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> **THE INSTRUMENT ENABLES CREDITORS TO PRESERVE AND REALISE THE VALUE OF THE BUSINESS ON A NON-DISTRESSED BASIS**

The Netherlands:
The proposed fast and flexible restructuring procedure

On 5 July 2019, 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 and a moratorium, whilst innovating on both. The result is a fast and flexible restructuring procedure. 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).

In case the debtor company is or can reasonably be expected to become insolvent it may propose a restructuring plan. Alternatively, a creditor, a shareholder, the works' council or the workplace's representation may request the appointment of a restructuring expert, who is then entitled to propose a plan. The plan can be limited to a subset of the capital providers (creditors and/or shareholders). The voting takes place in classes and within a class, a two thirds majority (in value) can bind a minority. No head count applies. In contradistinction to the UK scheme, the Dutch court will have the power to impose the plan on dissenting classes (cram-down, or "cross-class" cram-down, as referred to in the EU Restructuring Directive). Where all classes have accepted the plan, no dissenting creditor may receive less in value, whether in the money or out of the money, than he would expect to receive in liquidation (best interest of creditors' test).

Where one or more classes have rejected the plan, the following cram-down provisions apply.

- At least one in the money class must have accepted the plan; and
- The members of the dissenting class must have the right to choose between either:
  - (i) 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 succeeds), regardless of the form in which this distribution is made (cash or non-cash[1]), or
  - (ii) 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).

The court also has the ability 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. Also noteworthy is the possibility of choosing between a variant that falls within the European Insolvency Regulation and a variant that falls outside the European Insolvency Regulation.

In this latter scenario, any debtor may use this version, as long as the restructuring has a nexus to the Netherlands, irrespective of the debtor's COMI. 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 the guarantors or other group members being located in different jurisdictions.

To conclude this brief country report, we note that the instrument is debtor friendly in that it offers debtor companies an effective business rescue tool. The fact that others than the debtor (controlled by out of the money equity holders) can also initiate the procedure enhances early intervention. The instrument is also 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.

The bill provides for a fast, efficient and 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.

More background information, including the translation of the bill and the explanatory notes, can be found at: https://eyesoninsolvency.com/documenten/. ■

Footnotes:

1 A non-cash charge is a write-down or accounting expense that does not involve a cash payment.