SIMONT BRAUN

A STEP TOWARDS A HARMONISED EU INSOLVENCY FRAMEWORK

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On 19 December 2018, the Council of the EU and the Parliament reached an agreement on the proposal for a *directive on "preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures"*. The main objective of the directive is to enhance the rescue culture across EU. To do so, each Member State will be required to introduce into its substantive law effective preventive restructuring frameworks in order to help debtors experiencing financial difficulties to restructure at an early stage, with the objective to avoid insolvency and to improve the return for the creditors.

Moratorium

Debtors who negotiate a restructuring plan with their creditors will benefit from a stay of individual enforcement actions. National laws may organise a full moratorium suspending all enforcement actions against the debtors by all its creditors or a moratorium limited to one or more individual creditors, for a period of up to four months, which can be extended to up to 12 months by a judicial or administrative court's decision provided certain conditions are met. Judicial or administrative authorities will have the right to lift the stay if it becomes apparent that the majority creditors do not support the continuation of the negotiations or at the request of the debtor or the restructuring practitioner.

During the moratorium period, the debtor's obligation to file for insolvency will be suspended, and the creditors shall equally be prevented to file for the opening of insolvency procedures against the debtor. In addition, the creditors will be prevented to refuse to perform, terminate, accelerate or amend in any other way the contractual agreement to the detriment of the debtor.

Restructuring plans and cram-down mechanisms

A majority of creditors in all creditor classes must vote in favour of the plan in order for the plan to be adopted and to bind dissenting creditors (cram-down). Member States may determine the majority voting requirements for the adoption of a restructuring plan, which may not be higher than 75 per cent in the amount of claims or interests in each class.

If the necessary majority is not reached in all classes of creditors, the plan may still be adopted by a judicial or administrative authority if certain conditions are met. The plan must be supported by at least one affected class of creditors, and the dissenting classes must not be unfairly prejudiced under the plan (cross-class cram-down). In particular, the plan must comply with the so-called "absolute priority rule", i.e. the requirement that a dissenting class of creditors is paid in full before a more junior class to a subordinate class receiving anything under the plan.

Workers' rights may not be affected by the preventive restructuring procedure.

Restructuring privilege and super senior financing

The directive offers strong protection to new and interim financing. These financings may not be declared null and void in a subsequent insolvency proceeding, except in case of fraud and their grantors will be immune from any civil, administrative and criminal liability in the context of subsequent insolvency. Also, the Member States

may grant a priority right of payment to the grantors of new or interim financing that will rank at least senior to ordinary unsecured claims (super senior financing).

Court order and appointment of a restructuring practitioner

It will not be necessary to have a court order to open the restructuring process which may remain informal as long as the rights of third parties are not affected. The directive tends to limit the involvement of judicial or administrative authorities where it is necessary and proportionate. Also, the appointment of a restructuring practitioner will not be mandatory in all cases, but only in limited situations determined by national law such as situations where the debtor benefits from a general stay of individual enforcement actions and where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram down (see below).

As long as no restructuring practitioner is appointed, the debtor will remain in control of its assets, at least partially, and of the day-to-day operation of the business.

Duties of companies' directors

Member States will be required to implement rules on duties of directors in insolvency proceedings that will be taken into account to assess their potential liability. It concerns the requirement to take immediate steps to minimise the loss for creditors, workers, shareholders and other stakeholders, to have due regards to the interests of creditors and stakeholders, to take reasonable steps to avoid insolvency and to avoid deliberate or grossly negligent conduct that threatens the viability of the business.

Second chance

The directive contains measures that promote a second chance for entrepreneurs acting in good faith, including the right to be fully discharged of their debts. In the Member States where full discharge is conditional upon a partial repayment of debt, such repayment obligation will need to be based on the individual situation of the entrepreneur and proportionate to his or her disposable income over the discharge period which shall not be longer than three years.

Entry into force and impact on current Belgian insolvency law

The directive will be formally adopted after the pending linguistic review and published in the Official Journal. It will enter into force on the 20th day following its publication on the Official Journal. The Member States will have two years to implement the directive from the date of its entry into force.

The directive will be of minimum harmonisation. The Member States will have extensive flexibility to adapt the new framework to their domestic insolvency regulation which may go further than the new EU rules.

It is interesting to note that in the draft bill of 20 July 2017 (which became the law of 11 August 2017 which added a new book XX in the Belgian Economic Code), the Belgian legislator had intended to implement a "pre-pack bankruptcy", which was supposed to give the debtor the opportunity to "prepare" its bankruptcy out of court, with discretion and no publicity. The objective was to allow him to find better alternatives to the bankruptcy (notably via the transfer of his activities with the assistance of a "pre-trustee"). However, this part of the reform has eventually been abandoned.

One can notice that Belgian insolvency procedures are currently characterised by a high level of intervention of the courts, which usually appoint judicial representatives to assist the debtor in the different stages of the procedure. Yet, one of the objectives of the directive is precisely to promote out of court solutions and to limit the involvement of judicial and administrative authorities.

Therefore, and even if the directive gives the Member States large flexibility for its implementation, the Belgian legislator will likely need to noticeably amend not only its insolvency regulation but also its general philosophy. One can thus expect another significant reform of the subject matter in the next two years. We will, of course, monitor this closely.

Finally, the directive will let an important part of substantive law untouched, including the ranking of claims. It is, therefore, only a first step towards a harmonised EU insolvency framework.

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