Athens Journal of Law 2024, 10: 1-23
https://doi.org/10.30958/ajl.X-Y-Z

Hungarian Model of the Restructuring Process - National Report

By Noémi Suri[*]

As a result of the transposition obligation in Article 34 of Directive (EU) 2019/1023 of the European Parliament and of the Council on restructuring frameworks and insolvency, Act LXIV of 2021 (hereinafter - referred to as the Restructuring Act) on restructuring and the amendment of certain acts with the purpose of legal harmonisation was promulgated on 3 June 2021, effective as of of 1 July 2022 for any legal persons struggling with financial difficulties not yet insolvent. The creation of a restructuring model prescribed by the EU directive was implemented by the Hungarian legislator through the opening of a non-contentious court procedure ordered within the jurisdiction and exclusive competence of the Metropolitan Court of Budapest. The primary aim of this paper is to develop a complex and comprehensive picture of the restructuring procedure as placed within the system of insolvency and reorganisation procedures in Hungary. Firstly, the paper showcases the unified EU objectives set out by the directive within the system of European insolvency procedures. Secondly, it describes the Hungarian procedural rules and the most important related legal institutions adopted to implement these objectives. Section 6 of the Restructuring Act sets out that the aim of restructuring is to adopt and implement a restructuring plan with some or all of the creditors and thus prevent the debtor's future insolvency and ensure the debtor's financial viability. For the purpose of reaching this objective, therefore, restructuring constitutes measures aiming at restoring the financial balance of the debtor, including changing the composition, the conditions or the structure of the debtor's assets and liabilities and any other part of the debtor's capital structure. Among these measures, the Restructuring Act lists as example the sale of the debtor's property or part thereof, or the sale of any participation in the debt. The condition for restructuring is the likelihood of the company's insolvency. The definition of the likelihood of insolvent Directive (EU) on restructuring frameworks and insolvency, European insolvency procedures, insolvency and reorganisation procedures, restructuring plan, non-contentious court procedure bears a central significance here: it constitutes the entrance point into the restructuring procedure.[1] *In addition to the definition of insolvency, Section 2(2) of the Restructuring and Insolvency Directive renders the interpretation of the probability of insolvency into Member State jurisdiction. Among the Explanatory notes the Restructuring Act defines the likelihood of becoming insolvent as a situation in which there are reasonable grounds for believing that the debtor will be unable to meet his/her outstanding payment obligations when they fall due, unless further measures are taken.*

[*]Ph.D., LL.M., Assistant Professor, Pázmány Péter Catholic University, Faculty of Law and Political Sciences, Budapest, Hungary; Research Fellow, Mádl Ferenc Institute of Comparative Law, Budapest, Hungary.
E-mail: suri.noemi@jak.ppke.hu; noemi.suri@mfi.gov.hu
[1]Fabók (2020) in Bodzási at 153.

Keywords: *Directive (EU) on restructuring frameworks and insolvency; European insolvency procedures; Insolvency and reorganisation procedures; Restructuring plan; non-contentious court procedure*

Introduction

As a result of the transposition obligation in Article 34 of Directive (EU) 2019/1023 of the European Parliament and of the Council on restructuring frameworks and insolvency[2], Act LXIV of 2021 on restructuring and the amendment of certain acts with the purpose of legal harmonisation[3] was promulgated on 3 June 2021, applicable as of 1 July 2022 for any legal persons struggling with financial difficulties not yet insolvent.

The creation of a restructuring model prescribed by the EU directive was implemented by the Hungarian Legislature through the opening of a non-contentious court procedure ordered within the jurisdiction and exclusive competence of the Metropolitan Court of Budapest. The primary aim of this presentation is to develop a complex and comprehensive picture of the restructuring procedure as placed within the system of insolvency and reorganisation procedures in Hungary.

Firstly, the presentation showcases the unified EU objectives set out by the directive within the system of European insolvency procedures. Secondly, it describes the Hungarian procedural rules and the most important related legal institutions adopted to implement these objectives.

The Purpose and Objective of the Directive in the System of European Insolvency Law

Before discussing the objectives of the Restructuring and Insolvency Directive in detail, it is important to clarify the relationship between and the purpose of the legal sources of insolvency law in the European Union.

