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ARTICLE

Cross-Class Cramdown in Poland: Current Legal Framework and Upcoming Changes

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Synopsis

This article discusses the Polish legal framework of cross-class cramdown, a mechanism that enables the adoption of a restructuring plan binding dissenting creditors across different groups. While cross-class cramdown has been available in Poland since 2016, significant changes in this area are currently being proceeded, aimed at implementing the European Union directive on preventive restructuring frameworks[1]. The Directive provides for a number of conditions protecting creditors from potentially unfair results of application of this mechanism, most notably the 'relative' or 'absolute priority rule'. Below, we briefly outline the upcoming legislative changes to the Polish legal framework, which will introduce stricter provisions and new legal measures concerning cross-class cramdown.

Introduction

Cross-class cramdown is a mechanism allowing to adopt a restructuring plan that can bind dissenting creditors across different classes. From the very beginning, it has been a fundamental aspect of the US Chapter 11. It is fair to say that recently, it has become a feature of modern restructuring legal frameworks implemented in different jurisdictions. For example, in England and Wales, it was introduced in 2020 under the Corporate Insolvency and Governance Act, a significant legal reform following the COVID-19 crisis.

In other European countries, the expansion of the cross-class cramdown mechanism was triggered by the Directive, obliging the Member States to implement it into their legal frameworks. On this basis, it has been introduced as a brand-new tool, for instance, in Germany[2] and France[3].

In Poland, despite the delay in the Directive implementation process, cross-class cramdown has been available since 2016, as introduced independently by the Restructuring Law[4]. It may come as a bit of surprise that transposition of the Directive will make Polish regulations in this regard more restrictive than they are now.

Current legal framework in Poland

Under the Polish law, as a general rule, a restructuring plan is adopted by a majority of creditors who cast a valid vote, holding at least two-thirds of total value of claims of the voting creditors. Group voting is allowed and is almost always the case. In such case, the requirement of a majority in number of creditors and the two-thirds majority in total value of claims is applicable in each group respectively.

However, a unanimous support of all groups is not necessary for the plan to be adopted. Under certain conditions, the Polish law allows to cram down the dissent of one or more groups. Specifically, if one or more groups of creditors votes against the plan, it will still be adopted if the following two conditions are jointly met. Firstly, creditors holding at least two-thirds of total value of claims of all voting creditors must vote in favour of the plan. Secondly, the dissenting group or groups must be treated at least as favourably under the plan as in case of a bankruptcy. In other words, the dissenting creditors cannot receive a lower payment under the plan than they would receive if the bankruptcy proceedings were opened.

As one may see, the above requirements are not excessively high. In fact, the current Polish regulation is based on the concept of the 'best-interest-of-creditors test'. This criterion is also provided in the Directive, albeit not specifically for the cross-class cramdown, but

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1 The 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) (the 'Directive').

2 *Unternehmensstabilisierungs- und restrukturierungsgesetz* (StaRUG), in force from 1 January 2021.

3 *Ordinance 2021-1193*, in force from 1 October 2021.

4 *Ustawa Prawo restrukturyzacyjne* of 15 May 2015, in force from 1 January 2026 (the 'Restructuring Law').

as a general rule protecting dissenting creditors. Under the Directive, such test is defined to be satisfied if no dissenting creditor would be worse off under a restructuring plan than they would be according to the normal ranking of liquidation priorities under national law or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed[5] (in Poland, it would be bankruptcy).

Currently, Polish statutory provisions do not require any valuation or other specific calculation demonstrating that the above condition is met. In practice, as long as it is not contested by the dissenting creditors, the court approving the plan usually accepts that this condition is fulfilled based on the information presented in the report of the restructuring practitioner supervising the debtor or other documents submitted in the proceedings. In case there are objections to the validity of the plan's adoption raised by a creditor, the court may order the restructuring practitioner to submit the debtor's business appraisal, but it is only discretionary.

To sum up, current Polish provisions on cross-class cramdown are generally debtor-friendly. Their application is, in fact, only restricted by the 'best-interest-of-creditors test'. Importantly, this test is applicable in any case where a dissenting creditor raises objection against the adoption of the restructuring plan, not only in the case of cross-class cramdown. Other limitations provided for in the Directive specifically for the cross-class cramdown (in particular, the 'relative' or 'absolute priority rule') are not (yet) applicable under Polish law.

Upcoming changes in Polish legislation

Poland has not yet implemented the Directive, even though the deadline lapsed in July 2022. The first draft legislation implementing the Directive, which had been proceeded for a long time, was eventually abandoned, and the new government published completely new draft in October 2024. Currently, it is still in the pre-parliament consultation phase, but the entire legislative procedure should finally come to an end this year 2025.

Based on the latest available draft of the new law[6], significant changes are planned to be introduced in relation to the cross-class cramdown. They include modification of the restrictions relating to the required voting majority as well as the minimum terms of a restructuring plan to guarantee the interests of the dissenting groups of creditors.

Following Article 11(1)(b) of the Directive, the draft law provides for that if one or more groups of creditors votes against the plan, it is still adopted in the following two alternative situations:

(a) option 1: a majority of groups votes in favour of the plan, including at least one group of secured creditors or privileged creditors (i.e., having priority of satisfaction in bankruptcy, in particular public claims for social insurance contributions);

and if the above condition is not met, the plan may still be adopted if:

(b) option 2: at least one group of creditors who would have received any payment in case of bankruptcy proceedings (in-the-money creditors) votes in favour of the plan. This assessment is made based on a valuation of the debtor's business as a going concern.

Additionally, in both alternative situations, it is required that creditors holding at least half of the total value of claims of all voting creditors vote in favour of the plan.

