

The Stay in the WHOA: Right on Target or Missing the EU Mark?

A comparison of stay provisions between the 'Wet homologatie onderhands akkoord ter voorkoming van faillissement' and the EU Proposal for a Directive on preventive restructuring frameworks

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ABSTRACT

This paper compares the stay provisions of *The Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks* (hereafter: EU Proposal) and the "Wet homologatie onderhands akkoord ter voorkoming van faillissement" (WHOA) by asking: How does Article 375 WHOA compare to Article 6 EU Proposal?

When compared, the texts mentioned above, reveal that the main issue is the length of the stay period in the WHOA. While technically being in line with the EU Proposal, the stay period in the WHOA is on the shorter side of the minimum standard which could frustrate the convergence of EU and national restructuring laws.

Keywords

Stay provision; WHOA; EU Proposal on preventive restructuring frameworks; Restructuring businesses; Insolvency; Insolvency law

INTRODUCTION

When restructuring a business in financial distress, it can be of vital importance to create a period where the debtor does not have to worry about creditors reclaiming assets that are essential to the continuation of the business.¹ This period of calm, that supports the restructuring process, is known as a stay or moratorium.²

To facilitate the process of negotiating a restructuring plan the Dutch legislator has prepared a bill: "Wet homologatie onderhands akkoord ter voorkoming van faillissement" (Act on the Confirmation of Extrajudicial Restructuring Plans, WHOA).³ Parallel to this, the European Union (EU) legislator has been working on another legislative instrument, a Directive, covering more or less the same subject matter. In *The Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30* (hereafter: EU Proposal).⁴ This concurrence of legislative initiatives has led to some disparities between the two legislative instruments. A disparity that has been frequently addressed by scholars and practitioners in response to the WHOA is the stay. This paper will focus on the stay, due to the importance of the stay in restructuring processes and the frequency with which scholars and practitioners addressed the stay in the WHOA consultation.⁵

This paper will provide a comparison of the provisions on the stay in the WHOA and the EU Proposal. It looks at the legislative objectives of the provisions,

whom can request a stay, which claims it affects, the duration and the circumstances under which the stay can be lifted.

What is a Stay?

In the context of insolvency, the United Nations Committee on International Trade Law has developed a Legislative Guide on Insolvency Law (2005). Here, a 'stay of proceedings' is defined as follows: "a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate".⁶ The stay is usually a prerequisite for a successful restructuring as it prevents the debtor from losing (control over) essential assets necessary to keep the business going and prevents imminent insolvency to result in a bankruptcy proceeding.⁷

Research Problem, Question and Aim

The concurrence of legislative initiatives from the Dutch and EU legislators resulted in different provisions on the stay. The EU Proposal aims to provide minimum standards to ensure a cohesive restructuring framework in all EU Member States.⁸ For this the Dutch legislator has some freedom, however it must be in line with the minimum standards the EU Proposal tries to implement. If indeed the Dutch provision on the stay contains several outliers the legal certainty will suffer and complicate the practical applicability during restructuring proceedings involving more than one EU Member State.

In light of the importance of cohesion between the stay provisions my research question is as follows:
How does Article 375 WHOA compare to Article 6 EU Proposal?

The aim of this research question is to determine whether the Dutch proposed stay provision would need to be amended in order to ensure that a coherent restructuring framework is implemented throughout the EU.

Research Methodology

This research is based on the WHOA legislative proposal of 2017 and the EU Proposal of 28 March 2019.⁹ Due to the nature of the research subject there is not yet any real-world application of the proposed stay provisions. However, during the drafting and ameliorating of the proposals, practitioners and scholars have formulated their concerns on the stay. Furthermore, the explanatory memorandums provide insight into the thought processes

¹ This paper is based on the bachelor thesis that was finished in 2019 and represents the state of law as at: 2 April 2019.

² ELI Report 2017, p.222, §2.2.1.

³ MvT WHOA, p.1.

⁴ Outcome of the European Parliament's first reading, (Strasbourg, 25 to 28 March 2019).

