THE EUROPEAN UNION DIRECTIVE PROPOSAL ON RESTRUCTURING AND SECOND CHANCE: A CHECK OF COMPLIANCE BY ROMANIAN LAW

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Abstract

The European Commission is highly active in the field of insolvency, by making big steps towards reforming the concept of insolvency, beginning with the Recast of the European Insolvency Regulation, which has entered into force on 26th of June 2017, with small exceptions. On 22nd November 2016, the European Commission presented the Proposal for a Directive on restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/UE. The Proposal itself aims at reforming the concept of insolvency by trying to build a new entrepreneurial culture, based on rescuing financially distressed yet viable debtors. The effects of the actual European culture regarding insolvency, which prioritizes liquidation, have been quantified in job losses, a high rate of non-performing loans and low percentage of creditors' recovery rate. The Proposal invites Member States to put in place its provisions, by offering them a set of key principles and rules. The Proposal's general objective is to eliminate the barriers to the free flow of capital, but it also provides adjacent targets, which encourage cross-border investments and limit the rate of non-performing loans. This paper aims to analyze a check of compliance by Romanian law, in order to identify the way that our national law will need to be adapted to the Proposal's provisions.

Keywords: *financial difficulties, preventive restructuring frameworks, insolvency, second chance, debt discharge.*

1. Introduction

The European Commission is continuously working on increasing the efficiency of the single market. In order to fulfill this objective, the Capital Markets Union Action Plan[1] has been developed. One of the key objectives of the Action Plan is to stimulate the free flow of capital in the single market by eliminating identified barriers, some of which result from the differences among Member States' restructuring and insolvency frameworks. The first step towards identifying the barriers has been the quantification of the current situation in Europe regarding insolvency. As a result, statistics show that less than 50% of businesses survive for a five-year period.[2] Bankruptcy comes along with the stigma of failure and it's also the main fear of Europeans if they were to start a business.[3] Considering the high rates of business deaths in several Member States[4], due to the priority of liquidation instead of restructuring, their impact upon the single market and also the Europeans' fear of becoming an entrepreneur, the European Commission has issued a Recommendation on a new approach to business failure and insolvency[5] (the Recommendation) that aims at providing early restructuring frameworks for viable businesses and also a second chance for bankrupt but honest entrepreneurs. A next step in reforming the concept of insolvency consisted of the adoption of the European Insolvency Regulation of 20 May 2015[6] (EIR), which extended its field of application, therefore including pre-insolvency proceedings. In 2014, INSOL Europe has submitted a study to the European Commission[7], entitled *Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices*[8], which revealed that 13 Member States haven't put in place early restructuring frameworks. Thus, as a next step, in order to accelerate and consolidate a business rescue culture and a second chance for entrepreneurs, the European Commission has presented, on 22nd November 2016, the proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU[9] (the Proposal). This legislative initiative

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[1] Brussels, COM/(2015) 468 final: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0468&from=EN

[2] http://ec.europa.eu/eurostat/statistics-explained/index.php/Business_demography_statistics#High_growth_enterprises

[3] Flash Eurobarometer 354 (2012) Entrepreneurship in the E.U. and beyond, p. 72

[4] http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Figure6_Trend_of_enterprise_death_rates,_business_economy,_2014-2015_ (%25).png

[5] Brussels, 12.3.2014, C(2014) 1500 final, available at http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf

[6] Regulation (E.U.) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (Recast), O.J.E.U., L141/19.

[7] https://www.insol-europe.org/eu-study-group-publications

[8] Stefania Bariatti, Robert van Galen, TENDER No. JUST/2012/JCIV/CT/0194/A4, available at : http://ec.europa.eu/justice/civil/files/insol_europe_report_2014_annexes_en.pdf

[9] Strasbourg, 22.11.2016, COM (2016) 723 final : http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0723&from=EN

is an ambitious European project that stimulates Member States' cooperation in achieving the E.U.'s goals. The Proposal offers Member States minimum standards regarding pre-insolvency, insolvency and discharge proceedings. Insolvency has also been reformed in Romania, by adopting the Law no. 85/2014 regarding pre-insolvency and insolvency proceedings[10]. This paper aims to analyze the way that the Romanian law complies with the Proposal's provisions. A check of compliance is necessary because once the Proposal becomes binding[11], Member States will need to take measures to ensure that their national legislative context complies with the Proposal's provisions. If the Romanian law regarding pre-insolvency, insolvency and discharge proceedings doesn't fully comply with the Proposal's provisions, it will need to undergo several amendments in order to fulfill the minimum standards promoted by the European Commission.

