HOUTHOFF BURUMA

Continuity of Enterprises Act 1

Wet Continuïteit Ondernemingen I

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Translation by Jochem Hummelen

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Amendment to the Bankruptcy Act in connection to the appointment by the district court of an intended bankruptcy trustee to further the winding-up of a possible bankruptcy and to increase the chances of the continuation of an enterprise or of the relaunch of viable parts of the enterprise (Continuity of Enterprises Act I)

no. 2

LEGISLATIVE BILL

We Willem-Alexander, by the grace of God, King of the Netherlands, Prince of Orange-Nassau, etc. etc. etc.

Greetings to all who will see or hear these present! Be it known:
Whereas We have considered that it is desirable to include a regulation in the Dutch Bankruptcy Act under which the district court is offered the possibility to appoint an intended bankruptcy trustee preceding a possible bankruptcy,
We, therefore, having heard the Advisory Division of the Council of State, and in consultation with the States General, have approved and decreed as We hereby approve and decree:

SECTION I

The Bankruptcy Act is amended as follows:

A

After Section 3b, a section is inserted, reading:

Section 3c

If a bankruptcy petition is filed, while an appointment as referred to in Section 363 has been made, the district court will promptly inform the intended supervisory judge, the intended bankruptcy trustee and the debtor of such filing.

B

In Section 5, first subsection, «198 and 206» is replaced by: 206 and 363, first subsection.

C

Section 6 is amended as follows:

1. In the first sentence of the first subsection «is to be» is replaced by «is» and after the second sentence the following is added: If there has been an appointment as referred to in Section 363 in the three months preceding the filing of the debtor's application for its bankruptcy or a petition for bankruptcy, then the district court will summon the intended supervisory judge and intended bankruptcy trustee to be heard. If more than three months have passed since the termination of the appointment, the district court may summon the intended supervisory judge and intended bankruptcy trustee to be heard.

2. A new subsection is inserted, reading:
5. If an appointment as referred to in Section 363 has been made in the three months preceding the filing of the debtor's application for its bankruptcy or a petition for bankruptcy, then this will be specified in the bankruptcy order. If more than three months have passed since the termination of the appointment, the district court may decide to include the appointment in the bankruptcy order. ⓘ

D

After Section 14, a section is inserted, reading:

Section 14a

If there has been an appointment as referred to in Section 363 in the three months preceding the filing of the debtor's application for bankruptcy or a petition for bankruptcy, the district court will appoint the person or persons appointed as intended bankruptcy trustee as bankruptcy trustee and will appoint the member of its district court that was appointed as intended supervisory judge as supervisory judge in the bankruptcy, unless the district court finds that there are grounds to appoint a different bankruptcy trustee or a different supervisory judge.

E

In Section 74 a new subsection is inserted, followed by the renumbering of the second to the third subsection, reading:
2. If there has been an appointment as referred to in Section 363 in the three months preceding the filing of the debtor's application for its bankruptcy or a petition for bankruptcy, then the district court will, together with the bankruptcy order, establish a provisional committee as referred to in the first subsection at the recommendation of the intended supervisory judge or on the request of the intended bankruptcy trustee.

F

Section 215 is amended as follows:

1. In the second subsection «Section 6, first subsection, third sentence, and fourth subsection» is replaced by: Section 6, first subsection, third sentence, fourth subsection and fifth subsection.

2. After the second subsection two subsections are inserted, reading:
3. If there has been an appointment as referred to in Section 363 in the three months preceding the filing of a petition for suspension of payments, then the district court will appoint the person or persons

appointed as intended bankruptcy trustee as administrator, unless the district court finds that there are grounds to appoint a different administrator.

4. If there has been an appointment as referred to in Section 363 in the three months preceding the filing of a petition, then the district court will, before deciding on the definitive granting of the petitioned suspension of payments, summon the persons appointed as intended supervisory judge and intended bankruptcy trustee in the aforementioned appointment to be heard on the request. If more than three months have passed since the termination of the appointment, the district court may summon the aforementioned persons to be heard.

G

At the end of Section 218, subsection 7 the following is added: If there has been an appointment as referred to in Section 363 in the three months preceding the filing of a petition for suspension of payments, this is specified in the order.

H

Section 223a is amended as follows:

1. In front of the text the designation «1. » is placed.

2. A subsection is inserted, reading:

2. If there has been an appointment as referred to in Section 363 in the three months preceding the filing of a petition for suspension of payments, then the district court will appoint the member of its district court that was appointed as intended supervisory judge as supervisory judge, unless the district court finds that there are grounds to appoint a different supervisory judge.

I

After Section 362 a new title IV is inserted, titled: TITLE IV «Outside of bankruptcy and suspension of payments» reading as follows:

FIRST PART Appointment of an intended bankruptcy trustee

Section 363

1. At the request of a debtor that faces a situation in which it will not be able to continue to pay its debts, the district court that would be authorised according to Section 2 to declare the debtor bankrupt, can, in preparation of an impending bankruptcy appoint one or more persons that are to be appointed as bankruptcy trustee in case of a declaration of bankruptcy. The debtor has to show in its request that in its specific situation it is likely that this preparation has added value. Added value is assumed to be present if it can be demonstrated that the preparation can limit the damage for those affected by a possible bankruptcy to a certain extent or can increase the possibility of a sale of viable parts of the debtor's enterprise against the highest possible sale price while preserving as much employment as possible, to the extent that this outweighs the circumstance that the preparation takes place in private.

2. The request is filed with the court registry and handled with the greatest speed in the court in chambers. The district court will make an appointment if prima facie evidence supports the fact that there is a situation as referred to in the first subsection. The district court will specify in its order the added value that was put forward by the requesting party.

3. The district court will set a maximum term of twee weeks for the appointment referred to in the first subsection. This term can be extended at the request of the debtor by the district court with a term at its discretion. A request for extension of the term is made by the debtor before the preceding term ends and is handled by the district court in the same manner as the request referred to in the first subsection. Before deciding on the request for the extension of the term, the district court will summon the intended supervisory judge and the intended bankruptcy trustee to be heard and will give the debtor an opportunity to be heard. For the filing of a request for an extension no court fee will be charged. ⓘ

4. The district court can impose such conditions to the appointment, referred to in the first subsection, or to the extension of the term, referred to in the third subsection, as it deems necessary for the realisation of the intended goal of the appointment, for an enhancement of the position of the intended bankruptcy trustee or for the representation of the interests of the debtor's employees. The district court can, either at the recommendation of the supervisory judge, at the request of the intended bankruptcy trustee or on the basis of a substantiated request of the debtor or one or more creditors, also decide to do this during the term of the appointment. ⓘ

5. The district court can, for the payment of the intended bankruptcy trustee's fees and the third parties that are consulted by him or the costs charged by them, as referred to in Section 367, impose the condition to the appointment that security is provided. ⓘ

6. Section 107a, first subsection, of Book 2 of the Dutch Civil Code and possible provisions based on the articles of incorporation or based on an agreement between the shareholders and the legal entity regulating the decision-making process by the general meeting, are not applicable to the filing of a request as referred to in the first subsection. ⓘ

7. An appointment as referred to in the first subsection is not made if the requesting party is a natural person that does not conduct an independent profession or business, nor if the requesting party is a bank as referred to in Section 212g, first subsection, part a, or an insurer as referred to in Section 213. ⓘ

8. There is no legal remedy against a decision on a request as referred to in the first and third subsection. ⓘ

Section 364

1. The intended bankruptcy trustee, to safeguard the realisation of the added value, referred to in Section 363, first subsection, second sentence, that the district court specifically includes in its decision, is to be involved in the preparation of a possible bankruptcy and in this process represents the interests of the joint creditors of the debtor. ⓘ

2. The intended bankruptcy trustee is not obliged to follow instructions by the debtor, nor of one or more of his creditors. ⓘ

3. The debtor will provide the intended bankruptcy trustee when requested and at its own initiative and, if relevant, in the manner as specified, all information that the intended bankruptcy trustee needs for the execution of his role or of which the debtor knows or should understand that they are relevant in this context. ⓘ

4. With the consent of the debtor, the intended bankruptcy trustee, when obtaining information, can consult with third parties or request an expert to conduct an investigation. ⓘ

5. The intended bankruptcy trustee will not share the information obtained pursuant to the third and fourth subsection with other parties except for the intended supervisory judge or the district court, until he has obtained permission to do so from the debtor. ⓘ

Section 365

1. An appointment as referred to in Section 363, first subsection, also entails that the district court in its order will appoint one of its members that shall be appointed as supervisory judge in case of a declaration of bankruptcy.
2. The intended supervisory judge supervises the functioning of the intended bankruptcy trustee.
3. The intended bankruptcy trustee regularly reports to the supervisory judge about his findings. The intended supervisory judge can at all times summon the intended bankruptcy trustee to appear in person before the court. He is obliged to provide the supervisory judge with all desired information.

Section 366

1. The supervisory judge can, either on the recommendation of the intended supervisory judge, at the request of the intended bankruptcy trustee, or based on a substantiated request by the debtor or one or more creditors, at all times:
a) revoke an appointment as referred to in Section 363, first subsection, and
b) if all conditions, as referred to in Section 363, first subsection, are still satisfied, appoint a different person as intended bankruptcy trustee, or appoint one or more intended bankruptcy trustees.
Before deciding on this the district court will summon the intended supervisory judge and intended bankruptcy trustee to be heard and give the debtor and one or more creditors as referred to in the first sentence the opportunity to be heard. When the request is filed by the debtor, no court fee is due. ⓘ
2. The appointment, as referred to in Section 363, first subsection, ends by operation of law as a result of the expiration of the term as referred to in the third subsection of that section and by a declaration of bankruptcy of the debtor or the granting of provisional suspension of payments to the debtor, respectively. ⓘ
3. No later than seven days after the end of the appointment, the intended bankruptcy trustee will publish a report on his findings during the period that the appointment lasted. This term can be extended and determined by the district court, based on a substantiated request by the intended bankruptcy trustee. Further rules concerning the contents of the report may be laid down by governmental decree. ⓘ
4. The intended bankruptcy trustee files his report with the court registry of the district court. The report is filed for inspection without costs for any party, but not until after the debtor has been declared bankrupt or has been granted suspension of payments and only insofar as the application or petition for bankruptcy or the petition for suspension of payments has been filed within three months after the appointment has ended. The filing is free of charge. ⓘ
5. If the appointment, as referred to in Section 363, first subsection, has been revoked according to Section 366, first subsection, more than three months before the application or petition for bankruptcy or the petition for suspension of payments, the district court may order that the report is nevertheless filed for inspection without cost for any party. ⓘ

6. There is no legal remedy against a decision on a request as referred to in the first subsection.

Section 367

The debtor on whose request an intended bankruptcy trustee has been appointed, pays the salary of the intended bankruptcy trustee and costs of third parties consulted by him.

SECTION II

Book 2 of the Dutch Civil Code is amended as follows:

A

In the Sections 138 subsection 1 and 248 subsection 1 the following is inserted at the end:
If there was an appointment of an intended bankruptcy trustee as referred to in Section 363 of the Dutch Bankruptcy Act, and if, during the period that the appointment lasted or in the following bankruptcy, it turns out that the director has provided incorrect information with the request for that appointment about the added value of the preparation of the bankruptcy with intention of using the preparation phase on improper grounds, he has improperly performed his duties and it is presumed that this improper performance was an important cause of the bankruptcy.

B

In the Sections 164 subsection 1, under i, and 274 subsection 1, under i, the following is inserted before the semicolon: , or a request for the appointment of an intended bankruptcy trustee.

SECTION III

If the bill to amend the Dutch Bankruptcy Act submitted by royal message of 1 September, 2014 in connection with the introduction of the possibility of a civil director disqualification (Civil Director Disqualification Act) (Parliamentary Papers 34 011) has been passed into law and that Act enters into force at the same time or later than this Act, then, in Section 106a subsection 1 in Section I of that Act , under the deletion of «of» at the end of part d and replacement of the period by «;or» a part will be added, reading:
f. there has been an appointment of an intended bankruptcy trustee as referred to in Section 363, first subsection, and during the period that this appointment lasted or in the subsequent bankruptcy, it turns out that the director has provided incorrect information with the request for that appointment about the added value of the preparation of the bankruptcy with intention of using the preparation phase on improper grounds.

SECTION IV

This Act comes into force at a date to be set by royal decree, while different dates may be set for the separate sections or parts of them.

SECTION V

This act is cited as: Continuity of Enterprises Act I.

We order and command that this be published in the Bulletin of Acts and Decrees and that all ministerial departments, authorities, bodies and officials whom it may concern diligently implement it.

Done at

The Minister of Security and Justice

Memorandum of Amendment

House of Representatives

Unofficial translation

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Parliamentary year 2015-2016

34 218

Amendment of the Bankruptcy Act in connection to the appointment by the district court of an intended bankruptcy trustee to further the winding-up of a possible bankruptcy and to increase the chances of the continuation of an enterprise or of the relaunch of viable parts of the enterprise (Continuity of Enterprises Act I)

no. 7

MEMORANDUM OF AMENDMENT

Received 15 February 2016

The legislative bill is amended as follows:

Section I is amended as follows:

a. In part C, under 2, «in the three months» is replaced by «in the year» and «three months» by: a year.

b. After part C a new part Ca is added, reading:

Ca

In Section 14, third subsection, after «the profession and the domicile or the office of each member of the provisional committee of creditors, if one is appointed,» the phrase is added: as well as the appointment of an intended bankruptcy trustee if applicable in the year preceding the submission of the petition or the request for a bankruptcy order,.

c. In part G, «in the three months» is replaced by: in the year.

d. At the end of part I a new section is added, reading:

Section 368

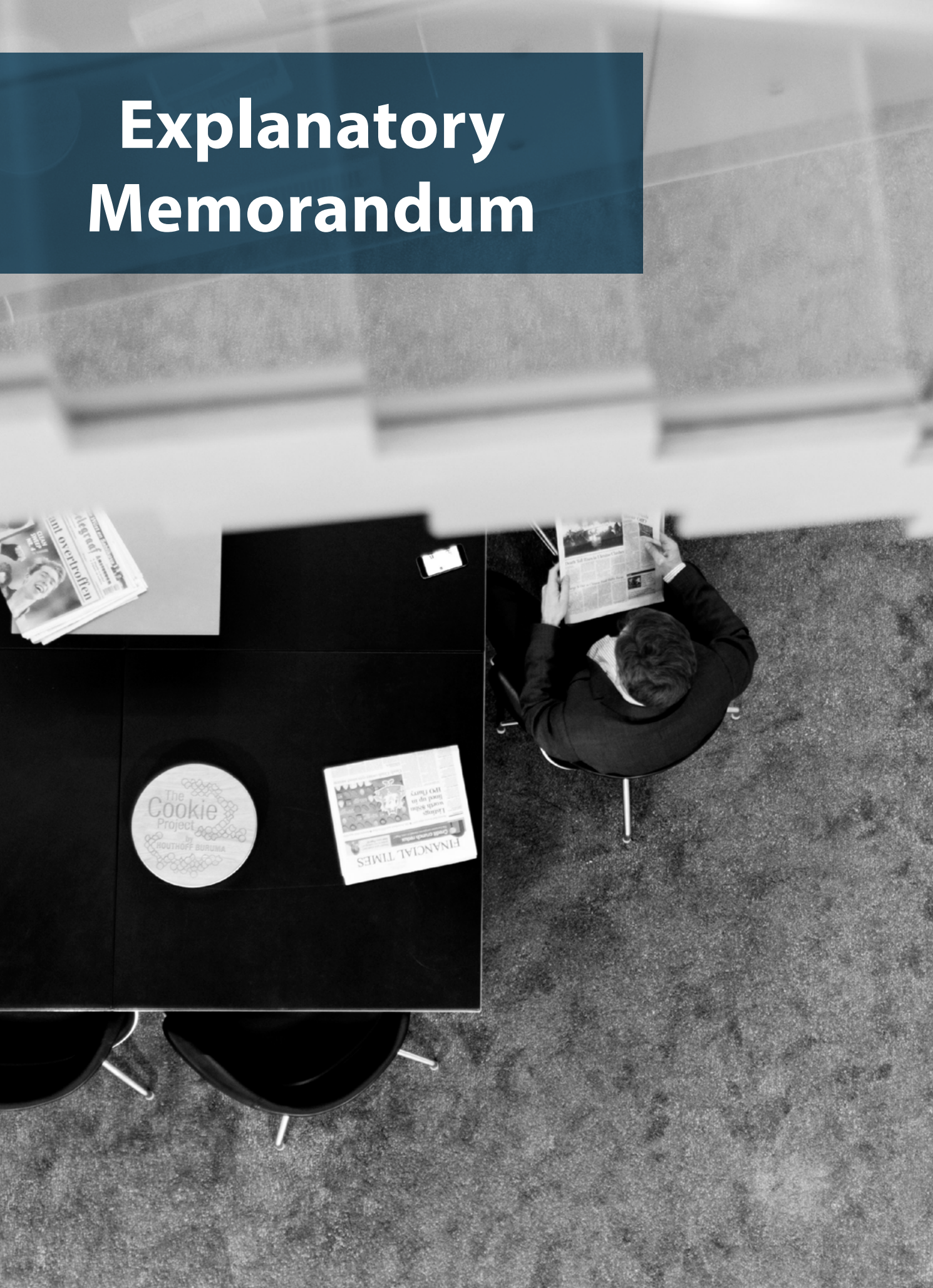
The filing of a request for the appointment of an intended bankruptcy trustee as referred to in Section 363 and the granting of such a request or an event that is directly related to that, are not grounds for changing the debtor's rights or obligations under the law of obligations, a suspension of the compliance with an obligation towards the debtor and the termination of an agreement entered into with the debtor.

Explanation

For the explanation of the proposed amendment provision, reference is made to the observations on this matter in the memorandum of reply.

The Minister of Security and Justice
G.A. van der Steur

Explanatory Memorandum



House of Representatives
Unofficial translation

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Parliamentary year 2014-2015

34 218

Amendment to the Dutch Bankruptcy Act in connection to the appointment by the district court of an intended bankruptcy trustee to further the winding-up of a possible bankruptcy and to increase the chances of the continuation of an enterprise or of the relaunch of viable parts of the enterprise (Continuity of Enterprises Act I)

no. 3

EXPLANATORY MEMORANDUM

I. GENERAL PART

1. Introduction

With this bill a regulation is introduced in the Dutch Bankruptcy Act (DBA) in which the district court is given the possibility to privately appoint, at the request of a debtor and prior to a bankruptcy order, who it will appoint as bankruptcy trustee (hereafter: intended bankruptcy trustee) and as supervisory judge (hereafter: intended supervisory judge) if there should be a bankruptcy. If the debtor is indeed declared bankrupt, it has been provided that the district court will usually appoint the persons it had previously appointed as intended bankruptcy trustee and intended supervisory judge as bankruptcy trustee and supervisory judge in the bankruptcy.[1]

The regulation is in line with a practice that has developed over the last few years and that is now applied by eight of the eleven district courts.[2] Following the regulation in the United Kingdom, where a relaunch after bankruptcy is prepared by an «*administrator*» preceding the bankruptcy order, this solution is also referred to with the term «*pre-pack*». In the literature the intended bankruptcy trustee is often also called «*silent administrator*». With this bill I am fulfilling the promise made by the former State Secretary for Security and Justice at the oral question time in the House of Representatives on 18 June 2013, to give, for reasons of legal certainty, the «*pre-pack*» an explicit legal basis.

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[1] For practical reasons – and because this is the sequence of events in the vast majority of the cases – in the Explanatory Memorandum reference is mainly made to the appointment of an intended bankruptcy trustee and an intended supervisory judge in the period before a bankruptcy. This does not change the fact that the appointment can also take place in the period before a suspension of payments is granted.

[2] The district courts of Central-Netherlands, Overijssel and Limburg do not use this practice.

To support the good experiences gained in practice and to provide room for further substantiation by that practice, a framework regulation has been chosen that consists of:

a) procedural rules in which an answer is given to the questions:
   – *when* the appointment of an intended bankruptcy trustee can be requested and how this should be done,
   – *when* and *how* the district court can grant such a request and under what conditions, and
   – *when* the appointment ends, as well as
b) rules on the duties and powers of the debtor, the district court, the intended bankruptcy trustee, the intended supervisory judge and the creditors, including the employees.

The regulation is applicable to enterprises, irrespective of the activities they undertake or the legal form in which they are run, and can therefore also be applied to enterprises in the semi-public sector.[3] The regulation is not applicable to natural persons who do not conduct an independent profession or business.

The present «*pre-pack practice*» benefits from the proposed regulation because it provides clarity with regard to the concept of the intended bankruptcy trustee and his role, duties and powers, as well as on the conditions under which an intended bankruptcy trustee can be appointed and how the supervision on the functioning of the intended bankruptcy trustee is regulated.[4] People and organisations in the field explicitly asked for this clarification.[5]

The proposed regulation also offers the «*pre-pack practice*» some innovations that benefit the creditors. The proposed regulation provides them with various opportunities to better highlight their interests during the «*private preparation phase*» - which begins with the appointment of an intended bankruptcy trustee - or in a subsequent bankruptcy. A new subsection is added to Section 74 DBA, for example, which provides that the district court will set up a provisional creditors' committee in the event of a bankruptcy order following a «*private preparation phase*» when the

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[3] Mr. G.R.J. de Groot, «*Zorg in de knel*», ZIP 2014(7).

[4] As observed in the consultation about the consultation version of this bill on behalf of CMS Derks Star Busmann N.V. by mr. M.R. van Zanten, this statutory basis and the clarity offered concerning the role of the intended bankruptcy trustee is also of importance, for example, within the context of the professional liability insurance of the lawyers who are appointed by the district court as intended bankruptcy trustee

[5] *Inter alia* mr. drs. N.W.A. Tollenaar, «*Faillissementsrechters van Nederland: geef ons de pre-pack*», Tvl 2011/23; mr. O.G. Tacoma and mr. C.J.M. Weebers-Vrenken, «*The b(l)ackside van een pre-pack-faillissement*», Vastgoedrecht 2013, 6; H. Koster, «*Herstructureringen bij insolventie: naar pre-pack plus!*», Tvl 2013/7; mr. E. Loesberg, «*Heiligt het doel de middelen? Pre-pack in het Nederlandse Faillissementsrecht*», Tijdschrift voor de ondernemingspraktijk 2013/1; mr. J.L.R.A. Huydecoper, «*Pre-pack-liquidatie: wat vindt een betrekkelijke buitenstaander daar op het eerste gezicht van?*», Tvl 2013/5; K. Beke & P. Wolterman, «*Verslag seminar «De Nederlandse pre-pack - ready for take off?» dated 11 April in Amsterdam*», Tvl 2012/31; mr. M.R. van Zanten, «*Aan het werk met de pre-pack*», Arbeidsrecht 2013/47; mr. W.J.P. Jongepier and mr. drs. K.P. Hoogenboezem, «*Wie is de stille bewindvoerder?*», FIP 2013/6; mr. B.J. Tideman, «*Kritische kanttekeningen bij de pre-pack*», FIP 2013/6; mr. drs. N.W.A. Tollenaar, «*Van pre-pack naar stille bewindvoering: een nuttige rechtsfiguur in de maak*», FIP 2013/6; mr. B.J. Tideman, «*Reactie mr. B.J. Tideman: wetgever van Nederland, geef ons de pre-pack+*», FIP 2013/7; mr. J.V. Maduro, «*Het wetsvoorstel Wet continuïteit ondernemingen I: de rechtszekerheid gediend?*», FIP 2013/8; mr. Ph. W. Schreurs, «*Hoe stil is de stille bewindvoerder nu eigenlijk*», FIP 2013/8; mr. M.J. Cools, «*Een doorstart in voorverpakking*», FIP 2013/8; mr. M.H.F. van Vugt, «*De Nederlandse pre-pack: time-out please!*», FIP 2014/1; prof. mr, F.M.J. Verstijlen, «*Pre-packing in the Netherlands*», NJB 2014/803; prof. mr. J.J. van Hees, «*Stille bewindvoering: pre-packen en wegwezen?*». Ondernemingsrecht 2014/79; mr. W.J.M. van Andel; «*Stop met de pre-pack*», Tvl 2014/37; mr. dr. R.R. Verkerk, mr. M. Windt and mr. T.L. Rozendal, «*Prepacks: transparantie en verantwoording achteraf*», Tvl 2014/40; prof. mr. F.M.J. Verstijlen, «*Reorganisatie van ondernemingen en pre-pack*», Vereniging «Handelsrecht» Preadviezen 2014, Uitgeverij Paris, Zutphen 2014.

intended bankruptcy trustee and/or the intended supervisory judge find reason to do so. The duty of this committee is to provide the bankruptcy trustee with advice – about the sale of parts of the enterprise for a relaunch, for example - and to that end they may consult all the relevant (financial) information and ask the bankruptcy trustee at any moment to provide more detailed information (Sections 76 and 77 DBA). The proposed regulation also takes account of the fact that, in general, a bankruptcy has a more profound impact on employees than on other creditors, which results in employees taking a special position within the group of creditors. In view of this, Section 363, fourth subsection, explicitly provides that the district court will have to ask the question, when it appoints an intended bankruptcy trustee, whether it is necessary to set specific conditions for the protection of the interests of the employees employed by the debtor. A condition the district court might set is that the works council or the staff representation be involved - subject to secrecy[6] - in the «*private preparation phase*».