⁵ Houthoff, Response WHOA, §6.3, p.6. INSOLAD, Response WHOA, §30, p.11. Boels Zanders Advocaten, Response WHOA, p.9. NOVA, Response WHOA, p.12. De Brauw, Response WHOA, §4.1.1 & §4.2, p.33-36. FNV, CNV & VCP, Response WHOA, p.2.

⁶ UNCITRAL Legislative Guide 2004, §12, under B, "Glossary, Terms and Definitions", p.7. ELI Report 2017, p.222, §2.2.1.

⁷ ELI Report 2017, p.222, §2.2.1.

⁸ Explanatory memorandum EU Proposal.

⁹ As of the 20th of June 2019, the EU Proposal has become an EU Directive and as of the 3rd of July 2019 the Dutch Minister of Legal Protection has presented the official WHOA Proposal to the Dutch Parliament for ratification. References in the footnotes are to the 2017 WHOA legislative proposal and the EU Proposal of the 28th of March 2019. In the official WHOA Proposal of the 3rd of July 2019 the stay provision has become Article 376 instead of Article 375.

of the legislators. The concerns formulated by practitioners and scholars, the explanatory memorandums as well as the text of the proposals themselves will provide the basis for the comparison in this paper. The comparison will focus on the following aspects: the legislative objectives of the provisions, whom can request a stay, which claims it affects, the duration and the circumstances under which the stay can be lifted.

The Stay in Article 375 WHOA

The general objective of the WHOA is to strengthen the possibilities for reorganising businesses that have profitable business activities, but that, due to heavy debts, are on the brink of going insolvent.¹⁰ The proposal aims to prevent that a small group of creditors or shareholders frustrates out-of-court negotiations to achieve a restructuring, thereby hurting the interests of all other stakeholders.¹¹

The objective of the stay is to provide the debtor the opportunity to negotiate a restructuring agreement by prohibiting creditors from recovering or reclaiming their property or exercising their right to the fulfilment of their obligations, unless they obtained authorisation from the court.¹²

Main Elements of Article 375 WHOA

According to Article 375 WHOA the stay can be requested by the debtor, represented in court by an attorney-at-law, if he has offered a restructuring agreement to the court in accordance with Article 370 WHOA.¹³ The Judge then has to decide whether or not the stay will be granted.

Article 375 WHOA seems to suggest that the debtor can only request a general stay for all creditors; however, the Dutch legislator explicates in the explanatory memorandum of the WHOA that the stay can be requested for all creditors or for a select few.¹⁴

The stay period can be granted for a maximum total of four months. According to Article 375 WHOA, an extension of two months to the initial two months may be granted if the court deems it necessary.¹⁵ The provision does not provide further guidelines to determine whether or not an extension is necessary. The legislator provides some examples when this might be the case in the explanatory memorandum, e.g. when the debtor wants to impair his creditors.¹⁶

Finally, the stay can be prematurely lifted according to Article 375 WHOA if reasons arise which make it unreasonable to continue to enforce the stay.¹⁷ In order to interpret 'unreasonable to continue', the explanatory memorandum refers to the same examples as for the granting of an extension.¹⁸

The Stay in Article 6 EU Proposal

The general objective of the EU Proposal is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms¹⁹ resulting from the differences between national laws and procedures concerning preventive restructuring.²⁰ Preventive restructuring frameworks should, above all, enable the debtor to restructure effectively at an early stage

and to avoid the insolvency and the liquidation of viable companies.²¹

The objective of the stay is to support the negotiations of a restructuring agreement by enabling the debtor to continue operating, or to preserve the value of the debtor's estate during the negotiations.²²

Main Elements of Article 6 EU Proposal

Article 6 EU Proposal does not state who is allowed to request the stay, it only states that Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support negotiations of a restructuring plan.

Member States may provide a general stay of individual enforcement actions covering all creditors, or a limited stay covering one or more individual creditors or categories of creditors.

A stay should apply for an initial maximum period of four months in order to provide for a fair balance between the rights of the debtor and those of the creditors.²³ Complex restructurings may require more time; however, the total duration of the stay shall not exceed twelve months.

Member States shall ensure that judicial or administrative authorities can also lift the stay in well-defined circumstances.²⁴ Furthermore, a stay should cease to have effect upon expiry of the stay period when no extension or renewal has been granted.

