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European Directive 2019/1023

A comparative analysis of the transposition in four EU member states and the state of alignment in four western Balkan candidate countries

Italy, Bulgaria, Portugal and Spain

Albania, Bosnia and Herzegovina, North Macedonia, Serbia

Directive 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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1. Analysis of the Directive 2019/1023

1.1 Overview of the European Directive 2019/1023

The issuance of "*Directive 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)*" occurs in a context where there is a profound need for harmonization of the various regulations of individual Member States regarding business crises, in order to improve the operation of businesses and economic relations between States. Well before the Directive, the legislature's intent to move in this direction was already evident, through the introduction of a series of measures such as:

- Regulation No. 1346/2000, consolidated into Regulation No. 848/2015, which updates and extends the regulation of cross-border insolvency proceedings, emphasizing the goal of overcoming business crises and introducing new rules to enhance cooperation among Member States;
- Recommendation 135 of March 12, 2014, aimed at ensuring that Member States introduce uniform insolvency regulations within one year.

With Directive 2019/1023, two basic concepts are reinforced:

1. **the timely detection of crises** and the consequent opportunity for early restructuring, i.e., before the state of insolvency occurs;
2. the idea of **offering the debtor a "second chance".** which is highly valued in Anglo-Saxon culture.

What Europe has requested to recover is the notion **that business risk cannot coincide with either criminal risk or the risk of almost indelible civil consequences**. If all entrepreneurs were successful, we would live in paradise on earth: doing business inherently represents a risk. Otherwise, the legislature would not have bothered to provide tools such as corporations and limited liability.

That said, the Directive allows Member States the freedom to introduce or not introduce rules that facilitate business continuity by anticipating crises in a timely manner, while still allowing the option to remain within a traditional framework without adopting such experiments.

1.2 Main aspects and objectives

The generic objective is to "normalize" the situation of business difficulties, considering it a possible and physiological condition of economic activity. This involves providing suitable tools for timely detection and amicable resolution of such difficulties, reserving bankruptcy only for the most extreme cases. In fact, debtors and creditors are the most interested—and therefore the best positioned—to find a way out of the crisis, ideally avoiding insolvency.

The Directive pursues a series of specific objectives, particularly aiming to:

1. Ensure Access to Preventive Restructuring Frameworks:

   a. Provide financially distressed but viable businesses and entrepreneurs with access to effective preventive restructuring frameworks that allow them to preserve business continuity.
2. Enable Early Restructuring:
   a. Allow debtors to effectively restructure at an early stage, preventing insolvency and thereby avoiding the liquidation of viable businesses.
3. Prevent Job Losses and Preserve Knowledge:
   a. Prevent the loss of jobs and valuable knowledge and skills and maximize the total value for creditors compared to what they would receive in the event of liquidation of the company's assets.
4. Prevent the Accumulation of Non-Performing Loans:
   a. Prevent the accumulation of bad debts, which can have wide-reaching negative effects on the economy.
5. Intervene before Insolvency:
   a. Ensure intervention before companies are no longer able to repay loans, thus helping to reduce the risk of loan deterioration during unfavourable economic periods and mitigating the negative impact on the financial sector.

1.3 Innovative features

The European Directive has strong innovative potential. The innovative features can be summarized in six points:

1. Entrepreneurs' access to preventive restructuring frameworks and techniques at a very early stage of potential insolvency;
   a. The Directive establishes that entrepreneurs can access preventive restructuring procedures at a very early stage of financial difficulty, before it turns into an irreversible crisis. This timely access is crucial for effective intervention without waiting for the financial situation of the company to degenerate to the point of no return, allowing for the recovery of operational continuity.
2. The preventive restructuring is "free-form," meaning there is no pre-packaged model;
   a. The legislative framework does not impose a rigid or pre-packaged model for restructuring but allows for flexibility in choosing the measures to be adopted. This "free-form" restructuring enables entrepreneurs to tailor the process to the specific and unique needs of their business, promoting customized solutions that can be more effectively implemented compared to standardized models.
3. The restructuring procedure applies to an economically sound company experiencing financial difficulties that could, with some probability, turn into insolvency;
   a. The Directive applies exclusively to businesses that, despite financial difficulties, are considered economically viable. This means that preventive restructuring is not intended for companies already in a hopeless state of collapse but for those that have realistic possibilities of restructuring and returning to full operation.
4. The initiative is up to the entrepreneur;

   a. Unlike many national legislations where the insolvency procedure can be triggered by creditors, the new directive places the entrepreneur at the center of the initiative. This approach gives entrepreneurs the control and responsibility to initiate restructuring processes, encouraging them to take proactive measures before the situation becomes critical.
5. The procedure can be initiated when certain alarm indicators are exceeded (such as the Debt Service Coverage Ratio, DSCR);
   a. The procedure can be initiated based on "alarm indicators" that signal a deterioration in the financial situation which, if not managed, could lead to insolvency. These indicators are essential for early diagnosis and timely intervention, maximizing the chances of restructuring the company.
6. The Directive focuses solely on business continuity tools, such as the preventive restructuring plan (and not on liquidation tools);
   a. The Directive focuses on business continuity tools rather than liquidation tools. This is crucial for preserving the value of businesses and maintaining ongoing operations, which is often much more beneficial for creditors and the overall economy compared to asset liquidation.