Paragraph 51 of the Preamble to the recast regulation on insolvency published[4] in the EU Official Journal on 5 June 2015 defines the effective execution of insolvency proceedings at the different group members involved as the general objective of the legal source. The scope of the European Insolvency Regulation is based on collective proceedings. In the European Insolvency Regulation, Articles 1 and 2 read together, collective proceedings are public proceedings involving all or a significant proportion of the debtor's creditors. The

[2]Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 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 (Directive on restructuring and insolvency).

[3]Hereinafter - the *Restructuring Act.*

[4]Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. Official Journal of the European Communities L 141/19. 5.6.2015 in 'European Insolvency Regulation'.

scope of the Regulation includes procedures to deal with the actual insolvency of a debtor as well as so-called 'impending insolvency'. The scope of the Regulation covers collective actions against a debtor, whether a natural[5] or legal person, a trader or a private individual: a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed, b) it should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and selfemployed persons, c) procedures which grant a temporary stay on enforcement actions brought by individual creditors where such actions could adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business.[6]

This Regulation addresses issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings, as well as the interconnection of insolvency registers.

The material scope of the Directive, constituting my research subject, prescribes substantial minimum rules for preventive restructuring procedures and procedures leading to the entrepreneur's discharge of debt, not only in cross-border insolvency procedures but in solely domestic (national) insolvency cases as well, by complementing the material scope of the Regulation as well as exceeding it.

Preambular paragraph (2) of the Directive defines restructuring as the primary objective of legislation at EU level - within the framework set out in the Directive - that the 'restructuring should enable debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or structure of their assets and their liabilities or any other part of their capital structure — including by sales of assets or parts of the business or, where so provided under national law, the business as a whole — as well as by carrying out operational changes'. 'Preventive restructuring frameworks should, above all, enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises.'[7] The regulation also aims to prevent the accumulation of non-performing loans.

The Directive emphasizes the protection of the affected parties' (debtor's, creditors', employees') rights both in the preparatory phase (involvement of the parties in the procedure), during the procedure and in the enforcement phase. The time factor plays a crucial role in restructuring. Sections (4) - (6) of the preamble of the Directive point out, on the one hand, that the possibility of restructuring arises at different procedural stages in different Member States, making measures to restore the debtor's financial stability less effective at both Member State and EU level. On the other hand, ineffective debt discharge and disqualification frameworks prevent enterprises from staying afloat and encourage companies to

[5]Zoltán Csehi points out that the personal scope of Hungarian insolvency proceedings does not extend to private individuals, when exploring the links between the European Insolvency Regulation and Hungarian law. In Csehi (2014) in Pogácsás at 116..

[6]A further condition is the protection of all creditors and, if no agreement on a recovery plan can be reached, the preliminary procedure referred to in points (a) or (b). See paragraphs 9 to 11 of the Preamble and Article 1 of the new Insolvency Regulation.

[7]See preambular paragraph (2) of the Directive.

relocate to another jurisdiction to allow for a fresh start within a reasonable timeframe. In my view, this latter carries the risk of forum shopping too.

The Position of Restructuring Procedures in the Hungarian Insolvency Law

Based on current legislation, debtors with payment difficulties may resort to the following non-contentious civil court procedures for the restoration of their solvency in Hungary. *Bankruptcy procedures* aim to restore the solvency of economically distressed but still salvageable economic entities through the institutions of moratorium and the so-called reorganisation programme to avoid the liquidation of the debtor entity.[8] Bankruptcy procedures are insolvency procedures regulated by Act XLIX of 1991 on bankruptcy procedures and liquidation[9] and are non-contention civil court procedures opened upon application to the court in which the debtor is granted a moratorium on payment to facilitate reaching a composition agreement it attempts to reach.[10]

Natural persons' debt settlement procedures are procedures allowing the settlement of debts for natural persons experiencing payment difficulties. The purpose of the debt settlement procedure is to ensure that the debts of natural persons in payment difficulties are settled and their solvency restored within a regulated timeframe using the necessary assets and income. The procedure must not be aimed at the definitive discharge of the debtor's payment obligation. For this Act CV of 2015 on the debt settlement of natural persons was established[11]. The *personal insolvency* is a legal institution aimed at freeing indebted individuals from the debt trap, with the primary objective of restoring the debtor's ability to pay, by reconciling the interests of the debtor and their creditors, under public supervision.[12]

In insolvency proceedings, liquidation proceedings are non-contentious proceedings within the jurisdiction of the court against an entity that is already in debt, the purpose of which is to distribute the assets of the entity to its creditors in a specified order, by dissolving the entity as a legal one without succession. In addition to bankruptcy, liquidation proceedings are insolvency procedures governed by the Bankruptcy Act on the Bankruptcy and Liquidation Proceedings Act.

