Restructuring Practice is Now Growing Worldwide Post-Covid Insolvency

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Abstract

The same late autumn, the same grim socio-economic "picture", painted in shades of grey, at least at national level, in which the health crisis reaches unimaginable heights and the wave of insolvencies currently "hidden" is preparing to "shake" aggressively the economy. We all want to talk about a post-Covid "world", about a "cured" healthcare system, about a competitive and innovative business environment, of course, as much as we want to talk about a new Romanian Commercial Code, to ensure the continuity of economic activity. But the wait doesn't seem to end. And yes, we all hoped that this pandemic drew new coordinates, and these new coordinates gave a real impetus to legislative reform, a much-needed reform in many areas of major interest at the crossroads of the global economic crisis. However, this much invoked and awaited reform does not seem to be tangible, palpable. The economy continues to "sink" easily and certainly. We continue to "navigate" through a fragmented and less predictable "landscape", but in the midst of these uncertainties we aim to take the "pulse of the economy" nationally and globally and identify the legal and economic instruments needed for sound insolvency reform, a field deeply shaped and "imprinted" by the Covid-19 pandemic. Insolvency can become one of the main pillars of the reconstruction of the post-Covid economy, through a careful and rigorous "grinding" of its regulations, driven of course by the changing perception of the insolvent debtor and the vision of the essence of our culture stuck in the idea of unforgivable guilt of the bankrupt. Although the "palette" of solutions in the restructuring area has diversified and enjoys a "legislative effervescence" globally, in Romania SMEs are "on the brink" and concrete measures to apply insolvency in a positive sense, in order to reintegrate debtors into the economic circuit, it is delayed, as is the process of transposing EU Directive 2019/1023 on restructuring and insolvency at national level. What are the consequences of these delays? We are preparing for a "tsunami" of insolvencies, and in the meantime, we are "hiding under the rug" the harsh economic reality and lack of capital. Let's "turn the clock" and give another chance to the field of insolvency, putting under scrutiny legal instruments still on the table of international bodies in the field, for a solid legislative reform and for a post-Covid "world".

Keywords: *insolvency, Covid-19, global practices, legislative innovation, Insol International, World Bank, comparative law, legislative reform tools.*

JEL Classification: K22, K33, K35

1. Introduction

Although anything that will become the "new normal" may still be unclear, we aim to conduct an "x-ray" of the business environment and an investigation of the likelihood of corporate insolvency, but also of the potential implications of excessive indebtedness inevitably induced by the "economic shock", associated with the outbreak

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of the Covid-19 pandemic. Such shocks underline the importance of policies adopted to facilitate the reallocation of resources in different sectors and activities.

Our interdisciplinary research, approached from a legal but also economic perspective, aims to identify possible options to flatten the crisis-related insolvency curve and instruments to reduce the risk of over-indebtedness, as chain insolvencies can affect viable firms and slow down the pace of economic recovery.

2. The "pulse" of the economy - in the midst of uncertainties. An uneven global recovery

This multidimensional crisis, with an evolutionary and disruptive character, seems to demand a much too high price, in addition to lives lost literally, we are talking about absolute destabilization of humanity, by excessive restraint of the economy, which means loss of jobs, income, of consumption, triggering unfair competition, even healthy enterprises facing unprecedented risks in previous crises. Of course, although the virus is the same, the impact and recovery potential differ from state to state.

In any case, in all the world's economies the pandemic has triggered a deep recession and lasting structural changes. There remains considerable uncertainty as to how lasting these effects will be. In a report prepared in September 2021[3], OECD confirms that global GDP has now exceeded its pre-pandemic level, but production and employment gaps remain in many countries, predominantly in emerging and developing market economies where vaccination rates is low. Although the economic impact of the Delta variant has been relatively easy to assimilate in countries with high vaccination rates, it has nevertheless added to pressures on global supply chains and costs. In this regard, we believe that greater international efforts are imperative to provide low-income countries with the necessary resources to vaccinate the population, both for their own benefit and globally. Of course, there remains a major risk of other variants of Covid, which may exceed the speed of implementation and effectiveness of currently available vaccines on the market, which means that governments resort to stricter isolation measures and, at the same time, lower investment confidence and of private sector spending. In such a scenario, the OECD expects GDP to fall below 3% in 2022. At the same time, it is estimated that the profits of enterprises will decrease between 40-50%, while approximately 7-9% of viable companies could get into difficulty. High levels of indebtedness essentially lead to an increased risk of a large-scale corporate over-indebtedness crisis.

According to the OECD[4], companies that have accumulated a significant level of debt are particularly exposed to sudden changes in economic conditions and may be forced to engage in a painful process of reducing indebtedness, drastically reducing costs

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[3] „*OECD Economic Outlook, Interim Report September 2021: Keeping the Recovery on Track*" - https://www.oecd-ilibrary.org/sites/490d4832-en/index.html?itemId=/content/publication/490d4832-en&_ga=2.192096106.1941978545.1634547906-964236149.1604345399#section-d1e530, last accessed 21/10/2021.

[4] Lilas Demmou, Sara Calligaris, Guido Franco, Dennis Dlugosch, Müge Adalet McGowan and Sahra Sakha, *Insolvency and Debt Overhang Following the COVID-19 Outbreak: Assessment of Risks and Policy Responses*, 15 January 2021, accessible on the website - https://www.oecd-ilibrary.org/economics/insolvency-and-debt-overhang-following-the-covid-19-outbreak-assessment-of-risks-and-policy-responses_747a8226-en;jsessionid=DUKm1GIqaEVVbbkBDsSNPW4j.ip-10-240-5-162, last accessed 21/10/2021.

to avoid default. In fact, large companies that intend to avoid insolvency will allocate more resources for debt repayment than for investments. At the same time, over-indebtedness can significantly increase the share of non-performing loans, which undermines the ability of banks to lend to healthy enterprises. What is certain is that the process of reducing the degree of indebtedness often involves reductions in costs but also in staffing, slowing down the recovery from the current crisis.

Indeed, the magnitude of the effects of the Covid-19 pandemic and how the rising debt wave associated with the health crisis has affected the economy is difficult to define and assume for the time being, especially as the "wave propagation" of this "socioeconomic earthquake" is not over.

The global pandemic has caused unprecedented "scars" worldwide. If we turn our attention to the airline industry, we will find that many companies have had to restructure their operations. For example, in the United States, where the federal government has provided rescue plans totaling $ 40 billion, only a few smaller airlines have been forced into insolvency law. In regions where governments have not provided rescue funds to the same extent as, for example, Latin America, even airlines with strong "roots" in the economy have been forced to seek protection under the famous Chapter 11 of the Insolvency Act, applicable in the USA. At the same time, airlines have tried to obtain recognition of insolvency proceedings in other jurisdictions under the UNCITRAL Model Law on Cross-Border Insolvency[5], as well as in accordance with the local legislation of the jurisdictions that have not adopted the Model Law. Examples include Malaysia Airlines, which applied for the "scheme of arrangement" in the United Kingdom, Virgin Australia Airways for the "Australian voluntary administration" or Thai Airways for the "rehabilitation proceeding" in Thailand, and AirAsia, which applied for such a restructuring procedure in Malaysia. This is a concrete example where airlines may face difficult problems in terms of jurisdiction, dealing with complex cross-border issues, the ability to renegotiate enforceable contracts, lack of certainty and especially the ability to obtain funding.[6]

Of course, cross-border recognition of insolvencies remains a sensitive issue, as does the post-Brexit regime, which is a dilemma, in that the loss of relatively simplified and automatic recognition regimes applied between the United Kingdom and EU Member States under the EU Procedures Regulation of insolvency 848/2015 was seen as a "great tragedy". For insolvency proceedings which started before 31 December

[5] The most important legal instrument produced by UNCITRAL is the Model Law on Cross-Border Insolvency, developed in 1997 to help countries "equip" their insolvency laws with a modern legal framework so that cross-border insolvency proceedings can be dealt with more efficiently. In the July 2018 session, UNCITRAL adopted and promulgated *Model Law on the Recognition and Enforcement of Insolvency Judgments (ML IRJ*), accessible at - http://www.uncitral.org/pdf/english/texts/insolven/Interim_ MLIJ.pdf, developed in recent years by UNCITRAL Working Group V and designed to complement the model of the UNCITRAL Law on Cross-Border Insolvency - ML CBI (1997), accessible at http://www. uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf. The new law provides for a simplification of procedures and greater clarity on when a judgment should be recognized, with the main objectives of ensuring the rapid recognition and enforcement of insolvency judgments, avoiding duplication of insolvency proceedings and increasing the security of debtor and creditor rights in insolvency proceedings, such as the protection of the debtor's assets and the optimization of their value.

[6] Richard Cooper, Ginger Haughes, Craig Montgomery, Leah Ryan, *Aviation Sector in distress – Cross Border Challenges and Solutions*, Insol International publications - https://www.insol.org/ – Insol World Q3 2021 - https://publications.insol.org/view/964914719/24-25/, pp. 24-25, last accessed 21/10/2021.

2020, the position was clarified by Withdrawal Agreement 2019/C 384 I/01, Regulation no. 848/2015 continuing to apply to these cases. However, the path to recognizing insolvency proceedings started after 31 December 2021 will be a much more complex one, giving insolvency practitioners the opportunity to "navigate" through a less predictable landscape, in which common law, domestic law and international treaties will interfere, in order to identify the most appropriate path. Indeed, we look back with regret on what has been called the clear and smooth "path" to the recognition of insolvency between Member States, facilitating more efficient and faster cross-border insolvency proceedings, with obvious benefits for creditors and other stakeholders.[7] However, given the increasingly pronounced transnational nature of companies' operations and finances, cross-border restructuring is becoming an important nuance in the size of each state's economy. Overcoming this as yet undetermined impact of Brexit on the financial and cross-border restructuring landscape at EU level, we must point out that many jurisdictions have taken steps to encourage cross-border cooperation, but also to harmonize insolvency law, on which we will focus in the following points of our research.

By narrowing the scope at national level and performing "x-ray" of the Romanian business environment, we will find that the financial blockage in the economy has increased significantly. According to the latest Coface barometers[8] and Sierra Quadrant[9], but also to the data and statistics provided by the National Office of the Trade Register[10], the number of professionals who went into insolvency in August was higher by 7.61% compared to the same period last year, between 01 January 2021 and 31 August 2021, 3,848 professionals went into insolvency. Moreover, the data shows that 73,365 companies went into insolvency this year, suspended their activity, were dissolved or deregistered, 13,398 more than last year.

The vulnerability of the business environment is deepening, given that according to estimates, over 100,000 companies in Romania are on the verge of "padlocking", amid rising operating costs, expanding the financial deadlock (rising fuel prices, rising energy and gas tariffs, etc.), difficult access to finance, but especially against the background of increasing distrust in business relations. Vulnerability manifests itself mainly in the area of SMEs, which are poorly capitalized. And yes, it seems that we are "spinning in a circle", the 4th wave of the Covid-19 pandemic this fall bringing us to the same point where we left and "virulently collapsing" any "brick" of socioeconomic reconstruction following the previous waves. We are on the verge of a new state of emergency. Nothing new… we return from where we left, on 16 March 2020, when the President's Decree was published declaring a state of emergency in Romania. A new sharp drop in consumption follows, which will cause more and more investors to look reluctantly at the initiation of new business lines. Experts say that the winter of 2021 will be the hardest

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[7] Insol Europe – Inside Stories, „*October 2021 - Turning back the Clock: Post-Brexit UK and Cyprus Cross-Border Recognition"* - https://www.insol-europe.org/news/inside-stories, last accessed 21/10/2021.

