

# The implementation of the EU Directive on Restructuring and Insolvency in Germany: A new star in the firmament



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**O**n 22 November 2016, the European Commission presented a proposal for a directive to transform the restructuring and reorganisation laws within the European Union, which was supposed to help finally deal with the consequences of the 2008/2009 financial crisis.

After extensive discussion surrounding the topic, a compromise was reached between the Council, the Commission and the Parliament in December 2018, leading to Directive (EU) 2019/1023 or the “*Directive 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*” entering into force in July 2019.

## Implementation in Germany

The implementation of the Directive has now been finalised in Germany with the adoption of the Stabilisation and Restructuring Framework for the Enterprises Act (*Unternehmensstabilisierungs- und restrukturierungsgesetz/StaRUG*) by the Bundestag on 17 December 2020. The StaRUG is intended to create the basis for the enforcement and implementation of corporate restructurings against the resistance of creditor minorities while avoiding insolvency proceedings.

In German law, the possibility of intervening in the rights of the collective creditors outside of

insolvency proceedings by way of a majority decision of the creditors has so far only been known in the case of bonds that fall within the scope of the German Bond Act (*Schuldverschreibungsgesetz/SchVG*). The StaRUG adds a long-awaited instrument to the restructuring toolbox, closing the gap between out-of-court restructuring, which requires unanimity within the creditors, and restructuring by majority decision in insolvency plan proceedings, which is inextricably linked to the classic disadvantages of insolvency proceedings (e.g., publicity, low flexibility, extensive costs).

Henceforth, restructuring measures can also be implemented outside of insolvency proceedings against the will of individual creditors. This will increase the incentive for companies in crisis to take measures to overcome economic difficulties at an early stage. In addition to companies, entrepreneurially active natural persons also have access to the StaRUG (section 30 paragraph 1 of the StaRUG).

## Key points of the new legislation

Some of the key points introduced by the StaRUG legislation are outlined below.

### *Application only to companies in the early stages of crisis*

The instruments of the StaRUG can only be used by companies where insolvency is imminent but has not yet occurred. According to section 18 paragraph 1 of the German Insolvency Code (*Insolvenzordnung/InsO*),

“imminent insolvency” means that the debtor is expected to become insolvent within the next two years. The existence of imminent insolvency within the meaning of section 18 paragraph 1 of the InsO is therefore the earliest point in time at which the instruments of the StaRUG can be used.

On the other side of the spectrum, the point in time that marks the end of the period until which the instruments of the StaRUG can be utilised, is the moment at which the mandatory reasons to file for insolvency arise. In Germany, these reasons are insolvency (*Zahlungsunfähigkeit*) within the meaning of section 17 of the InsO and over-indebtedness (*Überschuldung*) within the meaning of section 19 of the InsO. In the event of one of these two reasons arising, there is no longer any room for restructuring measures under the StaRUG; instead, a request for the opening of insolvency proceedings must be filed and insolvency proceedings initiated.

In the event that a mandatory reason to file for insolvency arises after the restructuring case is already pending with the restructuring court, sections 32 *et seq.* of the StaRUG state that the debtor is obliged to notify the restructuring court of this circumstance. In this case, however, there is no automatic transition to insolvency proceedings. Rather, the restructuring court weighs up the situation and need not dismiss the restructuring case as long as it thinks that insolvency proceedings are not in the interest of the creditors as a whole (section 33



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paragraph 2 no. 1 of the StaRUG).

### **The restructuring plan**

The most important restructuring instrument of the StaRUG is the restructuring plan, which can be seen as an overall settlement with the creditors. The plan determines which measures are necessary for successful restructuring. The creditors that are supposed to make concessions in the course of a restructuring are divided into groups based on reasonable criteria. The restructuring plan is then voted on group by group. The restructuring plan is accepted if 75% of the creditors in each group agree to it. Under certain conditions, individual groups can be outvoted if the majority of the groups approve the plan (cross-class cram-down).

The arrangement and negotiation of the restructuring plan can, in principle, be managed by the debtor company itself and without the involvement of a court. The involvement of the court is only necessary if the debtor intends to interfere with the creditors' rights against the opposition of a minority of creditors. This is already the case if there is no unanimous consent to the plan. Court decisions, however, are only made available to those affected by the plan.

### **Variation of legal relationships under a plan**

The restructuring plan is not limited to financial creditors and can therefore cover all types of claims and collateral rights. The only exceptions are employee claims, including occupational pension claims, and claims arising from intentional torts and state sanctions. The plan may also restructure share and membership rights within the debtor company. The plan can stipulate, for example, that creditors who waive part or all of their claims receive shares in the debtor company as a return (debt-to-equity swap). In addition, the plan may – subject to appropriate compensation – intervene in intra-group collateral provided by an affiliated company

of the debtor, e.g., parent, subsidiary or sister company. The originally envisaged – and from many sides criticised – provision according to which the court can terminate ongoing contracts upon application by the debtor was not included in the law.

### **Stabilisation order**

In order to provide stability until the restructuring plan is confirmed by the restructuring court and thus increase the chances of success of the restructuring project, the debtor company can apply to the restructuring court for a temporary stabilisation order (*Stabilisierungsanordnung*) according to sections 49 *et seq.* of the StaRUG. The restructuring court can then prohibit the debtor's creditors from taking enforcement measures (*Vollstreckungssperre*) and enforcing segregation and separate satisfaction rights in respect of movable property (*Verwertungssperre*).

This moratorium may be imposed for up to three months. Exceptionally, it may be extended by one month to a total of four months by a subsequent or new order if the plan offer has already been submitted to the creditors and acceptance of the plan is expected within that month. A further extension to a maximum of eight months in total is permissible if a plan accepted by the creditors has been submitted to the court for confirmation. The moratorium can in principle cover all claims. The only exceptions are claims from financial services contracts and claims that generally cannot be adjusted by the restructuring plan (i.e., employee claims, occupational pension claims, claims arising from intentional torts and state sanctions).

### **The concept of early crisis detection**

Section 1 of the StaRUG requires the members of the management body of a company to continuously monitor financial developments that may jeopardise the existence of the company. If

the management identifies such developments, they must take appropriate countermeasures and report these developments to the company's supervisory body (e.g., the supervisory board) without undue delay. Since such obligations already exist under the duty system of the current German company law, this is actually only a clarificatory provision and does not represent anything new to German business leaders.

What would have been genuinely new and revolutionary would have been the regulations on management liability and duties, which were originally envisaged in the first draft of the law. According to these provisions, as of the moment of imminent insolvency, the management of the company would have been obliged to give priority to the interests of the creditors and to act in accordance with these interests. Thus, there would have been a "shift of fiduciary duties" away from the general interests of the company and the shareholders towards the interests of the creditors. This "shift of fiduciary duties" was widely criticised by experts and the professional world and was therefore deleted from the final version of the StaRUG by the legislator.

Whether the remaining regulation in § 1 StaRUG is sufficient to meet the requirements of the Directive is currently disputed. Article 19 of the Directive provides that "Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to [...] the interests of creditors, equity holders and other stakeholders". Whether the current wording of the StaRUG satisfies this requirement will have to be clarified by experts and the courts. In any case, the wording of the Directive does not indicate that priority treatment of creditors' interests, as provided for in the original version of the StaRUG, is necessary. ■



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