EU COUNTRIES FACILITATE PREVENTIVE RESTRUCTURING

Less than half a year remains for the member states of the European Union to implement the rules effectuating the restructuring directive. The aim is to ensure that viable companies that have experienced financial difficulties have access to effective preventive restructuring frameworks that enable them to overcome the crisis and continue their operations. New solutions aimed at facilitating, accelerating and streamlining the early restructuring of companies should come into effect no later than 17.07.2021. In this issue of our International Newsletter, we report on the current status of the implementation of the directive in some of our alliance countries.

In principle, we observe that the individual EU Member States are in different stages in implementing the directive. The specific solutions they choose also differ from each other. This is not necessarily bad news for companies. Soon, they will have the opportunity to choose the most advantageous form of restructuring for cross-border activities.

Furthermore, it can be clearly seen that the pace of work in many countries has accelerated with the progression of the negative economic effects of the COVID-19 pandemic. Many countries had already introduced a suspension of the insolvency application obligation in the first few days of the pandemic and have adhered to this suspension to date. However, if these measures are ultimately eliminated, a massive increase in insolvencies is to be expected.

I. GERMANY

The directive has been implemented in Germany by the Law on the Stabilization and Restructuring Framework for Companies (StaRUG, *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen*), which came into force on 01.01.2021.

The restructuring procedure can be initiated in the event of imminent insolvency within the meaning of § 18 para. 2 of the Insolvency Statute (InsO, *Insolvenzordnung*). Imminent insolvency exists if the debtor is not likely to be able to meet payment obligations at the time of maturity within a forecast period of 24 months. A restructuring procedure cannot be initiated if the insolvency has already occurred or if there is over-indebtedness.

The heart of the new restructuring process is the restructuring plan which contains regulating provisions. This allows claims to be reduced or deferred. The StaRUG is based on the regulations on the insolvency plan. However, there are differences:

1. Unlike an insolvency plan, the restructuring plan does not necessarily apply to all creditors. The planner has a wide discretion in the selection of plan stakeholders. For example, the law considers it appropriate if only financial liabilities are created and the claims of small creditors, in particular consumers, small and micro-enterprises, or medium-sized enterprises, remain unaffected.

2. Certain claims – in particular claims by employees or rights arising from commitments to company pension schemes – cannot be included in a restructuring plan.
3. As with the insolvency plan, creditor groups are formed. The plan is accepted if it receives a qualified majority of 75% of the voting rights in all groups. If this majority is not reached, the consent is nevertheless deemed granted if the majority of the voting groups have agreed to the plan and further prerequisites are met.

The restructuring project must be reported to the competent restructuring court. The agreement on the plan can be organised by the debtor himself. In this case, the role of the court is limited to a subsequent control and confirmation. However, it is also possible to put the restructuring plan to a vote in a court proceeding.

During the restructuring proceedings, the court may issue a stabilisation order upon request. It can be ordered that measures of enforcement against the debtor are prohibited or temporarily suspended (block of enforcement) and rights to items of movable assets (e.g., collateral ownership) may not be enforced by the creditor (block of exploitation). In addition, contracts, e.g., rental or leasing contracts, cannot be terminated during the period of the stabilisation order due to payment arrears. The stabilisation order can last for a period of up to three months. It can be extended by another month under certain circumstances.

The court can cancel the restructuring procedure if insolvency or over-indebtedness occurs, the restructuring project has no prospect of implementation due to the serious and final rejection of the restructuring plan by those affected by the plan, or the restructuring court is aware of circumstances from which the result is that the debtor has seriously violated the obligations incumbent upon him.

II. ITALY

Italian legislation had already autonomously adopted provision 2019/1023, the so-called Code of Civil Procedure on Company Crises (legal decree no. 14 of 12.01.2019), which anticipated some of the topics also regulated in the directive. For the purpose of implementing the directive, a corresponding adjustment and supplementation of the Code of Civil Procedure on Company Crises was made with the Legislative Decree No. 147 of 26.10.2020 (correction ordinance); the entire code of procedure will enter into force on 01.09.2021.

In particular, the correction ordinance introduces measures relating to preventive restructuring frameworks, debt relief and professional bans, as well as measures aimed at increasing the effectiveness of restructuring, insolvency and debt relief procedures, while at the same time rejecting solutions that are incompatible with them.

