



## ONE YEAR DUTCH WHOA (SCHEME) – SOME LESSONS LEARNED

The new WHOA (also called the Dutch Scheme) has been available since 1 January 2021. It is an effective restructuring tool that allows the cramming down of dissenting creditors or shareholders, outside of a formal insolvency. This briefing provides an update on some important WHOA topics derived from various court judgments issued in 2021.

The WHOA supports the creation of a restructuring plan – outside of insolvency - through a procedure involving: a cram down of creditors or shareholders with 2/3 majority, possibilities for a cross-class cram down, appointment of a restructuring expert or observer, debtor-in-possession, a court-ordered stay, protection of DIP financing, amendment or termination of onerous contracts and a required court sanctioning, including several grounds for refusal.

### WHOA data 2021

As the WHOA can either be a public or a non-public proceeding, the exact number of WHOA proceedings launched in 2021 is unknown. Estimates indicate that there have already been more than 130 WHOA proceedings opened in The Netherlands since 1 January 2021, the vast majority being medium sized to (very) small companies. Also, the majority of debtors seem to opt for non-public WHOA proceedings. The WHOA in principle does not require court involvement, except for at the final stage when a sanctioning of the adopted WHOA is required for it to be binding. The court can, however, be approached in the interim for various reasons, most importantly the appointment of a restructuring expert, the application of a freeze period (stay), new money security approvals and proposals in relation to class composition. In relation to WHOA proceedings launched in The Netherlands, there have been more than 80 published court judgments. Only a small percentage of these judgments concerned the sanctioning of a WHOA plan. So far there is only 1 known sanctioned WHOA which was applied to a large Dutch corporate and included a cross class cram down.

### Some lessons learned

Please see below some specific themes that are important to remember when initiating a WHOA in 2022:

#### 1. WHOA entry test

The WHOA entry test means that the debtor must prove that it is still able to meet its current short term payment obligations but at the same time it must acknowledge that avoiding an insolvency is no longer realistic without the restructuring of its long-term debts. In cases where the debtor files a request to the court to grant a stay or appoint a restructuring expert, the court will have to consider whether the WHOA entry test is met prior to deciding upon those requests. From case law it appears that in such cases courts do focus on whether the debtor is able to pay its current obligations and they require that

### Key items

- Since 1 January 2021, there have been **more than 130 WHOA proceedings** opened in The Netherlands, the vast majority being medium sized to small companies.
- In all cases, expertise, independence and costs are the decisive factors in the court's decision to appoint a **restructuring expert**.
- One WHOA scheme sanctioned in relation to a large company involved a cross class **cram down**, meaning that one class voted in favour and the court sanctioned the plan making it binding on all classes - reasoning among others that (i) the dissenting senior lender would not be worse off under the WHOA plan than in hypothetical bankruptcy of the debtor and (ii) the WHOA plan did not violate the 'priority rule' (prioriteitsregel).
- In relation to **class composition**, the court ruled that the debtor's unsecured creditors (with the same rank) could be placed in different classes.
- The court pre-approved a **new money** arrangement where the debtor showed that the new money could only be used to fund the costs for the preparations of the WHOA plan.
- Various judgments have shown that the court – as required by the law - is very strict in applying the **information provisions** of the WHOA.
- A court judgment confirming a public WHOA plan will be automatically **recognised** in all EU Member States (except Denmark).

the debtor provides sufficient evidence of the same. It is therefore necessary for the debtor to show that the liquidity forecast covers the short-term critical expenses (for example costs for personnel) to operate the day-to-day business. The courts have made clear that they want to deter debtors from using the WHOA and its tools for improper or unlawful purposes. If no interim request is filed by the debtor, the court will test whether the requirements of the WHOA entry test have been met only when a debtor files its request to sanction the WHOA plan.

## 2. Stay

Approximately 50% of the published court judgments related to stays, which can be applied for a maximum period of 8 months. In most cases, the courts have allowed stays of between 2-4 months in the first instance, but further extensions have been applied in practice. In all cases, the courts pressed that progress in relation to the WHOA plan is important, and often courts have ordered the debtor or the restructuring expert to report back on progress within a number of weeks. Stays have been applied in some cases to all creditors of the debtor, and in other cases only to a number of specific creditors or in relation to certain assets of the debtor.

## 3. Restructuring expert

Approximately 20% of the published court judgments related to the appointment of a restructuring expert. In a number of cases the court rejected the request because the debtor did not meet the WHOA entry test and it was clear that the debtor was already (effectively) insolvent. Where the courts have decided to appoint a restructuring expert, we have seen (i) courts appointing the restructuring expert proposed by the debtor, (ii) courts appointing one of several proposed restructuring experts, i.e. the court making a choice out of a proposed list of two to three candidates, and (iii) courts, leaving aside all of the proposed restructuring experts, deciding – without a specific reason - to appoint an alternative expert. Leaving aside specific circumstances, it is justifiable to state that in cases where the debtor substantiates that the proposed restructuring experts are the best placed under the applicable circumstances, one of these experts will be appointed by the court. In all cases, (concrete and sector) expertise, independence and costs are the decisive factors for the court to make its choice in relation to appointing a restructuring expert and are therefore important elements for the debtor to take into account when making a short list and in the run-up to a hearing on the expert's appointment.