1.1. The Proposal's structure

The Proposal is structured into 47 recitals and 36 articles focusing on three main concepts: access to preventive restructuring frameworks, second chance for honest entrepreneurs and increasing the efficiency of restructuring, insolvency and discharge procedures through targeted measures.

1.2. The Proposal's objective(s)

The Proposal itself is a European objective that accelerates an insolvency reform. It is a flexible instrument setting minimum standards that Member States will use in order to comply with the current needs of the single market. As it mentions, the key objective is to reduce the barriers to the free flow of capital stemming from differences in Member States' restructuring and insolvency frameworks. Moreover, the Proposal's provisions themselves are objectives that need to be fulfilled by Member States. The aim is also to provide a common E.U.-wide framework, ensuring the removal of obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment. Over-indebted debtors that don't have access to debt discharge proceedings may change their jurisdiction in order to benefit from a true second chance, so it might be said that they no longer have the freedom of establishment. The free movement of capital consisting in cross-border investments is also discouraged by the length and costs implied by an insolvency proceeding. Lastly, even though the Proposal doesn't specify, another objective is to stimulate Member States into putting their efforts to ensure the implementation and development of efficient legislative frameworks covering these matters. Reforming the concept of insolvency and consolidating a business rescue culture is a process that needs time, and also synergic efforts of European institutions, on one side, and Member States on the other side.

2. A check of compliance by the Romanian law

Insolvency has been reformed in Romania though the adoption of the Law no. 85/2014, just a few months after the European Commission has issued the Recommendation on a new approach to business failure and insolvency. However, the Proposal sets targeted rules that Member States are invited to put in place. A check of compliance is not only an analysis of the Romanian law, but also an indicator of its standards in relation to the European standards.

2.1. Preventive restructuring frameworks

Preventive restructuring frameworks are regulated by Title II of the Proposal. In the European vision, preventive restructuring frameworks are important because they could be used as an instrument that reduces the rate of unnecessary business liquidations. If debtors across Europe had access to efficient, early restructuring frameworks, negotiations carried out with creditors may be eased, especially if they are managed by a *practitioner in the field of restructuring*, as they are defined in Article 2 (15) of the Proposal. A specialized negotiator will have two main objectives: they shall manage the difficulties that may cause a state of insolvency while making sure that the debtor's liabilities are covered. The Proposal aims at ensuring the availability of preventive restructuring frameworks in all Member States, which may decrease the rate of insolvent businesses. Preventive restructuring proceedings are to be triggered when there is likelihood of insolvency. Their role is to restore and enhance the debtor's viability through restructuring, while aiming at avoiding insolvency. Preventive restructuring frameworks are not limited, since the Proposal mentions that they may consist of one or more procedures and measures. The involvement of judicial or administrative authorities is limited to where it is necessary and should ensure the protection of affected parties' rights. Preventive restructuring proceeding may be accessed by the debtor, or by creditors which have the debtor's consent. In Romania, preventive restructuring frameworks have been a traditional commercial instrument, since the adoption of the Commercial Code in 1887, which regulated the pre-bankruptcy moratorium. The preventive composition has been firstly regulated by the Law of preventive composition from 1929, which has been abrogated in 1938. In the modern context, the traditional pre-bankruptcy moratorium took the shape of the ad-hoc mandate, which, along with the preventive composition, is regulated today by the Law no. 85/2014 regarding pre-insolvency and insolvency proceedings. Therefore, in Romania, two types of pre-insolvency proceedings are made available. They can

[10] Published in the Official Journal of Romania, Part I, no. 466 from 25th of June 2014

[11] The Proposal will enter into force on the twentieth day following the day of its publication in the Official Journal of the European Union.

