The transposition of the EU Directive: A great Franco-German convergence

Reinhard Dammann compares the French and German transpositions of the EU Directive on Restructuring and Insolvency

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In the Aachen treaty dated 22 January 2019, France and Germany agreed to deepen the integration of their economies and to harmonize their business laws, including their respective insolvency proceedings. The transposition of the EU Directive on Restructuring and Insolvency was a first opportunity to implement this programme.

What is the comparative result? At first sight, both countries took quite different approaches. France transposed the directive, *de minimis*, by way of an *Ordonnance* dated 15 September 2021, amending existing accelerated safeguard proceedings and introducing classes of creditors into safeguard and *redressement judiciaire* proceedings. By contrast, the German *StaRUG* created, as of 1 January 2021, a brand new standalone and very detailed restructuring procedure, containing no less than 102 paragraphs, in accordance with very thorough German style legislation. But in reality, there is a great deal of convergence of both systems.

> *With StaRUG, the German legislator has created brand-new mediation and preventive restructuring proceedings*

Different starting points

French law was known for an efficient and successful two stage model. A restructuring agreement was negotiated in the framework of a transparent pre-insolvency conciliation procedure. To overcome the holdout position of dissenting minority creditors, financial accelerated safeguard, functioning as a prepack, was available. However, the French system was also known for its debtor-friendly approach, lacking classes of creditors, cross-class cram-down and efficient creditor protection through the best interest of creditors' test.

Germany was starting from a blank sheet. There was no pre-insolvency restructuring procedure, but only efficient debt restructuring in the framework of the *Planverfahren* within regular insolvency proceedings (*InsO*).

With *StaRUG*, the German legislator has created brand-new mediation and preventive restructuring proceedings (*Sanierungsmoderation*, *StaRUG*-restructuring procedure). The new framework is conceived as a toolbox-system. The *StaRUG*-restructuring procedure takes over most of the ingredients of the successful *Planverfahren*, subject to three important changes: a greater flexibility to select affected parties; a ¾ majority rule of the amount of restructuring claims in each class (with no headcount majority) and the possibility to treat classes of equal ranking differently in case of cross-class cram-downs.

The French approach sticks to its successful two-stage system, but introduces classes of affected parties, replacing the old creditors' committees. In big restructuring cases (consolidated threshold of 250 employees and 20 million turnover or 40 million turnover), French law also enhances the protection of the rights of creditors through the introduction of the best interest of creditors' test and absolute priority rules and abrogating the possibility for the court to impose a debt scheduling plan for a duration of up to ten years.

The new German mediation: A transposition of the French *conciliation* model

In the new German mediation procedure, the debtor may ask the insolvency court to appoint a mediator to assist the debtor in its debt restructuring discussions with its major creditors. Like *conciliation*, the mediation procedure is strictly confidential in order to protect the credit provided by suppliers.
The procedure is designed for small and medium-size businesses. In case of conversion of the *Sanierungsmoderation* into a *StaRUG*-restructuring procedure, pursuant to § 100, *StaRUG*, the mediator becomes the practitioner in the field of restructuring. The restructuring agreement is fully consensual and will be sanctioned by the insolvency court.

But there are some rather small differences. While French *conciliation* is available to debtors in cessation of payments for less than 45 days, the German mediation is unavailable for debtors that are cashflow insolvent or overindebted. Contrary to French law, German mediation is silent on the possibility for the debtor to propose a mediator to the court. Such a choice in favour of the debtor, who remains in possession, would appear logical. The duration is slightly different: French *conciliation* is limited to four months, with a possible one-month extension, whereas the German mediation lasts three

months and can be extended once, upon request of the mediator, but only with the consent of the debtor and the creditors involved.

New financing benefits in both countries from the safe harbour principle in case of the opening of subsequent insolvency proceedings. But in French law, new-money creditors enjoy a privileged ranking and cannot be affected by the restructuring plan.

This being said, German practitioners could use mediation, like in France, to confidentially prepare a prepack debt restructuring plan to be sanctioned by the court within the public *StaRUG*-restructuring procedure.

The consent of the shareholders to open preventive proceedings

In Germany, it is debatable as to whether shareholders need to consent to the opening of *StaRUG*-restructuring procedure. Such a requirement would appear contrary to the objective of the law to provide for a possible cross-class cram-down of equity holders. In this respect, it is interesting to note that, in French law, which traditionally highly protects shareholders' rights, the management of the debtor may request the opening of accelerated safeguard proceedings without the consent of the equity holders.

The identical scope of preventive restructuring proceedings

In essence, preventive restructuring proceedings are semi-collective. Who is going to choose the affected parties? What are the applicable criteria? Both legislators have opted for a very flexible "*à la carte*" approach. Pursuant to § 8, *StaRUG*, the selection of affected parties must be made on objective criteria. As an example, it is possible to limit the scope of the proceedings to financial creditors. It is also possible to carve out small creditors and (strategic) suppliers. French law provides that the draft plan must set forth the underlying reasoning for the selection of affected parties. Thus, it is possible in both jurisdictions, like in the UK scheme of arrangement, to limit the circle of affected parties to main stakeholders.

The creation of creditor classes and the absolute priority rule

The French legislator transposed *verbatim* Article 9 of the directive when introducing classes of affected parties. In this respect, the German transposition, inspired by the *Planverfahren*, provides for possibility to create additional sub-classes for creditors having the same ranking. This approach constitutes an interesting model for French practitioners.

Quite surprisingly, in the case of the cross-class cram-down, the European directive opted, as matter of principle, in favour of the relative priority rule, leaving the option to the Member States to choose instead the absolute priority rule. Following the US example, the German *Planverfahren* uses the rigid US version of the absolute priority rule. Thus, it is not possible to freely allocate the surplus created by the restructuring plan. Classes of creditors having the same ranking must receive equal treatment.

When transposing the absolute priority rule, Germany introduced a double derogation in § 27 and § 28, *StaRUG*. First, it may be necessary to provide for some flexibility in favour of lower ranking classes, where such derogation is necessary to achieve the aims of the restructuring plan. Second, *a fortiori*, it is also possible to make limited derogations to the rule of equal treatment of classes with the same ranking. For example, it may be advisable to provide for a better treatment for unsecured (but strategic) suppliers by comparison to unsecured financial creditors. In the same vein, a plan may provide for a better treatment of a class of creditors that agrees to provide new money financing by comparison to creditors having the same ranking that refuse to participate. When adopting this second derogation, the German legislator has followed the French restructuring practice.

The German legislator provided for the possibility to address the issue of inter-group personal guarantees. French law is silent on this topic and the German approach is worth being considered in practice.

International recognition

Mediation and *conciliation* proceedings are confidential proceedings and thus are not comprised within the scope of the (recast) European Insolvency Regulation[1]. French accelerated safeguard proceedings are already listed in Annex A, whereas inclusion of its German counterpart is awaiting the revision of the EIR. Consequently, the international automatic recognition of the opening of proceedings as well as of the restructuring plan that is binding upon opposing minority creditors is guaranteed. ■

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Footnotes:

1 See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848