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CRISIS PREVENTION AS A CHANCE FOR BUSINESS RECOVERY IN THE EUROPEAN UNION

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Abstract: *With the entry into force of Directive No. 2019/1023 on Frameworks for Preventive Restructuring, clear and transparent legal instruments were introduced for crisis prevention in business operations of economic entities throughout the single market of the European Union. They involve early detection of circumstances that may lead to insolvency and encourage a response without delay. The key goal is to overcome the debtor's financial difficulties at an early stage, and when possible, prevent insolvency and ensure business sustainability. With the introduction of new instruments into the national legislation, the area traditionally governed by the norms of bankruptcy law, which are mostly of an imperative nature, has been entered. This was done by defining the circumstances that precede the reasons for bankruptcy and by providing instruments to protect the debtor from enforcement. The new instruments, on the other hand, are of a consensual legal nature, that is, governed by dispositive norms. The authors of this paper analyze the preventive instruments, their way of introduction into the legislation, as well as the particularity of*

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the new legal regime in important economies in the EU, using the normative and comparative law method. This article presents an analysis of the application of the new regulations, which have been in force for two years, and the results of their implementation.

Keywords: *Preventive restructuring, European Union, business recovery.*

1. INTRODUCTION

Since July 16, 2019, Directive No. 2019/1023 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) has been effective in the European Union, accompanied by the EU Directive Amendment No. 2017/1132 on Restructuring and Bankruptcy, or, shortened, Directive on Preventive Restructuring Frameworks (EU Directive 2019/1023 on preventive restructuring frameworks). As the Directive was not directly implemented, member states were given the deadline until July 17, 2021 to comply their national legislations with the relevant provisions. Namely, the subject Directive provides the introduction of one or more precise and transparent legal procedures for early detection of circumstances that lead to possible incapacity to pay, as well as incentives to act without delay. In addition, legal frameworks for preventive restructuring available to debtors are introduced, with the objective to overcome financial difficulties in their early stage, and, when possible, to prevent bankruptcy. Finally, the Directive provides procedures aimed at debt relief for the entrepreneur being in bankruptcy, as well as measures for increasing the efficiency of procedures related to restructuring, bankruptcy and debt discharge. Such a wide legal framework had been adopted before global crisis caused by COVID-19 epidemic broke out, and, therefore, such crisis was the additional factor in the process of compliance of the EU member states legislations. Regardless of the circumstances, the Directive provides the possibility to postpone the introduction of preventive instruments. However, member states faced with specific difficulties in

its implementation were entitled, until January 17, 2021, to require the extension of the term for compliance for, mostly, one year, with the obligation of prior notification to the EU Commission, accordingly. Most of the member states avail themselves of the subject possiblity. The reasons for such an extension were both slow legislative activity and the general situation caused by COVID-19 epidemic.

2. REFORM OBJECTIVES

By this Directive No. 2019/1023 on the Preventive Restructuring Frameworks, the European Union legislator defined the objectives being the contribution to orderly functioning of the internal markets and elimination of obstacles for realizing basic freedoms, such as free capital movement and free business establishment, resulting from differences in national legislations and procedures related to preventive restructuring, incapacity to pay, debt relief and restrictions. Moreover, the Directive does not question basic rights and freedoms of the workers and is focused to eliminate the stated obstacles by providing: 1) to sustainable enterprises and entrepreneurs facing financial difficulties the access to efficient national frameworks for preventive restructuring which would enable them to continue with their operations; 2) to decent entrepreneurs who are incapable to pay or heavily indebted the possibility of full debt discharge after a reasonable period or time, thus availing them of the second chance; and 3) the improvement of the procedures efficiency related to restructuring, bankruptcy and debt discharge, particularly in respect of shortening the respective length[4].

On one hand, in implementing this Directive, member states may exclude the procedures related to debtors that are financial entities, but differ from those who render financial services governed by specific

[4] This Directive does not refer to procedures related to debtors that are insurance and reinsurance companies, investment companies and participants in the financial market, central securities registries and other financial institutions and entities, public bodies defined by national legislations and natural persons who are not entrepreneurs. Insurance entities and financial market participants are subjet to Directive 2013/36/EU of the European Parliament and the Council dated June 26, 2013 on access to the credit institutions industry and the supervison of the credit standing of relevant credit institutions and investment companies, to the Amendment of the Directive 2002/87/E3 and declaring null and void of the Directive 2006/48/E3 and 2006/49/E3, *OJ L 176*, 27.6.2013, p. 338–436, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0036*, 24.08.2019.

