preventative restructuring frameworks – set out in the new proposal of the European Commission for a Directive on preventative restructuring frameworks, the second chance measures to increase the efficiency of restructuring, insolvency and discharge procedures. Despite this, the newly adopted stabilisation procedure could not overcome the number of procedural and substantive law oversights and shortcomings, merely leading to problems rather than solutions.

**Note**

1 The new amendments also introduce the trader's failure to submit its annual financial reports to the Commercial Register for the last three yearsas a new ground for opening of insolvency proceedings.

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# A golden age of Ukrainian restructuring

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This article deals with the long-awaited and prominent Ukrainian 'Law on Financial Restructuring' (the 'Law'), and describes the Law's general provisions and optimistic prognosis on its influence over Ukrainian distressed business. As a joint initiative of leading lenders, including the European Bank for Reconstruction and Development and World Bank, the Law ensures prospective debtors with a brand new opportunity for out-of-court financial recovery.

## General preconditions for adoption

For Ukraine, 2016 was a year of both hope and fear. Despite giving birth to a number of controversial legislation initiatives, a 'golden age' for Ukrainian restructuring began in 2016. On 14 June 2016, the Ukrainian Parliament (Verkhovna Rada) adopted the 'Law on Financial Restructuring' (the 'Law'), an unprecedented act, which has a high probability of radically changing the situation in both the domestic and European distressed debt markets.

As in many young democracies, Ukrainian business does significantly rely on bank loans. Not surprisingly dozens of companies appeared on or even crossed the verge of insolvency as a result of the current banking crisis. For such companies, having defaulted debts should have not led to insolvency since a vast amount of them owned assets and conceived business plans sufficient for reorganisation and even optimisation of their activities. These companies desperately needed an effective remedy to get a stay of pending court and/or enforcement proceedings, to be in a position to keep the business continuity without fearing arrests and seizures and, more importantly, to pave the way for effective restructuring liaison and possible distressed debts relief.

However, as of 14 June 2016 the domestic legislation had few options for solvency restoration. The Ukrainian Law on Insolvency did mention 'restructuring' as a term, but only as an equal to that of 'reorganisation' and therefore it did not provide separate options for either write-off or repayment of the distressed debt. Pre-trial financial relief (*dosudova sanatsiya*) was a theoretical rather than a practical remedy, as the whole procedure was not overly dependent on Ukrainian commercial courts. The latter, in turn, appeared reluctant to approve recovery plans in 98 per cent of pre-trial submissions.

It is worth noting that an initial draft law attempted to balance a newly introduced restructuring mechanism with pre-trial financial relief by amending the Law. As seen from the draft, this idea was heavily inspired by binding arrangement schemes used in such popular restructuring jurisdictions as Germany and the United Kingdom. Although this balanced approach was feasible, the final draft Law had no court intervention and no parallels with pre-insolvency relief (except an 18-month ban for relodging a restructuring motion as described below).

On the other hand, the vast majority of insolvency cases inevitably finished with liquidation, regardless of whether debtors possessed any assets or were simply managing a company or were a shell company.

These adverse conditions were addressed in the Law as a result of the joint initiative of leading lenders for Ukraine-based business projects, namely the European Bank for Reconstruction and Development and the World Bank. Dealing with a huge distressed debt pool in Ukraine, both banks were obviously interested in providing perspective debtors with a brand new opportunity for out-of-court financial recovery.

## Debtor

Restructuring proceedings under the Law can be initiated only in respect of a debtor that meets all the following requirements. The debtor shall:

- be a Ukrainian legal entity (except banks, financial institutions and public enterprises) in critical financial conditions, that is, in default before creditor(s);
- have an outstanding debt towards at least one financial institution (either Ukrainian or foreign); or
- have obtained consent from at least one financial institution (creditor) to participate in the procedure of financial restructuring.

The continuity of the debtor's business as a going concern shall be assessed as profitable by an independent expert. The expert shall be appointed by at least a two-thirds majority of votes at the creditor's meeting.

Group restructuring is also a brand-new option provided by the Law. It may be requested by a group of debtors having at least one joint creditor financial institution (CFI). If besides such a joint CFI each of the group members has its own CFIs, all of them should approve the restructuring.

