

CORONAVIRUS UPDATE: DUTCH GOVERNMENT ANNOUNCES TEMPORARY MORATORIUM OF PAYMENTS LEGISLATION

On 4 June 2020 the Dutch government announced a Temporary Moratorium of Payments Law (*Tijdelijke Betalingsuitstelwet 2020*) for Dutch companies that are in distress as a consequence of the Coronavirus (the **Dutch Moratorium**). Please see below a short overview of the proposed law.

Is the law currently effective?

No, it is only a draft law, which is subject to consultation and may therefore change. But the consultation ends on 11 June 2020 and the law may enter into force soon.

Who can request the Dutch Moratorium?

Any debtor who conducts a business, not being a financial institution, insurance company or an investment fund (*beleggingsinstelling*) within the meaning of Clause 1:1 of the Dutch Financial Supervision Act (Wft).

For how long will the Dutch Moratorium apply?

The initial period of the Dutch Moratorium is two months, which period can be extended twice by a maximum period of each two months. Therefore a maximum of six months in total.

What are the consequences of the Dutch Moratorium becoming effective in relation to a debtor?

During the Dutch Moratorium the following applies in relation to the creditor that made the bankruptcy filing: (i) the relevant bankruptcy filing will not be heard by the Dutch court, (ii) the relevant creditor cannot force payment of debts which have become due prior to the Dutch Moratorium becoming effective or suspend any services under the defaulted contract, and (iii) the creditor cannot demand for payment or take recourse against the debtor's assets during the Dutch Moratorium.

What are the conditions for granting the Dutch Moratorium?

The debtor must provide prima facie evidence that it is temporarily unable to continue to pay its debts solely or mainly as a consequence of the Coronavirus related measures which have been implemented in The Netherlands since 16 March 2020 and have resulted in the debtor not being able to continue its

ordinary course of business. In other words: the Dutch Moratorium is only available to those companies who are in distress because they have not been able to sufficiently continue their business as a result of the Coronavirus measures.

Is there any guidance on what the prima facie evidence should entail?

Yes. The draft law prescribes that it is sufficient if the debtor provides financial information which shows that (i) prior to the Coronavirus measures (i.e. 16 March 2020) being implemented the debtor was able to pay its debts, and (ii) since the measures being implemented the debtor's revenues declined by at least 20%.

Are there any other conditions to be assessed by the Dutch court?

Yes. After having reviewed the prima facie evidence, the Dutch court will also need to assess whether (i) it is expected that the debtor shall be able to continue to pay its debts after the Dutch Moratorium being terminated and (ii) the creditors' interests are not materially and unreasonably prejudiced.

Can the Dutch Moratorium be used against creditors who didn't file for bankruptcy but who initiated security enforcement actions?

Yes. The debtor can request the Dutch court in summary proceedings (*voorzieningenrechter*) to defer enforcement actions of certain creditors' rights against its assets, if such is necessary for the continuation of the business. This means that a debtor can use this law to postpone enforcement actions by its lenders in relation to security rights. Fully lender-led enforcement strategies would therefore (temporarily) be blocked. On the same basis, the debtor could request the court to lift attachments which were levied by a creditor. The conditions that apply to the Dutch Moratorium as described above shall apply here as well.

Does the Dutch Moratorium provide protection against actions from all creditors?

No, the draft law is not designed to impose a statutory moratorium on all payment obligations of the debtor. The Dutch Moratorium provides a possibility to ask the Dutch court to postpone bankruptcy filings, enforcement and attachment actions by specific creditors, for a maximum period of six months and subject to the aforementioned conditions.

Will directors be protected for continuing to trade during the Dutch Moratorium?

The draft law does not provide for specific protection for directors in respect of the directors duties' and related liability risks. This means that a careful approach in relation to topics including fraudulent preference, selective payments and actions of tort remains applicable. We note that the draft law does provide that due payments made during the Dutch Moratorium cannot be nullified on the basis of fraudulent preference (article 47 Dutch Bankruptcy Act) solely based on the fact that a bankruptcy filing was already made (but postponed) at that time.

How long will the law be applicable?

The draft law was published for public consultation on 4 June 2020 and the consultation ends on 11 June 2020. The Dutch Moratorium is proposed to enter into force as soon as possible, and will terminate on 1 October 2020 (unless extended by the legislator).

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