

Public Financing of Restructuring

Abstract: The Restructuring Law of 15 May 2015 makes provision for enterprises who wish to seek restructuring in a crisis situation. Restructuring, understood as the totality of activities from the time that difficulties arise to the time that financial health is restored, can be carried out successfully when appropriate financial support is secured. An important problem in the context of insolvency law is what instruments are available and where to seek financial assistance. This article focuses on entities that can offer help to a business in crisis, presents the national aid program “New Opportunity Policy”, designed to provide businesses with support from public funds, and discusses public aid instruments (rescue aid, temporary support and restructuring aid). It needs to be kept in mind that the company’s financial situation will determine which public aid instruments can be chosen to provide funding. The paper also highlights significant difficulties in obtaining private (internal, external) financing for restructuring. With the public support offered under Guidelines [EFTA Surveillance Authority Decision No. 321/14/ COL of 10 September 2014], the state can support an enterprise that is insolvent or endangered with insolvency in a difficult financial situation.

Keywords: restructuring, new financing, public aid, debtor, creditor

Introduction

In seeking to harmonise the rules governing corporate restructuring and insolvency within the European space, the rationale of Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019] is to minimise the restrictions on the free movement of capital and freedom of establishment, which arise from the widely differing regulations on the method of restructuring and declaring insolvency, and to provide a framework for the EU market to function properly in each individual European country.

The key issue is not only the scope of regulations under Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019], but also how the new provisions will bring individual legal systems of the Member States closer to-

gether [Klimas 2017, p. 105]¹. This is especially important since its provisions are to ensure greater freedom in the creation of national legislation or the remodelling of existing laws. Regulations across various legal systems must meet the minimum standards imposed by Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019], and Member States should take measures to achieve the objectives set out therein.

A noteworthy issue covered by Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019] is new financing in which emphasis is placed on the dependence of a successful remedial restructuring of a company upon the debtor's ability to obtain effective financial assistance. It will be important to answer how to provide new financing for companies (debtors) to cover operating costs at the stage of negotiating the restructuring (pre-restructuring) or for implementing the restructuring plan (during the restructuring process)². The analysis must not overlook the financing entity which will not be willing to commit itself to supporting enterprises in financial crisis without adequate protection and legal guarantees. Therefore, the question arises as to how to guarantee adequate security for the new financing (*super-senior* position) without violating the interests of existing creditors? Under Article 17 and 18 of Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019], the national legislature is obliged to remove restrictions on obtaining new financing in corporate restructuring, thereby facilitating access to a wide range of financing sources. The idea is to allow continued operation only of those entities that will be able to survive on the market with a specific development potential [Adamus, Geromin, Groele, Miczek 2021, p. 157].

At this point, it is worth noting the national aid program "New Opportunity Policy", whose aim is to support struggling enterprises with public funds in line with the Rescue and Restructuring Aid Law of 16 July 2020.

The aid programme was entrusted for implementation to the Agency for Development and Industry (hereinafter ARP) [www.arp.pl., access as of 3 March 2022], which grants aid on behalf of the minister responsible for the economy, whereby the

1 Differences across legal systems have demonstrated the unfavourable trend of *forum shopping* (transfer of assets or legal proceedings from one Member State to another in order to obtain a more favourable legal position) whereas EU legislation tries to prevent this from happening in the relationship between the Member States of the European Union.

2 Directive 2019/1023 also does not ignore the obligation to protect other transactions related to restructuring in art. 18, pkt 4: a) the payment of fees for and costs of negotiating, adopting or confirming a restructuring plan; b) the payment of fees for and costs of seeking professional advice closely connected with the restructuring; c) the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law; d) any payments and disbursements made in the ordinary course of business other than those referred to in points (a) to (c).

amount earmarked for public aid is specified in the Budget Law³. Pursuant to Article 13(6) of the Law, the ARP grants aid in favour of the minister responsible for economy, and the loan is then repaid to the minister's account designated in the administrative decision. Under the aforementioned Law, the granting of aid will be considered on the basis of the assumptions listed in Articles 3(7), 44 and 107 (due to social difficulties and market failures⁴) [EFTA Surveillance Authority Decision No. 321/14/COL of 10 September 2014, Leszek 2010, p. 17]. The study will adopt a dogmatic method supplemented with a comparative method, with information drawn from both domestic and foreign sources. Data obtained from the Central Economic Information Centre was also used.

