Dutch Scheme Thermometer

	Question	Explanation
1.	***Is the company eligible for application of the Act on Confirmation of an Extrajudicial Restructuring Plan (Dutch Scheme)?***	The criteria are: • the company has to have its seat or be visibly controlled out of the Netherlands (centre of main interest) or should otherwise have a sufficient nexus to the Dutch legal sphere; • the debtor may not be a natural person without a profession or enterprise; and • banks and insurers are ineligible. The Dutch Scheme cannot be aplied within 3 years of a failed attempt, except by a court appointed restructuring expert. ***Check: Assess type of enterprise***
2.	***Is there a likelihood of insolvency?***	Can it reasonably be presumed on the basis of a liquidity prognosis that the company will become insolvent (unable to pay its debts as they fall due)? The act does not set a time limit but a period of several weeks until a year could be considered. Possible operational or financial measures other than a Dutch Scheme to resolve the distress should be taken into account. ***Check: Assessment based on a liquidity prognosis***
3.	***Is the enterprise essentially viable?***	Is the enterprise sustainably profitable, whether or not after a financial restructuring or reorganisation? Setting aside the controlled liquidation of an unviable enterprise, the Dutch Scheme is in principle intended for enterprises which – whether or not after a restructuring – are viable so that by applying the Dutch Scheme the going-concern value can be retained. To be able to substantiate this, a turnaround plan or a forecast with a management explaination on the circumstances seems prudent.

NB: Assessment based on valuation model (adjusted for reorganisation value)

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4. ***Is the reorganisation value substantially higher than the liquidation value of the assets in bankruptcy?***

To successfully complete Dutch Scheme proceedings, the reorganisation value (the value retained in a going-concern scenario) must exceed the liquidation value in bankruptcy. If the difference between these values is insufficent, there will presumably be too little incentive for creditors and shareholders to cooperate in Dutch Scheme proceedings. In addition, the risk that a valuation will successfully be contested will increase in case of small differences. Moreover, the difference between the values will need to be sufficient to justify the costs of Dutch Scheme proceedings.

Ultimately these values should be well documented, including the basis (e.g. above mentioned turnaround plan), assumptions, sensitivities, uncertainties, valuation method and the manner of calculation. The liquidation value in bankruptcy should reflect the costs of bankruptcy proceedings and the fact that distributions are made at a later stage (time value of money), to the extent applicable.

Check: Compare the reorganisation value with the liquidation value in bankruptcy

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5. ***Is the likelihood of insolvency caused by (i) over-indebtedness or (ii) a non-cancellable long-term agreement?***

This is not a legal criterion but indicative for the question whether it is presumable that the Dutch Scheme can offer a solution for the distress. If the distress is primarily caused by labour costs or an outdated business model, the Dutch Scheme is not the appropriate tool. Conceivably, Dutch Scheme proceedings can be combined with a conventional restructuring to limit future labour costs and realise a higher reorganisation value – in accordance with applicable law, employee rights and proceedings.

It is well conceivable that in the interest of continuity consumers, trade creditors and essential suppliers are excluded from the Dutch Scheme and fully paid (see 6). If the debtor opts for the disclosed scheme proceedings the debtor may discretely arrange a scheme, without disclosure in the trade register, central insolvency register or Official Gazette. This way the risk of negative publicity can be mitigated. A works council will retain its authority in the disclosed scheme proceedings.

Check: Determine the cause of the distress, assess the possibility to apply the disclosed scheme proceedings

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6. ***Is a plan achievable based on the statutory rules of the game?***

In many cases successfull Dutch Scheme proceedings will require consent of (most of) the preferential creditors and the secured creditors (as a rule, the tax authorities and lenders). A preliminary classification, in which the nominal amounts of claims of various parties are compared to the reorganisation value to be distributed, can offer more insight in the attractiveness of a Dutch Scheme and into by which parties objections can be raised.

If another party than the company itself commences Dutch Scheme proceedings (by means of a restructuring expert), then in case of an SME the company's consent will in principle be required. SME within this meaning is: (i) less than 250 employees, **and** (ii) (a) less than EUR 50 mio annual turnover, or (b) less than EUR 43 mio balance total.

The key rules of the game to conduct a preliminary classification are:

- Parties need to be classified in separate classes if (i) the rights they have upon liquidation of the assets in bankruptcy proceedings differ to such an extent that there is not a comparable position, **or** (ii) the rights offered to them under the plan differ to such an extent that there is not a comparable position.
- Voting occurs based on a 2/3rd majority per class (based on the amount voted).
- No creditor may be worse off than upon liquidation of the assets in bankruptcy proceedings.
- Secured creditors are classified in separate classes for the expected proceeds of the collateral in bankruptcy proceedings. For the (unsecured) remainder of their claim they are placed in a class of unsecured creditors with or (in case of professional finance parties) without a cash-out option.
- In principle the statutory and contractual ranking has to be applied to distribution, unless the higher ranking class or classes agree to a deviation or there is a reasonable ground for deviating and the interests of the higher ranking creditors or shareholders are not harmed. In case of strict application of this rule, shareholders will forfeit their shares if the debtor's equity capital is negative. However, devating from this rule is well conceivable in relation to a controlling shareholder who is also the managing director and key to the success of the business or a shareholder providing fresh capital, or in relation to consumers, small creditors, trade creditors and essential suppliers.
- For court confirmation it is required that **at least** one (1) creditor class approves. If one or more creditor classes are in the money (i.e. it would receive value in bankruptcy proceedings), than at least one (1) such in the money class is required to approve. If more classes approve the scheme, the chance it will be sanctioned increases.
- A nay-voting class which is in the money (not being a secured professional finance party/ies) will be entitled to a cash-out option.
- Small unsecured creditors (maximum of 50 employees or a small company within the meaning of articles 2:395a and 2:396 Dutch Civil Code) with a trade receivable or a tort claim (damages) are, save for compelling reasons, entitled to at least 20%, in cash or otherwise.
- A bank or other professional finance party with a right of pledge or mortgage will, in relation to the liquidation value in bankruptcy of the secured portion of its claim, always need to be offered an alternative to a forced equity position but may to the extent of that value be rolled over without its consent.

Check: Analyse support in all classes, especially in the money

If an affirmative answer on all of these questions is in sight it is prudent to prepare a plan.

Contact

More information is available at: www.windtlegal.com

Should you have any questions please feel free to contact one of our restructuring experts:

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