Finally, on top of that, one additional condition must be satisfied for the cross-class cramdown to be allowed. Namely, if a group of creditors having a lower rank of satisfaction in the bankruptcy proceedings is to receive any payment under the plan, a dissenting group or groups of creditors with a higher rank of satisfaction in the bankruptcy proceedings have to be satisfied in full under the plan. The above condition reflects the 'absolute priority rule', as one of two alternative rules provided for in the Directive allowing the plan to be adopted despite the dissent of one or more group of creditors. The Directive provides the Member States with a choice of adopting one of two concepts[7]. According to the 'relative priority rule', provided in Article 11(1)(c) of the Directive, it is required that the plan 'ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class'. As an alternative option, Article 11(2) of the Directive allows the Member States to implement the 'absolute priority rule' stating that the plan must ensure 'the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan.'

In the initial version of the Polish draft legislation, its authors decided to adopt the 'relative priority rule' as a solution which seems to be closer to the current

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5 Article 2(1)(6) of the Directive.

6 *Ustawa o zmianie ustawy Prawo restrukturyzacyjne oraz ustawy Prawo upadłościowe* – draft dated 22 January 2025, published on: https://legislacja.gov.pl/.

7 Recital (55) of the Directive.

cramdown model under the Polish law. However, in the latest draft, the 'absolute priority rule' was chosen. It has been justified by better protection of the interests of secured creditors and easier distribution of the 'surplus' value of the debtor's business to the creditors included in the 2nd rank of satisfaction[8]. Under the Polish bankruptcy law, there are four ranks of satisfaction: 1st – covering privileged claims, such as employees' salaries and pensions, social insurance contributions, etc., 2nd – the broadest category covering all claims by default, including commercial claims and taxes; 3rd – covering all interest, and court or administrative fines, 4th – covering certain equity holders' claims. Despite the fact that the 'relative priority rule' is the default option under the Directive and is generally perceived to be a less restrictive alternative, in the Polish context this rule would make the group voting infeasible. This is because the vast majority of creditors fall into the same (2nd) rank. Thus, it would be virtually impossible to split them into different groups and offer different payment terms.

According to the second subparagraph of Article 11(2) of the Directive, the Member States may introduce provisions derogating from the 'absolute priority rule' where they are necessary in order to achieve the aims of the restructuring plan and where it does not unfairly prejudice the interests of any affected parties. Polish legislators used the above discretion and introduced two specific exceptions ensuring effectiveness of the restructuring proceedings. Under these exceptions, two specific categories of claims may receive a preferential treatment, and such treatment will not be considered as violating the 'absolute priority rule'. In other words, the following claims may be satisfied under the plan in greater proportion than they would be in the bankruptcy proceedings, and the adoption of the plan by way of a cross-class cramdown is still admissible:

(a) social insurance contributions or other claims of the Social Insurance Authority, in particular default interest;

    Under the Restructuring Law, such claims cannot be reduced under the plan. On the other hand, in the bankruptcy proceedings, any default interest (including those due to the Social Insurance Authority) are included in the 3rd rank of satisfaction. This means that, if not for the above exception, in most cases, the restructuring plan would be completely infeasible as it would have to provide full satisfaction for basically all creditors (as vast majority of them are included in the 2nd rank in the bankruptcy proceedings).

(b) claims of a creditor who has provided, or is about to provide, the financing necessary to perform the restructuring plan, or whose services to the debtor are necessary for the continuation of the debtor's business.

    Obviously, those creditors have a particularly important role in the entire restructuring process, which could be otherwise infeasible.

Irrespective of the conditions specifically related to the cross-class cramdown, in any case, the rights of all dissenting creditors will remain protected by the 'best-interest-of-creditors test'. In order to enable the assessment whether this test as well as the conditions for the cross-class cramdown are met, the draft legislation provides for a new requirement for specific calculations to be submitted in the restructuring proceedings. The restructuring practitioner supervising the debtor will be obliged to prepare a document called 'satisfaction test' including:

(a) valuation of the debtor's business as a going concern (assuming that the restructuring plan is performed), and its valuation for the case of liquidation, whether piecemeal or by a sale as a whole, in the bankruptcy proceedings;

(b) information on the expected extent of satisfaction of creditors in the bankruptcy proceedings (within each particular group);

(c) assessment of whether the claims subject to the plan will be satisfied to a greater extent if the plan is implemented, or in the bankruptcy proceedings.

In case of objections raised by a dissenting creditor as to the violation of the 'best-interest-of-creditors test' or other condition for the cross-class cramdown, the court approving the plan may order an independent verification of the 'satisfaction test' by a court-appointed expert.

Additionally, a significant change is to be introduced with respect to the status of secured creditors. As opposed to the current provisions, under the new legislation they are to be mandatorily affected by the restructuring plan. To safeguard their rights, in such case a group voting will be obligatory, and the secured creditors will constitute a separate group. The plan has to provide them with a degree of satisfaction no less favourable than in bankruptcy proceedings (which basically means separate satisfaction from the collateral or the amount equal to its value).

Concluding remarks

Cross-class cramdown is one of key tools for ensuring the efficiency of restructuring proceedings. So far, the Polish legal framework has allowed quite a wide

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8 Explanatory notes for the draft law, p. 8-9, published on: https://legislacja.gov.pl/.

discretion in the application of this mechanism. The Directive puts greater focus on the need for proper protection of creditors, which is necessary especially with respect to secured creditors. This results in a number of new legal measures that will be introduced into the Polish law in the nearest future, most notably the 'absolute priority rule', supplementing the current Polish cross-class cramdown model. These upcoming changes aim to enhance the balance between flexibility in restructuring and due creditor protection, aligning Poland's legal framework with the common European standards.

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