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[8]Nagy (2001) in Pogácsás (2001) at 186.

[9]Hereinafter - *Bankruptcy Act.*

[10]Csőke, A., Fodorné Lettner, E. & Cs. Juhász (2009) at 55.

[11]Hereinafter - *Personal Insolvency Act*. In this context, reference should be made to the Entrepreneurship 2020 Action Plan [COM(2012) 795 final, 09.01.2013] adopted on 9 January 2013, Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency [COM (2014) 1500 final, 12. 03.2014], Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 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 (Directive on restructuring and insolvency) [OJEU 172/18. 26.6.2019].

[12]Farkas, Cs., Kaprinay, Zs., Varga, I., Halászné Balkay, H., Sziklai, M. & I. Völgyesi (2015) at 45.

For the purpose of compliance with the Restructuring and Insolvency Directive, on 21 May 2021, the Hungarian National Assembly adopted Act LXIV (hereinafter - the *Restructuring Act*) on restructuring and the amendment of certain acts. The new legislation sets out the civil material and the procedural law rules of restructuring as of 1 July 2022, and introduces a new non-contentious civil procedure, the civil non-contentious court proceeding for restructuring. The integration of restructuring procedures in the Hungarian legal system was implemented by the creation of several new legislations and the amendment of some existing ones. Among the implementation regulations promoting the objectives of the Restructuring Act, Government Decree 762/2021 (XII. 23) on restructuring experts appointed by the court, Government Decree 763/2021 (XII. 23) on the detailed rules of debt settlement proceedings for natural persons, Decree 7/2022. (IV. 4) IM on the detailed rules of the court-appointment and termination of the appointment of restructuring experts were adopted. Furthermore, the Bankruptcy Act, Act V of 2006 on public company information, company registration and winding-up proceedings[13], Act CLXXXI of 2011 on the court registration of non-governmental organisations and related procedural rules, Act XCIII of 1990 on duties, Decree 8/2022 (IV. 4) IM on the amendment of Decree 14/2002 (VIII 1) were amended.

The Purpose of Restructuring, the Restructuring Plan and the Role of the Restructuring Expert in the Procedure

Section 6 of the Restructuring Act sets out that the purpose of restructuring is to adopt and implement a restructuring plan with some or all of the creditors and thus prevent the debtor's future insolvency and ensure the debtor's financial viability. For the purpose of reaching this objective, therefore, restructuring constitutes measures aimed at restoring the financial balance of the debtor, including changing the composition, the conditions or the structure of the debtor's assets and liabilities and any other part of its capital structure. Among these measures, the Restructuring Act lists as examples the sale of the debtor's property or part thereof, or the sale of any participation in the debtor[14]

The condition for restructuring is the likelihood of the company's insolvency. As Fabók points out, "[...] the definition of the likelihood of insolvency bears a central significance here: it constitutes the entrance point into the restructuring procedure."[15] In addition to the definition of insolvency, Section 2(2) of the Restructuring and Insolvency Directive renders the interpretation of the likelihood of insolvency into Member State jurisdiction. Among the Explanatory notes, the Restructuring Act defines the likelihood of becoming insolvent as a situation [...] in which there are reasonable grounds for believing that the debtor will be unable

[13]Hereinafter - *Company Procedures Act*.
[14]See Section 3(1)16 of the Restructuring Act.
[15]Fabók (2020*) in* Bodzási 153.

to meet his/her outstanding payment obligations when they fall due, unless further measures are taken.[16]

The first step in restructuring is the approval of the restructuring plan, which in fact starts with the classification of the creditors' claims. During the preparation of the restructuring plan, the debtor must compile the list of creditors whose claims must be assessed in relation to the restructuring already before the adoption of the restructuring decision.[17] The debtor must rank the creditor claims in the following four classes, the order of which does not mean the order of fulfilling the demand: *a)* insured creditors' claims, *b)* creditor claims related to business activity, *c)* other creditor claims, and *d)* creditor claims arising from transactions in the debtor's sphere of interest. The law stipulates that the principle of equal treatment must be ensured concerning affected creditors belonging to the same class of creditors.

Sections 45-46 of the Restructuring Act detail the content of the restructuring plan, and prescribe in writing its compulsory inclusion. Besides the classification of creditor claims, the plan must demonstrate how the insolvency of the company can be prevented and its continued operation maintained.

