

Temporary Deferral of Payments Act 2020 introduced to protect companies from bankruptcy

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Introduction

Despite the impact of the COVID-19 outbreak on legal matters and company wellbeing, creditors still have the same remedies at their disposal to recover unpaid debts (for further details please see "[Debt collection during COVID-19](#)"). Moreover, the Dutch courts are generally handling bankruptcy petitions and requests for pre-judgment attachment in the same way as they did before COVID-19.

However, this will likely change soon, as in June 2020 the minister for legal protection published a preliminary draft of the [Temporary Deferral of Payments Act 2020](#) for online consultation.

Essence of act

The temporary act's purpose is to protect Dutch companies from avoidable bankruptcies and limit the damage caused by the COVID-19 crisis as much as possible. The temporary act enables the courts, when ruling on a bankruptcy petition, to defer the bankruptcy proceedings for an initial period of up to two months, which can – on request – be extended once or twice, each time by no more than two months. Therefore, the deferral period cannot exceed six months in total.

In addition, the courts can be requested to suspend any other recovery actions instituted by the relevant creditor, with the purpose of enabling the indebted company to restart its activities after the government has (partly) lifted the restrictive COVID-19 measures.

Act in more detail

An indebted company facing a petition for its bankruptcy must file a request for the abovementioned deferral of the bankruptcy proceedings. To substantiate the request, the company must summarily prove that:

- its financial distress is exclusively or mainly due to the restrictive measures relating to the COVID-19 outbreak which were announced in the Netherlands on 16 March 2020; and
- it cannot continue its business as usual, which has resulted in a temporary inability to continue to pay its debts.

This is deemed to be the case when the company provides information about its financial position showing that:

- before the restrictive measures were announced, it had sufficient income to cover its due and payable debts; and
- since the measures were announced, it has suffered a loss in turnover of at least 20%.

If the company successfully proves the above, the court will grant the request for deferral if the following conditions are met:

- the company is expected to be able to pay its debts after the deferral period set by the court; and
- the legitimate interests of the bankruptcy petitioner are – in the court's opinion – neither undesirably nor disproportionately prejudiced.

If the court grants the request for deferral, the following will apply during the deferral period:

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- the indebted company cannot be compelled to pay debts to the creditor that requested the bankruptcy; and
- a failure by the company to fulfil a payment obligation towards the aforementioned creditor before commencement of the deferral period cannot by itself constitute a ground for the creditor to:
 - change in any way its obligations or commitments towards the debtor;
 - suspend the performance of any obligation towards the debtor; or
 - dissolve an agreement with the debtor.

Further, on the debtor's request, the court granting the deferral may also provide that during the deferral period:

- the creditor that requested the bankruptcy cannot exercise its right to recover assets belonging to or controlled by the debtor; and
- (pre-judgment) attachments are lifted.

If the request for deferral is granted but it subsequently appears that the criteria for granting the deferral are no longer met or the debtor has prejudiced the rights of one or more creditors, or it can reasonably be feared that the debtor will do so, the court will annul the deferral on its own initiative or on the request of the relevant creditor (such request will be handled with the utmost urgency).

Comment

The online consultation on the legislative proposal resulted in 16 comments, which were mostly positive. On 11 June 2020 the consultation closed and on 13 July 2020 the government submitted the legislative proposal to the House of Representatives. With Parliament in recess until the end of August 2020, some delay is probable. However, the temporary act is still expected to come into force in the near future and remain in force until at least 1 October 2020. After this, the act can be extended in two-month increments.

Recent practice shows that the courts seem to anticipate the entry into force of this temporary act as bankruptcy petitions are increasingly being deferred, usually for four weeks. This is apparently to give the relevant debtor some temporary breathing room, which is also one of the purposes of the Temporary Deferral of Payments Act.

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