

# **INSOL Europe/LexisPSL joint project on the implementation analysis of the Directive (EU) 2019/1023 in the EU Member States**

## **The Netherlands**

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**Restructuring & Insolvency analysis:** This article looks at how Austria has implemented Directive (EU) 2019/1023 as part of the Joint Project between INSOL Europe and LexisPSL to track implementation.

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### **INSOL Europe/LexisNexis research on implementation of the EU Directive**

LexisPSL are working with INSOL Europe on a joint project to obtain articles from the INSOL Europe membership and Country Coordinators showing how EU Member States have implemented [Directive \(EU\) 2019/1023](#) of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending [Directive \(EU\) 2017/1132](#) (the EU Directive).

A consolidated table appears at Practice Note: [INSOL Europe/LexisPSL Joint Project on EU Harmonisation Directive 2019/1023: consolidated table](#).

As always, you should contact local lawyers in the relevant jurisdiction to check the current measures in force and the impact of any particular circumstances or nuances of your case.

#### **Question 1: When did/will the new restructuring law come into force? What is/are the name of the new proceedings which comply with the EU Directive?**

The Dutch restructuring procedure, the Dutch Act on Court Confirmation of Extrajudicial Restructuring Plans (CERP)—or in Dutch Wet Homologatie Onderhandse Akkoorden (WHOA), is codified in the existing Dutch Bankruptcy Act (Faillissementswet) and came in to force on 1 January 2021.

#### **Question 2: Is court approval automatically required? Is court involvement possible during the course of the proceedings? (eg to rule on short notice on conflicts regarding classes of creditors with voting rights, etc)**

Strictly speaking, court approval is not automatically required. If the debtor offers their creditors a restructuring plan to which the creditors unanimously consent, subsequent approval (homologation) by the court is not deemed necessary. However, the WHOA contains a restructuring tool for those cases where not all creditors consent to the restructuring plan.

During the process of drafting the restructuring plan, the debtor (or the court-appointed restructuring expert) may request interim rulings on aspects relevant to the plan (eg creditor classification, valuation, proposed amendments of rights, voting procedure etc) under section 378 Bankruptcy Act (BA 2021).

**Question 3: What are the entry criteria (ie must insolvency be proved)? Could you please define the entry criteria under your national legislation?**

According to BA 2021, s 370 §1, the debtor must—with reason, be faced with the prospect of not being able to continue paying their debts. In the explanatory memorandum that accompanied the BA 2021 during the legislative process in Parliament, the importance of being able to meet current financial obligations (eg salary payments, gas, water, electricity and monthly rent) is emphasized. The WHOA is not an alternative for bankruptcy; the tool is an option in the earlier stages of financial distress.

**Question 4: Can foreign companies use the process?**

Foreign group companies qualify for the Dutch restructuring procedure if the activities of at least one of the group entities has a sufficient nexus to the Netherlands. Together with the flexibility of the tool and its EU-wide recognition, this makes the Dutch WHOA-procedure an attractive option for internationally operating business to restructure their European debts.

Automatic recognition of the Dutch public restructuring procedure binds all of the debtor's European creditors to cooling-off periods, class formations and amendments to rights sanctioned by Dutch courts on the basis of the WHOA. Thus creditors (and/or shareholders) from other Member States cannot bypass a Dutch WHOA-plan by enforcing a title obtained from a domestic court.

**Question 5: Does the debtor (ie company's management) remain in possession or is an insolvency practitioner (or any other professional, in that case could you please specify) automatically appointed?**

The debtor remains in possession, see BA 2021, s 377.

**Question 6: Is there any moratorium on claims to protect the debtor during the process? What is the minimum and maximum length of the stay?**

On the basis of BA 2021, s 376, the debtor (or court-appointed restructuring expert) may file for a four-month moratorium. During the moratorium, creditors cannot take action against the debtor's assets. Additionally, legitimate third-party owners of property held by the debtor may not reclaim their assets. Before the initial moratorium expires, the debtor (or the court-appointed restructuring expert) may request a four-month extension.

The court will reject the request for a moratorium if its declaration would inflict undue harm on (a) creditor(s) interest(s).

**Question 7: Are creditors placed into classes for voting purposes? How are 'affected creditors' defined under your legislation?**

Creditors are to be placed in classes for voting purposes. Classes are formed in such a way as to reflect their rights and the seniority of their claims and interests. Although debtors (and court-appointed restructuring experts) enjoy a large degree of flexibility when it comes to class-formation, BA 2021, s 374 does provide a number of hard and fast rules:

- creditors and shareholders may not be placed in the same class
- secured creditors and unsecured creditors must be placed in separate classes
- the (partially) unsecured claims of secured creditors must be placed in an unsecured class, and
- unsecured SME creditors must receive at least 20% of their claim in cash

**Question 8: What is the voting threshold to approve the restructuring?**

If a single group of creditors votes in favour of the restructuring plan, the plan can be sent by the debtor (or the court-appointed restructuring expert) for court approval/homologation (BA 2021, s 383 §1). A class will have voted in favour of the plan if a group of creditors that (is present or represented during the voting and) represent at least two-thirds of the total claim value grant their approval.

