

FAQ - ACT ON COURT CONFIRMATION OF EXTRAJUDICIAL RESTRUCTURING PLANS

1 WHO CAN INITIATE A RESTRUCTURING UNDER CERP?

The process may be initiated by the debtor, one or more creditors, the works council, an employees' representative or a shareholder. It is not relevant whether the debtor is situated or has its centre of main interest (COMI) in the Netherlands. Act of Court Confirmation of Extrajudicial Restructuring Plans ("CERP"; in Dutch "*WHOA*") is available in two versions. The public version requires a Dutch COMI. The undisclosed version is open to any debtor as long as there is sufficient connection between the restructuring and the Dutch jurisdiction. For example, where the debtor has significant activities or assets in the Netherlands, a substantial portion of the debt is governed by Dutch law or by a choice of forum clause selecting the Dutch courts, or the debtor is member of a group of companies of which a substantial number are located in the Netherlands. As long as there is sufficient nexus, a restructuring can be initiated for any debtor if it is reasonably plausible that it will be unable to pay its future debts as they fall due.

2 WHAT TYPE OF PROCEEDINGS DOES CERP PROVIDE FOR?

A restructuring in accordance with CERP is not a formal insolvency procedure. The debtor remains in full control throughout the entire process. The court may appoint a plan expert, but this person is only authorised to draw up and negotiate the restructuring plan on the debtor's behalf and to submit the plan for court confirmation.

CERP is available in two versions: a public version that will be part of the European Insolvency Regulation recast, and an undisclosed version that will be governed solely by Dutch law. Debtors with their COMI in the Netherlands may choose to apply the type they prefer; debtors without COMI in the Netherlands may only use the undisclosed version.

3 WHO CAN BE AFFECTED BY A RESTRUCTURING PLAN UNDER CERP?

A restructuring plan in accordance with CERP may include debt (both secured and unsecured) and equity (without shareholder consent being required). The debtor is at liberty to determine which creditors or shareholders it will include in the restructuring plan. The only exception is employees' claims stemming from their employment contracts. Creditors have to be placed in different classes if their rights at liquidation or after adoption of the restructuring plan will differ so much that their exposure is not comparable. Creditors and shareholders with different ranking will always be placed in different classes.

4 HOW DOES CERP FACILITATE A RESTRUCTURING?

CERP has been designed to provide for an optimal extrajudicial restructuring process. CERP allows a debtor to continue its business, by protecting from claw-back actions any funds provided to support business continuity and any security provided in this context. In addition, the court may order a moratorium that will prevent creditors from claiming payment, foreclosing on security or starting legal action (including insolvency proceedings) against the debtor. Naturally, the court may make an exemption if the circumstances so require.

Another way CERP supports a restructuring is by deactivating ipso facto clauses, which allow counterparties of the debtor to suspend or terminate their contracts based on the debtor being restructured or on any action taken in connection with a restructuring. A debtor may also propose amending an onerous contract. If the other party does not accept the proposal, the debtor may unilaterally terminate the contract and include the damages claim, if any, in the restructuring. Finally, any issue coming up in relation to the restructuring, may be presented to the court before the plan is put to a vote. An expert pool of judges will hand down final decisions.

5 HOW DOES CERP CATER FOR GROUP RESTRUCTURING?

If a group company is liable towards the debtor's creditors, for instance through a parent guarantee or surety, that obligation can be integrated into a single restructuring plan under CERP. This eliminates the need for opening various restructuring proceedings in different jurisdictions, and also prevents the guarantors from having to go through a restructuring themselves. What sets CERP apart as the tool of choice for cross-border group restructurings is that a group of companies may combine the public version and the undisclosed version of CERP.

6 HOW IS THE RESTRUCTURING PLAN VOTED ON AND APPROVED, AND WHERE DOES COURT CONFIRMATION COME IN?

Under CERP, every creditor and shareholder affected by a restructuring plan is eligible to vote. Voting takes place per class of debt or shares. A restructuring plan is approved by a certain class as soon as two-thirds of the total debt (or in the case of shareholders, the total subscribed capital) exercising their voting rights within their class, vote in favour of the plan. The plan is approved if all classes vote in favour of the plan. The court may subsequently be requested to confirm the plan.

Where not all classes have voted in favour of the plan, court confirmation is still an option. A restructuring plan that has been approved by at least one class of in-the-money creditors – or by the class in which the value breaks, that is, those creditors who would likely recover some or all of their claim in an alternative bankruptcy scenario – may be submitted for court confirmation. In that way, CERP allows for a cross-class cram-down.

7 HOW DOES A COURT ASSESS A REQUEST FOR CONFIRMATION OF A RESTRUCTURING PLAN?

CERP starts from the basic principle that the court will hand down a decision to confirm the restructuring plan as soon as possible, especially if all classes have voted in favour. Accordingly, CERP lists a limited number of grounds for refusal, rather than conditions for approval. Some grounds for refusal can be applied by the court on its own initiative, while other grounds can only be applied at the request of a creditor or shareholder who is eligible to vote. All grounds for refusal are in line with market practice. They include formal requirements and the lack of a guarantee of proper performance of the restructuring plan. The restructuring plan must also adhere to the absolute priority rule – no deviation from statutory or contractual ranking – with one minor exception, and has to meet the best-interest-of-creditors test.

8 WHAT HAPPENS AFTER COURT CONFIRMATION OF A RESTRUCTURING PLAN?

First, court confirmation is a final decision. CERP does not allow for any appeal. Second, the main consequence of court confirmation is that the restructuring plan becomes binding on all creditors and shareholders affected, regardless of how they voted on the plan. Finally, as the public version of CERP will be part of the European Insolvency Regulation recast, the court's decision will be automatically recognised throughout the EU. A court decision resulting from the undisclosed version of CERP lacks automatic recognition but will likely be recognised both in and outside of the EU, based on treaties or private international law.

9 WHAT ARE THE MAIN DIFFERENCES BETWEEN CERP AND A US CHAPTER 11, A UK SCHEME OF ARRANGEMENT OR A PART 26A PLAN?

CERP allows for both domestic and global restructurings with the flexibility of a UK Scheme of Arrangement, combined with the moratorium and certainty of a US Chapter 11. However, the cost of a CERP-restructuring is much lower and the timeframe very short (six to eight weeks from submitting the plan to a vote). A main advantage of CERP over the UK Part 26A Plan is the low approval requirement: two-thirds instead of 75% (or even more in the case of Chapter 11 or a UK scheme of arrangement), and the effect of a moratorium: a CERP-moratorium is much more extensive. Other key advantages are the option to include all liabilities of the various group members, to terminate onerous contracts, and to negotiate and implement the restructuring behind closed doors – preventing loss of value due to negative publicity.

FURTHER INFORMATION

Our [booklet](#) explaining CERP in detail

Our dedicated [webpage](#) – featuring the full CERP text, the explanatory memorandum (in Dutch and English) and various articles on CERP

A [comparative overview](#) of CERP, US Chapter 11, UK Scheme of Arrangement and new UK Part 26A Plan
