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WHITE PAPER

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The Dutch Scheme Has Arrived

After more than six years of development, the legislative process concerning new Dutch restructuring legislation (Wet Homologatie Onderhands Akkoord, or "WHOA") that introduces a Dutch debtor-in-possession proceeding (a "Dutch Scheme") combining features of chapter 11 of the U.S. Bankruptcy Code and the English Scheme of Arrangement was finalized at the end of 2020. The WHOA entered into force January 1, 2021 and is thus available to companies in distress from now onwards.

Since our previous *White Paper* of February 2020 on the Dutch Scheme, the WHOA has been amended in several relevant aspects. Here, we briefly discuss the most notable of these amendments and include a restated version of the original *White Paper* on the Dutch Scheme.

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AMENDMENTS TO THE WHOA

The WHOA restructuring legislation introduces a Dutch debtor-in-possession proceeding (a "Dutch Scheme") combining features of chapter 11 of the U.S. Bankruptcy Code and the English Scheme of Arrangement. The Dutch Senate adopted the WHOA on 6 October 2020; it is expected to enter into force January 1, 2021.

Since our February White Paper on the Dutch Scheme, the WHOA has been amended in several relevant aspects.

Small Enterprise Trade Creditors' Exception

The WHOA now includes additional protection for trade creditors who qualify as a small enterprise (defined as enterprises with a maximum of 50 employees, or less than € 6 million assets and € 12 million in net annual revenue). Subject to certain criteria, dissenting small enterprise trade creditors can prevent the adoption of a restructuring plan if they do not receive a distribution under the plan equal to at least 20% of their claims.

Secured Creditors' Position

The position of secured creditors under the WHOA has been further clarified in two amendments. First, the WHOA now specifically provides that a secured creditor's claim will be bifurcated into a secured claim, to the extent of the value of any collateral, and an unsecured claim for the deficiency, and that the secured and unsecured claims must be classified separately for plan voting purposes. The extent to which a claim is secured shall be calculated based on the value that the secured creditor would be expected to receive in a bankruptcy liquidation (as distinguished from a Dutch Scheme) by virtue of its security rights.

Second, secured financial creditors have been excepted from the obligation to offer dissenting creditors that are part of a dissenting class a cash distribution under the plan that is equal to the amount that they would have received in a bankruptcy liquidation. Instead, for the plan to be eligible for confirmation, it is sufficient to offer such a dissenting secured financial creditor, who is part of a dissenting class of creditors, any distribution other than (certificates of) shares for the plan to be eligible for confirmation.

RESTATED WHITE PAPER

Presently, Dutch law does not provide a mechanism for imposing a restructuring plan on dissenting creditors outside of formal insolvency proceedings. As a result, a restructuring plan currently requires the consent of all creditors and shareholders whose rights are affected by the plan. This has made restructurings outside of a formal insolvency proceeding very difficult and provides stakeholders with ample opportunity to monetize on nuisance value. With the Dutch Scheme, the Dutch legislature is aiming to effectively allow debtors to propose restructuring plans to their creditors and shareholders outside of formal insolvency proceedings, with the prospect of the debtor being preserved on a going-concern basis.

The Dutch Scheme is to a large extent in line with the EU-wide initiative to promote "debtor-in-possession" restructuring, as recently formalized in the EU Harmonisation Directive (EU 2019/1023). The bill was adopted by the Dutch legislature in October 2020 and has taken effect per January 1, 2021, allowing companies in distress to apply the Dutch Scheme from now onwards.

Key Features

The key features of the Dutch Scheme include:

- **Restructuring Plan:** Debtors or a court-appointed restructuring expert will be permitted to propose a restructuring plan for approval by creditors (secured, preferential, and unsecured) and shareholders.

- **Voting Threshold:** Stakeholders may be split into voting classes divided on the basis of the similarity of their rights vis-à-vis the debtor. The restructuring plan has to be approved by a two-thirds majority of each voting class, with the possibility of requesting a cross-class cram down in certain circumstances.

- **Debtor-in-Possession Proceeding:** The debtor remains in control of the company's affairs throughout the Dutch Scheme proceeding.

- **Stay of Individual Enforcement Actions:** Debtors will be permitted to apply for a stay of individual enforcement actions

and bankruptcy requests for a period of four months (extendable to a total of eight months in certain circumstances).

- **Broad Basis for Jurisdiction and Group Restructurings:** Subject to certain qualifying criteria, the Dutch courts will have jurisdiction to confirm restructuring plans for both Dutch and non-Dutch companies, allowing for cross-border group restructurings to be centralized in the Netherlands.

