

WHOA

Dutch scheme of arrangement



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I Introduction

1. This memorandum describes the bill on court sanctioning private composition to avoid bankruptcy (*de Wet homologatie onderhands akkoord ter voorkoming van faillissement*, the **WHOA** or the **Dutch Scheme**). The WHOA introduces the possibility in the Netherlands for companies to offer a composition to its creditors outside an insolvency proceeding.¹ The WHOA will enter into force on 1 January 2021.

II The WHOA

II.1 Offering a composition: by whom?

2. The WHOA provides that the company itself can offer a composition (i) to restructure its debts outside an insolvency proceeding or (ii) to liquidate the company outside an insolvency proceeding. Also, creditors, shareholders and a works council (if established) can initiate the launch of a composition by requesting the court to appoint a restructuring expert. Such expert could subsequently offer – on behalf of the company – a composition to creditors and shareholders of the company.

II.2 Offering a composition: private or public?

3. The WHOA gives the offeror (the company or the restructuring expert) the opportunity to offer a composition in (i) a private composition process or (ii) a public composition process. Only the public composition process will be notified with the European Commission with the request to be included in Annex A to the Insolvency Regulation.² A public process will be made public by registering the process with the relevant Dutch public registers, while the private process will not be recorded in a public register. The offeror will have to assess which procedure will have the most chance of success.³
4. If a public composition process has been initiated, the jurisdiction rules as included in the Insolvency Regulation will determine whether the Dutch court has jurisdiction and therefore the place of the centre of main interests (**COMI**) of the company will in principle be decisive. The private composition process is available to any company that has sufficient connection with the Netherlands (e.g. the existence of a Dutch branch, being part of an international group with Dutch group companies). The public composition process will be automatically recognised in the EU. The private composition process will not be recognised automatically.

¹ The Dutch Scheme is influenced by (primarily) the English scheme of arrangement and also the US Chapter 11 proceedings.

² Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

³ For example, in a public composition process section 8 of the Insolvency Regulation will apply, pursuant to which the composition process shall not affect the rights *in rem* of creditors or third parties in respect of (in short) all assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of composition process.

However, we expect that the private composition process will be recognised on the basis of local private international law and may (similar to the current practice for the English scheme of arrangement) be recognised under Brussel II recast.⁴

II.3 Offering a composition: to whom?

5. The composition can be offered to (a number of) creditors and shareholders. The WHOA provides for the possibility to divide the creditors/shareholders in different classes. It is left up to the offeror of the composition to introduce tailor-made classes depending on the circumstances of the case (save for the minimum protection rule, see paragraph II.8 below).
6. The only criterium is that if creditors/shareholders have, or as a result of the composition, obtain claims and/or rights that reasonably can be considered different in the sense that they reflect ‘incomparable positions’, those creditors/shareholders must be placed in different classes. Whether the positions of the creditors/shareholders are incomparable depends on:
 - i. their rights at the moment that the composition is offered;
 - ii. the rights that they shall receive as a result of the composition; and
 - iii. their interests, in particular the interests at the realization of the composition.
7. For the sake of completeness, we note that creditors/shareholders that will have a different ranking in bankruptcy will in any case have to be placed in different classes.⁵ Creditors can also be placed in different classes for the *same* claim, for example when part of the claim is secured (i.e. cross-holdings). Secured creditors will only be placed in a secured class for the amount that they would have realised in case of a bankruptcy (i.e. liquidation value applies). For the remainder of their claim they will be placed into an unsecured class.

II.4 Content of the composition and key elements of the WHOA

8. In principle, the offeror can design the composition as he deems fit. An important element in the WHOA is that also claims of surety’s, joint and severally liable debtors and guarantee providers can be amended by the composition. Currently, the Dutch Bankruptcy Act (*Faillissementswet*) does not provide such possibility.
9. Furthermore, the WHOA introduces the possibility for the company to make a proposal to amend contractual arrangements going forward. If the counterparty does not consent to the proposal, the offeror has the possibility to terminate the contract, subject to a reasonable notice period being observed by the company and after obtaining court approval for the termination.⁶ If the contract contains a clause that automatically terminates the contract or gives the other contract party the right to terminate or amend the contract if the offeror offers a composition (“*ipso facto*” clauses), such provision will be not applicable. The offering of a composition shall also not allow for the suspension of performance of obligations against the company.

