CONSIDERATIONS ON THE COORDINATION OF PREVENTIVE RESTRUCTURING MEASURES INTRODUCED BY DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 JUNE 2019 ON PREVENTIVE RESTRUCTURING FRAMEWORKS, ON DISCHARGE OF DEBT AND DISQUALIFICATIONS, AND ON MEASURES TO INCREASE THE EFFICIENCY OF PROCEDURES CONCERNING RESTRUCTURING, INSOLVENCY AND DISCHARGE OF DEBT, AND AMENDING DIRECTIVE (EU) 2017/1132 (DIRECTIVE ON RESTRUCTURING AND INSOLVENCY)

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Abstract

Preventive solutions are a growing trend in insolvency law and approaches that have the aim of saving the companies which are still economically viable are a benefit to the economy. Differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt generate additional costs for investors and also lead to uneven conditions for access to credit and to uneven recovery rates. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital Markets Union in particular. These are only some of the results of the reflection determining the initiative for a new legal framework, as introduced by the Directive (EU) 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).This paper does not aim to offer solutions or to critically analyse the level of ambition of the Directive, but only to provide an examination of the national frameworks in articulation with the new instrument introduced at Union level, indicating new trends foreseen by its provisions and preliminary directions for reflection in the transposition process.

Keywords: *arrangement with creditors, ad-hoc mandate, viability test, early warning tools, classes of creditors, employees' rights.*

1. Introduction

The directive aims at the smooth functioning of the internal market by removing obstacles to the exercise of fundamental freedoms, such as the free movement of capital and the freedom of establishment, resulting from differences between national legal provisions and procedures relating to preventive restructuring, insolvency, debt relief and write-offs. The legislative instrument also ensures that viable businesses and entrepreneurs in financial difficulty have access to effective national preventive restructuring frameworks that allow them to continue to operate, that honest insolvent or over-indebted entrepreneurs can benefit from a full debt write-off after a reasonable period of time has elapsed, thus allowing them a second chance, and last but not least that restructuring, insolvency and debt write-off procedures become more effective, in particular by shortening their duration.

2. Development of the proposed Directive

As is well known, in 2016[1] the Proposal for a Directive on preventive restructuring frameworks, second chance and efficiency enhancing measures for restructuring, insolvency and debt relief procedures and amending Directive 2012/30/EU was launched and in December 2018, the EU Council and the Parliament reached an agreement on the compromise text, the final form of the text being confirmed by the Council on 19 December 2018. The legislative process ends on 6 June 2019, when the legislative proposal was adopted at Justice and Home Affairs Council level. It should be noted that, from the perspective of national legislation, a significant part of the objectives of the Directive are reflected in our legislative system. We have in mind, on the one hand, the common regulation and, on the other hand, the special legislation in the field of banking, of which we will present, below, some aspects of a principled nature.

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[1] Boon, Gert-Jan and Ghio, Emilie, *An EU Preventive Restructuring Framework: A Hole in One?* (August 5, 2019). D. Ehmke et al., *"An EU Preventive Restructuring Framework: a hole in one?"* (2019) 28 International Insolvency Review 184 available at SSRN: *https://ssrn.com/abstract=3689002* or *http://dx.doi.org/10.2139/ssrn.3689002*.

2.1. Status of restructuring/prevention measures in common regulatory framework

In our legal system, insolvency prevention procedures were regulated for the first time by Law No 381/2009[2] on the introduction of the arrangement with creditors and the ad hoc mandate. This law provided an opportunity for debtors in financial difficulty to avoid insolvency proceedings. The scope of application of Law No 381/2009 was laid down in Article 1 of the Law, according to which the arrangement with creditors and the ad hoc mandate applied to legal persons organising an undertaking in financial difficulty without being in a state of insolvency[3]. It follows that the main addressees of Law No 381/2009 were legal persons organising an undertaking in financial difficulty[4].

Law No 85/2014 introduced a new legal regime for insolvency proceedings which differs from the previous regulation in several respects[5]. One such difference also concerns the scope of these proceedings. In the current regulation, insolvency proceedings apply to debtors in financial difficulty. According to Article 5(27), a debtor in financial difficulty is a debtor who, although performing or capable of performing the obligations due, has a low degree of short-term liquidity and/or a high degree of long-term indebtedness, which may affect the fulfilment of contractual obligations in relation to the resources generated by the operational activity or the resources attracted by the financial activity.