[8] *Coface Study: Insolvencies In Romania Increased In The First Half Of 2021 By 23% Compared To The Same Period Of Last Year* - https://www.coface.ro/en/News-Publications/News/Coface-Study-Insolvencies-in-Romania-increased-in-the-first-semester-of-2021-by-23-compared-to-the-same-period-last-year, last accessed 21/10/2021.

[9] https://www.capital.ro/sierra-quadrant-100-000-de-firme-risca-sa-puna-lacatul-pe-usa-perspectivele-sunt-sunt-sumbre.html, last accessed 21/10/2021.

[10] https://www.onrc.ro/index.php/ro/statistici?id=252, last accessed 21/10/2021.

period the Romanian economy will go through since the previous crisis, and a "thawing" of the appetite for business could appear only in the spring of 2022, meanwhile the effects of the pandemic creating a real economic deadlock. At the same time, it is expected that a number of 150,000 companies will "desert" in the face of this large-scale economic crisis.

Looking in the mirror and carrying out an analysis of the 2008 crisis versus the 2020 crisis, in relation to several economic indicators,[11] we will find that the companies active in Romania at the beginning of 2020 were in a more vulnerable situation compared to the previous crisis, respectively the period of 2007, which implies a much more rigorous effort for the recovery and restart of the economy this time.

This sacrifice curve in business can only be flattened by accessing the forms of restructuring offered by insolvency law, whose profound reform is delayed, restructuring supported at the same time by concrete financial instruments allocated to the business environment through banks and investment funds, venture capital funds.

As an overall economic outlook, we still want to remain optimistic even in "world of uncertainty". The trend of global recovery will continue but will remain uneven. Why? Because the extent of support through budgetary, policy measures and the degree of "injection" of liquidity into severely affected sectors differs considerably from one country to another, because vaccination and its acceptance take place at different rates, because the degree of confidence and commitment business risks manifest themselves differently from one culture to another, all of which can affect the prospects for a full recovery in all countries next year.

However, a positive impetus comes from the latest World Bank forecasts, which seem to be in stark contrast to the statistics recorded so far at the national level. Thus, according to the latest forecast[12] of the World Bank for the Europe and Central Asia region, developed in October 2021, Romania will have an economic growth of 7.3% this year. At the same time, the European Commission recently forecast an economic growth of 7.4% for Romania, the IMF 7%, and the International Bank JP Morgan estimated 8.4%. At the same time, according to the indicators *Composite Leading Indicators* (CLI)[13], OECD anticipates a moderate pace of expansion in Canada, the Euro area as a whole and the United Kingdom, with similar indices now appearing in the United States or Japan.

However, compared to the critical moment registered by the current health crisis at national level, but also to the persistent increase of consumer prices in recent months determined by the increase in energy prices, the prospects remain extremely uncertain.

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[11] *Coface Romania Analysis: the Vulnerability of the Business Environment in the Context of the Covid-19 Pandemic* - https://www.coface.ro/en/News-Publications/News/Coface-Romania-Analysis-Vulnerability-of-the-business-environment-in-the-context-of-the-Covid-19-pandemic, last accessed 21/10/2021. Indicators selected by Coface: Positive working capital (2007) => Negative working capital (2015 - 2019); Decrease of the degree of capitalization, from 35% (year 2007) to 28% (year 2019); Increasing the share of short-term debt in total debt, from 58% (2007) to 75% (2019); Net divestments, fixed assets decreasing from 63% (2007) to 48% (2019); Increasing the debt collection period to 115 days (2019) compared to 60 days (2007).

[12]https://ziarulunirea.ro/banca-mondiala-previziune-optimista-pentru-romania-economia-va-creste-puternic-in-2021-736993/, last accessed 21/10/2021.

[13] Composite Leading Indicators (CLI), *CLIs continue to point to a moderating pace of expansion in economic activity*, OECD, October 2021 - https://www.oecd.org/newsroom/composite-leading-indicators-cli-oecd-october-2021.htm, last accessed 22/20/2021.

Uncertainties persist even in countries enjoying the gradual lifting of COVID-19 isolation measures amid progress in vaccination campaigns, with analytical indicators from international bodies such as the OECD or the World Bank now fluctuating more than ever, which we cannot rely on these forecasts of the anticipated growth of economic activity. In fact, in a special analysis of "Competition and the Recovery of Companies after Covid-19", the World Bank found, based on survey data from "Business Pulse Surveys" that the pandemic had a profound and varied impact on companies. On average, companies in the region recorded significant decreases in monthly sales and the number of full-time employees. It is clear that forecasts and findings of economic dynamism are often antithetical and difficult to quantify. Such predictions certainly remain a challenge. Of course, the projections are conditioned by continued political support to ensure a sustainable and complete global "recovery".

3. Insolvency in the context of the COVID-19 pandemic. "Recap"

The year 2020, marked by the "globalization" of the Sars-Cov-2 virus, "unveiled" the weaknesses of many modern market economies, whether or not they are able to cope with the financial and social costs of a health crisis that has "short-circuited" the world economy. The triggering of the state of emergency and later the state of alert in most countries of the world, was indeed a compromise between health and the economy, but a much-needed compromise. The economy seems to have beaten to the "last breath", some entrepreneurs have reinvented themselves in the struggle for survival, large companies have restructured, governments have refocused on plans to allocate funds and state aid to support economy and population, implementing comprehensive policy support programs to respond quickly to the initial economic crisis. These policies immediately provided support to companies and workers who were protected from the worst effects of the crisis. While the number of those receiving government support measures varied widely from country to country, on average 50% of companies reported receiving government support in response to the economic pandemic crisis.

For example, at EU level, the European Commission has relaxed European budgetary rules, instituted state aid actions, created the EUR 37 billion Coronavirus Response Investment Initiative to provide liquidity to SMEs and the healthcare sector, the Instrument for Development has launched. support for mitigating unemployment risks in an emergency - SURE (Support mitigating Unemployment Risks in Emergency),[14] as well as the NextGenerationEU Europe Recovery Plan, the NGEU being the temporary instrument designed to stimulate recovery with multi-annual allocations for the period 2021-2027 and also the largest package of incentives ever funded in Europe, with a total allocation of 2 018 billion EUR which will help rebuild Europe in the post-COVID-19 pandemic. It is in fact aiming at a reconstruction that will make Europe greener, more digital and more resilient.[15]

At the level of Romania, the legislative start in this sense was represented by

[14] For development, see Ionel Didea, Diana Maria Ilie, *The state of emergency and the economic repercussions. A new "avalanche" of insolvencies*, „Journal of Law and Administrative Sciences" no. 13/2020, p. 89-112.

[15] *Recovery plan for Europe* - https://ec.europa.eu/info/strategy/recovery-plan-europe_ro, last accessed 22/20/2021.

GEO no. 29/2020 on some economic and fiscal-budgetary measures,[16] as essential measures to mitigate negative repercussions on the economy. These measures have stopped for the moment the sometimes-abusive behavior, in our opinion, of the fiscal creditor, suspending, during the state of emergency, but also for a period of 30 days after its cessation, all forced executions and conferring certain advantages such as extending payment terms and the granting of fiscal facilities, measures that have curbed bankruptcies by giving respite to debtors in financial difficulty. Of course, in addition to GEO no. 29/2020 came many other emergency ordinances, as the social crisis and the economic crisis deepened, requiring new support measures. We mention here GEO no. 30 of 18 March 2020 for amending and supplementing normative acts, as well as for establishing measures in the field of social protection in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus, which came with new measures to support the economy, by establishing state insurance of technical unemployment benefits. The excessive prolongation of the alert state led to a long series of ordinances, among which GEO no. 132 of 7 August 2020[17] on support measures for employees and employers in the context of the epidemiological situation caused by the spread of SARS-CoV-2 coronavirus, as well as for stimulating employment growth, on the basis of which derogations from the Labor Code continued temporarily reduce working time by no more than 80% of the daily, weekly or monthly duration provided for in the individual employment contract, a reduction determined by the "*establishment of the state of emergency/alert/siege, in accordance with the law, during the state of emergency/alert/siege, as well as for a period of up to 3 months from the end of the last period in which the state of emergency/alert/siege was established*" Employees affected by the measure received an allowance of 75% of the gross monthly basic salary related to the hours of reduction of the working hours settled from the unemployment insurance budget, after the employer fulfills the declaratory and payment obligations related to the income from salaries.

And because the "brutal remove from infusions" of the economy can now more than ever lead to its collapse, at a time when debtors are unprepared to face the palpable effects of the pandemic, at a time when more practical and simplistic restructuring methods, solutions and opportunities are still awaited, by reforming the insolvency law, recently, more precisely in October 2021, GEO no. 111 of 2 2021[18] for the establishment of social protection measures for employees and other professional categories in the context of prohibition, suspension or limitation of economic activities, determined by the epidemiological situation generated by the spread of SARS-CoV-2 coronavirus, which aims to resume technical unemployment, in the amount of 75% from the basic salary corresponding to the job held. This indemnity is available to both employees of employers during the temporary interruption of activity, totally or partially, and those whose activity was suspended as a result of the epidemiological investigation carried out by DSP, the indemnity being calculated for the number of days in which the activity was suspended, but not later than 31 December 2021. Certainly, the support measures will not stop on 31 December 2021. In fact, the European Commission has recently stated that it wants to extend the aid measures granted to companies until mid-2022, proposing

[16] Published in the Official Gazette of Romania no. 230 of 21 March 2020.
[17] Published in the Official Gazette of Romania no. 720 of 10 August 2020.
[18] Published in the Official Gazette of Romania no. 945 of 4 October 2021.

a phasing out of support measures in the context of the pandemic crisis.[19]

Specialists in economics[20] bring into question the fact that the IMM INVEST ROMANIA program, which allowed Romanian SMEs significantly affected by the COVID-19 crisis to obtain state-guaranteed loans of up to 800,000 Euros for carrying out current activity or for investments, without commissions and interest,[21] it was really the only successful tool that worked. It functioned as a "safety net" for SMEs, but not for those already in insolvency or in financial difficulty, excluding those with outstanding loans in the last 6 months or those with major incidents with promissory notes in the last 6 months prior to 31 December 2019.

However, we go beyond the support measures provided at national level and turn our attention to the way in which the pandemic has resized the insolvency legislation, support institution and *sine qua non* of these measures, and which, we hope, the pandemic will continue to reform in the interests of all parties involved, but also in the interests of the solid reconstruction of the economy. As a brief overview of the "fingerprint" left so far by the onset of the Covid-19 pandemic on the legislative "picture" in the field of insolvency[22] , we will lean, on the one hand, on Law no. 55 of 15 May 2020 on some measures to prevent and combat the effects of the COVID-19 pandemic[23], in which the legislator allocated a number of articles, we could even say generously, dedicating Section 8 – "Insolvency measures" exclusively to the matter of insolvency, and on the other hand, on Law no. 113/2020 regarding the approval of GEO no. 88/2018 for the amendment and completion of some normative acts in the field of insolvency and other normative acts[24].