The proposed regulation also contains some new measures which will result in a contribution of the «*private preparation phase*» to the combating of bankruptcy related fraud and abuse of bankruptcy law. In respect of the latter, this does not only benefit the creditors but also competitors and society as a whole. When it becomes clear in the «*private preparation phase*» or during the subsequent bankruptcy that the directors or the *de facto* directors of the enterprise run by the debtor have used or have intended to use the «*private preparation phase*» on improper grounds, it will be made easier for the bankruptcy trustee to hold such directors or *de facto* directors liable for the resulting damage and this may - after the entry into force of the Civil Director Disqualification Act[7] - also result in the disqualification of a civil director (Sections II and III).

The bill is part of the legislative program Recalibration of Bankruptcy Law. As the House of Representatives was informed in a letter of 26 November 2012, this program is based on three pillars: (i) combating fraud, (ii) strengthening of the ability of enterprises to reorganise and (iii) modernisation of the bankruptcy proceedings.[8] This bill is part of the second pillar: strengthening of the reorganising ability of enterprises (hereafter also: reorganisation pillar). In the progress letters to the House of Representatives on 27 June 2013, 15 November 2013, 15 July 2014 and 9 December 2014 it was set out that the aim of this pillar is to avoid unnecessary bankruptcies as much as possible.[9] To stimulate business owners to seek help in time in the event of an impending inability to pay, measures are developed to facilitate reorganisation, restructuring and relaunch outside of bankruptcy. Within the second pillar measures will also be taken - to limit damage resulting from the bankruptcy - to promote

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[6] In this respect it is of importance that Section 7:678 of the Dutch Civil Code provides that when an employee «*discloses particulars of the household or business of the employer which he should have kept confidential*», it will be considered an urgent reason for dismissal. Moreover, on the basis of Section 20 Works Councils Act, the works council already has an obligation of secrecy subject to sanctions under criminal law, with respect to (1) any business and trade secrets of which they become aware in their capacity as a works council member, (2) all matters which the works council or the employer has required them to keep secret, or (3) which, given the secrecy required of them, they must understand this to be of a confidential nature. See mr. C. Nekeman and mr. E. Knipschild, «*Het recht op informatie en de plicht tot geheimhouding van de ondernemingsraad*», Arbeidsrecht 2007, 49.

[7] Parliamentary Papers II 2013-2014, 34 011, no. 2.

[8] Parliamentary Papers II 2012-2013, 29 911, no. 74.

[9] Parliamentary Papers II 2012-2013,33 695, no. 1; Parliamentary Papers II, 2013-2014, 33 695, no. 3; Parliamentary Papers II, 2013-2014, 33 695, no. 5 and Parliamentary Papers 11, 2014-2015, 33 695, no. 7.

the (temporary) continuation of the enterprise during bankruptcy and to speed up a relaunch after bankruptcy of viable parts of the enterprise. At present, expectations are that three bills in total will be part of the second pillar. This bill is the first one and is therefore called the Continuity of Enterprises Act I. The other two bills relate, for the time being, to the introduction of:

(i) a regulation regarding the formation of a cram down plan outside of bankruptcy, which will be shaped by the proposal for the Continuity of Enterprises Act II[10], and
(ii) several measures with which 1) bankruptcies can be avoided; 2) the temporary continuation of an enterprise during bankruptcy is facilitated, so that the bankruptcy trustee is given the opportunity to properly wind up the bankruptcy in the interest of the creditors, and 3) the chances of a relaunch of an enterprise (or parts of it) after bankruptcy are enhanced, which will be defined with the proposal for the Continuity of Enterprises Act III.

In addition it is also observed that the Minister of Social Affairs has recently had a comparative law research carried out into the position of the employee in bankruptcy.

2. Objective of the bill

2.1 Liquidation of the bankrupt estate and the sale of parts of the enterprise

When a debtor can no longer meet its payment obligations, the district court may order the bankruptcy at its request or at the request of one or more creditors (Section 1 DBA). At that time the district court also appoints a bankruptcy trustee whose duty it is to manage and liquidate the bankrupt estate for the benefit of the joint creditors; this means that he will have to realise the assets of the bankrupt for the highest possible price to subsequently distribute the proceeds among the creditors (Section 68 DBA). Also, a supervisory judge who monitors the bankruptcy trustee's management and liquidation of the bankrupt estate (Section 64 DBA) is appointed. There may still be viable parts within the enterprise run by the debtor. These parts of the enterprise, just like other assets (e.g. the machinery and equipment), might be sold, after which they can be re-used. The proceeds of the sale accrue to the bankrupt estate and will eventually be distributed among the creditors. Because there are various advantages in selling most part of the existing assets to one buyer who will continue a large part of the enterprise, this kind of asset transactions occurs regularly. The proceeds, for example, are often (considerably) higher than when individual assets are sold to different buyers. In the event of a continuation of the enterprise, moreover, jobs involved can be (partly) preserved and the supply of products and services to customers can be continued. This does not only serve societal interests, but also the immediate financial interests of the bankrupt estate. After all, in bankruptcy the back wages of the employees can be reduced if the buyer/relauncher employs some of these employees. The risks of damage for the customers of the enterprise and claims that may result from that, can also be reduced or even eliminated if the buyer/relauncher can continue the supply of products and services to those customers. The result of these

[10] A consultation version of this bill can be found at http://www.internetconsultatie.nl/wco2.

advantages is that after taking his instalment the bankruptcy trustee will usually first examine whether there are viable parts of the enterprise and candidates that might wish to continue them.[11] A complication, however, is that there is often little time to realise a relaunch. Practice shows that after a bankruptcy order enterprises are almost always faced with negative publicity resulting in an uncontrollable situation; lenders proceed to enforce security interests, customers lose faith, suppliers refuse to continue to supply and employees start looking for another job. In addition, a bankruptcy trustee needs some time to gather information, whereas without information he is unable to have a clear picture of what the risk might be if the enterprise is continued in bankruptcy. This may result in a standstill of a large part of the enterprise and the parts of the enterprise that are still viable soon losing much of their value and potential profitability, making it difficult to find a buyer who would be willing to risk a relaunch. Even then it still remains to be seen whether a good sales price can be achieved.

2.2 Preparation of a bankruptcy

For enterprises of some size it is common practice that, when serious financial problems arise, the board or the *de facto* directors first approach advisers to find a solution for the financial problems. If this is unsuccessful, the bankruptcy is often prepared with the same advisers, so that the damage to the employees, the commercial network and the customers can be reduced as much as possible.[12] Looking for potential takeover candidates and negotiations about the sale of parts of the enterprise is often part of that preparation. If the board succeeds in preparing a sales transaction before the bankruptcy order, it continues to be up to the bankruptcy trustee in the bankruptcy - as manager and liquidator of the bankrupt enterprise – to decide whether he wishes to cooperate with that sale (cf. Section 68 DBA). He will want to do this – in view of his duty - when he is convinced that the sales transaction proposed to him can achieve the highest possible result for the joint creditors.[13] Subsequently the supervisory judge will still also have to give permission for the private sale (cf. Sections 101, first subsection, and 176 DBA).[14] The problem in a regular bankruptcy is that on the day of the bankruptcy order the bankruptcy trustee and the supervisory judge - because they have not been involved in the preparation - are confronted «*out of nowhere*» with the prepared sales transaction. On the one hand the bankruptcy trustee and the supervisory judge will need some time to fill that information gap before they can make a decision about whether or not the prepared relaunch will be effectuated. Considering the risk that the intended buyer in the turmoil following the bankruptcy order still decides

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[11] Prof. mr. J.J. van Hees, «*Stille bewindvoering: pre-packen en wegwezen?*», Ondernemingsrecht 2014/79.

[12] In the case law and literature it is assumed that in this context the directors or the *de facto* directors of the enterprise are also subject to a certain duty of care: see Dutch Supreme Court (HR) 11 February 2011, JOR 2011/114 with commentary from W. van Andel (*Ontvanger/ Wesselman*) and mr. Ph.W. Schreurs (2011), «*A Corporate Cloak, de bijzondere zorgplicht van de bestuurder na fallissement*», Insolad lustrumbundel 2011. See also mr. drs. C.M. Harmsen, «*Voorbereiding van een doorstart: hoever mag de ondernemer gaan?*» and dr. mr. J.A.A. Adriaanse and prof. dr. J.G. Kuijl RA, «*Lijken in de kast; Waarom turnarounds mislukken en doorstarts plaatsvinden: een bedrijfseconomische analyse*», in the Insolad Jaarboek 2008, pp. 19 - 37 and 67 - 79.

[13] Mr. J.M. Lemstra and mr. J.M. Van der Weide, «*Kloeke curatoren*», In Jaarboek Insolad 2008, pp. 161-177.

[14] Mr. F.H.E. Boerma, «*Doorstart vanuit het perspectief van de rechter-commissaris*», In Jaarboek Insolad 2008, pp. 179 - 192.

not to go ahead with the sales transaction or that he aims for a reduction of the sales price, the bankruptcy trustee and the supervisory judge, on the other hand, will feel the time pressure to decide swiftly.[15] It is therefore often not possible to organise a public sales process - as is common outside of bankruptcy – within which potentially interested buyers are given ample opportunity to gather information about the enterprise and to compete for a possible acquisition of the enterprise.[16] The information gap referred to therefore also applies to potentially interested buyers. If they have not been involved in the preparation of the bankruptcy, it is almost impossible for them to swiftly make an offer for the enterprise after the bankruptcy order, which offer is both interesting for the bankruptcy trustee and sensible for themselves. This means that, on balance, in a regular bankruptcy, often only the parties that were approached before the bankruptcy order by the debtor, are given a real opportunity to buy the enterprise out of bankruptcy. The lack of transparency during the preparation phase, the information gap of the bankruptcy trustee and the supervisory judge, the creditors and other parties involved, as well as the turmoil around the bankruptcy order also imply that there is a risk of bankruptcy fraud and/or abuse of bankruptcy law, while this is not discovered or not until at a later moment in time.

2.3 The «pre-pack practice»

The present «*pre-pack practice*» arose from the need of both business owners and bankruptcy trustees and judges to be able to prepare a possible upcoming bankruptcy in relative calm– i.e. before the turmoil of the bankruptcy begins - with the parties directly involved. The purpose of this is that the «*private preparation phase*» gives the intended bankruptcy trustee the opportunity to inform himself at this early stage about the situation the enterprise run by the debtor is in and to monitor the preparation phase initiated by the board or the *de facto* directors of that enterprise. Because the intended bankruptcy trustee reports his findings to the intended supervisory judge, the latter is also enabled to study the upcoming bankruptcy even before the bankruptcy order. When the bankruptcy is ordered both of them are better prepared as a result; after the bankruptcy order they can immediately act expeditiously and, if applicable, take a well-informed decision more quickly about whether or not a prepared sales transaction should be effectuated. If the bankruptcy trustee and the supervisory judge agree to the sales transaction, it can be effectuated shortly after the bankruptcy order and it can prevent the chaotic situation described above from having an effect on the value of parts of the enterprise or the chances of a successful relaunch.[17] The result is that higher proceeds from the sale of a debtor's assets can be achieved for the benefit of the joint creditors in the bankruptcy and that the individual creditors have a better chance of being paid at least a part of their claim in bankruptcy. The relaunch, moreover, results in the possibility of the jobs in the enterprise being preserved (at least partially). Furthermore, suppliers and customers may benefit from the relaunch of the parts of the enterprise on account of the continuity in the purchase or supply of goods and/or services, respectively.

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[15] Mr. Ph.W. Schreurs (2011), «*A Corporate Cloak, de bijzondere zorgplicht van de bestuurder na faillissement*», Insolad lustrumbundel 2011.

[16] Prof. mr. J.J. van Hees, «*Stille bewindvoering: pre-packen en wegwezen?*». Ondernemingsrecht 2014/79.

[17] Mr. drs. N.W.A. Tollenaar, «*Failissementsrechters van Nederland: geef ons de pre-pack!*», TvI 2011/23 and prof. mr. F.M.J. Verstijlen, «*Pre-packing in the Netherlands*», NJB 2014/803.

In essence the «*pre-pack practice*» is therefore simply an adaptation of a well-established method, i.e. the preparation of an upcoming bankruptcy and a possible relaunch from that bankruptcy. Instead of the debtor and its advisers doing this completely on their own initiative, in the «*pre-pack practice*» the district court that is competent to declare the bankruptcy and the intended bankruptcy trustee and the intended supervisory judge are involved.[18] This also implies – in addition to the advantages stated above - that the intended bankruptcy trustee and the intended supervisory judge are given the opportunity to monitor the preparation process. As a result the intended bankruptcy trustee, moreover, is able to act at the earliest possible opportunity when he believes that the preparation phase takes a turn that is not in the interest of the parties involved in the possible upcoming bankruptcy and in particular the creditors (including the employees)[19] or when he discovers bankruptcy fraud or the intention to abuse bankruptcy law. The fact that the preparation of the bankruptcy in general takes place privately, causes the creditors - unless they are involved in this – to not being able to represent their own interests. The «*pre-pack practice*», however, makes it possible that the intended bankruptcy trustee and the intended supervisory judge can do this for them. Because of the private nature of the «*private preparation phase*» the creditors do not have the possibility, as opposed to in bankruptcy, to request the supervisory judge through Section 69 DBA to intervene in the policy of the intended bankruptcy trustee. The creditors should be able to rely on the intended bankruptcy trustee acting on his own accord when the debtor steers the preparation phase in a direction which is not in their interest, and on the supervisory judge supervising the intended bankruptcy trustee to actually do so. This implies that more responsibility falls on the intended bankruptcy trustee and the intended supervisory judge than on the bankruptcy trustee and the supervisory judge in bankruptcy. The intended bankruptcy trustee and the intended supervisory judge are already expected to guard the interests of the creditors and other parties involved in the possible upcoming bankruptcy during the «*private preparation phase*». This means that they have to monitor the preparation phase with a very critical eye.[20] Discussions are already taking place in the field about how this should be concretely implemented. The Dutch Association of Insolvency Practitioners (Insolad), for example, took the initiative to draw up a manual (in the form of practice rules based on «*best practices*») for the way an intended bankruptcy trustee should operate.[21]

As stated above, this solution is currently being applied by eight of the eleven district courts. The eight district courts using the «*pre-pack method*» consult one another and they regularly exchange experiences. Well-known examples of situations in which the intended bankruptcy trustee and the intended supervisory judge were involved even before the bankruptcy order, are the bankruptcies and the resulting relaunches of

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[18] Mr. M.R. van Zanten, «*Aan het werk met de pre-pack*», Arbeidsrecht 2013/47.

[19] See, for example, the first public report of mr. Jongepier in the bankruptcy of the Estro Groep B.V. et al,. in which he describes that he initially had some reservations about the preparation phase aimed at a relaunch after bankruptcy as initiated by the management of the child daycare business, but that after some adjustment a sale of a major part of the enterprise could still be realised on acceptable conditions. http://www.boekel.com/media/1137967/openbaar_verslag_1a_inzake_estro_stille_bewindvoering_.pdf.

[20] Mr. J.L.R.A. Huydecoper, «*Pre-pack-liquidatie: wat vindt een betrekkelijke buitenstaander daar op het eerste gezicht van?*», TvI 2013/5.

[21] These practice rules can be found at: https://static.basenet.nl/cms/105928/website/praktijkregels-beoogd-curator.pdf. See also mr. R. Mulder, «*De Pre-pack: Verkoop en voortzetting in stilte, verantwoording In het openbaar. Een bespreking van de concept praktijkregels van Insolad*», TvI 2015/5.

shrimp supplier Heiploeg[22], retail chains De Harense Smid[23] and De Schoenenreus[24], lingerie brand Marlies Dekkers[25], the Ruwaard van Putten Ziekenhuis[26], and child day care business Estro[27]. In the beginning of 2015, J.R. Hurenkamp published the results of an empirical survey he had carried out for *48* bankruptcies in the period from 1 January 2012 to 1 July 2014 in which cases an intended bankruptcy trustee was appointed before the bankruptcy had been ordered.[28] On the one hand, the research was an analysis of the bankruptcy reports issued in the bankruptcies in question. On the other hand, the research was an analysis of interviews of in total twenty (intended) bankruptcy trustees, (intended) supervisory judges and lawyers of debtors in total who had previously participated in a «*pre-pack*». In the publication of mr. Hurenkamp as a result of his research, he describes how the «*pre-pack*» was applied in cases he had studied and the results to which this led.[29] Mr. Hurenkamp outlines the results of his research as follows.

– The «*private preparation phase*» lasted an average of *12.5* days. The «*private preparation phase*» was terminated prematurely on *2* occasions, *38* times immediately followed by a bankruptcy order and *8* times first preceded by an extension of suspension of payments.
– In *37* cases, a sale/relaunch of parts of the enterprise was prepared during the «*private preparation phase*» which was effectuated by the bankruptcy trustee after the bankruptcy order. In *25* cases, the relaunch took place within one to three days after the bankruptcy order. In *7* cases, more time passed between the bankruptcy order and the relaunch. In these cases the «*private preparation phase*» was first followed by a suspension of payments or it took more time after the bankruptcy order before the bankruptcy trustee and the supervisory judge gave their approval to the sale/relaunch. In *15* cases there was a relaunch with an «*connected party*»[30], of which in *3* cases a condition precedent or condition subsequent was agreed. This condition meant that it was explicitly provided that if the bankruptcy trustee were to receive a more favourable offer after the bankruptcy order, the prepared sale/relaunch would not go ahead.[31] With these relaunches that had been prepared prior to the bankruptcy order, on average 68% of the present jobs could be preserved.
– In *6* cases a sale/relaunch of parts of the enterprise was negotiated during the «*private preparation phase*», but the preparation of a sales

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[22] Prof. mr. F.M.J. Verstijlen, «*Pre-packing in the Netherlands*», NJB 2014/803. http://www.dorhout.nl/downloads/Verslag_stille_bewindvoering.20140204.PDF.

[23] http://bgadvocaten.nl/nl/actualiteiten/kantoornieuws/falllissementsverslag-%22de-harense-smid%22/

[24] https://www.abenslag.nl/fileadmin/user_upload/Schoenenreus/persbericht_Schoenenreus.pdf.

[25] http://www.faillissementsdossier.nl/nieuws/7088/marlies-dekkers-maakt-doorstart.aspx.

[26] http://www.dvdw.nl/media/112055/f.09.13.531_st._ruwaard_van_puttenziekenhuis_-_openbaar_verslag_1.pdf.

[27] http://www.boekel.com/media/1137967/openbaar_verslag_1a_inzake_estro_stille_bewindvoerlng_.pdf.

[28] Mr. J.R. Hurenkamp, «*De pre-pack in de praktijk»; Een analyse van 48 faillissementen waarin de aanwijzing van een beoogd curator heeft plaatsgevonden*». Celsus juridische uitgeverij, Amersfoort, 2014.

[29] J.R. Hurenkamp, «*Failliet of fast forward? Een analyse van de pre-pack in de praktijk*», TvI 2015/20.

[30] Prof. mr. J.J. van Hees describes a relaunch with an «*associated party*» as a situation in which the parts of the enterprise after the bankruptcy order are continued in another legal identity and the same persons (e.g. the «*old*» shareholder and/or the «*old*» management) turn out to be in control in the enterprise making a relaunch as the ones in the enterprise that went bankrupt. (Prof. mr. J.J. van Hees, «*Stille bewindvoering: pre-packen en wegwezen?*», Ondernemingsrecht 2014/79.)

[31] See Niopal B.V. (F.13/14/317), Dankers Glas- en Schilderwerken B.V. (F.01/13/972) and Yaper B.V. (F.13/13/677).

transaction before the bankruptcy order eventually failed. In *3* cases the bankruptcy trustee managed to realise a sale/relaunch after the bankruptcy order after all. In these relaunches that were not effectuated until after the bankruptcy order in the bankruptcy, however, on average only 24% of the present jobs could be preserved.

Mr. Hurenkamp also observed differences in the application of the current «*pre-pack practice*». In particular this concerns the attitude of the intended bankruptcy trustee during the «*private preparation phase*»; does he take an active part in the preparation of a relaunch or rather an observing role? There are also differences in the way of preparing a sale/relaunch of parts of the enterprise. As part of that preparation, for example, in many cases no market survey was carried out. There were also great differences in the reporting by the former intended bankruptcy trustee on what happened during the «*private preparation phase*» and the term within which the report was published. As set out above, the proposed regulation will provide more clarity and uniformity in this respect. It is also relevant that in 2014 the Radboud University carried out an exploratory investigation in cooperation with BDO Consultants on the effects of the current «*pre-pack practice*» on the amount of the proceeds from the sale of a debtor's assets. It is reported that on the basis of their first findings the investigators assume that in the current practice there are surplus proceeds for the estate which vary from 10% to 30%.[32]

The current practice actually shows that the appointment of an intended bankruptcy trustee may also contribute to a solution for the financial problems still being found privately outside of bankruptcy, with which the continuation of the enterprise can be safeguarded. That is why it is important that the debtor prepares itself in time for a possible bankruptcy and also asks itself in this respect whether the early involvement of the future bankruptcy trustee is desirable. Bearing this in mind it is of crucial importance, moreover, that the appointment is reversible, that it does not oblige the debtor to eventually submit a petition for bankruptcy and that this does not limit the debtor in any other way in its freedom to aim at a solution outside of bankruptcy. In view of the latter it is important that the appointment of an intended bankruptcy trustee does not result in changes in the debtor's power of management and disposition.

The reason for presenting the proposed regulation now is that there is a need for a statutory framework that supports the existing «*pre-pack practice*» and contributes to:

a) an optimum use of the possibilities to reduce the damage resulting from the bankruptcy for parties involved when this practice is used, and
b) avoiding that this practice is used in cases for which they were not intended.

3. Brief description of the contents of the regulation

3.1 Introduction

The bill provides a statutory basis for the «*pre-pack practice*» and increases the possibilities of preparing a bankruptcy. The purpose of the preparation is to reduce the damage resulting from the bankruptcy for creditors (including the employees) and other parties involved as much as possible, including by increasing the chances of a sale and the subsequent relaunch of viable parts of the enterprise against the highest possible proceeds while preserving as many jobs as possible (Section 363, first subsection). To achieve this result and to avoid that the «*private*

[32] See «*Optreden stille bewindvoerder leidt tot hogere boedelopbrengst*», Het Financieel Dagblad, 7 July 2014.

preparation phase» is used on improper grounds[33] the proposed regulation provides that:

a) the preparation of the bankruptcy takes place under the supervision of the district court, the intended bankruptcy trustee and the intended supervisory judge (Sections 363 to 365);
b) these participants have means available with which they:
   – can represent the interests of the joint creditors during the «*private preparation phase*» (including those of the employees) and of other parties involved in the possible upcoming bankruptcy (Sections 363 to 366), and
   – to that end, if necessary, can see to it that the preparation phase is adjusted or its intended term shortened (Section 366, first subsection, under a), and
c) when it becomes evident in the «*private preparation phase*» or during the subsequent bankruptcy that the board or the *de facto* directors of the enterprise run by the debtor have used or have wanted to use the «*private preparation phase*» on improper grounds, this may lead to joint and several liability of the board or the *de facto* directors for the resulting damage and - after the entry into force of the Civil Director Disqualification Act[34] - to disqualify a civil director (Sections II and III).

