North Macedonia the first EU candidate country to adopt the EU Directive

Dr Djuro M. Djuric explains the novelties of the new tools in North Macedonia

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> *The new law is intended to replace the Law on Bankruptcy and resolve the issues regulated by the Law on Out-of-Court Settlement*

In February 2022, the Ministry of Economy of the Republic of North Macedonia prepared, in cooperation with the International Financial Corporation (World Bank Group), a Draft Law on Insolvency and submitted it to the Parliament (Собрание[1])

The objective of this law is to provide protection of investors and their business, flexible and simplified proceedings for small enterprises and to clarify the conditions for participation of creditors in insolvency proceedings. One of its greatest novelties is the introduction of preventive restructuring proceedings for debtors in difficulty. This instrument should allow the debtor to negotiate debt settlement options with its creditors and avoid insolvency in a timely manner. For this EU candidate country, it will also mean harmonization of the national legislation with the Directive on Restructuring and Insolvency.[2]

Scope of the new law

The new law is intended to replace the Law on Bankruptcy[3] and resolve the issues regulated by the Law on Out-of-Court Settlements.[4] Thus, it will include both in-court and out-of-court insolvency prevention instruments. Subject to exceptions in favour of state bodies and funds, banks and other companies in the financial and insurance sectors, the law is designed to cover the insolvency of both legal and natural persons.

Structure of the Law

The Draft Law on Insolvency is composed of 473 articles, divided into 13 sections. The Draft Law on Insolvency regulates:

(i) the early warning system;
(ii) preventive restructuring procedures (постапката за превентивно преструктуирање);
(iii) pre-bankruptcy reorganization proceedings based on a reorganization plan (предстечајна реорганизација);
(iv) bankruptcy proceedings (стечајната постапка);
(v) elements of the bankruptcy proceedings;
(vi) the legal consequences of opening bankruptcy proceedings against a legal entity;
(vii) the management, disposal and sale of property included in the bankruptcy estate (стечајна маса);
(viii) the settlement of creditors' claims;
(ix) implementation of the reorganization plan in bankruptcy;
(x) individual bankruptcy proceedings;
(xi) the legal consequences of bankruptcy proceedings;
(xii) release from obligations;
(xiii) special bankruptcy proceedings for traders;
(xiv) personal management; and
(xv) bankruptcy proceedings with a foreign element and other issues.

The law stipulates that companies that have submitted a proposal for the initiation of procedures for the resolution of insolvency at an early stage remain in management of the companies and may run the business with view to overcoming the financial difficulties (i.e., as a debtor-in-possession).[5] There is also the possibility of reorganization of the bankrupt debtor. However, this can only occur at the proposal of the bankruptcy administrator or creditor, provided the return on creditors' claims is higher than the liquidation value of the assets. In the bankruptcy procedure, the bankruptcy administrator will undertake the management of bankruptcy proceedings and control the assets of the bankrupt debtor.

Key novelties

The biggest novelties in the new law are the early warning system and preventive restructuring procedure.

The system for early warning enables the taking of measures in a timely manner for the purpose of preventing future insolvency. The Draft Law enables a debtor who is likely within a period of one year to become unable to pay its debts to take measures to restructure its obligations and other measures to overcome the causes leading to their inability to pay debts (insolvency) on the basis of a restructuring agreement concluded with creditors.

Pre-bankruptcy reorganization proceedings are carried out to restructure the debtor's business, based on a proposed reorganization plan, which will enable:

(i) continuation of the debtor's business venture via a financial restructuring;
(ii) current shareholders to retain shares in capital and more favourable conditions for the

payment of claims to the creditors;
(iii) more favourable terms for creditor payment where bankruptcy proceedings have been opened, subject to the order of claims being respected.

Procedural Steps

Court competence

In preventive restructuring, pre-bankruptcy reorganization and bankruptcy proceedings, the basic courts in whose territory the debtor's seat is located are exclusively competent.

Preventive restructuring

A preventive restructuring is carried out in respect of a debtor likely to become insolvent within one year to enable it, on the basis of a restructuring agreement, to take measures to restructure its own obligations and overcome the risk of becoming insolvent. A restructuring agreement (договор за преструктуирање) is an agreement concluded by the debtor with the creditors where:
(i) the conditions are defined (participants, obligations towards creditors, necessary restructuring measures, implementation of those measures and any conditions); and
(ii) other mutual rights and obligations are established for the restructuring.

