THE LAWYER BRIEFING SERBIA

RESTRUCTURING

Privatisation practice

Amendments to the Privatisation Act do not provide a solution for companies in the restructuring process, and changes are expected

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The Serbian parliament adopted amendments to the Privatisation Act on 12 May and the act came into force the following day. The legislator extended the life of companies in the restructuring process (which were subjects of privatisation) for five months.

Reasons behind the amendments

At the end of last year the Constitutional Court invalidated the provisions of the then-binding Privatisation Act that did not permit enforcement against the assets of companies in the restructuring process that were subjects of privatisation. Namely, from the date of rendering a decision on the restructuring of such a company until the date of rendering a decision on termination of the restructuring procedure, but in any case not later than 30 June, enforcement measures against such entities were forbidden.

The consequence of the invalidation of this provision is the enactment of the aforementioned amendments that formally implement the decision of the Constitutional Court while determining the status of companies in the restructuring process that were the subjects of privatisation. These would only be valid until the resolution of the issue.

The figures

By these amendments, 164 companies with more than 80,000 employees have been rescued from bankruptcy. The enactment of this law has been justified by the fact that some of those companies are of great strategic importance to Serbia.

However, the provisions are time-limited to 150 days. In the meantime, the status of some companies in the restructuring process will be resolved while the rest will fall into bankruptcy as there is neither the financial capability nor any commercial reason for their existence.

The amendments in concreto

First, the amendments harmonise the law with the decision of the Constitutional Court. The unconstitutional paragraphs of the law have been erased and altered so that the contentious Art.20 now only refers to state creditors that are prohibited from seeking enforcement against the assets of privatisation subjects that were privatised by public tender or public auction.

As enforcement against the assets of the subjects of privatisation is no longer prohibited, the legislator had to come up with a transitional solution that would satisfy the ratio legis reflected in the decision of the Constitutional Court while extending the life of companies in the restructuring process, ultimately buying time to find the right solution.

Thus, the amendments prescribe a time-consuming procedure prior to enforcement against the assets of companies in restructuring that was subject of privatization.

The procedure

If they have a claim on a company in restructuring, creditors are obliged to submit an application for settlement to the Privatisation Agency in the form to be found on the website of said body within 30 days from the time the amendments enter into force. They have to submit the resolution on enforcement, the execution document and other documents that prove the validity and legal existence of their claims so the agency can determine the amount of the claim.

Within 90 days of the expiry of the above deadline, the agency will record the submitted applications, determine the amount of the claim for each creditor and for each privatisation subject in restructuring, and prepare proposals for settlement of the claims. These will be submitted to the creditors.

Creditors may, within 30 days of the expiry of the deadline, declare whether they agree with the agency's proposal. However, that provision is not peremptory since creditors are only required to observe and stress their opinion with regard to the agency's proposal. The legislator obviously avoided prescribing such an obligation as the amendments are short-lived.

The amendments re-establish the ban for creditors of entities in restructuring on forced execution or forced debt collection within 150 days of enactment. Penalties for creditors who seek forced execution or enforcement are also prescribed.

The future

Without a doubt, this regulation is an elegant way to comply with the standpoint of the Constitutional Court while preserving the existing limitation, thus rescuing some companies in distress. However, that means the formally implemented decision of the Constitutional Court has been ignored in its essence, which is a dangerous precedent. It gives the misleading impression that the view of the highest tribunal has been recognised through the harmonisation of the first paragraphs of the amendments, while through the following provisions it is obvious that the ratio legis of the decision of the Constitutional Court shall be circumvented by means of procedural bypass.

In any case, this regulation does not set out an ultimate resolution to the question of companies in the restructuring process, so a draft of a new act must be a priority in the next few months.