There are therefore two conditions for the application of insolvency proceedings: the status of the debtor and its financial difficulty. Since the law does not specify otherwise, it means that insolvency prevention proceedings are intended for both natural person debtors and legal person debtors, the important thing is to have the legal status of debtor within the meaning of this law.

As regards the debtor's financial difficulty, this may be caused by: a significant drop in the economic profitability of the debtor's business; the loss of important markets, partners, customers or suppliers; the introduction of administrative or legislative measures in the field in which the debtor operates, the bankruptcy of business partners, etc. It is important to note that recourse to the arrangement with creditors, i.e. the ad hoc mandate, does not imply that the debtor is insolvent or insolvent and, even more so, that insolvency proceedings have been opened against him. The financial hardship referred to in the rule under consideration has a different legal meaning from the specific meaning of insolvency, which implies the impossibility of paying the debtor's debts with the money available. While insolvency involves the cessation of payments due to a lack of liquidity, the arrangement with creditors and the ad hoc mandate concern only certain managerial or economic disruptions, but not the non-payment of outstanding debts. At most, they can be regarded as precautionary measures to prevent the debtor from becoming insolvent or insolvent in the future.

If the debtor who owns the business is unable to pay (insolvency), the use of a composition or an ad hoc mandate is excluded, because in such cases, according to Article 66 of the law, the debtor is obliged to apply to the court for insolvency. While the use of composition and the ad hoc mandate is optional, the application for insolvency is mandatory for the debtor. Nor is the commencement of insolvency proceedings conditional on the debtor attempting to use the arrangement with creditors or the ad hoc mandate. The procedures governed by the current legislation are not mandatory preliminary proceedings prior to the opening of insolvency proceedings or the exercise of any action or procedural means of enforcement by creditors, and it is left to the debtor to use them.

Within the meaning of Article 5(17) of Law No 85/2014, a composition agreement is a contract concluded between the debtor in financial difficulty, on the one hand, and the creditors holding at least 75% of the value of the claims accepted and uncontested, on the other hand, approved by the court, whereby the debtor proposes a recovery plan and a plan for the realisation of the claims of these creditors, and the creditors agree to support the debtor's efforts to overcome the difficulties in which it finds itself.

The ad hoc mandate is a confidential procedure, initiated at the request of the debtor in financial difficulty, whereby an ad hoc trustee, appointed by the court, negotiates with creditors with a view to reaching an agreement between one or more of them and the debtor in order to overcome the state of difficulty (Article 5(36) of the Law). The arrangement may provide for measures such as write-offs, rescheduling or partial reduction of debts, continuation or termination of ongoing contracts, staff reductions, etc., with a view to making the economic activity of the debtor's business in difficulty profitable.

Both the arrangement with creditors and the ad hoc mandate are reserved to the debtor, in the sense that they are triggered at his request, but their implementation requires the creditors' consent. Therefore, the procedures and measures regulated by Law No 85/2014 can only be carried out with the express consent of the creditors, materialised in the conclusion of a contract to this effect.

As regards the participants in the two procedures, according to the provisions of Article 7 of Law No

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[2] M. Of. no. 870/14 december 2009.

[3] About a similar framework see RPS Submitter, Banque de France and Epaulard, Anne and Zapha, Chloé, *Bankruptcy Costs and the Design of Preventive Restructuring Procedures* (April 2021). Banque de France Working Paper No. 810, available at SSRN: *https://ssrn.com/abstract=3840236*.

[4] V. Nemeș, *Drept comercial*, Ed. Hamangiu, București, 2018, p. 483.

[5] St.D. Cărpenaru, *Tratat de drept comercial român*, ediţia a V-a actualizată, Ed. Universul Juridic, București, 2016, p. 705.

85/2014, the bodies applying the ad hoc mandate and composition procedure are the courts, through the president of the court. It follows from the wording of the law that, in practice, the procedures and measures under the ad hoc mandate are ordered by the president of the court, while those specific to the arrangement with creditors fall within the competence of the judge in charge of the proceedings.