With regard to the protective measures that can be applied for at the same time as the application for approval of a crisis regulation procedure, the correction ordinance has determined, for example, that these may not take longer than four months in accordance with the provisions of the directive.

Also within the correction ordinance, the invalidity of the clauses on the automatic termination of contracts in the event of an application for approval of the settlement procedure was defined within the scope of the regulations on pending contracts in accordance with Art. 97 of the Code of Civil Procedure on Company Crises. In addition, it was determined that in the case of loan agreements, the lender may continue to collect the receivables already paid, even after the submission of the settlement request, whereby the collection of the receivable by the lender against third-party debtors of the financed party is also a main service; the path for dissolution of the contract with the receivable after return of the collected amounts in self-liquidating transactions is thus open. However, the provision provides that in the event of a termination of the contract, the lender is entitled to withhold those amounts that were paid by the third-party debtors in the period between 120 days before the application for access to the proceedings and the delivery of the resolution on dissolution.

With regard to restructuring agreements with extended effect pursuant to Art. 61 of the Code of Civil Procedure on Company Crises, the requirement was excluded by means of the correction ordinance to satisfy the creditors mainly with the proceeds from the continuation of the company since the agreement cannot have any liquidation purposes (this does not apply to agreements with banks and financial intermediaries).

Although most of the changes proposed and required by the directive have been implemented by way of the correction ordinance, the directive has not yet been fully transferred to the Italian legal system, so that further legislative interventions will be necessary for a complete implementation; however, according to our state of knowledge, there are no draft laws yet available so that it remains to be seen if one will occur and, if so, in what form a complete draft law and, above all, a complete guideline implementation would take place.

III. AUSTRIA

The COVID-19-related crisis situation has created massive liquidity difficulties for numerous companies. The longer this situation lasts, the more difficult it is to overcome the associated financial and economic challenges of the companies concerned. At the beginning of the COVID-19 pandemic, the Federal Government had already created measures to procure liquidity and ensure the solvency of companies.

At the same time, several special provisions under insolvency law have already been introduced, which have ensured that large insolvencies have not yet occurred. For example, the deadline for the mandatory insolvency application was extended from previously 60 to 120 days due to the reason for the opening of the insolvency proceedings. This deadline extension only applies to those debtors who have entered the economic crisis situation due to the COVID-19 pandemic. The extension of the deadline may only be used for serious, promising restructuring attempts, i.e., there must be a realistic chance to eliminate the reason for opening the insolvency proceedings within the (extended) deadline. This requires a corresponding prognosis which must be evaluated on an ongoing basis. The insolvency application obligation due to insolvency over-indebtedness and the aforementioned deferrals of taxes and social security contributions were re-enacted, now having been recently suspended until 31 March 2021. To date, no further deadline extension has been announced by the legislature.

Parallel to the changes in the law on insolvency law caused by COVID-19, implementation of the EU restructuring directive by Austrian legislation is now imminent. The draft law is still in political voting. However, a timely submission of a ministerial draft and subsequent timely implementation in the Austrian legal system is to be expected. Austrian legislation intends to implement the provisions of the directive within the framework of a restructuring regulation to be newly created. In the future, the latter should grant debtors the possibility to apply for the opening of a judicial, but not public, restructuring procedure upstream of an insolvency, even if there is a “probable insolvency”. According to the current level of information, it can be assumed that the previous reorganisation key figures from the Corporate Reorganisation Act, namely an equity ratio of less than 8% and a fictitious debt repayment period of more than 15 years, will be used for the assessment of the existence of a probable insolvency that jeopardises the existence of the debtor without restructuring.

In the course of the restructuring procedure, the debtor is to be granted largely self-administration via his company and assets. This is under the supervision of a restructuring officer and the insolvency court. For a limited period of time, there should be the possibility of using a moratorium in the form of an enforcement or insolvency block. A restructuring plan should be submitted to the creditors. A minimum ratio to be offered to the creditors with regard to their claims should not be necessary. The introduction of different creditor classes provided for in the directive, which diverge both with regard to the order of their satisfaction and with regard to the respective voting relationships relating to the restructuring plan, is alien to Austrian insolvency law. This should also be regulated in the new law.