3.2 Procedural rules

The «*private preparation phase*» provided for in this bill begins with the appointment of an intended bankruptcy trustee. For that reason first and foremost procedural rules are provided for in which it is laid down when a debtor can ask for the appointment of an intended bankruptcy trustee and the way in which this request can be made. It has also been provided how the district court handles such a request and when it could grant such a request, as well as the conditions it will (or can) attach to this (Section 363).

The request

It has been provided that the debtor can ask for the appointment by submitting a request to the district court. This means that the debtor will have to be represented by a lawyer when he submits its request. The district court will handle the request as soon as possible in chambers and decide in an order (Section 363, first and second subsection). It will only admit the debtor to the «*private preparation phase*»
if the request for the appointment of an intended bankruptcy trustee meets the procedural requirements provided for by law and the debtor also succeeds in showing that a scenario in which the possible upcoming

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[33] The «*private preparation phase*» is used on improper grounds when used as a pre-stage to a debtor's own petition for bankruptcy (cf. Section 1 DBA) on improper grounds. The latter occurs when the debtor exercises his authority to file its own petition for bankruptcy for another purpose than for which it had been granted (District Court The Hague 15 October 2014, JAR 2015/4; Dutch Supreme Court (HR) 28 May 2004, ECLI:NL:HR:2004:AP0084; Dutch Supreme Court (HR) 29 June 2001, JOR 2001/169). This is the case, for example, when the only reason for petitioning a bankruptcy is to be able to circumvent the employment protection of employees and to make a downsized relaunch after bankruptcy to gain an advantage over competitors.

[34] Parliamentary Papers II 2013-2014,34 011, no. 2.

bankruptcy is prepared privately in the relevant specific situation, is likely to have such an added value in the context of the winding-up of the bankruptcy for parties involved and, if applicable, achieving a relaunch after that bankruptcy, that this is to be preferred above the scenario – and the corresponding possibilities and safeguards - of a regular (unprepared) bankruptcy.[35] It is also of importance that the debtor shows that there is a real chance that a bankruptcy order is imminent, but that he is not yet *de facto* in a state of bankruptcy. The fact is that one of the conditions for the appointment is that the debtor should still be able to meet the current and new payment obligations – including the fees of the intended bankruptcy trustee and the costs of the third parties he consulted, as well as tax payment obligations (Sections 363, first and second subsection, and 367).[36] This requires that the request is well-substantiated and that the debtor provides insight in the intended outcome of the preparation and what effects the preparation is expected to have for different groups of creditors and for the employees employed by it.

The appointment and the beginning of the «private preparation phase»

If the district court gives a positive decision, it will «*privately*» appoint an intended bankruptcy trustee (Section 363, second subsection). The fact that the appointment takes place «*privately*», means that the appointment (in view of the intended purpose, being the «*private*» preparation of the possible upcoming bankruptcy) is not published – as is common practice in accordance with the Sections 14, third subsection, 216, 223, first subsection, and 293 DBA when a bankruptcy is ordered, a (provisional) suspension of payments is granted or the debt rescheduling scheme is applied – nor entered in the insolvency register. When the district court appoints an intended bankruptcy trustee, it also appoints one of its members as intended supervisory judge (Section 365, first subsection). The district court will attach a maximum term of two weeks to the appointment. The current practice has shown that in any case it should be possible to have a plan of action within two weeks. If working out the plan requires more time, this term can be extended by the district court at the request of the debtor by a term to be decided by the district court, provided that at that time the appointment still has the added value referred to above and the debtor is still able to meet its current and new payment obligations (Section 363, third subsection). The district court may also attach other conditions to the appointment, including a provision of security for the payment of the fees of the intended bankruptcy trustee (Section 363, fourth and fifth subsection).

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[35] Mr. dr. R.R. Verkerk, mr. M. Windt and mr. T.L. Rozendal, «*Prepacks: transparantie en verantwoording achteraf*», Tvl 2014/40; mr. B.J. Tideman, «*Reactie mr. B.J. Tideman: wetgever van Nederland, geef ons de pre-pack+*», FIP 2013/7, p. 236.

[36] Current tax payment obligations are defined as the tax obligations of which the initial payment term (for self-assessment taxes provided for in Section 19 of the State Taxes Act and for assessment taxes provided for in Section 9 of the Collection of State Taxes Act 1990) has not expired at the time of the commencement of the «*private preparation phase*». In the event of new tax payment obligations they are tax obligations that do not arise until after the commencement of the «*private preparation phase*». If the «*private preparation phase*» starts on 29 March 2017, for example, the turnover tax due on the first quarter of 2017 and the statutory payroll tax and social security contributions for the months February and March 2017 are to be regarded as current tax payment obligations. In such event new tax payment obligations are the turnover tax that becomes due in the second quarter of 2017 and the statutory payroll tax and social security contributions for the month of April 2017.

The termination of the «private preparation phase»

It is also provided *how* and *when* the «*private preparation phase*» ends (Section 366). This is the case when:

– the appointment of the intended bankruptcy trustee on the recommendation of the intended bankruptcy trustee or the intended supervisory judge, or at the request of the debtor or one or more creditors involved in the «*private preparation phase*» is revoked by the district court;
– the applicable term for the appointment expires, or
– the debtor is declared bankrupt or granted a provisional suspension of payments (Section 366, first and second subsection).

An important element of the termination of the «*private preparation phase*» is the obligation of the former intended bankruptcy trustee to issue a report (hereafter also: final report) about his findings in that phase. The former intended bankruptcy trustee – who at that time will usually be the bankruptcy trustee in the bankruptcy – will have to do this within seven days after the end of the «*private preparation phase*». The final report has to be submitted to the court registry. There it can be inspected by anybody free of charge, but – in view of the private nature of the appointment - not until after the debtor has been declared bankrupt or has been granted a suspension of payments. This means that when the involvement of the intended bankruptcy trustee ends because the debtor still succeeded in finding a solution for its financial problems outside bankruptcy, the final report will not be made public. If, however, a bankruptcy or a suspension of payments follows within three months, the court registry will nonetheless make the final report available for public inspection. The more time that passes between the end of the appointment and the bankruptcy order or the granting of the suspension of payments, the lesser the relevance of what occurred in the «*private preparation phase*» for the parties involved in the bankruptcy or the suspension of payments. This is why the final report does not have to be made available for inspection if more than three months have passed. Should the district court be of the opinion, however, that – in spite of the time that has since passed - it may still be relevant to the parties involved in the bankruptcy or the suspension of payments to examine the findings of the intended bankruptcy trustee, it is at liberty to still decide so (Section 366, fourth and fifth subsection). In this respect consideration should be given to the case where the «*private preparation phase*» ended because a solution for the financial problems seemed to have been found, but where it becomes evident after a little more than three months that the situation is untenable. If in the meantime the circumstances have not essentially changed in respect of those at the time of the end of the «*private preparation phase*», the district court might come to the conclusion that it may still be of importance for the parties involved in the bankruptcy to know what happened during that phase. If the «*private preparation phase*» ends as a result of the debtor being declared bankrupt or of being granted a suspension of payments, the district court will usually appoint as bankruptcy trustee or administrator and supervisory judge the persons it had appointed before. This is only different when, at the time of the bankruptcy order or the granting of suspension of payments, there are changed circumstances and resulting reasons to depart from the earlier appointment (Sections 14a, 215, third subsection, and 223a, second subsection). A completely failed «*private preparation phase*» - whether or not together with an incorrect performance of duties by the intended bankruptcy trustee and/or a toxic relationship between the debtor and the intended bankruptcy trustee - and an apparent conflict of interests that came to light after the appointment, might be reasons to appoint a «*new*» bankruptcy trustee and/or a «*new*» supervisory judge.

It has also been provided that when the intended supervisory judge or the

intended bankruptcy trustee find reason to do so, the district court will set up, in the bankruptcy order, a provisional creditors' committee whose duty it is to give advice to the bankruptcy trustee (Section 74, second subsection, DBA).

3.3 Role and duties of the district court, the intended bankruptcy trustee and the intended supervisory judge

The regulation also provides more details about the role and the duties and powers of the parties involved in the «*private preparation phase*», including in particular the district court, the intended bankruptcy trustee and the intended supervisory judge.

3.3.1 The district court

«Gatekeeper»

The district court acts as a «*gatekeeper*» of the «*private preparation phase*». It decides on the request for the appointment of an intended bankruptcy trustee and determines whether a debtor is admitted to the «*private preparation phase*». If so, the district court - for the representation of the interests of the joint creditors and other parties involved in the possible upcoming bankruptcy and to avoid abuse – also sets the boundaries at the beginning of the «*private preparation phase*» and is in charge during that phase. The district court decides, for example, who becomes intended bankruptcy trustee (Section 363, first subsection) and how long the «*private preparation phase*» is permitted to last. It can extend the «*private preparation phase*» at the request of the debtor or rather end this phase prematurely, when there are reasons to do so according to the intended bankruptcy trustee, the intended supervisory judge, the debtor or one or more creditors involved in the preparation phase (Sections 363, third subsection, and 366, first subsection, under a).

«*Added value*»

The district court also defines the preparation phase by explicitly stating in its decision the «*added value*» the «*private preparation phase*» has according to the debtor in its specific situation. In this way it is immediately clear for the intended bankruptcy trustee and the intended supervisory judge at the commencement of that phase for what purpose the preparation phase is used and the district court also determines the mandate of the intended bankruptcy trustee (Sections 363, second subsection, 364, first subsection, and 365, second subsection). It should be noted that this does not prevent the intended bankruptcy trustee and the intended supervisory judge from keeping their eyes open during the «*private preparation phase*» for other possible final scenarios for this phase. The debtor, for example, might initially have asked for the appointment in connection with the preparation of a relaunch after bankruptcy, but it may become evident during the «*private preparation phase*» that a relaunch is not possible after all. In such event a continuation of the preparation of the bankruptcy can still be desirable. If, as a result of the preparation, the enterprise can enter the bankruptcy with a «*soft landing*», this may limit the damage arising from the bankruptcy for creditors and other parties involved. If the intended bankruptcy trustee concludes (whether or not together with the debtor) that another outcome of the preparation than the outcome initially put forward by the debtor - when the request for the appointment of an intended bankruptcy trustee was made – is better for the creditors, it is even his duty to see to it that the preparation phase is adjusted accordingly. If necessary, the intended

bankruptcy trustee or the intended supervisory judge may in this case ask the district court to check whether the private preparation of the bankruptcy still has sufficient added value or if that this is no longer the case, this would mean that the «*private preparation phase*» would have to be terminated (Section 366, first subsection, part a).

Conditions for the appointment

The district court may also attach conditions to the granting of a request for the appointment of an intended bankruptcy trustee. In this respect it focuses in particular on the interests of the employees employed by the debtor (Section 363, fourth subsection). The district court might stipulate, for example, that the works council or the staff representation be involved - subject to secrecy[37] – in the «*private preparation phase*». Another option is that the associations of employees with members in the enterprise (trade unions) are informed and are asked for their input during the «*private preparation phase*», so that the interests of the employees are also brought to the forefront during that phase. It may also be agreed in this respect that secrecy is observed. Especially when large enterprises are having financial problems and are trying to find solutions for this, it regularly happens that at this stage the trade unions act as an advocate of the interests of the employees.[38] Moreover, as a result of two recent relaunches from bankruptcy, the trade unions initiated legal proceedings on behalf of the employees impacted by these bankruptcies.[39] It is obviously preferable that the trade unions do not have to come into action for their members afterwards, but that they can exercise their influence in advance.
The conditions set by the district court when granting a request for the appointment of an intended bankruptcy trustee may extend beyond the «*private preparation phase*» alone. If the request is made in the context of the preparation of a relaunch and if at that time there is only one serious potential candidate, the district court might stipulate, for example, that if this continues to be so during the «*private preparation phase*», a public announcement will first have to be made of the prepared relaunch after the bankruptcy order. The district court, moreover, might decide that after that announcement the creditors and other candidates for a relaunch, if any, should be allowed a new term within which they can respond

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[37] In this respect it is of importance that Section 7:678 of the Dutch Civil Code provides that when an employee «*discloses particulars of the household or business of the employer which he should have kept confidential*», it will be considered an urgent reason for dismissal. On the basis of Section 20 of the Works Councils Act, moreover, the works council already has an obligation of secrecy subject to sanctions under criminal law, with respect to (1) any business and trade secrets of which they become aware in their capacity as a works council member, (2) all matters which the works council or the employer has required them to keep secret, or (3) which, given the secrecy required of them, they must understand to be of a confidential nature. See mr. C. Nekeman and mr. E. Knipschild, «*Het recht op informatie en de plicht tot geheimhouding van de ondernemingsraad*», Arbeidsrecht 2007, 49.

[38] See, for example, the negotiations between the trade unions and department store V&D and between the trade unions and retailer Blokker: http://www.nu.nl/ondernemen/3994055/vakbonden-en-vd-gaan-dinsdag-weer-in-overleg.html; http://www.nu.nl/ondernemen/3995416/vakbonden-overtuigd-van-noodzaak-ingrijpen-bij-blokker.html.

[39] See http://www.nu.nl/economie/3833676/vakbonden-dagen-heiploeg-vanwege-flitsfaillissement.html and http://www.nu.nl/economie/3855192/vakbond-rechter-overname-estro.html.

to the prepared relaunch.[40] If there are any objections from creditors, the bankruptcy trustee and the supervisory judge can take them into consideration when they make their decision about whether or not the prepared relaunch should be effectuated. The objections might lead to a renegotiation of the conditions of the relaunch, for example. If there are no other potential takeover candidates who come forward within the deadline or if there are potential takeover candidates, but their bid serves the interests of the joint creditors to a lesser extent than the offer made during the «*private preparation phase*», the prepared relaunch can be effectuated after the expiry of the deadline.[41] [42] By imposing this condition there is a risk that the turmoil of the bankruptcy still has some impact on the success of the relaunch and, as a result, on the viable parts of the enterprise keeping their value. In certain cases - particularly in the case of a prepared relaunch with an «*connected party*»[43] - imposing this condition may still be justified. This may prevent, for example, that the relaunch for the parties involved in the bankruptcy comes across as a scenario concocted in «*backrooms*» from which mainly the «*connected party*» benefits.[44] By imposing such condition the district court can ensure that the transparency around the relaunch after bankruptcy is increased and that two risks are removed; i.e. the risk that potential takeover candidates are overlooked and that, because of this, the sale and relaunch do not achieve the highest possible result, as well as the risk of abuse of bankruptcy law. For these purposes it has also been provided in the proposed regulation that the district court:

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[40] See in this respect also Section 4.2.3 of the Draft for an Insolvency Act of 2007 from the Commissie Kortmann; http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2007/11/21/voorstel-commissie-kortman-voorontwerp-insolventiewet.html.

[41] See mr. J.M. Hummelen, «*Het verkoopproces in een pre/packaged activatransactie*», Tvl 2015/2 and mr. dr. R.R. Verkerk, mr. M. Windt and mr. T.L. Rozendal, «*Prepacks: transparantie en verantwoording achteraf*», Tvl 2014/40, in which such a proposal was made. In this respect Mr. Hummelen refers in his publication to the «*stalking horse*» procedure applied in the United States for pre-packaged asset transactions. This procedure means in essence that prior to the bankruptcy order the debtor negotiates a sales contract with a third party - the «*stalking horse*» -, in which it is agreed that the sales contract is subject to the condition that no better price is achieved in a public auction after the bankruptcy order. For the «*stalking horse*» there is uncertainty for some time after the bankruptcy order about the question whether he will acquire the assets involved in the sales contract. This uncertainty is often compensated by offering the «*stalking horse*» a compensation, in the form of a «*break up fee*» for example (often a percentage of the agreed sales price).

[42] In the bankruptcy of Grafisch Centrum Vanderheym – which was prepared privately - an agreement for a relaunch was entered into by the bankruptcy trustee with a relaunching party (in this case not an «*connected party*») soon after the bankruptcy order, on the condition subsequent that the bankruptcy trustee did not receive higher bids. The bankruptcy trustee subsequently issued a bidding procedure and invited the parties who had shown an interest in a possible relaunch after the bankruptcy order, to make a bid for the enterprise. This eventually did not result in a better offer. See the bankruptcy trustee's report for a more detailed description of the process: http://insolventies.rechtspraak.nl/pdf.ashx?ID=10.rot.14.327.F.V.01.

[43] Prof. mr. J.J. van Hees describes a relaunch with an «*associated party*» as a situation in which the parts of the enterprise after the bankruptcy order are continued in another legal identity and the same persons (e.g. the «*old*» shareholder and/or the «*old*» management) turn out to be in control of the enterprise making a relaunch as the ones in the enterprise that went bankrupt. (Prof. mr. J.J. van Hees, «*Stille bewindvoering: pre-packen en wegwezen?*». Ondernemingsrecht 2014/79.)

[44] See, for example, the news coverage around the relaunch of child daycare business Estro; http://www.nrcq.nl/2014/07/24/eigenaar-failliet-kinderdagverblijf-estro-sloot-miljoenendeal-met-zichzelf, and mr. dr. R.R. Verkerk, mr. M. Windt and mr. T.L. Rozendal, «*Prepacks: transparantie en verantwoording achteraf*», Tvl 2014/40, in which it is argued that a transaction with a «*connected party*» requires more attention from the district court, the intended bankruptcy trustee and the intended supervisory judge.

– may order that security must be provided for the payment of the fees of the intended bankruptcy trustee (Section 363, fourth subsection), and
– may replace the intended bankruptcy trustee during the «*private preparation phase*» or appoint one or more fellow intended bankruptcy trustees[45] if there are reasons to do so according to the intended supervisory judge, the intended bankruptcy trustee, the debtor or one or more creditors involved in the preparation phase (Section 366, first subsection).

The bankruptcy following the «private preparation phase»

Finally it is the district court that hears the petition or the debtor's application for bankruptcy that is related to the debtor. If the applicable conditions have been met, the district court orders the bankruptcy and the «*private preparation phase*» ends by operation of law as a result (Section 366, second subsection).
The district court contributes to a more smooth transition from the «*private preparation phase*» to the bankruptcy phase. It does so by usually appointing the persons who were the intended bankruptcy trustee and intended supervisory judge in the «*private preparation phase*» as the bankruptcy trustee and supervisory judge in the bankruptcy.
The district court also monitors a smooth proceeding of the provision of information to the creditors and other parties involved in the bankruptcy about that what took place shortly before the bankruptcy order in the «*private preparation phase*», by:
– taking receipt of the final report of the former intended bankruptcy trustee (who usually has become bankruptcy trustee in the bankruptcy since then[46]) to subsequently making it available for public inspection at the court registry (Section 366, fourth subsection), and
– setting up a provisional creditors' committee if the intended supervisory judge or the intended bankruptcy trustee find reason to do so (Section 74, second subsection).

The duty of the provisional creditors' committee is to provide the bankruptcy trustee advice – for example about the sale of parts of the enterprise for a relaunch – and the committee may to that end consult all relevant (financial) information and ask the bankruptcy trustee at any time to provide further information (Sections 76 and 77 DBA).[47]

Provision of information

To be able to properly carry out its duties as a «*gatekeeper*» and supervisor, it is of importance that the district court has access to all information required. That is the reason the proposed regulation provides that the debtor will have to properly substantiate its request for the appointment of an intended bankruptcy trustee. This means in any event that the debtor will have to submit all the relevant (financial) information. At present several district courts are using a questionnaire with which the debtor is urged to provide other relevant information, e.g. information

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[45] For example, in the «*private preparation phase*» preceding the bankruptcy of shrimp supplier Heiploeg, two intended bankruptcy trustees were appointed: http://www.dorhout.nl/downloads/Verslag_stille_bewindvoering.20140204.PDF.

[46] In the vast majority of the cases the «*private preparation phase*» will be followed by a bankruptcy and the former intended bankruptcy trustee will usually be appointed as bankruptcy trustee in the bankruptcy. In such event the report that has to be published within seven days after the bankruptcy order by the former intended bankruptcy trustee – who at that time has since become bankruptcy trustee - about his findings during the «*private preparation phase*» is in fact the first bankruptcy report of the bankruptcy trustee in the bankruptcy.

[47] See mr. dr. R.R. Verkerk, mr. M. Windt and mr. T.L. Rozendal, «*Prepacks: transparantie en verantwoording achteraf*», Tvl 2014/40, in which such a proposal was made.

about – briefly put - the procedure that has been followed so far to solve the financial problems and who are (or have been) involved. In the consultation version of this bill, the Council for the Judiciary announced that the national consultative body of supervisory judges in bankruptcies and suspensions of payments which presently periodically adopts the «*Guidelines for bankruptcies and suspensions of payments*» (the Recofa), will develop a national questionnaire.[48]
The proposed regulation also provides that in the «*private preparation phase*» the intended bankruptcy trustee and the intended supervisory judge act as an informer for the district court when it has to take decisions about:

a) the possible extension of the duration of the appointment (Section 363, third subsection),
b) the revocation of the appointment (Section 366, first subsection, under a), or
c) the replacement of the intended bankruptcy trustee by someone else or the addition of one or more fellow intended bankruptcy trustees (Section 366, first subsection, under b).

3.3.2 The intended bankruptcy trustee

Representative of interests

The intended bankruptcy trustee – as future liquidator of the bankrupt estate (Section 68, first subsection, DBA) – is involved in the preparation of the possible upcoming bankruptcy initiated by the debtor. During the «*private preparation phase*» he represents the interests of the joint creditors (Section 364, first subsection). In this respect the intended bankruptcy trustee also takes the interests of the debtor and interests of a societal nature (e.g. the continuity of employment, know-how and productivity) into account. In that sense the viewpoint of the intended bankruptcy trustee does therefore not differ from the one of the bankruptcy trustee in bankruptcy.[49] More responsibility, however, falls on him than on the bankruptcy trustee in bankruptcy on account of the lack of transparency in the «*private preparation phase*». Because the preparation phase takes place privately, creditors and other parties involved in the possible upcoming bankruptcy – unless they are involved in this – cannot represent their own interests in this phase. They should be able to rely on the intended bankruptcy trustee to do this for them during the «*private preparation phase*».

Duties

In practice, his involvement in the «*private preparation phase*» means that the intended bankruptcy trustee – in preparation of his future role as bankruptcy trustee in the bankruptcy – carries out duties which he normally could only perform until after the bankruptcy order. He gathers information, for example, about the «*ins and outs*» of the enterprise and to that end he examines the books and records and other relevant financial information (including the documents that were submitted to the district court with the request), he maps out the work force and he

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[48] In the explanation (by section) of Section 363, second subsection, the contents of this questionnaire are discussed in more detail.