arrangements according to which national supervisory or sanation authorities have broad intervention powers, comparable to powers stipulated by the Union legislation and the national legislation related to financial entities. On the other hand, memeber states may extend the implementation of the debt discharge procedures to natural persons who are not entrepreneurs[5] and limit the implementation of the framework for preventive restructuring to legal entities. Likewise, certain types of receivables may also be excluded from the implementation. Such receivables are the following: a) existing and future receivables of present or former employees in relation to the debtor, b) receivables related to alimony payments resulting from family relations, parenthood, marriage or in-law relations, and c) receivables arising from offensive liability of the debtor. However, frameworks for preventive restructuring do not have effect on the acquired rights to professional pension.

EU member states were obliged, in the period from 2019 to 2021, to provide the debtors with the access to a number, or a larger number, of clear and transparent early warning instruments (Đurić, Jovanović, Legal Frameworks for Preventive Restructuring in the European Union, 157-170.) for determining the circumstances that could result in threatening incapacity to pay and that could warn to the necessity of immediate action. For that purpose, member states may use state-of-the-art information technologies for notification and communication.

3. NEW LEGAL INSTRUMENTS

Directive No. 1023/2019 on Preventive Restructuring Frameworks comprises the following early warning instruments: a) warning mechanisms when the debtor does not effect certain types of payments, b) consulting services rendered by public or private organizations, and c) incentives in accordance with national legislation for third persons with relevant information on the debtor, such as accountants, tax authorities and organizations competent for social insurance, aimed at warning the debtor in case some negative tendencies are spotted

[5] *Ibidem*, Art. 2 para. 1. item 9., of the Directive considers every natural person performing trade, business, artisan or professional acitivity as entrepreneur.

(Preamble of the Directive no. 2019/1023 on Preventive Restructuring Frameworks). Likewise, this Directive stipulates the necessity of providing the access for the debtors and representatives of employees to relevant and updated information on availability of early warning instruments, as well as of procedures and measures related to restructuring and debt discharge. In that respect, EU member states are obliged to avail the information on access to early warning instruments to the public via Internet in a manner which is easily available and disclosed in the way adjusted for the users. This particularly refers to small and medium enterprises. Additionally, the states may support the representatives of employess in assessment of the debtor`s economic position.

Preventive instruments have, for several years, been in the focus of legislative activities at the EU and member states level. Such activities are aimed at encouraging the debtors to duly and timely react to financial difficulties and crisis situations, in general, in order to overcome the same with the assistance of court and agreement with creditors (Đurić, Jovanović, *idem*, 161). When debtors are in threat of incapacity to pay, the Directive requires the member states to provide access to frameworks for preventive restructuring enabling restructuring aimed at prevention of incapacity to pay and maintenance of the sustainability, without questioning other solutions for prevention of incapacity to pay aimed at protecting jobs and maintaining business activity (Item 23. and 85. of the Preamble of the Directive on Frameworks for Preventive Restructuring No. 2019/1023). Restructuring comprises measures for restructuring of the debtor`s operations including changing of composition, conditions or property and liabilities structure of the debtor or any other part of the debtor`s capital structure such as sale of property or parts of business (Čolović, Restructuring of the Debtor, 5-20) and, if provided by the national legislation accordingly, sale of the business as permanently operating company, as well as all necessary operative changes or combination of respective elements (Art. 2. para. 1. item 1. Directive no. 2019/1023 on Preventive Restructuring Frameworks). Legal grounds for restructuring procedure are disclosed in the schedule binding only for familiar creditors and those who participated in its adoption (Jacobi, EU-Restrukturierungsrichtlinie 2019/1023: Wirkungen des bestätigten Plans, S. 257).

Legal grounds for preventive restructuring stipulated by this Directive may comprise one or more procedures, measures or provisions. The same may, also, be conducted out of court, without questioning other frameworks for restructuring in compliance with the nation legislation (Đurić, Jovanović, *Legal Instruments for Corporate Crisis Prevention*, 2020, 162). Member states are authorized to establish some restrictions related to the participation of the court or other administrative body during the procedure for preventive restructuring for the cases in which it is necessary and proportional. Thus, they are obliged to provide the right of each respective party and relevant stakeholder. In general, preventive restructuring procedures related to the debtor`s operations are commenced at the request of creditors (Art. 4. item. 7. of the Directive no. 2019/1023 on Preventive Restructuring Frameworks). However, the Directive on Preventive Restructuring Frameworks also provides the possibility to initiate the preventive restructuring procedure at the request of both creditors and representatives of employees, with the debtor`s consent, as well as to limit the request for obtaining consent for cases in which debtors are small and medium enterprises (Deppenkemper, Der präventive Restrukturierungsrahmen: Schweizer Taschenmesser oder zahnloser Tiger? 600).

