Schoenherr - New EU Restructuring Directive: A game changer for restructurings?

The list of successful restructurings outside insolvency proceedings is as long as it is confidential. Every year, companies of all sizes are stabilised and sustainably restructured without the stigma of insolvency proceedings. However, until now there has been no European legal framework for pre-insolvency restructurings and only a few national laws explicitly provide for the possibility of such preventive restructurings. This will change now.

On 20 June 2019 the new European Directive 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 "Restructuring Directive") was officially adopted and will be published in the Official Journal soon.

Avoiding insolvency

For the first time the Restructuring Directive establishes uniform rules for preventive restructuring frameworks aiming at avoiding (the stigma of) insolvency proceedings: Starting point for preventive restructurings is the "likelihood of insolvency". A term to be defined by national law but describing in any case a point in time before a company becomes insolvent in terms of the respective national insolvency law.

Preventive restructuring plan

The core of a successful restructuring is the negotiation and implementation of a restructuring plan. Under the Restructuring Directive, any measures deemed necessary for successful restructuring can form part of the restructuring plan, e.g. asset sale, operational changes, debt-to-equity swap or (re-)financing. The appointment of an external restructuring practitioner might be possible or even mandatory in certain cases to assist the parties in negotiating and drafting a restructuring plan.

If new and/or interim financing is granted in the restructuring plan and confirmed by court, there shall in principle no longer be any risk of civil, administrative and criminal liability for the creditor, e.g. such financing can no longer be declared void, voidable or unenforceable in subsequent insolvency proceedings. Such legal certainty when providing fresh money might become one of the most important features in practice.

Is it confidential?

National judicial or administrative authorities need to be involved at least in certain cases, e.g. for the confirmation of a restructuring plan. It could turn out that this is the Achilles' heel of the Restructuring Directive's preventive restructuring concept: The involvement of courts or administrative authorities could not only substantially delay the restructuring, but there would also be a risk that details of the restructuring and the debtor's financially strained situation could be disclosed to the public. In contrast to insolvency proceedings, successful out-of-court restructurings typically remain confidential to avoid negative consequences for the debtor's business (e.g. loss of consumer trust). Hence the new tools under the Restructuring Directive will only be accepted in practice if confidentiality is ensured to the utmost extent in the national transposition laws.

Take a breath!

If necessary to support the restructuring, individual enforcement actions against the debtor might be suspended for up to 12 months. This can either cover all types of claims, including secured and preferential claims, or be limited to certain creditors or claims only.

For the duration of such stay, a debtor's obligation to file for insolvency and the opening of insolvency proceedings at the request of creditors, shall be suspended, which shall free the debtor from the imminent risk of personal liability in such scenarios. Though, Member States may decide that this does not apply if a debtor is unable to pay its debts as they fall due.

In addition, during the stay creditors may not withhold performance or terminate certain contracts (e.g. if vital for the debtor's day-to-day business) solely by reason of restructuring proceedings, a stay of individual enforcement actions, or non-payment by the debtor.

Majority vote

The parties affected by the restructuring plan will vote on the restructuring plan and will be treated in separate classes reflecting their interests, e.g. secured and unsecured creditors.

Restructuring plans may be adopted by a majority of each class as defined by each Member State (majority requirements of up to 75 %). This means that it will be no longer necessary that all affected creditors agree to a restructuring plan and prevents that single creditors can block restructuring efforts. The Restructuring Directive also provides detailed rules on a cross-class cram-down, i.e. the confirmation of the restructuring plan even if it was not approved by the majority of affected parties in every voting class but by the majority of voting classes. This requires, amongst others, that the dissenting voting classes are not worse off compared to liquidation in insolvency proceedings.

Certain restructuring plans may only become binding once they are confirmed by a judicial or administrative authority, e.g. restructuring plans providing for new financing, affecting the interests of dissenting creditors, or if more than 25 % of the workforce is lost.

Take the chance!

The new Restructuring Directive has to be implemented by the Member States until approximately June/July 2021. The Directive provides more than 70 options Member States can choose from. If implemented wisely, e.g. by limiting the involvement of courts or administrative authorities and avoiding publicity, such new restructuring frameworks could be a real game changer for restructurings in the European Union. Member States who are willing to abandon old patterns of court driven insolvency laws may establish themselves as new centres of pre-insolvency restructurings.

The full text of the final draft of the Restructuring Directive can be found *here*.