Thus, considering that we are still in the state of alert, the temporary measures regulated by the provisions of Law no. 55/2020 continue to produce their effects. These measures aim, among others, at a suspension of art. 66 of the Insolvency Code - Law no. 85/2014 on insolvency prevention and insolvency proceedings, in the sense that *the debtor is no longer obliged to file a request to open insolvency proceedings during the state of alert*, but this option is not restricted either, the legislator leaving to the insolvent debtor the possibility to choose between requesting the opening of the procedure, either during the state of alert or after its expiration. At the same time, the law promotes insolvency prevention procedures, especially the preventive arrangement with creditors, by ensuring longer deadlines for drafting the arrangement with creditors offer but also by conditioning creditors of prior negotiation with the debtor, proven, moreover, by

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[19] https://www.digi24.ro/stiri/economie/digi-economic/comisia-europeana-vrea-ca-masurile-privind-ajutoarele-pentru-firme-sa-fie-prelungite-pana-in-iunie-2022-1685541, last accessed 22/20/2021.

[20] Adrian Câciu, economist: *A lot of people have wondered why borrowed money doesn't make it into the economy* - https://www.bursa.ro/conferinta-linistea-dinaintea-furtunii-si-tentativele-de-indiguire-dezbatere-pe-tema-directivei-ue-privind-restructurarea-si-stergerea-de-datorii-63733343, last accessed 22/10/2021.

[21] https://www.fngcimm.ro/imm-invest, last accessed 22/20/2021.

[22] For a detailed presentation of the amendments brought by Law no. 55/2020, respectively by Law no. 113/2020 on Law no. 85/2014, see Ionel Didea, Diana Maria Ilie, *Covid-19 - the catalyst of a legislative reform in the field of insolvency*, article presented at the 10th edition of the International Conference "Perspectives of Business Law in the Third Millennium" and published in the book Thierry Bonneau, Cristina Elena Popa Tache, *Innovation and Development in Business Law. Contributions to the 10th International Conference Perspectives of Business Law in the Third Millennium*, ADJURIS - International Academic Publisher, January 2021 - www.adjuris.ro/editura_en.html.

[23] Published in the Official Gazette no. 396 of 15 May 2020.

[24] Published in the Official Gazette no. 600 of 8 July 2020.

documents, before requested the opening of insolvency proceedings. Thus, during the alert period, the legislator added a new condition for creditors to be able to request the opening of insolvency proceedings, namely proof that they tried to conclude a payment agreement with the debtor. In addition to extending certain deadlines specific to the preventive composition procedure, the legislator also opted for the extension of certain deadlines of the insolvency procedure itself, namely the duration of the observation period and the reorganization plan.

Globally, we can say that since 2020, legislators have responded roughly similarly to insolvency measures. INSOL International together with the World Bank Group made a *Report*25 - „*Corporate Insolvency: Responses in Times of Covid-19: Report*", which presents the different responses of governments to the crisis generated by Covid-19, some faster, others later. For example, Italy, Spain and Turkey have effectively suspended the right of creditors to initiate insolvency proceedings during this period, a measure also announced by India. Colombia, for example, has greatly reduced the length of procedural deadlines, practically simplifying the insolvency procedure itself, which we have been proposing since the beginning of the pandemic, at least for SMEs.

The reality is the same, as evidenced by the report by Insol International in collaboration with the World Bank Group, namely that high-income countries have allowed themselves to implement broader and faster responses than middle- and low-income economies in response to the Covid-19 crisis. However, there are exceptions. For example, while Colombia has implemented one of the most extensive packages of measures, the United Kingdom has not implemented major reforms. At the same time, it has been found, for example, that many high-income countries do not promote the use of electronic tools (e.g. Germany, Spain), unlike many middle-income countries, which have managed to adopt this strategy. (e.g., India). The pandemic has boosted the digital economy, virtual interactivity but also the growing share of online commerce. Eventually, the impact of technological innovations will be directly reflected in the way justice is done, and the Covid-19 pandemic has had the effect of accelerating and rapidly improving the use of digital tools by courts around the globe, motivated by the goal of maintaining justice in fully operation even during periods of health restrictions. As we are already talking about a digitalization of the economy, we can also start a digitalization of justice. One such example is Brazil, where the activities of the courts have taken place without interruption even during the most critical periods of social distancing measures, as a result of the "virtualization" of judicial activities. With regard to courts with jurisdiction in bankruptcy and judicial reorganization proceedings, the National Council of Justice issued, in March 2020, Recommendation no. 63, which advises judges on how to resolve insolvency cases in the context of the pandemic, in order to mitigate its impact on companies, stimulating measures such as: suspending general meetings of creditors in physical format and transforming them into online meetings; virtual supervision of the activity of companies under reorganization by the

[25] INSOL International - World Bank Group Global Guide - Aurelio Gurrea-Martinez, Simon Brodie & Pooja Mahajan, *Corporate Insolvency: Responses in Times of Covid-191: Report* - http://insol-techlibrary.s3.amazonaws.com/a8d909e7-532c-489a-b7fb-3a05cc15377a.pdf?AWSAccessKeyId=AKIAJA2C2IGD2CIW7KIA&Expires=1595403544&Signature=WGGgiLZ%2Baksnn7X%2BfqhbwEYuBWw%3D, last accessed 22/10/2021.

judicial administrator/judicial curator, etc. Similarly, in October 2020, the Brazilian National Council of Justice approved Resolution no. 345, which allows state courts to adopt 100% digital decisions, with the processing of court proceedings exclusively by electronic means and remotely, without the parties having to appear in person at any time or for any procedural act.[26] Estonia also enjoys the image of one of the most successful digitizations in the world, with almost 99% of state services available online, but not in this respect in the case of insolvency proceedings, which were not sufficiently fluid or digital. However, several years of revision of insolvency legislation have finally reached their peak in Estonia and significant changes have been adopted as of 1 February 2021. The purpose of these amendments to the Bankruptcy Act is to make insolvency proceedings faster, more cost-effective and more transparent.[27]

It is certain that most countries have raised the need to reform the restructuring policy of debtors in difficulty as a result of the crisis generated by Covid-19, but the identified disadvantage is that the reform stopped during the alert period, in a limited time context. Such as Portugal, which relied on the idea that "serious problems require extraordinary remedies", thus creating extraordinary restructuring procedures for an extraordinary crisis by Law no. 75/27 of November 2020, meant to allow a more accelerated restructuring of the affected enterprises, mechanism accessible for a limited period of time, respectively until 31 December, with the possibility of extension. Interestingly, these extraordinary procedures did not involve costs and could only be accessed once. These extraordinary restructuring procedures are applicable both when there is a probability of insolvency and when there is a real insolvency. In both cases, the condition of access is that the financial difficulty in which the debtors find themselves is caused by the COVID-19 crisis, being necessary to demonstrate that, by 31 December 2019, the company had a positive balance, i.e. the value of assets exceeded liabilities.[28] Poland is also an example of temporary simplified restructuring procedures (SRPs) during the impact of the Covid-19 pandemic, which, in principle, correspond to the "scheme of arrangement" procedure known to English law. The simplified restructuring procedure assumes that the restructuring is carried out with the limited participation of the court, but under the supervision of a restructuring adviser chosen by the debtor. On the basis of an arrangement that has been concluded, the administrator of the arrangement controls the activities of the debtor and ensures an efficient and compliant procedure. The debtor, together with the arrangement administrator, will prepare arrangement proposals and lead the process of collecting creditors' votes. The start of simplified restructuring procedures requires a notice to be placed in the Polish Official Gazette at national level: Monitor Sądowy i Gospodarczy (MSiG).[29]

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[26] Daniel Carnio Casto, Frederico A.O. de Rezende, *The New Brazilian Cross-Border Insolvency Framework and the Adoption of The JIN Guidelines for Direct Communication and Cooperation Between Courts*, „Insol International publications" - https://www.insol.org/ – Insol World Q3 2021 - https://publications.insol.org/view/964914719/24-25/, pp. 1-11, last accessed 22/10/2021.

[27] Signe Viimsalu, *The Challenges of Further Digitalisation in Estonian Insolvency Proceedings*, august 2021, INSOL Europe's Inside Stories - https://www.insol-europe.org/news/inside-stories, date of last accessed 22/10/2021.

[28] Catarina Serra, *For Great Ills, Great Remedies! The New Extraordinary Proceedings for the Economic Sustainability of Businesses*, May 2021, INSOL Europe's Inside Stories - https://www.insol-europe.org/news/inside-stories, last accessed 22/10/2021.

[29] However, Polish specialists have identified notable risks for foreign creditors, including: a) The risk of inefficient termination of the contract by the foreign-based creditor, the debtor announcing the opening of

Returning to the national level, we emphasize that Law no. 55/2020 was only the start of the legislative reform of the insolvency matter, as a large part of the measures ordered during the alert state were subsequently taken over by Law no. 113/2020[30], which gave them the final character in the insolvency Code - Law no. 85/2014 on the procedures for the prevention of insolvency and insolvency. Practically, the long-awaited and most resonant changes are, on the one hand, the elimination of the right of current creditors holding a claim above the threshold value, with a maturity of more than 60 days, to enforce the debtor, and, on the other hand, the elimination of the condition relating to the existence of a tax claim below 50% of the debtor's declared total of claims, in the event that the request for the opening of insolvency proceedings is submitted by them. Basically, insolvency regained its meaning and purpose for which it was regulated and ended a chapter in the history of this procedure, a chapter which meant the suffocation of litigations by the courts, the pressure abusively exercised by current creditors, especially tax creditors, increasing the number of bankruptcies and losing confidence in insolvency proceedings. Another major amendment brought by Law no.113/2020 is that regarding the increase of the threshold value, from Lei 40,000 to Lei 50,000, an amount provided for both creditors and debtor in order to open the insolvency procedure. In fact, the threshold value was increased to Lei 50,000 during the alert period in the case of debtors who have interrupted their activity totally or partially, based on Law no. 55/2020 on some measures to prevent and combat the effects of the Covid-19 pandemic, a measure that has now become permanent.

In addition to being an absolutely essential change and claimed by the very current socioeconomic context, Law no. 113/2020 has in fact created the necessary legislative framework to transpose internally EU Directive 1023/2019 on restructuring frameworks, second chances and discharge of debt, laying an important foundation for the culture of prevention in business and second chances to debtors in financial difficulty. And because the countdown has begun in order to transpose Directive (EU) 2019/1023 at national level, the draft law amending and supplementing Law no. 85/2014 on insolvency prevention and insolvency proceedings, in its revised form following its submission to public debate, should receive inter-ministerial opinions and, subsequently, the approval of the Government and Parliament. Although Directive 1023/2019 was to be transposed, with few exceptions, at national level by 17 July 2021, debtors on the

SRP in MSiG (permission of the arrangement administrator is required for termination in such a case), even if it refers, for example, to real estate outside Poland, which is leased by a Polish company that is the subject of the SRP process; b) Reduced capacities for foreign creditors to respect the effects of MSiG ads: a problem for creditors without continuous access to the MSiG ads database; c) Automatic suspension of enforcement and enforcement of court orders: the law provides for the suspension of these proceedings, including if they involve a foreign decision or a court decision; d) Possibility to include secured claims on the debtor's property in the settlement agreement without the knowledge of a foreign creditor: foreign creditors in rem may be surprised (after receiving the ballots) that they are included in the arrangement and may be voted out of it; e) The limited liability of the debtor for opening an SRP even in bad faith; f) The limited liability of the administrator of the arrangement for the failure of the PRS procedures - as a result of improper supervision of the debtor's activity. See Paweł Chmieliński, *Simplified Restructuring Proceedings in Poland: Risks for Creditors*, April 2021, INSOL Europe's Inside Stories - https://www.insol-europe.org/news/inside-stories, last accessed 22/10/2021.