be triggered only by the debtor[12], when there is likelihood of insolvency. Both of them are submitted to confirmation by the Court. If the Court states that the debtor is in a state of insolvency, the pre-insolvency proceedings will not be opened. The state of financial difficulty is the main condition that needs to be fulfilled in order to access either the ad-hoc mandate, either the preventive composition. The Law no. 85/2014 provides several measures which can be adopted by the debtor in order to avoid insolvency through restructuring, but they have an exemplary and not a limiting nature. If voted by creditors, any measures considered adequate could be adopted. The Court's involvement is limited but also necessary. When accessing the preventive composition proceeding, the debtor may request, under several conditions, a temporary stay of individual enforcement actions. If admitted by the Court, a certain protection of creditors' rights is required. The Court's involvement in pre-insolvency proceedings is limited to the legal aspects implied by each proceeding. In regards of the availability of early restructuring frameworks, the Romanian law fully complies with the Proposal's provisions. In terms of facilitating negotiations in order to adopt a preventive restructuring plan, the Proposal provides the following minimum standards. First of all, the debtor should remain totally or at least partially in control of their assets and day-to-day operation of the business. This requirement is particularly important due to the separation of preventive restructuring from formal restructuring unfolded in an insolvency proceeding, where the debtor may or may not remain in possession. The Proposal also states that appointing a practitioner in the field of restructuring shall not be mandatory in every case. This particular requirement targets micro, small and medium enterprises, which may not carry out the costs implied by an early restructuring proceeding. According to the Annual Report on SMEs[13], *firms with 0 and 1 to 4 employees accounted for 98% or more of all business deaths in 15 Member States (...) and for between 95% and 97% of all business deaths in 9 other Member States (...)* This shows us that the Proposal is flexible enough to provide an efficient preventive restructuring framework for SMEs, in order to stimulate entrepreneurship. In the Proposal's view, the appointment of a practitioner in the field of restructuring may be required in two cases: if the debtor is granted a general stay of individual enforcement actions and where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down. The Romanian law maintains the debtor in possession, but in a preventive composition proceeding, if the debtor seriously violated the terms negotiated with creditors, through actions such as favoring one/more creditors or asset alienation, the creditor's meeting may decide to file a request of the composition's resolution. There is no sanction for the debtor that limits the control over the business. However, the Romanian law provides that during the proceeding, the debtor has control over the business and day-to-day operations, in the terms negotiated in the preventive composition and under the supervision[14] of the assigned insolvency practitioner. As we can see from above, the Romanian law complies with the Proposal's provisions regarding the debtor in possession, except the provisions which state that the appointment of a practitioner in the field of insolvency shall not be mandatory in every case. According to the Law no. 85/2014, the organs applying the ad-hoc mandate are the president of the Court and the insolvency practitioner, while the organs applying the preventive composition proceeding are the syndic-judge and the insolvency practitioner. A financially distressed debtor may resort to an informal mediation procedure, where the appointment of an expert is not mandatory, but these types of proceedings are not recognized as pre-insolvency proceeding by the law. In means of a temporary stay of individual enforcement actions, the Proposal provides that Member States shall provide a framework which allows a debtor to benefit from a temporary stay of individual enforcement actions, if and to the extent such a stay is necessary to support the negotiations of a restructuring plan. The temporary stay of individual enforcement actions may also target secured creditors, and may be general (covering all creditors) or limited (covering one or more creditors). So far, the Romanian law complies with the Proposal's provisions, since the preventive composition allows the debtor to benefit from a temporary stay of individual enforcement action, if and only if at least 75% of the value of creditors' claims is engaged in the proceeding. However, the Proposal limits the stay of individual enforcement actions to 4 months. This period may be extended under the following conditions: firstly, if there is evidence that progress has been made in the negotiations of a restructuring plan and secondly, if the extension of the stay does not unfairly prejudice the rights or interests of any affected parties. The total duration of the stay of individual enforcement actions should be limited, in the Proposal's view, to maximum twelve months. In this matter, the Romanian law does not comply with the Proposal's provisions, since the preventive composition allows a debtor to benefit from a temporary stay of individual enforcement actions throughout the whole duration of the proceeding, respectively 24 months from the date of the composition's homologation, with the possibility of extending it with maximum 12 months. The debtor may

[12] However, article 26 (2) from the Law no. 85/2014 provides that the negotiations (but not the proceeding) may also be initiated by the creditors or by the debtor's shareholders.