## Creditors

The procedure does not require the involvement of all creditors (which means that the debtor has a right to decide what creditors are to be involved in the procedure and creditors that are not involved cannot adhere to the procedure without the debtor's consent). As mentioned above, at least one of the creditors must be a financial institution, otherwise the proceedings cannot be initiated. Each creditor (except special categories as mentioned below) that intends to participate shall grant written consent for both participation in restructuring and arbitration of related disputes.

The Law specifically highlights three categories of creditors:

- creditors whose claims are secured by either a pledge or a mortgage. A restructuring plan may amend the amount, conditions and priority of securities. The priority may be amended only subject to a secured creditor's consent;
- creditors that are affiliated with the debtor. They are allowed to participate in proceedings, however they are only spectators to the process and have no leverages over the restructuring; and
- tax authorities. If, as of the date of lodging a motion for restructuring, a tax debt exceeds one-third of the total default debt and the tax authority has approved participation in the restructuring, then the latter is held to be and may act as a regular creditor. On the other hand, if a tax debt does not exceed one-third of the total debt pool, the tax authority may act as a creditor in the restructuring process with no additional formalities.

## Initiation of restructuring

The financial restructuring may be initiated exclusively by the debtor (ie, no creditors are allowed to do so). To initiate the proceedings, the debtor has to lodge a written motion supported by written consent of at least one CFI. This creditor should not be affiliated with the debtor and must have a claim of not less than 50 per cent of the total default amount owed to financial institutions. As a rule, claims of affiliated creditors are not taken into account while determining this percentage.

It is worthwhile mentioning that in the case of initiation of previous restructuring or pre-trial financial relief the debtor cannot relodge the motion for 18 months. This provision was apparently designed to ensure that no frivolous action for obtaining protection is used by unfair debtors.

## Protective measures

As in the Ukrainian Law on Insolvency before the reform of 2013 and the recently introduced Indian Insolvency Act, the Law grants the debtor with a moratorium from the very first day of the process. The moratorium's main goal is to prevent the debtor's assets from being disposed so as to keep them as a basis for resetting the debtor's business activities. Even target enforcement over the debtor's tangible assets may irreversibly break production or trading cycles and thereby dramatically reduce the chances of its financial relief.

Unlike insolvency proceedings, the restructuring moratorium's term should not exceed 90 days but, if agreed by the involved creditors, it can be extended by an additional 90 days (giving a total maximum length of 180 days).

The moratorium does not affect creditors who are not involved in the restructuring. However, even when the moratorium remains in force, any creditor is allowed to obtain a court decision for compulsory debt repayment or enforcement over a pledge. This term was specifically introduced in the Law to prevent limitation periods from expiring as a result of the restructuring.

Following a classical approach, labour and personal injury claims are also freed from the moratorium. Regardless of the moratorium, any creditors (either affected or not by the moratorium) may initiate court proceedings for compulsory debt collection or enforcement over pledged assets.

As the cornerstone of the Law is the consent of the creditors' majority, they may decide to terminate the moratorium at any time. In that case, the debtor and any of the involved creditors may conclude a debt rescheduling agreement, which would limit the creditors' rights to enforce over the debtor's assets, as well as obligations of the latter to refrain from the disposal of assets, additional financing, etc. The rescheduling agreement does not affect those creditors who did not conclude it and it terminates if they enter into a restructuring plan. Since the Law and pre-trial financial relief did not reach a common goal, it appears rational to prevent either race-to-the-court or competition between restructuring and court insolvency proceedings. Hence if as of the commencement date of the restructuring of any insolvency procedure pending before a Ukrainian commercial court, the latter has three consecutive options:

- to suspend insolvency proceedings prior the end of the restructuring process;
- to renew insolvency proceedings if a restructuring plan has not been adopted; or
- to close an insolvency case if a claim of the creditor that initiated the case is prescribed by the restructuring plan to be either satisfied or restructured.

## Adoption and implementation of a restructuring plan

The restructuring plan is developed by joint efforts of the debtor (or a group of them), creditors (including those affiliated with the debtor) and investors (if there are any).