From the point of view of territorial jurisdiction, the procedures governed by Title I of Law No 85/2014, the ad hoc mandate and the arrangement with creditors, fall within the ordinary jurisdiction of the court in whose district the debtor's main office or place of business is located. In this regard, Art. 8 para. (1) of Law No 85/2014 provides that the court within whose jurisdiction the debtor's principal place of business or place of business is located shall have jurisdiction to hear the applications referred to in this Title. According to Article 9 of Law No 85/2014, the court of appeal is the court of appeal for judgments delivered by the president of the court or the syndic judge

With regard to the other bodies applying insolvency proceedings, namely the ad hoc trustee and the administrator in composition, the former is present in the ad hoc trustee proceedings and the latter in the proceedings and measures established in the composition proceedings. The rule gives effect to the principle enshrined in Article 4(13), according to which the administration of insolvency prevention and insolvency proceedings must be carried out by insolvency practitioners and their conduct under the control of the court.

In addition to these bodies, creditors and the debtor whose economic enterprise is in financial difficulty also participate in insolvency proceedings.

Creditors participate in the proceedings individually, to the extent permitted by the rights attached to their claim, and collectively, under the conditions laid down by law, through the creditors' meeting and the creditors' representative.

The debtor participates in the procedure mainly through the ad hoc trustee and, in the arrangement with creditors procedure, through the administrator. Moreover, the ad hoc trustee and the administrator in composition are proposed by the debtor, so that they are the contractual representatives of the debtor in financial difficulty.

2.2. Features of prevention/restructuring procedures in the current domestic regulation

Thus, the prevention procedures in the current regulation, which can be used to achieve the objectives of restructuring, have the following characteristics:

a) They are optional procedures because recourse to either of the two instruments (ad hoc mandate and composition) is optional;

b) Both procedures are triggered at the exclusive request of the debtor;

c) Reorganisation and liquidation procedures are not subject to preventive (restructuring) procedures;

d) Both proceedings are collective in the sense that they require the participation of all creditors;

e) Both the ad hoc mandate and the composition procedure are applicable in the event of the debtor's financial difficulties;

f) Both procedures are judicial in nature, in that they presuppose the participation of the judiciary; the ad hoc mandate is granted by the president of the court of the debtor's seat, and the composition procedure is triggered by the syndic judge;

g) Both procedures are primarily aimed at safeguarding the debtor's business and, in the alternative, the interests of creditors;

h) Lastly, both procedures are clearly social in nature, the aim being, as far as possible, to save jobs and, implicitly, to protect employees.

3. The rationale for the new Directive

The rationale of this new architecture reflects the economic and social reality of commercial enterprises at European level. Of these, it is worth mentioning at least those with a particular impact, such as: half of all businesses survive less than five years , 43% of Europeans would not start a business for fear of failure in several EU Member States, viable businesses facing financial problems are more likely to liquidate rather than restructure early.

4. Specific objectives in the context of the co-ordinated preventive restructuring

In terms of structure, the Directive contains: general provisions and early warning tools (Title I), preventive restructuring frameworks (Title II), measures to enhance the efficiency of preventive restructuring, insolvency and debt relief procedures (Title IV).As regards the objectives pursued, the following guidelines deserve attention:

►Access of viable firms in financial distress to national preventive restructuring mechanisms;

►Giving a second chance to honest, over-indebted entrepreneurs by providing full debt relief after a reasonable period of time and limiting the length of time that an insolvency procedure can lapse;

►Increasing the efficiency of preventive restructuring, insolvency and debt write-off procedures including through the introduction of electronic means of communication.

►Avoiding, as far as possible, financial collapse and the use of winding-up proceedings for economic enterprises.

The purpose of the current preventive procedures in domestic law (composition and ad hoc mandate)

The main purpose of the insolvency prevention procedures in our law can be deduced from the

interpretation of the provisions of Article 2, second sentence, of Law 85/2014 and consists in granting "where possible, the opportunity to recover the activity" to the debtor. Also, one of the principles promoted by the aforementioned law is to give the debtors a chance for an efficient and effective recovery of the business through insolvency prevention proceedings (Article 4, paragraph 2 of the law). It follows from the texts of the law to which I have referred that the purpose of the procedures specific to the ad hoc mandate and those specific to the arrangement with creditors is to rescue the debtor in difficulty and, implicitly, to avoid financial collapse by opening insolvency proceedings. But the rules governing insolvency proceedings also have a clear social character, since they are concerned with saving the jobs of the debtor's employees (Article 13(2)).In contrast, by comparison, the main purpose/objective of insolvency proceedings is to apply collective proceedings to cover the debtor's liabilities (Article 2 of the Act). It should be noted that while the ad hoc mandate and the arrangement with creditors are concerned with rescuing the debtor by maintaining its existence and preserving jobs, the insolvency proceedings are primarily concerned with satisfying creditors' claims. Metaphorically but with full practical meaning, it can be argued that insolvency proceedings are "debtor proceedings" and insolvency is "creditor proceedings".

