New Proposal for a Directive on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures

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As announced earlier this year at the Commission's conference on "Convergence of insolvency frameworks within the European Union – the way forward" (see Blogpost http://wp.me/p4SfbY-4OQ) Vera Jourová, EU Commissioner for Justice, Consumers and Gender Equality has presented a proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures on Thursday 22 November (see http://europa.eu/rapid/press-release_IP-16-3802_en.htm). The proposal has to be seen in the context of the Juncker Plan, the Action Plan on Building a Capital Markets Union and the Single Market Strategy, all aiming at the strengthening of Europe's Economy and the stimulation of investments in Europe. However, it is a much bigger step towards a harmonized European Insolvency Law than the Commission's non-binding recommendation on a new approach to business failure and insolvency from 2014. Furthermore, whereas the EIR recast deals with issues of jurisdiction, applicable law, recognition and enforcement of insolvency decisions, as well as coordination of cross-border insolvency procedures, the proposal now obliges Member States to introduce specific types of procedures and set up measures to ensure that insolvency proceedings are effective in regard to promoting preventive restructurings and second chance. It thereby aims to reduce barriers to cross-border investment related to differences between the Member States' restructuring and second

chance frameworks as well as unnecessary liquidations of viable companies. Additionally it shall improve the effectiveness of all restructuring, insolvency and second chance procedures within the EU.

The proposal consists of 47 recitals and 36 Articles on 55 pages. It can be roughly divided into three main parts. It is setting up a preventive restructuring framework (Title II), minimum standards for the second chance for entrepreneurs (Title III) and measures to raise the efficiency of restructuring, insolvency and second chance (Title IV and V).

Preventive Restructuring Frameworks

Art. 4 requires the Member States to ensure that, "where is the likelihood of insolvency, debtors in financial difficulty have access to an effective preventive restructuring framework that enables them to restructure their debts or business, restore their viability and avoid insolvency." Interestingly Art. 5 states that the appointment of a practitioner in the field of restructuring is not mandatory in all cases. It remains to be seen how the group of insolvency practitioners will react to this aspect. According to Art. 6 a general or a limited stay of individual enforcement actions may be ordered for a maximum period of no more than four months. The proceeding aims at negotiating a restructuring plan (see Chapter 3). The restructuring plan needs to be approved by the creditors and confirmed by a judicial or administrative authority (Art. 9 and 10). Where the necessary majority of creditors in one or more voting classes is not reached the plan may still be confirmed by ways of a cross-class cram-down compliant to Art. 11.

Second Chance for Entrepreneurs

Title III sets up rules about the discharge of debt for over-indebted entrepreneurs. First of all the Member States have to ensure that over-indebted entrepreneurs may be fully discharged of their debts (Art. 19). Additionally the proposal states in Art. 20 that the maximum period of time after which over-indebted entrepreneurs may be fully discharged from their debts shall be no longer than three years. It has to be noted that this might lead to different discharge periods for entrepreneurs and consumers.

Measures to increase the efficiency of restructuring, insolvency and second chance

Title IV mainly tries to ensure that judiciary and administrative authorities dealing with restructuring and insolvency are proper trained (art. 25). The same applies to insolvency practitioners (Art. 25). Again, it remains to be seen how the group of insolvency practitioners will react to this aspect. Title V instructs Member States to set up a data collection on annual statistics about restructuring and insolvency proceedings.

Finally some thoughts on the interplay between the proposal and the EIR recast. The new preventive restructuring proceedings will principally fall within the scope of the EIR recast (see Art. 1 c) EIR recast). But as it is a directive we will face many different national proceedings. One may not forget that all these proceedings need to be signed up in Annex A of the EIR to fall within its scope. The proposal might raise some further questions with regard to the EIR recast: Is it possible to give an undertaking pursuant to Art. 36 EIR recast in such a preventive restructuring proceeding? May a court order a stay of the opening of a secondary insolvency proceedings according to Art. 38 III EIR recast where there is a preventive restructuring proceeding in the main proceeding?

The Commission's proposal is ambitious. However, it lets important parts of substantive insolvency law, for example the ranking of claims or director's liabilities, untouched. Furthermore it still has to pass the Council and the European Parliament. As the Commission's proposal on the EIR recast, it will probably undergo some major changes in the upcoming process, too. It will be highly interesting how different interest groups might influence the final version of the Directive.