Debtors with the imposed charge for heavy breach of accounting or bookkeeping obligations provided by the national legislation of the respective member state may be allowed to access the framework for preventive restructuring. Prior to such access, they are obliged to undertake appropriate measures for correction of the actions that led to imposition of the respective charge, while the request for examining the sustainability of operations within the national legislation may be imposed or introcuced. The objective of the subject provision is to exclude the debtors having no possibility for sustainable operations, i.e., with the possibility of causing possible damages to the debtor`s property. Finally, the Directive allows the debtor to have limitations in respect of number of attempts to access the framework for preventive restructuring within a certain time period.

Directive No. 2019/1023 on Preventive Restructuring Frameworks imposes to the EU member states the obligation to maintain certain specificities of the procedures in introducing the framework for preventive restructuring. They are: 1) maintaining rights and

authorizations of the debtor (*debitor in possession*), 2) suspending individual enforcement actions (*moratorium*), 3) contents of the restructuring schedule, its adoption and effect, 4) mechanism of imposing the schedule to disapproving creditors (*cross-class cram-down*), 5) protection of new financing and temporary financing, and 6) duties of the director. The issue is about the procedures or instruments that may be used in the early stage of operation crisis. Although they do not prevent the occurrence of reason for bankruptcy, they are not compulsive and do not have negative connotation, as bankruptcy has, but represent voluntary, consensual instruments for solving crisis situations (Đurić, Joavnović, *Legal Instruments for Corporate Crisis Prevention*, 2020, 44-46), without too much publicity, while the operation is still sustainable. Participation of the court is limited to protection of debtors from the enforcedment-oriented statements of creditors and acknowledgement of the agreement being the basis for the preventive restructuring schedule, but also representing the important element of creditors` protection by way of reviewing the legality of the schedule and providing its implementation.

Finally, the Directive No. 2019/1023 on Preventive Restructuring Frameworks provides the obligation for the court and administrative bodies` members dealing with procedures related to restructuring, bankruptcy and debt discharge to gain the adequate knowledge and have necessary expertise for performing their duties. This implies that such procedures should be settled efficiently with the aim to provide prompt actions during the procedures. Furthermore, the terms for selection and appointment procedure, as well as the procedure for releasing of duty and resignation of the administrator must be clear, transparent and fair. It is stipulated that member states have to establish appropriate supervision mechanisms and regulatory mechanisms in order to guarantee the effective supervision of the administrator`s activities, with the aim to provide efficient and competent services of administrators and their unbiased and independent attitude in relation to the involved parties.

4. ADOPTION OF THE DIRECTIVE PROVISIONS IN THE EU MEMBER STATES

For the majority of member states, the EU Directive No. 2019/1023 on Preventive Restructuring Frameworks stipulates extremely ambitious

term for introduction of new instruments. Namely, the provision of Art. 34(1) stipulates that member states should, until July 17, 2021, adopt and aknowledge the laws, regulations and administrative provisions necessary for compliance with this Directive. Therefore, Art. 34(2) of the Directive stipulates a possibility of variation from the Paragraph 1., in case a member state faces particular difficulties in its implementation, stating that the compliance term may be extended for mostly one year. Member states that decided to extend the term were obliged to notify the EU Commission on the relevant postponement of implementation for the period after July 17, 2021. In practice, majority of EU member states availed themselves of the respestive possibilty. Until expiration of the additional term all member states adjusted their national legislations with the provisions of the Directive No. 2019/1023 on Preventive Restructuring Frameworks.

In respect of compliance with the provisions of the Directive, EU member states can be divided in two groups. The first group includes states that implemented the Directive within the first term provided for its implementation. The second group comprises states that required the extension of the term. Access to mutual framework remained open for the United Kingdom of Great Britain and Northern Ireland, as well, although it left the European Union in 2020. Namely, the United Kingdom adopted a new Law on Corporate Insolvency and Administration in 2020. године, which was significantly, but not completely, in compliance with the Directive requirements.