The plan has to contain a number of essential terms, in particular:

- the amounts and terms of repayments to creditors, including affiliates, fiscal bodies and those not participating in the restructuring;
- the conditions of involvement of investors;
- the terms of opening of bank accounts for distribution of amounts obtained from the sale of the debtor's assets;
- the conditions of restructuring and its implementations, including a list of successive agreements that the debtor has to conclude within the given time;
- the terms of control over implementation of the restructuring and termination of the plan; and
- the terms of division of the involved creditors into clusters depending on the nature of their claims and availability of securities.

Apart from various remedies for financial relief (eg, the review of long-term loans, new financing, sale of assets, termination of potentially unprofitable but binding contracts, writing-off defaulted debts, changing corporate governance and the debtor's corporate structure), for the very first time in Ukrainian legislation the Law provides a 'debt-for-equity' swap. This in turn might trigger certain legal issues if debt-for-equity swaps resulting in the increase of the share capital of a target company were viewed as illegal and annulled by domestic courts. To prevent the misuse of rights from the affiliated creditors, the Law sets certain limitations for their involvement in the adoption and implementation of the restructuring plan.

Firstly, the affiliates have no voting rights and thereby cannot directly influence the plan's adoption. Secondly, if creditors are divided into categories, the affiliates are restricted to obtain any privileges as compared with other involved creditors.

The restructuring plan is adopted by either:

- consent of all involved creditors; or
- under an arbitral award.

In the first scenario, all creditors presumably agree the restructuring terms before voting. This is an approach similar to that in cross-border group insolvency coordination stipulated by recast EU Regulation on Insolvency Proceedings.

However, being realistic it is quite hard to imagine such a unified approach in Ukrainian realities, especially if the process involves a Ukrainian financial institution. Therefore if there is no consent among all involved creditors, then a two-thirds majority of them supporting the plan may transfer its adoption to arbitration. If that is the case, the plan is considered as approved from the date of a final and binding arbitral award.

Additional protective measures to those not voting for the plan are also given:

- the restructuring plan should not worsen repayment conditions for those creditors that voted against it or refrained from voting; and
- if creditors that did not vote in favour of the restructuring plan do not approve financing, writing-off secured debts, suspension of interest calculation or distribution of costs received from sales of securities, such actions cannot be applied to the debtor.

To prevent the voluntary challenge of the plan by non-involved creditors, the Law sets out that failure to implement the plan could not be considered as a breach of contract by the debtor. The plan would be deemed as valid, effective and binding if signed by:

- the debtor and all involved creditors; or
- the debtor, those creditors that voted in favour of its approval and the arbitrator that issued the arbitral award validating the plan.

As compared with recast EU regulation, the Law does not lack teeth. While some criticism was heard regarding cross-border insolvency arrangements with no binding effect over creditors, the Law could not be condemned for that. In particular, a restructuring plan is mandatory for: (1) the debtor, its affiliates and guarantors; and (2) the creditors. Even creditors that voted against the plan or refrained from voting are bound by it. The plan also prevails on any particular contract or agreement between the creditors and the debtor, guarantors and/or pledgers.

The plan may be amended under the same procedure as for its adoption.

## Coordinating bodies – arbitration

For coordination and administrative purposes there are two bodies: a supervisory board and a registry. The first one consists of nine persons representing the national bank, Ministry of Finance, Ministry of Economic Development and Trade, Ministry of Justice, associations of financial market players, business representatives and market experts. All candidates are approved by the relevant committee of the Ukrainian Parliament.

After being adopted, the supervisory board:

- forms the registry;
- approves members of the arbitration committee, as well as lists of arbiters, arbitration fees and rules; and
- develops requirements for independent experts determining possibility of a debtor's relief.

The registry acts as an official intermediary for any documents exchanged that are related to the restructuring process. At the same time, the Law imperatively prohibits it from any direct participation in the restructuring negotiations.

The arbitration process for any dispute arising from the restructuring process is headed by an arbitration committee. The committee is created by the supervisory board and consists of a head and two deputies. Their powers, as well as procedural rules for dispute resolution, are determined by arbitration regulations.