[30] Law no. 113 of 8 July 2020 approving Government Emergency Ordinance no. 88/2018 for the amendment and completion of some normative acts in the field of insolvency and other normative acts, published in the Official Gazette no. 600 of 8 July 2020.

verge of "survival" are waiting at the last minute, after two years of pandemic and economic crisis, for the implementation of tendering preventive restructuring procedures and revisions to the judicial reorganization procedure to maintain the trend of harmonization at European level and to strengthen society's need to develop a "rescue culture".[31] But because we have "reached" the present, completing the "virtual journey" for the last two years, we stop at what "recap" means, with the promise of developing new restructuring opportunities but also the shortcomings of this bill that can be improved, in the last section of our research, related, of course, to other instruments on the agenda of European and international bodies.

4. „Back" to the Future. A post-covid "world": risk assessment, ensuring the restructuring of viable enterprises in temporary difficulty and liquidating non-viable ones

What if we take our time back to the time before this virus appeared? Would we enjoy the prospects of a more promising socioeconomic future, "unshaken" by the effects of the pandemic? What would the current moment, the end of 2021, have been like if this pandemic had not existed? Would we have enjoyed an economic assault, a better world? Or, on the contrary, a "dusty" legislative framework? Because we cannot go back in time, because we cannot change history, but we must live it and build a better future, a post-Covid world, we will start from the premise that any crisis becomes an opportunity for meaningful reform in society, a crisis without which the future may not have had this chance to offer an innovative perspective in all social, economic and legislative aspects. In fact, we know very well that insolvency reforms have been more frequent in the countries most severely affected by the global financial crisis. Let's be more aware of the reality of change and the question: *what to do tomorrow, today or even yesterday?*

The whole economy is resetting, from the energy transition and depolluting technologies to the stakes of using hydrogen, from the circular economy to the digitalization of companies, stimulating the ecosystem of green-oriented companies, recycling, creating new, innovative industries. The pandemic started a change in perception, through which humanity endured the "new" more easily from the need to adapt, digitalization reached unimaginable levels, the legislation underwent a surprisingly fast modeling, which makes us believe that and the culture of second chance and prevention in business can take strong roots against the background of the health, social and economic crisis. Why? Because we look at things much more deeply. It is our chance to make the transition to a new chapter of the business environment by eliminating the stigma of insolvency and developing the spirit of negotiation. In essence, the chances of companies surviving will depend on how quickly they react to warning signals, the options offered by the legislation, using all relevant information in an alert way and constantly adapting to unpredictable and oscillating socioeconomic scenarios.

The year 2020 represented the start of an economic and social decline, but also

[31] For development, see Ionel Didea, Diana Maria Ilie, *A new stage in the development and consolidation of a "rescue culture and prevention in business" in the spirit of a European legal instrument such as hard law. National transposition of Directive (EU) 2019/1023,* portal Universul Juridic, 8 April 2021 - https://www.universuljuridic.ro/o-noua-etapa-in-dezvoltarea-si-consolidarea-unei-culturi-a-salvarii-si-a-preventiei-in-business-in-spiritul-unui-instrument-juridic-european-de-tipul-hard-law-transpunerea-la-nivel /.

the start of a profound legislative reform, especially regarding the "key" norms targeting the economy, such as the field of insolvency. How are the effects of the pandemic seen from the perspective of insolvency and restructuring specialists? Pretty worrying. More worrying is the fact that at national level a quarter of the companies that have reached the insolvency threshold have not even tried to access a reorganization, restructuring procedure, much less an insolvency prevention procedure. Even companies in a state of imminent insolvency have not yet resorted to a recovery procedure. According to a CITR analysis, 57% of debtors in financial difficulty have postponed access to a judicial reorganization procedure for an average of 3 years, although such an experience can only be beneficial to the debtor, as it contributes to the development of side in terms of the art of negotiation, an extremely important component of entrepreneurship in general and the culture of prevention in business, in particular[32].

The global reality is that insolvencies have been postponed, rather than prevented, with financially struggling entrepreneurs facing a "false comfort" of measures extended by temporary insolvency law, but many of the support measures have expired or it is about to cease, which is why a "dilution" of certain temporary measures can only ultimately lead to the failure of a restructuring chance and a direct entry into bankruptcy. And here we are talking primarily about the option given to insolvent debtors to request or not the opening of insolvency proceedings during the state of alert.

The bottom line is that although governments are preparing to face a major wave of insolvencies in 2020, most states have actually stepped into 2021 with an even greater number of "hidden insolvencies". Due to the maintenance of support measures, including the insolvency moratorium, the "hidden insolvencies" of 2020 did not really manifest in 2021, the peak being most likely to be reached in the coming years. The harsh reality is that companies have accumulated even higher debts, which they have been "rolling", the latest data revealing that in the next period, most companies, especially those in the area of SMEs, will have to identify new solutions for the payment of much higher outstanding debts, a context in which restructuring/reorganization procedures can have a huge impact on stabilizing the economy.

We must accept at the cultural level of society that the risk of postponing insolvency is even greater. Postponement is not a solution, especially if we take into account the risk of successive waves of coronavirus epidemic, which will continue to block the attempt to restart the economy and translate it. The end point of the alert state is a difficult moment to estimate at present, and any postponement of insolvency can only lead to an increase in debts and finally to the disappearance of the business from the economic circuit. The timely onset of insolvency can save the debtor from going bankrupt, the main objective of society in general being in reality to maintain a circular economic environment. This wave of insolvencies could be canceled if we move a lot on the area of insolvency prevention, or at least diminished by reorganization and reintegration into the economic circuit, especially since we have the necessary legal framework to save and turn these zombie companies into profitable and competitive companies.

Of course, another major factor that blocked the manifestation *the domino effect*

[32] See, for development, Vasile Godîncă-Herlea, *The role of negotiation in the restructuring of companies in difficulty and the culture of prevention in business* - https://www.universuljuridic.ro/rolul-negocierii-in-restructurarea-companiilor-in-dificultate-si-cultura-preventiei-in-business /, last accessed 22/10/2021.

of insolvency in the years 2020-2021 is the fact that, unlike any other previous crises, states have "injected" massive liquidity into the economy, temporarily preventing a capital crisis of enterprises. In this respect, the business environment has been on hold throughout this period, accessing the state aid provided by the Government rather than entering into restructuring processes specific to insolvency proceedings.

These subsidy and support measures for companies have indeed worked, but they have not definitively solved the problems of vulnerable businesses, but rather have gained time for them, as indebtedness has increased, the risk of insolvency of companies has increased and materialized by increasing 31% of the number of companies that ceased operations in the first half of this year and 23% of the number of those that went into insolvency. Thus, as Coface specialists note, the first half of 2021 marked a realization of "hidden insolvencies", putting even more pressure on the business environment with the challenges of imbalances in global production and logistics flows, low predictability of prices of goods and materials, inflation and political risks.[33] What is certain is that the corporate bill for the pandemic has not yet been paid, even if the number of insolvencies is still low compared to the wave of insolvencies we expect in the near future.

How do we look at the future? By assuming the creation of a post-Covid world, a socioeconomic framework devoid of stages of financial support measures and of course supported by the legislative side of society, by virtue of the belief that "*jus est ars boni et aequi*"- "law is the art of good and justice". We need to get acquainted with reality, adapt, overcome the crisis, approach these new developments with pragmatism, move to the next stage with courage, anticipate change and invest in practical solutions that better manage risks. Why? Because the gradual withdrawal of support measures will test companies' resistance to shocks and their ability to manage their resources efficiently and because ,,*the gradual cessation of state support will, in principle, trigger two types of insolvencies: the insolvency of companies that were not viable even before the crisis, but which were kept afloat by emergency measures, and the insolvency of companies weakened by the crisis, respectively, especially because of their excessive indebtedness*".[34]

As the World Bank reports, as economies enter the economic recovery phase, it will be important for authorities in all countries to phase out comprehensive policy support measures and focus on encouraging a competitive business environment, which is essential for a strong recovery, resilient to future crises, as well as for long-term sustainable economic growth. The solution is to improve the institutional, legislative framework, but especially the implementation of public policy reforms needed to strengthen insolvency and dispute resolution, in order to facilitate the market entry of new companies and improve the capacity of the financial sector to provide loans for the

[33] Coface Study: „*Insolvencies In Romania Increased in the First Semester of 2021 by 23% Compared to the Same Period Last Year*" - https://www.coface.ro/en/News-Publications/News/Coface-Study-Insolvencies-in-Romania-increased-in-the-first-semester-of-2021-by-23-compared-to-the-same-period-last-year.

[34] Maxime Lemerle, head of the Sectoral Research and Insolvency department, in the article published by Euler Hermes, *Insolvency risk: explaining the domino effect of the Covid-19 pandemic* - 21 February 2021 - https://www.eulerhermes.com/ro_RO/stiri-si-analize/sfaturi-de-afaceri/cartea-electronica-riscul-de-insolventa-si-efectul-de-domino-al-pandemiei-de-covid-19/riscul-de-insolventa-explicarea-efectului-de-domino-al-pandemiei-covid-19.html.

business sector.[35] It is essential to remain realistic and able to constantly adapt, taking into account both risks and opportunities.

Equity and quasi-equity infusions may be insufficient to enable companies to operate normally if debt ratios and the risk of default remain high. For these companies, reducing the debt burden by restructuring debts can change both the time when a possible insolvency can be reached and their ability to invest. The process of reducing indebtedness often involves cost reductions and staff reductions, slowing the recovery from the current crisis.

The exceptional magnitude of the crisis and the high levels of uncertainty that companies continue to face are likely to make it more difficult to distinguish between viable and non-viable companies. The risk of supporting potentially unsustainable businesses must be weighed against the risk of forcing viable and productive businesses into liquidation prematurely. This is due to the fact that these insolvency frameworks tend to become less efficient in times of crisis, especially when the courts are crowded, which can lead to the liquidation of more viable and productive enterprises than is desirable, with negative effects on economic growth. In order to avoid the need to identify non-viable companies at an early stage, it is essential to organize policy support under the premise of maintaining optionality, i.e. to help companies overcome the COVID crisis, but periodically reassessing their viability, for example by addressing stage financing. In a broader sense, a potential strategy would be to adopt a cascading multidimensional approach. Initially, policy makers could aim to "flatten the insolvency curve" by providing additional resource services and restoring the equity of firms in difficulty, and then, if these additional resources are not sufficient, they could encourage restructuring at debt time to allow companies in difficulty to continue to operate smoothly. Finally, in order to deal with companies that would still be unviable despite public support and debt restructuring, governments could improve the efficiency of liquidation procedures to unlock productive resources.