5. Elements of novelty introduced by the Directive[6]

5.1. The 'viability test' in relation to a debtor in financial difficulty

According to Recital 21, Member States should be able to introduce a debtor viability test as a condition for access to the preventive restructuring procedure provided for in this Directive. Such a test must be carried out without prejudice to the debtor's assets, which could take the form, inter alia, of granting an interim stay or carrying out the test without undue delay. However, the absence of prejudice should not prevent Member States from requiring the debtor to prove his viability at his own expense. The operative part of the Directive enshrines in Article 4 this way of conditioning access to preventive restructuring frameworks by stipulating that Member States may maintain or introduce a viability test in national law, provided that this test is aimed at excluding debtors who have no prospect of viability and that it can be carried out without detriment to the debtors' assets.

It should be noted that the Directive does not require the introduction of such a test (it is not a mandatory provision), leaving this option to the national legislator. However, the prescribed way in which such a test could be devised is rather vague, as "no prospect of viability" and "no damage to the debtor's assets" are far from being objective criteria for quantifying an outcome on the basis of which access to a restructuring procedure should be allowed. On the other hand, access to the procedure and the suspension of enforcement could lead to losses of the debtor's assets and, at the same time, to the impossibility of realising creditors' claims.

Provisions of the national Law

In assessing the stage of financial difficulty and the chances of recovery/restructuring, the rules of domestic law differ depending on the procedure used. Thus, in the matter of ad-hoc trusteeship, Article 13 of Law 85/2014 provides that, after hearing the debtor, if it is established that the debtor's financial difficulties are real and the person proposed as ad-hoc trustee meets the legal conditions for exercising this capacity, the president of the court shall appoint, by enforceable decision, the proposed ad-hoc trustee. In this procedure, therefore, the analysis is left to the discretion of the courts through the president of the court, who will decide on the basis of the financial statements submitted by the debtor applicant.

With regard to the arrangement with creditors, Article 24(1) of Law 85/2014 provides that "the draft arrangement agreement must set out in detail: a) the analytical statement of the debtor's assets and liabilities, certified by a chartered accountant or, where applicable, audited by an auditor authorised by law; b) the causes of the state of financial difficulty and, where applicable, the measures taken by the debtor to overcome it by the time the arrangement offer is submitted; c) the projected financial and accounting development over the next 24 months". It is easy to see that the documentation is much more extensive and, moreover, some of the documents are endorsed by specialist experts, in order to make it easier for the official receiver to analyse them.

5.2. Early warning tools

One preventive measure promoted by the Directive is the creation of tools to identify and give early warning of financial distress.

In this respect, it is worth noting Recital (49), which states that, in order to further encourage preventive restructuring, it is important to ensure that directors are not discouraged from exercising reasonable business judgement or taking reasonable commercial risks, in particular where this would improve the prospects of a potentially viable business restructuring. Where the company is in financial difficulty, directors should take steps to minimise losses and avoid insolvency, such as: seeking professional advice, including on restructuring and insolvency, using, for example, early warning tools

[6] Krohn, Axel, Rethinking Priority: The Dawn of the Relative Priority Rule and a New 'Best Interest of Creditors' Test in the European Union (June 20, 2020) available at SSRN: https://ssrn.com/abstract=3554349 or http://dx.doi.org/10.2139/ssrn.3554349.

where they exist; safeguarding the company's assets to maximise value and prevent loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; refraining from engaging the company in the types of transaction that could be subject to avoidance action unless there is a proper business justification; continuing to trade where it is appropriate to do so in order to maximise the value of the company as a going concern; negotiating with creditors and entering into pre-emptive restructuring procedures.

As can be seen, the Directive places a very strong (even unprecedented) emphasis on the managers of the company, who are primarily responsible for both identifying future financial difficulties and finding the best measures and solutions to overcome financial crises and avoid the bankruptcy of the businesses they run.

In addition to the increased responsibilities of company managers, it is also worth mentioning the provisions of the Directive on technical early warning instruments and access to information. In this respect, Article 3 of the Directive states that Member States shall ensure that debtors have access to one or more clear and transparent early warning instruments which enable them to detect circumstances which may give rise to the likelihood of insolvency and which may signal to them the need to act without delay.