[13] Patrice Muller, Shaan Devnani, Jenna Julius, Dimitri Gagliardi, Chiara Marzocchi, Annual Report on European SMEs 2015/2016, November 2016, p. 58, available at: https://ec.europa.eu/jrc/sites/jrcsh/files/annual_report_-_eu_smes_2015-16.pdf

[14] The Law no. 85/2014 doesn't provide a definition of the conciliator's supervision, but provides instead a definition of the supervision exercised in an insolvency proceeding.

also request a temporary stay of individual enforcement actions even before the composition's homologation. Moreover, the Law no. 85/2014 provides that the conciliator may file for approval a request to postpone the payment of dissent creditors' claims with maximum 18 months, under the condition of offering these creditors equivalent guarantees. In matters of the period of the stay of individual enforcement actions, the Romanian law exceeds the period recommended by the Proposal. Also, it doesn't provide the possibility of lifting the stay of individual enforcement actions, but instead provides that when the creditors' meeting decides to file for the preventive composition's resolution, the preventive proceeding is suspended *ope legis*. If the preventive composition is suspended, creditors may continue their enforcement actions. In terms of consequences of the stay of individual enforcement actions, provided by Article 7 of the Proposal, the aim is to facilitate the debtor's restructuring while protecting the interests of affected parties. Therefore, the Proposal provides that the obligation of filing for insolvency proceeding should be suspended for the duration of the stay. The Romanian law doesn't clearly specify it, but a homologated composition may still continue when the debtors becomes insolvent, if they fully respect the terms negotiated with creditors. The law also provides that when a debtor is in a negotiation[15] process with its creditors and meanwhile becomes insolvent, the obligation of filing for insolvency proceedings arises in a period of 5 days from the date of the negotiations' failure. Also, if the preventive composition is homologated, insolvency proceedings may not be commenced. In reference to those creditors whose claims arise after the stay is granted, the Romanian law provides two alternatives: either they adhere to the preventive composition by their inclusion in negotiations, either they may recover their claim by any other means provided by the law. In matters of the restructuring plans content, stated in Article 8 of the Proposal, a minimum amount of information is required, as following. Firstly, the debtor's identity is required, as well as a valuation of the present value of the debtor/debtor's business and a reasoned statement on the causes and the extent of the financial difficulties. Secondly, the identity of the affected parties and their claims/interests covered by the restructuring plan is required. Also, affected parties should be grouped in classes, in order to exercise their vote upon the restructuring plan, while mentioning the value of claims in each class. Non-affected parties are also to be mentioned in the plan, along with a statement of reasons why it is not proposed to affect them. Furthermore, another minimum requirement of the Proposal concerns a reasoned statement by the person responsible for proposing the plan which explains why the business is viable, how implementing the proposed plan is likely to avoid insolvency and restore long-term viability. Lastly, in terms of the plan, the minimum requirements of the Proposal consist of three main elements: its proposed duration, any proposal by which debts are rescheduled or waived or converted into other forms of obligations and any new financing anticipated as part of the restructuring plan. Looking at the Law no. 85/2014, the formalities of the preventive composition are commenced in the base of the preventive composition offer, which will be submitted for approval to the creditors. The offer will include the following: the preventive composition's project, a list of known secured and unsecured creditors including the value of their claims and the debtors' state referring to its financial difficulties. Furthermore, the preventive composition's project needs to include the following:

I. the analytic situation of the debtors' assets and liabilities (certified by an expert accountant or audited by an authorized auditor)
II. the causes of financial difficulties including planned measures taken by the debtor in order to overcome these difficulties (until the moment of the offer's submission for approval)
III. a projection of the financial and accounting evolution on the following 24 months
IV. a detailed recovery plan.