The important thing is that policy makers must find a balance between the risk of eliminating support too early, which can lead to the liquidation of viable companies, and the provision of widespread support for too long, which can favor the persistence of unviable companies. Flexible support measures are needed, which could evolve as the economic situation improves. We believe that premature or sudden withdrawal of political support should be avoided. In fact, recently, the European Commission proposed to extend, until 30 June 2022, the scope of the temporary framework on state aid for small and medium-sized companies affected by coronavirus. Moreover, the EC stressed that SMEs are normally based on bank financing and could be even more indebted after the crisis.[36] As a short parenthesis, of national interest, we remind here that on 20 October 2021, there was a discussion between the representatives of the Ministry of Investment and European Projects and those of the Ministry of Finance, regarding the preparations for agreements with international financial institutions involved in managing the financial instruments for the business environment to which

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[35] https://ziarulunirea.ro/banca-mondiala-previziune-optimista-pentru-romania-economia-va-creste-puternic-in-2021-736993 /, last accessed 22/10/2021.

[36] *„We propose a phasing out of support measures in the context of the crisis, to allow Member States and industry to adjust, accompanied by measures to relaunch private investment in the recovery phase"* said European Commission Vice - President Margrethe Vestager.

companies will have access through the National Recovery and Resilience Plan, amounting to 1.25 billion euros and will be granted through banks and investment funds/venture capital funds. For SMEs and mid-caps, the Recovery Venture Capital Fund (partner: EIF) will be Eur 400 million. It will provide equity support to SMEs, mid-caps, start-ups and advanced development companies focused on renewable energy and energy efficiency.[37] At national level, the European Commission recently announced, more precisely at the end of October 2021, the approval of a scheme worth EUR 358 million (RON 1.772 billion) to support small and medium enterprises (SMEs) in Romania. This scheme, in the form of state aid, will be open to SMEs operating in sectors particularly affected by the coronavirus epidemic.[38]

In times of high uncertainty about the future growth of sales, equity financing is desirable from the point of view of entrepreneurs, given that own funds act as an automatic stabilizer. Governments have a variety of policy options to leverage equity financing to support viable businesses, and authorities can provide equity directly through infusions of public funds into businesses (e.g. Alitalia and Lufthansa by the Italian and German governments). Supporting the financing needs of SMEs and start-ups may require a different and more comprehensive approach, as equity markets for small and medium-sized enterprises are thinner and often completely lacking. Providing support in the form of equity for companies in difficulty and ensuring debt restructuring should reduce the accumulation of unwanted bankruptcies.

In addition to direct infusions of equity, decision-makers could resort to more indirect measures. For example, in accordance with the business continuity framework proposed by specialists in the field[39], reimbursement could be linked to the profitability of businesses: the companies that recover the most will pay more in the form of future taxes, while those that face greater difficulties will pay less. Such support could help flatten the bankruptcy curve, while limiting the risk of costly default.

Ongoing political support is needed to ensure a sustainable and comprehensive global recovery, through reforms in areas that would accelerate the adoption of digital technologies, such as supporting companies in developing online business models and improving digital skills. Also, the structural policy recommendations addressed to OECD member countries and key partner countries, contained in the 2021 edition – "Going for Growth",[40] aims at reforms to improve the functioning of labor markets through changes in labor market regulation, education and skills, activation policies and measures to increase the participation of women, minorities and migrants in the labor force.

Another useful measure to address the financing needs of SMEs in particular, without increasing debt, is to turn government (crisis-related) loans into grants. For

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[37] https://mfe.gov.ro/pregatiri-in-vederea-finantarilor-pentru-mediul-de-afaceri-incluse-in-pnrr/, date of the last accession 28/10/2021.

[38] https://romania.representation.ec.europa.eu/news/comisia-aproba-o-schema-romaneasca-valoare-de-358-de-milioane-eur-pentru-sprijinirea-2021-10_ro, last accessed 22/10/2021.

[39] Hanson, S., J. Stein, A. Sunderam and E. Zwick, (2020), *Business Continuity Insurance: Keeping America's lights on during the pandemic*, White Paper of Becker Friedman Institute apud OECD Papers No. 1651, „Insolvency and debt overhang following the COVID-19 outbreak: Assessment of risks and policy responses", op.cit.

[40] *OECD Economic Outlook, Interim Report September 2021: Keeping the Recovery on Track* - https://www.oecd-ilibrary.org/sites/490d4832-en/index.html?itemId=/content/publication/490d4832-en&_ga=2.192096106.1941978545.1634547906-964236149.1604345399#section-d1e530, last accessed 28/10/2021.

example, in the United States, loans obtained through the Paycheck Protection Program could be converted into grants, provided the company spends at least three-quarters of the money on salary expenses and the rest on rent and utilities bills. Similarly, the German government has launched the "Immediate Assistance Program" (*Soforthilfeprogramm*) to provide subsidies to small businesses, the persons carrying out independent activities and the self-employed, provided that the funds are used to cover mainly rental and leasing costs.[41]

Insolvency regimes must balance incentives for debtors to invest and take risks with incentives for creditors to provide funds. The existence of effective pre-insolvency frameworks and debt restructuring could help address the problem of over-indebtedness by reducing the negative impact of debt reduction on GDP growth and by accelerating the resolution of non-performing loans.[42]

In order to ensure that post-pandemic economies are more appropriate and resilient, policy makers should carefully tailor their support to the unique situations of different enterprises but also sectors, with a particular focus on SMEs, which include among the largest users of insolvency systems. It is important to allow viable companies to continue their business, service their debts and restore their solvency in the post-pandemic economy. Therefore, decision-makers must avoid adopting a single approach to insolvency reform and develop specialized insolvency regimes for SMEs, as also emphasized by the World Bank's MSE Principles,[43] recently launched, more precisely on 22 April 2021.

Certainly, the new challenges of a post-Covid world require new perspectives and revised answers.

5. The practice of restructuring is moving globally. Examples of good practice and international and Union legal instruments to flatten the bankruptcy curve at the national level. There are new "hubs" for restructuring

Before dealing with the last section, we aim to schematically outline the "picture" of our research, by highlighting the key points, which can be concentrated in three questions, key questions recently addressed by the World Bank, in collaboration with INSOL International, regulators insolvency in 26 jurisdictions, with the core of triggering and organizing the debate platform being "the response of states to Covid-19 and future challenges"[44], respectively:

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[41] OECD Economics Department Working Papers No. 1651 - https://www.oecd-ilibrary.org/docserver/747a8226-en.pdf?expires=1635414081&id=id&accname=guest&checksum=1C4F7EF2F759BBE353A7231E5BD9B63A, last accessed 28/10/2021.

[42] Carcea, M., D. Ciriaci, C. Cuerpo, D. Lorenzani and P. Pontuch, (2015), *The Economic Impact of Rescue and Recovery Frameworks in the EU*, EU Discussion Papers, No. 004. - https://ec.europa.eu/info/sites/default/files/file_import/dp004_en_2.pdf, last accessed 28/10/2021.

[43] Scott Atkins Kai Luck, *The New World Bank Insolvency Principles: Informal Workouts and MSE Insolvency Processes as Key Pillars of Economic and Financial Stability International Corporate Rescue*, Australia Publication, July 2021 - https://www.nortonrosefulbright.com/en-bi/knowledge/publications/ffbd7c0b/the-new-world-bank-insolvency-principles-informal-workouts-and-mse-insolvency-processes.

[44] Mahesh Uttamchandani, Scott Atkins, Andrés F. Martínez, *2021 World Bank & INSOL International's Legislative & Regulatory Group: COVID-19 response and the challenges ahead*, 27 July 2021 - https://blogs.worldbank.org/psd/2021-world-bank-insol-internationals-legislative-regulatory-group-covid-19-response-and, last accessed 29/10/2021.

- How have the main insolvency challenges as a result of the pandemic been addressed?

- What are the future challenges despite the measures implemented?

- How is the state preparing for a potential wave of insolvencies?

We note that the first two questions have been checked up to this point in the research. In this regard, we analyzed the first phase of the onset of the Covid-19 pandemic, which required a certain "breathing space" for debtor, making a recapitulation, indeed not exhaustive, of the temporary measures taken globally but also nationally, this virus demonstrating to governments that no country is immune to a financial crisis and highlighting the importance of enforcing insolvency regimes. Thus, most countries have changed their insolvency framework to give insolvent companies a chance to survive in the short term, evoking in our research numerous examples of recent temporary insolvency measures in response to COVID-19.

The second phase of the pandemic, or we could say the moment of awareness of the future challenges and the need for socioeconomic reset and legislative reform to a much deeper extent, coincided with the moment of realization of the effects of the pandemic even despite temporarily adopted measures, which did nothing but translate the economic shock and create new waves of propagation. Here, too, we reflected on the creation of the foundation of a post-covid "world", assessing the risks and analyzing the possibility of restructuring viable enterprises in temporary difficulty and liquidating the non-viable ones.

It remains to identify the answer to the last question, because yes, we must prepare for a serious wave of insolvencies, especially at national level. However, we can reduce the intensity of this wave of insolvencies by promoting insolvency prevention measures or at least by reducing the number of bankruptcies, which involves a profound reform and simplification of the judicial reorganization procedure. We will try to draw up this ideal legislative framework, which will allow the relaunch of the economy and society in general, by referring to some examples of good practices encountered internationally, but also from the perspective of the latest instruments, respectively *model laws, regulations, directives or principles* proposed by international and union bodies.

More structural changes in the characteristics of insolvency regimes could help to coordinate creditors' claims in a way that is compatible with maintaining the viability of the business. This crisis can provide an opportunity for reforms that are often difficult to implement and take time to conceive. Actions in these areas could be based on several pillars. First, the establishment of legal conditions to increase incentives for investors to provide new financing for companies in financial difficulty. Second, favoring pre-insolvency proceedings that are associated with a higher success rate. Third, the establishment of specific procedures for SMEs, including the promotion of informal debt restructuring, as they present a higher risk of being liquidated in formal insolvency proceedings. Fourth, the establishment of specific out-of-court procedures that have proven to be effective in times of systemic crisis. Finally, ensuring an efficient liquidation process and ensuring the institutional conditions for a fresh start.[45]

[45] Lilas Demmou, Sara Calligaris, Guido Franco, Dennis Dlugosch, Müge Adalet McGowan, Sahra Sakha, OECD Economics Department Working Papers No. 1651, *Insolvency and debt overhang following the COVID-19 outbreak: Assessment of risks and policy responses*, 15 January 2021 - https://www.oecd-

As we enjoy reading the extensive collection of articles recently produced by members of Insol Europe, we note that 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 (Restructuring and Insolvency Directive)*[46], it is increasingly contributing to the reform of the restructuring practice at Union level, with the implementation phase being completed in several Member States. In fact, Directive 2019/1023 is a European legal instrument of the type *hard-law*, which aims at two important levels, namely: harmonization/ uniformity of legislation at EU level in the field of insolvency but also the development of a culture of rescue that can be achieved, on the one hand, through sound insolvency prevention procedures, and on the other hand, by promoting and accessing the judicial reorganization procedure in the insolvency phase.

This Directive remains an important legal instrument for flattening the insolvency curve and Member States must hurry to implement it, many of them, including Romania, exceeding the transposition deadline at national level. For example, in Germany the Directive has already been transposed with the adoption of the Law on the Stabilization and Restructuring Framework for Enterprises (*Unternehmensstabilisierungs- und restrukturierungsgesetz/StaRUG*) in the Bundestag on 17 December 2020, entering into force on 01 January 2021. According to the latest articles published by Insol Europe specialists,[47] StaRUG adds a long-awaited instrument to the set of restructuring instruments, reducing the gap between out-of-court restructuring, which requires unanimity among creditors, and restructuring by majority decision in insolvency plan proceedings, which is inextricably linked to the classic disadvantages of insolvency proceedings (for example advertising, low flexibility, extended costs).

