THE COMPARATIVE CALCULATION DURING EXTRAJUDICIAL RESTRUCTURING – WHAT IS BEING COMPARED?

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On November 22nd, 2016, the commission presented the draft of a EU guideline for a preventative framework of restructuring. According to the draft, the member states should – in essence – take care of the possibility of an extrajudicial restructuring of economically damaged, but not yet bankrupt companies and individuals. This is supposed to come with the participation of certain creditors and contain a vote for a restructuring plan that eventually gets the confirmation by a court of law. If the restructuring plan to be created is accepted by a qualified majority of the affected creditors (Pareto principle), creditors that, for instance, reject a debt waiver, are also to be involved and liable. In effect, this is an interference into the constitutionally protected property rights of the rejecting creditors, which should only be possible under extreme circumstances.

Naturally, the creditors need to be able to visualize alternative scenarios in order to vote for the restructuring plan. For this, they at first will have to trust the word of their debtor, who is obligated to comprehensively disclose his financial situation. Claims against a third party, for instance in accordance to the Creditor's Avoidance of Transfers Act (Anfechtungsgesetz), will also have to be considered in this context. Therefore, affected creditors have to know what their standing would be without the drafted measures, like in case of the company being sold or liquidated. The comparative calculation, which is already known from insolvency plan proceedings, will be a key component. In the guideline draft, this comparative calculation is called "best interest of creditors test". It is defined as the circumstance in which no rejecting creditor may have a worse standing after the restructuring plan than after a liquidation, regardless if the liquidation is happening piece by piece or accomplished by selling the running business. After the conception of the guideline draft, declarations only started being possible when the confirmation process for the accepted restructuring plan by a court through official channels was happening. Likewise, this criterium reasonably becomes the foundation for the decision made by the afflicted creditors even before that – namely, over the course of the negotiations and the voting over the restructuring plan.

One might think this comparison value would mostly be measured according to the current continuation value, i.e. the price the company would be sold for in the current market situation. After all, according to the guideline draft, the afflicted company must under no circumstances be bankrupt at the start of the proceedings. Therefore, there is no room for the usage of liquidation values, since those require bankruptcy. Nevertheless, the guideline draft assumes the liquidation value as a prerequisite, i.e. the price which the objects belonging to the company would sell for, in case of a sale after closure of the company. It seems obvious that a comparative calculation based

on the liquidation value, which will regularly be placed far below the continuation value, will play right into the hands of the debtor. The reason for that: The higher the alternative value, the more likely a to-be-dispossessed debtor is being put in a worse position. Consequently, associations are rejecting this method of calculation and are requesting of the legislator to take the real value of the company into account for the realization of the guideline. Considering the restructuring process is not equal to bankruptcy proceedings, this is the only correct path to take.

Should the commission's plan of only taking the liquidation value into account stick, claims specific to insolvency (like claims of contestation or liability claims against management) would consequently have to be involved into the evaluation. It is accepted in bankruptcy plan proceedings that debtors must at least give explanations about such claims during the descriptive part of the plan, so creditors can take everything into consideration. If a debtor was able to refrain from these explanations in the restructuring plan, even with the foundation the liquidation scenario being an advantage for him, everything is nothing more than cherry picking at the expense of the rejecting creditors. It is more than questionable whether this will promote the necessary trust in the extrajudicial restructuring process.

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