

European Perspective in Brief

July/August 2013

Mark G. Douglas

Europe has struggled mightily during the last several years to triage a long series of critical blows to the economies of the 28 countries that comprise the European Union, as well as the collective viability of eurozone economies. Here we provide a snapshot of some recent developments regarding insolvency, restructuring, and related issues in the EU.

The Netherlands—On July 11, 2013, the Enterprise Chamber of the Amsterdam Court of Appeal handed down a highly anticipated ruling regarding the compensation offered by the Dutch Minister of Finance in relation to the expropriation by the Dutch state of shares and subordinated debt issued by the SNS Reaal Group (“SNS”). The February 1, 2013, nationalization of SNS was the first-time application of the Dutch Intervention Act. On February 25, 2013, the Dutch Council of State ruled that the Dutch Minister of Finance was entitled to expropriate the shares and subordinated debt, but not future claims. The expropriation was effected for the purpose of shifting from the Dutch taxpayers to the private sector the burden of the SNS rescue package, which totals more than €1 billion.

In a widely reported decision that raises questions about the viability of the European Union’s policy of imposing bail-ins as a condition for any future rescue packages, the Enterprise Chamber refused to bless the Finance Minister’s zero-compensation offer. Specifically, the court ruled that the Minister failed to justify the offer, which in any case would have been unlikely to

comply with the full-compensation standard required by both Dutch and international law. A valuation will now be performed by three independent experts appointed by the court.

The decision may have ramifications beyond the Netherlands, with many European states and banks likely to require emergency support in the coming years. Questions may also be raised regarding the impact of the ruling on the bail-in elements of the Cyprus rescue package. Certain claims are already pending in connection with the EU's actions in Cyprus.

Jones Day acted for various bondholders in the Enterprise Chamber proceeding. A copy of the ruling (in Dutch) can be found at <http://www.jonesday.com/files/upload/SNS%20REAAAL--beschikking%20110713.pdf>.

The U.K.—In a much-awaited judgment, *In the Matter of the Nortel Companies and In the Matter of the Lehman Companies* [2013] UKSC 52 (24 July 2013), the U.K. Supreme Court has decided that the liability of a company in administration or liquidation to contribute to an underfunded defined-benefit pension fund following a financial support direction or contribution notice issued by the U.K. Pensions Regulator after the commencement of the insolvency process was a provable debt ranking equally with the claims of other unsecured creditors. Crucially, the court held that the liability was not an expense of administration or liquidation which would cause it to rank ahead of the claims of all other creditors, except fixed-charge (secured) holder claims and the claims of an administrator or liquidator for remuneration.

This decision provides helpful guidance, as it brings certainty after several unsettled years over the treatment of these pension liabilities, which, because of their size, are able to alter fundamentally the center of gravity of any administration or liquidation. A more detailed discussion of the ruling can be accessed at http://www.jonesday.com/to-rank-or-not-to-rank-uk-supreme-court-decision-in-lehman_nortel-07-25-2013/.

Other recent European developments can be tracked in Jones Day's *EuroResource*, available at <http://www.jonesday.com/euroresource--deals-and-debt-07-30-2013/>.