IV. POLAND

In light of the negative economic effects of the COVID-19 pandemic, Polish legislation already decided to introduce regulations for a new, simplified restructuring procedure in mid-2020. These should remain in force for the time being until the end of June 2021. If these prove themselves in practice, this procedure will form the framework of preventive restructuring in Poland.

The new proceedings are characterised by a minimum degree of judicial participation and, at the same time, very extensive protection for the debtor against the enforcement of creditors. It can be claimed by any company which has been threatened with insolvency or has even become insolvent. The difficult financial situation of the debtor making the application does not have to be attributable to the COVID-19 pandemic.

The initiation of the procedure only requires the conclusion of a contract with a restructuring consultant and an announcement in the official government gazette. It is not linked to the consent of the restructuring court.

From the day of publication of the announcement until the day of suspension or termination of the proceedings, the debtor enjoys a number of advantages:

- He is not obligated to satisfy the claims falling under the restructuring comparison.
- In principle, all enforcement proceedings already initiated or conducted against him, including proceedings with regard to claims secured by a mortgage or a lien, are suspended. New enforcement proceedings may not be initiated.
- The termination of the rental or lease agreement for business premises or real estate in which the debtor operates its company by the landlord or lessor is not permitted.
- The prohibition of termination also applies to credit, leasing, asset insurance, bank account and guarantee contracts, licence contracts as well as guarantees or letters of credit.
- The debtor is still entitled to conduct the ongoing business of its company. The consent of the restructuring consultant must only be obtained for decisions that go beyond the scope of normal business operations.

The court can annul the effects of the announcement at the request of a creditor in the event that these lead to the creditor’s disadvantage, but not ex officio. In addition, the task of the court is only to approve the settlement accepted by the creditors. The creditors generally agree in writing on such a settlement, whereby there is also the possibility of convening a virtual creditor meeting.

The entire proceedings should last a maximum of four months until the application for approval of the settlement by the court is filed. For the company, this means a moratorium of up to four months for the payment of claims, including those that are secured, for example, by a mortgage or a lien, and the protection against enforcement and termination of essential contracts. A timely opening of the restructuring procedure also protects against liability due to delayed insolvency.

V. SLOVAKIA

The implementation of the restructuring directive is currently underway. The implementation should take place either on the basis of a draft law on the amendment of law no. 7/2005 coll. on insolvency and restructuring or on the basis of a completely new legal act on the regulation of insolvencies and restructuring.

For the purpose of combating the economic consequences of the COVID-19 pandemic, a law no. 421/2020 coll. on the temporary protection of companies in financial difficulties has already been adopted. This law has already implemented individual requirements of the restructuring directive. The law gives the company the opportunity to make an application for temporary protection. If the legally established conditions are met and the application meets the legally prescribed requirements, the competent court will immediately issue a certificate of temporary protection to the applicant. In this context, no insolvency proceedings can be opened against the company. The law also provides for restrictions for the enforcement against the company or the termination of certain contracts. In addition, regulations were introduced to privilege the satisfaction of new claims from the loan financing that the company receives during the period of temporary protection. However, since not all the requirements of the restructuring directive were met by means of the aforementioned law, it cannot be claimed that the directive has been fully implemented in the Slovak legal system.

In particular, the goal of the correct implementation should be to simplify, streamline and accelerate smaller insolvency proceedings, to optimise the restructuring overall, and to regulate questions in connection with the specialisation of the competent authorities within the framework of the restructuring of large companies. However, the exact framework for the implementation of the restructuring directive in Slovakia remains to be developed and published.

VI. SPAIN

In Spain, an actual implementation of the restructuring directive is currently not yet to be considered in spite of the soon expiry of the implementation deadline. A draft law is also not yet available. This is primarily due to the fact that the Spanish Insolvency Act was recently subjected to a full reform. Thus, the revised text of the Insolvency Act (TRLC) only came into force on 01.09.2020.

This long-awaited revision of the Insolvency Act strengthens the restructuring possibilities already provided in the old version, both outside and within insolvency proceedings.

Within the framework of refinancing agreements between the debtor and its creditors, deferrals or debt conversions can be agreed upon, for example, to improve the financial situation of the debtor company and thus prevent insolvency. The new text of the law provides that the agreement includes a feasibility plan which ensures the continuation of the professional or business operations of the debtor in the medium and long term.

