The European Parliament has approved the proposed directive for Preventative Restructuring Frameworks.

The reform initiative to create uniform legal frameworks for preventative restructuring in Europe is picking up speed. The European Parliament approved the directive on 28.03.2019. Beforehand the final draft of the compromise solution dated 17.12.2018 had gone back and forth between the European Council and the European Parliament.

This was the outcome of the tripartite discussions between the European Parliament, the European Council and the EU Commission on the proposed directive from the EU Commission COM(2016) 723 final dated 22.11.2016 which in its turn was based on a Recommendation from the EU Commission dated 12.03.2014 ("new approach to business failure and insolvency").

Thus, another milestone has been reached on the path to establishing a Preventative Restructuring Framework in Germany and Europe. Once the directive has been published the EU Member States have two years in which to transpose the provisions into international law. In exceptional cases, this transposition period can be extended by one year on request.

The Federal Ministry of Justice and Consumer Protection has already stated that it does not want to make full use of this transposition period and that it is already working on the transposition. However, this should be brought into line with the the results of the ESUG evaluation of October 2018 at the same time (ESUG = German Act for Further Facilitation of the Reorganisation of Enterprises - *Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen*, ESUG).

Preventative restructuring framework in Germany from 2022 at the latest

It can therefore be assumed that at the latest by 2022 there will be a Preventative Restructuring Framework in Germany (in some cases als oreferred to as "pre-insolvency restructuring procedures"). This may be one or more procedures or isolated measures.

The new statute will fundamentally change how companies deal with financial crises and restructuring. For the first time there will be a legal framework outside insolvency proceedings in order to - together with the parties involved - discuss and implement restructuring measures without having to achieve a consensus where individuals may block proposals.

An important instrument of the new provisions will be restructuring plans setting out all measures and by means of which the parties involved can then vote. Any decisions will be made by majority vote. Voting will be in groups or categories - similar to the approach taken in insolvency plans. These groups or categories will be classified according to the economic interests of the parties involved. If the parties involved are outvoted a court must confirm the result of the ballot. The court will then review in particular whether the procedural provisions have been complied with and that no-one has been unreasonably disadvantaged. Only then, and only to the extent that the parties affected have been involved accordingly, does the restructuring plan have binding effect.

While the restructuring is being drafted and negotiated the court will instruct a moratorium in order to protect the ongoing business operation from being disrupted by enforcement proceedings of individual creditors or contractual relationships necessary for operations no longer applying. There is a certain degree of protection, similar to the situation in preliminary insolvency proceedings. Thereby the creditors' interests may not be unreasonably disadvantaged. This is why there are strict requirements placed on instructing and lifting moratoria. The term will also be restricted to four months initially, and no more than twelve months.

In addition, the new directive provides that new financing granted in a Preventative Restructuring scheme will be protected from avoidance actons by the insolvency administrator in the event of a later opening of insolvency proceedings. Directors' liability in such situations will also be regulated more simply to reflect the interests of the parties inresructuring scenarios.

Aim to improve restructuring culture, but allowing flexibility in its implementation

As the Directive applies for all EU Member States the EU hopes that the restructuring and reorganisation of undertakings in Europe as a whole will be made easier, thus preventing insolvencies. Trade and investment barriers will also be removed as the previously widely differing regulations in the individual Member States are harmonised and the market participants will thus better be able to assess entrepreneurial risk. Restructuring measures will also be introduced earlier on the whole to increase their prospects of success. The costs will also be lowered so that especially SMEs can access such measures more easily.

The directive allows the Member States considerable flexibility on many detailed issues in transposing the provisions into national law. Some Member States may introduce simple regulations which are easily enforced where the level of protection of the interests of the parties involved is lower. Other Member States could implement stricter proceedings with high barriers, thereby upholding a high degree of protection of individual interests. In the short term, there could be a risk of competition between jurisdictions, since a well-functioning legal framework also offers economic advantages. Time will tell which constructions will prove their worth in practice and to what extent alignment will take place.