IMPLEMENTING THE RESTRUCTURING DIRECTIVE

The original deadline for the implementation of the restructuring directive expires as early as 17.07.2021. This legal act, which is not directly binding and must be implemented by each EU Member State, aims to promote proceedings that enable the restructuring of debtors at risk of insolvency. In addition, in each Member State, companies must be provided with early warning methods, and the natural persons who do not perform any entrepreneurial activity must be provided measures for debt relief.

Some Member States, such as Poland, have decided to postpone the implementation deadline by one year and are working hard to develop new regulations or to change those already in force. Others, such as Germany, can refer to legislation that has already come into force and even initial practical experience. We continue to observe that the specific solutions chosen or even just considered by the Member States are grossly different 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. The same can apply to natural persons who have run into financial trouble and are considering consumer insolvency.

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.

AUSTRIA

The Restructuring and Insolvency Directive Implementation Act (RIRL-UG) has now been passed by the National Council for the domestic implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20, 2019. The Restructuring Regulation (ReO) contained in the RIRL-UG provides for a judicial restructuring procedure and will come into force together with accompanying amendments to the Insolvency Regulation (IO) - in time for the expiry of the implementation period specified by the EU - on July 17, 2021.

With the deadline for implementing Directive (EU) 2019/1023 already expiring on July 17, 2021, the final version of the Restructuring and Insolvency Directive Implementation Act (RIRL-UG) has been eagerly awaited. The core objective of the introduction of a restructuring order (ReO) envisaged therein is to rescue companies that have got into financial difficulties by means of a "pre-insolvency" judicial restructuring procedure and to restore their viability in order to avert insolvency. This new form of restructuring could be an important lifeline for many companies - especially in view of the knock-on effects of the Corona crisis. The Federal Act on the Restructuring of Companies (ReO) contained in the RIRL-UG will enter into force on July 17, 2021.

The new restructuring procedure is generally open to all (viable) companies, including SMEs and one-man businesses (with the exception of the financial sector in particular), and requires

that the debtor is "likely to become insolvent". This is the case if there is a threat of insolvency or if the URG ratios are not met (equity ratio below 8% and notional debt repayment period of 15 years exceeded). It is essential that the company is able to continue as a going concern. Against this background, the presentation of a going concern forecast is required. This can also be provided conditionally with the acceptance and confirmation of the restructuring plan. However, the new restructuring procedure is generally not available to insolvent debtors.

The core of the proceedings is the so-called restructuring plan, which contains possible restructuring measures, including in particular the deferral and reduction of creditors' claims. In principle, the restructuring plan must be submitted when the proceedings are initiated. However, it can also be drawn up during the proceedings with the involvement of a restructuring representative (who is similar to an insolvency administrator), provided that at least a restructuring concept is already submitted in the application. The debtor is granted self-administration in the proceedings.

In order to support the negotiation of a restructuring plan, the debtor may request that execution proceedings against its assets may not be granted (so-called enforcement bar). This also leads to a suspension of the debtor's obligation to file for insolvency in the event of over-indebtedness under insolvency law, restricts the obligation to file for insolvency in the event of insolvency and also has the effect of eliminating or at least reducing the liability of the company's bodies for delaying insolvency. The suspension of enforcement may not exceed three months but may be extended upon request (to a maximum total period of six months).

The ReO also provides for a "standstill" for material company-related contracts still to be performed, which are necessary for the going concern of the company. There is no provision for the preferential termination of continuing obligations or employment contracts within the meaning of Sections 21 et seq. of the IO.

The vote on the restructuring plan is held in so-called "creditor classes" (secured, unsecured, bondholders, creditors in need of protection and subordinated creditors), which is a novelty in Austrian law. The adoption of the restructuring plan requires a simple (head) majority of the creditors in each class and a qualified majority of 75% of the total amount of the claims of the creditors included. Notwithstanding the foregoing, a restructuring plan which has not been adopted by the relevant classes of creditors in each voting class may, upon application by the debtor, be confirmed by the court (so-called cross-class cram-down), provided that the statutory requirements for this are met.

The reorganization within the meaning of the Reorganization Regulation can therefore also be implemented, if necessary, against the resistance of individual, so-called "chord disruptors". Even individual classes of creditors can be outvoted under certain conditions.