Therefore, EU Directive 2019/1023 represents a significant step towards a more preventive and less punitive regulatory system, which prioritizes restructuring and business continuity over liquidation. This paradigm shift not only has the potential to save numerous businesses from closure but also to preserve important jobs and expertise embedded in the economic and social fabric across EU member states.

1.4 The benefits for Stakeholders

The new regulatory framework provides several benefits for several stakeholders. Firstly, the introduction of preventive restructuring frameworks gives entrepreneurs essential tools to identify and address financial difficulties early, thus avoiding worsening into insolvency. Early access to restructuring allows the entrepreneur to maintain control of the company, planning and implementing structural, operational, or financial changes that can restore the business's health and profitability. By acting promptly, the entrepreneur can renegotiate debts, optimize operations, and maintain the trust of suppliers and customers, ensuring operational continuity without significant interruptions, which is essential for the company's long-term survival.

Another key stakeholder is represented by creditors, who can include suppliers, financial institutions, or other entities with claims against the company. These parties benefit significantly from the preventive restructuring process. Instead of facing substantial losses in case of insolvency and company liquidation, where claims are often settled last and potentially paid in minimal amounts, restructuring allows for debt negotiation that can guarantee higher and quicker returns. This system not only protects the value of credits but also promotes stable and long-term business relationships, strengthening trust between parties and contributing to market stability.

Another essential stakeholder is the shareholders/investors. For shareholders and investors, preventive restructuring is a lifeline that can prevent the total loss of their investment value. In an insolvency context, investors often recover little or nothing; however, restructuring can mean that the company not only survives but potentially becomes stronger, preserving and possibly increasing the value of their investments. Business continuity ensures that investments retain their validity and growth potential, making the investment less risky and more stable.

Employees are also fundamental beneficiaries of this Directive, as they directly benefit from preventive restructuring through job preservation. Instead of facing massive layoffs typically accompanying company closure or liquidation, restructuring often preserves employment. Additionally, maintaining company operations allows employees to retain their jobs and the skills and professionalism developed over time, contributing to a more stable and productive working environment.

For banks and financial institutions, preventive restructuring means dealing with fewer non-performing loans, which can severely impact their balance sheets and market reputation. A company that continues to operate is more likely to repay loans, reducing risk for the bank and improving financial stability. This is particularly important during periods of economic instability, where a reduction in non-performing loans can make the difference between financial stability and crisis. Additionally, dealing with healthy companies contributes to greater solidity in the overall credit system.

The community benefits indirectly but significantly from business continuity. Keeping companies open supports the local and regional economy, preventing the domino effect of failures that can occur when a significant company ceases operations. Business continuity also promotes a stable economic environment, supports employment, and minimizes distortive effects on local communities.

Finally, the state and public administration benefit when companies avoid insolvency. An operating company is a source of tax revenue, essential for funding public infrastructure and social services. Moreover, by avoiding mass unemployment, the state saves on social costs such as unemployment benefits and other economic supports for affected workers.

From this framework, it emerges that preventive restructuring not only saves the company from potential closure but creates an ecosystem of tangible benefits for all involved stakeholders, strengthening the resilience and sustainability of the economic and social fabric at local and national levels.

2. Business crises: An overview of the literature

Business crises can greatly disrupt operations, leading to financial losses, harming reputations, and potentially endangering the existence of the organization. Hermann (1972) argues that a crisis is a "situation that incorporates the following three conditions: (a) a surprise (b) a threat to high-priority goals, and (c) a restricted amount of time available for response". It is essential to prevent such crises to ensure business continuity and resilience. Several studies have analysed the various strategies and practices that companies can use to avert crises, drawing from academic research and industry case studies.

Therefore, business crises are unexpected events or series of events that threaten the stability and functionality of an organization. They can be categorized into several types, including financial crises, operational crises, strategic crises, and reputational crises (Coombs, 2007). Understanding the nature and types of crises is the first step in developing effective prevention strategies.

Most contributions focus on the crisis management, emphasizing the importance of proactive planning, risk assessment, and preparedness to manage and mitigate the impacts of crises (Fink, 1986). Smith (2003) adds that no organization can have complete control over its business environment and, therefore, it is highly necessary to have continuity management (BCM) and crisis management capability. Johansen et al. (2012) conduct a large survey among Danish public and private organizations to analyze the dynamics of internal crisis management and communication and see how these companies or organizations perceive, plan, coordinate and implement internal crisis management and crisis communication activities before, during and after a crisis. Most large organizations claim to have a crisis or contingency plan, pointing out that large organizations are more crisis-prepared. During a crisis, the firm typically produces more low-quality information, and employees feel frustrated and insecure.

Booth (2015) examines the conventional approaches followed by many firms in the face of change and crisis. He cautions against the risks of theories that oversimplify the causes of crises and their potential solutions, neglecting the unique characteristics of each firm and its specific environment and proposes a dynamic new vision of crisis management where the role of leadership is key, as pointed out by Glamuzina and Lovrincevic (2013) as well. The survival of a firm through a crisis also depends on its level of innovation and the quality of its business strategies (Naidoo, 2010).

Other studies investigate the "Organizational Resilience Theory" and point out the capacity of organizations to adapt to and recover from unexpected disruptions through resilience and adaptability (Lengnick-Hall & Beck, 2005, Labaka et al., 2013).

