

A second chance.... for the Second Chance Directive in Poland

Paweł Kuglarz and Mateusz Kaliński write on the areas needed to be covered in the new bill to ensure compliance with EU law requirements



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Almost all of the European Union Member States have already implemented the Restructuring Directive, also referred to as the Second Chance Directive. Unfortunately, at time of writing, Poland is the only country which has failed to do so, although several drafts have so far been discussed.

Proposals of the Implementing Bill

In Poland, a team of experts within the Ministry of Justice prepared the first bill which was subject to public consultations a long while ago. A lot of business organizations (also including the National Chamber of Insolvency Practitioners and the INSO Section of the Allerhand Institute), public entities as well as the courts submitted their positions on the draft. Later on, yet another draft was published, slightly changing its subject matter, by expanding the scope of the regulation, and thus requiring another round of consultations.

Over the period of parliamentary elections in Poland in October 2023, Mateusz Morawiecki's government sent this draft to the Parliament for consideration. However, the newly elected government of Donald Tusk decided in January 2024 to withdraw the draft bill and present it for further amendments. In summary, a lot of work has already been done, including the drafting of a very detailed report on the areas needed to be covered to ensure compliance with EU law requirements.

Which areas should be covered

The governmental document envisages some really interesting restructuring tools in line with the Restructuring Directive, like the possibility to access more easily cross-class cram-downs, amendments to liquidation arrangement proceedings and the possibility for the court to change (up to some extent) the arrangement made – and under certain conditions.

Liquidation arrangements and curing defects

Liquidation arrangement is a method of restructuring which uses the sale of an enterprise as an arrangement proposals. So far, using this instrument is not connected with the effect of execution sales, as it provides for no liability towards old debts. The proposed bill changes the situation for the better and stipulates the execution sale effect also for liquidation arrangement. Also, if some minor mistakes are made within the arrangement proceedings, the court will now have the opportunity to change it at its own discretion. Under the initial proposal, it was only able to refuse approval of an arrangement that failed to meet its expectations.

Appointment of Trustees and Court Supervisors

Unfortunately, the currently publicly available bill implementing the Directive proposes far reaching changes to the appointment of the trustees as well as court supervisors. A trustee is appointed under the bankruptcy regime with the appointment being made by the

court, whereas a court supervisor is appointed under the restructuring regime and may either be appointed by the debtor or proposed for appointment by the creditor (or creditors). The Directive sets out no strict requirements with respect to this issue, thus in our opinion it is not necessary to implement any changes thereto.

However, the Polish draft envisages that the appointment of the trustee would be made out of a list of insolvency practitioners, with any insolvency practitioner being able to choose three courts by which they can be appointed. This system is somehow close to selection by the drawing of lots, because a trustee never knows what bankruptcy proceedings they will get. Although there are some exceptions envisaged, the general idea provides for automatic choice of a trustee, according to the number assigned to them from the list, even if a qualified insolvency practitioner title will be required for the biggest and most important proceedings.

Moreover, the Polish bill challenges the freedom of establishment of insolvency practitioners, who are entrepreneurs, imposing an obligation on them to choose specific courts. The first draft provided for application of these new rules even in arrangement approval proceedings, where the legal basis for supervision over proceedings is the agreement between the debtor and insolvency practitioner. Thankfully, after hefty criticism, the former government resigned from this particular idea.

Nevertheless, we are still



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forced to continue to criticise the latest currently discussed version of the bill, because of its interference in the freedom of conducting business activity by insolvency practitioners and failure to address the obviously problematic issue.

The proposed regulation does not put the right stress on the competences of the trustee. We also believe it pushes transparency to the limits at too high a level it seems, threatening the professionalism of trustees and their proper experience in handling cases.

These plans raised a lot of discussion in Poland, and in our view, the proposed changes should be criticised. As at time of writing, the bill has been withdrawn from the Parliament for further work by the government.

Seizing the opportunity: What could be changed?

We believe that there will be space for further improvements – touching also the appointment of trustees and court lists of insolvency practitioners who can serve as arrangement supervisors within restructuring proceedings. Happily, currently most of ideas covered by the Second Chance Directive are already within the Polish legal framework, thus the lawmakers can focus merely on additional changes that may be introduced.

Firstly, there comes the issue of an appropriate organizational structure for the insolvency-related judicial system, which is nowadays inefficient, despite the idea of reform having been discussed for at least 20 years so far. Secondly, important changes may be introduced to insolvency practitioners formal self-government structures, endowing them with the possibility to enforce disciplinary responsibility.

With regard to the organization of the judiciary system, nowadays, first instance bankruptcy and restructuring cases are processed in district courts (*sądy rejonowe*), which are

the lowest level of Polish courts, irrespective of the value of the case and its complexity.

Therefore, a first-instance judge has to deal with complex restructuring cases valued at billions of Polish zloty as well as simple consumer bankruptcy cases of relatively small value. The workload is overwhelming. First-instance judges are dealing with approximately 200 consumer bankruptcy cases and ten corporate restructuring cases at the same time – an untenable work load.

A better system would leave consumer bankruptcy cases at the district court level, so that individuals would have easy access to justice, whereas complex restructuring cases could be moved to regional courts. Such a reform has been discussed for over 20 years now, and lately has been emphasized by the INSO Section of the Allerhand Institute.

We believe the regional courts should also become specialised second-instance courts for cases from district courts. Moreover, cases heard in regional courts (*sąd okręgowy*) could be appealed to the appellate courts (*sądy apelacyjne*), which will help to make judgements more uniform in restructuring cases. Currently, Poland struggles with differing judgements in similar cases, which is a pitfall that needs to be addressed.

There is also a need to create a special chamber or unit within the Supreme Court (*Sąd Najwyższy*), which would be responsible for restructuring and insolvency cases. In our opinion, this reform complies with the requirements set forth in the Restructuring Directive, which places the stress on efficient judicial systems and also the proper training of insolvency practitioners.

Conclusions

To sum up, we would like to point out that the matter of implementation of the Second Chance Directive has become an urgent issue in Poland, as we are



currently the only EU Member State with no implementation so far. Unless the Directive is implemented within a very short time, Poland may be subject to financial penalties as the European Commission may take proceedings against Poland before the European Court for failure to implement the Directive.

The current government has an opportunity to implement the new changes in the judicial system and improve other areas that badly need improvement. Therefore, it is hoped that the Polish government can really give a second chance to ... the Second Chance Directive, properly and effectively implemented. ■



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