The applicability of arbitration is defined by an arbitral clause or agreement stated in the framework agreement, the debtor's motion for restructuring or a clause within the creditor's written consent.

Having received a notification on the dispute, the arbitral committee appoints an arbitrator. The latter resolves the dispute under the arbitration regulations by delivering an arbitral award. The award is final and binding for all parties to the dispute.

## Taxation conditions

The Law amends the Tax Code of Ukraine by providing special taxation conditions for parties to the restructuring. Notably, the amendments also concern pre-trial financial relief as well, which for a long time remained absent in tax legislation.

The most crucial changes relate to corporate income tax. For a long time, if a creditor wrote-off the debt (or a part of it) of a Ukrainian company within the limitation period given, such creditor was obliged to increase its financial results accounting for a written-off amount. Only when limitation periods expired could such debt be declared irredeemable and thereby be written-off with no negative tax consequences for the creditor.

As of now – and prior to 19 October 2019 – the taxation basis for calculating the corporate income tax has changed. A special ruling provides so-called 'tax differences' for the adjustment of a financial result for taxation. From a practical point of view, it allows both debtor and creditors to reduce their gross income either partially or in full depending on their accounting standards and written-off amounts.

As regards VAT, a debtor's supply of goods, which are made according to the restructuring plan, has to be fully exempt from VAT until 1 January 2020. In this case a taxpayer is not entitled to amend the tax credit assigned in connection with such supply operations, although further operations are released from VAT.

Remarkable changes were introduced in respect of tax debt restructuring. The Code introduces three instruments of tax debt restructuring: (1) annulment (forgiveness); (2) instalment; and/or

(3) tax deferment. The latter has to be used within ten days of the date of approval of the restructuring plan. A debtor's property is exempt from tax lien and administrative arrest (if imposed) starting from the date of the introduction of the plan.

A tax debt is subject to an automatic write-off:

- if it was incurred within three years before the start of financial relief – on a pro-rata basis in respect of written-off amounts;
- if accrued more than three years before the financial relief – to be written off in full; and
- if the debt consists of penalties and late fees assessed before the financial restructuring and is challenged by the debtor – to be written off in full.

The remaining tax debt (if any) should be repaid under terms no worse than those set for other creditors. A total term of instalment or deferment may be no longer than three years from when the plan was adopted.

## Conclusions

The Law is an interim but an extremely actual remedy for financial relief of potentially viable debtors. With no court or other state authorities involved, it allows both debtors and creditors to balance their interests and thereby to revitalise distressed businesses without significant expenses. Unlike its 'big brother' – the recast EU Regulation on Insolvency Proceedings – the Law does have teeth in respect of binding the character of the restructuring plan and fines for restructuring-based offences. The Law is initially considered as a temporary measure, losing its force after a three-year cadence (eg, on 19 October 2019). The implementation of the Law is being heavily supported by leviathans of the market like the European Bank for Reconstruction and Development, the World Bank, Independent Association of Ukrainian Banks and even the 'Big Four' accounting firms.

As with any pioneer act, the Law is expected to be criticised as well as amended during its application. Nevertheless it appears that advocates for the Law are not confused by negative prognoses; and as Aristophanes said: 'It is from their foes, not their friends, that cities learn the lesson of building high walls and ships of war'.

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# A new framework for small-scale insolvencies in Greece

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Following the recent amendments to the Greek Insolvency Code, the procedure for small scale insolvencies was revamped in an innovative manner. More specifically, the new provisions allow the court to derogate from the provisions of the Code, as regards the manners and forms of small scale insolvency proceedings. While the application of this provision in practice remains an open question, it represents yet another step in the country's continuing effort to deal with the growing indebtedness of SMEs and may, in time, pave the way for a permanent and specialised SME insolvency procedure.

## Introduction

The need for a specialised or simplified framework for small-scale insolvencies has been the subject of discussion in Greece from as early as 1933. This is rather unsurprising considering the importance of small and medium-sized enterprises (SMEs) – which are considered the primary users of such a simplified framework – to the domestic economy. In fact, data