If the vote on the restructuring plan has not produced the necessary consensus for its adoption among all classes of creditors, the debtor, the debtor's equity holder with at least a majority interest, or with the debtor's consent, any of the creditors concerned may apply to the court for the it to approve the restructuring plan by way of a cross-class cramdown. In this case, if the court approves the restructuring plan, it also applies to the dissenting creditor (class).[18]

The restructuring expert plays a crucial role in the implementation of the restructuring plan. The restructuring experts' responsibilities are defined by Government Decree 762/2021 (XII. 23) on the restructuring experts assigned by the court. The court shall, upon request, approve the participation of a restructuring expert in the proceedings or, in the cases provided for by law, appoint a restructuring expert ex officio.

The debtor, affected creditors possessing the majority of claims or insured creditors may submit an application to the court to issue an order approving the participation of the restructuring expert named in the application in the restructuring (Section 27 of the Restructuring Act). Upon ex officio assignment, the law makes a distinction between compulsory cases and cases at the discretion of the courts. The court shall appoint a restructuring expert ex officio (compulsory), if (1) - the court ordered a general moratorium and there is no restructuring expert appointed, (2) - if the court orders a limited moratorium and the claims related to the restructuring amount to no less than 25% of the balance sheet total of the debtor's last financial statement, there is no restructuring expert appointed, an application was submitted for the approval of the restructuring plan by way of a cross-class cramdown, and there is no restructuring expert appointed at the time of the submission, or (3) - a counterclaim is submitted in the non-

[16]See Section 3(1)8 of the Restructuring Act.
[17]https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf at p. 11
[18]https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf 13-14.

contentious procedure for the approval of the restructuring plan, and no restructuring expert is appointed at the time of the submission.

The court may appoint an expert on a discretionary basis where a limited moratorium has been imposed and the creditors concerned so request to protect the interests of the creditors, where no restructuring expert has been appointed, or where a counterclaim is filed in the non-contentious proceedings for the approval of the restructuring plan, and where a technical issue raised justifies the appointment of a restructuring expert in addition to the restructuring expert involved in the restructuring.[19]

As a general rule, only one restructuring expert at a time may be engaged in a restructuring.[20] Only organisations registered in the register of liquidators and national liquidation organisations registered in the official register may be assigned as restructuring experts. In its order appointing the restructuring expert, the court shall specify the tasks, rights and obligations of the restructuring expert [Section 25(2) of the Restructuring Act]. The primary task of the restructuring expert is participating in the preparation of the restructuring plan, providing assistance for the debtor and the affected creditors in negotiating about, agreeing on, and approving the restructuring plan, supervising the measures taken in connection with the debtor's negotiation of the restructuring plan and its approval by the affected creditors, supervising the debtor's business during the period of negotiations concerning the restructuring plan. This activity is performed in exchange for a fee. The Restructuring Act defines expert fees in bands. The rules of fee payment depend on whether the expert is assigned on request or ex officio. If the restructuring expert was appointed ex officio, the expert fee is defined by the court. As a general rule, upon assignment, the restructuring expert's fee shall be paid by the debtor. In other cases, it may be decided on by the debtor and the creditors concerned.

Features of Non-contentious Proceedings

The "preventive restructuring framework" prescribed in Article 4 of the Restructuring and Insolvency Directive was introduced by the Hungarian Legislature as a non-contentious procedure within the jurisdiction of the courts, which can be included in the reorganisation proceedings, and is only available to enterprises such as legal entities or other entities having civil status and carrying on economic activities. Restructuring proceedings can be included among non-contentious proceedings opened upon application under the jurisdiction of a court (the jurisdiction and exclusive competence of the Metropolitan Court of Budapest) in which legal representation is mandatory and there is no interruption, suspension, or granting of legal aid, and only limited stay and intervention are allowed, based

[19]https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf 7-8.

[20]An exception is the case where [...] a counterclaim is submitted in the non-contentious procedure for the approval of the restructuring plan and, because of an arising technical issue, the assignment of an additional restructuring expert is justified beside the already engaged one. https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf

only on legal authorisation. The restructuring procedure is based primarily on documentary evidence. However, the court can also order the evidence it considers necessary ex officio (if necessary, hold a personal hearing), ask the parties to the case and the restructuring expert for a written statement.[21]

In the action, the deadline for the court's general obligation to take action is 8 working days (Section 14(3)). In restructuring procedures only a judge can make any decision that is subject to appeal.