[49] Dutch Supreme Court (HR) 24 February 1995, NL 1996/472, with commentary from WMK (Gerritse q.q./Ontvanger; Sigmacon II) and Dutch Supreme Court (HR) 20 March 1981, NJ 1981/640 (Veluwse Nutsbedrijven). Prof. mr. F.M.J. Verstijlen, «*Pre-packing in the Netherlands*», NJB 2014/803; mr. Dr. R.R. Verkerk and mr. L.L.J. van de Laar, «*De (proces)belangen van de gefailleerde*», FIP 2014/6 and mr. A. van Hees, «*Maatschappelijk verantwoord vereffenen*», TvI 2015/1.

analyses the causes and the consequences of the financial problems. The intended bankruptcy trustee also keeps an eye on possible irregularities that could suggest bankruptcy fraud or abuse of bankruptcy law. As described in the next section, he is expected to act decisively when such fraud signals are discovered. In such cases the intended bankruptcy trustee, however, does not act as a supervisor in the usual sense of the word; i.e. as a civil servant appointed by the government and whose duty it is to supervise compliance with laws and regulations. The intended bankruptcy trustee is not expected to deal with the business operations in detail; it is not his duty, for example, to assess and approve all transactions or other acts the debtor wishes to perform. It is intended, however, that the intended bankruptcy trustee – in order to compensate the lack of transparency for the creditors and other parties involved in the enterprise run by the debtor – critically monitors the preparation phase and holds the debtor accountable when this phase seems to take a turn as a result of which the interests that he represents seem to be in jeopardy. If it is subsequently shown that the debtor does not adjust the preparation phase, the intended bankruptcy trustee is expected to act; meaning that he uses the resources (as specified hereafter) available to him. This is in keeping with his duty. Due to the fact that the «*private preparation phase*» gives the intended bankruptcy trustee the opportunity to carry out the duties as referred to above, intended bankruptcy trustees in current practice are also appointed in cases where there is no preparation of a possible relaunch after bankruptcy. Particularly in the case of large enterprises it may be of major importance that the intended bankruptcy trustee can «*read up*» before the bankruptcy order. An example of a bankruptcy where this was a reason to involve the intended bankruptcy trustee in the enterprise even before the bankruptcy order, was the bankruptcy of aircraft constructor Fokker.[50]

If the appointment has been requested to increase the chances of a relaunch post-bankruptcy, the intended bankruptcy trustee checks the steps that have already been made to this end by the debtor and he keeps a close eye on when further steps can be made. The intended bankruptcy trustee is expected to critically assess the sales process, which in this case forms part of the preparation phase. This means that he monitors the integrity of this process while actively looking for potential takeover candidates within the limits of the required confidentiality.[51] All of this is done in order to avoid that the interests of the creditors are not sufficiently taken into account in the preparation process and that other parties involved in the possible upcoming bankruptcy and interesting parties are overlooked. To be able to do this well, the intended bankruptcy trustee himself will also have to find out in any event during the «*private preparation phase*» what potential takeover candidates there are in the market and what a realistic acquisition price is. In the United Kingdom «*administrators*» make use of «*The UK's Online Insolvency Marketplace*» for this. This is a website where parties that are interested in the acquisition of businesses can create a profile, so that «*administrators*» can find those parties and can subsequently invite them to make a bid. If there are parties that show an interest after such an invitation, the website offers «*administrators*» the opportunity to give those parties – after signing a confidentiality agreement – access to the relevant corporate information

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[50] See note 12 to the publication of prof. mr. J.J. van Hees, «*Stille bewindvoering: pre-packen en wegwezen?*». Ondernemingsrecht 2014/79.

[51] See for the sake of comparison the responsibility of the trustee in bankruptcy. In a judgment of 6 February 2007 (JOR 2007/106) the Court of Appeal of Arnhem ruled that the bankruptcy trustee had not performed his duties properly because he had failed to give a potential takeover candidate the opportunity to make a bid for a relaunch of the bankrupt company.

within a protected digital space.[52] From my understanding, there are intentions within our insolvency practice to develop a similar online platform.
The intended bankruptcy trustee will also have to ascertain what the effects of a possible relaunch will be for the joint creditors (including the employees) and other parties involved in the possible upcoming bankruptcy.[53]
If asked by the debtor, the intended bankruptcy trustee may also play a rather more active role in the preparation phase. However, in this respect it is of importance that the intended bankruptcy trustee does not take up the role of adviser of the debtor. After all, this might easily be in conflict with his role as the representative of the interests of the joint creditors and other parties involved in the possible upcoming bankruptcy. As briefly mentioned above, the debtor will have to be assisted by a lawyer when a request for an appointment of an intended bankruptcy trustee is made. It is recommendable for various reasons – as specified in the explanation of Section 1, part B (regarding the amendment of Section 5, first subsection, DBA) – that also during the «*private preparation phase*» the debtor is assisted by its own legal adviser(s).
After the termination of the «*private preparation phase*», the former intended bankruptcy trustee – who at that time has since become bankruptcy trustee in the bankruptcy – must publish a report in which he states what he observed during that phase and how he acted (Section 366, fourth subsection).

Independence and provision of information

If the intended bankruptcy trustee wishes to be able to properly carry out these duties, it is of importance that he is able to operate independently and that he has the required information at his disposal. For that reason it has been laid down in the proposed regulation that during the «*private preparation phase*» the intended bankruptcy trustee is not held – although the debtor pays his fees (cf. Section 367) – to follow the debtor's instructions, nor those of its creditors, and that the debtor is obliged to provide the intended bankruptcy trustee with all the information the latter requires to perform his duties, both when asked and on its own initiative (Section 364, second and third subsection). The intended bankruptcy trustee, with the debtor's consent, may also ask third parties for information or ask experts to perform a study (Section 364, fourth subsection).[54] The intended bankruptcy trustee will treat the information he obtains in confidence and only share this information – with others than the intended supervisory judge and the district court – when the debtor has given him permission to do so (Section 364, fifth subsection).
The above shows that the debtor plays an important part in the provision of information to the intended bankruptcy trustee. The appointment of the intended bankruptcy trustee, moreover, does not involve any changes of the debtor's power of management and disposition. In the «*private preparation phase*» the intended bankruptcy trustee may therefore never

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[52] See http://www.ip-bid.com/.

[53] See by way of illustration the first public report of mr. Jongepier in the bankruptcy of the Estro Groep B.V. et al, in which he outlined the effects for the parties involved (including the employees) in the bankruptcy (and for the bankrupt estate) by means of three scenarios that could have occurred in this case. http://www.boekel.com/media/1137967/openbaar_verslag_1a_inzake_estro_stille_bewindvoering_.pdf.

[54] The «*silent administrator*» appointed in the period before the bankruptcy of Schoenenreus B.V. put together a team of lawyers specialised in insolvency law, company law, labor law and tenancy law. This team subsequently assisted him in gaining a good understanding of the corporate structure, the corporate activities and the management of the financial affairs of the enterprise within a short period of time.; http:/insolventies.rechtspraak.nl/pdf.ashx?ID=01.obr.13.80.F.V.01.

act in public or perform acts that are related to the enterprise run by the debtor without the consent of the board or the *de facto* directors. This raises the question as to whether the intended bankruptcy trustee does not become too dependent on the debtor as a result or whether in these circumstances the intended bankruptcy trustee will be able to sufficiently maintain his independent position – which is required to be able to properly represent the interests of the joint creditors and other parties involved in the possible upcoming bankruptcy.[55] Something that should not be forgotten, however, is that the involvement of the intended bankruptcy trustee results from an initiative of the debtor. After all, it is the debtor who asked for the appointment of an intended bankruptcy trustee. He did this with the intention to be able to prepare the possible upcoming bankruptcy and a possible relaunch with the person who will take over the administration of the enterprise directly after the bankruptcy order and who will take care of the liquidation of the bankrupt estate and in this respect will have to decide whether he can carry out what was prepared before the bankruptcy order and, if applicable, whether he can cooperate in a relaunch. If the debtor withholds important information from the intended bankruptcy trustee during the «*private preparation phase*» or if he does not allow in that phase that the intended bankruptcy trustee speaks with third parties – including experts and the parties on whom the success of a possible relaunch will also depend, e.g. the possible takeover candidates, the financiers involved, the suppliers of essential goods and services and the staff represented by the works council or the staff representation – the debtor runs the risk of:

a) the intended bankruptcy trustee asking the district court to be discharged from his appointment on account of the fact that he is hindered in the performance of his duties and, as a result, causing the «*private preparation phase*» to end (Section 366, first subsection, under a), or
b) the intended bankruptcy trustee feeling insufficiently informed at the time of the bankruptcy order, which will make it impossible for him to take an immediate decision about a prepared relaunch.

When the intended bankruptcy trustee asks the district court in the situation set out under a, to be discharged from his appointment, this does not mean that, when a bankruptcy is ordered some time later, he can no longer be appointed as bankruptcy trustee in the bankruptcy. On the contrary, the know-how and experience that he acquired as intended bankruptcy trustee before his discharge from that position, may just make him a very suitable bankruptcy trustee in the bankruptcy. By not cooperating or by not doing anything with this when the intended bankruptcy trustee believes that the preparation phase requires some adjustment, the debtor therefore shoots itself in the foot.
The fact that the intended bankruptcy trustee usually becomes bankruptcy trustee in the bankruptcy and is therefore the one that decides whether what has been prepared before the bankruptcy order will be carried out, means – together with the possibility to ask the district court for the discharge of his appointment as intended bankruptcy trustee – that it is not so much the intended bankruptcy trustee who is dependent on the debtor, but that it is eventually the debtor who is dependent on the intended bankruptcy trustee.[56]

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[55] See, *inter alia*, mr. W.J.M. van Andel; «*Stop met de pre-pack*», TvI 2014/37; prof. mr. F.M.J. Verstijlen, «*Pre-packing in the Netherlands*», NJB 2014/803; mr. J.V. Maduro, «*Het wetsvoorstel Wet continuiteit ondernemingen I: de rechtszekerheid gediend?*», FIP 2013/8 and mr. B.J. Tideman, «*Kritische kanttekeningen bij de pre-pack*», FIP 2013/6.

[56] Mr. Ph. W. Schreurs, «*Hoe stil is de stille bewindvoerder nu eigenlijk*», FIP 2013/8.

Combating bankruptcy fraud and abuse of bankruptcy law

Although not the primary goal of the proposed regulation, it can also contribute to the combating of bankruptcy fraud and abuse of bankruptcy law, simply because the intended bankruptcy trustee and the intended supervisory judge are involved before the bankruptcy order and in this respect can gather valuable information.
Should the intended bankruptcy trustee find in the «*private preparation phase*» that the board or the *de facto* directors of the enterprise run by the debtor have performed legal acts that may be considered to be an «*fraudulent preference*» or that in the request for the appointment of an intended bankruptcy trustee they provided incorrect information about the added value of the preparation of the bankruptcy, such prior knowledge provides him with the opportunity to immediately act decisively in the bankruptcy. The contested legal acts may soon be reversed by him in bankruptcy by submitting a so-called «*actio pauliana*» on the basis of Section 42 DBA. If the «*untruths*» regarding the added value of the «*private preparation phase*» are part of a preconceived plan of the board or the *de facto* directors to head for a bankruptcy and to subsequently use that (for spurious reasons) to circumvent the employment protection of employees and to make a relaunch after bankruptcy with a downsized enterprise, the bankruptcy trustee may prevent this plan from succeeding by not carrying out the relaunch prepared for that purpose. Moreover, in the proposed regulation it is made easier for the bankruptcy trustee to hold the board involved or the *de facto* directors liable for the damage that may have occurred as a result of these actions (cf. Sections 2:138 or 248 DCC). In such event the intended bankruptcy trustee may also ask the court to impose a civil director disqualification on the persons in question (Sections II and III). Finally proceedings will be available to the bankruptcy trustee after the introduction of the Act for the strengthening of the position of the bankruptcy trustee to be able to speedily refer such fraud signals to the authorities involved in the combating of fraud.[57]
After the «*private preparation phase*» the former intended bankruptcy trustee – who at that time will usually be the bankruptcy trustee in the bankruptcy – has to publish a report about his findings during that phase. By means of this report, the creditors and any other parties involved in the bankruptcy can learn of possible objectionable conduct of the board or the *de facto* directors of the enterprise run by the debtor prior to the bankruptcy. By means of the report, they can also establish whether they have been prejudiced as a result of this. If so, they can bring this to the attention of the bankruptcy trustee and, if necessary, of the supervisory judge on the basis of Section 69 DBA.[58]

Strengthening the position of the intended bankruptcy trustee

All this does not change the fact that it may strengthen the position of the intended bankruptcy trustee when the district court attaches specific conditions to the appointment. To prevent financial dependence on the intended bankruptcy trustee, for example, it has been laid down in the proposed regulation that for the payment of the fees of the intended bankruptcy trustee and the costs of third parties he consulted, the district court may attach the condition of the provision of security to the appointment (Section 363, fifth subsection).

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[57] A consultation version of this bill can be found at: http://www.rijksoverheid.nl/nieuws/2014/02/24/opstelten-versterkt-positie-van-de-curator.html.

[58] Mr. dr. R.R. Verkerk, mr. M. Windt and mr. T.L. Rozendal, «*Prepacks: transparantie en verantwoording achteraf*», TvI 2014/40.

The district court might also set other conditions, e.g. the condition that the debtor has to agree to the calling in of experts (a market expert, for example) to assist the intended bankruptcy trustee in the performance of his duties. It may also help when instead of one intended bankruptcy trustee the district court appoints two or even more fellow intended bankruptcy trustees who – if necessary, depending on their specific know-how –, can divide the duties, can consult each other and together can better counterbalance the debtor. The Sections 363, first and fourth subsection, and 366, first subsection, part b, on the basis of which the district court can set the aforementioned conditions, ensure that the risk of the intended bankruptcy trustee «*being too much involved in what the debtor intends*» and not being able to keep his independent position, can be taken away by the district court. The presence of the intended supervisory judge is of importance in this respect. The exact scope of the intended supervisory judge's role will be set out in detail in the next section.
The effectiveness of the performance of the intended bankruptcy trustee – in spite of all these safeguards – obviously depends entirely on the expertise and firmness of the person who is the intended bankruptcy trustee.[59] When appointing bankruptcy trustees in bankruptcies (and administrators in suspensions of payments) the district courts are already using a list with persons eligible for appointment: the so-called list of bankruptcy trustees.[60] The bankruptcy trustees on the list are classified under different categories on the basis of their experience, expertise and education. For each bankruptcy, consideration is given to the category the bankruptcy trustee would have to come from, also taking into account, if necessary, the specific know-how and/or experience that a bankruptcy trustee may have in the branch of the bankrupt. In this respect, the initiative of Insolad to bring about a manual for the mode of operation by an intended bankruptcy trustee (in the form of practice rules based on «*best practices*») is also of great value.[61]

The bankruptcy following the «private preparation phase»

In the vast majority of cases, the «*private preparation phase*» will be followed by a bankruptcy in which the former intended bankruptcy trustee will be appointed as bankruptcy trustee. In his role as bankruptcy trustee in the bankruptcy the former intended bankruptcy trustee will have to decide whether that what was prepared before the bankruptcy order can be carried out. If the intended supervisory judge or the intended bankruptcy trustee see reason to do so, the district court appoints a provisional creditors' committee in the bankruptcy order and the committee provides the bankruptcy trustee with advice about the decisions that he is to take in the bankruptcy, including the decision on a possible relaunch (Sections 74, second subsection, and 78 DBA). In view of the latter, it stands to reason in any event that the employees are represented in the committee. Their very close involvement in and knowledge of the enterprise run by the debtor and of the branch within which that enterprise operates, make the employees an important adviser for the bankruptcy trustee when the bankruptcy trustee has to make a

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[59] Mr. Ph. W. Schreurs, «*Hoe stil is de stille bewindvoerder nu eigenlijk*», FIP 2013/8 and mr. J.M. Lemstra and mr. J.M. van der Weide, «*Kloeke curatoren*», in Jaarboek Insolad 2008, pp. 161 -177.

[60] The basic principles developed by Recofa, approved by the LOVCK and realised in consultation with INSOLAD can be found at: http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civiel-recht/Documents/130315-Benoemingenbeleid.pdf.

[61] These practice rules can be found at: https://static.basenet.nl/cms/105928/website/praktijkregels-beoogd-curator.pdf. See also mr. R. Mulder, «*De Pre-pack: Verkoop en voortzetting in stilte, verantwoording in het openbaar. Een bespreking van de concept praktijkregels van Insolad*», Tvl 2015/5.

decision about whether or not to effectuate the relaunch prepared in the «*private preparation phase*». In view of the hectic situation described above, which usually happens after the bankruptcy order, and the effect of that on the preservation of the value of the viable parts of the enterprise and the chances of a successful relaunch, it is of importance that the provisional creditors' committee and the bankruptcy trustee hold a meeting as soon as possible (Section 76 DBA). For that reason the intended bankruptcy trustee and the intended supervisory judge already have to consider who should have to become a member of the committee prior to the bankruptcy order and these persons should also preferably be approached before the end of the «*private preparation phase*». If this succeeds, it should be possible to arrange a meeting soon after the bankruptcy order between the creditors' committee and the bankruptcy trustee, where the committee can provide the bankruptcy trustee with advice.
By means of the report – which is filed at the court registry, where it will be publicly available for inspection – and in the meeting with the provisional creditors' committee, the intended bankruptcy trustee provides full information to all parties involved in the bankruptcy and in particular the creditors about what happened in the «*private preparation phase*» and how he represented the interests of the (joint) creditors and other parties involved in the bankruptcy in that phase.

In the literature, the term «*silent administrator*» is often used with respect to the tests in actual practice with involving the enterprise of the intended bankruptcy trustee as early as in the preliminary stage of a possible bankruptcy. The term administrator, however, implies a change in the debtor's power of management and disposition in the sense that the debtor no longer has the power of disposition without the administrator's permission. This is expressly not the case in the proposed regulation. For this reason it was decided not to use the term «*silent administrator*». Other terms, such as «*insolvency expert*», «*insolvency-adviser*» and «*pre-bankruptcy trustee*» were considered, but these terms did not cover the feel of the role and the duties, as well as the powers of the person appointed by the district court as the one who will be appointed as bankruptcy trustee in the event of a bankruptcy or they might create false expectations on this subject. For that reason, a choice was eventually made for the term «*intended bankruptcy trustee*».

3.3.3 The intended supervisory judge

Supervisor

The duty and powers of the intended supervisory judge can best be described in the following manner. The intended supervisory judge is involved – as future supervisor of the administration and the liquidation of the bankrupt estate (Section 64 DBA) – in the preparation of the bankruptcy initiated by the debtor (Section 365, first subsection). During the «*private preparation phase*» he critically oversees – in order to compensate the lack of transparency for the creditors and other parties involved in the enterprise run by the debtor – the preparation phase and he monitors the functioning of the intended bankruptcy trustee. Because the preparation phase takes place privately, the creditors cannot – unless they are involved in this – represent their own interests in this phase. In order to do this, they depend on the performance of the intended bankruptcy trustee. In contrast to the bankruptcy phase, the creditors also do not have the possibility to ask the supervisory judge via Section 69 DBA to intervene in the policy of the intended bankruptcy trustee because of the private nature of the «*private preparation phase*». The creditors should be able to rely on the fact that the intended supervisory judge

supervises of his own accord that the intended bankruptcy trustee properly stands up for their interests (Section 365, second subsection). This creates an extra responsibility for the intended supervisory judge. When carrying out this extra responsibility, the intended supervisory judge is given support because in its order for the appointment of the intended bankruptcy trustee the district court determines the purpose of the «*private preparation phase*» and, consequently, also the mandate of the intended bankruptcy trustee. This is done by the district court by explicitly stating in the order the «*added value*» of the «*private preparation phase*» for its specific situation as put forward by the debtor. This added value was decisive in the decision of the district court to admit the debtor to the «*private preparation phase*». If necessary, the intended supervisory judge may ask the district court during the «*private preparation phase*» – on the basis of the information available at that time – to check once more if it believes that there is still added value (Section 366, first subsection, part a). There might be a reason for this, for example, when the intended bankruptcy trustee and the intended supervisory judge find during the «*private preparation phase*» that the intended result initially put forward by the debtor – upon submitting the request for the appointment of an intended bankruptcy trustee – turns out to be unfeasible after all.[62]
The intended supervisory judge will have to monitor that the intended bankruptcy trustee always stays within the mandate of the district court. To this end the proposed regulation provides for a number of obligations of the intended bankruptcy trustee in respect of the intended supervisory judge. During the «*private preparation phase*», for example, the intended bankruptcy trustee has to report to the intended supervisory judge and provide all the required information about the progress of the preparation phase. The intended bankruptcy trustee will, of course, have to address the way in which he performs his duties in this process. If necessary the intended supervisory judge may also call the intended bankruptcy trustee for a meeting with which the latter will have to comply at all times (Section 365, third subsection).

Means of the intended supervisory judge

If the intended bankruptcy trustee is in danger of falling outside of the mandate of the district court, the intended supervisory judge has means available to intervene and to see to it that the preparation phase is adjusted. If the intended supervisory judge finds, for example, that the intended bankruptcy trustee does not sufficiently take into consideration the fact that in the preparation phase the interests of specific groups of creditors are in danger of being overlooked, he may urge the intended bankruptcy trustee:

a) to request more detailed information about certain matters from the debtor or (with the cooperation of the debtor) from third parties, or
b) to discuss with the debtor the desirability of:
   – experts to be approached to conduct a further investigation in view of those interests, or
   – the works council or the staff representation to be involved (subject to secrecy) in the «*private preparation phase*» if it concerns the interests of the employees.

The intended supervisory judge might even reinforce this by announcing that he will ask the district court, when it orders the bankruptcy, to set

[62] See, for example, the «*private preparation phase*» shortly before the bankruptcy of the Weijmans Media Groep B.V. In that case the intended bankruptcy trustee found within a few days after his appointment on the basis of the a information provided to him and meetings with the directors that there was no longer any point in a «*pre pack-process*» because of the payment difficulties that had since become acute. http://www.turnaroundadvocaten.nl/upload/20141127.4e.verslag.publicatie.pdf.

up a provisional creditors' committee (Section 74, second subsection). In addition or instead of that, the intended supervisory judge might also make procedural agreements with the intended bankruptcy trustee during the «*private preparation phase*» for the procedure that will be followed after the bankruptcy order. They might agree that within that subsequent procedure a possibility is provided for the creditors to still be able to exert influence – whether or not through official channels relying on Section 69 DBA – on, for example, the decision-making process of the bankruptcy trustee and the supervisory judge about a prepared relaunch after the bankruptcy order. One previously mentioned example is of an announcement of the prepared relaunch and a short period of time during which creditors can respond. In the scenario referred to above, where the intended bankruptcy trustee is too involved in a preparation of a relaunch after bankruptcy of which it is doubtful whether this is in the interest of the joint creditors and other parties involved in the possible upcoming bankruptcy, the intended supervisory judge has the following possibilities to do something against this. Firstly he can point out to the intended bankruptcy trustee that, if the preparation phase is to result in a proposal for a relaunch to which he – in his role as supervisory judge – will be able to agree to in the bankruptcy, this procedure requires adjustment. To emphasise the need for adjustment, the supervisory judge might still ask the district court to attach a condition to the appointment (Section 363, fourth subsection). The engagement of an expert who could deliver an opinion about the relaunch, might be such a condition. If it subsequently turns out that the intended bankruptcy trustee does not do enough with this, the intended supervisory judge might ask the district court to discharge the intended bankruptcy trustee from his appointment (Section 366, first subsection, part a). If the intended supervisory judge believes that in spite of this situation it is still desirable that the «*private preparation phase*» be continued, he could ask the district court for a replacement of the intended bankruptcy trustee (Section 366, first subsection, part b). Should the intended supervisory judge have doubts about the course of the preparation phase and the role of the intended bankruptcy trustee in this, a solution could be that someone else assists the intended bankruptcy trustee. The intended supervisory judge might still ask the district court to appoint a fellow intended bankruptcy trustee for this (Section 366, first subsection, part b).