The specific literature on firms' crisis prevention and detection analyses different aspects, pointing out to the complexity of understanding warning signals that might arise. While there is agreement on the need of considering crisis prevention as an essential part of a firm's management practices, there is no agreement on the optimal process to follow (Jaques, 2010). As far as the crisis prevention is concerned, some scholars investigate the key strategies that companies can implement to prevent business crises. Hubbart (2009) claims that regular risk assessments help identify potential threats and vulnerabilities. Effective risk management involves implementing measures to mitigate identified risks. Techniques such as SWOT analysis (Strengths, Weaknesses, Opportunities, Threats) and PEST analysis (Political, Economic, Social, Technological) should be used, independently of the firm size. Moreover, developing detailed crisis management plans that outline roles, responsibilities, and procedures is critical. These plans should be regularly updated and tested through simulations and drills to ensure effectiveness (Mitroff, 2001). Investing in organizational culture and resilience by fostering flexibility and continuous learning is another key aspect to reduce the risk of business crises. This includes investing in employee training, encouraging innovation, and motivation (Barry et al., 2022). Taneja et al. (2014) underline the relevance of decisions and actions of organizational leaders in preventing crises. They show that they are not limited to any organizational size or type and require decision makers to be ready to act fast when they occur.

Freeman (1984), through the “Stakeholder theory”, highlights the role of stakeholder engagement in identifying potential risks and developing collaborative strategies to prevent crises (Freeman, 1984). Effective Communication Transparent and timely communication with stakeholders, including employees, customers, and investors, can help manage perceptions and prevent the escalation of potential crises. Establishing communication protocols and media relations strategies is essential (Coombs, 2014).

Besides crises prevention, early detection of potential issues allows organizations to address them before they escalate into full-blown crises. This can be achieved through monitoring financial indicators, customer feedback, and market trends (Hale, Dulek, & Hale, 2005) and implementing early warning systems is crucial.

The computation and the monitoring of financial ratios can help business crisis prediction. In particular, financial ratios should investigate different aspects of companies’ performance and should include working capital/total asset, net income/total asset, retained earnings/total asset, equity value per share, EPS (earnings per share), operating earnings per share and tax rates (Lin et al., 2011). Svabova et al. (2018) propose a predictive model of firms’ financial distress and crisis based on liquidity, activity, solvency and profitability indicators. Chen at al. (2020) suggest a financial distress prediction model that includes not only traditional financial variables, but also several important corporate governance variables.

Preventing business crises requires a comprehensive approach that integrates risk assessment, crisis planning, effective communication, organizational resilience, and early warning systems. By leveraging theoretical frameworks and learning from practical case studies, companies can develop robust strategies to anticipate, manage, and mitigate potential crises, ensuring long-term stability and success.

3. The implementation of the Directive: the aspects investigated

In this study, four EU countries will be analyzed. These countries are Spain, Italy, Portugal, and Bulgaria. They have been selected as partners of the OITBC Project.

Through the conducted research, four aspects have been investigated to analyze the aforementioned countries. The aspects identified from the literature analysis are the following:

- **Changes in the regulatory framework in light of the Directive's transposition** - This metric evaluates the extent and nature of legislative changes introduced by individual Member States to align with the provisions of the Directive. Crucial in this context is assessing how the new Directive extends preventive restructuring beyond traditional insolvency contexts, introduces or modifies conditions under which businesses and entrepreneurs can access these frameworks, and adjusts procedural and transparency requirements to facilitate timely and effective restructuring.
- **New procedures introduced by the Directive** - The new regulations introduce preventive restructuring frameworks aimed at providing entrepreneurs with effective tools to avoid insolvency and safeguard business continuity. These frameworks enable financially distressed yet economically viable businesses to negotiate with creditors and restructure their debts through a well-defined process.
- **Early warning indicators** - Early warning indicators are specific signals that may indicate likely financial difficulties before they become critical. The Directive encourages Member States to develop mechanisms that may include economic, financial, and liquidity indicators.
- **The role of the court** - The role of the court is crucial in preventive restructuring procedures. This metric should assess the extent to which courts are involved in restructuring procedures, such as confirming restructuring plans or supervising the application of new regulations. It should also evaluate any new responsibilities assigned to courts by member states, such as overseeing early warning systems and approving restructuring plans.

Evaluating the transposition of the Directive through these metrics will provide a comprehensive overview of how various member states are implementing the required changes to enhance crisis management, with a particular focus on preventing insolvency and safeguarding the economic fabric.

3.1 The case of Spain

Spain transposed the European Directive about small and medium enterprises (SMEs) in crisis. Specifically, Spain transposed the Directive (EU) 2019/1023 on Preventive Restructuring Frameworks into the Spanish law via Law 16/2022. Additionally, Spain has taken steps to address the challenges faced by SMEs in response to crises, as outlined in the "Spanish Presidency of the EU" document, which proposes supporting SMEs as a fundamental role in Europe. Indeed, the Spanish Law 16/2022, which amends the recast of the Insolvency Law, was published on September 6, 2022. It entered into force 20 days after its publication in the Official Gazette of the Spanish State, on September 26, 2022. This law brings significant changes to Spanish insolvency and pre-insolvency scenarios, aiming to transpose Directive (EU) 2019/1023 of the European Parliament into Spanish legislation.

