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Evaluation 'Wet homologatie onderhands akkoord'

Summary

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Summary

On January 1, 2021, The Act on court confirmation of extrajudicial restructuring plans (*Wet homologatie onderhands akkoord* ('WHOA') or 'Dutch scheme') came into effect. The WHOA aims to strengthen the reorganizational capacity of debtors with viable business prospects facing financial hardship potentially resulting in insolvency due to an excessive debt. To this end, the WHOA allows a debtor or the restructuring expert to offer a composition plan to all or some of its creditors or shareholders. If certain requirements are met, the plan can be confirmed (*gehomologeerd*) by the court, making it binding on all affected parties, even if they did not consent to it. This option can also be utilized in cases where a company is no longer viable, and a liquidation plan outside a formal insolvency proceeding would yield a better outcome than a liquidation within bankruptcy.

When the WHOA was enacted, the Act contained a provision stipulating that an evaluation must take place within three years after the WHOA coming into effect, to assess the effectiveness and impact of the WHOA in practice. The present report contains the outcome of that evaluation, which has been performed on behalf of the Research and Data Centre ('WODC'). Its main findings revolve around questions regarding the extent to which the WHOA achieves its objectives, whether the legal instruments have been applied as intended, whether there are elements in the legal framework that operate differently than intended, and whether any parts of the legal framework require any adjustment.

To answer these questions, various research methods have been employed. Firstly, a reconstruction of the 'policy logic' (*beleidslogica*) underlying the WHOA, has been conducted based on an examination of the legislative and parliamentary history. Secondly, all WHOA-related caselaw published on the official judicial website (www.rechtspraak.nl) between January 1, 2021, and July 1, 2023, was analysed. Thirdly, several expert meetings were held, during which discussions took place with representatives of various stakeholders regarding the practical implementation of the WHOA, as well as the success and fail factors. Fourthly, more in-depth case studies were carried out on five WHOA trajectories based on case dockets and interviews with involved parties. Finally, a survey was held among different stakeholder groups (professional practitioners, financial and legal advisors, judges, academia) to investigate the extent to which specific experiences with the WHOA are endorsed among experts with practical knowledge.

The main conclusion of these studies is that the WHOA generally achieves its core objective of strengthening the reorganizational capacity of viable enterprises, largely functioning as intended by the legislator. Additionally, though to a slightly lesser extent, the WHOA appears to contribute to enhancing the voluntary settlement process, as it provides clear frameworks for negotiations, with parties engaging against the backdrop of this legal trajectory, and to the controlled settlement of a business through a liquidation plan. Moreover, in general, the statutory instruments of the WHOA seem to operate adequately. This pertains particularly to the options for declaring a 'cooling-off' period during which creditors cannot enforce their rights (*afkoelingsperiode*) and the possibilities for extending it once or more. Furthermore, the option of having the court address in advance certain issues which may hamper confirmation of the plan by the court, so-called 'aspect requests' (*aspectenverzoeken*), allowing for early clarification of (foreseeable) issues in the process, has been utilized several times. From the perspective of creditor protection, it is worth considering allowing this instrument to be used not only at the court's initiative *ex officio* or at the request of the debtor or the restructuring expert, but also at the request of the observer, if deemed in the interest of securing the interests of creditors or shareholders. This would prevent these parties from raising their disapproval for the first time during the confirmation hearing, unintentionally leading to the rejection of the plan. The use of Article 42a of the Bankruptcy Act to protect certain finance (and related) transactions in connection with the plan and plan negotiations against subsequent 'avoidance actions' (*paulianabestendige rechtshandelingen*) by liquidators or the option to terminate burdensome agreements for the debtor pursuant to Article 373 of the Bankruptcy Act have been less frequently employed thus far.