In addition to mentioned division, the EU state members may be divided in groups as per their manner of national legislations compliance. Therefore, some of them decided to enact a new comprehensive law, e.g., Federal Republic of Germany and Austria. Others selected the approach of partial amendment of prevailing laws, either by their changes and amendments or by granting special powers to the executive authorities, e.g., France and Romania.

As concerns the implementation of the Directive No. 2019/1023 on Preventive Restructuring Frameworks, the legislator in Germany introduced its provisions into the legal system by enacting a separate law, Law on Frameworks for Stabilization and Restructuring of Enterprises (*Unternehmensstabilisierungs- und -restrukturierungsgesetz*

vom 22. Dezember 2020 (BGBl. I S. 3256)). This regulation has been implemented since January 1, 2021 and, at the same time, it implements the provisions of the Directive and regulates the right to restructure as a separate branch. It regulates the implementation in enterprises in the early crisis stage, partial inclusion of the court in the procedure, the possibility of inclusion of all creditors and capital owners, the adequate majority in decision making, preparation of agreements, moratorium, new financing, restructuring proponents, etc. On July 15, 2021, Austria adopted the Fedaral Law on Restructuring of Enterprises (*Bundesgesetz über die Restrukturierung von Unternehmen (Restrukturierungsordnung – ReO), Bundesgesetzblatt I Nr. 147/2021*). This law regulates the restructuring procedure initiated at the request of the debtor, thus enabling the debtor to restructure its business in order to avoid bankruptcy and mainatin sustainability. Furthermore, this law regulates the activities related to restructuring of debtor`s operations, including change of composition, conditions or structure of property and liabilities or any other part of capital structure of debtor`s operations, such as sale of property or operations and total sale of enterprise and any other necessary operational measures or combination of the respective elements.

Even prior to effectiveness of the Directive No. 2019/1023, France had adopted the Law on Business Growth and Transformation (Loi Pacte - Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises, JORF n°0119 du 23 mai 2019) and Article 196 thereof authorizes the Government to enforce the provisions of the EU Directive by the legislative act (ordonnance) within 24 months from the effectiveness of the Law. Act No. 2021-1193 of September 15, 2021 (Ordonnance n° 2021-1193 du 15 septembre 2021 portant modification du livre VI du code de commerce, JORF n°0216 du 16 septembre 2021) made some changes in the Book VI of the Trade Law related to operating difficulties of businesses. The subject Act became effective on October 1, 2021 and was to be applied only to forthcoming procedures. Preventive procedure introduced the possibility of conciliation, the initiation of which results in enforcement moratorium in relation to the debtor.

In 2020, Greece enacted the Law No. 4738/2020 on Debt Settlement and Second-Chance Arrangement (Law 4738/2020 (Official Government Gazette A' 207/27.10.2020) «Debt Settlement and Second Chance

Provision», aiming to address for the first time holistically the insolvency issues of natural and legal persons and incorporate the provisions of the Directive (EU) 2019/1023). By this Law, Greece provided early warning mechanisms, out of court settlement procedure, pre–bankruptcy business sanation procedure, and initiated more flexibile approach to the bankruptcy procedure and automatic debt discharge in relation to the debtor, upon expiry of the legally set date.

Homologation Private Agreement in Bankruptcy Prevention Act (WHOA) (Wet van 7 oktober 2020 tot wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot homologatie van een onderhands akkoord (Wet homologatie onderhands akkoord), Staatsblad 2020, 414) entered into force on January 1, 2021 in the Netherlands. Due to similarities with the British Scheme of Arrangement, the professional circles refer to it as the Dutch Scheme. By this Act, the efficient mechanism of restructuring was for the first time introduced in the Netherlands, out of the formal bankruptcy procedure. Dutch Scheme is based on the elements of agreement conclusion procedure, similar to the solution stated in Chapter 11 of the USA Bankruptcy Act. This Act stipulates that the company itself may offer the agreement for restructuring its debts out of bankruptcy procedure or for liquidation of the company out of bankruptcy procedure in private (not public) or public procedure of concluding the agreement. Only the process of public conclusion shall be included in Annex A of the EU Act No. 848/2015 on the bankruptcy procedure. Public agreements shall be registered in relevant public registries, while private ones shall not be registered accordingly. The company itself decides which procedure shall have most chances for success. The first agreement was confirmed in February 2021.