The recovery plan in the preventive composition proceeding resembles the recovery plan as part of a judicial reorganization proceeding. The Romanian law also requires the recovery plan to include the following: the debtor's activity reorganization and targeted measures planned to be adopted in order to avoid insolvency. The law gives some examples of several measures which could be adopted. In reference to the plan's content, the Romanian law fully complies with the Proposal's provision. It doesn't specifically require a reasoned statement of the person proposing the plan which explains why the business is viable, how the plan's implementation is going to result in avoiding insolvency and restore the business's long-term viability. However, considering that the recovery plan is the main instrument in a preventive composition proceeding, it cannot be elaborated without approaching these requirements. Pre-insolvency and insolvency proceedings, in Romanian law, commence based on the state of the debtor: a debtor in state of insolvency needs to file for insolvency proceedings and a debtor in state of financial difficulty will file for pre-insolvency proceedings (ad-hoc mandate or preventive composition). Thus, in order to access pre-insolvency proceedings, the state of financial difficulty must be reasoned and proved. One of the Proposal's most significant provisions requires Member States to make a model for restructuring plans available online, in national and other languages, containing at least the information required under national law and also general and practical information on how the model is to be used. This particular requirement is highly beneficial for micro, small and medium enterprises but

[15] The Romanian law limits the duration of negotiation to a period of maximum 60 days. The prior regulation of pre-insolvency proceedings (Law no. 381/2009, currently abrogated) provided a maximum period of 30 days.

also for the entrepreneurial environment. In Romanian law, the preventive composition proceeding is based on the creditors' votes upon the preventive composition offer. The recovery plan may include rescheduled and/or reduced claims and also new financing. After the creditors approve the preventive composition offer, the practitioner in the field of restructuring will file for the Court's approval a request of the composition's homologation. The syndic-judge verifies if the debtor fulfills the following legal requirements: (i) the value of challenged claims doesn't overcome 25% of the total value of claims and (ii) the composition has been approved by creditors holding at least 75% of the total value of accepted and unchallenged claims. Also, the syndic-judge verifies the preventive composition offer, with all included documents. The judicial involvement is limited to verifying if the debtor fulfills the legal conditions. The aspect of opportunity that lies in the debtor's recovery and its possibility to avoid insolvency is fully control by the creditors. The syndic-judge doesn't have the possibility to refuse confirming a restructuring plan that doesn't have a reasonable prospect of preventing the debtor's insolvency and ensuring the viability of the business. In reference to the plan's confirmation duration, the Romanian law provides that the parties will be summoned by the syndic-judge within 48 hours from the day the request was filed and decisions shall be urgently adopted. Even though the list of creditors mentions the nature and value of the claim, creditors are not divided into classes; the law only requires mentioning which creditors are secured and unsecured. Their right to vote upon the restructuring plan and its further amendments is determined by reporting the value of their claim to the total value of claims. The Romanian law doesn't require the approval of at least one class of affected creditors. In reference to equity holders, article 27 (6) of the law provides that they may vote upon the restructuring plan, only if they are given less than they would receive in case of bankruptcy (a liquidation value is to be determined). In regard of creditors, if they challenge the restructuring plan on grounds of an alleged breach of the best interest of creditors' test, the Romanian law doesn't explicitly provide the obligation of determining the liquidation value. However, in practice, even though pre-insolvency proceedings are rarely used, the syndic-judge may order an evaluation of the debtor's business, which shall be elaborated by an appointed expert. In terms of the effects of restructuring plans, the Romanian law provides that, if creditors holding at least 75% of the total value of claims vote in favor of the restructuring plan, it will be submitted for the Court's confirmation and after its confirmation, it becomes binding upon all participant creditors, including those creditors who voted against the plan. If new claims arise during the preventive composition proceeding, held by creditors who weren't initially involved in the plan's adoption, these particular creditors aren't affected in any way by the plan. The decision which confirms the plan's adoption may be appealed within 7 days, calculated from its pronouncing for those who were present, and from its communication, for those who weren't present. Filing an appeal against the decision which confirms the plan's adoption has no suspensive effects on the plan's execution. The judicial authority which adopts a decision in regards to an appeal is the Court of Appeal, which may decide to reject the restructuring plan's adoption. However, if the Court of Appeal decides in favor of the plan's adoption, dissenting creditors will not be granted monetary compensation. The reason is because, according to the legal definition of the state of financial difficulty, the debtor pays or is able to pay its obligations and is not insolvent. This is also the reason why the law doesn't provide a priority rule in terms of payments. It is assumed that the debtor is able to pay all its obligations, but accesses the preventive composition in order to re-negotiate or reschedule some of these payments, to prevent a future state of insolvency. In respects to Article 16 of the Proposal, which provides protection for new and interim financing, the Romanian law's provisions comply. Actually, the Law no. 85/2014, which consisted of a national insolvency reform, has adopted 13 fundamental principles[16] which apply to both pre-insolvency and insolvency proceedings. The eighth principle states that debtors should be granted access to financing in pre-insolvency proceedings, in the observation period and also in judicial reorganization, while creating an adequate regime in order to protect these claims. Therefore, article 24 paragraph (2) point b) states that in the preventive composition proceeding, in the debtor is granted new financing, these claims benefit from a priority in distribution, after the procedural expenses. Actually, this particular provision is the only one mentioning a certain priority rule in the preventive composition. New and interim financing benefit from the same protection regime, both in the observation period [art. 87 paragraph (4)] and judicial reorganization [art. 133 paragraph (5) point b)]. The Romanian law doesn't provide that grantors of new and interim financing shall be exempted from liability in case of the debtor's subsequent insolvency, but this is because creditors control the opportunity aspects of reorganization (both in insolvency and pre-insolvency proceedings). Therefore, no financing will be granted without the creditors' favorable vote, in the stated conditions for each type of proceeding. In respects of Article 17 of the Proposal, some transactions mentioned at point 2 are included in the restructuring plan, which is submitted for the creditors' approval, and transactions regarding restructuring fees and the appointment of a practitioner in the field of restructuring are also submitted for the creditors' confirmation, before the plan. In order to elaborate a restructuring plan, the practitioner and its emolument

