New Bankruptcy Code of Ukraine: What to expect

Olha Stakheyeva-Bogovyk informs us of what to expect from the new code in Ukraine

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Global tendencies and the intensively developing restructuring and bankruptcy legal environment across the globe make it impossible to ignore such processes. Ukraine does not.

On 15 April 2019 the President of Ukraine finally signed the first ever Code of Ukraine on bankruptcy procedures ("Bankruptcy Code of Ukraine"), drafted with the assistance of the IMF and the World Bank. It shall replace the current Law of Ukraine "On Restoring Solvency of the Debtor or Declaring It Bankrupt" ("Law of Ukraine") on its full enactment date, i.e. 21 October 2019. It is expected that the national restructuring and bankruptcy frameworks should become more effective, transparent and predictable than before.

Among the key anticipated developments that the Bankruptcy Code of Ukraine suggests, are the following.

Improved preventive restructuring framework

The national preventive restructuring framework, the so-called 'rescue procedure of the debtor before the opening of the bankruptcy proceeding', is relatively new for Ukraine. It was introduced not that long ago and purported to rescue a debtor before it becomes insolvent.

In fact, under the former framework envisaged by the Law of Ukraine, no real practical implementation was possible. Mostly, the problem concentrated around the all-secured creditors' consent, needed for the approval of the rescue plan, which was almost impossible to obtain.

With the adoption of the Bankruptcy Code of Ukraine the whole concept of this procedure has undergone some significant changes. The former 'dead' provisions on preventive restructuring have been perfected to give way to more practical implementation. The amended preventive rescue procedure is now more akin to the English scheme of arrangement under the UK Companies Act and also embraces some features of the Chapter 11 US Bankruptcy Code restructuring procedure.

Among the most significant developments is lowering of the voting threshold for the affected secured creditors (from 100% reducing to 2/3 of those voting in the class).

In practice, the introduction of a within-class cram-down of the dissentient secured creditors mechanism should prevent them from impeding the approval of the rescue plan to a certain extent. Therefore, chances of getting a restructuring plan approved and implemented in the zone of insolvency increase, which was not the case before. In this sense, Ukraine should become a more preventive-restructuring-friendly jurisdiction in order to facilitate the within-country preventive restructuring, instead of 'chasing' for some popular foreign restructuring hubs.

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Imposition of joint liability on the debtor's director

Previously, the Law of Ukraine set a general obligation of the debtor in case of a mere likelihood of insolvency (when repaying to one creditor will result in inability to repay the others in full) to file an application for the opening of the bankruptcy proceedings. However, now, under the Bankruptcy Code of Ukraine, the debtor shall be bound by a strict time-limit, i.e. to file the application within 1 month as of the date of the appearance of distress circumstances.

Should the director fail to comply with the above-mentioned obligation in the zone of insolvency, the bankruptcy court can hold that the director shall bear a joint liability before the creditors. Moreover, the ruling of the bankruptcy court holding the infringement shall alone suffice to expose the debtor's director to the joint liability, without the need to prove his/her 'fault' in a separate criminal proceeding.

In practice, setting strict deadlines for actions to be taken by the debtor when in the likelihood of distress and a prospect of a straightforward director' joint liability before the creditors are deemed to serve as a good instrument to discipline the

day-to-day management of the debtor, to monitor the viability of the business and be ready to detect the problem at an early stage and thus to effectively tackle it as soon as possible.

Easy "entry" into the bankruptcy case

The grounds for the opening of bankruptcy proceedings have been simplified. No longer is the initiation of the bankruptcy case linked to some burdensome and time-consuming requirements. Namely, the creditor is no more dependent on the existence of following:

a) a debt threshold (i.e. the outstanding uncontested claim in the amount of 300 minimal wages[1] (approx. €41,454.00));
b) the collection of debt proofs via the court and enforcement authorities (i.e. obtaining of the final court decision and the ruling on the opening of enforcement procedure) and
c) the debtor's failure to repay the debt within a three-month period as of the set date for its settlement.

Instead, to initiate a bankruptcy case under the newly adopted Bankruptcy Code of Ukraine, the creditor is to provide in the application the information on the amount of debt owed by the debtor, along with the circumstances of the case, as a ground for opening of the bankruptcy proceedings. Moreover, along with submitting the application for the opening of the bankruptcy proceeding, the creditor or the debtor (depending who files) is to secure a trustee's advance payment of 3 minimal wages (approx. €415.00), together with paying the court fee in the amount of 10 living minimums[2] (approx. €636.00).

Introduction of the automatic lifting of a moratorium (a stay) for secured creditors

Generally, the opening of the court bankruptcy proceedings in Ukraine automatically triggers a moratorium (a stay) to protect the debtor and the property from claims and enforcement, foreclosure actions.

Given the above, by virtue of the moratorium it was not possible to foreclose on the collateral whenever the secured creditor deemed necessary. In fact, that was only possible in the liquidation procedure via an auction sale.

However, such a general bar on foreclosure actions has been circumvented by the new provisions of the Bankruptcy Code of Ukraine. Namely, provided no court ruling on the opening of the rescue procedure or decision on declaring the debtor bankrupt is rendered, the moratorium should automatically be lifted for the secured creditors upon the lapse of 170 calendar days as of the date of opening the administration procedure. In practice, that should mean that the secured creditor shall have a chance to foreclose on the collateral just after the administration procedure and before other rescue or liquidation procedures start, should the abovementioned conditions be met.

Amended claw-back period in avoidance transaction actions

Now the claw-back ("twilight") period has been extended from one year to three. It means that the transactions that were entered into by the debtor three years before or after the opening of the bankruptcy proceedings and which caused damages to the debtor or creditors, can be subject to avoidance actions within the bankruptcy proceedings, upon the trustee's or the creditor's motion.

Sale of the debtor's assets via an electronic auction

The sale of all debtor's assets shall exclusively take place via an electronic auction. This measure should promote transparency of the sale procedure and eliminate (or reduce to the minimum) any external intervention.

Takeaways

The effectiveness and deficiencies of the adopted Bankruptcy Code of Ukraine shall be possible to detect only via its practical application. In any case, it is deemed that the vector that is being pushed forward corresponds to the global tendencies towards facilitating the rescue of viable businesses in the zone of insolvency and increase the efficiency of the bankruptcy procedures. ■

> THE VECTOR THAT IS BEING PUSHED FORWARD CORRESPONDS TO THE GLOBAL TENDENCIES TOWARDS FACILITATING THE RESCUE OF VIABLE BUSINESSES

Footnotes:

1 One Minimal Wage amount as of 1 January 2019 till 30 June 2019 = UAH 4,173.00; 300 minimal wages = UAH 1,251,900.00; (1 EUR = UAH 30.2 as of April 2019)
2 One Living Minimum as of 1 January 2019 till 30 June 2019 = UAH 1,921.00.