czech Insolvency Act came into force which brought, among other things, changes to debt relief as a means of resolving insolvency.

The Insolvency Act in its previous manifestation determined that a debtor's debt due to business operations does not prevent the resolution of the debtor's bankruptcy by debt relief providing that the creditors of the corresponding receivables give their consent. Under the amended rules, the default assumption is that the creditors consent unless they expressly inform the court, along with their application for registration of their claims, that they do not agree with the

resolution of the bankruptcy by debt relief, giving reasons for their opinion.

Permission of debt relief

Another change concerns the proposal for the permission of debt relief. Under the current rules, the proposal for the permission of debt relief must be written and submitted on behalf of the debtor by an attorney-at-law, notary, court bailiff, insolvency trustee, or accredited person (whereas "*accredited person*" means a legal entity that has been granted accreditation by the Ministry of Justice for providing services in the area of debt relief under the Insolvency Act).

The remuneration for drafting and filing of the proposal for the permission of debt relief (including all related services) is due to the respective attorneys-at-law, notaries, insolvency trustees and court bailiffs. Its amount is limited to CZK 4,000 excluding

VAT (CZK 6,000 excluding VAT for joint debt relief for spouses). The remuneration also covers all steps related to submission of the proposal for the permission of debt relief, including consultations with the client as well as removing errors in the proposal. On the other hand, if the proposal for the permission of debt relief is processed by an accredited person (for example, a non-profit organization in the form of a debt counselor or a civil counselor), the proposal is free of charge for the client. The aforementioned remuneration is not paid in cash by the client, but the party who draws up the proposal enters into the insolvency proceedings with a claim towards the estate.

Under the current rules, the insolvency trustee must withhold from the debtor's monthly payments an amount corresponding to his or her remuneration and reimbursement of his or her expenses for six months (to the detriment of all creditors), and deposit this amount in a special account.

Court hearing

Another substantial change related to debt relief is the replacement of the review meeting in the form of a court hearing by a report on the review. A formal review meeting will now only be convened upon the request of an absolute majority of registered creditors whose receivables (in terms of their amount) account for an absolute majority of all unsecured claims.

If the insolvency court does not approve debt relief, it need not automatically declare the debtor to be bankrupt. Bankruptcy is to be declared only in specific cases as defined in the Insolvency Act.

Finally, the Insolvency Act now explicitly enshrines the combination of a repayment schedule and the monetization of the asset (or part of it) which may be permitted upon explicit request by the debtor. ■



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**A FORMAL
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WILL NOW ONLY
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