

# WHOA – the long awaited introduction of binding, pre-insolvency composition in the Netherlands

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The long awaited reform of Dutch restructuring law, featuring what may be described as a “Dutch Scheme of Arrangements”, has finally been put to parliament. The draft bill is generally referred to by its upbeat sounding Dutch acronym “WHOA”. It is expected that the WHOA will enter into force in 2020.

The WHOA aims to protect business continuity and the value of going concern enterprises. The new restructuring framework enables a debtor to offer a tailor-made extrajudicial restructuring plan (the Plan) to all or some of its creditors and shareholders while remaining in control of the company (debtor-in-possession). The Plan can be confirmed by the court, provided certain essential requirements are met, making it binding on all affected parties, including those who oppose the Plan.

A welcome addition to a previous draft of the WHOA is that a pool of expert judges will be installed, who will exclusively handle WHOA-matters. This will certainly improve the predictability of WHOA decisions and thereby enhance deal certainty.

This alert provides a high level overview of the main features of the WHOA.

## Who is it for?

One of the most innovative features of the WHOA is that it in fact provides for two procedures, a public and a private one.

The “public WHOA” is available to debtors who have their Centre of Main Interests (or COMI) in the Netherlands. The public WHOA will be subject to the European Insolvency Regulation (EIR) and will be automatically recognized throughout the member states of the European Union (with the exception of Denmark).

The “private WHOA” potentially allows a large number of foreign companies to benefit from the new WHOA procedure. The “private WHOA” is available to debtors who have their COMI in the Netherlands as well, but also to debtors who do not have their COMI in the Netherlands but have a registered office there or debtors who have a sufficient connection with the Netherlands. Examples of a “sufficient connection” are provided in the explanatory memorandum to the draft bill and include: (i) the debtor has significant assets in the Netherlands: (ii) a substantial portion of the debt that is to be restructured is governed by Dutch law or includes the choice of the Dutch courts: (iii) the debtor is part of a group of companies, a substantial part of which are companies established in the Netherlands: (iv) the debtor is liable for the debts of another debtor (most likely: a group company) in respect of which the Dutch courts have jurisdiction. The private WHOA is not subject to the EIR and recognition in other jurisdictions should be allowed on the basis of the general recognition principles of court decisions.

# What does it do?

The essence of the WHOA is that a minority group of dissenting creditors, as well as shareholders of a distressed debtor are bound to an agreement (the Plan) that the debtor has concluded with the majority of its creditors.

Under the WHOA, the Plan can be offered to creditors and shareholders and can alter the rights of any creditor or shareholder, including secured and preferential creditors, co-debtors and guarantors.

Under the WHOA creditors can be divided into different classes. It is left up to the debtor to introduce tailor made classes depending on the circumstances of the case. Class formation is very flexible provided that creditors and shareholders who have or will obtain incomparable rights vis-à-vis the debtor (e.g. secured creditors, unsecured creditors, subordinated creditors and shareholders) have to be placed in different classes. Rights of employees cannot be effected by the Plan.

The Plan is approved within a class when creditors representing a two-thirds majority in value of the outstanding claims consent to the Plan. If a class votes (or several classes vote) against the Plan the court can nonetheless approve the Plan if, in short, at least one class has voted in favor of the Plan and the distribution of the value created by the Plan does not deviate from the priority of the creditor classes, unless such deviation is reasonable and does not prejudice the rights of other creditors or shareholders.

# How does it facilitate a Plan?

Restructuring tools including the confirmation of a Plan are available in a number of jurisdictions. What makes the WHOA particularly interesting are the accompanying provisions, which protect the debtor during the WHOA process and facilitate the accomplishment of a plan. These accompanying provisions include:

- a. The court may appoint a restructuring expert on the request of a creditor, the works council, employees' representative or a shareholder if a debtor does not propose a Plan (in time). Experts may propose a plan instead of the debtor.
- b. A new money exception. Emergency funding to the debtor is protected from annulment actions by a bankruptcy trustee in the event the Plan would fail.
- c. The court is competent to take interim measures such as a stay (moratorium) of a maximum of two times four months and any further "orders it deems necessary to protect the rights of creditors".
- d. The court may appoint an observer of the debtor whose tasks include the supervision of the accomplishment of the Plan while safeguarding the interests of the joint creditors.
- e. Both the debtor and the restructuring expert (but not any creditor or shareholder!) may approach the court for an order for clarification on issues of interest such as class formation, information provision, valuation principles etc. Such orders significantly limit the risks of the court not approving the Plan at a later stage. Moreover, these court orders are not subject to appeal.
- f. Inclusion of sureties, jointly liable parties and co-debtors of the debtor in the restructuring.
- g. Onerous contracts may be terminated on three months' notice. Damages claims following termination may be dealt with in the Plan.
- h. Ipso facto clauses (contractual provisions allowing termination of contracts upon insolvency) are deactivated.

# Why is it interesting?

For Dutch companies, the WHOA provides a very welcome restructuring alternative to a full-fledged bankruptcy.

For international groups of companies that have a nexus in the Netherlands, even if this is only on the basis of a Dutch financing SPV, the (private) WHOA may be used as a (single) restructuring tool and as an effective, fast and relatively cheap alternative to US chapter 11 proceedings and the English scheme of arrangements.

Finally, the WHOA may serve as a benchmark for other member states of the EU. The public WHOA is the first (dedicated) implementation by a member state of the EU Preventive Restructuring Frameworks Directive (Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20, 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132).

## Your Key Contacts



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