The Comparison

Main Objectives

The objective of the EU Proposal is not only to provide a minimum standard, but also to remove obstacles to the exercise of fundamental freedoms that result from the differences between national laws and procedures concerning preventive restructuring.²⁵ The minimum standards should allow the Member States flexibility to apply common principles, while still respecting national legal systems.²⁶

The objective of the WHOA is more limited. As the WHOA is an amelioration of the Dutch insolvency law framework amending the Dutch Bankruptcy Act (DBA). However, due to the binding nature of an EU Directive, the WHOA must also comply with the provisions of the EU Proposal in order to support the 'big picture' objectives of the EU.²⁷ The EU allows the Dutch legislator the flexibility to fit the EU Proposal in the existing framework of the DBA due to the minimum standards approach of the EU.

Objectives of the Stay

The EU Proposal clarifies that the stay should enable the debtor to continue to operate or preserve the value of the debtor's estate, while the stay in the WHOA seems to have only the objective of supporting the restructuring negotiations by preventing uncooperative creditors from frustrating the restructuring negotiations.²⁸ The WHOA is not focussed on the preservation of the value of the debtor's estate or the continuation of the operation of the business, but on the protection of the other creditors and

¹⁰ MvT WHOA, p.1.

¹¹ MvT WHOA, p.1.

¹² Art. 375(1) WHOA. MvT WHOA, p.13 & 31.

¹³ MvT WHOA, Article 5 DBA, p.15-16. Under B WHOA, p.2.

¹⁴ MvT WHOA, p.31.

¹⁵ In the official proposal of the WHOA of the 3rd of July 2019 the maximum stay period has been extended to 8-month total if deemed necessary.

¹⁶ MvT WHOA, p.15 & 31-32.

¹⁷ Art. 375(4) WHOA.

¹⁸ MvT WHOA, p.15 & 31-32.

¹⁹ Free movement of persons, goods, capital and services.

²⁰ EU Proposal, recital 1.

²¹ EU Proposal, recital 2.

²² EU Proposal recital 32.

²³ EU Proposal recital 35.

²⁴ E.g. when the stay does no longer fulfil the objective of supporting the negotiations on the restructuring plan, or at the request of the debtor or the practitioner in the field of restructuring.

²⁵ EU Proposal, recital 1. See explanatory memorandum EU Proposal.

²⁶ EU Proposal, recital 16.

²⁷ EU Proposal, recital 1. See explanatory memorandum EU Proposal.

²⁸ MvT WHOA, p.13 & 31. EU Proposal recital 32.

stakeholders against uncooperative creditors that might undo all the restructuring efforts by recovering or reclaiming their assets.²⁹ This difference in objective should receive further attention from the Dutch legislator.

Requesting the Stay

Article 6 EU Proposal does not provide a clear indication of who can request a stay. It only states that Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support negotiations of a restructuring plan. This allows Member States to choose a system that works within their existing legal frameworks. This is what the Dutch legislator has done in the WHOA. In the WHOA, the stay can be requested by the debtor after which the court has to decide whether or not the stay will be granted.³⁰

Affected Claims

The court can grant a general or a limited stay according to both the WHOA and the EU Proposal.³¹ Furthermore, the EU Proposal states that Member States should be able to exclude certain claims from the scope of the stay in well-defined circumstances, again leaving a wide margin for the Member States to incorporate the stay in their respective restructuring frameworks.³²

The Stay Period

According to the EU Proposal, a stay should apply for an initial maximum period of four months in order to provide for a fair balance between the rights of the debtor and those of creditors.³³ Complex restructurings may require more time; however, the total duration of the stay shall not exceed twelve months.

The stay period in the WHOA is on the short end of the minimum standard, namely, a stay period that can be granted for a maximum total of four months.

Responders to the consultation on the WHOA state that the proposed length of the stay can be too short or too long depending on the case, and thus the period is too inflexible for real world application.³⁴ They suggest that the stay should be linked to the circumstances of each case and the state of the negotiations at the time the stay is requested.³⁵

If the Netherlands is the only EU Member State to implement a stay period on the shorter end of the minimum standard, this will become an obstacle to the exercise of fundamental freedoms resulting from the differences between national laws and procedures concerning preventive restructuring.³⁶ The chosen minimum of the minimum standard would run counter to the harmonisation objective of the EU. The resulting patchwork of legislation would impede the legal certainty of the EU citizen. The short stay period would become a problem during more complex restructuring processes, e.g. during the restructuring of large organisations which may have subsidiaries in other Member States. This would run counter to the main objective of the EU Proposal.

