Technical Insight: The Niebler Report

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Emmanuelle Inacio takes a closer look at The Niebler Report on the European Commission's Proposal Directive on Preventive Restructuring

> THE NIEBLER REPORT PROPOSES A DEFINITION OF "LIKELIHOOD OF INSOLVENCY"

On 21 August 2018, the Committee on Legal Affairs of the European Parliament adopted Angelika Niebler's Report[1] on the European Commission's Directive Proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU[2].

Indeed, the committee on Legal Affairs recommended that the European Parliament's position adopted at first reading under the ordinary legislative procedure (Article 294 TFUE) should amend the European Commission's Directive Proposal. The most important proposed amendments are the following:

Preventive restructuring frameworks

As a reminder, the Directive Proposal introduces an obligation for the Member States to ensure that, where there is a likelihood of insolvency, debtors shall have access to a preventive restructuring framework that enables them to restructure their debts or business and to benefit from a stay of individual enforcement actions if, and to the extent that, such a stay is necessary to support the negotiation of a restructuring plan[3]. The Niebler Report proposes a definition of "likelihood of insolvency" that "means a situation in which the debtor is not insolvent under national law but in which there is a real and serious threat to the debtor's future ability to pay its debts as they fall due"[4].

The Report adds that the Members States may provide for restructuring frameworks to be available at the request of creditors and workers' representatives, with the agreement of the debtor[5].

But the Report adds a restriction: the Member States have the possibility to provide that access to restructuring proceedings is limited to enterprises that have not been finally sentenced for serious breaches of accounting and bookkeeping obligations under national law.

The Directive Proposal requires that the Member States shall ensure that the debtors who are negotiating a restructuring plan with their creditors may benefit from a stay of individual enforcement actions if and to the extent that such a stay is necessary to support the negotiations of a restructuring plan[6]. The Report adds that the stay of individual enforcement actions may be possible where the obligation of the debtor to file for insolvency has not yet arisen and provided there is a likelihood of preventing the company from undergoing insolvency proceedings.

Regarding the question of the maximum duration of stay, like in the Directive Proposal, the Report requires the Member States to allow the debtor to apply for a general or limited stay of individual enforcement actions to support the negotiations of a restructuring plan limited to 4 months. But, the Report also proposes that the total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed ten months (not 12 months as the Directive Proposal). The Reports adds a new provision: the total duration of the stay shall be limited to two months if the registered office of the company has been transferred to another Member State within a three-month-period prior to the filing of a request for the opening of restructuring proceedings[7] to avoid *forum shopping* and for consistency with the Regulation 2015/848.

Regarding restructuring plans, the Directive Proposal requires Member States to include a minimum mandatory information in restructuring plans submitted for confirmation by a judicial or administrative authority[8]. The Niebler Report proposes that the Member States shall require all restructuring plans to be confirmed by a judicial or administrative authority and include a minimum mandatory information.

According to the Report, the modalities of information and consultation of the workers' representatives in accordance with the EU's and the national law as well as information on the organisational aspects that bear consequences upon employment (such as dismissals, short-time work or similar) should *inter alia* be included in the restructuring plans. The Report adds that restructuring plans should not affect worker' rights, entitlements, claims, occupational

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pension funds or schemes[9] and that the Member States shall ensure that, where the plan includes measures leading to changes in the work organisation or in contractual relations, those shall be confirmed by workers in cases where the national law and practices require such confirmation[10].

Moreover, the Report adds that restructuring plans which involve the loss of more than 25% of the workforce should be confirmed by a judicial or administrative authority[11]. According to the Report, the Members States shall ensure that the workers' rights, such as the right to collective bargaining and industrial action, that their right to be informed and consulted should not be compromised by the restructuring process and that workers shall always be treated as a preferential and secured class of creditors[12].

The Proposal includes a cross-class cram-down mechanism to be used if the restructuring plan is not supported by the required majority in each class of affected parties, leading to a dissenting voting class. In the case of a cross-class cram-down, the restructuring plan must always be confirmed by a judicial or administrative authority. The cross-class cram-down mechanism is subject to a number of minimum harmonised requirements in order to ensure that the rights of the parties involved are appropriately protected. This means that the plan must be supported by at least one class of affected creditors, and dissenting voting classes must not be unfairly prejudiced under the proposed plan[13]. The Report proposes that the plan must be approved by the majority of classes of affected creditors and that the Member States have the option of increasing the minimum number of classes required to support the plan as long as the minimum number still represents the majority of classes[14].

Regarding the role of the practitioner in the field of restructuring, the Proposal states that the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall not be mandatory in every case but may be required where the debtor is granted a general stay of individual enforcement actions or where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down[15].

The Report requires that whether or not the supervision of a restructuring procedure by a practitioner in the field of restructuring is mandatory, it shall in all cases be subject to the national law in order to safeguard the rights of affected parties, which is reassuring for the insolvency practitioners. The Report adds that the Member States shall require the appointment of a practitioner in the field of restructuring at least where the debtor is granted a stay of enforcement actions, where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, in accordance and where it is requested by the debtor or by a majority of creditors[16].

Practitioners in the field of restructuring, insolvency and second chance

Regarding the role of the practitioner in the field of restructuring, insolvency and second chance, the Report puts the emphasis on their training, as well as of the members of the judiciary and of the administrative authorities.

According to Report, the Commission shall facilitate the sharing of best practices between Member States with a view to improving the quality of training across the Union, including by means of networking and the exchange of experience and capacity building tools, and if necessary shall organise training for members of judiciary and administrative authorities dealing with restructuring, insolvency and second chance matters[17].

Moreover, the Report strengthens the need to frame the practice in the field of restructuring, insolvency and second chance and increase its transparency. Indeed, according to the Report, Member States shall ensure that practitioners in the field of restructuring, insolvency and second chance, as well as other effective oversighting mechanisms concerning the provisions of such services comply with statutory codes of conduct, which shall at least include provisions on training, qualification, licensing, registration, personal liability, insurance and good repute[18]. Member States shall establish effective sanctions for failure to comply with the practitioners' obligations and ensure that information about the authorities exercising supervision or control over practitioners in the field of restructuring is publicly available[19].

To be continued… ■

Footnotes:

1 http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2018-0269&language=EN#title5
2 https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52016PC0723
3 Article 4.
4 Amendment 44.
5 Amendment 57.
6 Article 6.
7 Amendment 59.
8 Article 8.
9 Amendment 65.
10 Amendment 66.
11 Amendment 67.
12 Amendment 70.
13 Article 11.
14 Amendment 68.
15 Article 5.
16 Amendment 58.
17 Amendment 91.
18 Amendment 92.
19 Amendment 93.

THE COMMISSION SHALL FACILITATE THE SHARING OF BEST PRACTICES BETWEEN MEMBER STATES WITH A VIEW TO IMPROVING THE QUALITY OF TRAINING ACROSS THE UNION