It is also essential that the debtor can limit the procedural instruments of the ReO to individual creditors and "creditor classes" and, in principle, decide for himself whether or not the restructuring proceedings are to be made public in the edict file. In particular, the possibility of secrecy can considerably facilitate continued operation and prove to be extremely practicable in practice.

In addition, the ReO also provides for a limitation of the risk of avoidance for new financing and interim financing as well as other transactions in connection with the restructuring in the event of a subsequent insolvency of the debtor.

In view of the current tense economic situation and the lack of practical relevance of reorganization proceedings as defined in the URG, the legislative attempt to prevent insolvency by

means of "pre-insolvency" restructuring proceedings is in any case to be welcomed.

Since the ReO creates a legally clear and modern framework for the reorganization of companies and contains partly innovative new features, such as the possibility of a restructuring against the will of individual "piecework disruptors" as well as the minimization of the risk of avoidance in the case of new and interim financing, the draft law represents overall a quite successful implementation of Directive (EU) 2019/1023. However, it remains to be seen whether the new "pre-insolvency" restructuring procedure will actually be accepted and gain significance in practice.

BULGARIA

In 2019, Bulgaria worked with the European Commission to develop a road map for the reform of the insolvency framework and the stabilisation of Bulgaria, with a view towards Bulgaria's upcoming admission to the Eurozone. In this document, a comprehensive amendment of the Commerce Act in the area of insolvency was planned, which also provides for the implementation of the restructuring directive. As a result, a new draft law on the amendment and supplementation of the Commerce Act on was submitted for public discussion by the end of March 2021. The draft has not yet been discussed in Parliament. As a result of the parliamentary elections in Bulgaria in April 2021, there was a delay in the parliamentary debates about the draft, and as of today's date the implementation of the Directive has not been implemented.

The regulations in the new draft have been discussed and worked out by representatives of the Appeals Court, lawyers, the High Court Council, and legal scholars, and they concern the insolvency proceedings in all phases. The purpose of the amendments is both to implement the Restructuring Directive as well as to implement a deep reform of insolvency proceedings in the direction of shorter deadlines, maintaining the viability of the company, better guarantees for the interests of creditors, etc.

CZECH REPUBLIC

The draft law on preventive restructuring has still not been published in the Czech Republic.

In the meantime, it is therefore clear that the Ministry of Justice cannot prepare the implementation of the Restructuring Directive in the Czech Republic in a timely manner.

The Czech government has therefore asked the EU Commission to extend the deadline for the adoption of the law in connection with the implementation of the restructuring directive by one year, namely until July 2022.

In the view of insolvency experts, the Ministry has missed a great opportunity, since adoption of the new law would also benefit companies that have survived the severe restrictions of their economic activities in the fight against the Covid-19 disease.

Unfortunately, since February 2021, no further detailed information on the preparations of the Restructuring Act has been published.

GERMANY

At the beginning of the year, the German legislature implemented the Directive by way of the Law on the Stabilization and Restructuring Framework for Companies (StaRUG). The StaRUG, which entered into force on 01.01.2021, should give companies and entrepreneurial individuals threatened by imminent insolvency the opportunity to carry out restructuring on the basis of a restructuring plan at an early stage and shielded from the public.
The centrepiece of the restructuring procedure under the StaRUG is a restructuring plan designed by the restructuring company itself, which strongly conforms to the content of the previously known insolvency plan. In contrast to the insolvency plan, the restructuring plan does not have to extend to all creditors of the

company, but rather it is at the discretion of the company whether the plan should affect all or only selected creditors. Furthermore, the implementation and enforcement of this plan does not require the consent of all creditors concerned; the restructuring project can be enforced against the resistance of a minority of the creditors, provided that this is approved by a qualified majority of the creditors (so-called cross class – cramdown procedure) and is confirmed by the restructuring court over the course of this process.

Not only the initiative and the design of the restructuring plan but also its implementation and the business of the company during the ongoing restructuring process are essentially in the hands of the company itself that is in need of restructuring. A transfer of administrative powers and the power of disposition to an officially appointed administrator, as in the insolvency proceedings according to the InsO, is not provided for according to the StaRUG. Although the restructuring court can appoint a restructuring officer and equip him with certain information rights, the competence of the restructuring officer is essentially limited to a consulting and monitoring function, while the management of the company continues the operational activities independently and largely without external instructions.