National Legal Basis for New Financing

In order to provide protection for new financing in restructuring and other related transactions, the national legislature provides it through the Bankruptcy Law of 28 February 2003 (see Article 11)⁵ and the Restructuring Law of 15 May 2015 (see Article 141(1)⁶ and 141(2)⁷) [Witosz 2021, Article 11]. In addition, in order to implement the Guidelines [EFTA Surveillance Authority Decision No. 321/14/COL of 10 September 2014] and to comply with the requirement to implement the government's support programme for enterprises under the "New Opportunity Policy", the legislature envisioned the Rescue and Restructuring Aid Law of 16 July 2020⁸.

3 The maximum expenditure limit for the implementation of tasks envisioned in the Law for the years 2020–2029 is PLN 1 billion 200 million; the European Commission's decision No. C (2020) 7937 of 12 November 2020 on state aid approved the extension of the "New Opportunity Policy" programme until 2026.

4 Sources of market failure include: the presence of a public good and externalities (costs and benefits), incomplete market information as well as transaction costs.

5 Reasons for insolvency: one of the following: 1) loss of the ability to pay (Article 11(1)-(2)), 2) predominance of liabilities over assets (Article 11(2)-(7)).

6 Rescue aid or temporary restructuring aid can be granted to micro-, small and medium enterprises in a difficult economic situation, which: 1) undertook business activity in the given sector at least 3 years before the date of submission of the restructuring application, 2) are not active in the steel, coal or financial sectors, 3) are not active in a market where there is or may be long-term structural overcapacity, 4) are not part of a capital group.

7 Public aid for restructuring may be granted to an enterprise at risk of insolvency: 1) where the enterprise, as a result of incurred losses, lost more than half of the capital, in particular where the sum of profit (loss) from previous years, net profit (loss) in a given financial year, supplementary capital, revaluation capital and other reserve capital (funds) is negative and its absolute value is greater than 50% of the basic capital (fund); 2) to an enterprise other than a small or medium-sized one when, in the last two years, the ratio of: a) debts to equity was higher than 7.5; b) operating profit plus depreciation to interest was lower than 1.

8 The Rescue and Restructuring Law dates back to the government programme already adopted by the resolution of the Council of Ministers of 22 July 2014 entitled: "New Opportunity Policy". The

The entry into force of the law in 2020 was forced by the COVID-19 pandemic. In the explanatory memorandum for the aforementioned law, it is emphasised that the national policy on entrepreneurship is not only about providing support for starting up or conducting an existing business, but also about providing assistance to those entities already operating on the market with specific development potential, which have fallen into a financial crisis and are therefore worth helping. Under the provisions of the Law, in the event of a crisis, companies can count on assistance with restoring the profitability of their operations, taking the form of financial aid, such as a loan. According to the Guidelines, enterprises are lent money for a specific purpose, which at all times remains public funds and has a refundable character. In addition, it allows capital entries, and relief in the repayment of certain public-law liabilities [Government programme The Rescue and Restructuring Aid Law. Explanatory Memorandum – form No. 300].

Data presented by the Central Economic Information Centre [www.coig.com.pl, access as of 3 February 2022] show that in 2020, 800 restructuring proceedings were initiated, of which, in the month of December 2020 alone, there were 144 proceedings. By comparison, in the preceding years – 2018 and 2019 – there were half as many (465). The latest data for the period of January-September 2021, which was published in the Judicial and Economic Gazette, shows that in about 1,400 cases an announcement was made about the commencement of restructuring proceedings. Thus, the large increase in the number of restructuring proceedings also translates into a crisis situation in connection with COVID-19.

Entities That Can Offer New Financing

An entity which may provide new financing may be a creditor of the debtor, a financial institution, including a bank, etc., however, in the majority of cases such financing is difficult to obtain (multiple conditions have to be met) and practically unavailable. Moreover, a public entity able to support enterprises in crisis by implementing appropriate mechanisms. The public support of new financing, which is necessary, stems from the Communication of the European Commission [EFTA Surveillance Authority Decision No. 321/14/COL of 10 September 2014], providing guidelines for the state, which can support an insolvent company or a company at risk of insolvency in financial difficulties.

Within the framework of permitted state aid [Ambroziak 2019, p. 74], a company in financial dire straits may avail itself of the following forms (instruments) of support: rescue aid and temporary restructuring support are designed for companies

programme, which covers the period 2014–2020, has created a method of operation for state policy on insolvency issues.

in the pre-restructuring phase, i.e., in the early stage of the crisis, while restructuring aid is available at the stage of implementation of the restructuring plan.