For the purposes of the first subparagraph, Member States may use up-to-date information technology for notification and communication. Early warning tools may include: (a)alert mechanisms where the debtor has failed to make certain types of payments; (b)advisory services provided by public or private organisations and (c) incentives under national law for third parties holding relevant information about the debtor, such as accountants, tax authorities and social security authorities, to alert the debtor to adverse developments.

Member States shall ensure that debtors and employees' representatives have access to relevant and up-to-date information on the availability of early warning instruments as well as procedures and measures on debt restructuring and debt relief.

5.2.1. Early intervention tools in the current legislative system

As mentioned above, our legal system regulates measures to prevent financial distress in the banking and insurance sectors. These measures are identical, although they are regulated by separate legislation, which is why we will present mainly those in the banking sector. The regulatory act that constitutes the seat of matter in this regard is Law No. 312 / 2015[7] on the recovery and resolution of credit institutions and investment firms, as well as for amending and supplementing certain regulatory acts in the financial sector, which transposes the main European regulations in this area, such as EU Regulation No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments[8]

5.2.2. Early intervention measures that can be taken in the course of financial resolution

In this regard, Article 149 of the Law provides that if a credit institution breaches or, due to, inter alia, a rapid deterioration of its financial situation is likely to breach, in the near future, the requirements laid down in Regulation (EU) No 575/2013, Government Emergency Ordinance No 99/2006 and the regulations issued by the National Bank of Romania in application thereof, the capital market provisions transposing Title II of Directive 2014/65/EU or any of Articles 3-7, Articles 14-17, Articles 24, 25 and 26 of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets may take, as appropriate, at least the following measures: (a) require the management body of the credit institution to implement one or more of the arrangements or measures set out in the recovery plan or to update such recovery plan where the circumstances leading to the early intervention differ from the assumptions set out in the original recovery plan and to implement one or more of the arrangements or measures set out in the updated plan within a certain timeframe to ensure that the negative conditions prescribed by law no longer exist; (b) request the management body of the credit institution to review the situation, identify measures to address any problems identified and develop an action programme to address those problems and a timetable for its implementation; (c) request the management body of the credit institution to convene a general meeting of the shareholders of the credit institution or, if the management body fails to comply with this requirement, to convene such a meeting directly and, in either case, to set the agenda and request that certain decisions be considered for adoption by the shareholders; d) request the replacement of one or more members of the management body or of the senior management of the credit institution; e) request the management body of the credit institution to draw up a plan for the negotiation of a debt restructuring with some or all of the creditors of the credit institution in accordance with the recovery plan, as appropriate; f) request changes to the business strategy of the credit institution; (g) request changes in the legal or operational structure of the credit institution; and (h) obtain, including through on-site inspections, and provide to the National Bank of Romania as resolution authority all information necessary to update the resolution plan and to prepare for a possible resolution of the credit institution, as well as to carry out a

[7] M. Of. no. 920/11 december 2015.
[8] JLO 176 /27.6.2013 and JLO 173 from 12.6.2014.

valuation of the credit institution's assets and liabilities in accordance with legal provisions.

For the purposes of the law (Art.149 para.2), a rapid deterioration in the financial situation of a credit institution includes a deterioration in the liquidity situation, an increase in leverage, non-performing loans or concentration of exposures, assessed on the basis of a set of indicators, which may include the credit institution's own funds requirement plus 1.5 percentage points[9].

One measure that may be used is the appointment of a temporary manager. The temporary administrator is appointed if the replacement of senior management or the management body is insufficient to overcome the distressed situation. In particular, the National Bank of Romania, as the competent authority, may appoint one or more temporary administrators of the credit institution, which may include the Bank Deposit Guarantee Fund. The National Bank of Romania may appoint any temporary administrator, either to temporarily replace the credit institution's management body or to temporarily work with the credit institution's management body.

As mentioned above, identical regulations are also found in the insurance sector, being introduced by Law 246/2015[10] on insurance recovery and resolution. According to the law, early intervention measures are those measures ordered by the Financial Supervisory Authority for the purpose of restoring the financial situation of the insurer and avoiding deterioration of the solvency capital situation, as well as of the own funds covering the solvency capital requirement (Art., item 29 of Law no.246/2015). If the above-mentioned measures do not achieve their purpose or there is a significant deterioration of the financial situation of the insurer or there are serious breaches of the law, the Financial Supervisory Authority may request the replacement of the senior management or the management body of the insurer as a whole or of some of its members (Art. 29). We have presented the principles of early intervention in the financial-banking sector because they can serve as a source of inspiration for the common law legislator when implementing restructuring frameworks in national legislation.

