

RESOR

BULLET POINT SUMMARY



THE PROPOSED DUTCH SCHEME

A WORLD-LEADING RESTRUCTURING TOOL IN THE MAKING

On 5 July 2019, after six years of hard work and field study, the Dutch Ministry of Justice submitted to parliament a bill, the Act on the Confirmation of Private Plans, seeking to introduce a pre-insolvency procedure in the Netherlands, which one might refer to as the "Dutch scheme". It is expected or hoped for that the bill will be adopted by parliament this year and enter into force in January or July next year.

The Dutch scheme combines elements of the UK scheme, such as the ability to implement a plan outside formal insolvency proceedings, with elements of Chapter 11, such as a cram down mechanism, whilst innovating on both. The result is a fast and flexible restructuring procedure containing all the powers needed to do the job. The Dutch scheme is compliant with, and as such the first procedure to give effect to, the recently adopted EU Restructuring Directive (EU 2019/1023).

We offer a short bullet point summary of the proposed procedure below.

GENERAL CHARACTERISTICS – PLAN PROCEDURE OUTSIDE OF FORMAL INSOLVENCY

- Procedure in which a restructuring plan is put to vote, a majority can bind a minority within each class, and the court has the power to impose the plan on dissenting classes (cram down)
- Outside of formal insolvency proceedings
- Debtor-in-possession
- Can be limited to a subset of the capital providers (creditors and/or shareholders)
- Option to choose between a public variant and a confidential variant
- Minimal court involvement

INITIATING THE PLAN – DEBTOR AND CREDITORS ALIKE

- When the debtor is or can reasonably be expected to become insolvent (could be a year ahead)
- The debtor may propose a plan as long as a restructuring expert has not been appointed
- A creditor, a shareholder, the works council or the workplace representation may request the appointment of a restructuring expert, who is then entitled to propose a plan to the exclusion of the debtor

- The restructuring expert is only concerned with the development of a plan. The debtor remains in full control of the ordinary course of business throughout the process
- The restructuring expert requires the consent of the debtor to propose a plan in case of an SME

CONTENTS OF THE PLAN - MAXIMUM FLEXIBILITY

- No prescriptions and a high degree of flexibility as to the commercial contents of the plan (extension and/or reduction of debt, debt for equity swap, sale of assets, controlled wind-down, etc)
- Can bind all types of capital providers, including secured and preferential creditors and shareholders
- Can be limited to a subset of the capital providers
- Can include third party releases
- Cannot effect obligations arising out of employment contracts

PROCEDURE - FAST AND EFFICIENT, DEALT WITH BY SPECIALISED JUDGES

- No court test at entry where the debtor proposes the plan
- Electronic voting 8 days (may be more) after plan is proposed
- No convening hearing, not prior approval of disclosure statement and no formal creditors meetings
- Confirmation hearing within two weeks after vote
- Confirmation decision as soon as possible thereafter (within one or two weeks)
- No appeal – the entire procedure can be finalised within 3 – 5 weeks
- Cases dealt with by a small team of specialised judges specifically trained for the purpose

VOTING AND ACCEPTANCE

- Voting takes place in classes
- Class formation on the basis of similarity of new and existing rights
- Where legal title is split from beneficial ownership, the beneficial owner is entitled to vote
- Class acceptance on the basis of two thirds (2/3) in amount of those participating; no head count

CONFIRMATION AND CRAM DOWN

- Where all classes have accepted the plan: no dissenting creditor may receive less in value, whether in cash or in non-cash, than it would expect to receive in liquidation (best interest of creditors test)
- Where one or more classes have rejected the plan (cram down):
 - Consent of the debtor required in case of an SME (but equity may not exercise hold out position)
 - at least one in the money class must have accepted the plan
 - the members of the dissenting class must have the right to choose between either:
 - a distribution with a value equal to their share, in accordance with their rank, of the reorganisation value (i.e. the value distributable if the plan comes about), regardless of the form in which this distribution is made (cash or non-cash), or
 - a distribution in the form of cash equal to their share, in accordance with their rank, of the liquidation value (i.e. what they would expect to receive if liquidation were to take place).

SUPPORTIVE MEASURES

- A tailored individual or general stay at the request of the proponent of the plan for a period of 4 months with the possibility of extension to a maximum of 8 months
- The stay can also be extended to protect guarantors
- Protection of security for new funding
- Ability to continue using encumbered working capital subject to adequate protection
- Ability to continue essential contracts despite default by providing security for the performance of new obligations (while pre-existing defaults continue)
- Invalidation of *ipso facto* and change of control clauses
- Ability to reject onerous contracts; rejected contract is converted into a monetary damages claim that can be restructured under the terms of the plan (employment contracts are exempted)
- Ability of the court to make bespoke provisions in departure of statutory provisions to facilitate tailor made solutions
- Ability of the court to make binding determinations on any difficult issues at an early stage (i.e. before the vote) so that uncertainty can be removed as quickly as possible. This includes issues such as eligibility, jurisdiction, admission to the vote, class formation, valuation, etc.

INTERNATIONAL ASPECTS - JURISDICTION AND USE BY FOREIGN DEBTORS

- The public procedure will be placed on Annex A of the European Insolvency Regulation
- The confidential procedure will fall outside the European Insolvency Regulation
- Jurisdiction for the public procedure based on COMI or establishment
- Jurisdiction for the confidential procedure based on domicile of applicant or

affected party or sufficient connection, which is very broad and does not require the COMI of the debtor to be located in the Netherlands

- An officeholder in foreign reorganisation or insolvency proceedings can be appointed as a restructuring expert in Dutch scheme proceedings in respect of the same or a different member of the group

ANALYSIS

- The bill provides for a fast, efficient and highly flexible instrument with all the powers required to reconfigure the capital structure as appropriate whilst protecting the interests of everyone involved and preserving the business throughout
- The instrument is debtor friendly in that it offers debtors an effective business rescue tool
- The fact that also others than the debtor (controlled by out of the money equity) can initiate the procedure, enhances early intervention
- The instrument is creditor friendly in that it enables creditors to preserve and realise the value of the business on a non-distressed basis, without disruption and without value leakage to out of the money parties
- The instrument enables existing equity to inject new money into the business and thus to protect its investment by facilitating the elimination of unsupported debt
- The instrument properly protects senior dissenting classes' exit rights; they cannot be forced to remain seated and to continue financing the business (i.e. taking non-cash) against the majority will of the class, which also obviates the need for a feasibility test
- The availability of a variant that falls within the European Insolvency Regulation and a variant that falls outside the European Insolvency Regulation, with very broad jurisdiction, makes the instrument particularly useful for dealing with cross-border groups. The variant that falls within the European Insolvency Regulation offers the benefit of automatic recognition. The variant that falls outside of the European Insolvency Regulation can be used where the Insolvency Regulation is problematic because of the existence of security rights on foreign assets (rights in rem exception) or because of the COMI of guarantors or other group members being located in different jurisdictions. This enables a cross-border group to be restructured through proceedings in a single jurisdiction.

In sum, the Dutch scheme appears to have the potential of becoming a world-leading restructuring tool.

EYES CONFERENCE ON DUTCH SCHEME ON 1 NOVEMBER 2019 IN AMSTERDAM

RESOR and the Business & Law Research Centre of the Radboud University of Nijmegen, in cooperation with the Dutch Ministry of Justice and the relevant industry associations, are organising a conference on the Dutch scheme that will be held on 1 November 2019 in Amsterdam. The conference will be held in Dutch, but an English interpreter will be present for non-Dutch speakers. If you are interested in participating, please register by sending an email to annelies.bierenbroodspot@resor.nl.

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