II.5 Moratorium

10. While the WHOA does not cater for an automatic (worldwide) moratorium, the company may request the court to grant a moratorium against individual enforcement actions by creditors, including filings for involuntary bankruptcy or for a suspension of payments, for a maximum period of four months (with a possibility to extend for another four months).

The court will grant a moratorium, if it *prima facie* appears that:

- i. the moratorium is necessary for the continuation of the business of the company during the preparation of and the negotiations in relation with the composition;

4 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

5 For example secured creditors or creditors with a retention of title (*eigendomsvoorbehoud*).

6 The company is in principle free in determining the notice period but if the court deems it unreasonable (i.e. too short), then it can extend it to a maximum of three months following ratification of the composition.

- ii. the moratorium is within the joint interest of the creditors of the company; and
- iii. the moratorium is not materially detrimental to the interests of any of the creditors whose interests are affected by the moratorium.

11. The court may attach certain conditions to a moratorium (e.g. the appointment of an observer⁷ or the determination of the period in which the voting on the composition has to take place).

II.6 Voting

12. The voting on the composition takes place per class. The voting can take place physically, in writing or electronically. A class of creditors has approved the composition, if a group of creditors that represent at least 2/3 of the amount of claims of the participating creditors in that class have voted in favour of the composition. A class of shareholders has approved the composition, if at least 2/3 of the amount of the subscribed capital of participating shareholders in that class are in favour of the composition. Only shareholders and creditors whose rights are affected by the composition are entitled to vote.⁸

II.7 Cram down

13. If at least one class has voted in favour of the composition, the company can request the court to approve the composition and declare it generally binding (i.e. also on dissenting creditors and shareholders). If there is a class that would receive payment of (part of) its claim in a bankruptcy scenario, it will have to be this class that votes in favour of the WHOIA. The WHOIA, therefore, introduces a possibility for the court to declare a composition generally binding even though not all classes have voted in favour of the composition (a so-called cross-class cram down). The court will refuse to declare the composition generally binding

if the composition is unreasonable (as further explained in paragraph II.9 below).

II.8 Minimum protection

14. In order to protect small and medium sized creditors, the composition must essentially offer at least 20% payment on claims of these creditors. The following criteria apply:
- i. a creditor either qualifies as a micro- or small enterprise under the Dutch Civil Code⁹ or has less than 50 employees registered with the Dutch Chamber of Commerce; and
 - ii. such creditor has a claim on the company based on (a) delivered goods or rendered services or (b) tort.
15. If the composition entails that these creditors will receive less than 20% of their claim, an explanation will have to be included in which the company explains that there is a compelling ground to pay these creditors less than 20% of their claim.