As concerns Spain, the Bankruptcy Law from 2003 was replaced by the consolidated text of September 1, 2020 and, presently, it has been the primary law regulating the bankruptcy procedure in Spain (*Ley 38/2011, de 10 de octubre,de reforma de la Ley 22/2003, de 9 de julio, Concursal, BOE-A-2011-15938*). In addition, although for temporary purposes, the Royal Decree-law 16/2020 of April 28, 2020 on procedural and organizational measures to address COVID-19 under the administration of justice shall be applied to all bankruptcy and restructuring procedures in the several forthcoming years (*Real Decreto-ley 16/2020, de 28 de*

abril, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia,BOE-A-2020-4705). During the pre-bankruptcy procedure, debtors and creditors may reach the agreement on refinancing, court (homologized) restructuring schedule or the agreement on out of court payment (intermediation). Although the court is initially included, formal institutional participation during the negotiation process is quite limited, with the exception of negotiations on out of court payment agreement concluded with the assistance of the bankruptcy intermediator (*mediador concursal*) (*Art. 5 bis. Ley 38/2011, de 10 de octubre,de reforma de la Ley 22/2003, de 9 de julio, Concursal,BOE-A-2011-15938*). On August 3, 2021, the Council of Ministers approved the proposal of the Law on Bankruptcy Legislation Compliance with the EU Directive 2019/1023 on Frameworks for Preventive Restructuring, and, therefore, it is expected from Spain to introduce new procedures, in the near future.

In case of Hungary, firstly, the Government Decree 345/2021 (VI 18) was enacted (Avállalkozásokreorganizációjáról, valamintacsődeljárásról ésafelszámolásieljárásrólszóló 1991. évi XLIX. törvény, továbbá acégnyilvánosságról, abíróságicégeljárásról ésavégelszámolásrólszóló 2006. éviV. törvényeltérő alkalmazásárólszóló 345/2021. (VI. 18.) Korm. Rendelet). By the said Act, the institute of reorganization as a type of bankruptcy procedure was introduced into the Hungarian legislation. It is important to note that, according to the said provisions, the unsuccessful reorganization does not, automatically, lead to bankruptcy. Besides, two types of reorganization were introduced: confidential and public. Subsequently, the Parliament adopted the LXIV Law from 2021 on restructuring and changes and amendments of certain acts in order to harmonize the law, which was to become effective on July 1, 2022, thus introducing the preventive restructuring procedure in the legislation (2021. évi LXIV. törvény a szerkezetátalakításról és egyes törvények jogharmonizációs célú módosításáról, Magyar Közlöny; Number: 102).

It should be noted that some states already had preventive instruments similar to those provided by the Directive No. 1023/2019 on Preventive Restructuring Frameworks in their legislations, such as Ireland, Italy, Latvia, Poland and Portugal.

5. SPECIFICITY OF REFORMS IN CERTAIN EU MEMBER STATES

Germany is the most efficient country in respect of implementation of Directive no. 2019/1023 on Preventive Resytructuring Frameworks and introduction of new instruments. Therefore, this chapter deals with the procedures that have been, during the latest bankruptcy legislation reform, introduced into the German legislation. However, due to the fact that the procedure for bankruptcy prevention has been prevailing in France for almost 15 years, this chapter shall address the issue of incorporation of the provisions of the Directive 2019/1023 on Frameworks for Preventive Restructuring into the French legislation.

German legislator decided to enact a completely new law and, therefore, adopted a set of regulations named the Law on Further Development of Recovery and Bankruptcy Legislation (German abbreviation is *SanInsFoG*) (Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts vom 22. Dezember 2020 (BGBl. I S. 3256)), which became effective on January 1, 2021. Main regulation in this set of regulations is the Law on Stabilization and Restructuring of Enterprises (German abbreviation is StaRUG - Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen vom 22. Dezember 2020 (BGBl. I S. 3256)). This Law established a new legal institute, i.e., the restructuring procedure as bankruptcy prevention.

