

SUMMARY

Case C-126/16. Transfer of undertakings

Is Netherlands insolvency procedure, in the event of the transfer of the insolvent undertaking in the case where insolvency is preceded by a judicially-monitored pre-pack procedure, which is expressly aimed at securing the survival of (parts of) the undertaking, compatible with the objective and purport of Directive 2001/23, and is Article 7:666(1)(a) of the Burgerlijk Wetboek (Civil Code), in that light, (still) in conformity with the Directive? Is Directive 2001/23 applicable in the case where a so-called 'prospective insolvency administrator' ('beoogd curator') appointed by the Rechtbank acquaints himself, prior to commencement of the insolvency procedure, with the situation of the debtor and investigates the possibilities for a restructuring of the activities of the undertaking by a third party and also prepares for acts which must be carried out shortly after the insolvency in order to enable the restructuring to take place by means of an asset transaction through which the undertaking of the debtor, or part thereof, will be transferred at the date of the insolvency or shortly thereafter, and those activities, in their totality or in part, are continued (virtually) without interruption? Does it make any difference in this regard whether the continuation of the undertaking is the primary objective of the pre-pack, or whether the (prospective) insolvency administrator's primary objective with the pre-pack and the sale of the assets in the form of a 'going concern' immediately after the insolvency is to maximise the proceeds for all of the creditors, or that, in the context of the pre-pack, consensus on the transfer of assets (continuation of the undertaking) is achieved before the insolvency and its implementation is formalised and/or effected after the insolvency? And how should the matter be viewed if it is sought to secure both the continuation of the undertaking and the maximisation of proceeds? Is the date of the transfer of the undertaking for purposes of the applicability of Directive 2001/23 and of Article 7:662 et seq. of the Civil Code arising from it, in the context of a pre-pack preceding the insolvency of the undertaking, determined by the actual consensus on the transfer of the undertaking achieved prior to the insolvency, or is that date determined by the point in time at which responsibility as employer for carrying on the business of the unit in question shifts

from the transferor to the transferee?

Creator: European Court of Justice (ECJ)

Verdict at: 2016-02-26

Case number: C-126/16