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Welcome to the first edition of **Restructuring Watch** from the Akin Gump financial restructuring team in London. These editions will provide short and accessible updates on key legal developments in the European restructuring and insolvency world.

In this edition of **Restructuring Watch**, we look at Smile Telecoms (the first 901(C)(4) application in respect of a restructuring plan proposed under Part 26A of the Companies Act 2006), things to be aware of now that the National Security and Investment Act 2021 is in force, recent additions to (and removals from) the Recast Insolvency Regulation and a government consultation on the regulation of insolvency practitioners and firms providing insolvency services.

RECENT DEVELOPMENTS

Smile Telecoms' Second Restructuring Plan: Breaking New Ground with a (Successful) 901(C)(4) Application to Exclude a Class of Creditor

Smile Telecoms Holdings Limited ("Smile Telecoms") has made the first court application to exclude a class of creditors from a plan on the basis that they do not have a genuine economic interest in the plan company.

Under section 901(C)(3) of the Companies Act 2006 (the "Act"), a plan company must convene a meeting of every creditor or member which is "affected by" a restructuring plan. Section 901(C)(4) of the Act permits classes to be excluded, and no meetings of those stakeholders convened, if the court is satisfied that no member of the relevant class has a genuine economic interest in the plan company.

Based on the principles applicable to class composition, eight classes of stakeholders (creditors and members) should have been convened to consider and vote on the Smile Telecoms restructuring plan (which is its second plan; its first was sanctioned by the court in March 2021). However, section 901(C)(4) of the Act gave Smile Telecoms the opportunity to exclude certain classes, an opportunity which it seized.

In an oral judgment handed down following a lengthy hearing on 12 January 2022, the court was satisfied that, based on the evidence before it, the only class of creditors or members with any genuine economic interest in Smile Telecoms was the Super Senior Lender class. As a result, meetings of the other stakeholders did not need to be convened and a single meeting of the Super Senior Lender class will now be held.

This application was the first to be made under section 901(C)(4). While we await written judgment, it is now clear that an application under that section represents a viable alternative to convening meetings of out-of-the-money classes and seeking to cram those

classes down at the sanction hearing. However, the application of the provision in future cases will necessarily be fact dependent.

National Security and Investment Act 2021 Comes Into Force

In April last year, the National Security and Investment Act 2021 ("NSIA") received Royal Assent, and it came into force on 4 January 2022.

The NSIA is focused on changes to the ownership and control of entities and assets operating in the United Kingdom ("UK") where that ownership/control change could affect UK national security. Through the NSIA's provisions, the government has essentially enhanced its ability to scrutinise transactions which might impact on national security (appropriately balanced so as to ensure businesses can still operate in (and are not disincentivised to do business in) the UK). The NSIA takes a three-pronged approach to national security screening, which our international trade team cover in this briefing. In summary: for certain industry sectors, mandatory notification applies and the government has a discretionary authority to call-in ownership/control changes for review.

Why is this relevant to the restructuring world? It will be important to bear the implications of the new regime in mind when planning for implementation of restructurings (including contingency planning), particularly if the relevant company operates in (or may be considered to operate in) one of the 17 key industry sectors defined in the relevant regulations (e.g. energy, defence, communications, certain emerging technologies and critical supplies to government, etc.). Of particular relevance may be the following:

- **Taking share security:** English law-governed share pledge agreements ordinarily provide that, following enforcement, the security agent may exercise voting rights in respect of the relevant shares. It is not immediately clear whether the notification regime would be triggered simply by that provision being included in a share pledge, even prior to acceleration or enforcement action, and clarification may need to be sought.
- **Officeholder appointments:** Simply appointing administrators will not trigger the notification provisions of the NSIA, as there is an explicit carve-out for those appointments. That carve-out does not apply to liquidators or receivers, so it is likely that, in those circumstances, even greater thought would need to be given to the need for (mandatory) notification or call-in.
- **Share or asset sale/enforcement:** Two immediate considerations here: do the notification regimes apply and how would the clearance or review process impact timing/execution risk?
- **Debt-for-equity swap:** Depending on the level of shares to be issued, the regime may have consequences for debt-for-equity swaps concerning a qualifying entity.

EU Recast Insolvency Regulation Updated

From 9 January 2022, Annexes A and B of the EU Recast Insolvency Regulation (Regulation (EU) 2015/848) were updated. Most relevant is the fact that Annex A was updated to include (among other processes) the new Dutch scheme (the "WHOA") and reflect recent additions and revisions to the French and German restructuring frameworks. Those procedures will now be automatically recognised in all EU member states (except Denmark). UK processes have also, in light of Brexit, been removed from Annex A (and UK insolvency practitioners from Annex B).

Consultation: Regulation of Insolvency Practitioners and Insolvency Services

Just before Christmas, the Insolvency Service launched a consultation entitled "The future of insolvency regulation". The consultation is open until 24 March 2022 and can be accessed here.

The consultation seeks views on the creation of a single regulator of insolvency practitioners ("IPs") and extending regulation beyond individual IPs to the firms that offer insolvency services. Currently, IPs are regulated by (one of) four professional bodies, and the consultation seeks views on (among other things) whether a single independent regulator should replace those bodies.

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