

The Netherlands: Multi-stakeholder view on valuations under the WHOA

The proposed new Dutch restructuring law: *Wet Homologatie Onderhands Akkoord*, or WHOA in short, is expected to be enacted in the second half of 2020. The WHOA will enable debtors to offer a tailor-made, court-sanctioned restructuring plan to all or some of their creditors and shareholders, while remaining in control of the company. We expect it will be a better restructuring tool than the UK Scheme of Arrangements or the US Chapter 11.

In today's Dutch restructurings, individual shareholders or creditors can currently hinder the process by refusing to consent to a restructuring plan. By retaining their right to seek (full or partial) repayment of their claim, they can disrupt a restructuring plan and force other, more senior creditors to take a disproportionate haircut on their respective claims or even render the restructuring plan infeasible and force the company into insolvency proceedings. The WHOA aims to resolve this problem.

An important element of the WHOA is that the restructuring plan can be imposed on individual creditors or shareholders that have voted against it. This will strengthen the reorganisation capacity of companies, by offering parties an alternative restructuring instrument, thereby reducing the number of bankruptcies and improving the value distribution to stakeholders. Given the potential significant impact, the proposed law includes certain safeguards to protect the claims of the stakeholders involved. For example:

- **Best interest of creditors:** A creditor or shareholder class should, under the restructuring plan, receive at least the same value compared to what it would receive in case of an insolvency.

- **The Dutch absolute priority rule:** The value distribution to the various classes under the restructuring plan should be in line with the economic entitlement of the various claims, based on the ranking provided by law or contract. Any deviation from the ranking is only allowed in exceptional circumstances.
- **Cash-out option:** The plan must allow any creditor that is part of a dissenting class to opt for an immediate cash-out for the amount equal to the expected recovery in case of insolvency.

These safeguards demonstrate that the reorganisation and liquidation values are fundamental in the context of the WHOA.

The **reorganisation value** represents the value of the company once the restructuring plan has been sanctioned by the court, considering any new money requirements and the execution risk of the restructuring plan. It should be adjusted for non-operating assets and liabilities, as well as claims by any operational creditors that are part of the restructuring plan.

The **liquidation value** comprises the most likely (cash) proceeds that would be realised for the orderly (but distressed) sale of the business (or parts thereof) and/or assets of the company in an insolvency process.

Although these valuation concepts appear straightforward, it is important to note that valuations are not simple calculation exercises that come to a single undisputable outcome, given that they can be driven by subjective assumptions dependent on each stakeholder's position and incentives. For example, from a senior debt holders' perspective (i.e. a party who has the first claim on the reorganisation value), there is an incentive to argue a lower value. This would increase the chances

that more junior debt holders will be (partially) forced out of the envisaged capital structure and reduces the risk of another future financial distress. From the junior debt holders' perspective, however, the opposite holds true: there is an incentive to argue a higher value limiting the impact on their outstanding debt. Shareholders that are initially out of the money but contribute new capital also have an incentive to argue a lower valuation to increase the write-off of existing debt and the shareholder's potential upside if the company would outperform its restructuring plan.

The extent to which these conflicting interests will materialise in a WHOA procedure depends on the degree to which individual stakeholders are (expected to be) in- or out-of-the-money versus other stakeholders. The fact that multiple stakeholders are involved, however, can still make a restructuring process under the WHOA rather complex and difficult to manage. This emphasises the need for the involvement of professional valuation and restructuring experts. A well substantiated business plan including the impact of resolving the operational distress needs to be the objective cornerstone for the reorganisation value.

We believe that the WHOA provides for a welcome and much needed alternative to the current restructuring framework in the Netherlands, and will be key to solving problems following the COVID-19 crisis. The WHOA provides for an additional instrument for distressed firms and their creditors. If properly implemented, this will not only result in increased value preservation, but also improved value distribution and therefore it benefits the broad set of stakeholders involved in a restructuring process. ■



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INDIVIDUAL SHAREHOLDERS OR CREDITORS CAN CURRENTLY HINDER THE PROCESS BY REFUSING TO CONSENT TO A RESTRUCTURING PLAN