[16] The fundamental principles were inspired from the World Bank's principles.

need to be previously submitted for the creditors' approval and only after a decision is made, the plan may be drafted. Actually, any transaction, measure or premise must firstly be submitted for the creditors' approval and then submitted for the syndic-judge's confirmation. In regard to Article 18 of the Proposal, which states the directors' duties in the likelihood of insolvency, it might be said that the Romanian law doesn't provide any kind of obligation. Accessing pre-insolvency proceedings is the debtor's option, while accessing insolvency proceedings is indeed an obligation. The *likelihood of insolvency* may be translated in the *state of financial difficulty* provided by the Romanian law.

2.2. Second chance for entrepreneurs

Second chance for honest but bankrupt entrepreneurs is regulated by Title III of the Proposal. According to Articles 19-23 of the Proposal, Member States are invited to put in place debt discharge proceedings, in order to give honest but bankrupt entrepreneurs a true second chance. The discharge period is also a key factor in ensuring over-indebted entrepreneurs a second chance. Therefore, the discharge period is recommended to take no longer than 3 years starting from: (a) the date on which the judicial or administrative authority decided on the application to open such a procedure, in case of a procedure ending with the liquidation of an over-indebted entrepreneur's assets; or (b) the date on which implementation of the repayment plan started, in case of a procedure which includes a repayment plan. Member States also need to ensure that on expiry of the discharge period, over-indebted entrepreneurs are discharged of their debts. At the end of the discharge period, the entrepreneur is protected by any disqualifications related to the over-indebtedness. Member States are given the option to derogate from these provisions, by maintaining or introducing provision restricting the access to discharge proceedings, when justified by a general interest. As examples, the Proposal provides the following cases: (i) when the over-indebted entrepreneur acted dishonestly or in bad faith towards the creditors when becoming indebted or during the collection of the debts, (ii) when the over-indebted entrepreneur does not adhere to the repayment plan or to any other legal obligations aimed at safeguarding the creditors' interests; (iii) in case of abusive access to discharge proceedings and (iv) in case of repeated access to discharge procedures within a certain period of time. Member States are given the option to exclude several categories of debts from discharge, such as secured debts, debts arising out of criminal penalty or tortious liability. The Proposal also treats situations where over-indebted entrepreneurs having both professional and personal debts, by stating that all debts should be treated in a single proceeding, for the purpose of obtaining a discharge. The Proposal also provides derogation, stating that both proceedings should be coordinated for the purposes of obtaining a discharge. The Proposal's provision regarding second chance frameworks are the result of constant analysis made at E.U. level, which revealed that a true second chance given to the entrepreneur to re-launch a business and also to the entrepreneur as a natural person may easily contribute to strengthen the single market's efficiency. Actually, 82% of Europeans[17] believe that people who started their own business and failed should be given a second chance. The Romanian law doesn't provide a debt discharge framework for over-indebted entrepreneurs. It is true that a debtor going bankrupt will be discharged of the debts which couldn't be covered by liquidation, but this is only because after bankruptcy proceeding ends, the debtor ceases to exist and only if it is proven that the debtor acted honestly and in good-faith. Also, these provisions regard strictly the debtor as a legal person and not as a natural person. There is no other law beside the Law no. 85/2014 that provides a debt discharge framework. In this particular matter, the national law doesn't comply at all with the Proposal's provisions. The insolvency of a natural person is not regulated by the Law no. 85/2014, but by the Law no. 151/2015, which began to be applied starting with 1st of January 2018 and therefore the legislative outcomes are not yet known. In the doctrine it has been shown[18] that a debt discharge may, is some hypothesis, take more than 12 years. Therefore, it is recommended for our national law to implement the Proposal's provisions even before the deadline, since it has been proven that a second chance benefits the economic environment.