3.1.1 The change in the regulatory framework in light of the adoption of the Directive

The transposition of Directive (EU) 2019/1023 into the Spanish law has led to significant changes in the insolvency field, introducing major reforms such as the introduction of "Restructuring Plans" which allow for early restructuring measures to be adopted by debtors to prevent insolvency. This amendment aims to make the instrument more effective and increase the likelihood of successful restructuring. The new law also includes measures to streamline insolvency proceedings, reduce procedural terms, and enhance the procedure for the sale of production units.

The legislation on whistleblowing, for example, is also part of this regulatory update and requiring companies with more than 50 employees to establish internal reporting channels, extending protection to various individuals, and outlining penalties for non-compliance. The legislation aims to provide comprehensive protection for whistleblowers and ensure reporting mechanisms are in place across different sectors.

In summary, the transposition of Directive (EU) 2019/1023 in Spain has reformed insolvency procedures, introduced new restructuring mechanisms, and enhanced whistleblower protection through the implementation of relevant EU directives.

3.1.2 The new procedures introduced by the Directive

In the context of a business crisis, if an economic entity falls into the category of businesses that can be subjected to the bankruptcy procedure, there are different procedures to apply compared to those that cannot be subjected to bankruptcy proceedings. The new Spanish Law 16/2022, which transposes the EU Directive 2019/1023 on Preventive Restructuring Frameworks, introduces major reforms in the insolvency field. Some key procedures for businesses that can be subjected to bankruptcy include:

1. **Restructuring Plans**: Debtors can resort to Restructuring Plans at an early stage if insolvency is objectively foreseeable within the following two years. These plans are flexible and can include various restructuring measures affecting assets. Once confirmed by the Court, they may extend their effects to dissenting creditors, entire classes of creditors, or dissenting shareholders.
2. **Special Procedure**: This procedure allows for a three-month non-extendable negotiation period during which individual foreclosures are avoided. It offers options for a continuation plan or fast liquidation of the company in imminent or current insolvency situations.
3. **Insolvency Administrator**: If the appointment of an insolvency administrator is not requested, the debtor itself may carry out liquidation.
4. **Qualification Section**: The qualification section determines whether insolvency was guilty or fortuitous and is based on the veracity of information provided.
5. **Debt Exoneration**: The new law includes mechanisms for debt relief, allowing for exoneration of debts with or without liquidation of assets, provided the debtor acts in good faith.
6. **Early Warning Measures**: The law creates early warning tools like self-diagnosis systems and public counselling services for distressed companies to encourage proactive measures.
7. **Special Procedure for Micro-Companies**: A simplified procedure is designed specifically for micro-companies to resolve situations quickly.

These procedures aim to streamline insolvency proceedings, provide flexibility for debtors, and enhance the chances of successful restructuring or recovery for businesses facing financial distress.

Some key features of Restructuring Plans include:

- They can be utilized at an early stage when insolvency is objectively foreseeable within the following two years.
- They can affect all types of creditors, not just financial ones.
- Parties do not require legal representation in the process.
- Standardized electronic forms are preferred for submissions.
- Virtual hearings replace in-person ones for efficiency.
- Proactivity is emphasized, with specific measures or information needing explicit requests.
- The negotiation period is three months, non-extendable, with winding-up through electronic platforms.
- Once confirmed by the Court, the plan's effects may extend to dissenting creditors or shareholders.
- Creditors vote in classes formed according to specified criteria.
- Executory contracts can be terminated for restructuring purposes.
- Directors' duty to promote dissolution due to losses is suspended during restructuring.

Additionally, Law 16/2022 introduces early warning tools for debtors to proactively address financial difficulties. The law also amends the fresh start procedure to include a merit-based discharge system based on the good faith of the insolvent debtor.

3.1.3 Early warning indicators

Spain has established early warning tools as part of the transposition of the Directive (EU) 2019/1023 on Preventive Restructuring Frameworks into Spanish law via Law 16/2022. These tools aim to encourage proactive behavior by debtors. The Law includes self-diagnosis systems for companies to confidentially assess their financial situation and public, free, and confidential counseling services for distressed companies. These measures allow companies to determine if they are at risk of insolvency and seek assistance early on to prevent financial crises.

These measures are designed to facilitate early intervention and restructuring, enhancing the likelihood of successful outcomes for financially distressed businesses. The assertion that companies subject to bankruptcy in Spain can only rely on the "Insolvency Plan" tool under Law 16/2022 is not entirely accurate. Law 16/2022, which transposes Directive (EU) 2019/1023 on Preventive Restructuring Frameworks into Spanish law, introduces significant reforms in the insolvency field, including the introduction of "Restructuring Plans" rather than limiting the tools to an "Insolvency Plan".

The **Early Warning Mechanism** introduced in Law 16/2022 in Spain provides a set of economic and financial indicators to monitor the state of corporate crisis. These indicators aim to encourage debtor proactivity and include tools such as self-diagnosis systems for companies to confidentially assess their situation and public counseling services for distressed companies. The law allows debtors to resort to Restructuring Plans at an early stage if it is objectively foreseeable that without measures, the debtor will not be able to meet obligations within the following two years. Some economic and financial indicators used in this mechanism may include liquidity ratios, profitability ratios, leverage ratios, and solvency ratios, among others, to assess the financial health of a company and predict potential insolvency risks.

The Early Warning Mechanism in Law 16/2022 in Spain incorporates various economic and financial indicators to monitor the state of corporate crisis. While specific indicators may vary, common ones used globally for early warning systems include:

- Value of imports and exports
- Foreign exchange reserves
- Industrial production
- Liquidity ratios
- Profitability ratios
- Leverage ratios
- Solvency ratios.

