

EUROPEAN DIRECTIVE ON PREVENTATIVE RESTRUCTURING FRAMEWORKS

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The European Council agreed its position on the proposal for a European directive on preventive restructuring frameworks, “second chance” and measures to increase the efficiency of

restructuring, insolvency and discharge procedures (amending Directive 2012/30/EU, which aims: (i) to provide early-stage access to viable enterprises facing financial difficulties to preventive restructuring frameworks; (ii) to provide a second chance to reputable bankrupt entrepreneurs and introduce measures to increase the efficiency of restructuring, insolvency and discharge procedures of the Member States. The main elements of the proposal are maintained, although Member States are given more flexibility in certain provisions on the involvement of judges, the term of the stay of individual enforcement actions and the “cross-class cram-down” conditions. The European Parliament will negotiate now towards reaching an agreement in early 2019.

The goal of the proposal

To facilitate greater legal certainty in EU cross-border investments, particularly in assessing credit risk, and encourage timely restructuring of viable EU companies facing financial distress, the proposal intends to increase the convergence of insolvency and restructuring procedures of the Member States to deepen financial integration, lowering costs for the obtaining of credit and increase the EU's competitiveness.

Key elements of the proposal

Creditors' interest shall prevail over equity holders

The creditors' interest shall prevail over equity holders, in the sense that, without prejudice to the protection of their legitimate interests, the shareholders should not be able to unreasonably prevent or block the adoption or implementation of restructuring plans which would bring the debtor back to viability, and Member States should ensure that there are no company law rules that could jeopardise the implementation of the restructuring plans.

The proposal even sets forth that Member States may make provision for equity holders to form one or more distinct classes by themselves and be given a right to vote on the adoption of restructuring plans (which shall be subject to the “cross-class cram-down” mechanism). As a result, equity holders would vote on the restructuring plan as a class of creditors but not in their role as shareholders in a shareholders meeting and their votes would be determined according to their actual stake in the equity, irrespective of any contractual provision establishing otherwise in a shareholders' agreement.

Debtor in possession

The appointment of practitioners in the field of restructuring will be restrained. The proposal considers that debtors should generally control the preventive restructuring procedure and keep at least partial control of their assets and managerial powers on the day-to-day operations unless a general stay is granted or a judicial or administrative authority needs to pass the plan due to “cross-class cram-down”.

Cram-Down: Dissenting creditors shall abide by the restructuring plan

Dissenting classes of creditors will be bound by the reorganisation plan if it is “supported by at least one affected class of creditors and that dissenting classes are not unfairly prejudiced under the proposed plan”. This contrasts with the regime in force in Spain –Additional Provision Fourth of the Spanish Insolvency Act 22/2003.

Stay

There is a stay of individual enforcement actions if such a stay is necessary to support the negotiations of a restructuring plan period. The stay period should not exceed four (4) months, but it could be extended up to twelve (12) months. Notwithstanding, where, according to national laws that restructuring plans should be submitted within eight (8) months from the start of the initial stay of

individual enforcement actions to a judicial or administrative authority for confirmation, Member States may provide stay extensions until the plan is finally confirmed.

The position of the council

The main elements of the proposal are maintained by the council although Member States are given more flexibility to decide on when and where the involvement of judges is made mandatory, on the term of the stay of individual enforcement actions as explained and to set the conditions needed to carry out a prior valuation of a business, as well as the rules determining when a creditor class can be crammed down.

Toni Barios is a partner at Cases & Lacambra. He can be reached at toni.barios@caseslacambra.com