The Restructuring Act defines both the material law and the procedural law conditions of initiating a restructuring procedure. As regards the material law conditions, Section 12 of the Restructuring Act prescribes rules in accordance with Section 3:16 of the Civil Code. In connection with restructuring, the debtor's chief executive officer is entitled to convene its decision-making body upon short notice. The decision on restructuring is made and its starting date is set by the debtor's decision-making body (hereinafter - the decision-making body) or, in the case of a debtor who is a single legal person, by its founder or sole member. For the initiation of the restructuring procedure, the debtor's chief executive officer prepares a submission - as a sort of precondition - which details at least a) the debtor's financial position, b) the facts and conditions supporting the likelihood of insolvency, as well as the non-existence of any legal obstruction to the decision on restructuring, c) the affected creditors' claims, the register of the creditors concerned pursuant to Section 40 - including disputed creditor claims - furthermore, which creditor claims it does not wish to include in the restructuring and why, d) any changes potentially affecting the debtor's operations during restructuring, e) what legal, economic and other aspects justify the restructuring, f) the circumstances based on which it is probable that negotiations with the creditors will be successful, and the restructuring plan will be accepted, and g) the starting date of the restructuring (Section12(2)). As a general rule, the decision-making body decides on the execution of the restructuring and the preliminary approval of the restructuring plan by three-quarters majority. Following the decision on restructuring, the debtor's chief executive officer must take every necessary action within his/her responsibilities to ensure consideration of creditor interests, and to reach the decisions within the competence of the debtor's decision-making body or its founder or sole member in case of a debtor who is a single legal person, therefore in particular the decisions required to avoid insolvency.

Within 5 days of reaching a decision on a restructuring request before the Metropolitan Court of Budapest, the debtor shall initiate the restructuring procedure, informing it of the decision on the execution of restructuring and its starting date. The application for the initiation of a restructuring procedure must be submitted electronically on the form published on the website of the National Office of the Judiciary. Among its provisions outlined for submissions, the Restructuring Act refers first to the rules of the Code of Civil Procedure[22], secondly, in Sections 20 and 22, it defines the mandatory content of the submission.

[21]See more details at Horváth (2023) at 2-3.
[22]See Section 114 and 115 of the Code of Civil Procedure.

The debtor has the option to request the appointment of a restructuring expert and a moratorium at the same time as the opening of the proceedings, but can also request these only at a later stage of the proceedings.[23]

In restructuring procedures, it is mandatory to engage a restructuring expert. To facilitate negotiations on the restructuring plan, the court may, at the request of the debtor, order a moratorium suspending individual enforcement actions. An application for a moratorium may only be submitted by the debtor. The Restructuring Act defines three types of moratorium: (i) general moratorium which applies to all the debtor's creditors, (ii) a limited moratorium, which applies to creditors who are included in the restructuring plan, and (iii) a temporary moratorium, which may be imposed until a final decision on the application for a moratorium is taken to protect the interests of creditors. For a general moratorium, the order of the moratorium is published by the court in the Cégközlöny (National Gazette). For a limited moratorium, the relevant decision is sent to the creditors to whom the moratorium is applicable. The moratorium also applies to any liabilities becoming due during the moratorium. A creditor subject to the moratorium may not initiate enforcement proceedings against the debtor during the moratorium period, and any pending enforcement proceedings initiated after the restructuring start date are suspended, nor may it initiate winding-up proceedings. During the moratorium period, the debtor is also entitled to a moratorium on the payment of claims of creditors subject to the moratorium that became due before the moratorium.

The moratorium can be extended and a new moratorium imposed, which can be initiated by the debtor, the restructuring expert and the creditor as well. A moratorium may be ordered for a period set out in the application, but no longer than 4 months. At the same time, if the period is extended or a new moratorium is ordered, it may not extend a total of 12 months.

Summary

In my view, the European Legislator has set an appropriate level of harmonisation through the framework set out in the Restructuring and Insolvency Directive, which we have achieved in Hungary by creating a new non-litigation procedure under the jurisdiction of the courts.

From the perspective of the past two years, there is not yet sufficient information, data and court practice available on the practical implementation of the legislation. But after a detailed review of the relevant legislation, it can be concluded that it is indeed an effective tool for companies to prevent future insolvencies and ensure their viability.

[23]https://birosag.hu/sites/default/files/jogszabalyi_valtozasok_2022_julius.pdf

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