These indicators help assess the financial health of a company, predict potential insolvency risks, and prompt proactive measures to address financial distress.

3.1.4 The role of the court

In the preventive restructuring process under Spanish Law 16/2022 transposing Directive (EU) 2019/1023, the judicial authority intervenes at the stage of redress settlements. The court approves redress settlements unless they are deemed unduly prejudicial to the rights and interests of the parties involved. Approved settlements become binding on the parties, including consumers who have not refused to be bound by them. The court's involvement ensures fairness and compliance with legal standards in the restructuring process.

Furthermore, in the preventive restructuring process in Spain under Law 16/2022, court approval (homologación) is required for various aspects, including:

- Entitlement to claw-back protection for new money, interim financing, or any transaction under the plan.
- Cram-down of creditors or classes of creditors.
- Cram-up of shareholders.
- Termination of existing contracts in the interest of the restructuring.

The party seeking judicial approval can request that any opposition from other parties be filed and analyzed before approval to prevent subsequent appeals. Dissenting creditors can challenge approval based on grounds such as the borrower not being in actual insolvency.

3.2 The case of Italy

Italy transposed Directive (EU) 2019/1023 through the Legislative Decree No. 147 of 23 September 2022.

This legislation, published in the Official Gazette Serie Generale No. 227 on 26 September 2022 and effective from 27 October 2022, aims to introduce measures for preventive restructuring, debt relief, and insolvency prevention, as well as to enhance the effectiveness of insolvency procedures. With these actions, Italy has pursued the directive's objectives of facilitating the continuity of economically viable enterprises and providing a second chance to entrepreneurs. This legislation represents a fundamental step towards harmonizing European insolvency regulations, thereby reducing barriers to free trade and improving the financial stability of businesses.

3.2.1 The change in the regulatory framework in light of the adoption of the Directive

The Code of Crisis and Insolvency in its current text has been significantly innovated by Legislative Decree No. 83 of 2022, which incorporates the principles outlined in Directive No. 2019/1023 (hereinafter "Insolvency Directive"). The multitude of measures, agreements, and tools now available to debtors for overcoming business crises and insolvency fit within the general framework of the objectives set forth by the Insolvency Directive. The legislature does not provide a specific definition of business continuity, nor does it give indications regarding its verification. The concept of business continuity, indeed, has an economic-business matrix, identifiable in the enterprise's ability to operate under normal conditions, over a time frame of at least one fiscal year. Normal functioning refers to the enterprise's capacity to generate, through the conduct of its characteristic activities (corporate purpose), economic-financial flows adequate to complete its production cycle and regularly meet its business obligations. In the current Code of Crisis and Insolvency, the principles have undergone significant changes, where the preservation of the enterprise is placed on the same level as creditor satisfaction; previously, bankruptcy law prioritized creditor satisfaction over the continuation of the enterprise. From a definitional standpoint, Article 84, paragraph 2, of the Code of Crisis and Insolvency distinguishes business continuity as direct or indirect. Business continuity can indeed be direct, with the entrepreneur continuing the business activity following the submission of a composition proposal, or indirect, if the plan provides for the management of the operating enterprise or the resumption of activity by a party other than the debtor through transfer, usufruct, transfer of the company to one or more companies, including those newly established, or by lease, even stipulated beforehand, provided that it supports the filing of the application, or by any other title.

3.2.2 The new procedures introduced by the Directive

The Crisis Code allocates to Title IV the discipline of Crisis Regulation Instruments, ranging from Articles 56 to 120; these comprise a defined set of tools primarily aimed at safeguarding business continuity following the overcoming of a "reversible" business crisis or insolvency.

- Specifically, reference is made to a plurality of institutions, with the main ones being:
- Attested Recovery Plan under Article 56 of the Crisis and Insolvency Code (CCII);
- Debt Restructuring Agreements for Continuity under Articles 57-61 CCII;
- Restructuring Plan subject to approval under Articles 64 bis and 64 quater CCII.

Regarding crisis regulation instruments, the legislature has intervened to precisely specify the contents of the Plan, as seen in Article 56 CCII, paragraph 2, concerning Agreements implementing Attested Recovery Plans, referenced by Article 57 (ADR). It stipulates that the document must indicate:

