

Estonia: Transposing the Preventive Restructuring Directive



This article introduces the opinions of the group of insolvency experts (“the Group”) in Estonia called by the Estonian Ministry of Justice to discuss the implementation of Directive (EU) 2019/1023 (“the Directive”).

Stay of individual enforcement actions

The Group suggested to maintain the suspension of enforcement proceedings as an automatically applicable general measure and to leave the suspension of other measures optional on a case-by-case basis.

The Group proposed setting a specific duration for the suspension of enforcement measures in the Restructuring Act (“the RA”) in order to meet the requirements of the Directive. The Group also suggested that a court could decide to terminate the stay at the request of a creditor, IP or the debtor, if the suspension was no longer necessary or became disproportionately burdensome for the creditor.

The Group considered that the RA must restrict the creditor’s right to terminate contracts relevant to the debtor’s continuation of business before the reorganisation proceedings, following the rules of Article 7 of the Directive, on the condition that creditors must be provided with adequate protection mechanisms.

The restructuring plan

The Group recommended that the creditors’ best interest test should be enacted directly by the RA.

The Group suggested that the creditors would be divided at least into four classes: (i) secured creditors; (ii) equity holders; (iii) parties related to the debtor; and (iv) unsecured creditors. When adopting the restructuring plan,

the secured creditors would vote in a secured creditors’ class only to the extent where their claims have been secured.

The compliance of the plan with the creditors’ best interest test will be supervised by the restructuring advisor and by the judge. The Group recommended the development of a team of specialised insolvency judges. Nonetheless, the existence of quick and flexible Estonian restructuring proceedings, the lack of specialised judges and the small size of the Estonian economy are the main reasons why the Group did not support “pre-packs” or special regulation for “SMEs” at the moment.

Cross-class cram-downs

A novelty for Estonians is the cross-class cram-down. The Group was of the opinion that the requirements of Article 12 of the Directive could be solved by allocating equity holders into a separate class and, where they do not approve the plan, by enforcement of the cross-class cram-down under Article 11 of the Directive. For the purpose of implementing the cross-class cram-down rules, including, but not limited to the case of equity holders, the fairness test (including of course the creditors’ best interest test) and the relative priority rule should be followed. The relative priority rule was suggested instead of the absolute priority rule, as the relative priority rule is more flexible and efficient in dividing the surplus of the restructuring proceedings. It thus makes restructuring proceedings more efficient and encourages debtors to invest in restructuring efforts.

Interim and new financing

The interim financing shall be protected from claw-back actions, if the interim financing is new and reasonably and immediately necessary for the debtor’s business

to continue operating or to preserve or enhance the value of that business (as defined in the Directive) and only in case the court approves the plan. There is no requirement for *ex-ante* control of interim financing. Both interim and new financing should receive priority in any future bankruptcy proceedings.

Appeals

The Group recommended to shorten the terms of the rescue proceedings and to restrict the right of appeal as much as possible.

Individual persons

The Group suggested treating individual entrepreneurs and other natural persons on equal terms. The Group proposed for individual persons the compulsory debt counselling before official court procedures. The court should take in consideration the pre-official court counselling procedure and decide whether to direct the individual person to bankruptcy or to rehabilitation proceedings. The period prior to the fresh start is to begin from the declaration of bankruptcy of the individual person and will be shortened to three years. In case of dishonest debtors, the period before a fresh start is to be prolonged or the decision to allow a fresh start may be cancelled. ■

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