Early Access to the Dutch Scheme

The proposed bill is aimed at granting viable enterprises in financial distress early access to a restructuring tool that will enable the debtor to restructure its liabilities and to survive on a going-concern basis. To be eligible to use the Dutch Scheme, it must be "reasonably likely that the debtor cannot continue to pay its debts." This will be the case if the debtor is still able to pay its due and payable debts, while at the same time there is no realistic prospect of avoiding future insolvency if its debts are not restructured (looking as much as a year ahead). Unlike a UK scheme of arrangement, there will not necessarily be a court hearing prior to the meeting of the debtor's creditors and shareholders to vote on the restructuring plan. Whether the debtor complies with the eligibility criteria for the plan and has properly constituted creditor classes for voting on the plan will in principle be tested only at the confirmation hearing. In principle, a debtor need not obtain shareholder consent to initiate the process and propose a restructuring plan.

Individual creditors, shareholders, and employee representative bodies are also permitted to commence restructuring proceedings by requesting the court to appoint a restructuring expert, who is tasked with independently developing and proposing a restructuring plan on behalf of the debtor. This request will be granted if it is reasonably likely that the debtor cannot continue to pay its debts, unless the stakeholders as a whole will be disadvantaged by the appointment of an independent restructuring expert. Since the Dutch Scheme is a debtor-in-possession procedure, the restructuring expert is not authorized to take control of the debtor's business. However, the debtor himself is not permitted to propose a restructuring plan during the duration of the expert's appointment either. In case of a debtor with a small or medium size enterprise, the restructuring expert will under certain circumstances require shareholder consent to offer the restructuring plan to the creditors.

A Broad Basis for International Jurisdiction and Recognition

One of the Dutch Scheme's most important benefits is that it will be available both to Dutch companies that have a Centre of Main Interest ("COMI") in the Netherlands and foreign companies. If a debtor's COMI is located in the Netherlands, a "public" Dutch Scheme proceeding may be opened, which will be publicized by registration in the insolvency register and in which court decisions are public. Dutch "public" proceedings will benefit from automatic recognition throughout the European Union pursuant to the EU Regulation on Insolvency Proceedings.[1]

In the alternative, or if opted for voluntarily, debtors may also apply for "non-public" Dutch Scheme proceedings, which will not be registered in the insolvency register and in which court proceedings will take place in judges' chambers (i.e., anonymized decisions). This type of proceeding will fall outside the scope of the EU Regulation on Insolvency Proceedings and thus is not limited to debtors with either a COMI or an "establishment" in the Netherlands. Access to this non-public proceeding is open to any debtor with a "sufficient connection" to the Netherlands, which, for example, may be established or otherwise evidenced if a (substantial) part of:

- The debtor's assets or group companies are located in the Netherlands; and/or

- The relevant finance documents are governed by Dutch law or include a forum choice for the Dutch courts.

A court-confirmed restructuring plan in a non-public proceeding, however, will not be automatically recognized in the European Union on the basis of the European Insolvency Regulation. Recognition under UNCITRAL Model Law implementations, the EU Brussels I Regulation, or domestic laws may potentially be available, however.

Flexible Content of the Restructuring Plan

The plan may alter rights of all or some of the debtor's creditors, whether secured, preferred, or unsecured, and of existing shareholders. As the bill takes a flexible approach to the underlying terms of the restructuring plan, its content may be tailored to the circumstances at hand. The restructuring plan may, for example, entail a debt-for-equity swap, a (partial)

1 At the time of this White Paper, the Dutch government has announced it will request to have the public Dutch Scheme be admitted to the list of 'insolvency proceedings' recognized as such under the EU Regulation on Insolvency Proceedings, the so-called Annex A.

write-off or extension of debt, a sale of all (or part) of the debtor's assets, or a combination of these options. To the extent that the implementation of a restructuring plan requires a shareholder resolution, the court-confirmed restructuring plan will act as a substitute for sucha resolution.

Employees' claims that arise from employment contracts will, however, be excepted from the Dutch Scheme's scope, as the Dutch legislature is currently considering separate legislation addressing the effect of insolvency on employment contracts.

The Voting Process

Once the final restructuring plan has been negotiated, the debtor (or the restructuring expert if appointed) will have to present the plan to the affected creditors and shareholders at least eight days prior to voting. The voting procedure may be determined by the debtor, is flexible, and allows voting to take place electronically, in writing, or in person.

All creditors and shareholders whose rights will be affected under the plan are entitled to vote. Voting may take place in classes formed on the basis of similarity of existing and prospective rights with respect to the debtor. Although the WHOA allows ample flexibility in formation of those classes, it does prescribe several rules concerning specific creditor groups. Firstly, to the extent that secured creditors' claims are only partly covered by security rights, their claims must in principle be split and placed into two separate voting classes: secured creditors and general unsecured creditors. To what extent a claim is secured shall be calculated based on the value that the secured creditor would be expected to receive in a bankruptcy by virtue of his security rights.

Moreover, if the plan offers less than 20% distribution on the claims of small trade creditors, they must be included in a separate class for voting purposes. A creditor qualifies as a small trade creditor if it:

- Has a small enterprise with a maximum of 50 employees, or less than € 6 million assets and € 12 million net annual revenue; and
- Has claims resulting from supplied goods or services or from tort.