## 4. Cram down

The majority of the sanctioned WHOA proceedings involved a cram down within a class, meaning with a consenting vote of at least 2/3 of the value of claims of those who have voted. There has been one WHOA scheme which was sanctioned in relation to a large company, and which involved a cross class cram down, meaning that one class voted in favour and the court sanctioned the plan making it binding on all classes. In this specific WHOA proceeding, the plan aimed to implement amendments to the debtor's senior financing, including a covenant-holiday, the addition of a liquidity covenant, and a roll-up of the senior interest (PIK-interest) against an increased rate. The outstanding debt owed to the senior lender was not decreased and the maturity date remained as is. Furthermore, the WHOA plan aimed to postpone wage tax payments owed to the Dutch tax authorities. Finally, the shareholder injected additional liquidity (EUR 4m) into the group, whereby the plan aimed to allow the shareholder to keep its shares without dilution. The shareholders' rights were not affected thus it was not included in the WHOA plan nor offered a vote. The senior lender voted against the WHOA plan and thus a cross class cram down was required for sanctioning. The Dutch tax authorities voted in favour of the

WHOA plan, which delivered the required vote of an "in the money" class when applying a cross class cram down. The court sanctioned the WHOA plan and the cross-class cram down, determining, among other elements, that (i) the dissenting senior lender would not be worse off under the WHOA plan than in the hypothetical bankruptcy of the debtor and (ii) the WHOA plan did not violate the 'priority rule' (*prioriteitsregel*) because, based on independent reports received, the senior lender was offered its total debt subject only to revised commercial terms which were in line with market conditions. As a result, the court has sanctioned a cross class cram down in relation to a WHOA plan which was approved by only the tax authorities, even though (i) the tax authorities only voted in favour because the WHOA plan included a proposal which was compliant with its own public WHOA guidelines (*Besluit Noodmaatregelen Coronacrisis*) and (ii) the value of the "in the money" claim of the Dutch tax authorities was limited compared to the value of the senior creditors' claim who voted against the plan (3% vs 97%). Appeal proceedings are not possible under the WHOA, so time will tell whether courts will take the same approach in similar circumstances.

#### 5. Class composition

There have not been many disputes or judgments in relation to class composition. The vast majority of sanctioned WHOA proceedings followed the standard approach for class composition, without any opposition, being secured creditors, preferential creditors and unsecured creditors. In one WHOA proceeding the court did rule in relation to a request made by the debtor about the proposed class composition. The business was active in agriculture and as such dependent on specific creditors who would allow harvesting of products during a certain period. The court ruled that the debtor's unsecured creditors (with the same rank) could be placed in different classes, one class for the general unsecured creditors who were offered payment of 20% of their claims to be paid, and one class for those creditors that were important for the harvesting process, who were offered payment of 100% of their claims. This WHOA plan was sanctioned at a later stage by the court, with the required majority voting in favour in each class.

#### 6. Safe harbour for new money

The debtor can request the court to pre-approve new contractual arrangements while working towards a WHOA plan, which includes bridge financings and related (new) security. If the court has given its approval, such contractual arrangements cannot be annulled at a later stage if the plan were to fail, and the debtor becomes insolvent. In 2021, a small number of WHOA judgments confirmed that this indeed seems to work as expected. The court emphasized in one case that the new money must be actual new money that is made available and cannot be funds which have already been provided prior to the launch of the WHOA process. Also, the court must be satisfied that the other creditors are not prejudiced by the new money and/or new security, this requirement was met in a case where the debtor showed that the new money was necessary for the continuation of the debtors' business whilst preparing the WHOA plan. In another case the court pre-approved a new money arrangement where the debtor showed that the new money could only be used to fund the costs for the preparations of the WHOA plan and subject to the approval of the restructuring expert.

#### 7. Information

Various judgments have shown that the court – as required by the law - is very strict in applying the information provisions of the WHOA. There have been a

number of rejections to sanction a WHOA plan due to lack of information and transparency. In one case, the court declined to sanction a WHOA plan because there was a lack of information about an unnamed creditor that had provided new money to support the restructuring. The court noted that a WHOA plan must provide information about any new financing acquired under Article 375 paragraph 1 of the Dutch Bankruptcy Act, which the debtor had failed to do.

#### 8. Recognition

The WHOA has been added to the EUIR, which means that a court judgment confirming a public WHOA plan will be automatically recognized in all EU Member States (except Denmark). It applies to public WHOAs only in relation to companies that have their COMI in The Netherlands.

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