In addition, it should be noted, however, that the WHOA has not entirely functioned as intended in all of its aspects. Particularly, doubts arise regarding its suitability for Small and Medium-sized Enterprises (SMEs). Although the WHOA has been successfully implemented for SMEs in practice as such, the study identified nevertheless some areas for improvement. It is worth noting that the term ‘SME' encompasses a wide variety of enterprises, and that these areas appear to be particularly relevant to smaller businesses. Factors such as an insufficient awareness of the existence of the WHOA and the high costs associated with a WHOA process, both in terms of preparation (consultants) and the actual procedure (court fees, lawyers), were identified.

The research does indicate that this legislative evaluation is relatively early, suggesting that certain challenges may not have fully surfaced yet. Moreover, the study reveals that in some respects the practical implementation must still find its way, such as in defining the precise roles and duties of the restructuring expert and the observer, as well as the manner of appointing these actors. This also applies to the practical implementation of the disclosure requirements for the debtor in relation to the size of its business. While some of these aspects can be left to further development in practice, possibly in guidelines developed by that practice, others may require additional research and, in certain aspects, limited legislative adjustments. The report includes various recommendations for this purpose, categorized into three groups, distinguishing between adjustments that are relatively straightforward and those that are less so, as well as more practical adaptations that do not necessitate amendments to the WHOA.

The first category includes a variety of easy adjustments, such as the already announced reduction or abrogation of court fees for WHOA-cases, an extension of a cooling-off period pending a court decision on such matters and on confirmation, and the possibility of digital hearings by the court as was the case during the COVID-19 pandemic.

The second category pertains to a variety of topics, such as (i) the definition of 'ongoing obligations' (*lopende verplichtingen*) that the debtor must continue to fulfil during a WHOA process, (ii) the timeframe between the appointment of an observer and the date set for the confirmation hearing in case of a cross-class cramdown when not all so-called ‘in-the-money’ classes have consented to the agreement, (iii) whether an ‘investigation into possible irregularities’ (*rechtmatigheidsonderzoek*) should be mandatory or discretionary for the restructuring expert or the observer to be executed, (iv) the extent of creditor protection and the moment at which creditors can be heard by a judge, (v) the effects of the ‘twenty percent’ rule (*twintigprocentsregel*), pursuant to which certain SME-creditors must receive at least 20% of the value of their claim, on the position of other unsecured creditors and the tax authorities, while the definition of the creditor eligible for this rule may lead to unintended and unwanted consequences, (vi) some procedural aspects regarding the confirmation hearing (limitations by the court to size (in words/pages) of the court papers submitted by the parties and sometimes very short notice for certain hearings), and (vii) the consequences of the WHOA for the position of the issuer of (bank) guarantees upon payments made thereunder.

The third and final category firstly focuses on proposals to adapt the WHOA to SMEs, particularly smaller businesses, in light of the growing awareness of the need to take timely action when financial problems arise. Secondly, the research shows that the roles and duties of the restructuring expert and the observer, as well as the manner of appointing these actors, require further development. This can be achieved by creating guidelines from professional practice. These guidelines can also assist in addressing some practical challenges related to the so-called ‘aspect requests’ (*aspectenverzoeken*), ‘cooling-off’ period (*afkoelingsperiode*) and the liquidation and reorganization valuations required by law.

Lastly, the research indicates no insurmountable obstacles arising from the exclusion of appeal, which means that the rulings of the court are rendered in the first and highest instance, and thus, in principle, are immediately final. In addition, the judgment of the Supreme Court excluding pension premium obligations from a WHOA plan, also appears not to pose substantial obstacles. Finally, there seems to be no excessive increase in the workload of the judiciary

resulting from the WHOA, certainly not in relation to the mandatory consent of the debtor for certain actions by the restructuring expert.

While it appears that the WHOA contributes to strengthening the reorganizational capacity of viable enterprises, thereby simultaneously preserving employment, the extent of its impact and the economic effects of the WHOA could not be assessed by the conducted studies. For this aim, it is therefore advisable to reevaluate the WHOA in a few years, including an assessment of its long-term economic effects.