A few months after its entry into force, the new law was subjected to a practical run-through. Thus, what was probably the first restructuring procedure according to the new StaRUG was confirmed by the District Court of Hamburg in April, 2021. In addition to a concept for the settlement of creditor claims, the restructuring plan also contained Corporate Law measures, such as the reduction of the share capital, the replacement of the shareholders and the takeover of new shares by an external investor. The restructuring plan was approved not unanimously by the creditors but rather by a majority of them in conformance with StaRUG. Only two weeks after the discussion and voting date, the restructuring plan was confirmed by the restructuring court and was also legally valid after the expiry of the two-week appeal period. With the judicially confirmed restructuring plan, the Debtor succeeded in averting an imminent insolvency.

This initial practical experience has thus shown that the preventive restructuring procedure is suitable as a fast and inexpensive instrument for the early restructuring of companies. With simplified access to self-administration, this practice should give the managers in particular positive incentives to initiate restructuring measures early on. However, whether the concept of the new procedure has been completely successful or has weak points will have to be shown in further practice.

HUNGARY

With the adoption of the LXIV law from 2021, the Hungarian Parliament implemented the EU Directive on the preventive restructuring framework (2019/1023) on 3 June in the Hungarian legal system and introduced the restructuring procedure. The most important economic policy objective of the policy is to address financial difficulties of companies at an early stage, promote their restructuring and restore their solvency. This is not an insolvency proceeding, but a new pre-insolvency proceeding. The new law will take effect on 01.07.2022.

The new restructuring procedure could essentially represent an alternative to the settlement procedure for companies in financial difficulties. A major advantage of restructuring proceedings is that they are usually controlled by the parties, and the court has only limited jurisdiction. In addition, not all creditors are necessarily involved; the debtor decides who should be involved. The debtor is granted a payment moratorium vis-a-vis the participating creditors so that the negotiations can be continued; however, the debtor must continue to fulfil the contracts with the uninvolved creditors. This provides debtors with sufficient flexibility to allow the company to continue operations while negotiating with key creditors on whom its financial

stability depends. However, if all creditors are involved, the moratorium becomes general and the proceedings become public, which increases the jurisdiction of the court.

The debtor is supported in the procedure by restructuring officers if this is necessary or desired by one of the parties. The role of the experts is to help with the creation of the restructuring plan, to negotiate with the creditors, to conduct the negotiations and to bear responsibility for the correct implementation of the restructuring plan.

The main advantage of the restructuring procedure compared to a purely contractual agreement between the parties is that it must be accepted by majority resolution with mandatory consent. This avoids the oft-experienced situation in which the tenacity of an individual creditor blocks the agreement and thus the survival of the debtor. It also has the advantage, compared to the current settlement procedure, that the creditors have much more decision-making power, the debtor's hands are not tied, and every unsuccessful negotiation does not automatically lead to a liquidation procedure, which in the past represented a significant risk for the debtors.

It may therefore be expected that the introduction of restructuring procedures will strengthen the position of companies and thus their creditors on the Hungarian market, which will have a positive effect on the Hungarian economy in the long term.

ITALY

Italy, as well as other countries, including Ireland, Cyprus, Finland, Denmark, the Czech Republic, Latvia, Luxembourg and Slovenia, has asked the European Commission to extend the deadline for implementing the Directive by one year, making reference to the possibility provided for in Art. 34 para. 2 of the Directive in the event of foreseeable difficulties in implementation. This is essentially due to the fact that the implementation of the Directive must be coordinated with the existing Crisis Code.

The Italian Crisis Code was originally intended to enter into force on 01.09.2021, although a postponement of the entry into force is expected in view of the economic consequences triggered by the pandemic. Although the general structure of the Crisis Code is consistent with the European requirements, there is no lack of coordination deficiencies. In addition to eliminating the contradictions, the implementation could therefore also be an opportunity to take advantage of the opportunities offered by the harmonisation of European law. In Italy, the government has set up a commission that not only has to assess the possible critical aspects of some provisions of the Crisis Code, taking into account the economic context changed by the pandemic, but which is also supposed to formulate proposals for the integration of the Crisis Code in the implementation of the Directive.

POLAND

The simplified restructuring procedure, introduced by a law to act against the negative effects of the COVID-19 pandemic, has proven to be the restructuring procedure that is most interesting for Polish entrepreneurs with financial difficulties. Originally, the possibility of initiating the proceedings was limited until the end of June, then the end of November 2021. Since the procedure was an excellent test area prior to the implementation of the restructuring directive, the legislature now intends to maintain it without a deadline by changing the existing regulations on the ordinary procedure for the approval of a settlement.