2.3. Measures to increase the efficiency of restructuring, insolvency and second chance

In the Proposal's view, the judicial or administrative authorities applying the proceedings should receive initial and further training to a level appropriate to their responsibilities, in order to ensure expeditious treatment of the procedures. The same condition is requested for practitioners in the field of restructuring, be they mediators, insolvency practitioners or other practitioners appointed in the restructuring, insolvency and second chance matters. The goal is for them to provide their services in an effective, impartial, independent and competent way in relation to the parties. The Romanian law provides initial and further training for both judicial authorities and practitioners in insolvency. Organs applying the proceedings operate under their specific Code of ethics. In reference to the appointment of the practitioners in the field of restructuring, in both pre-insolvency and insolvency proceedings the practitioner's appointment must be approved by creditors and subsequently

[17] Flash Eurobarometer 354 (2012) Entrepreneurship in the E.U. and beyond, p. 9.

[18] Gavrilescu Luiza Cristina, O analiză a conformității legii române a insolvenței personale cu recomandările Comisiei Europene sub aspectul reglementării eliberării de datorii a debitorului, the Romanian Magazine of Business Law no. 7/2015, article consulted in the database www.sintact.ro.

confirmed by the judicial authority. The Romanian law also provides clear criteria of the practitioner's removal and resignation. In pre-insolvency proceedings, the practitioner in the field of restructuring is named by the debtor and must be then approved by the creditors and confirmed by the judicial authority (the president of the Court in case of ad-hoc mandate or the syndic-judge in case of preventive composition). Creditors may decline the appointment of a practitioner in insolvency, and suggest the appointment of another practitioner, but he/she still must be approved by at least 50% of the votes of creditors which are present to the meeting (or send their vote electronically). In insolvency proceedings, the practitioner in insolvency may be appointed either by the debtor or creditor, either by the Court. The practitioner in insolvency may decline its appointment. But if accepted, he/she still must be confirmed by at least the majority of creditors in meetings unfolded in the presence of at least 30% of the value of claims. The procedure-related fees undergo the same conditions. In complex cases, the appointment of the practitioner in the field of restructuring may be considered in respects to their experience and expertise. Both pre-insolvency and insolvency proceedings are being judicially supervised. The syndic-judge verifies all legal aspects of the proceeding, ensuring protection of the creditors' and debtor's interests. In relation the Article 28 of the Proposal referring to the use of electronic means of communication, the third fundamental principle of pre-insolvency and insolvency proceedings states that organs applying the proceedings shall ensure an efficient proceeding, including adequate mechanisms of communication, in order to unfold the proceeding in a reasonable time, objectively and impartially, with a minimum of costs. The Romanian law encourages the use of electronic means of communication, in order to limit the costs and make the proceeding as efficient as possible. In reference to Title V of the Proposal, which treats the monitoring of restructuring, insolvency and discharge procedures, Member States are invited to ensure and sort data collection for the first full calendar year following the date of application of implementing measures, in accordance with Article 29 of the Proposal, which will be annually transmitted to the Commission, by 31st of March of the calendar year following the year for which the data is collected. This requirements is explained by the review clause, stated in Article 33 of the Proposal, according to which no later than 5 years from the date of start of application of implementing measures and every 7 years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive, including on whether additional measures to consolidate and strengthen the legal framework on restructuring, insolvency and second chance should be considered. " The Proposal does not provide rules regarding the way data will be collected, which means that Member States have the liberty of creating their own suitable context that will ensure this obligation's fulfillment."[19]