The bankruptcy following the «private preparation phase»

In the vast majority of cases, the «*private preparation phase*» will be followed by a bankruptcy and the former intended supervisory judge will in general be appointed as supervisory judge in that bankruptcy. The latter is only different in the event of changed circumstances at the time of the bankruptcy order and consequential reasons to differ from the earlier appointment (Sections 14a, 215, third subsection, and 223a, second subsection). A completely failed «*private preparation phase*» and an apparent conflict of interests that came to light after the appointment, for example, might be reasons to appoint a «*new*» supervisory judge. If this is not the case and if the intended supervisory judge is appointed as supervisory judge in the bankruptcy, he will in that role – as described above –, and if applicable, have to decide whether he can give permission

for the effectuation of a relaunch prepared prior to the bankruptcy order (cf. Section 101 subsection 1 and 176 DBA).[63]

4. Interests of the joint creditors, including employees

Objections have been raised in the literature in respect of the preparation of a relaunch after bankruptcy with the involvement of the intended bankruptcy trustee. These objections are essentially the fear that the «*private preparation phase*», because of the lack of transparency and the risk of abuse of the regulation by the debtor, will eventually still not serve the interests of the parties involved in the bankruptcy, in particular those of the creditors and the employees.[64]
Reference is made, for example, to the circumstance that the transaction for the relaunch after bankruptcy is brought about in a private negotiation process – instead of in a public sales process – in which sometimes only a few parties (i.e. the debtor and one or only a few potential buyers) are involved. In this way the process that leads to the formation of the transaction – as well as the way in which the conditions of the transaction in question are agreed within that process – is invisible to the creditors. Because of the absence of a public sales process with competition between several candidates, it also remains to be seen whether the highest possible proceeds could indeed be realised. The intended bankruptcy trustee in the «*private preparation phase*», moreover, would get too much involved in the business operations of the enterprise and the preparation of a relaunch. In his role as bankruptcy trustee, he would therefore after the bankruptcy order no longer be able to independently assess or contest the assets transaction for the relaunch that had been prepared before the bankruptcy. The «*pre-pack*» would also favour certain classes of creditors and prejudice other creditors. The «*pre-pack*» would also have competition-distorting effects and encourage the improper use of the bankruptcy on for the benefit of a restructuring.

Despite all these objections, it should be argued, however, that the risks of a sub-optimal result and of the improper use of bankruptcy law in the case of a relaunch after a regular bankruptcy, are greater than in a relaunch prepared before the bankruptcy order under the supervision of the future bankruptcy trustee and the future supervisory judge. This is because a regular bankruptcy often shows one of the following two less favourable scenarios:

a) the sales transaction for the relaunch after bankruptcy is not effected by the bankruptcy trustee until after the bankruptcy order, or

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[63] See for a description of the assessment the supervisory judge will have to make, mr. F.H.E. Boerma, «*Doorstart vanuit het perspectief van de rechter-commissaris*», in Jaarboek Insolad 2008, pp. 179-191.

[64] E.g. Mr. drs. N.W.A. Tollenaar, «*Faillissementsrechters van Nederland: geef ons de pre-pack*», Tvl 2011/23; J.C. van Apeldoorn «*Pre-packs*», Tvl 2012/17; mr. O.G. Tacoma and mr. C.J.M. Weebers-Vrenken, «*The b(l)ack side van een pre-pack failissement*»; mr. E. Loesberg, «*Heiligt het doel de middelen? Pre-pack in het Nederlandse Faillissementrecht*», Tijdschrift voor de ondernemingspraktijk 2013/1; mr. B.J. Tideman, «*Kritische kanttekeningen bij de pre-pack*», FIP 2013/6; mr. M.J. Cools, «*Een doorstart in voorverpakking*», FIP 2013/8; mr. M.H.F. van Vugt; «*De Nederlandse pre-pack: time-out please!*», FIP 2014/1; mr. drs. R.J. van der Ham, «*Liever failliet dan doorgaan met slecht personeel: over het risico van misbruik van de pre-pack*». Arbeidsrecht 2014/28; mr. W.J.M. van Andel; «*Stop met de pre-pack*», Tvl 2014/37; mr. dr. R.R. Verkerk, mr. M. Windt and mr. T.L. Rozendal, «*Prepacks: transparantie en verantwoording achteraf*», Tvl 2014/40; dr. I. Zaal, «*De rol van de ondernemingsraad bij een pre-pack: tijd voor een wettelijke regeling*», FIP 2014/8 and prof. mr. J.J. van Hees, «*Stille bewindvoering: pre-packen en wegwezen?*». Ondernemingsrecht 2014/79.

b) it is prepared before the bankruptcy order by the board or the *de facto* directors of the enterprise run by the debtor of their own accord.

In the first scenario, the turmoil of the bankruptcy will in most cases have a negative effect on the value of parts of the enterprise and the chances of a successful relaunch. The effect of this is that in the sales transaction the bankruptcy trustee can often only insist on a low price (close to the liquidation value of the parts of the enterprise). This results in lower proceeds from the sale of a debtor's assets and a greater loss of employment.
In the second scenario the creditors of the enterprise run by the debtor do not have any influence on the preparation phase unless they are involved. The same is true for potentially interested buyers. Just like the bankruptcy trustee and the supervisory judge, they are not confronted with the prepared sales transaction until after the bankruptcy order. Creditors and interested buyers are faced with an information gap as a result. This makes it difficult for the creditors and potentially interested buyers to properly understand the prepared sales transaction within a short period of time. For that reason there is actually often little opportunity for the creditors to still exercise any influence on the decision-making of the bankruptcy trustee and the supervisory judge as to whether or not the prepared relaunch should be effectuated. For potentially interested buyers it is usually not possible to effectively compete in the sales process because they fail to quickly make a competitive takeover bid on the enterprise; i.e. a bid that is both interesting for the bankruptcy trustee and sensible for themselves. Because of the lack of monitoring during the preparation phase, in this scenario there is also a greater risk of bankruptcy fraud and/or abuse of bankruptcy law, while this is not discovered or not until at a later moment.[65]

The point of the «*pre-pack method*» developed in the past few years in legal practice is that it leads to an improvement of the position of creditors. This practice entails that the preparation of the bankruptcy and, if applicable, a relaunch after that bankruptcy takes place under the supervision of the intended bankruptcy trustee and the intended supervisory judge. As a result the intended bankruptcy trustee and the intended supervisory judge are enabled to study more closely the situation the enterprise is in, even before the bankruptcy order. They can also keep a close eye on the preparation phase. As a result the intended bankruptcy trustee and the intended supervisory judge will «*be better prepared*» in the bankruptcy and be able to take a faster decision and be better informed about whether or not to effectuate a prepared sale/relaunch. They are also enabled to exercise influence on the preparation phase and in this way they can see to it that the best possible result (i.e.

[65] Prof. mr. J.J. van Hees, «*Herstructurering met behulp van faillissement*», in: prof. mr. G. van Solinge e.a. (red.), «*Herstructurering van ondernemingen in financiële moeilijkheden*», Serie vanwege het van der Heijden Instituut, part 124, Kluwer Deventer (2014), p. 52 and mr. R.J. van Galen, «*Knelpunten in ons insolventierecht*». Ondernemingsrecht 2014/81.

retaining maximum value and employment as possible) is achieved.[66] (See in this respect the results of the survey of Hurenkamp and the Radboud University in cooperation with BDO Consultants, referred to in section 2.3 of the general part of this explanatory memorandum). Should there be a preconceived plan of the board or the *de facto* directors to abuse bankruptcy law, the intended bankruptcy trustee and the intended supervisory judge have a greater opportunity to discover this in time because they are involved sooner and they can put a stop to this by not carrying out the prepared relaunch.[67]

This bill does not only result in a statutory basis of the «*pre-pack practice*», but also in a demarcation of it. It is made clear, for example, when an intended bankruptcy trustee should or should not be appointed. It is also clearly described in the proposed regulation what the intended bankruptcy trustee's role is, the means that are available to him, how the district court can support him and how the supervision of the intended supervisory judge of the functioning of the intended bankruptcy trustee has been provided for.

It has been made explicit in the proposed regulation that the intended bankruptcy trustee and the intended supervisory judge are expected – to be able to properly guard the interests of the creditors and – to monitor the preparation phase with a critical eye. If the intended bankruptcy trustee believes that the preparation phase takes a turn as a result of which the interests he represents seem to be at stake, he is expected to act; that means that he uses the means available to him (and referred to in section 3.3.2).[68]

It is also clearly set out how the intended bankruptcy trustee can be supported by the district court when fulfilling his role, which can attach conditions to the appointment of an intended bankruptcy trustee and therefore also to the «*private preparation phase*». By setting conditions the district court may increase the chance that the anticipated result of the preparation phase is achieved (Section 363, fourth subsection). It can also set conditions which strengthen the position of the intended bankruptcy trustee or ensure that the interests of the employees are done more justice during the «*private preparation phase*». The district court may set the condition, for example, that the debtor will have to approve that external experts are called in who can support the intended bankruptcy trustee with the performance of his duties[69] or that the works council or the staff representation is involved – subject to secrecy – in the «*private preparation phase*».[70] Should there be a preconceived plan of the board or the *de facto* directors to improperly use the bankruptcy, the intended bankruptcy trustee and the intended supervisory judge have more opportunity to discover this in time and to take measures because they are involved sooner; for example, by not carrying out a relaunch prepared by the board after the bankruptcy order – or not until after this has been renegotiated first – and hold the board involved liable for the damage resulting from their actions (Sections II and III). The effect of the proposed

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[66] See, for example, the first public report of mr. Jongepier in the bankruptcy of the Estro Groep B.V. et al,. in which he describes that he initially had some reservations about the preparation phase aimed at a relaunch after bankruptcy as initiated by the management of the child day care business, but that after some adjustment a sale of a major part of the enterprise could still be realised on acceptable conditions. http://www.boekel.com/media/1137967/openbaar_verslag_1ainzake_estro_stille_bewindvoering_.pdf.

[67] See section 2.3 of the explanatory memorandum.

[68] See section 3.3.2 of the explanatory memorandum.

[69] The «*silent administrator*» appointed in the period before the bankruptcy of Schoenenreus B.V. put together a team of lawyers specialised in insolvency law, company law, labour law and tenancy law. This team subsequently assisted him in gaining a good understanding of the corporate structure, the corporate activities and the management of the financial affairs of the enterprise within a short period of time; http://insolventies.rechtspraak.nl/pdf.ashx?ID=01.obr.13.80.F.V.01.

[70] See section 3.3.1 of the explanatory memorandum.

regulation, moreover, is that the creditors can become aware – by means of the final report of the intended bankruptcy trustee (cf. Section 366, fourth and fifth subsection) filed with the court registry and made available for inspection – of the sale and relaunch of the parts of the enterprise and of what occurred in the «*private preparation phase*», sooner than they can at present. This increases their chance to still exercise influence on the decision-making process of the bankruptcy trustee and the supervisory judge about a possible relaunch.

In regards to the issue of the distortion of competition, it should be noted that a relaunch after bankruptcy will often have some effect that can be described as a distortive effect on competition. This is because parts of the enterprise are excluded from the bankruptcy, as it were, and the debt burden remains. This is offset, however, by the fact that the proceeds of the sale of the parts of the enterprise flow back in the bankruptcy. After the sale after the bankruptcy, the parts of the enterprise are relaunched with «*a clean slate*» under a new owner. Competitors, on the other hand, will have to continue to be responsible for their debts themselves. At the same time, not every change in a position of a market party automatically has an effect on the positions of (all) other market parties in the same branch. The distortive effect on competition is less when the price of the sale of the parts of the enterprise is higher. In that case the new owner will have to make more investments to be able to take over the parts of the enterprise. With the preparation of a relaunch after bankruptcy under the supervision of the intended bankruptcy trustee and the intended supervisory judge, it can be achieved that a higher price can be insisted on when the parts of the enterprise are sold after bankruptcy. The fact that the «*private preparation phase*» may sooner uncover the possible abuse of bankruptcy law, also helps reduce the distortive effect on competition of relaunches after bankruptcy.

5. Consultation

In the fall of 2013, a consultation version of this bill was published on the internet.[71] All the interest groups involved were contacted and asked for advice and the bill was discussed with the Advisory Committee on Civil Procedural Law. In addition to individual responses, comments were received from the following umbrella organisations and companies: the Council for the Judiciary (hereafter: Rvdr), the Netherlands Association for the Judiciary (hereafter: NVvR), the Dutch Association of Insolvency Practitioners (hereafter: Insolad), the Insolvency Law Advisory Committee of the Netherlands Bar Association (hereafter: NOvA), M.R. van Zanten on behalf of CMS Derks Star Busmann N.V. (hereafter: Van Zanten), D.P. Schalken on behalf of law firm Bogaerts & Groenen (hereafter: Schalken), the practice group Corporate Law, Insolvency & Litigation of law firm AKD, Ph. W. Schreurs on behalf of law firm Boels Zanders (hereafter: Schreurs), the Dutch Banking Association (NVB), the Association of Leasing Companies in the Netherlands (NVL), the Confederation of Netherlands Industry and Employers VNO-NCW and the Dutch Federation of Small and Medium-Sized Enterprises MKB Nederland (VNO-NCW/MKB), the Dutch Trade Union Confederation FNV and P. Hufman, J. van der Pijl and I. Zaal on behalf of the Department of Labour Law of the University of Amsterdam (UvA).[72]

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[71] http://www.internetconsultatie.nl.

[72] Made available for inspection at the Central Information Office of the House of Representatives

Key focus points of the consultation

The consultation resulted in a great deal of support for the bill that – as emphasised by many respondents – meets the strong demand expressed by people and organisations in the field for legislation whereby a Dutch version of the «*pre-pack*» is introduced. The fact that a framework regulation has been chosen which provides room for further substantiation by people and organisations on the ground was also met with approval. Only the NOvA doubts the usefulness of and the need for the proposed regulation. In response to this it should be noted that the proposed regulation – as set out above – is based on the practices of eight of the eleven district courts and that there is a demand from the same people and organisations in the field and also from politicians for a statutory basis of this. Moreover, the European Commission has recently called on the Member States in its recommendation of 12 March 2014 to put forward measures that – briefly stated – should enable «*the efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance*».[73] The proposed regulation fits within this framework.
In the consultation several suggestions were made to adjust the regulation, or the explanation of it. These suggestions were mainly related to:

- a further substantiation of the role and of the duties and powers of the intended bankruptcy trustee and the intended supervisory judge;
- a tightening of the safeguards against abuse or the improper use of the regulation;
- arranging for more transparency for the creditors;
- the reduction of the risk of unintended negative consequences of the application of the regulation (distortion of competition);

In the explanation below of each individual section, it will be specified each time by section how these suggestions have been dealt with.

During the consultation three points of interest also emerged that can best be generally discussed here, namely:

- the corporate law question whether a request for the appointment of an intended bankruptcy trustee is a decision for which the approval of the general meeting of shareholders (hereafter: the general meeting) is required, and
- the issues related to labour law:
  a) whether it is a matter of a decision on which advice must be sought as referred to in Section 25 of the Works Councils Act when an enterprise decides to submit a request to the district court for the appointment of an intended bankruptcy trustee, and
  b) how the proposed regulation is related to the legislation based on Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Approval general meeting

In the consultation the NVB and Van Zanten, among others, made an appeal for the provision of clarity about the question whether submitting a request for the appointment of an intended bankruptcy trustee is a decision for which the approval of the general meeting is required. Reference was made in this respect – to the extent related to a public

[73] http://ec.europa.eu/justice/civil/files/c_2014_1500_nl.pdf. See also mr. E. Schmieman, «*De aanbeveling van de Europese Commissie inzake een nieuwe aanpak van faillissement en insolventie*», Ondernemingsrecht 2014/77.

limited company – to Section 2:107a of the Dutch Civil Code (DCC). The first subsection of that Section provides that the board of a public limited company require the approval of the general meeting for resolutions about an important change in the identity or character of the company or the enterprise.

If a debtor is a company, the request for the appointment of an intended bankruptcy trustee on behalf of the company is submitted by its board. To answer the question whether the board requires the approval of the general meeting for this, it is of first importance – for both the private company with limited liability and the public limited company – that on the basis of established case law of the Dutch Supreme Court (HR) it is the responsibility of the board of the company to determine the company's policy and strategy.[74] The decision to submit a request to the district court for the appointment of an intended bankruptcy trustee falls within that autonomy of the board. Financial problems are best solved when they are recognised and dealt with at an early stage. One of the objectives of the program the recalibration of bankruptcy law, of which this bill forms part, is therefore to stimulate business owners to seek help in time in the event of imminent inability to pay. In view of the duty of the board of the company as strategy maker and policymaker within the enterprise, the responsibility to call for help in time rests on them, and in this respect they have to take the interest of the company and the enterprise associated with it into consideration. The request for the appointment of an intended bankruptcy trustee is an important instrument for that, of which the board of the enterprise should be able to make use as they see fit.
It is also relevant for the public limited company – in connection with the provisions in Section 2:107a, first subsection, DCC – that the appointment of an intended bankruptcy trustee does not imply a change in the identity or the nature of the company or the enterprise. After all, the appointment only leads to the district court appointing who it will appoint as bankruptcy trustee and appoint as supervisory judge, should it effectively come to a bankruptcy. Subsequently these persons are «*privately*» involved in the preparation of the bankruptcy initiated by the board and, if applicable, of a possible relaunch of viable parts of the enterprise after that bankruptcy.
To be able to make use of the opportunity provided by this bill to prepare a possible upcoming bankruptcy in relative calm with the involvement of an intended bankruptcy trustee, requires that the appointment of the intended bankruptcy trustee takes place privately. If the approval from the general meeting should have to be asked first before the submission of the request by the board, it will be almost impossible in practice, especially for larger companies with many shareholders, to keep the appointment of the intended bankruptcy trustee private. The fact that a large number of persons (the shareholders) must first be called for the meeting where they are subsequently informed about the financial problems and the related intention to submit a request for the appointment of an intended bankruptcy trustee, entails a large risk that «*the news*» about the financial problems becomes public knowledge even before the request has been submitted. Therefore, for the reasons as specified above, the decision to submit a request for the appointment of an intended bankruptcy trustee to the district court does not fall under the category of decisions included in Section 2:107a, first subsection, DCC for which the board requires the approval of the general meeting. A provision in the articles of association providing that submitting a request for the

[74] Dutch Supreme Court (HR) 21 January 1955, NJ 1959/43 (Forumbank); Dutch Supreme Court (HR) 13 July 2007, JOR 2007/178 (ABN AMRO) and Dutch Supreme Court (HR) 9 July 2010, JOR 2010/228 (ASMI).

appointment of an intended bankruptcy trustee requires the approval of the general meeting, is not applicable either. The same applies to a stipulation in an arrangement – unrelated to the articles of association – agreed between the shareholders and the legal entity. To make this clear, this has been laid down in so many words in the proposed Section 363, sixth subsection.

Advice works council

In the consultation FNV and Van Zanten asked that clarity be provided about the question whether an enterprise that intends to submit a request for the appointment of an intended bankruptcy trustee to the district court would first have to ask the works council for advice. In this respect particular reference was made to Section 25 subsection 1, parts e and n, of the Works Councils Act. For the reasons specified below, I believe that this is not the case. This does not actually change the fact that the district court – on the basis of Section 363, fourth subsection – may attach the condition to the appointment of a intended bankruptcy trustee that the works council be involved – subject to secrecy – in the «*private preparation phase*». As described in section 3 above, the employees – represented by the works council – may be an important adviser in the preparation of the bankruptcy and, if applicable, a relaunch after that bankruptcy because of their very close involvement in and knowledge of the enterprise run by the debtor and of the branch within which that enterprise operates.

Section 25, subsection 1, of the Works Councils Act confers the right of advice to the works council in respect of a number of proposed resolutions of the enterprise. The parts e and n of the first subsection are about resolutions concerning:

– «*a significant change in the organisation of the enterprise or in the division of powers within the enterprise*» (part e), and
– «*commissioning, and formulating the terms of appointment of, an expert outside the enterprise to advise on matters referred to above [in the parts a to m]*» (part n).

The decision to submit a request for the appointment of an intended bankruptcy trustee to the district court does not fall under part e because – as already noted in section 3 – the appointment of an intended bankruptcy trustee does not imply a «*change in the organisation of the enterprise, or in the division of powers within the enterprise*»: the appointment implies no changes in the debtor's power of management and disposition. Nor does the request fall under part n because during the «*private preparation phase*» – as explicitly provided for in Section 364, first subsection, and explained in section 3.3.2 – the intended bankruptcy trustee acts as representative of the interests of the joint creditors and he is therefore not an adviser of the debtor. This decision also does not fall under the other categories of decisions included in the other parts of Section 25, subsection 1, of the Works Councils Act.

For the sake of clarity it is also observed that when the debtor still wishes to make decisions during the «*private preparation phase*» within the meaning of Section 25, subsection 1, of the Works Councils Act, the right for the works council to give advice remains in full force in respect of these decisions.[75] In section 3.2 reference was made to the fact that the current «*pre-pack practice*» shows that the appointment of an intended bankruptcy trustee may also contribute to a solution for the financial problems still being found privately outside bankruptcy, with which the continuation of the enterprise can be safeguarded. For example, if the

[75] Prof. mr. F.M.J. Verstijlen, «*Reorganisatie van ondernemingen en pre-pack*», Vereniging «Handelsrecht» Preadviezen 2014, Uitgeverij Paris, Zutphen 2014, page 61.

debtor, for the purposes of such a rescue attempt, calls in an adviser to give advice on what the implications would be if the enterprise were to scale down or were to dispose of certain parts, the works council has the right to give advice on the consultancy assignment on the basis of Section 25, subsection 1, part n, Works Councils Act.

Directive transfer of enterprises

Part 8 of Title 10 of Book 7 DCC includes a regulation regarding the protection of the rights of employees in the event of a transfer of an enterprise. The regulation is based on Directive 1977/187 of 14 February 1977 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJEU 5 March 1977, L 61/26). This directive was replaced by Directive 98/50 of 29 June 1998 (OJEU 17 June 1998, L 201/88), and the regulation of 1977 was clarified and adjusted as a result of case law of the Court of Justice of the European Community. With Directive 2001/23 of 12 March 2001 (OJEU 22 March 2001, L 82/16) (hereafter: the Directive) the regulation was laid down again. The aim of the directives referred to was – briefly stated – to secure that in the event of a transfer of an enterprise, the employees of that enterprise enter the employment of the acquirer of the enterprise by operation of law and on the same conditions as the ones of the transferor. As laid down in the Articles 3 and 4 of the Directive and the Sections 7:663 to 665 and Section 7:670, subsection 8, DCC this means, briefly stated, that after the transfer of the enterprise the employees retain their rights under the employment contract they had before the transfer and that the transfer of the enterprise is in itself no reason for dismissal. In accordance with Section 7:662 subsection 2 DCC «*the transfer* [of an enterprise]» means «*the transfer, arising from a contract, merger or division of an economic unit which keeps its identity*»).
Article 5, paragraph 1, of the Directive provides that the Articles 3 and 4 of the Directive, unless the Member States provide otherwise, are not applicable when «*the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practioner authorised by a competent public authority)*». As a result of this it was prescribed in Section 7:666 DCC that the Sections 7:662 to 665 and Section 7:670, subsection 8, DCC are not applicable to the transfer of an enterprise if the employer has been declared bankrupt and the enterprise forms part of the bankrupt estate.