The simplified restructuring proceedings are characterised by a minimum degree of judicial participation and, at the same time, very extensive protection for the debtor against enforcement by creditors. It can be utilised by any company that is been threatened with insolvency or has even become insolvent. 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 the announcement, the debtor has four months to file the application for approval of the settlement. During this time, he must convince his creditors to agree to the settlement. Otherwise, the proceedings will be terminated by law. This is a relatively short period of time, but practice shows that the percentage of agreements concluded in this procedure is quite high.

There are a number of privileges available to the debtor during the proceedings. First and foremost, 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 by the landlord or lessor of the rental or lease agreement for business premises or real estate in which the debtor operates its company is not permitted. The prohibition of termination also applies to asset insurance policies and credit, leasing, bank account, and licensing contracts, as well as guarantees and letters of credit. The debtor is still entitled to conduct the ongoing business of his company. The consent of the restructuring consultant must only be obtained for decisions that go beyond the scope of normal business operations.

According to the currently applicable regulations on the simplified restructuring procedure, during the procedure the debtor is also not obliged to satisfy the claims falling under the restructuring settlement. However, in the draft law, which is also supposed to retain this type of procedure after 30.11.2021, such relief is not provided for the debtor. The lack of a corresponding regulation, i.e. the lack of a moratorium for the debtor to repay creditor liabilities can unfortunately prove to be fatal for the form of restructuring discussed, since this means that the debtors would have to pay their claims on an ongoing basis, even those that are covered by the settlement, and would only be able to withhold the payments after the conclusion of the settlement. The procedure would therefore not even give the debtor any "breathing space" during the crisis, although this is precisely where the main advantage of all preventive restructuring procedures is seen.

SLOVAKIA

In Slovakia, the implementation of the restructuring directive continues to be worked on. Due to the bad pandemic situation, which lasted several months, this work was delayed. The implementation is supposed to take place either on the basis of a draft law on the amendment of law no. coll. 7/2005 on insolvency and restructuring or on the basis of a completely new law on the regulation of insolvencies and restructuring.

In particular, the goal of correct implementation should be to simplify, streamline and accelerate smaller insolvency proceedings in particular, 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 implementation of the restructuring directive in Slovakia remains to be developed and published.

SPAIN

Shortly before expiry of the implementation period of the directive, the Spanish government has now filed an application for an extension of the deadline by another year, i.e. until 17.07.2022, with the European Commission.

Notwithstanding the application, the legislature is already working on a reform of the fully revised text of the Insolvency Act (TRLC) that first came into force in September in order to incorporate the new provisions of the Directive into the Spanish legislation.

Particular attention is paid to the debt issuance or the deferral of debts to public authorities, such as the tax authorities or the social security authorities.

The TRLC in its current version expressly stipulates that debts to public authorities are not covered by a residual debt release. Nevertheless, rulings of the provincial courts that declare this provision to be inapplicable and thus extend a residual debt release for this type of debt are piling up. The reason for this is that the previous version of the Insolvency Act still provided the possibility of being exempted from these debts. The courts consider the new regulation to be non-constitutional and are suspending its application. The courts' attitude in recent months led to a wave of lawsuits, as insolvency debtors are trying to be exempted from debts against public bodies by way of litigation. The result was an overloading of the courts.

In order to master this problem and to ensure compliance with guidelines, the legislature is working on a mechanism that should allow debtors to also obtain exemption with regard to debts to public authorities.

A concrete draft proposal does not yet exist. It is also not foreseeable when such a draft proposal can be expected.

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Publisher, media owner, editorial office: Saxinger, Chalupsky & Partner v.o.s., advokátní kancelá | 301 00 Plze , B. Smetany 2, Tel.: +420 377 330 163, plzen@scwp.com | 110 00 Praha 1 Tel.: +420 221 803 350, praha@scwp.com | Saxinger, Chalupsky & Partner v.o.s., advokátní kancelá is a member of SCWP Schindhelm Services SE, Alliance of European Commercial Law Firms | All information is subject to correction in spite of careful processing and cannot replace individual advice in individual cases. The liability of the authors or the publisher is excluded.