Also from 01 January 2021, we are talking about a new Dutch restructuring scheme[48], which combines the characteristics of the procedure in *Chapter 11* in the USA with the English arrangement scheme, at the same time being inspired by the EU Restructuring Directive 2019/1023. Wet *Homologatie Onderhands Akkoord* (WHOA) provides a new restructuring instrument, as a very welcome addition to the Dutch Bankruptcy Code, which dates back to 1896 and consists essentially of only two types of formal insolvency proceedings for companies: suspension of payments and bankruptcy. The WHOA, referred to in some circles as the "Dutch Scheme", requires the restructuring expert, appointed by the court, to draw up and propose a restructuring plan independently on behalf of the debtor and whether the restructuring is initiated by the debtor or one of the other parties, the debtor will maintain control over his business

ilibrary.org/economics/insolvency-and-debt-overhang-following-the-covid-19-outbreak-assessment-of-risks-and-policy-responses_747a8226-en;jsessionid=VYvPE3T6NaNbld-vRubyXMEl.ip-10-240-5-167, last accessed 28/10/2021.

[46] The text of the Directive can be consulted by accessing the website: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32019L1023&from=EN , last accessed 01/11/2021.

[47] Olomon Ljumani, *The Implementation of the EU Preventive Restructuring Directive in Germany: A New Star in the Firmament*, Insol Europe – Inside Stories, https://www.insol-europe.org/news/inside-stories, last accessed 01 November 2021.

[48] Jasper Berkenbosch and Sid Pepels, *The Dutch Scheme is in Force: European Restructuring Practice on the Move!*, https://www.insol-europe.org/news/inside-stories, last accessed 01/11/2021 .

throughout the process. Here we see a much more active role of the insolvency practitioner. And here, as a small parenthesis, we point out that it is necessary to specialize practitioners in insolvency, respectively on restructuring and bankruptcy. For example, we are realistic that at the national level there are very rare cases in which the insolvency practitioner himself proposes a judicial reorganization plan, even if the report states that the debtor's activity can be recovered, although the law does not restrict it, having the possibility to submit the reorganization plan either alone or in collaboration with the debtor or even together with one or more creditors. However, including the lack of regulation of granting financial incentives to administrators for the successful implementation of a judicial reorganization plan and the quality of the act of coordinating the procedure, as we find in other states (success fee - Belgium), are disadvantages in promoting a second chance debtors and justifies the lack of interest of insolvency practitioners in this regard. Entrepreneurs must be opened to requesting the expertise of specialists capable of creating at least from the shadows the negotiation plan and the exposures of restructuring, reorganization. Here, too, we have in mind specialists in restructuring and reorganization, such as "turnaround management", who have the ability to provide support in crisis management and which is a widely used approach in other European countries. Returning to Poland, we note that the Dutch scheme falls into two distinct types: (1) public proceedings, which will be announced by registration in the insolvency register, in which judgments are public and which are expected to be included in Annex A to the Regulation (EU) 2015/848 (EIR) and (2) private proceedings, which will not be registered in the insolvency register, in which judicial proceedings will take place in the chambers of judges (i.e. anonymized decisions) and which do not have the characteristics necessary for insolvency under the EIR. This dualistic approach, which also inspired the German legislator when it developed StaRUG, combines the benefits of EIR with the flexibility of domestic private international law. Dutch companies with their center of main interest (COMI) or headquarters in the Netherlands can open public proceedings under the EIR, allowing for automatic recognition throughout the EU (excluding Denmark). They, together with companies that have COMI elsewhere, can also request private procedures, access that is open to any debtor with a "sufficient connection"[49] with the Netherlands. As private proceedings will not be automatically recognized in the EU on the basis of EIR, external recognition can only be available under the UNCITRAL Model Law (if implemented), the EU Brussels I Regulation and/or the Rome I Regulation or the rules of international private internal law. This broad and flexible approach, which allows Dutch courts to assume jurisdiction over both Dutch and external debtors, allows the Dutch Scheme to become an interesting complement to the international restructuring practice toolkit. While larger European companies have often moved to London over the last decade to restructure debt, many Dutch practitioners expect the Dutch scheme to take over (part of) this role, especially now following Brexit, when decisions of UK courts can no longer be based on EU law for (automatic) recognition in the Member States. We wonder if this legislative reform will turn the Netherlands into a new restructuring hub. The Dutch scheme offers

[49]A sufficient connection can, for example, be established or otherwise highlighted if a (substantial) part of:
• the debtor's assets or group companies are located in the Netherlands; and/or.
• the relevant financial documents are governed by Dutch law or include a choice of forum in favour of the Dutch courts.

significant flexibility, limited court involvement and ample autonomy to determine the course of proceedings, has a wide range of support tools (e.g. the option to centralize proceedings for an entire multinational group of companies in the Netherlands, the possibility to get rid of burdensome contracts - an instrument that has, for example, been excluded from StaRUG) and will include limited costs compared to the current restructuring procedures used.

However, despite the effects of Brexit, the English restructuring practice can be expected to maintain its role in the coming years, primarily as a result of the often discussed "Gibbs rule", in the sense that a restructuring through a Dutch system, or similar continental European procedures, will thus not always be sufficient in respect of debts governed by English law. Secondly, "the Scheme of arrangement" in the United Kingdom remains attractive due to well-established practice and case law. However, if the Dutch courts can show that they are willing to rely on well-established cross-border market practices, the dominance of British practice may prove to have only a limited effect. Due to the historical nature of the UK restructuring hub, a company could also consider, for example, the opening, in addition to a Dutch scheme, of a parallel procedure in the UK to use the tested British scheme as a predictable backup.

And if we keep talking about this facet of *forum shopping* and international cooperation and coordination, we can turn our attention to Hong Kong as an example of good practice. Thus, for years, offshore and Hong Kong courts have worked very well together to facilitate rapid and efficient restructuring of a number of offshore entities with economic ties in Hong Kong. In general, these efforts have been beneficial to the creditors of these entities, who would otherwise have received smaller amounts as a result of the emergency sale of the company's assets by liquidation. One of the commonly used techniques is technique *Z-Obee*. Its use stems from the fact that Hong Kong courts cannot appoint PLs as temporary "light-touch" liquidators to restructure a company's debts, but in order to meet this demand, a practice has emerged to request the appointment of PLs in the offshore jurisdiction in which the company was established. Subsequently, the PLs seek the recognition and assistance of the Hong Kong court, under conditions that allow them to continue the restructuring in Hong Kong (for example, through an arrangement scheme in Hong Kong). Although less common, there are also examples of "reverse recognition" if the Hong Kong court makes appointments to offshore companies and the holders of those positions are then recognized and assisted by the courts in the country of incorporation. The provisional liquidators - PL do not replace the administrators but supervise them and help them to carry out a restructuring. They may also be required to consult and approve any proposed transaction that does not fall within the normal course of business. Such requests are common in the Cayman Islands and Bermuda, where there are well-established legal bases for such appointments. These appointments are accompanied by the legal suspension of executions, which allows room for maneuver to explore restructuring options.[50]

In this area of international cooperation and coordination in the field of insolvency, we also mention the case of Brazil, where there were also increased concerns about the situation of companies in financial difficulty, which has had the effect of

[50] Cristopher Farmer, Eleanor Fisher, Grant Carroll, Ian Mann, Nicholas Fox, Shelley White, „*Common Sense in Common Law Recognition*", Insol World Q3 2021 - https://publications.insol.org/view/964914719/, last accessed 01/11/2021.

accelerating the legislative process for the draft law reforming the Law on reorganization and bankruptcy in Brazil, which culminated in the enactment of Law 14.112/2020, in force since 23 January 2021[51]. The law promoted a substantial change in Brazil's insolvency framework, seeking to modernize the legal framework to address a company's financial difficulties, including the full adoption of the UNCITRAL Model Law on Cross-Border Insolvency. As a result of these reforms, the National Council of Justice issued Resolution no. 394 of 18 May 2021, which establishes rules on cooperation and direct communication with foreign insolvency courts for the processing and resolution of cross-border insolvency issues. At the same time, by the CNJ Resolution no. 394 the rules on communication and cooperation between courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, proposed by *Judicial Network Insolvency Guide* (JIN)[52], Brazil becoming the 16th jurisdiction to be included in the list of courts that have adopted *JIN guidelines*.

JIN held its inaugural conference in Singapore on 10 and 11 October 2016, which ended with the issuance of a set of guidelines entitled "*Guidelines for communication and cooperation between courts in cross-border insolvency*", also known as the JIN Guidelines. The first JIN members contributed to the development of the JIN Guidelines and the JIN guidelines received the "Most Important General Development" award from the Global Restructuring Review ("GRR") at the 2017 GRR Awards Ceremony, which took place in June 2017. Among the jurisdictions that have adopted the JIN Guidelines are of course the most important restructuring hubs in the world, including the Delaware District of the USA, Singapore, the Supreme Court of Bermuda, the Division of the Chancellery of England and Wales, the Grand Court of the Cayman Islands, the Federal Court from Australia etc.

When implementing insolvency protocols for direct communication and cooperation, Brazilian judges must now comply with the following guidelines: communication from court to court for the purpose of coordinating or deciding on material or procedural issues can be achieved by any means allowing the participation of the Parties as observers; in case of participation of the parties, they must be convoked/summoned at least 5 days in advance, except in cases of urgency recognized by the court; the communications provided in point I, when they are public, register and are freely accessible to the parties to the proceedings; the place and time of communication between the courts will be determined by mutual agreement by the courts. The adoption of the best practice rules proposed by the JIN guidelines will make the Brazilian business environment more international and transparent, these developments contributing to greater legal certainty and efficiency in dealing with companies in financial difficulty, by promoting investment and attracting foreign capital for the development of Brazilian enterprises.

Going beyond the idea of international cooperation and returning to the need for convergence, European and international harmonization in the field of insolvency, we note that after the completion of work on Directive 2019/1023 on preventive

[51] Daniel Carnio Costa, Frederico A. O. de Rezende, *The New Brazilian Cross-Border Insolvency Framework And the Adoption of the JIN Guidelines for Direct Communication and Cooperation between Courts*, Insol World Q3 2021 - https://publications.insol.org/view/964914719/10-11/, last accessed 01/11/2021.

[52] http://www.jin-global.org/jin-guidelines.html, last accessed 01/11/2021.

restructuring, the European Commission Expert Group on Restructuring and Insolvency (ECEG) resumed work in April 2021 in the sense of laying the foundations of a *new instrument in the field of insolvency law*[53], the initiative is based, in fact, on the success of the European Insolvency Regulation 848 of 2015 and Directive 2019/1023. In fact, there is an aim for greater convergence in substantial insolvency law, following a general assessment launched in December 2020 and a subsequent public consultation open until April 2021, which can only make us happy, clinging to the hope that this Union legal instrument will take the form of a Directive, as a legal instrument of the type *hard-law* and not the form of a Recommendation, an aspect not yet determined by the ECEG. Adoption by the Commission is planned for the end of 2022[54] and areas of interest include: the preconditions for initiating proceedings (including a definition of insolvency); avoidance actions and the effects of recovery rights; asset tracking frameworks; the position of insured creditors and the balance between secured creditors and other stakeholders (e.g. employees, suppliers); as well as the issue of court expertise and judge training.