Voting will take place per stakeholder class. Acceptance of the restructuring plan by a class requires a two-third majority in the amount of the total debt or equity of the class' stakeholders participating in the vote. Contrary to the UK Scheme and the current Dutch plan offering instruments in formal insolvency proceedings, the Dutch Scheme does not require a qualified majority in headcount.

Court Confirmation and the Cross-Class Cram Down

The debtor (or restructuring expert) may request that the court confirm the plan if at least one class of impaired creditors has voted in favor of the restructuring plan. The court will in principle hold a confirmation hearing following the creditor vote within eight to 14 days following the confirmation request.

On the court-tested requirements for confirmation, the bill distinguishes between cases where the voting requirement has been met in all classes, and those where one or more classes have voted against the plan.

If all classes have voted in favor of the plan, the court will deny confirmation of a restructuring plan—either on its own motion or on request of an affected creditor or shareholder—when, *inter alia*:

- It is reasonably unlikely that the debtor could continue to pay its debts if the plan were implemented;
- One of the prescribed formal requirements of the bill has not been met;
- Performance of the restructuring plan is not properly guaranteed; or
- The debtor wants to attract new financing as part of its restructuring efforts and incurring such financing would materially disadvantage creditors.

Dissenting creditors may also request that the court refuse confirmation if, under the plan, they will receive less value, whether in cash or in non-cash consideration, than they would expect to receive in a liquidation scenario ("best interest of creditors test").

If one or more classes have voted against the restructuring plan, the court may still confirm it and impose a "cross-class cram down." However, dissenting stakeholders in a dissenting class may ask the court to refuse confirmation of the plan, if:

- The separate class of small trade creditors receives less than 20% distribution on their claims, absent compelling grounds for such a lower distribution;

- The reorganization value is not distributed to the dissenting class in accordance with statutory and contractual priorities—unless there is a reasonable ground for such deviation and the deviation does not disadvantage affected stakeholders (i.e., the "absolute priority rule" combined with a reasonableness exception);

- They are not entitled to a cash distribution for the amount that they would expect to receive if the debtor's assets were liquidated, to the extent that those stakeholders are not secured financial creditors; or

- They are secured creditors who have provided financing to the debtor on a commercial basis (secured financial creditors) and are only entitled to a distribution in the form of (certificates of) shares.

If the court confirms the restructuring plan, it is binding on all stakeholders qualified to vote. Once approved by the court, the plan confirmation order may not be appealed.

An Effective Group Restructuring Tool

A restructuring plan in a Dutch Scheme proceeding may also alter certain claims that the debtor's creditors may have against group companies (e.g., guarantees), even though those group companies are not themselves subject to restructuring proceedings. With cross guarantees being the rule rather than exception within multinational groups of companies, it will now be possible to restructure group guarantees within a single cross-border Dutch Scheme proceeding.

Moreover, as the Dutch Scheme permits courts to assert broad jurisdiction over foreign companies in non-public proceedings (see above), insolvency proceedings regarding multinational groups of companies may readily be centralized in the Netherlands. Jurisdiction for non-public proceedings may be asserted by a Dutch court if the foreign group companies have a "sufficient connection" to the Netherlands. Thus, the Dutch Scheme will permit multinational groups of companies to centralize their restructurings in the Netherlands by combining public proceedings for companies with a COMI in the Netherlands with non-public proceedings for foreign companies. This is particularly true if combined with instruments that provide for international recognition, such as the UNCITRAL Model Law, which has been enacted in over than 50 jurisdictions.

Supportive Tools to Promote the Restructuring

The Dutch Scheme provides for several additional tools that may be used to further promote the development and implementation of the restructuring plan:

- A moratorium on creditors' actions and insolvency proceedings upon the debtor's (or the restructuring expert's) request for a period of four months, with the option to extend to a total of eight months;

- Contractual provisions purporting to unilaterally or automatically terminate, amend, or suspend contract rights (i.e., "ipso facto" clauses) cannot be enforced during Dutch Scheme proceedings;

- Debtors may propose amendments to burdensome contracts (e.g., lowering periodic lease payments or interest payments) or terminate such contracts if the counterparty does not accept the proposed amendments. Damage claims resulting from termination may be included in the restructuring plan;

- To promote deal certainty, the debtor (or the restructuring expert), as it is developing a restructuring plan, may request that the court approve certain aspects of the plan in advance, including the proposed classification of stakeholders, voting procedures, stakeholder voting eligibility, and whether certain grounds to refuse confirmation (as discussed above) exist;

- The court may issue injunctive relief to protect stakeholders' interests; and

- The court may insulate new financing required for the implementation of a restructuring plan from claw-back provisions. Court approval will be granted if the relevant transaction is necessary to continue the debtor's business during the preparation of the restructuring plan (i.e., financing during the plan development period), if the transaction is in the interest of the debtor's creditor body as a whole, and if no individual creditor will be substantially damaged.

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