In the consultation the NOvA, the FNV, the UvA and in one of the individual responses, the question was raised if this is different when a relaunch of viable parts of the enterprise is prepared before the bankruptcy order under the supervision of the intended bankruptcy trustee and the intended supervisory judge. In this respect it is relevant to observe that the Dutch Supreme Court (HR) already expressed an opinion about the situation in which a relaunch from bankruptcy was prepared during a suspension of payments, which was effectuated by the bankruptcy trustee in bankruptcy after the bankruptcy order.[76]
This situation is comparable to the situation in which an intended bankruptcy trustee was appointed before a bankruptcy order. During the suspension of payments, preparations are made for a relaunch of viable parts of the enterprise after bankruptcy. The future bankruptcy trustee – in this case in his capacity of administrator in the suspension of payments – is involved in this, just like he is in the «*private preparation phase*» preceding the possible upcoming bankruptcy that begins with the

[76] Dutch Supreme Court (HR) 30 October 1987, *NJ* 1988/191 (*Happé/Scheepstra*).

appointment of an intended bankruptcy trustee. When the time is ripe the administrator asks the district court – with the agreement of the debtor to whom suspension of payments is granted – to withdraw the suspension of payments and to simultaneously order the bankruptcy (Section 242, subsection 1 under 5 in conjunction with subsection 4 DBA). In those cases the administrator is usually appointed as bankruptcy trustee in that bankruptcy. This makes it possible for the bankruptcy trustee to effectuate the prepared relaunch quite soon after the bankruptcy order.
In its judgment the Dutch Supreme Court (HR) commented in particular on the question whether, in the situation described, the time of transfer can be deemed to be before the conversion of the suspension of payments into a bankruptcy, as a result of which the provisions about transfer of enterprise would be fully applicable. In its judgment the Dutch Supreme Court (HR) ruled that by means of the import of the acts performed it must be established at what time there is a transfer of the enterprise. If it can be said that the most significant part of the acts/transactions with which the relauncher is enabled to continue the enterprise, takes place after the bankruptcy order, the transfer of the enterprise takes place after bankruptcy and the rights and obligations to the employees of the bankrupt do not pass to the relauncher.
On the basis of this idea it must be concluded that the answer to the question above is negative; the Sections 7:662 to 665 and Section 7:670, subsection 8, DCC are not applicable in the event of a transfer of parts of the enterprise from bankruptcy while it makes no difference whether that transfer preceding the bankruptcy is prepared under the supervision of an intended bankruptcy trustee and an intended supervisory judge. The underlying reasons for this are the following. The appointment of an intended bankruptcy trustee results in the intended bankruptcy trustee and the intended supervisory judge being involved in the preparation of the possible bankruptcy and, if applicable, on the initiative of the debtor, the process of searching for possible takeover candidates for viable parts of the enterprise. This means in any event that the intended bankruptcy trustee monitors with a critical eye, makes inquiries and forms an opinion about the course of events within the enterprise and, if applicable, about the sales process initiated by the debtor and that he informs the intended supervisory judge about this. In this sense the «*private preparation phase*» can be viewed as a kind of investigation phase or «*due diligence*» phase. If asked by the debtor, the intended bankruptcy trustee may also assist the debtor in the preparation phase in a more proactive manner. It is of importance in this respect, however, that in the «*private preparation phase*» that begins with his appointment, the intended bankruptcy trustee does not have any statutory authority to bind the debtor or, as the case may be, its assets. This means that before the bankruptcy order the intended bankruptcy trustee can therefore not yet enter into a definitive and binding agreement about a sale of viable parts of the enterprise after bankruptcy. The question whether, and if so, on what conditions, the sale and the subsequent relaunch after bankruptcy eventually can go ahead, at the time of the «*private preparation phase*» still depends on a number of circumstances that are beyond the debtor's and the potential buyer/takeover party's control:

– The district court still has to decide on the application for the bankruptcy and might come to the conclusion that the condition for granting this application has not been satisfied (Section 1, first subsection, DBA); there are financial problems, but the debtor is not yet in a situation where he has ceased to pay its debts and there are

alternatives for the debtor to reorganise its enterprise and to solve its financial problems outside of bankruptcy.
– At the time of the bankruptcy order the district court might arrive at the opinion that there are changed circumstances and consequential reasons to differ from the earlier appointment and might eventually not appoint the persons appointed earlier as intended bankruptcy trustee and intended supervisory judge, but might appoint others as bankruptcy trustee and supervisory judge in the bankruptcy (Section 14a).
– After the bankruptcy order there might still be circumstances that cause the bankruptcy trustee (whether or not this is the person that had been appointed as intended bankruptcy trustee) to not (or to no longer) agree to the result of the negotiations achieved by the debtor; an example of this is when there are other very serious interested parties who wish to pay a higher price for taking over the parts of the enterprise.

It will therefore not be definitively clear until after the bankruptcy order whether the transfer will take place and under what conditions this will happen, so that the Sections 7:662 to 665 and Section 7:670, subsection 8, DCC are not applicable.

6. Consequences for the corporate sector and compliance costs

When a debtor submits a request to the district court for the appointment of an intended bankruptcy trustee, he will provide the district court for the purposes of that request with information about – briefly stated – the (financial) situation its enterprise is in. To this end the debtor will also have to submit specific documents (see more details in the explanation of Section 363, first and second subsection). If the debtor's request is granted, the debtor will subsequently have to provide the intended bankruptcy trustee, both when asked and on its own initiative, with all the information the intended bankruptcy trustee requires in the performance of his duties in the «*private preparation phase*» of the possible bankruptcy. These are therefore obligations to provide information that only arise when business owners themselves choose to involve the district court, the future bankruptcy trustee and supervisory judge (if any) in the preparation of a possible upcoming bankruptcy. It is actually also in the debtor's own interest to provide the district court and the intended bankruptcy trustee with this information. This is, after all, the only way to achieve the result that he strives for with the request for the appointment of the intended bankruptcy trustee; the preparation of the possible upcoming bankruptcy and, if applicable, the increase of the chances of a sale of viable parts of the enterprise – for a relaunch – at the highest possible price. Furthermore, in the event of a bankruptcy order, the debtor in the bankruptcy would already be obliged to provide this information to the bankruptcy trustee on the basis of the current Bankruptcy Act (Section 105 DBA). For this reason these obligations to provide information cannot be seen as new substantive compliance costs. In regards to the workload for the judiciary, the following should be observed. The bill is partially a codification of the current practice of eight of the eleven district courts, where the district court is involved, mainly through a supervisory judge, in the preparation of a possible bankruptcy of an enterprise and, if applicable, the preparation of a relaunch of viable parts of the enterprise even before a bankruptcy order. In that sense, the bill only provides a foundation for existing practice. Moreover, this approach partially means a shift of supervisory duties of the supervisory judge to an earlier date. Because the supervisory judge was able to keep an eye on things even before the bankruptcy order, he will have an advantage in terms of information in the event of an actual bankruptcy. This will have a cost saving effect in the bankruptcy proceedings, in which the bankruptcy trustee is monitored and

the periodical reporting and the interests and possible complaints and claims of the creditors must be assessed. There is therefore only a limited workload increase for particularly those courts that do not yet apply this practice, but will do so after the introduction of the proposed statutory regulation.

II. BY SECTION

Section I

Part A

Section 3c

In the Dutch Bankruptcy Act a new Section 3c is included. This Section provides that when a petition for bankruptcy is filed by a creditor (hereafter: petitioner-creditor) in the «*private preparation phase*», the district court immediately notifies the intended supervisory judge, the intended bankruptcy trustee and the debtor of this. In this respect, it is of importance to observe that the handling of the petition for bankruptcy is not suspended. This question was posed by the Rvdr, Insolad and the NOvA in the consultation.
As stated before, the purpose of an appointment of the intended bankruptcy trustee is to be able to prepare a possible upcoming bankruptcy in relative calm – i.e. before the turmoil begins - with the parties directly involved. The aim of this is to limit damage for the creditors (including the employees) and other parties involved in the possible upcoming bankruptcy as much as possible, which includes increasing the chances of a sale and subsequent relaunch of viable parts of the enterprise for the highest yield possible and while preserving as many jobs as possible (Section 363, first subsection). Practice shows that the appointment may sometimes also contribute to a solution for the financial problems being found outside of bankruptcy, through which a continuation of the enterprise can be safeguarded. As a result of the petition for bankruptcy this process may come under severe pressure. The handling of a petition for bankruptcy usually takes place within a few weeks after the petition has been filed. The granting of the petition for bankruptcy automatically leads to the end of the «*private preparation phase*» (Section 366, second subsection). If more time is required, the debtor might decide to contact the petitioner-creditor. The debtor might inform the petitioner-creditor about the preparations that are being made for the possible upcoming bankruptcy and – as the Rvdr suggested in the consultation – include him in this. This might result in the petitioner-creditor asking the district court to put its petition for bankruptcy on hold for a while. It is of importance in this respect that the debtor is swiftly informed of the petition for bankruptcy, so that he can also take swift action towards the petitioner-creditor.
If the petitioner-creditor is involved in the preparation phase, it gives him an advantage in terms of information over other creditors. This might be considered an advantage, but at the same time the intended bankruptcy trustee will thoroughly monitor any transaction that takes place in the «*private preparation phase*» between the petitioner-creditor and the debtor. The petitioner-creditor is not allowed to misuse this advantage in terms of information. This advantage may not lead, before or after the bankruptcy order, to the petitioner-creditor being favoured over the other creditors (with similar claims) because this would affect the equality of creditors. The intended bankruptcy trustee, whose duty it is in the «*private preparation phase*» to represent the interests of the joint creditors, will have to monitor this (Section 364, first subsection). It is therefore of importance that not only the debtor is informed of a petition for

bankruptcy filed, but also the intended bankruptcy trustee. The same is true for the intended supervisory judge. This information is relevant for the intended supervisory judge because he supervises the functioning of the intended bankruptcy trustee (Section 365, second subsection).
Insolad advised to stay the handling of the petition for bankruptcy, assuming that the appointment is always of short duration, so that the stay of the petition for bankruptcy would not be a problem. The appointment is indeed in principle valid for a period of fourteen days. However, in Section 363, third subsection, to be discussed later, it has been provided that this period can be extended by the district court at the request of the debtor by a period to be set by the district court. In view of this it was decided not to automatically stay the handling of the petition for bankruptcy, but to leave the decision on the stay to the petitioner-creditor. Another aspect of this is that an automatic stay of the petition for bankruptcy would mean that the petitioner-creditor would have to be informed of the reason of it; i.e. that it should be informed of the existence of a «*private preparation phase*» as a result of which the preparation is no longer private. This might in particular have disastrous consequences in cases where the preparation process is almost finished; the result pursued with the appointment of the intended bankruptcy trustee might still be lost right before the finish. Now that the petition for bankruptcy is not stayed and the fact that there is a «*private preparation phase*» therefore does not have an effect on the right of the creditors to file a petition for the bankruptcy of the debtor, nor on the period within which such a petition for bankruptcy is handled by the district court, there is no reason to require that the district court must inform the petitioner-creditor. Whether the petitioner-creditor is notified of the current «*private preparation phase*», is now therefore left to the debtor. As set out above, the debtor will have reason to do this if he expects that the intended outcome with the «*private preparation phase*» will not be realised before the handling of the petition for bankruptcy.

Part B

Section 5, first subsection, DBA

Part B provides that the request for an appointment of an intended bankruptcy trustee also falls under the category of requests that have to be submitted by a lawyer. The debtor will therefore have to be represented by a lawyer.[77] This is justified (as also stated in the consultation by Van Zanten and Schalken), because it is of importance that before submitting a request for the appointment of an intended bankruptcy trustee, the debtor is informed of, among other matters, the conditions this request must satisfy in accordance with Section 363, first subsection, and the documents that have to be submitted, before the district court can grant such a request (see the explanation of Section 363, first and second subsection).

[77] Mr. E. Loesberg, «*Hoe gaat het met de pre-pack?*», TOP 2014, 4 (309), 7 June 2014.

It is also of importance that the debtor is familiar with the legal significance of the appointment of an intended bankruptcy trustee before he files such a request. It is important, for example, that he knows:
– when the «*private preparation phase*» commences and when and how this can end (Section 366);
– what the role and the duties and powers are of the intended bankruptcy trustee and the intended supervisory judge (see section 3 of the general part of this explanatory memorandum and the explanation of the Sections 364 and 365);
– what is expected of the debtor itself, and that he will have to be informed in any event of the information obligations to which he is subject during the «*private preparation phase*» in accordance with Section 364, third subsection.

It is also of importance that the debtor knows that he continues to be responsible for its own actions: after the appointment of the intended bankruptcy trustee he will remain responsible for the management and the power to dispose of the assets belonging to the enterprise. If the debtor is a company, this therefore also means that the board of that company, to avoid later liability claims, has to continue to ascertain whether the company will be able to fulfil the obligations it assumed.
It is up to the lawyer to tell the debtor that after the appointment of an intended bankruptcy trustee it will be in a situation with different responsibilities. The debtor will have to be explained in any event, for example, that when its request is granted he will have to provide the intended bankruptcy trustee during the «*private preparation phase*», both when requested and on its own initiative, with all the information required by the intended bankruptcy trustee in the performance of his duties (Section 364, third subsection).
The involvement of a lawyer is also desirable because – as will be explained below in the context of Section 363, second subsection – the request will have to be properly substantiated. In the consultation Van Zanten observed that the involvement of a lawyer in a sense might also function as a filter and that it may prevent the district court from being confronted with cases for which the appointment of an intended bankruptcy trustee is not appropriate or with requests that are insufficiently substantiated.

Parts C, D, F, G and H

Sections 6, first subsection, and 215, fourth subsection, DBA

When the district court receives a petition or own application for bankruptcy, it will hear the relevant request in chambers (cf. Section 4 DBA). If the bankruptcy order has been petitioned in accordance with Section 1, first subsection, DBA by one or more creditors, they will be heard by the district court about the petition. Pursuant to Section 6, first subsection, DBA, the district court can also summon the debtor to be heard about the petition or own application for bankruptcy. As a result of a judgment of the Dutch Supreme Court (HR), this currently happens in almost all cases.[78] In part C it is added that when there has been a «*private preparation phase*» before the petition or own application for bankruptcy, the district court also hears the intended supervisory judge and the intended bankruptcy trustee about the petition or application. In the consultation version if this ball it was provided that the district court «*had to give*» the intended supervisory judge and the intended bankruptcy trustee «*the opportunity to be heard*». With this the initiative to be heard or not, was given to the intended bankruptcy trustee and the intended supervisory judge. The current wording is stricter; the intended

[78] Dutch Supreme Court (HR) 29 October 1982, NJ 1983,196.

supervisory judge and the intended bankruptcy trustee have to be summoned by the district court in order to be heard and not «*only*» be given the opportunity to be heard. This changed wording was the result of a suggestion made by the Rvdr in the consultation. The Rvdr recommended to be more consistent in this provision with the methodology of Section 73 DBA, which provides for the dismissal and the replacement of the bankruptcy trustee, as well as for the addition of a fellow bankruptcy trustee during bankruptcy. Within the scope of that Section a «*circle of persons to be heard*» is also relevant; before the district court decides on the bankruptcy trustee's dismissal or the addition of a fellow bankruptcy trustee in any event it hears the bankruptcy trustee and the supervisory judge (for the latter cf. Section 65 DBA) and, if necessary, the debtor and, if applicable, the creditors who filed the request for the bankruptcy trustee's dismissal. When handling a petition for bankruptcy or application, the district court has to ask itself the question who it will appoint as bankruptcy trustee and as supervisory judge. If there has been an appointment of an intended bankruptcy trustee and an intended supervisory judge before the bankruptcy, the district court will, together with the bankruptcy order, usually appoint the persons it had appointed before as bankruptcy trustee and as supervisory judge (Section 14a). As observed by the Rvdr in the consultation, objections may arise against the intended bankruptcy trustee and/or the intended supervisory judge during the «*private preparation phase*», just like during the bankruptcy. It therefore seems obvious to take the same «*circle of persons to be heard*» as in the context of Section 73 DBA during the handling of a petition or own application for bankruptcy - where the question whether the intended bankruptcy trustee and the intended supervisory judge «*can stay on*» in the bankruptcy will also have to be answered - following a «*private preparation phase*».
In the consultation the Rvdr did observe that as more time passes between the «*private preparation phase*» and the handling of the petition or the own application for bankruptcy, the less relevant the findings of the intended bankruptcy trustee and the intended supervisory judge are for the decision about the bankruptcy order. For that reason a distinction is made between:

– the cases in which *less than three months* have passed between the end of the «*private preparation phase*» and the filing of the petition for bankruptcy or own application – in which cases the intended bankruptcy trustee and the intended supervisory judge are always heard – and
– the cases in which *more than three months* have passed between the end of the «*private preparation phase*» and the filing of the petition for bankruptcy or own application – the district court may decide to hear the intended bankruptcy trustee and the intended supervisory judge, but it is not obliged to do so.

In its advice the Rvdr referred to the three-month period as a relevant time frame.
During the consultation the NVvR posed the question whether, where a petition for bankruptcy is concerned, it is intended that the intended supervisory judge, the intended bankruptcy trustee and the debtor are heard in the presence of the petitioner. This is not prescribed. Whether this is desirable in the relevant situation, is left to the district court.
The tests in practice referred to above have shown that it is also possible that a «*private preparation phase*» is not followed by a bankruptcy order, but by the granting of a suspension of payments. For those cases a regulation is included in Section 215, fourth subsection, DBA similar to the one in Section 6, first subsection, DBA; before a decision is made as to whether the petitioned suspension of payments will be definitively granted, the district court hears the intended supervisory judge and the intended bankruptcy trustee on this.

Sections 6, fifth subsection, and 218, seventh subsection, DBA

On the advice of the Rvdr, a new fifth subsection is added to Section 6 in which it is provided that when a bankruptcy order is preceded by an appointment of an intended bankruptcy trustee and an intended supervisory judge, this will be stated in the bankruptcy order. This provides – together with the final report the former intended bankruptcy trustee has to issue within seven days after the bankruptcy order in accordance with Section 366, third subsection – the desired openness to third parties at the time the bankruptcy is ordered. In this case the aforementioned comment made by the Rvdr is also of importance; i.e. that the findings of the intended bankruptcy trustee and the intended supervisory judge become less relevant for the parties involved in the bankruptcy the more time has passed between the «*private preparation phase*» and the bankruptcy order. That is the reason why, when at the time of the filing of the petition for bankruptcy or own application more than three months have passed since the revocation of the appointment (cf. Section 366, first subsection), the district court will in principle no longer mention the «*private preparation phase*» in the bankruptcy judgment. Should the district court be of the opinion, however, that it still may be relevant to third parties – in spite of the time that has expired since then – that they are informed of the fact that in the past there has been an appointment of an intended bankruptcy trustee, then it has the option to refer to this in the bankruptcy judgment. The «*private preparation phase*» may have been ended, for example, because a solution for the financial problems seemed to have been found, but the situation turns out to be untenable a little more than three months later. If the circumstances have not essentially changed in the meantime compared to those at the time of the termination of the «*private preparation phase*», the district court might come to the conclusion that it may still be of importance for the parties involved in the bankruptcy to know what happened during that phase. As stated before, a «*private preparation phase*» might also be followed by a suspension of payments being granted instead of by a bankruptcy order. That is why a sentence is added to Section 218, seventh subsection, in which an identical provision is included.

Sections 14a, 215, third subsection, and 223a, second subsection, DBA

If there has been an appointment of an intended bankruptcy trustee and an intended supervisory judge prior to a bankruptcy, the district court will usually appoint the persons it had appointed as bankruptcy trustee and as supervisory judge before in the bankruptcy order. However, in the event of changed circumstances and of the reasons for the district court to differ from its earlier appointment, the district court has the possibility in the bankruptcy to still appoint another person as bankruptcy trustee and/or appoint another member as supervisory judge at the time of the bankruptcy order. This principle is laid down in a newly inserted Section 14a of the Dutch Bankruptcy Act. In section 3 of the general part of this explanatory memorandum it has already been described that a completely failed «*private preparation phase*» – whether or not together with an improper performance of duties by the intended bankruptcy trustee and/or a toxic relationship between the debtor and the intended bankruptcy trustee – and an apparent conflict of interests that came to light after the appointment, may be reasons to appoint a «*new*» bankruptcy trustee and/or a «*new*» supervisory judge. In the explanation to the consultation version of this bill, a breach of confidence between debtor and intended bankruptcy trustee was explicitly given as an example. It should be noted in this respect, however, that a breach of confidence does certainly not always have to be a reason to appoint a «*new bankruptcy trustee*». After

all, in the «*private preparation phase*» the intended bankruptcy trustee does not act as a «*friend*» or adviser of the debtor (just like the bankruptcy trustee in the bankruptcy does not act this way toward the bankrupt debtor). As described in section 3.3.3, a breach of confidence might be a reason for the intended bankruptcy trustee to ask the district court to end his appointment as intended bankruptcy trustee. With this the «*private preparation phase*» would end (Section 366, first subsection, under a). Should a bankruptcy follow, the district court – just like the Rvdr and the NOvA observed in the consultation – is still at liberty to appoint the former intended bankruptcy trustee as bankruptcy trustee: it may indeed be that the intended bankruptcy trustee is (still) the most suitable person to wind up the bankruptcy. Section 14a gives the district court the opportunity in such a situation to appoint someone else as a bankruptcy trustee, but it has no obligation to do so.

The district court may become aware of changed circumstances on the basis of information provided to it by the intended bankruptcy trustee, the intended supervisory judge or the debtor. It is also possible that a petitioner-creditor submits information that leads the district court to conclude that there are reasons to deviate from its earlier appointment. This is one of the reasons why it is important that the intended supervisory judge, the intended bankruptcy trustee, the debtor and, if applicable, the petitioner-creditor are heard by the district court before a decision is made on the petition or own application for bankruptcy (see the explanation of the Sections 6, first subsection, and 215, fourth subsection, DBA).

If the district court in the bankruptcy eventually does not appoint the person appointed as intended bankruptcy trustee as bankruptcy trustee, but someone else, this will not immediately mean – as the NOvA observed in the consultation – that all the know-how gathered and preparations made by the intended bankruptcy trustee in the «*private preparation phase*» are lost. The former intended bankruptcy trustee, after all, leaves a final report behind which the «*new bankruptcy trustee*» will be able to subsequently use as a basis (Section 366, third subsection). The «*new bankruptcy trustee*», however, will have to familiarise himself with the bankruptcy and this will take time. The consequence may be that the outcome that was intended with the «*private preparation phase*» – a limitation of the damage for the joint creditors and other parties involved in the bankruptcy – is not achieved. In view of this, it has been provided that when a bankruptcy order is preceded by an appointment of an intended bankruptcy trustee and an intended supervisory judge, the district court usually adheres to its earlier appointment. This means that in the bankruptcy order, the district court:

– appoints the person it appointed before as intended bankruptcy trustee as bankruptcy trustee, and
– appoints the member of its district court it appointed before as intended supervisory judge as supervisory judge.

The district court will only deviate from its earlier appointment in the event of changed circumstances and which results in reasons to do so. In the consultation version of this bill, reference was still made to «*compelling reasons*». In the consultation, however, it turned out that – as a result of a remark made by the Rvdr – that the term «*compelling*» was redundant and could only cause confusion. This term was therefore deleted from the bill.

Because a «*private preparation phase*» could also be followed by the granting of a suspension of payments instead of a bankruptcy order and because in that case it is desirable – also for the aforementioned reasons – that the intended bankruptcy trustee and the intended supervisory judge are appointed as administrator and supervisory judge, respectively, a new third subsection is added to Section 215 DBA and a new second subsection is added to Section 223a DBA, in which this is provided for.

Part E

Part E provides for a subsection being added to Section 74 DBA in which the following is provided for. When there has been a «*private preparation phase*» and the intended supervisory judge or the intended bankruptcy trustee see reason to do so, the district court will set up a provisional creditors' committee at the time the bankruptcy is opened. The duty of the provisional creditors' committee is to give advice to the bankruptcy trustee – for example, about the sale of parts of the enterprise for the purpose of a relaunch – and to that end it may consult all relevant (financial) information and at any time ask the bankruptcy trustee to provide further information (Sections 76 and 77 DBA). This regulation makes it possible to inform the creditors immediately after the termination of the «*private preparation phase*» about what happened during that phase and the bankruptcy trustee can show how he – in his role as intended bankruptcy trustee – represented the interests of the creditors during that phase. Furthermore, the creditors are given the opportunity to still exercise influence on, for example, the decision-making by the bankruptcy trustee and the supervisory judge about a prepared relaunch.[79] In view of the turmoil described above, which usually follows the bankruptcy order, and the effect of that on the preservation of the value of the viable parts of the enterprise and the chances of a successful relaunch, it is important that the provisional creditors' committee and the bankruptcy trustee soon assemble at a meeting (Section 76 DBA). For that reason, the intended bankruptcy trustee and the intended supervisory judge must consider before the bankruptcy order who would have to become a member of the committee, so that the district court is provided with concrete information when it orders the bankruptcy.

Part I

Title IV «Outside of bankruptcy and suspension of payments»

After Section 362 DBA, a new Title IV «*Outside of bankruptcy and suspension of payments*» is included. As stated in section 1 of the general part of this explanatory memorandum, the legislative program also works on a regulation to enable a cram down plan outside of bankruptcy. The aim is to incorporate this regulation together with the regulation proposed in this bill in two separate sections in the new Title IV. The regulation proposed in this bill will be incorporated in a new part 4.1 (*Appointment of an intended bankruptcy trustee*). In view of the fact that both regulations have to be viewed within the context of the bankruptcy and the suspension of payments, but not within the context of the debt rescheduling scheme for natural persons, it was considered to incorporate these regulations after Title II in a new Title IIA. The proposed regulation regarding the appointment of an intended bankruptcy trustee, however, already includes five sections and expectations are that the regulation on the cram down plan outside of bankruptcy will include even more sections. If both regulations would be inserted after Title II, this would mean that the sections in Title III would have to be renumbered or that the new Title IIA would contain a large number of sections with a number and letter combination. Because neither option would produce a desired result, it was eventually decided to insert the regulations regarding the appointment of an intended bankruptcy trustee and the compulsory composition outside of bankruptcy at the end of the Dutch Bankruptcy Act in a new Title IV.