Lifting of the Stay

The EU Proposal states that Member States shall ensure that judicial or administrative authorities can lift the stay

prematurely under certain well-defined circumstances.

According to Article 375 WHOA the stay can be prematurely lifted if reasons arise that make the continuation of the stay unreasonable.³⁷ Both of these norms are quite vague and have been points of critique from academics for lack of clarity.³⁸ Both the Dutch and EU legislators will need to provide clear guidelines on how these norms need to be applied for this not to become a cause of dispute in practice.

CONCLUSION

In this study I reviewed the question *how Article 375 WHOA compares to Article 6 of the EU Proposal?*

To answer this question, I have examined and compared the objectives and main elements of both provisions, to determine their similarities and disparities.

Both the WHOA and the EU Proposal seem to be dealing with the same points of contention, namely: the length of the stay period, and the vagueness of the norms of application when it comes to determining the parameters of the granting, lifting and extension of the stay. Therefore, both legislators should, in my opinion, provide clear guidelines on how these norms should be interpreted to provide practice with the necessary legal certainty in the tumultuous times of financially distressed businesses.

When comparing the main elements of both provisions, it becomes apparent that the WHOA is mostly in line with the EU Proposal.

The biggest issue I identified is the length of the stay period in the WHOA. While technically being in line with the EU Proposal, the stay period in the WHOA is on the shorter side of the minimum standard. This minimalist approach from the Dutch legislator could be viewed as in line with the Dutch system, as the current stay in the DBA is of the same length. Nonetheless, I believe that by choosing the bare minimum of the minimum standard, the Dutch legislator could be frustrating the convergence of EU and national restructuring laws. Creating a patchwork of differing national laws rather than the EU envisioned harmonisation.

In neither the text of the WHOA itself, nor the corresponding explanatory memorandum, did the Dutch legislator explain their choice for the length of the stay. I would therefore recommend that either the Dutch legislator looks into lengthening the proposed stay period or provides a clear reason as to why they believe that the total maximum of four months will be adequate to achieve the proposed objective of providing support to the debtor to negotiate a restructuring agreement.

Concluding remarks

After the conclusion of this research the EU Proposal has become an EU Directive on the 20th of June 2019. And as of the 3rd of July 2019, the Dutch minister for legal protection has submitted the official ameliorated WHOA proposal to the Dutch Parliament for ratification.

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SRC 2019, December 5, 2019, The Netherlands.

²⁹ MvT WHOA, p.13 & 31. EU Proposal recital 32.

³⁰ Article 375(1) WHOA.

³¹ MvT WHOA, p.31. Article 6(3) EU Proposal.

³² Article 6(4) EU Proposal.

³³ EU Proposal recital 35.

³⁴ NOvA, Response WHOA, p.12. De Brauw, Response WHOA, §4.1.1 & §4.2, p.33-36, WBRT, Response

WHOA, §4.2, p.5.

³⁵ De Brauw, Response WHOA, §4.2.8, p.36.

³⁶ EU Proposal, recital 1. See explanatory memorandum EU Proposal.

³⁷ Art. 375(4) WHOA.

³⁸ N.W.A. Tollenaar, §3.3, p.74. H. Eidenmüller, p.17 e.v. INSOLAD, Reponse WHOA, §28, p.10-11. NOvA, Response WHOA, p.12.

ROLE OF THE STUDENT

Trieneke Lorjé was an undergraduate student working under the supervision of Mr. J.M.G.J. Boon when the research of this paper was performed. The broad topic of a comparison between the WHOA and the EU Proposal was proposed by the supervisor after which the student chose the more specified comparison between the corresponding provisions on the stay. The research of the legislative processes, the research of the consultation on the legislative proposals, the in-depth review of the proposed stay provisions, the comparison of the findings and the formulation of the conclusion as well as the writing were done by the student in question.

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