In addition, for companies whose liabilities are below EUR 5 million and have less than 50 creditors, as well as for natural persons with less than EUR 5 million in liabilities, there is the possibility of concluding out-of-court payment agreements with their creditors. To date, there was disagreement as to whether the debtor can obtain a residual debt release only if he has demonstrably attempted to conclude an out-of-court payment agreement. The TRLC expressly clarifies that this is not the case.

One innovation concerning the restructuring within insolvency proceedings is the change with regard to the complete or partial transfer of a company unit. A creditor who is interested in the takeover of a business unit of the debtor company in crisis can file an insolvency application and attach an offer for the acquisition of a business unit. Thus, the transfer can take place from the beginning of the proceedings, thus avoiding a further deterioration of the situation of the debtor. What is new here is that the purchaser is now exempted from the employment and social security liabilities of the previous owner with regard to the employment relationships, which he does not assume. Rather, it only has to assume the costs for the employees who remain in the company.

VII. CZECH REPUBLIC

The Czech Republic is currently working on implementing the restructuring directive. Preventive restructuring is currently provided for in Czech insolvency law. Therefore, already valid laws, in particular the Czech Insolvency Act, must be adjusted accordingly as well. The Ministry of Justice is currently working on a draft of the law on preventive restructuring, which has not yet been published. However, in light of the negative economic effects of the COVID-19 pandemic, the pressure with regard to a rapid adoption of the law has risen sharply. The specific parameters of preventive restructuring can only be presented after publication of the draft law. Below, we present the principles of the draft that we already know.

According to the information known to us so far, preventive restructuring should not necessarily have to be approved by all creditors or by all members of the affected groups of creditors whose claims or other rights of the companies must be restructured to remedy their economic difficulties or to avert imminent insolvency. As part of preventive restructuring, various measures are being taken – in particular the postponement of the due date or the reduction of corporate liabilities, operational changes (reduction of the number of employees, termination of operations, changes in management) but also a possible sale of assets or changes at the shareholder level (including the capitalisation of receivables or the entry of a new investor). These measures are then concentrated on the restructuring plan that results from the company's negotiations with the creditors. The company should have self-administration in accordance with the directive.

A predominant part of the restructuring process will take place outside the formal court proceedings and will not require a formal initiation of proceedings before the insolvency court. The debtor will initiate and carry out the negotiations with the individual creditors or creditor groups. The practice therefore expects that the law on preventive restructuring will facilitate the possibility of restructuring and thus avoid stigmatisation of the company and protect against the negative effects of a complete publication in the insolvency register. However, the draft law provides for a separate restructuring register to be introduced.

In the simplest variant, the plan is accepted if all creditors vote for it. In this case, the plan does not need to be approved by the court. According to the published partial information, however, this must be submitted to a court for confirmation if: (i) the claims of the creditors are reduced or their due date is postponed and the creditors concerned do not agree to the plan, (ii) the plan provides for a new financing, and (iii) if the plan foresees the dismissal of more than 25% of the employees of the company.

The basic prerequisite for the success of the preventive restructuring will be the possible continuation of the company.

CONTACT

Austria:
Nina Pichler
N.Pichler@scwp.com

Bulgaria:
Cornelia Draganova
Cornelia.Draganova@schindhelm.com

Czech Republic/Slovakia
Monika Deislerová Wetzlerová
Wetzlerova@scwp.cz

Germany:
Sabine Freytag
Sabine.Freytag@schindhelm.com

Johannes Thoma
Johannes.Thoma@schindhelm.com

Hungary:
Beatrix Fakó
B.Fako@scwp.hu

Italy:
Cristina Turcato
Cristina.Turcato@schindhelm.com

Poland:
Aleksandra Krawczyk
Aleksandra.Krawczyk@sdzlegal.pl

Spain:
Axel Roth
A.Roth@schindhelm.com

Turkey:
Gürkan Erdebil
Gurkan.Erdebil@schindhelm.com

Publisher, media owner, editorial office: Kancelaria Prawna Schampera, Dubis, Zając i Wspólnicy sp.k. | 50-077 Wrocław, ul. Kazimierza Wielkiego 3, Tel. +48 71 326 51 40, wroclaw@sdzlegal.pl
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