5.3. Possibility of granting a suspension, on request or by law, in order to access a restructuring procedure

Suspension applies to all types of claims (including secured and preferential claims), but Member States may provide that suspension may also be partial (certain creditors or categories of creditors, notified under national law).

Member States may provide for certain exclusions from the applicability of the suspension:

- in well-defined circumstances;
- with appropriate justification; and only if the suspension would unfairly prejudice the holders of the claims concerned enforcement would jeopardise the restructuring.

Employees' claims are excluded from the application of the suspension, but Member States may decide otherwise. The period of suspension is 4 months, with the possibility of extension, under limited conditions, up to a maximum of 12 months). Article 30 of Law no.85/2014, provides "(1)By ordering the approval, the syndic judge shall suspend all enforcement proceedings.(2) At the request of the administrator in composition, subject to the debtor's provision of guarantees to creditors, the syndic judge may impose on non-signatory creditors of the composition with creditors a maximum period of 18 months to postpone the due date of their claim, during which time no interest, penalties or any other expenses related to the claims shall accrue. The provisions relating to the deferment of the due date of the claim shall not apply to qualified financial contracts and bilateral netting transactions under a qualified financial contract or a bilateral netting agreement.(3) The composition shall be enforceable against budget creditors, subject to compliance with the legal provisions on state aid in domestic and European law, as provided for in Article 24(5)."

5.4. Division into "classes" of creditors

Law 85/2014 does not provide for the division of creditors into classes in insolvency proceedings Directive but leaves the possibility that Member States may provide that debtors who are SMEs may choose not to treat affected parties in separate classes.

5.5. Protection of new financing in proceedings

Article 4 of Law 85/2014, Principle 8 provides at this stage for ensuring access to sources of finance in insolvency prevention proceedings, during the observation and reorganisation period, with the creation of an appropriate regime to protect such claims.

5.6. Protection of employees (right to information and consultation, in the spirit of the regulation and not formally versus interference of employees in company decisions, better position of employees' claims)

The Directive proposes, in an effort to increase support for employees and their representatives, that Member States ensure that employees' representatives have access to relevant and up-to-date information on the existence of early warning instruments and that they are offered support in assessing the economic situation of the debtor. It goes without saying that workers will benefit from the full protection of labour law in all preventive restructuring procedures. In this respect, the

[9] It is noted that "rapidly deteriorating financial condition" within the meaning of the financial and banking regulations refers to the state of insolvability of the entity in question.

[10] M. Of. no. 813/2 november 2015.

Directive provides that the obligations relating to the information and consultation of employees under the national provisions transposing those Directives remain unaffected. The same applies to the obligations to inform and consult employees' representatives on the decision to have recourse to a preventive restructuring framework under Directive 2002/14/EC.

However, we draw attention to the possibility of tactical insolvencies, deliberately used to evade the debtor from tax or labour law provisions, to the need to maintain the status of preferential creditor of employees and also to the need to implement rules that prevent the company's assets from being reduced below the level necessary to pay wage claims.

6. Conclusions. Possible guidelines for the transposition process

As it has been observed and also mentioned at the beginning of the study, measures promoted by the Directive (EU) 2019/1023 are to be found already in national law, in the framework of the two preventive procedures, namely the ad hoc mandate and the arrangement with the creditors We have also listed the main features of the two procedures and also need to confirm their effectiveness, without denying however, the need for their improvement. Consequently, inspired by the application of the national existing legal framework , we continue to advocate, in the transposition process, for the preservation of a voluntary, judicial, collective, social and safeguarding character of the proceedings. At the same time, we are convinced that early intervention instruments which are completely lacking in domestic law, should be used with maximum efficiency and, as we have outlined above, the tools used in the banking and insurance sector could serve as a benchmark for the legislator in this area, as well. In concrete terms, as recommended by the Directive and, moreover, banking and insurance regulations, the measures adopted should provide also the responsibility of the directors, especially since, except in certain fairly limited sectors, no special training or experience is required to run the company. We do not rule out the creation of technical instruments, including by involving public authorities in the task of identifying financial difficulties, an early and prompt intervention being necessary in order to find viable solutions for businesses that have a chance of being rescued.

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