The proposal for an agreement has to include:
(i) a review of creditors' claims unpaid within the last quarter before the proposal for a preventive restructuring (основен преглед на побарувања на доверителите);
(ii) an audit report on creditors' claims and enforcement in which the auditor provides and opinion; and
(iii) notarized statements from creditors consenting to the opening of the procedure for preventive restructuring, to include creditors' claims of at least 30% of the total amount of claims against the debtor. During preventive restructuring, the statute of limitations does not run with respect to creditors' claims.

The restructuring agreement enters into force when consent is given by:
(i) the debtor's governing institutions as per the law, the articles or debtor's agreement;
(ii) creditors, whose claims are at least 75% of the amount of all unsecured claims included in the review; and
(iii) where secured claims covered by the agreement are included in the basic review of claims, creditors representing at least 75% of the amount of all secured claims.

The agreement and the conditions for its implementation have to be reviewed by an authorized auditor. It will enter into force upon the entry into force of the court decision for its approval and has legal effect on the claims of creditors that have consented to the agreement.

Pre-bankruptcy reorganization proceedings

The pre-bankruptcy reorganization proceedings can be opened if the court determines that the debtor is close to being unable to pay, i.e., that the debtor will not be able to fulfil its existing

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obligations after they are due. Pre-bankruptcy reorganization proceedings is carried out by the court and a commissioner appointed from among persons on the list of bankruptcy administrators who have passed the exam for specialist knowledge about reorganization plans.

The court is obliged to decide on the proposal to open the pre-bankruptcy reorganization proceedings within eight days from submission, although the opening decision does not affect the debtor being able to carry out business activity. Until the completion of pre-bankruptcy reorganization proceedings, litigation and other proceedings as well as enforcement over assets is not permitted.

Each group of creditors, with a right to vote, votes on the plan for reorganization separately. Related companies and persons, as defined by the Law on Commercial Companies, are excluded. The rules for the grouping of creditors that refer to the reorganization proceedings in bankruptcy are applied. Creditors are deemed to have accepted the plan of reorganization, if a majority of all creditors with voting rights voted for it and, if in each group, the sum of the claims of the creditors who voted for the plan is greater than the sum of those voting against. If a majority for a reorganization plan is reached, the court shall approve it and it will also have legal effect on the creditors who did not participate in the pre-bankruptcy reorganization proceedings as well as on those that participated, with their claims being determined.

Bankruptcy Proceedings

Bankruptcy proceedings against the debtor can be opened if the court determines the existence of insolvency or over-indebtedness. A proposal for the opening of bankruptcy proceedings to the court can be submitted by:

(i) the debtor;
(ii) a company shareholder with personal liability; or
(iii) a creditor.

The debtor is deemed unable to pay if an amount that should have been validly paid remains outstanding for 45 days. Over-indebtedness exists if the debtor who is a legal entity has property amounting to less than its existing liabilities. Also, if during the supervision period, it is determined that the plan for reorganization cannot be carried out, any creditor and the commissioner (bankruptcy administrator), can submit a proposal for opening bankruptcy procedure.

When deciding on opening bankruptcy proceedings, the court may allow the debtor to manage and dispose of the assets within the bankruptcy estate under the supervision of a commissioner (лично управување од должникот). Otherwise, a court can allow the debtor the right to self-administration of the proceedings:

(i) at the debtor's request;
(ii) where proceedings are requested by a creditor or its representative, with the creditor's consent; or
(iii) where the court is convinced that allowing this is unlikely to lead to a delay in the procedure or cause damage to creditors.

Summary

The adoption of the new Law on Insolvency is expected in 2023. Its structure is novel and represents an advance on the previous legal framework. The fact that it has been designed to reflect the Directive on Restructuring and Insolvency is of great interest and it will certainly be a novelty for the jurisdiction compared to the existing regulation. ■

Footnotes:

1 See Ministry of Economy of the Republic of North Macedonia, available at: <www.economy.gov.mk/mk-MK/news/predlog-na-zakon-za-insolventnost.nspx>.

2 Directive 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

3 Official Gazette of Republic of Macedonia No. 34/2006, 126/2006, 84/2007, 47/11, 79/13, 164/13, 29/14, 98/15 and 192/15.

4 Official Gazette of Republic of Macedonia No. 12/2014.

5 See Parliament of the Republic of North Macedonia (Собрание на Република Северна Македонија, Парламентарен Институт), available at: <www.sobranie.mk/content/%D0%9F%D0%B0%D1%80%D0%BB%D0%B0%D0%BC%D0%B5%D0%BD%D1%82%D0%B0%D1%80%D0%B5%D0%BD%20%D0%B8%D0%BD%D1%81%D1%82%D0%B8%D1%82%D1%83%D1%82/14.pdf>.