Main innovations introduced by the above Law are: 1) personal administration in the preventive procedure, 2) ¾ majority as per the volume of receivables obliging the opposing creditors in every class, as well as the possibilty for the court to incur the restructuring schedule to opposing classes, in cases when majority of classes supports the schedule, provided that, in such a way, the creditors are not unfavourably positioned, 3) possibilty of opening preventive procedure in the early stage and beyond formal bankruptcy procedure, when the occurrence of incapacity to pay threatens within 24 months, 4) introduction of moratorium to enforced execution in regard to the debtor`s property for the period of 3 to 4 months, with the possibility of extension of up to 8 months, at most, 5) debt to equity swap and other measures of the corporate law as a part of restructuring schedule, 6) restriction of clauses on contract termination for the reason of bankruptcy or financial position of the party (*ipso facto* clauses), 7) selection of either public or

confidential procedure, 8) set of entire restructuring company management duties in respect of creditors, and 9) exclusion of specific rights, in the restructuring schedule, to terminate the contract and possibillity of change in claiming the compensation for damages due to early contract termination. Moreover, at the level of actual competency, 24 courts of specific competence for restructuring were selected (Mailly M., Omar P., StaRUG: A model for Europe? p. 11).

Preventive procedure is initiated at the proposal of the debtor. Debtor may be any legal entity and natural person being subject of bankruptcy procedure (*insolvenzfähig*) (§30. Abs. 1. StaRUG). The debtor should submit to the court the said proposal together with the draft restructuring schedule and the receipt confirming that the company is in threat of insolvency. The condition for implementing the restructuring procedure is that the actual insolvency or excess indeptedness have not, yet, incurred. However, it is necessary that the actual danger of insolvency exists, as well as the fact that it is more than possible that inability to pay shall occur in the forthcoming 24 months, unless adequate restructuring measures are implemented. The indication that the obligation shall be due in 24 months is not sufficient to justify the existence of actual reason. Moreover, the debtor may choose a wide range of instruments for successful implementation of restructuring schedule (Vallender, Das Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz, Neue Sanierungsoptionen für Unternehmen in der Krise, 2021, S. 202). Some instruments may be implemented by the debtor itself, while the others require the court confirmation. Thus, the moratorium on the enforced execution or imposing the schedule to opposing creditors requires the court confirmation (§ 49 ff. StaRUG).

In respect of the contents of the preventive restructuring schedule, the legislator offered to the debtor a free selection of economic measures, and therefore, the debtor itself decides on the measures to be included in the schedule (Madaus, Auf in die Moderne! Das SanInsFOG macht den Restrukturierungsstandort Deutschland, 2021). Thus, the only obligation of the debtor is to include financial creditors in the schedule. Preventive restructuring schedule is binding for all included creditors, as well as for creditors with separate satisfaction rights, for creditors with preference payment classes and capital owners (Pogoda, Thole, The new German "Stabilisation and Restructuring Framework for Businesses", 2021). If the restructuring schedule implies the interference with the creditors`

rights provided by the company`s group member, the schedule must also incorporate the position of the related company granting the provision of rights as well as the effects of the schedule to the respective company (§ 2. Ab. 4. StaRUG).

The issue of appointing the trustee to the preventive restructuring is of particular significance. Namely, the law introduces the possibility for the debtor to decide, on its own, whether to require the appointment of trustee or not, except in cases when the said appointment is mandatory. The role of the trustee to restructuring is: 1) to coordinate the procedure, 2) to supervise the administration of the debtor, 3) to inform the court on the course of the procedure, and 4) to perform certain professional powers entrusted to it by the court. Prior to apponting the trustee to restructuring, the court hears the debtor, capital owners and creditors. In some cases, it is mandatory for the court to appoint the trustee to restructuring at the debtor`s request and, only when such proposal is not binding, creditors may propose the trustee to restructuring. Additionally, the Law on Stabilization and Restructuring of Enterprises introduces the recovery mediation procedure. Namely, at the request of the debtor, the court may appoint the competent person to be an intermediary in the preventive restructuring procedure.

The expenses of preventive restructuring procedure implementation shall be paid in accordance with the provisions of the restructuring schedule. Legally binding provisions of the schedule and measures for their implementation may not be disputed in future bankruptcy procedure. The same implies for the financing and security thereof, required within the schedule. Additionally, schedule financing or ``new money`` shall not have priority in the process of settlement in case of bankruptcy procedure.

The company`s – debtor`s (directors) management has specific duty to act in the manner to provide debtor`s restructuring process with due expertise and diligence and with the purpose to protect creditors` interests. Non-compliance with these newly established duties may represent grounds for claiming the responsibility of the respective company (Freitag, Grundfragen der Richtlinie über präventive Restrukturierungsrahmen und ihrer Umsetzung in das deutsche Recht, 2019, S. 544).

At the level of international private law, public preventive restructuring procedures are included into Annex A of the EU Regulation 848/2015 on Bankruptcy Procedures to be applied in cases of cross-border procedure. In case the debtor requires a confidential procedure, the same shall be applied out of the validity domanin of the stated EU Regulation.