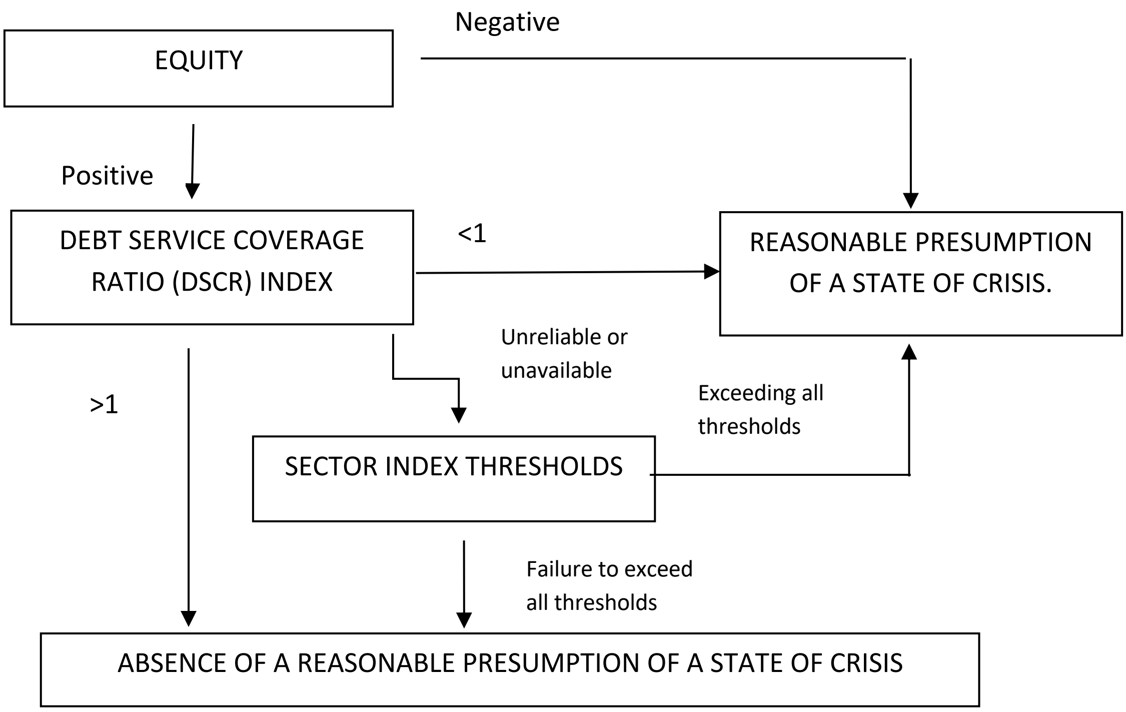
- The economic, financial, and asset situation of the enterprise
- The main causes of the crisis
- Intervention strategies and the necessary timeframes to restore financial stability
- Creditors and the number of credits proposed for renegotiation, including the status of negotiations, as well as the list of non-associated creditors, detailing the resources allocated for their full satisfaction by the due date
- New financial contributions
- Action timelines to verify their implementation, along with tools to adopt in case of deviation between objectives and current situation

- The industrial plan and its financial implications

The Plan must be attested by a professional possessing the independence requirements stipulated by the legal system.

3.2.3 Early warning indicators

The Italian legislation has defined a system of warning indicators which can be summarized as follows:



The prospectus shows that initially the evaluation starts with the assessment of the net worth. If the company's net worth is negative, a reasonable presumption of a crisis state can be inferred directly. Conversely, if the net worth is positive, the next step involves calculating the "debt service coverage ratio" (DSCR).

The formula for calculating this indicator involves placing expected cash flows in the numerator and debt service obligations in the denominator. Here are the interpretations based on the DSCR value:

- If DSCR > 1: The operating cash flow generated exceeds the financial obligations to service the debt. This signals that the company is financially healthy and able to meet its financial obligations.
- If DSCR = 1: The operating cash flow generated is fully absorbed by the financial obligations to service the debt. This indicates that the company has no additional resources for investments.
- If DSCR < 1: The operating cash flow is less than the financial obligations to service the debt. This situation indicates some financial strain with potential difficulties in debt repayment.

In cases where DSCR > 1, there is therefore no reasonable presumption of a crisis state. Conversely, a DSCR < 1 suggests a reasonable presumption of a crisis state.

- If the DSCR is not reliable or unavailable for some companies, sector-specific indices need to be analyzed. The following sector-specific indices are reported:
- Interest and other financial charges sustainability ratio: interest and other financial charges / net revenues. The threshold value for this index ranges between 1.5% and 3.8%.
- Equity adequacy ratio: net worth / total debts. The threshold value for this index ranges between 2.3% and 9.4%.
- Return on net asset index: cash flow / total assets. The threshold value for this index ranges between 0.3% and 1.9%.
- Liquidity index: current assets / current liabilities. The threshold value for this index ranges between 69.8% and 108.0%.
- Social security and tax debt index: tax and social security debts within and beyond the financial year / total assets. The threshold value for this index ranges between 2.9% and 14.6%.

If all parameters of these indices are negative, there is a reasonable presumption of a crisis state. Conversely, if not, a reasonable crisis state for the company is not presumed.

3.2.4 The role of the court

Approval by the court is required only for:

- Debt restructuring agreements in continuity according to Articles 57-61 of the Italian Code of Crisis and Insolvency (CCII).
- Restructuring plans subject to court approval under Articles 64 bis and 64 quater of the Italian Code of Crisis and Insolvency (CCII).

For the certified recovery plan, however, the attestation of an independent professional is sufficient.

3.3 The case of Portugal

Portugal effectively transposed Directive (EU) 2019/1023, a significant milestone in the harmonization of restructuring and insolvency laws with European Union standards. The transposition was implemented through Law No. 9/2022, promulgated on January 11, 2022, and published in the Official Gazette.

This legislation revolutionized the Portuguese legal framework, aligning it with the guidelines of the European Union Directive. Law No. 9/2022 establishes crucial measures to support and streamline company restructuring processes and payment agreements. Essentially, this law transposes into the Portuguese legal system Directive (EU) 2019/1023 of the European Parliament and the Council, dated June 20, 2019, which focuses on preventive restructuring regimes, debt relief and measures to increase efficiency of restructuring, insolvency and debt discharge processes. Additionally, the law modifies the Insolvency and Business Recovery Code, the Commercial Companies Code, the Commercial Registration Code, and related legislation, providing a more modern and efficient approach to dealing with insolvency and business restructuring situations.