We were saying that we are hoping for a legal instrument of the hard-law type precisely because transposition is difficult at national level, especially assuming and integrating a simple Recommendation, and here we focus on the transposition of Directive 2019/1023 in Romania and the impediments that keep this process in place.

We could say that at national level we already enjoy a fairly solid, modern and generous supportive legislative framework for the debtor in financial difficulty, which will be an even wider framework on the restructuring side and the second chance following the transposition of EU Directive 2019/1023, as we have a bill on the table of Parliament. Moreover, Law no. 85/2014 on insolvency has already transposed in its content the basic principles contained in the Directive, however, the national culture in the field of reorganization, especially the preventive restructuring has to recover from the European culture and the economic and legal realities are slightly different compared to the entire EU market. The draft law, developed at national level for amending and supplementing the Insolvency Code[55], intervenes with essential changes on the insolvency prevention instruments, starting from the premise that the currently regulated ones, respectively the ad-hoc mandate and the preventive arrangement with creditors, have structural deficiencies reflected by the extremely small number of procedures carried out in this area. This eliminated the ad hoc mandate procedure, which was almost non-existent in the business environment approach, and introduced a new restructuring procedure - *restructuring agreement*. It is a legal instrument that offers a high degree of confidentiality and is based on an *out-of-court* phase of negotiation and concluding a restructuring agreement between the debtor and the creditors whose claims will be affected by the agreement. Of course, in all this process of drafting and negotiating the agreement, the debtor is under the assistance of a restructuring administrator - insolvency

[53] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws-, last accessed 01/11/2021.

[54] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Law-insolventei-crestere a-convergentei-legislatiilor-nationale-pentru-a-incoraja-investitiile-transfrontaliere_ro, last accessed 01/11/ 2021.

[55] The project can be consulted by accessing - http://www.just.ro/proiectul-de-lege-pentru-modificarea-si-completarea-legii-nr-85-2014-privind-procedurile-de-prevenire-a-insolventei-si-de-insolventa/, last accessed 01/11/ 2021.

practitioner, and the debtor's activity during the restructuring period will be supervised by the administrator for a maximum of 3 years. The intervention of the court is minimal, only confirming the restructuring agreement. In addition to the fact that it is a flexible procedure, with the debtor enjoying the freedom to negotiate with all creditors, or bilaterally, to return to the agreement until the majority necessary for approval is obtained, the advantage comes primarily from SMEs, because the procedure becomes exclusively extrajudicial in case the debtor obtains the unanimity of the votes of the affected creditors and the turnover is below Eur 500,000, with the mention that before the debates the project provided a threshold higher than Eur 1 million, which in our opinion was more favorable, as it is a further step in supporting micro-enterprises, which ultimately account for 99% of all EU businesses.

Regarding the second restructuring mechanism, respectively *preventive arrangement with creditors*, it will also undergo a series of changes, including the suspension of law forced executions from the moment of opening the procedure, for a period of 4 months, with the possibility of extension up to 12 months. For debtors who have a turnover of up to Eur 500,000 in the previous year, it is not mandatory to establish the categories of receivables and if the debtor will not opt for the establishment of receivables the plan will be considered accepted if voted by an absolute majority of the amount of receivables affected. Suspension by law of forced executions is one of the absolutely necessary changes to the preventive arrangement with creditors mechanism, as currently the suspension of forced execution operates only after the approval of the arrangement with creditors, and the even greater risk is that other creditors may start forced execution, thus acquiring a position privileged to creditors who have undertaken such a restructuring plan. These changes provide another guarantee to creditors, who will have the courage and openness to vote and support a preventive arrangement with creditors. Insolvency prevention procedures also become much more structured and transparent, by setting the minimum content of a restructuring plan and introducing, similar to the insolvency procedure, the system of voting by categories of receivables, namely: a) receivables that benefit from preferential rights, b) salary receivables, c) receivables of essential creditors, if applicable, d) budget receivables, e) other receivables.

Because it is part of the "rescue culture" area, a strategic objective of the EU, the draft law brings timely, effective and ***judicial reorganization procedure.*** The efficiency of the judicial reorganization procedure is primarily related to the limitation of the observation period and the faster confirmation of the reorganization plan through mechanisms to solve faster the problem of appeals, a problem that currently delays the moment of confirmation of the reorganization plan by the syndic judge, which makes it no longer grounded, no longer viable for the chance of a successful reintegration of the debtor on the market. It also changes the maximum duration of the judicial reorganization period, from 4 years to a maximum of 5 years, a change triggered by requests from the business environment, in the sense that the 4-year period is very short and incompatible with the possibility of recovery.[56] We appreciate as extremely useful the amendment proposed by the new draft law of art. 175 (1) of the Insolvency Code, in the sense that it was expressly stipulated the possibility to close the reorganization

[56] For development, see Ionel Didea, Diana Maria Ilie, *A new stage in the development and consolidation of a "rescue culture and prevention in business, op. cit.,* portal Universul Juridic, 8 April 2021.

procedure if, by derogation from the provisions of the fiscal legislation, there are ongoing procedures for staggering the current budget receivables. And here, as a small parenthesis, we consider that in the current economic context so fragile, it would be necessary to extend the application of Government Ordinance no. 6/2019 on the establishment of fiscal facilities[57], not only in the sense of granting new deadlines for the submission of a restructuring plan, but also in the sense of the possibility of restructuring the outstanding budgetary obligations also after 31 December 2020. These legislative instruments become restructuring options for the debtor, but also strong points in the development of the culture of insolvency prevention and negotiation, offering the possibility to restructure the debtors based on various and advantageous procedures to certainly prevent bankruptcy.

If we return to the question of how we are preparing at the national level for a wave of insolvencies following the Covid-19 pandemic, we may be a little disappointed, in the sense that, on the one hand, the entry into force of this draft law on the transposition of EU Directive 2019/1023, and on the other hand, because the reality of our socioeconomic culture is not sufficiently prepared to embrace the opportunities for insolvency prevention, which are in the spotlight this time. We consider that it was an opportune moment to reform the judicial reorganization procedure in more depth, and this area was quite little touched upon in the draft law. We all know that in Romania companies postpone the insolvency for 3-4 years for fear of failure, the reorganizations still evolving from about 1% of the number of insolvencies, in 2008, to about 6%. However, if we talk about the poor access to the judicial reorganization procedure, it is all the more difficult for us to admit that the insolvency prevention procedures will be accessed in a very large number overnight.

That is why we believe that this adjustment to improve, make more flexible and simplify the area of insolvency prevention was indeed necessary in the evolution of this area, but at the same time, we believe that the chance of drawing up a special judicial reorganization procedure has once again shifted, applicable to SMEs, a much more accessible procedure at national level as opposed to insolvency prevention procedures.

With regard to the area of insolvency prevention, it is necessary to massively promote these mechanisms in the business environment, as well as to develop financial education for such rules to reach their finality. However, the mere reference to a possible "debt restructuring" and treating the expression as a kind of magic incantation that will save the debtor is not enough. Preventive restructuring procedures have existed until now at national level, since 2009, unfortunately without interest. We believe that their revised form of the draft law will not change the behavior of debtors overnight, thus triggering a wave of insolvency prevention proceedings. However, we must admit that there is a beginning in everything and we hope that these prevention practices will gradually become an integral part of our business culture. A useful measure in times of crisis and which would help to promote and develop a culture of negotiation at national level would

[57] Published in the Official Gazette no. 648 of 5 August 2019. Similar to the insolvency reorganization procedure specific to insolvency, G.O. 6/2019 involves the staggering of certain budgetary obligations, under the conditions of drawing up a restructuring plan and applying a prudent private creditor test, performed by an independent expert. Among the advantages of appealing to Ordinance no. 6/2019 includes the preservation of the administration right, the possibility for the company to become eligible for accessing loans, the suspension of forced executions but also the possibility to access other recovery measures, respectively the insolvency prevention procedures regulated by Law no. 85/2014.

be to provide free advice on accessing these procedures, at least for SMEs that cannot afford such supportive advice, the costs being supported by the state.

Stricto sensu, returning to the actual insolvency procedure, namely the judicial reorganization, this time bypassing the bankruptcy procedure, we will focus on a key proposal to flatten the insolvency curve to close the circle of resistance measures to the next wave of insolvencies.

We were saying that we need to look at the whole, not limit ourselves to tools like that *hard-law* and take them as such. It would be advisable, when drafting a bill, to start from an *in globo* research, allowing a solid legislative reform adapted to our socioeconomic doctrines. All the more so as in the insolvency area we enjoy a "rich bouquet" of tools recently offered by EU and international bodies, thus having the opportunity to extract from this "palette" of principles, regulations, model laws and guidelines, which interferes and resonates with the legislation, custom and culture of our country and what needs to be regulated as a matter of urgency. It is not desirable to limit ourselves only to what we have as a "homework", which is mandatory, as is the case with EU Directive 1023/2019, because we risk losing sight of key opportunities for legislative reform. Of course, there are many legislative nuances that can be improved on the part of judicial reorganization, primarily in order to develop a "rescue culture", which we have developed on other occasions,[58] but this time, we intend to analyze as the last key legislative reference, but of major and immediate interest, the need to create a special reorganization legal framework for SMEs. The current draft law has tried to draw up a regulation to support them, but only in the area of prevention. Here, too, we have in mind the possibility for SMEs with a turnover of less than Eur 500,000 (in the initial, unrevised form, an amount of Eur 1 million was stipulated, in our opinion much more advantageous) to benefit from a fully out-of-court solution, by concluding a restructuring agreement that coagulates the unanimity of the votes of the affected creditors.

In order to flatten the insolvency curve, it is essential that in the future SMEs can benefit from a simplified insolvency regime, not just pre-insolvency, especially a simplified judicial reorganization procedure. It is an urgent and absolutely necessary measure, promoted internationally. Thus, on 22 April 2021, the World Bank launched the revised edition of its *Principles for effective insolvency regimes*[59], principles that cover a wide range of topics and are the result of close collaboration with INSOL International, UNCITRAL, the International Association of Insolvency Regulators and a task force of public and private sector experts from around the world. They have been designed as a broad-spectrum assessment tool to support countries in their efforts to assess and improve key aspects of their trade law systems. The principles cover various issues such as the role of the courts and judicial training, business groups, effective cross-border insolvency protocols, but also cover an area considered special, namely *the need for flexible and effective rescue and restructuring laws for SMEs.* This area has indeed become a stronger focus for developed and developing nations alike in the last few years,

[58] Regarding the broad development of proposals for a deeper legislative reform in the field of insolvency, see Ionel Didea, Diana Maria Ilie, *A new stage in the development and consolidation of a "rescue culture and prevention in business, op. cit.*, portal Universul Juridic, 8 April 2021.

[59] Scott Atkins, Kai Luck, *The New World Bank Insolvency Principles: Informal Workouts and MSE Insolvency Processes as Key Pillars of Economic and Financial Stability*, Australia Publication, July 2021, https://www.nortonrosefulbright.com/en-bi/knowledge/publications/ffbd7c0b/the-new-world-bank-insolvency-principles-informal-workouts-and-mse-insolvency-processes, last accessed 02/11/2021.

with the onset of COVID-19 highlighting the weakness of many existing processes that exist globally given that formal insolvency proceedings that prevail are designed primarily for larger companies. According to World Bank estimates, SMEs account for over 95% of enterprises and account for more than 60% of global employment and the magnitude of these adverse effects is therefore particularly profound. The previous update of the *Principles* focused on the lessons learned from the global financial crisis of 2008, but now the update comes at a time when the world is facing unique challenges, with SMEs experiencing significant levels of financial difficulty. The new Principles recommend the elimination of bureaucracy but also the development of out-of-court restructuring systems, which involve low costs for SMEs.