Unlike German, French legislator approached to changes of the existing reasons for bankruptcy and to both legal prevention institutes and institutes for overcoming reasons for bankruptcy, as well. In that respect, the provisions of the warning procedures (procédure d'alerte) and reconciliation procedures (*procédure de conciliation*) were extended, while the saving procedure (*procédure de sauvegarde*) and accelerated saving procedure (*procédure de sauvegarde accélerée*) were adjusted, i.e., rearranged. However, we shall not present all, but only key innovations of the French Bankruptcy Law reforms.

As concerns the warning procedure, the reform provides the possibility of accelerated course of the procedure and recognition of signs of weaknesses in the company`s operations (Clouzard, Premier volet de la réforme du droit des entreprises en difficulté : l'ordonnance du 15 septembre 2021). French law also recognizes the preventive procedures that are open for every legal entity or natural person entered into trade and companies` register or artisan register (Art. 611-1.Code de commerce). In order to use the preventive instrument, the relevant entity or person has to document the existance of difficulties that affect the course of operations (*difficultés de nature à compromettre la continuité del'exploitation*), but that did not result in incapacity to pay. Upon receiving the proposal, the chairman of the competent commercial court may request, immediately upon scheduling the hearing of the debtor`s management, to be submitted with all documents clarifying economic and financial position of the debtor (Art. L. 611-2. Code de commerce). In addition, the auditor is authorized to inform the chairman of the competent court on the absence or insufficiency of the undertaken measures immediately upon notifying the debtor`s management thereof, and require to be heard (Nouvel article L. 611-2-2 du Code de commerce, venant pérenniser l'article 1 de l'ordonnance n° 2020-596 du 20 mai 2020).

Further, as concerns the reconciliation procedure, the Regulation No. 2021-1193 of September 15, 2021 limited the maximum duration of receivables due term as per their nature (Art. 2 del'Ordonnance n° 2020-

596 du 20 mai 2020). Namely, when the creditor invited to reconcile, during the conciliation procedure, presents the debtor to be in delay, sues the debtor or does not accept to stoppage of the claim of receivables during the reconciliation period within the term determned by the mediator, debtor may require from the chairman of the competent commercial court commencing the procedure to, based on provisions of Art. 1343-5 of the Civil Code, rearrange the manner of payment of due amounts within two years. Moreover, the court may postpone or rearrange the manner of settlement of undue receivables within the term of the reconciliation procedure (Art. L. 611-7 Code de commerce). Possible failure of reconciliation or termination of the agreement on reconciliation shall not have effect on such settlement rearrangement (Art. L. 611-10-4 Code de commerce).

As regards bankruptcy procedure, French legislator, firstly, adjusted the existing saving procedure (*procédure de sauvegarde*) to the provisions of Directive 2019/1023 on Preventive Restructuring Frameworks. In that respect, the timeframe for saving plan (reorganization) adoption was shortened and management of the company is encouraged to require the court ban in the early stage of crisis. Prevailing review timeframe of 18 months is shortened to 12 months, i.e., 6 months with the possibility of extension for another 6 months (Art. L. 621-3 Code de commerce). In respect of debtor`s obligations comprised by the plan, the same may be set on the basis of bookkeeping or auditing reports before finalization of the procedure for determining the receivables.

Regulation No. 2021-1193 of September 15, 2021, rearranges the procedure of saving acceleration. New provisions combined the procedure of accelerated saving (*procédure de sauvegarde accélerée*) and the procedure of accelerated financial saving (*procédure de sauvegarde financière accélerée*) into one procedure, which was abolished. In such a way, the procedure became more simplified and available to wider range of entities (Lemercier, Réforme du droit des entreprises en difficulté : publication du décret d'application, 2021). The procedure commences at the proposal of the debtor in the mediation process, who submits draft schedule on operations sustainability which should obtain broad consent of the interested parties in the saving procedure, thus enabling its adoption. If the schedule is not adopted, the court dismisses the procedure without commencing the saving procedure, reorganization or

bankruptcy procedure. Additionally, prevailing conditions for commencing the accelerated saving procedure are cancelled except for the required verified auditors` reports or report of the licenced bookkeeper (Art. L. 628-1 Code de commerce). Accelerated saving plan may be adopted within 2 months, with the one possibility of extension. Effects of the plan are limited only to the respective parties. List of creditors` receivables who participated in the reconciliation procedure shall be made by the debtor itself. The debtor has to list the receivables that have settlement priority, as well as security for receivables, and the agreements on less favourable settlement (Art. L. 628-7 du Code de commerce).