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[79] See mr. dr. R.R. Verkerk, mr. M. Windt and mr. T.L. Rozendal, «*Prepacks: transparantie en verantwoording achteraf*», Tvl 2014/40, in which such a proposal was made.

Compared to the consultation version if this bill, the order of the sections in the new section 4.1 (*Appointment of an intended bankruptcy trustee*) has been changed. On the advice of the Rvdr, it was decided to reorder the sections. In the new arrangement it is first regulated when a debtor can ask for the appointment of an intended bankruptcy trustee and in which way this request can be submitted to the district court. It is also laid down how the district court attends to such a request and when it could grant this, as well as the conditions it will (be able to) attach to it (Section 363). Subsequently the description of the duties of the intended bankruptcy trustee and of the intended supervisory judge are discussed (Sections 364 and 365). And finally, the end of the «*private preparation phase*» and the fees of the intended bankruptcy trustee and the costs of third parties he consulted will be addressed (Sections 366 and 367).

Section 363

Section 363 provides for procedural rules that determine when a debtor can ask for the appointment of an intended bankruptcy trustee and in what way this request can be made. It has also been provided how the district court attends to such a request and when it might be able to grant this request, as well as the conditions it will (be able to) attach to it.

Subsection 1

The first subsection provides the district court with the opportunity, even before a bankruptcy order and at the request of a debtor, to privately decide who it will appoint as bankruptcy trustee in the event of a bankruptcy. For this appointment the debtor has to submit a request to the district court. Compared to the consultation version of this bill – in response to a remark made by the NOvA during the consultation – it has been clarified that the request must be submitted to the district court that would be competent to attend to a petition or own application for bankruptcy related to the debtor.
The proposed regulation gives the debtor the opportunity to prepare the possible upcoming bankruptcy – under the supervision of the intended bankruptcy trustee and the intended supervisory judge – in relative calm. The debtor itself retains the management and power of disposition of the assets belonging to its enterprise. In view of the private nature of the appointment and the fact that the possible upcoming bankruptcy is always prepared on the initiative of the debtor, it has been decided to only give the debtor (and therefore no other parties) the authority to request the district court to appoint an intended bankruptcy trustee.

First sentence

The first sentence shows that with its request the debtor will firstly have to show that it is likely that there are serious financial problems. After all, it has been decided that the request should be made by «*a debtor that threatens to get into a situation in which he cannot continue to pay its debts*». In the consultation the Rvdr and the NOvA pointed out that in the consultation version of this bill a reference to the financial situation of the debtor was missing in the legislative text, while the explanation of the consultation version clearly showed that with the proposal «*a foundation was (...) offered to involve the bankruptcy trustee in an enterprise in serious financial difficulties before it is a question of bankruptcy*».

In respect of the financial situation of the debtor-petitioner it was also noted in the consultation – by the Rvdr, the NVvR, Insolad, the NOvA, van Zanten and the NVL – that a condition for the appointment of an intended bankruptcy trustee by the district court should be that the debtor demonstrates its ability to still meet the current and new payment obligations in the «*private preparation phase*» – including the fees of the intended bankruptcy trustee and the costs of the third parties he consulted, as well as tax payment obligations.[80] This is in line with the chosen criterion. This also expresses that, in order to stand a chance to be appointed as an intended bankruptcy trustee, the financial problems may not be of such nature that the debtor is already in a *de facto* bankruptcy situation (cf. Section 1, first subsection, DBA): i.e. «*in a situation where he has ceased to pay its debts* ». If this is the case, he will immediately have to apply for bankruptcy to prevent its debts from accumulating even more and a «*private preparation phase*» is no longer an option. Even when there is a (temporary) inability to pay (and therefore no longer just a threat) – which means that the debtor «*foresees that he will not be able to continue to pay its due and payable debts* » – it is actually too late for the appointment of an intended bankruptcy trustee. In such an event it stands to reason that the debtor immediately applies for a suspension of payments, while subsequently trying to find solutions for its problems within that procedure, using the instruments made available to it (Section 214, first subsection, DBA).
In line with the objective of the reorganisation pillar under the Bankruptcy Law Recalibration program, the chosen wording intends to stimulate the debtor to seek help in time in the event of imminent inability to pay and to prepare itself in time – to be able to limit the damage for creditors and other parties involved as much as possible – for a possible upcoming bankruptcy.

In the consultation the Rvdr, Insolad and the NOvA asked the question whether the debtor can still request an appointment of an intended bankruptcy trustee if a petition for its bankruptcy has already been submitted. The Rvdr was of the opinion that this should not be the case. Insolad, on the other hand, argued that a petition for bankruptcy does not have to preclude the appointment of an intended bankruptcy trustee. It was decided to follow the latter approach. When a petition for bankruptcy is pending, this means that the debtor has not (yet) paid several debts. This does not necessarily mean, however, that the debtor also effectively «*is in situation where he has ceased to pay its debts*»; the prerequisite condition for it to be declared bankrupt. In other words; a petition for bankruptcy is not automatically granted and therefore does not always result in a bankruptcy order either. If the debtor is still in the preceding phase – i.e. that «*he threatens to be in a situation in which he will no longer be able to pay its debts* » – and if also the other condition of

[80] Current tax payment obligations are defined as the tax obligations of which the initial payment term (for self-assessment taxes provided for in Section 19 of the State Taxes Act and for assessment taxes provided for in Section 9 of the Collection of State Taxes Act 1990) has not expired at the time of the commencement of the «*private preparation phase*». In the event of new tax payment obligations they are tax obligations that do not arise until after the commencement of the «*private preparation phase*». If the «*private preparation phase*» starts on 29 March 2017, for example, the turnover tax due on the first quarter of 2017 and the statutory payroll tax and social security contributions for the months February and March 2017 are to be regarded as current tax payment obligations. In such event new tax payment obligations are the turnover tax that becomes due in the second quarter of 2017 and the statutory payroll tax and social security contributions for the month of April 2017.

Section 363, first subsection, to be discussed later, has been satisfied, it should still be possible to appoint an intended bankruptcy trustee. As discussed in the explanation of part A (introduction of a new Section 3c), it does seem obvious in such event that the debtor contacts the creditor who filed the petition for bankruptcy. The debtor might inform the petitioner-creditor about the preparations he intends to make for the possible upcoming bankruptcy. The debtor might involve the petitioner-creditor and ask him to request the district court to postpone the handling of the petition for bankruptcy for a while.

Second and third sentence

In the second sentence it is determined that a request for the appointment of an intended bankruptcy trustee by the district court can only be granted when the debtor shows that it is likely that a «*private preparation phase*» – which begins with the appointment of an intended bankruptcy trustee – has «*added value*» in its specific situation. Pursuant to the third sentence this occurs when a scenario in which the possible upcoming bankruptcy is privately prepared in the relevant specific situation in such a way that an added value for the winding-up of the bankruptcy and for the parties involved is to be preferred over the scenario – and the corresponding possibilities and safeguards – of a regular (unprepared) bankruptcy. During the consultation it was pointed out in several responses – including in the response from the Rvdr, the NVB and VNO-NCW/MKB Nederland – that the proposed regulation should not lead to every bankruptcy automatically being preceded by a «*private preparation phase*». Also in view of the lack of transparency in the «*private preparation phase*» towards third parties – in particular the creditors (including suppliers and customers) and employees – it is of importance that the appointment only takes place if there is added value. In the consultation the NVB gave the example of an enterprise that, in the event of a bankruptcy order, can still be continued in bankruptcy for some time without a substantial loss in value. In such a case a «*classic relaunch*» after bankruptcy – as a result of a public sales process with competition between several potential takeover candidates – would be preferable.

In the consultation version of this bill it was provided that in its request for the appointment of an intended bankruptcy trustee the debtor had to show that it is likely that:

a) this would serve the interest of its joint creditors, or
b) societal interests – e.g. public order and safety, the continuity of the enterprise run by the debtor and the preservation of jobs for the employees in that enterprise – would be served.

The first ground – «*the interest of the joint creditors*» – has been set out more concretely. This interest consists of the bankruptcy causing the least possible damage for them. In other words: it is of importance for the creditors that in the bankruptcy the highest possible proceeds from the sale of a debtor's assets can be achieved, so that the largest possible part of their claims can be paid. As set out in section 2 of the general part of this explanatory memorandum, the appointment of an intended bankruptcy trustee *can* contribute to this. To this end it has been provided in Section 363, first subsection, third sentence, that the debtor will have to show that it is likely that «[...] *the preparation* [of the bankruptcy] *can limit*

the damage for the parties involved in a possible bankruptcy [...] *or can increase the chance of a sale of viable parts of the enterprise run by the debtor after the possible bankruptcy order* ***against the highest possible sales price*** [...]». Moreover, for the creditors it is in particular of importance that they can rely on the fact that during the «*private preparation phase*» the intended bankruptcy trustee will guard their interests. This interest has been laid down in the terms of reference of the intended bankruptcy trustee discussed in detail in section 3 of the general part of this explanatory memorandum (in Section 364, first subsection). In regards to the second ground, various responses in the consultation – including the responses from the Rvdr, Insolad, NOvA, law firm AKD and VNO-NCW/MKB Nederland – showed that this ground could be interpreted as such, that the district court, when handling the request for the appointment of an intended bankruptcy trustee, would have to give as much weight to societal interests as to the interests of the joint creditors. In the aforementioned responses, it was subsequently observed that the appointment of an intended bankruptcy trustee takes place in anticipation or in view of possible upcoming bankruptcy procedure in which this weighing of interests would have a different outcome. The bankruptcy procedure, after all, is primarily aimed at the liquidation of the assets of the debtor for the benefit of its joint creditors. According to the case law, the bankruptcy trustee may take societal interests into consideration while performing his duties in bankruptcy, but this does not mean that they – in the event of conflicting interests – should be given preference over the interests of the joint creditors.[81] Because it was not the intention to deviate from this line, it was decided to delete the second ground. The societal interests are now, just like the interests of the joint creditors, incorporated in the ground for appointment formulated in more general terms; the preparation of the bankruptcy has to have added value in the sense that «*the preparation can limit the damage for the parties involved in the possible bankruptcy*». It is very well conceivable that as part of the preparation of an imminent bankruptcy, the appointment of an intended bankruptcy trustee can prevent the specific know-how or expertise within an enterprise from being lost (unnecessarily) after the bankruptcy order. Where reference is made to «*the damage for the parties involved*», not only purely financial damage is referred to but also to other forms of damage and societal damage. An intended bankruptcy trustee can therefore also be appointed when the debtor demonstrates that the preparation of a possible bankruptcy with a view to an efficient winding-up of it, is of importance in view of interests of a societal nature. In that case it does matter, however, that during the «*private preparation phase*» the intended bankruptcy trustee ensures that the interests of a societal nature will not prevail over the interests of the joint creditors.

Subsection 2

In the second subsection it is provided that the district court will attend to the request, which has to be filed with the court registry, in chambers. This is in line with the practice regarding the handling of the petition or own application for bankruptcy. In accordance with Section 4, first subsection, DBA, the hearing in chambers is common practice for the petition or own application for bankruptcy, because the interest of the debtor will in

[81] Dutch Supreme Court (HR) 24 February 1995, NJ 1996/472 (*Sigmacon II*); Dutch Supreme Court (HR) 19 April 1996, NJ 1996/727 (*Maclou*); Dutch Supreme Court (HR) 19 December 2003, NJ 2004/293 (*Mobell/Interplan*) and Dutch Supreme Court (HR) 19 December 2011, NJ 2012/515 (*Prakke/Gips*).

general be in conflict with a public hearing. The same applies to a request for the appointment of an intended bankruptcy trustee. For submitting the request for the appointment of an intended bankruptcy trustee the debtor will have to pay a court fee. He will be charged the fee for cases of unspecified value. At present this is €285 for natural persons and €613 for legal entities (see the annex to the Court Fees (Civil Cases) Act).
The district court decides on the request in an order. In the consultation version of this bill a provision was included in which it was prescribed that the order would not be made public. The NVvR made some critical comments in this respect. It might be concluded from this provision that the order would not be delivered in public, which would be in conflict with Section 122 of the Constitution. Following the advice of the Advisory Committee on Civil Procedural Law, it was decided to strike this provision. This means that in regards to the public nature of the order, the standard rules of civil procedural law and in particular Section 28 of the Code of Dutch Civil Procedure are followed. In the first subsection of that Section it is provided that the order is delivered in public. In modern-day practice, however, this does not mean that decisions are pronounced in public; usually the public does not show any interest at all. It follows from the case law of the European Court of Human Rights that other ways of making judgments public are also permissible (cf. ECtHR 8 December 1983, 7984/77, Pretto, ECtHR 8 December 1983, 8273/78, Axen and ECtHR 22 February 1984, 8209/78, Sutter). Usually a judgment is pronounced by the bailiff and a copy of the judgment is sent to the parties involved. Section 28, second subsection, of the Code of Dutch Civil Procedure, moreover, provides that the court clerk in principle provides a copy of judgments and orders at the request of anyone. He may not do so, however, if he believes that the provision of a copy should be refused in whole or in part in order to protect substantial interests of others, including those of parties involved. In view of the interest for the debtor in the private nature of the appointment, the latter will almost always be the case in the event of an order to appoint an intended bankruptcy trustee.[82]
The district court will give a positive decision on the request if prima facie evidence supports the existence of facts or circumstances, which show that the conditions for the appointment as laid down in the first subsection have been met. «*Prima facie evidence*» means that after a brief but critical study – as underlined by VNO-NCW/MKB in the consultation – the district court should be able to establish whether the conditions specified in the first subsection have been met and whether there is therefore reason to proceed to appoint an intended bankruptcy trustee. To enable the district court to carry out this study, the debtor will have to properly substantiate its request and – as emphasised in the consultation by the Rvdr – will also have to provide it with underlying documents. With this the district court is also enabled to check the availability of the information the intended bankruptcy trustee will need in the performance of his duties, in the event of an appointment. Now that this bill provides for a framework regulation, the district courts are offered room to develop a joint policy regarding the information to be involved in the request. In the consultation the Rvdr announced that the national consultative body of supervisory judges in bankruptcies and suspensions of payments which presently periodically adopts the «*Guidelines for bankruptcies and suspensions of payments*» (the Recofa) will develop a questionnaire for this. At present several

[82] See in this context also: mr. R.R. Verkerk and mr. R.A. Woutering, «*De openbaarheid van de civiele procedure*», TCR 2013/3.

district courts are already using such a questionnaire. The questionnaire urges the debtor to submit information on the basis of which the district court can swiftly gain insight into the financial situation of the enterprise and can assess whether the appointment has added value. The debtor is asked, among other matters, to demonstrate that the administration of the enterprise run by it has been organised in such a way, that insight into the rights and obligations of the enterprise can easily be obtained. The debtor is also asked for the most recent three financial statements and whether he filed them (on time), as well as for an up-to-date profit and loss account and a short-term cash flow forecast. The latter is of importance because, among other matters, on the basis of this the district court can establish whether the debtor is still able to pay current and new payment obligations – including the fees of the intended bankruptcy trustee and the costs of third parties to be consulted by him, as well as tax payment obligations.[83] The district court also asks whether legal proceedings are pending, whether attachments have been levied and whether the bank and other security holders, if any, are aware of the filing of the request for the appointment of an intended bankruptcy trustee. The debtor is also asked to specify the actions he has taken to solve the financial problems and if, for example, the works council or a trade union have also been involved. If the appointment is requested with a view to a possible relaunch, the debtor has to inform the district court about the efforts it has made in this respect; i.e. that he is asked whether a market research has been carried out and whether there are any potential takeover candidates. The district court also asks who – i.e. which advisers and which potential buyers or interested parties – have been involved in this process so far. If appraisal reports have been drawn up, the debtor is asked to submit these reports. In the second sentence of the second subsection, it is provided that in its order the district court states the «*added value*» of the «*private preparation phase*» put forward by the debtor. As stated in section 3 of the general part of this explanatory memorandum, with this the district court determines the purpose of the «*private preparation phase*» and also the mandate of the intended bankruptcy trustee. The «*added value*» referred to was decisive in the decision of the district court to admit the debtor to the «*private preparation phase*». It is possible, however, that the intended bankruptcy trustee and/or the intended supervisory judge begin to have doubts during the «*private preparation phase*» – on the basis of the information available at that time – about the question whether there is still «*added value*», or whether in fact there has ever been «*added value*». In such event the intended bankruptcy trustee and/or the intended supervisory judge may ask the district court to review this again (Section 366, first subsection, part a). In this respect the Sections II and III are also of importance. If the board or the *de facto* directors of the enterprise run by the debtor provided incorrect information with respect to the added value of the preparation of the bankruptcy, and if the result of this was that the debtor was wrongly admitted to the «*private preparation phase*», in

[83] Current tax payment obligations are defined as the tax obligations of which the initial payment term (for self-assessment taxes provided in Section 19 of the State Taxes Act and for assessment taxes provided in Section 9 of the Collection of State Taxes Act 1990) has not expired at the time of the commencement of the «*private preparation phase*». In the event of new tax payment obligations they are tax obligations that do not arise until after the commencement of the «*private preparation phase*». If the «*private preparation phase*» starts on 29 March 2017, for example, the turnover tax due on the first quarter of 2017 and the statutory payroll tax and social security contributions for the months February and March 2017 are to be regarded as current tax payment obligations. In such event new tax payment obligations are the turnover tax that becomes due in the second quarter of 2017 and the statutory payroll tax and social security contributions for the month of April 2017.

the subsequent bankruptcy the bankruptcy trustee may hold these persons liable for the resulting damage (cf. Sections 2:138 or 248 DCC). He may also ask the court to impose a civil director disqualification on the persons concerned. This is made possible in the Sections II and III.

Subsection 3

It follows from the third subsection that if the district court decides to grant the request for the appointment of an intended bankruptcy trustee, it will attach a maximum term of two weeks to the appointment. This term may subsequently be extended by the district court at the request of the debtor with a term set by the court. To this end the debtor has to submit a request to the district court. He will have to do this before the term attached to the appointment at that time expires.
In the consultation version of the bill it was still left to the district court to decide whether or not to attach a term to the appointment and the supervisory judge was given the authority to extend this term at the debtor's request. The provision has been adjusted in the sense that setting a deadline for the appointment is now the starting point and that the district court decides on the possible extension of that deadline. Initially the appointment is valid for a maximum period of two weeks. In this respect the advice of the Rvdr, law firm AKD and the NVL, among others, was followed. They also pointed out that by attaching a term to the appointment, the risk of claims for (new) creditors (including suppliers, customers and employees) being left unpaid, is reduced. Contrary to this advice, however, it was decided that the term could be extended by the district court not just once but several times, and the term can be determined by the district court (this term may be shorter or longer than two weeks). This was done in response to a comment made by Insolad in the consultation. Insolad argued that setting a deadline may also have a depressing effect on prices. By determining that several extensions are possible, this risk is reduced.
As proposed in the consultation by the Rvdr and Van Zanten it has been explicitly prescribed in the third subsection that the district court can only grant a request for the extension of the term if the conditions for the appointment in accordance with the first subsection, are still met; this means – in brief – that the appointment 1) must have added value and 2) the interest for which the appointment took place has to be served by an extension of the «*private preparation phase*». In view of the importance for (new) creditors (including suppliers, customers and employees) to reduce the risk, as referred to above, the debtor must also still be able to pay its current and new payment obligations.[84] The more time progresses, the more difficult it will become to pass this test. After the expiry of the first term of two weeks, for example, the monthly recurring moment when overhead costs – e.g. the salaries and the rent of the business premises – have to be paid will soon come in sight and with that also the risk for the debtor that he will no longer be able to meet these payment obligations. Furthermore, with the appointment of an intended bankruptcy trustee the debtor has been given a new payment obligation; i.e. the fees of the intended bankruptcy trustee.
As proposed in the consultation by the Rvdr and Insolad, it has been determined that the district court will ask the intended bankruptcy trustee and the intended supervisory judge for information before it decides on the request for an extension.

[84] Mr. M.J. Cools, «*Een doorstart in voorverpakking*», FIP 2013/8.

Because the request for an extension is so closely linked to the initial request for the appointment of an intended bankruptcy trustee and is also made shortly after the initial request, the debtor does not have to pay another court fee for submitting this request.

Subsection 4

In accordance with the fourth subsection, the district court may attach conditions to both the appointment and to the extension of the term applicable to this appointment, when it considers this necessary:
– to achieve the intended purpose of the appointment;
– to strengthen the position of the intended bankruptcy trustee, or
– for the representation of the interests of the employees employed by the debtor.

In regards to the latter ground, it was stated in section 3 of the general part of the explanatory memorandum that the district court might set as a condition that, for example, the works council or the staff representation be involved – subject to secrecy – in the «*private preparation phase*». If the appointment is requested for the preparation of a possible sale and subsequent relaunch of viable parts of the enterprise, the district court might set conditions to ensure that the best price is realised in the event of a sale. It might require from a debtor, for example, that this debtor submits a more detailed plan to the intended bankruptcy trustee for the rescue of the viable parts of the enterprise within a specific term.

Subsection 5

As stated before, one of the conditions for the appointment is that the debtor must still be able to pay the current and new payment obligations – including the fees of the intended bankruptcy trustee and the costs of the third parties he consulted, as well as tax payment obligations (see the explanation of Section 363, first and second subsection)[85]. In Section 367, which prescribes that the debtor has to pay the fees of the intended bankruptcy trustee and the costs of third parties he consulted, this is indeed taken as a starting point. In accordance with Section 363, fifth subsection, the district court may also attach the condition of the provision of security for the payment of these costs to the appointment of an intended bankruptcy trustee.

Subsection 6

In section 5 of the general part of this explanatory memorandum it has been set out that the decision to submit a request for the appointment of an intended bankruptcy trustee to the district court on the basis of statutory law does not fall under the category of resolutions for which the board of a private company with limited liability or a public limited company require the approval the general meeting.

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[85] Current tax payment obligations are defined as the tax obligations of which the initial payment term (for self-assessment taxes provided for in Section 19 of the State Taxes Act and for assessment taxes provided for in Section 9 of the Collection of State Taxes Act 1990) has not expired at the time of the commencement of the «*private preparation phase*». In the event of new tax payment obligations they are tax obligations that do not arise until after the commencement of the «*private preparation phase*». If the «*private preparation phase*» starts on 29 March 2017, for example, the turnover tax due on the first quarter of 2017 and the statutory payroll tax and social security contributions for the months February and March 2017 are to be regarded as current tax payment obligations. In such event new tax payment obligations are the turnover tax that becomes due in the second quarter of 2017 and the statutory payroll tax and social security contributions for the month of April 2017.

In the sixth subsection it is prescribed that a provision in the articles of association that deviates from this – and in which it is therefore provided that for submitting a request for the appointment of an intended bankruptcy trustee the approval of the general meeting is required – is void.

Subsection 7

The seventh subsection provides that an intended bankruptcy trustee will not be appointed when the relevant request has been submitted by:
a) a debtor being a natural person who does not conduct an independent profession or business;
b) a bank as referred to in Section 212g, first subsection, DBA, or
c) an insurer as referred to in Section 213 DBA.
This is in line – as was suggested in the consultation by the Rvdr – with Section 214, fourth subsection, DBA in which the same restrictions have been included regarding the scope of the regulation in the context of the suspension of payments.
Debtors who do not conduct an independent profession or business are excluded because the proposed regulation is only designed for enterprises. Specific insolvency proceedings are applicable to banks and insurers, as laid down in the parts 1.11AA and 1.11B of the Dutch Bankruptcy Act, respectively. The regulation proposed in this bill is not suitable to be applied to such insolvency proceedings.
There are no other restrictions on the scope of the regulation: it is applicable to all enterprises, irrespective of the activities they perform or their legal form. The regulation can also be applied in the case of an enterprise that operates in the semi public sector.