There was also a sense of urgency in the proceedings of UNCITRAL's Working Group V (with insolvency responsibilities) due to the potential consequences that the possible withdrawal of SME protection granted during the COVID 19 pandemic could have in the near future. Discussions and debates[60] highlighted the need for an imminent, if not immediately usable, tool to help SMEs cope with pandemic deadlocks. The impact of the pandemic fueled this concern, which inspired the convening of several informal sessions hosted on Zoom, during which many of the issues were recognized and at least to some extent resolved before the official meetings convened. We are talking about *The draft law on a simplified insolvency regime for micro-enterprises (MSE insolvency).*[61] Although UNCITRAL Working Group V discussed the need to provide a model for a simplified insolvency regime for micro-enterprises since the preliminary examination of this idea at the 45th session of Working Group V in 2013, it was necessary for some time until the concept found its form in a non-binding legal instrument - *MSE Insolvency Guide.* The first full draft of the simplified insolvency regime was taken into account at the 56th session in Vienna in 2019, which was discussed and revised several times in the sessions that followed in 2020. Only this year, at the height of the effects of the COVID 19 pandemic, a draft model law was agreed in principle, and in relation to the economic challenges of the last year, this progress is particularly timely.

This bill is largely based on similar concepts and provisions included in the UNCITRAL Insolvency Law Guide,[62] which was designed to provide "a comprehensive statement of the key objectives and principles that should be reflected in a state's insolvency laws".[63] The key objectives of the simplified insolvency law are to provide a fast, simple, flexible and low-cost, targeted and easily accessible insolvency procedure for SMEs. The regime also aims to promote the opportunity for a "new beginning" and a discharge of the debtor's obligations through the agreement and implementation of a debt restructuring plan with creditors. The main issues raised during the discussions often revolved around how some of these key provisions are formulated to encourage close implementation, as well as to ensure a balance between the need to "simplify" the

[60] Jennifer L. L. Gant, *UNCITRAL Working Group V and a Simplified Insolvency Regime for MSEs*, Insol Europe – Inside Storiy, June 2021 - https://www.insol-europe.org/news/inside-stories, last accessed 02/11/ 2021.

[61] The works of Working Group V can be accessed here - https://uncitral.un.org/en/working_groups/5/insolvency_law, last accessed 02/11/ 2021.

[62] The UNCITRAL Insolvency Law Legislative Guide can be found by accessing - https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law, last accessed 02/11/ 2021.

[63] The draft text on a simplified insolvency regime discussed at the 58th session of Working Group V can be found here: https://undocs.org/en/A/CN.9/WG.V/WP.172, last accessed 02/11/ 2021.

regime, while avoiding the dangers, which could lead to the abuse of a process that may be too easily accessible, a problem that also arose at the time of the introduction of the restructuring agreement at national level, as an insolvency prevention procedure.

Unfortunately, like all models of laws and legislative guidelines produced by UNCITRAL, the World Bank and other international organizations, the simplified insolvency regime will, of course, be a non-binding legal instrument that is fully optional in the field of its application. It does not offer any mandatory harmonization tool, such as Directive 1023/2019, but as we said, fortunately, it can be a model to follow and integrate into our national legislation, as a perspective for legislative reform, so as to we do not remain "bound" in the transposition of binding legislative instruments. Thus, the MSE insolvency provides 107 recommendations and 389 paragraphs of comments that add clarity and explanations to those recommendations, which the implementing countries can take or leave as they see fit. We mention that it is intended to be completed in December 2021, being on the agenda of the 59th meeting of Working Group V of UNCITRAL, which will take place between 13-17 December 2021 in Vienna.[64]

Consequently, States should provide for a simplified insolvency regime and, to this end, take into account the following *key objectives* :[65] (a) Establishing fast, simple, flexible and low-cost insolvency proceedings for SMEs, hereinafter referred to as "simplified insolvency proceedings" (b) Providing and facilitating access to simplified insolvency proceedings for micro, small and medium-sized enterprises (SMEs); (c) Promoting a new start for the SME debtor by facilitating the viable liquidation of non-viable SMEs and the reorganization of viable SMEs through simplified insolvency proceedings; (d) Ensuring the protection of persons affected by the simplified insolvency proceedings, including creditors, employees and other interested parties (hereinafter referred to as "interested parties") throughout the simplified insolvency proceedings; (e) Providing effective measures to facilitate the participation of creditors and other interested parties in simplified insolvency proceedings; (f) Implementing an effective sanctions regime to prevent abuses or misuse of the simplified insolvency regime and imposing appropriate sanctions for misconduct; (g) Addressing insolvency concerns; and g bis) Where reorganization is feasible, retention of jobs and investments. At the same time, states need to ensure that a simplified insolvency regime applies to all SMEs, noting that aspects of the regime may differ depending on the type of SME, according to recommendations 8 and 9 of the guide.

And because our analysis focuses on the reorganization and financial recovery and development of a rescue culture, we will continue to focus on the characteristics of the simplified reorganization procedure, as outlined in the draft UNCITRAL Guide on simplified procedures for SMEs. The guide refers to "reorganization" as the process by which the financial well-being and viability of a business can be restored, and it continues to operate using various means, including debt write-offs, debt rescheduling, debt-to-equity conversions and the sale of business (or parts) of it). The reorganization in the case of SMEs will result in a reduction, deletion or rescheduling of debt for which

[64] United Nations Commission on International Trade Law, Working Group V (Insolvency Law), Fifty-ninth session Vienna, 13–17 December 2021, Annotated provisional agenda, *Finalization of a draft legislative guide on insolvency law for micro- and small enterprises* - https://undocs.org/en/A/CN.9/WG.V/WP.173.

[65] United Nations Commission on International Trade Law, Fifty-fourth session Vienna, 28 June – 16 July 2021, *Report of Working Group V (Insolvency Law) on the work of its fifty-eighth session*, New York (online), 4–7 May 2021 - https://undocs.org/en/A/CN.9/1052.

no complex reorganization steps will be required, usually provided for larger enterprises.

We must also keep in mind that the SME debtor may not be able to draw up a feasible reorganization plan at an early stage and therefore the insolvency law should allow the SME debtor to prepare the reorganization plan with the assistance of an independent party, a specialist in the field. Regarding deadlines, UNCITRAL recommends very short procedural deadlines. Thus, the national rules of the States applicable to simplified insolvency proceedings should allow for expedited proceedings, with shorter legal deadlines than those applicable in standard insolvency proceedings, with limited reasons for possible extensions of the default deadlines in the maximum permissible number of extension requests. At the same time, the development of rules on notification, the functioning of creditors' committees, meetings and the verification of receivables should be deactivated or adjusted, especially where there is little value for distribution. At the same time, it is recommended to implement measures to make the system easily accessible and usable, including by providing standardized forms and templates and the possibility to access procedures online, where possible. States should consider the interaction of the competent authority with other State bodies, such as tax authorities and state registries (e.g. commercial registers and guarantee registers). Electronic government platforms can significantly accelerate this task. These measures could facilitate the collection of information on the assets, liabilities and transfers of the SME debtor and help to channel the information to the competent authority. They may also facilitate the verification of the information by the competent authority, with the result that a decision on the application and the appropriate course of action will be taken in a shorter time.[66]

Last but not least, UNCITRAL also points out in the Guide that eligible debtors who do not have sufficient resources to finance an insolvency proceeding should still be able to access a proceeding to resolve financial difficulties and obtain discharge. To this end, there should be alternative mechanisms to cover the costs of administering the simplified insolvency proceedings where the SME debtor cannot meet them, including the use of public funds or the establishment of a fund from which the costs of the insolvency proceedings can be borne. For example, allowing the payment of administrative expenses in installments, including from future revenues by implementing the debt repayment or reorganization plan, would allow the SME debtor to share at least part of the costs of the procedure.

We hope that this legislative instrument will be available as soon as possible, at least until the economic safety nets are withdrawn, as a mechanism for resolving financial difficulties or at least creating the possibility of less painful exits from a business becomes vital as a result of the "collapse" of the global economy.

In conclusion, we believe that SMEs can justify differentiated treatment in a debt restructuring strategy, as complex, lengthy and rigid procedures, the necessary expertise and high insolvency costs can be demanding for this category of companies.

As we said, in recent years there has been a great increase in awareness of the need to better respond to the insolvency needs of SMEs, even EU Directive 1023/2019 suggests that, in order to help SMEs restructure at low costs, it is recommended that restructuring plans be developed to suit their needs and specificities, using templates that should be developed at national level and made available online, and that early warning

[66] See recommendations 195-196 in the Guide.

tools be put in place to warn debtors of the urgency to act, taking into account the limited resources for hiring experts.

The OECD also called for the adoption of special insolvency proceedings for SMEs, as well as for the possibility for the debtor to pay administrative costs related to insolvency proceedings in installments. According to the OECD Insolvency Indicator, in 2016, 25 OECD countries did not have any special indicators of special procedures for SMEs. However, a number of countries have taken steps to simplify insolvency proceedings for SMEs in response to the COVID-19 pandemic. The new COVID-19 moratorium in Switzerland offers SMEs a simple procedure to obtain a temporary suspension of their payment obligations. Brazil has proposed the implementation of simplified insolvency rules for SMEs (during judicial restructuring plans, they may be allowed to pay debts up to 60 monthly installments instead of 36 months, as is currently the case). In the United States, the threshold required to have access to the simplified insolvency rules of *Small Business Reorganization Act* 2019 it has been expanded to allow more companies to have access to simplified procedures. The introduction of such simplified rules and flexibility regarding payment plans could increase the likelihood that viable SMEs in temporary difficulty will be restructured immediately. Let's admit that during a systemic crisis, restructuring can become difficult even in the case of large companies, where in normal times it seems quite efficient. In these circumstances, court-supervised restructuring may take too long, in which case extrajudicial renegotiations should be given priority whenever possible. That is why we believe that insolvency prevention procedures are becoming an essential pillar of economic recovery, but dedicated especially to large companies, while a simplified judicial reorganization procedure would become the rescue of SMEs and the second key pillar to overcome the catastrophic effects of the Covid-19 pandemic.

6. Conclusions

Although we did not initially intend this, the research proved to be quite extensive, through cascading economic and legislative approaches, born perhaps from the "thirst" for analysis and identification of socioeconomic recovery solutions, which is why we will try to summarize and concentrate the conclusions in the statement of Winston Churchill who said that „*Success is not final, failure is not fatal; it is the courage to continue that counts*".

This period teaches us that we must find in ourselves the strength and courage to continue and identify solutions every time. This is when jurisdictions need to identify the weaknesses of insolvency legal institutions, addressing them as a key challenge and a priority area for reform.

Moreover, it is time to build strong, stable legal institutions that remain resistant even to large-scale economic "shocks", as a legal mechanism, such as insolvency, must continue to meet the needs of debtors even in times of economic crisis, so that the impact is reduced and the recovery potential is high.

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