As regards the bankruptcy reorganization procedure, minor changes were made in respect of rights to submit the proposal for extension of the term for review and the proposal for settlement of debtor`s liabilities prior to finalization of the receivables determination procedure. Finally, in the bankruptcy procedure, the creditors` receivables settlement sequence is determined to be in 15 payment lines together with receivables with the priority in settlement (Art. L. 643-8 du Code de commerce).

6. CONCLUSION

EU Directive No. 1023/2019 on Preventive Restructuring Frameworks represents a significant innovation for the member states' legislations, and for the states aiming to become members, as well. The point is in the powerful incentive for economic entities facing difficulties in efficiently and timely commencing the process of overcoming the same and in preventing the bankruptcy. First of all, with the aim to incorporate the provisions of the above Directive in the national legislations through reforms, the focus of the bankruptcy law is directed to maintaining the debtor`s personal administration, to establishing preventive procedures with the participation of the court, to moratorium on enforcements during the procedure and preparation of preventive restructuring schedule. Furthermore, the establishment of specific duty of the company`s management in relation to creditors during the restructuring process is an important issue. Finally, the said Directive is an incentive for implementation of mediation in bankruptcy prevention, whereas this institute gained a new dimension. Besides, implementation of new

solutions shall bring to compliance of the part of material bankruptcy law at the EU member states level. However, the set term of two years provided for compliance of national regulations was too ambitious. A large number of states required from the EU Commission to extend the term for compliance of their national legislations with the provisions of the Directive No. 1023/2019 on Preventive Restructuring Frameworks. The reason for that lies in the differences in bankruptcy law constitutions among various states, in complexity of new instruments, and in disturbances incurred as the consequence of COVID-19 pandemic, as well. EU member states, like Germany and France, each in their own way, adjusted their national regulations and they implement new or complied preventive restructruring legal institutes. According to adopted solutions, a specific restructuring or reorganization legislation is established, which, in addition to the prevailing bankruptcy law, represents a broader field, legislation aimed for economic entities facing difficulties. On the part of debtor, new legal framework represents a partial alleviation of the economic situation, incurred both due to business challenges in the last decades and to unforeseeable difficulties caused by the still present pandemic. However, on the part of creditors and particularly professional organizations of administrative receivers, new regulations appear to be unnecessary and excessive. The arrangements with debtors are construed as encouragements to avoid liabilities and to evade creditors. Implementation of Directive No. 1023/2019 on Preventive Restructuring Frameworks has demonstrated certain results in the European Union member states. Both small economic entities and large companies tend to implement preventive instruments.

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PREVENCIJA KRIZE KAO ŠANSA ZA OPORAVAK POSLOVANJA U EVROPSKOJ UNIJI

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Sažetak: *Stupanjem na snagu Direktive br. 2019/1023 o okvirima za preventivno restrukturiranje uvedeni su jasni i transparentni pravni instrumenti za prevenciju kriza u poslovanju privrednih subjekata na celom jedinstvenom tržištu Evropske unije. Oni uključuju sisteme za rano otkrivanje okolnosti koje mogu dovesti do insolventnosti i podstiču na reakciju bez odlaganja. Ključni cilj je da se finansijske teškoće dužnika prevaziđu u ranoj fazi, a kada je to moguće, spreči insolventnost i obezbedi održivost poslovanja. Uvođenjem novih instrumenata u nacionalno zakonodavstvo stupa se u oblast koja se tradicionalno reguliše normama stečajnog prava, koje su uglavnom imperativnog karaktera. To je učinjeno definisanjem okolnosti koje prethode razlozima stečaja i davanjem instrumenata zaštite dužnika od izvršenja. Novi instrumenti su, s druge strane, konsensualne pravne prirode, odnosno uređeni su dispozitivnim normama. Autori ovog rada analiziraju preventivne instrumente, način njihovog uvođenja u zakonodavstvo, kao i posebnosti novog pravnog režima u značajnim privredama u EU, primenom normativnog i uporednopravnog metoda.*

U ovom članku je data analiza primene novih propisa koji su na snazi dve godine i rezultati njihove primene.

Ključne reči: *preventivno restrukturiranje, Evropska unija, oporavak poslovanja.*