

European Perspective in Brief

November/December 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—The Minister of Justice recently proposed legislation that would authorize the court appointment of a prospective trustee (*beoogd curator*) for a company prior to the commencement of formal insolvency proceedings for the purpose of exploring potential restructuring and/or sale opportunities. The proposal is part of a broader legislative initiative that includes a proposal for compulsory extrajudicial compositions and various measures designed to encourage the continuation and reorganization of insolvent companies.

Existing Dutch insolvency law does not provide an explicit legal basis for the appointment of a trustee prior to the opening of formal insolvency proceedings. However, several courts have implemented the practice of confidentially disclosing the identity of the trustee that the court would appoint should a formal request for bankruptcy or suspension of payments be made, to give the future trustee an opportunity to gather adequate information concerning the company's affairs in anticipation of the proceedings. Informal guidelines have been developed by several courts in recent months to expand the trustee's role in connection with negotiations with

prospective buyers and the formulation with important stakeholders of prepackaged plans for a controlled insolvency. Although experience with this relatively new practice has been generally positive, the absence of any formal legal basis has created uncertainty.

Under the proposed legislation, a “prospective trusteeship” would not constitute a new insolvency regime. Unlike a bankruptcy trustee (*curator*) or an administrator in suspension of payments (*bewindvoerder*), a prospective trustee would have no authority over the company and no power to represent it. The debtor would retain exclusive possession of its assets.

A prospective trustee would not be an agent of, or advisor to, the company. The trustee’s mandate would be to represent the interests of the company’s combined creditor constituency. At the company’s request, the prospective trustee could apprise the company of his or her views regarding: (i) whether the actions the company intends to take in the regular conduct of its business or in paying its debts could, in the event of insolvency, reasonably be expected to withstand nullification on the grounds of fraudulent preference; (ii) the conditions under which the trustee (in the event of insolvency) might reasonably be expected to sell the company’s assets (e.g., by means of a prepackaged sale); and (iii) what could be done to expedite the resolution of a bankruptcy. The prospective trustee may engage advisors (e.g., valuation experts) with the company’s consent.

A prospective trustee would be appointed by the court at the company’s request on the basis of evidence that the appointment would best serve the interests of creditors or would be in the public interest. A prospective trusteeship could be terminated by the court on its own initiative or

at the request of the company. It could also terminate upon the commencement of an insolvency proceeding for the company.

The U.K.—The Royal Bank of Scotland (“RBS”) on November 1, 2013, announced a new plan aimed at speeding up its restructuring, returning money to British taxpayers, and restoring the bank to profitability. RBS, which is owned principally by the British government following a £45 billion (\$72 billion) bailout, announced that it would transfer approximately £38 billion (\$61 billion) of toxic assets into a separate entity within the bank. The creation of the internal “bad bank” came after the government launched an inquiry in July into whether RBS should be dismantled, but opted against a breakup. RBS also announced that it would focus on retail and commercial banking in its home market and would move up to 2014 an initial public offering of its wholly owned U.S. subsidiary, Citizens Financial Group. Pressure from the government on RBS to accelerate the sale of its troubled-loan portfolio has been mounting in anticipation of a general election in the U.K. scheduled for 2015.

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