It is worth noting that under Article 26 [Restructuring Law Act of 15 May 2015 Journal of Laws of 2020, item 1228 later amended] regulations require restructuring advisors (administrators, supervisors) to support debtors in the search for effective sources of financing (e.g., obtaining public aid) of their business during the restructuring process [Janik 2019, p. 301]. In addition, an entity interested in the “New Opportunity Policy” programme has the opportunity to consult free-of-charge a restructuring advisor consultancy at one of the Business Service Centres throughout Poland, who will explain the procedure for application for aid⁹.

Public Aid Instruments

Any decision concerning a company will depend on the situation in which it finds itself and what procedure is appropriate to implement certain rescue aid instruments (see Table 1).

Examples of securities include: mortgage together with assignment of receivables under an insurance contract, civil (registered) pledge together with assignment of receivables under an insurance contract, assignment of receivables, declaration on submission to execution directly under a notarial deed, blank promissory note together with a promissory note declaration, transfer of ownership for collateral, surety, guarantee (bank, insurance), etc. On the other hand, an equity contribution may consist of the enterprise’s own funds (excluding depreciation and planned profits), resources coming from the owners or enterprises of the same capital group, resources provided by the enterprise’s creditors or other resources, obtained on market conditions. The equity contribution must be actually delivered and cannot constitute public aid or restructuring aid akin to that referred to in Article 39(1) of the Law, in terms of impact on the enterprise’s solvency or liquidity level.

9 Summary of applications issued as of December 8, 2021 (for the years 2020–2021): Rescue aid (6 applications, amount of applications: 28 965 240, 48 PLN), Temporary restructuring support (2 applications, amount of applications: 4 188 967, 36 PLN), Restructuring aid (6 applications, amount of applications: 234 713 000, 00 PLN). Scientific Conference – Restructuring Congress on December 9, 2021: Corporate Finance in Restructuring: Public Aid, M. Zalewska (Development and Industry).

Table 1. Categories of Public Aid According to the Rescue and Restructuring Law of 16 July 2020¹⁰

Rescue aid	Temporary restructuring support	Restructuring aid ¹
Beneficiary		
enterprises referred to in Article 141(1) of the Restructuring Law, provided they are at risk of insolvency and meet the conditions set out in Article 141(2) of the Restructuring Law, enterprises referred to in article 141(1) of the Restructuring Law, provided that they are insolvent within the meaning of Article 11 of the Bankruptcy Law.	micro-, small or medium enterprises referred to in Article 141(1) of the Restructuring Law, provided they are at risk of insolvency and meet the conditions set out in Article 141(2) of the Restructuring Law and meet the conditions set out in Article 11(2), micro-, small or medium enterprises referred to in Article 141(1) of the Restructuring Law, provided they are insolvent within the meaning of Article 11 of the Restructuring Law and meet the conditions set out in Article 11(2) of the Bankruptcy Law.	enterprises referred to in Article 141(1) of the Restructuring Law, provided they are at risk of insolvency and meet the conditions set out in Article 141(2) of the Restructuring Law, enterprises referred to in article 141(1) of the Restructuring Law, provided that they are insolvent within the meaning of Article 11 of the Bankruptcy Law.
Purpose of the aid		
To support the business in a crisis situation, so that it can – in the shortest possible time – maintain minimum financial liquidity and develop a further action plan, e.g., a restructuring plan.	To boost the restructuring process by creating the framework for the beneficiary to plan and implement an appropriate action to restore its viability in the long term (self-restructuring). This is conditional upon the implementation of a simplified restructuring plan.	To eliminate the negative social effects of the crisis and market distortions, and to prevent bankruptcy and liquidation of enterprises. The aid is designed to restore the business's ability to compete on the market; the objective is to eliminate the causes of the difficulties, and not just to compensate for losses suffered.
Support (time)		
Urgent (automatic), temporary (temporary)	Urgent and temporary, in the long term (as a continuation or a standalone instrument).	Long-term
Period and form of support		
Loan (6 months) with the possibility of extension. The aid received in the form of a loan with interest shall be repaid no later than on the date of repayment stated in the awarding decision. The aid is repaid to the account indicated in the awarding decision. Security may be required.	Loan (18 months) with the possibility of extension; the period of any previous rescue aid is included (this instrument is granted for a longer period rescue aid; it can be a continuation or standalone instrument. Security may be required.	Up to 10 years. For example: loans; taking up stocks or shares in the increased share capital or participation in the increase of the share capital by the adding face value of the existing shares or stocks and taking up bonds. Change in loan repayment dates towards the granting entity; Conversion of a loan, granted as rescue aid or as temporary restructuring support, to the enterprise's shares or stocks (Article 39 Aid) Security and equity contribution may be required ² .