3. Conclusions

The Law no. 85/2014 on pre-insolvency and insolvency proceedings is considered to be a modern law[20], which responds to the current needs of the market. However, if we refer to pre-insolvency proceedings, they are rarely accessed (official statistics revealed that there were around 200 preventive compositions accessed by debtors from 2009 to 2017). The Romanian law, as we saw, mostly complies with the Proposal's provisions in relation to Title II and Title IV. In relation to Title III however, the Romanian law doesn't comply at all, since debt discharge proceedings (as an effect of the Law no. 85/2014 for legal persons and of the Law no. 151/2015 for natural persons, and not a separate accessible proceeding), may exceed the period of 3 years recommended by the Proposal. In conclusion, the Romanian law doesn't comply with the following Proposal's provisions: Article 3, Article 5 paragraph (2), Article 6, Article 8 paragraph (2), Article 10 paragraph (3), Article 13 and Title III. Therefore, the Romanian law shall adopt several amendments in order to fulfill the Proposal's requirements. It is recommended that, after the final draft of the Proposal is published, the Romanian law shall adopt the minimum standards even before the deadline. Creating a uniform framework across Member States would ensure a more stable economy, by eliminating insolvency-related risks and fears for investors and also by limiting the non-performing loans.

References

- Brussels, COM/(2015) 468 final
- http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0468&from=EN
- http://ec.europa.eu/eurostat/statistics-explained/index.php/Business_demography_statistics#High_growth_enterprises
- Flash Eurobarometer 354 (2012) Entrepreneurship in the E.U. and beyond, p. 72

[19] Costea Corina Georgiana, *The E.U. Directive Proposal on restructuring an second chance: an analysis of the most relevant concepts*, in process of publication on www.insol-europe.org, essay presented on 19th of January 2018, on The High Level Course on Insolvency Law in Eastern European Jurisdictions 2017/2018, Bucharest.

[20] Insolvency, at national level, has been reformed by the Law no. 85/2014, which brought several substantial modifications.

- http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Figure6_Trend_of_enterprise_death_rates,_business_economy,_2014-2015_(%25).png
- Brussels, 12.3.2014, C(2014) 1500 final, available at http://ec.europa.eu/justice/civil/files/c_2014 _1500_en.pdf
- Regulation (E.U.) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (Recast), O.J.E.U., L141/19
- https://www.insol-europe.org/eu-study-group-publications
- Stefania Bariatti, Robert van Galen, TENDER No. JUST/2012/JCIV/CT/0194/A4, available at
- http://ec.europa.eu/justice/civil/files/insol_europe_report_2014_annexes_en.pdf
- Strasbourg, 22.11.2016, COM (2016) 723 final
- http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0723&from=EN
- Patrice Muller, Shaan Devnani, Jenna Julius, Dimitri Gagliardi, Chiara Marzocchi, Annual Report on European SMEs 2015/2016, November 2016, p. 58, available at: https://ec.europa.eu/jrc/sites/jrcsh/files/annual_report_-_eu_smes_2015-16.pdf
- Gavrilescu Luiza Cristina, O analiză a conformității legii române a insolvenței personale cu recomandările Comisiei Europene sub aspectul reglementării eliberării de datorii a debitorului, the Romanian Magazine of Business Law no. 7/2015, article consulted in the database www.sintact.ro
- Costea Corina Georgiana, *The E.U. Directive Proposal on restructuring an second chance: an analysis of the most relevant concepts*, in process of publication on www.insol-europe.org, essay presented on 19th of January 2018, on The High Level Course on Insolvency Law in Eastern European Jurisdictions 2017/2018, Bucharest