In the approval process, the court will scrutinise compliance with procedural rules. Dutch courts have been particularly strict regarding information asymmetry. It is important that debtors communicate transparently with their creditors and provide sufficient background information to enable creditors to assess the viability of the plan before voting. The court will also assess the conformity of the plan with a number of material requirements, such as the creditor best interest test.

**Question 9: Can shareholders be bound?**

BA 2021, s 370 §1 states that shareholders can be included in a restructuring plan. Court approval will bind shareholders in the same way that creditors are bound.

**Question 10: How are secured creditors treated?**

Secured creditors retain their priority status and should not be worse off than in bankruptcy.

A secured creditor's share of the reorganisation value may be distributed in the form of shares or depositary receipts. Unsecured creditors must be offered the option of taking a cash payment that is more than or equal to the value of their claim in bankruptcy. Unsecured small to medium-sized enterprise (SME) creditors must be offered a cash payment of at least 20% of the total value of their claim (BA 2021, s 384 §4 c & d ).

During the moratorium, secured creditors cannot execute their security rights.

**Question 11: How are employees treated?**

Rights of employees, insofar as they follow from their employment contracts, cannot be changed under a restructuring agreement as defined in the WHOA. This follows from section 369 §4 BA and ([Directive 2001/23/EC](#)).

Recently, the Supreme Court of the Netherlands ruled that overdue pension premiums cannot be included in a restructuring plan, as these premiums are 'rights' of employees.

**Question 12: Can certain (holdout) creditors be crammed down? Is the absolute priority rule applied?**

The WHOA includes the possibility of a cross-class cram down. If the court has approved the restructuring plan, the rights of dissenting creditors and shareholders will change accordingly (BA 2021, s 385).

The WHOA has a 'light' absolute priority rule (APR). The court does not assess conformity with APR ex officio. A dissenting creditor has to argue that the restructuring plan is in breach of APR. The court must subsequently decide whether the circumstances of the case justify such breach (BA 2021, s 384 §4).

**Question 13: Can onerous contracts be disclaimed? Are there any restrictions on ipso facto clauses?**

The debtor (or court-appointed restructuring expert) may request the court to terminate an onerous contract when the plan is sent for approval/homologation (section 373 §1 BA). The contract then ends on the day of approval, unless the court applies a longer notice period. Any indemnity for early termination of the contract may be part of the restructuring plan. Through homologation of the restructuring agreement, the indemnity is also settled.

During the process of drafting and offering the restructuring plan, creditors may not invoke ipso facto clauses (section 373 §3 BA).

**Question 14: Will the new procedure be listed in Annex A of the EU Recast Regulation on Insolvency 2015/848? If not, how will it be recognised in other countries?**

As of 9 January 2022, the public restructuring procedure is listed in Annex A of the EU Recast Regulation on Insolvency 2015/848. Recognition of the private procedure takes place according to the rules of private international law of the foreign jurisdiction concerned and/or (bilateral) treaties.

**Question 15: Are new money or other arrangements granted any protection/priority (eg DIP finance)?**

The WHOA provides a safe harbour for new DIP finance. The debtor may also provide collateral/security. Safe harbours are subject to prior court approval.

**Question 16: How long should the process take (roughly)?**

On the basis of published court judgments, an average WHOA-process takes upwards of six months. If all preparations have taken place upfront—and creditors do not dissent, the minimum time for a court approval/homologation is about two months.

**Question 17: How much is the process likely to cost (roughly)?**

The court declared a restructuring plan binding on all creditors (homologation) at a cost of €5,737.00 if the debtor is a legal entity (corporation, partnership etc) and €2,277.00 if the debtor is sole proprietor. This however does not include legal fees (the plan must be submitted by an attorney) and the costs of financial advice etc. The aforementioned costs will likely comprise the majority of the total costs involved in the (formal) restructuring process. Legal fees and the costs of other advisers will be determined by the complexity of the case, the number of interim rulings, eventual difficulties with classes of creditors etc. Firsthand experience with the WHOA has shown that good preparation by the debtor is very important as the legal fees and other costs otherwise can become unsustainable, hampering the restructuring process or even bringing the restructuring process to an early end.