¹⁰ It is worth stressing that rescue aid and – in the case of SMEs and smaller state-owned enterprises – also temporary restructuring support can be granted to enterprises who are not in a difficult economic situation within the meaning of points 19–20 of the Guidelines, but due to exceptional and unforeseen circumstances have urgent liquidity needs.

Maximum amount of financing		
An enterprise may make the grant of a loan in a higher amount more probable, based on a financial projection to define the enterprise's needs related to financial liquidity.		The amount of financing must result from the restructuring plan submitted by the enterprise, the implementation of which will enable the enterprise to restore the long-term ability to compete in the market.
Loan amounts		
Loan amounts – [Specimen from Appendix No. 1 of the Guidelines] i.e., value of negative cash flows from the enterprise's operating based on data for the last financial year.		
Form		
Decision after prior formal and substantive verification of the documents submitted by the enterprise (30 to 45 days).	Decision	Decision
Reporting and control of the aid provided		
Quarterly report within 45 days after the end of each quarter (expenses made).		
Final report within 90 days after the expiry of the period for which it was granted.	Final report within 120 days after the expiry of the period for which it was granted.	
Effect		
Restructuring plan (preliminary) (substantiated by financial forecasts of the financial situation entity) or a liquidation plan	Restructuring plan	Implementation of the restructuring plan

Sources: *Government programme The Rescue and Restructuring Aid Law, Explanatory Memorandum – form No. 300, Sierakowski B., Zimmerman P. (eds.) (2020), Ustawa o udzielaniu pomocy publicznej. Komentarz, C.H. BECK, Warsaw.*

Assessment of the Reasons for Providing Aid

With reference to Article 47 of the Public Aid Law, prior to granting restructuring aid the ARP assesses the justifiability of such a grant, with consideration given to the following:

1. the priorities set out in the government's restructuring programmes;
2. the expected economic effectiveness of the enterprise in a difficult economic situation after the restructuring process is complete;
3. the volume of employment at the enterprise in a difficult economic situation;
4. supply and demand forecasts regarding the market where the enterprise in a difficult economic situation operates;
5. the enterprise's place of business. The award of financing is conditional upon filing an application to the ARP with required information as specified at [www.arp.pl., access as of 3 March 2020].

An application submitted to the ARP is then evaluated formally and substantively, e.g., economic and financial analysis is carried out, based on the submitted financial statement (vertical, horizontal and indicator analysis). The ARP encourages the submission of applications for the funds available, with detailed information available at www.arp.pl.

Conclusion

The issuance of the European Commission Guidelines on State Aid for Rescuing and Restructuring Non-financial Businesses provided the impetus for the implementation of the APR-operated aid scheme. It is stressed that ‘...*the use of (aid) schemes contributes to distortions of competition related to potential abuse, by allowing the Member State to clearly define ex ante under what conditions it may decide to grant aid to companies in difficulty...*’ [Government programme The Rescue and Restructuring Aid Law. Explanatory Memorandum – form No. 300]. The undertaken financial operations must meet the objectives pursued by enterprise owners and be consistent with the country’s financial system. On the other hand, they need to fulfil one of the paradigms of restructuring law – allowing only those entities that are capable of surviving to continue operating. Therefore, the main assumption of the ‘New Opportunity Policy’ programme is to support enterprises so that they can continue their operations in line with the principles of rational management.

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List of Legal Acts

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Efta Surveillance Authority Decision No. 321/14/COL of 10 September 2014 amending for the one-hundredth time the procedural and substantive rules in the field of State aid by adopting new Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (Guidelines 2015/1856).

Bankruptcy Law Act of 28 February 2003 (Journal of Laws of 2021, item 1588 later amended).

Restructuring Law Act of 15 May 2015 (Journal of Laws of 2020, item 1228 later amended).

Rescue and Restructuring Aid Law Act of 16 July 2020 (Journal of Laws of 2020, item 1298 later amended).

Other publications

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