II.9 Ratification

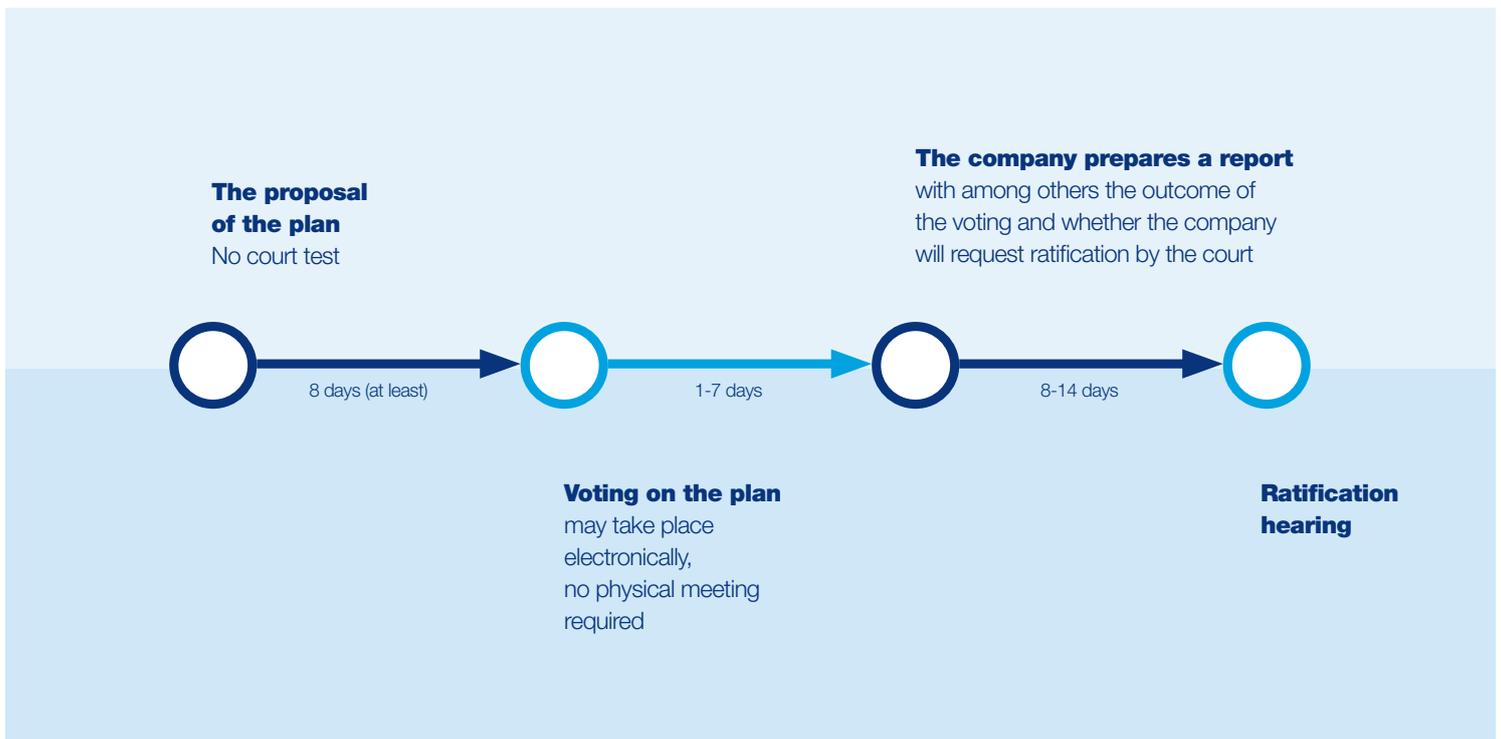
16. After the composition has been adopted and approved by the creditors/shareholders, the court will schedule a hearing for the ratification of the composition by the court.
17. Before making a decision about the ratification of the composition, the court will assess whether it has jurisdiction (as described in paragraph 4 above).
18. The composition will be confirmed by the court if the voting thresholds have been met and the debtor satisfied the requirement of keeping the creditors and shareholders informed, unless:
- i. it is not within reasonable expectations that the company will not be able to pay its debts;

7 An observer is tasked with supervision of the composition formation process with a view to safeguard the interests of the joint creditors. The observer will inform the court if he believes the debtor will not be able to effect a composition or the interests of the creditors are being prejudiced. An observer can only be or remain appointed if a restructuring specialist has not yet been appointed.

8 Please note that in contrast with a Dutch composition in bankruptcy (and – the way we understand it – the English scheme of arrangement), the WHOIA does *not* have a headcount test.

9 A creditor qualifies as a SME-creditor for the purposes of the WHOIA if either (a): it doesn't meet at least two of the three following criteria: (i) the value of its assets do not exceed EUR 6 million, (ii) the net turnover over one financial year does not exceed EUR 12 million and/or (iii) the average number of employees over such financial year is less than 10, or (b): has 50 employees or less.

- ii. the performance of the composition by the company has not been sufficiently secured/guaranteed;
 - iii. the voting procedure was seriously defective;
 - iv. the company wants to enter into new financing arrangements in relation to the composition which are detrimental to the interests of the creditors;
 - v. the approval of the composition has been reached by means of fraud, deceit or by favouring one or more ordinary creditors; or
 - vi. there are other reasons that oppose ratification of the composition.
19. In addition, the WHOA provides opposing creditors or shareholders who are part of a class that has voted against the composition with various options to protect their economic and other interests by requesting the court to reject ratification, for example:
- i. a class of creditors may not receive less under the composition than it would receive according to the ranking as catered for in the Dutch Civil Code or in contractual arrangements (if any), unless there are reasonable grounds to deviate from this ranking or if the interests of the creditors in this class are not prejudiced (*absolute priority rule*); and
 - ii. a class of creditors may not lose the right under a composition to receive cash payments of at least the amount that they would have received in a bankruptcy scenario (*no creditor worse off rule*). This protection does not apply to secured creditors that have granted the company financing on a commercial basis.
20. For completeness sake, we note that the company and restructuring specialist may request the court to render a decision on preliminary questions¹⁰ at an earlier stage before the voting takes place.
21. Please note that no appeal is available against the ratification decision of the court, as finality and deal certainty are key elements of the WHOA.



10 E.g. the question whether the composition of the different classes of creditors are justified.

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