Therefore, Law No. 9/2022 represents a significant advance in Portuguese law, reflecting Portugal's commitment to adhering to European Union regulatory standards and improving its legal system in the context of modern business needs.

3.3.1 The change in the regulatory framework in light of the adoption of the Directive

The transposition of EU Directive 1023/2019 has had a significant impact on Portuguese national regulation, particularly in relation to specific obligations within companies to monitor business continuity. Some of the changes and impacts include:

Creation of the Early Warning Mechanism (MAP): Implemented by Decree-Law No. 47/2019, the IAPMEI MAP aims to alert entrepreneurs in a timely manner to the predictable situation of insolvency, thus promoting proactive monitoring of business continuity.

Changes to the CIRE: The Directive brought significant changes to the Insolvency and Business Recovery Code (CIRE), which were implemented in April 2022. These changes include 100 concepts and 35 articles that aim to improve the efficiency of insolvency and restructuring processes.

Law 9/2022: This law, which amends the CIRE and some related legislation, was one of the main ways of transposing the Directive into Portuguese law, reflected in the monitoring and management practices of insolvency risks in companies.

These measures emphasize the importance of a proactive approach in managing insolvency risks and sustaining the continuity of business operations in Portugal.

3.3.2 The new procedures introduced by the Directive

Portuguese national legislation, after the transposition of EU Directive 2019/1023, focuses on establishing a framework for the preventive restructuring and recovery of companies in financial difficulties. This framework aims to avoid insolvency, allowing companies to continue their operations in a viable manner. Main points covered by Portuguese legislation on the rehabilitation process:

Preventive Restructuring: The legislation allows companies in difficulty to initiate a preventive restructuring process. This process aims to ensure the continuity of the company's operations, maintaining total or partial control of its assets and the current management of its activity.

Suspension of Enforcement Measures: During the restructuring process, a suspension of enforcement measures against the company's assets may be granted. This suspension can be applied generally to all creditors or limited to certain creditors, and has an initial duration limited to four months, and can be extended for a maximum of 12 months.

Restructuring Plans: Legislation requires that restructuring plans include detailed information about the company's economic situation, the affected parties, the conditions of the plan, and the prospects for avoiding insolvency and ensuring the company's viability. Member States may require that the justification for the plan is validated by an external expert or restructuring professional.

Protection of Honest Businesspeople: The Directive and its transposition aim to protect honest businesspeople, facilitating access to restructuring tools that can save viable companies, preserving jobs and know-how. The legislation emphasizes the importance of making restructuring measures available only to entrepreneurs who act honestly.

Involvement of Creditors and Other Parties: Portuguese legislation ensures that creditors and other interested parties have the opportunity to be involved in the restructuring process, including the right to vote on the adoption of restructuring plans. Specific conditions are established under which creditors may be excluded from voting rights or their views considered in the restructuring process.

These measures reflect Portugal's effort to align its legislation with European standards, aiming to improve the recovery and viability of companies, encouraging restructuring as an alternative to insolvency.

3.3.3 Early warning indicators

The Early Warning Mechanism (EWM) as part of the Capitalizar Program, in fact provides a set of economic and financial indicators aimed at monitoring the state of the business crisis. These indicators are compiled from the Central Balance Sheet of the Bank of Portugal, based on data from the Simplified Business Information (IES) and analyzed by IAPMEI. The objective of EWM is to offer a differentiated approach to more effective business restructuring processes, going beyond the Early Warning already existing.

The economic and financial indicators provided by the Early Warning Mechanism include:

- EBITDA/Business Volume (VN): This indicator reflects the generated EBITDA margin, representing the company's ability to generate profits before interest, taxes, depreciation and amortization, in relation to its business volume.
- Financial Charges/EBITDA: Measures the ability to absorb financial charges by the EBITDA generated, indicating the proportion of operating profits used to cover financial charges.
- General Liquidity: Calculated as Current Assets / Current Liabilities, this indicator measures the company's ability to meet its short-term obligations with its short-term assets.
- Financing obtained/EBITDA: Indicates the level of coverage of the financing contracted by the company by the EBITDA generated, reflecting the relationship between the financing obtained and the generation of EBITDA.

- Financial Autonomy: Represented by the Equity / Assets ratio, it defines the level of financing of the company's assets by its own capital, measuring external financial dependence.
- Financial Leverage: Calculated as Financing obtained / (Equity + Financing obtained), this indicator measures the proportion of external financing in the company's total financial resources.
- Additionally, the MAP includes an indicator that measures the company's compliance with the provisions of article 35 of the Commercial Companies Code, expressed by the ratio of Equity / Paid-in Capital (Share), which may be associated with the generation/destruction of value for the company.

These indicators are aimed at micro, small and medium-sized companies (SMEs) and small-medium capitalization companies (SMC) based in Portugal, subject to the presentation of Annex A within the scope of the IES and are fundamental for a better perception of the economic situation. -financial, balance trend and company performance.

