Briefing

# The WHOA: a new global restructuring tool

**On 6 October 2020, Dutch Parliament formally adopted legislation introducing a new global restructuring tool to support business continuity and recovery, the WHOA. The effective date of the WHOA will be announced shortly, potentially still in 2020. For Dutch companies, the WHOA provides a long awaited restructuring alternative to formal bankruptcy proceedings. For multinational companies with their registered office in the Netherlands or a "sufficient connection" with the Netherlands, the WHOA may also be used to effectively restructure their global operations.**

Pim van Leersum (Finance & Restructuring Partner) comments: *"The Netherlands just introduced a smart and effective restructuring tool that can be used in local and cross border restructurings. In light of the impact of COVID-19, the WHOA is particularly timely for businesses facing financial distress."*

## High-level background information

The WHOA stands for the 'The Act on the confirmation of private restructuring plans' (*de Wet homologatie onderhands akkoord*) and is also informally referred to as 'the Dutch Scheme of Arrangement'. In short, the WHOA enables businesses in financial distress to offer a tailor-made restructuring plan to all or some of their creditors and shareholders, while remaining in control. Alternatively, creditors, shareholders or, if established, the debtors' works council (or other employee representative body) can petition a Dutch court to appoint a restructuring expert who may propose a restructuring plan on their behalf. If certain requirements are met, the restructuring plan can be confirmed by a Dutch court, making it binding on all affected parties.

The WHOA is a game changer in the Netherlands, where previously a financial restructuring of a business prior to bankruptcy (or suspension of payment) proceedings was only possible on a consensual basis with the support of all relevant parties to the restructuring, implying that a single ('hold out') creditor or shareholder could potentially frustrate the process. At the same time, the WHOA may also serve as a benchmark for other EU member states as it is the first implementation by a member state of the EU Directive on restructuring and insolvency.

One of the key advantages of the WHOA is its flexibility. The WHOA does not prescribe the specific contents of a restructuring plan. Debtors (or a restructuring expert appointed by court) can draft a restructuring plan as they see fit. A restructuring plan may for example involve extending and/or writing off debt, amending or terminating onerous contracts (employment contracts are exempted), selling assets and/or implementing debt-for-equity swaps. A restructuring plan may provide for cross-class cram down of creditors and group company obligations (even if the group companies are non-Dutch).

Speed and deal certainty are at the heart of the WHOA. The WHOA supports a swift creation of a restructuring plan through a debtor-in-possession procedure, which includes a court-ordered stay, protection of DIP financing and short statutory periods for voting etc. A court order can be requested on any procedural or substantial matter before a vote is held. An expert pool of judges is to issue final decisions. Court


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confirmation of a restructuring plan can be refused only on limited grounds. There is no option to appeal such court decisions.

The WHOA provides for certain creditor protections, including a type of absolute priority rule and certain protections for smaller trade creditors.

The WHOA provides for two procedures, a public and a private one:

- The public procedure is available to debtors who have their Centre of Main Interests (COMI) in the Netherlands. It is considered more suitable for complex multiple class restructurings. The public WHOA will be automatically recognized within the EU.

- The private procedure is available to debtors who have their COMI in the Netherlands, 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. It is generally considered more suitable for targeted single class restructurings.

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