

The first year of StaRUG: A disappointing result?

Olomon Ljumani and Peter Neu report on the high hopes and low acceptance for the new German toolbox



PROF. DR. PETER NEU
Partner, ATN-Rechtsanwälte,
Cologne, Germany



OLOMON LJUMANI
Legal Counsel, Abiomed
Europe GmbH; Lecturer,
University of Public
Administration, North Rhine-
Westphalia, Germany

Over a year has passed since the EU Directive on Restructuring and Insolvency (EU 2019/1023) was implemented in Germany. With the implementation of the Directive came the adoption of the Stabilisation and Restructuring Framework for Enterprises Act (StaRUG) (Unternehmensstabilisierungs- und restrukturierungsgesetz) by the German legislature on 17 December 2020.

As reported in the Spring 2021 edition of Eurofenix, the StaRUG was intended to create the basis for the enforcement and implementation of corporate restructurings against the resistance of minority creditors, while avoiding insolvency proceedings. German policymakers made great efforts to implement the law at the beginning of 2021, seven months earlier than necessary, in order to pre-empt the wave of insolvencies that was expected, due to the coronavirus pandemic.

The reason behind this was to give companies affected by the pandemic an additional tool for their restructuring toolbox, in order to allow a more differentiated response to the potential crisis. Expectations of the new law were accordingly high. German politicians even prided themselves on having created a law that was not only in line with the modern approach to restructuring law, but that could also compete with the English Scheme of Arrangement and the Dutch WHOA (*Wet homologatie onderhands akkoord*). One of the aims of the StaRUG was to

counteract so-called forum shopping and to develop Germany into a more attractive place for restructuring. There was even concern, in part, that the courts would be overburdened with the adaptation and the resulting workload.

Falling short of expectations

To the surprise of the majority of experts, these high expectations have not been met. The StaRUG has not been accepted by practitioners to the degree that was expected when it was implemented. According to the German insolvency trade journal “INDat Report”, there were only 22 applications for StaRUG proceedings in 2021. This figure is based on a survey among restructuring courts located in Germany. Thus, while the Dutch WHOA enjoys great popularity, with an estimated 130 procedures in 2021, the German StaRUG is only of secondary importance. The difference in acceptance levels becomes even clearer when one takes into account that Germany has five times as many inhabitants as the Netherlands. Malicious tongues sarcastically claim that there are now more legal commentaries on the StaRUG than there are procedures.

Manifold causes for low acceptance and German cautiousness

Possible reasons for the low level of acceptance among practitioners are the subject of much debate among experts. It is difficult to identify a clear reason,

particularly since StaRUG procedures are, by their very nature, not public. However, one reason for the low acceptance probably has to do with the cautiousness for which Germans are known around the world. The StaRUG is new, it is a behemoth of 100 sections and is generally perceived as complicated. Many decision-makers are therefore suspicious of the StaRUG and are worried about making things worse in an already bad economic situation. Such caution is nothing new in Germany.

A very similar reaction was provoked in Germany when the Act to Further Facilitate the Restructuring of Companies (ESUG) (*Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen*) was introduced in 2012. The ESUG was also a law that aimed to innovate and modernise the possibilities for restructuring companies. The changes introduced at that time were as far-reaching as those in the StaRUG. Here too, the reaction in the German industry was initially very restrained. However, the initial hesitation has subsided over time and today the restructuring instruments introduced by the ESUG are part of the daily work in restructuring practice. It seems likely that the acceptance of the StaRUG will increase similarly, once a number of successful StaRUG proceedings have been completed.

First showcase example

The restructuring proceedings of *eterna Mode Holding GmbH*



The StaRUG has not been accepted by practitioners to the degree that was expected when it was implemented