Subsection 8

The eighth subsection provides that there is no legal remedy against the decision of the district court on a request for the appointment of an intended bankruptcy trustee or a request for the extension of the term applicable to this appointment. In response to comments made by the NVvR, Insolad and the NOvA in the consultation, it has been clarified in the text that this applies to both the rejection and the granting of the request and that not only appeal is excluded, but every other legal remedy as well.

Section 364

Section 364 includes more details on the role and of the duties and powers of the intended bankruptcy trustee. For a more conceptual description of this, reference is made to section 3 of the general part of this explanatory memorandum.

Subsection 1

In the first subsection the role and the duties of the intended bankruptcy trustee are addressed.

First part of the sentence

In the first part of the sentence, it has been provided in terms of the role of the intended bankruptcy trustee that in order to achieve the objective in view of which the debtor requested the appointment, he is to be involved in the preparation of a possible bankruptcy. This means that this provision must be read in conjunction with Section 363, first subsection, second sentence, and that the involvement of the intended bankruptcy trustee is

therefore desirable for the purposes of a preparation of a possible upcoming bankruptcy initiated by the debtor. In this respect it is also of importance that this preparation is intended to limit the damage for the parties involved in the possible upcoming bankruptcy – including in particular the joint creditors – and, if applicable, to increase the chances of a sale of viable parts of the enterprise run by the debtor after the possible bankruptcy order at the highest possible price while preserving as many jobs as possible.
The second part of the sentence explicitly provides that in the «*private preparation phase*» it is the intended bankruptcy trustee's duty to represent the interests of the joint creditors. As described in section 3 of the general part of this explanatory memorandum, more responsibility falls on the intended bankruptcy trustee in the performance of this duty than on the bankruptcy trustee in bankruptcy because of the lack of transparency in the «*private preparation phase*». Because the preparation phase takes place privately, the creditors and other parties involved in the possible upcoming bankruptcy – unless they are involved in this – cannot represent their own interests in this respect. They should be able to rely on the intended bankruptcy trustee to do this for them during the «*private preparation phase*».

In the consultation the Rvdr recommended to expressly include the role of the intended bankruptcy trustee in the Act, in order to define the statutory outlines within which the intended bankruptcy trustee functions and to provide a statutory basis for the framework for assessing whether an intended bankruptcy trustee properly performs his duties. In this context the order of the district court in which it appoints the intended bankruptcy trustee, is also relevant. As described in section 3 of the general part of the explanatory memorandum the district court demarcates the preparation phase by explicitly stating in its order the «*added value*» that the «*private preparation phase*» has according to the debtor in its specific situation. With this it is immediately clear for the intended bankruptcy trustee and the intended supervisory judge at the start of that phase what the purpose of the preparation phase is and with it the district court also determines the mandate of the intended bankruptcy trustee (Sections 363, second subsection, 364, first subsection, and 365, second subsection).
The intended bankruptcy trustee is therefore involved in the preparation of the possible upcoming bankruptcy and, if applicable and on the debtor's initiative, the process of searching for potential takeover candidates for viable parts of the enterprise. What this involvement concretely entails has been specified in section 3 of the general part of this explanatory memorandum.
The second subsection of Section 365 of the consultation version of this bill still provided for a provision on the basis of which the debtor could ask the intended bankruptcy trustee to give his opinion on whether the performance of specific acts would be acceptable or useful as far as he was concerned. The main question was whether the intended bankruptcy trustee could indicate how likely it would be that as the bankruptcy trustee in the bankruptcy he:
– would nullify legal acts – e.g. taking out an emergency loan against the provision of security – on the basis of the Sections 42 to 47 DBA, or
– would want to carry out a sale of assets prepared by the debtor prior to the bankruptcy order on the basis of Section 101 DBA.

The provision was related to the wish of debtors who request the appointment of an intended bankruptcy trustee, to obtain as much certainty as possible at the earliest possible opportunity on the question whether the preparations that they make for the purposes of the possible

upcoming bankruptcy can also count on the consent of the (future) bankruptcy trustee in that bankruptcy.
In the consultation this provision was criticised by the Rvdr, the NVvR, Insolad and the NOvA, for various reasons. It was noted, for example, that the possibility for the intended bankruptcy trustee to issue such statements did not seem to be fully consistent with the restrained and observing role assigned to the intended bankruptcy trustee in the consultation version of this bill. It was also argued that in the «*private preparation phase*» – because of its private nature – the intended bankruptcy trustee would only be able to base himself by information provided by the debtor. This might only give him a limited impression of the situation and he would therefore not enable him to make such statements. Also the fact that there will usually be a severe time pressure, might be an obstacle.[86] Because of the risk of later liability claims, intended bankruptcy trustees would not want to wish to make such statements. With this, intended bankruptcy trustees would also commit themselves in some way and it would hinder them later in the performance of their duties as bankruptcy trustee in the bankruptcy. If intended bankruptcy trustees were prepared to make statements, such statements would only lead to false certainty; there is no definite answer to whether or not legal acts would have to be nullified on the basis of the Sections 42 to 47 DBA or whether the prepared sale of parts of the enterprise after the bankruptcy order will be effectuated. In the consultation only the NVB expressed itself in a positive way regarding the provision specified above on account of the aspect of obtaining certainty on the preparations that are made prior to the possible bankruptcy.
As a result of the comments referred to, it was decided not to take over the provision as included in Section 365, second subsection, of the consultation version of this bill. This raises the question as to how the debtor will be provided with the certainty he requires. As set out above, the duty of the intended bankruptcy trustee in the «*private preparation phase*» is to represent the interests of the joint creditors (including the interests of suppliers, customers and employees). This means that while the debtor is making preparations, the intended bankruptcy trustee keeps a critical eye on things and makes inquiries about the course of events within the enterprise and that the intended bankruptcy trustee calls the debtor to account when the debtor wishes to carry out transactions or acts that are not in the interest of the joint creditors, so that the debtor itself adjusts its preparation phase. The debtor might conclude from this that he is «*on the right track*» when the intended bankruptcy trustee does not make any adjusting comments. If the intended bankruptcy trustee does make such comments, the debtor knows that it would be wise to adjust its preparation phase accordingly.

Subsection 2

The second subsection underlines the independent position of the intended bankruptcy trustee as described before in section 3 of the general part of this explanatory memorandum, so that he can represent the interests of the joint creditors (including the interests of suppliers, customers and employees). It is provided that the intended bankruptcy trustee – although the debtor pays his fees (cf. Section 367) – is not obliged to follow instructions of the debtor or of one or more creditors. Another provision in which the independent position of the intended bankruptcy trustee is reinforced, is found in Section 363, fifth subsection.

[86] Prof. mr. F.M.J. Verstijlen, «*Pre-packing in the Netherlands*», NJB 2014/803.

To avoid financial dependence on the intended bankruptcy trustee, this provision prescribes that for the payment of the fees of the intended bankruptcy trustee and the costs of third parties he consulted, the district court may attach the condition of provision of security to the appointment. During the «*private preparation phase*» the intended bankruptcy trustee is accountable to the intended supervisory judge (Section 365, third subsection). After the end of the appointment, the former intended bankruptcy trustee must issue a final report of his findings within seven days and file this with the court registry. If the appointment ends with the bankruptcy order of the debtor or with it being granted the extension of suspension of payments, the report will also be made publicly available for inspection free of charge (Section 366, third and fourth subsection). With this the intended bankruptcy trustee in fact accounts for his own actions afterwards in the «*private preparation phase*» to all parties and in particular to the creditors.

Subsection 3, 4 and 5

In the consultation the NOvA observed that the intended bankruptcy trustee, to be able to properly fulfil his role for the purposes of the preparation of a possible upcoming bankruptcy and his corresponding duty as advocate of the interests of the joint creditors, must have all the required information at his disposal.[87] Also in relation to this, in Section 364, third subsection, the debtor's obligation to provide information to the intended bankruptcy trustee, has been tightened compared to the consultation version of the bill. It is provided that the debtor has to provide the intended bankruptcy trustee, both when requested and on his own initiative, with all required information. The intended bankruptcy trustee is therefore authorised to ask the debtor for all the information that he needs and the debtor is obliged to comply with this request. In accordance with the fourth subsection, the intended bankruptcy trustee may, with the debtor's permission, also ask third parties for information or ask experts to carry out an investigation.
In view of the private nature of the appointment and the fact that the appointment does not change the debtor's power of management and disposition, Section 364, fifth subsection, prescribes that the intended bankruptcy trustee will treat the information obtained in confidence and will only share this information with third parties when he has been given permission to do so by the debtor.
As observed before in section 3 of the general part of this explanatory memorandum, the debtor plays an important part in the provision of information to the intended bankruptcy trustee. This may be reason to assume that there is confidence between the intended bankruptcy trustee and the debtor. If this is not (or no longer) the case – if, for example, it became clear that the debtor did not fully inform the intended bankruptcy trustee – this might lead (but not necessarily so) to the stepping down of the intended bankruptcy trustee. The proposed Section 366, first subsection, provides for the possibility of revocation of the appointment on the recommendation of the intended bankruptcy trustee or the intended supervisory judge, or at the request of the debtor.

Section 365

Section 364 includes details of the role and of the duties and powers of the intended supervisory judge. For a more conceptual description of this, reference is made to section 3 of the general part of this explanatory memorandum.

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[87] Mr. J.M. Hummelen, «*Het verkoopproces in een pre/packaged activatransactie*», Tvl 2015/2.

Subsection 1

The first subsection provides that when the district court decides to grant a request for the appointment of the intended bankruptcy trustee, it also appoints one of its members who, in the event of a bankruptcy order, will be appointed as supervisory judge. It seems logical that an intended supervisory judge is appointed because in the possible bankruptcy the bankruptcy trustee will manage the bankrupt estate under the supervision of the supervisory judge. For all private transactions, moreover, that the bankruptcy trustee would wish to carry out in bankruptcy – including a private sale of parts of the enterprise –, he will first have to be given permission by the supervisory judge (cf. the Sections 101, first subsection, and 176 DBA). Another reason why the involvement of the intended supervisory judge is also desirable in the «*private preparation phase*» is that in that phase the intended supervisory judge will have a supervisory role. In this manner – as also stated by the Rvdr and the NVB in the consultation – the lack of transparency towards third parties and in particular the creditors (including the employees), can be overcome.

Subsection 2 and 3

The second subsection includes a description of the duties of the intended supervisory judge. In the consultation it was recommended by the Rvdr, the NVvR, the NOvA, the NVB and others, to specify the role of the intended supervisory judge in further detail in both the Act and in the explanatory memorandum. It was decided to follow this advice.
It is provided in the Act that the intended supervisory judge supervises the functioning of the intended bankruptcy trustee (Section 365, second subsection). As noted in section 3 of the general part of this explanatory memorandum, the intended supervisory judge monitors the preparation phase with a critical eye and he supervises the functioning of the intended bankruptcy trustee during the «*private preparation phase*» in order to compensate the lack of transparency for the creditors and other parties involved in the enterprise run by the debtor. Because the preparation phase takes place privately, the creditors – unless they are involved in this – cannot represent their own interests themselves. For this they depend on the actions of the intended bankruptcy trustee. Because of the private nature of the «*private preparation phase*» the creditors also do not have the possibility, in contrast to what is the case in bankruptcy, to ask the supervisory judge via Section 69 DBA to intervene in the policy of the intended bankruptcy trustee. The creditors must be able to rely on the fact that the intended supervisory judge oversees that the intended bankruptcy trustee competently protects their interests (Section 365, second subsection) on his own accord.
Apart from that, the intended supervisory judge – just like the intended bankruptcy trustee – also acts as an informer for the district court when it has to take a decision about the extension of the duration of the appointment (Section 363, third subsection), the revocation of the appointment (Section 366, first subsection) or the replacement of the intended bankruptcy trustee by someone else or the addition of one or more fellow intended bankruptcy trustees (Section 366, first subsection).
To enable the intended supervisory judge to perform his supervisory duty, it is provided for in Section 365, third subsection, that the intended bankruptcy trustee regularly reports his findings to the intended supervisory judge. The intended supervisory judge may also at any time order the appearance of the intended bankruptcy trustee in person and the intended bankruptcy trustee is obliged to provide all the information the intended supervisory judge requires. On the advice of the Rvdr, this provision was adopted from the draft bill for an Insolvency Act of 2007 of

the Kortmann Commission (Section 7.2.4 of the draft bill).[88] This draft bill includes a regulation for the appointment of a silent administrator (part 7.2). Although another purpose is intended with this regulation – i.e. providing an opportunity for help and assistance to a debtor to sort things out under the professional supervision of a «*silent administrator*» and to avoid an insolvency – the provision in which it is laid down on how the «*silent administrator*» has to account for his actions is also very useful in the context of this bill.

Section 366

In Section 366 it is prescribed how and when the appointment ends – and, consequently, the «*private preparation phase*» – and what the consequences are of that.

Subsection 1

In accordance with the first subsection the appointment of the intended bankruptcy trustee can be revoked by the district court before the relevant term has expired. In Section 364, first subsection of the consultation version of this bill, reference was still made to the «*release of the intended bankruptcy trustee from his duties*». In the «*private preparation phase*», however, the intended bankruptcy trustee's primary duty is – for the representation of the interests of the joint creditors and of other parties involved – to monitor the preparation phase with a critical eye and to prepare himself for the possible upcoming bankruptcy. In the consultation Insolad observed that the chosen terminology was incongruent and recommended to replace this by the more neutral term «*revocation of the appointment*». The provision was adjusted as a result.
It was also decided that the district court can also replace the person appointed as intended bankruptcy trustee by someone else (hereafter: replacement of the intended bankruptcy trustee) or that it can appoint one or more fellow intended bankruptcy trustees. In the consultation the Rvdr and Van Zanten advised, regarding the possibility to extend the term of the appointment (cf. Section 363, third subsection), to explicitly lay down in the Act that the district court will only be able to grant a request for such an extension when the conditions that are set for the appointment in accordance with Section 363, first subsection, are still satisfied; this means – in brief – that [1)]the appointment 1) still has to have added value and 2) the debtor must still be able to pay its current and new payment obligations. In Section 363, third subsection, this advice was followed and it was added that the debtor must also still be able to meet current and new payment obligations. It was decided to set the same conditions for a request for the replacement of the intended bankruptcy trustee or for the appointment of one or more fellow intended bankruptcy trustees.
If a request for the revocation of the appointment, for the replacement of the intended bankruptcy trustee or for the appointment of one or more fellow intended bankruptcy trustees, is submitted by the debtor, the debtor does not have to pay a court fee for this. The reason for this is that the debtor already paid a court fee when he submitted the initial request for the appointment of an intended bankruptcy trustee. This later request is closely connected with this and for that reason another court fee is unnecessary. Creditors – who have not yet paid a court fee – do have to pay a court fee when they submit the request. At present this is €285 for natural persons and €613 for legal entities (see the annex to the Court Fees (Civil Cases) Act).
A reason for the revocation of the appointment or the replacement of the

[88] http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2007/11/21/voorstel-commissie-kortman-voorontwerp-insolventiewet.html.

intended bankruptcy trustee might be a breach of confidence between debtor and intended bankruptcy trustee. In the consultation Van Zanten and Schalken identified a possible cause of such a breach of confidence; the debtor does not respond to «*comments*» made by the intended bankruptcy trustee and still intends to carry out transactions or actions that are not in the interest of the joint creditors or the debtor fails to comply with its obligation to provide information in accordance with Section 364, third subsection. As observed in the consultation by the Rvdr, the NOvA and by Schreurs, it should in this respect be noted, however, that a breach of confidence does not always have to be the reason to revoke the «*appointment*». In the aforementioned situations it may still be in the interest of the joint creditors that the intended bankruptcy trustee continues to be involved and continues to monitor. In the consultation VNO-NCW/MKB Nederland correctly stated that the deciding factor is whether the appointment is still in the interest of the joint creditors. Another reason for the submission of a request for the revocation of the appointment may actually also be that the debtor has since found a solution for its financial problems outside of bankruptcy. The revocation of the appointment – except for the case where the financial problems have since been solved – has far-reaching consequences. After all, the result is that it is very likely that the intended outcome of the «*private preparation phase*» will not be achieved. Also for that reason it is of importance that the district court, before it takes a decision on whether or not to revoke the appointment, always hears the intended supervisory judge and the intended bankruptcy trustee about this first. The district court also has to give the debtor and, if the request has been submitted by a creditor, the creditor, the opportunity to be heard. If the request for the revocation of the appointment was prompted by the circumstance that there has been a breach of confidence between the intended bankruptcy trustee and the debtor, the hearing might give the district court the opportunity to still restore the relationship between the intended bankruptcy trustee and the debtor. The fact that the intended supervisory judge and the intended bankruptcy trustee are always heard, is also related to their role in the «*private preparation phase*» (see in this respect section 3 of the general part of this explanatory memorandum and the explanation of the Sections 364 and 365).

Subsection 2

The second subsection provides that the appointment ends by operation of law as a result of the expiration of the term attached to the appointment or as a result of the debtor being declared bankrupt or being granted the extension of provisional suspension of payments. The latter logically follows from the fact that as of that moment the intended bankruptcy trustee and the intended supervisory judge will usually be bankruptcy trustee or administrator and supervisory judge in the bankruptcy or in the suspension of payments, respectively, and will in that capacity perform the duties they have in accordance with the Titles I and II of the Dutch Bankruptcy Act. This is, as far as the bankruptcy trustee and the administrator are concerned, only different when the district court decides in the bankruptcy order that he will not follow its earlier appointment and appoints a «*new bankruptcy trustee*» or a «*new administrator*» (see in this respect the explanation of parts D to G).

Subsection 3 - 5

A significant consequence of the termination of the appointment is the obligation of the former intended bankruptcy trustee to issue a final report about his findings in the «*private preparation phase*» within a period of seven days (Section 366, third subsection). As noted before in section 4 of the general part of this explanatory memorandum, this report provides full information afterwards to third parties and in particular to the creditors about what happened shortly before the bankruptcy order.
In the third subsection of Section 364 of the consultation version of this bill, it was still provided that the former intended bankruptcy trustee had to issue a report «*immediately*». Following on from the advice of the Rvdr and of Schalken in the consultation, a fixed term of seven days is now specified. If the former intended bankruptcy trustee fails to issue his report within that term he may ask the district court for an extension of the term.
In the consultation the Rvdr observed with respect to the contents of the report that the intended bankruptcy trustee will at least have to include the following in his report:

– the situation of the enterprise as he found it,
– the plan of action as proposed by the debtor,
– if there has been (a preparation of) a sale and relaunch of parts of the enterprise shortly after the bankruptcy order; the sales process and the (substantiated) choice for the takeover candidate.

In the consultation the Rvdr announced that the Recofa will draw up more detailed guidelines and/or a model for the final report, after the example of the «*Statement of Insolvency Practice 16*» applicable in England.[89] Insolad has since taken the initiative to produce a manual for the mode of operation by an intended bankruptcy trustee (in the form of practice rules based on «*best practices*»). In these practice rules, detailed attention is also paid to the contents of the final report to be issued after the end of the «*private preparation phase*» by the former intended bankruptcy trustee.[90] Now that the people and organisations in the field themselves have produced a further substantiation of the obligation for the former intended bankruptcy trustee to issue a final report, the legislator does not have to do this for now. Should this be different in the future, the third subsection provides for the possibility to lay down additional rules concerning the contents of the report by governmental decree.
The final report has to be filed with the court registry where it is publicly available for inspection free of charge, but – considering the private nature of the appointment – not until after the debtor has been declared bankrupt or after he has been granted a suspension of payments. This means that when the involvement of the intended bankruptcy trustee ends because the debtor succeeded to find a solution for its financial problems outside of bankruptcy, the final report will not be made public. If, however, a bankruptcy or a suspension of payments still follows within three months, the court registry will still make the final report publicly available for inspection. As the Rvdr noted in the consultation, the findings of the intended bankruptcy trustee become less relevant to third parties as more time has passed between the end of the «*private preparation phase*» and

[89] http://www.icaew.eom/~/media/Files/Technical/Insolvency/regulations-and-standards/sips/england/sip-16-e-and-w-pre-packaged-sales-in-administrations.pdf.
[90] See the rules 9.1 - 9.4 of the practice rules that can be found at: https://static.basenet.nl/cms/105928/website/praktijkregels-beoogd-curaror.pdf. See also mr. R. Mulder, «*De Pre-pack: Verkoop en voortzetting in stilte, verantwoording in het openbaar. Een bespreking van de concept praktijkregels van Insolad*», Tvl 2015/5.

the bankruptcy order or the granting of suspension of payments. The court registry therefore *does no longer have to* make the final report publicly available for inspection when more than three months have passed. Should, however, the district court be of the opinion that – in spite of the time that has passed since then – it may still be relevant to third parties to inspect the final report, it may decide that the final report is still made available for inspection at the court registry (Section 366, fourth and fifth subsection).

Subsection 6

In the sixth subsection it is provided that there is no legal remedy against the decision of the district court on a request for revocation of the appointment, for the replacement of the intended bankruptcy trustee or for the appointment of one or more fellow intended bankruptcy trustees. This is in line with Section 363, seventh subsection, which provides that there is also no legal remedy against the decision of the district court on a request for the appointment of an intended bankruptcy trustee or the extension of the term applicable to this appointment. In the consultation the NVvR observed that this provision was still missing here.

Section 367

This Section provides for the payment of the intended bankruptcy trustee and of the third parties he engaged. As noted before, one of the conditions for the appointment is that the debtor must still be able to pay the current and new payment obligations, including the fees of the intended bankruptcy trustee and the costs of the third parties he consulted (Section 363, first and second subsection). Section 367 does indeed take this as a basis.
In the third subsection of Section 367 of the consultation version of this bill, it was still provided that if the debtor was to be declared bankrupt before the fees of the intended bankruptcy trustee and the costs of third parties he engaged would have been paid, the fees and these costs would be paid as general bankruptcy costs as referred to in Section 182 DBA. Now that it has been provided, however, that there will be no appointment when the debtor is unable to pay these costs and the district court may also attach the condition to the appointment of an intended bankruptcy trustee that security be provided for the payment of these costs, this provision has become redundant.

Sections II and III

Sections II, part A, and III

The Sections II, part A, and III include a regulation to prevent the «*private preparation phase*» from being used on improper grounds. Firstly, Section 2:138 subsection 1 and Section 248 subsection 1 of the Dutch Civil Code will be amended. It is provided that when it becomes evident in the «*private preparation phase*» or during the subsequent bankruptcy that the board or the *de facto* directors of the enterprise run by the debtor deliberately provided false information about the added value of the preparation of the bankruptcy in their request for the appointment of an intended bankruptcy trustee with the aim of using the preparation phase for spurious reasons, it is assumed that they improperly performed their duties and it is presumed that the improper performance of duties is a major cause of the bankruptcy. As a result of this, it becomes easier to recover the damage resulting from the use of the «*private preparation phase*» on improper grounds from the board or the *de facto* directors.
It will also be possible for the bankruptcy trustee in the bankruptcy

following the «*private preparation phase*» and for the Public Prosecution Service – after the entry into force of the Civil Director Disqualification Act – on the basis of Section 106a, first subsection, part f, DBA, to ask the court to impose a civil director disqualification on these persons in such event.

Section II, part B

It will be provided in the Sections 2:164, subsection 1, under i and 2:274, subsection 1, under i of the Dutch Civil Code that the board of a public limited company or a private company with limited liability requires the approval of the supervisory board, if there is one, before they can submit a request for the appointment of an intended bankruptcy trustee. On the basis of the aforementioned Sections, the supervisory board has to give its approval for a resolution of the board to apply for bankruptcy and to submit a petition for a suspension of payments. Now that a request for the appointment of an intended bankruptcy trustee can only be made in the event of a threatening bankruptcy or suspension of payments, it seems logical to also involve the supervisory board in this.

Sections IV and V

Section IV contains the usual provision about the entry into force. Section V contains the short title of the Act.

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