3.3.4 The role of the court

In Portugal, the intervention of the judicial authority, namely the judge, in the preventive restructuring process occurs at the stage of approval of the recovery plan or payment agreement. The role of the judge is essential for the approval or rejection of these agreements, as described below:

- Approval of the Recovery Plan: After the unanimous vote of a recovery plan by creditors, the plan is immediately sent to the judicial process for approval or rejection by the judge. This plan must be accompanied by documentation proving its approval, which is certified by the provisional judicial administrator. The judge then evaluates the plan and decides whether to approve it or refuse it.
- Approval of Payment Agreement: Likewise, if negotiations lead to the unanimous approval of a payment agreement by all creditors, this agreement is also submitted to the judge for approval or refusal. The agreement must be signed by all parties involved and is accompanied by documentation proving its approval, also attested by the provisional judicial administrator. If approved by the judge, the payment agreement takes effect immediately.

Thus, in Portugal, the judicial authority intervenes in the final phase of the preventive restructuring process, playing a decisive role in validating and implementing the agreements reached between the parties involved.

Analysis of the documents reveals that the judicial authority plays a crucial role in various stages of restructuring and insolvency processes in Portugal. This involvement goes beyond the mere approval of the Recovery Plan, extending to several phases and legal instruments. For example, according to the e-book on the Recovery and Resilience Plan, authorities may refuse to confirm a restructuring plan if it does not present reasonable prospects of avoiding the debtor's insolvency or guaranteeing the viability of the company, evidencing a judgment of merit on the potential of the plan. Furthermore, the CIRE establishes that the judge may outright reject the request for declaration of insolvency under certain conditions, which underlines the judicial authority in the initial phase of the insolvency process. Finally, Law No. 9/2022 reflects judicial intervention in the appointment of provisional judicial administrators and in the decision on the approval of recovery plans, reinforcing the importance of judicial assessment in the restructuring and recovery of companies.

3.4 The case of Bulgaria

Bulgaria transposed Directive (EU) 2019/1023 only recently by means of an amendment to the existing restructuring provisions stipulated in the Bulgarian Commercial Act. In particular, the Directive was transposed through the adoption of the Law for Amendment and Supplement of the Commercial Act, promulgated on 1 August 2023 in the Official Journal (OJ, issue 66 / 01.08.2023)1.

This transposition was further supported through Ordinance No. 9 of October 30th, 2023, on the terms and conditions for the provision by the High Judicial Council of the information under Art. 24, paragraph 2 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings2 as well as Ordinance on early warning tools and access to information for enterprises facing insolvency3, dated December 12th, 2023.

The legislative amendments to the Commercial Act and the related regulations and by-laws, intended to secure the transposition and the fulfillment of the requirements of Directive (EU) 2019/1023, provided for:

- identification and establishment of early warning tools;
- facilitation of the initiating of restructuring / stabilization proceedings to secure debt relief for entrepreneurs;
- possibility for electronic exchange of information and documents in insolvency, restructuring and debt relief proceedings.

3.4.1 The change in the regulatory framework in light of the adoption of the Directive

To be considered insolvent, an economic entity should be unable to meet its financial obligations related to business transactions or meet its public obligations to the state or municipalities related to its commercial activity, or fulfil its obligations under contractual agreements, or fulfil its obligation to pay remuneration to at least one-third of its employees, which has not been discharged for more than two months (Art. 608).

There is a legal presumption of insolvency if the economic entity has not published in the Commercial Register its annual financial statements for the past three years or has ceased to make payments, or the claim of a creditor who has filed for insolvency has been outstanding for more than six months.

An economic entity can also be insolvent if it can pay only some of its debts and such difficulty is not temporary in nature. A company is considered over-indebted if its assets are insufficient to cover its financial obligations.

The debtor’s legal representatives are obliged to file an application in writing for the initiation of insolvency proceedings within 30 days after the date on which the company became insolvent or over-indebted (Art. 626). The application may be filed by the debtor, its successor, management body or a general partner. The proxy is obliged to notify the debtor of the insolvency / over-indebtedness within 7 days of its occurrence.

In case the above-listed representatives fail to file the application for the initiation of insolvency proceedings, the responsible persons are jointly liable to the creditors for the damages caused by delayed filing.

As of July 2017, there has been a special regime in Bulgaria for pre-insolvency restructuring intended for corporate entities facing "likelihood of insolvency", but not actually insolvent. This pre-insolvency restructuring regime, also called "stabilization", is aimed at securing the restructuring and preservation of such entities.

Unlike the insolvency proceedings, normally initiated by the creditor, “stabilization” proceedings could only be initiated by the company itself. The “restructuring” proceedings are intended to reach an agreement between the company and its creditors on the settlement of the company’s debt, in order to avoid the initiation of insolvency proceedings. Thus, viable companies facing financial difficulties have the chance to restructure their debt at an early stage and preserve their business continuity.

The Law for Amendment and Supplement of the Commercial Act introduced some significant novelties. One of the major amendments was related to the criterion "likelihood of insolvency" (Art. 761, para 1-3) considered a prerequisite for the restructuring application.

Under the former regime, the debtor's expected inability to make payments was based on their maturities over the following six months. However, this six-month threshold proved to be too short, hence the applications for pre-insolvency restructuring / stabilization proceedings were usually submitted too late, which was the reason why courts used to regularly find actual insolvency instead of "likelihood of insolvency". Now this period has been extended to 12 months.

Another significant amendment is the express obligation of the debtor's management to take steps towards restructuring / stabilization should there be "likelihood of insolvency" (Art. 620a). Such restructuring may include modifying the capital composition, conditions and structure of assets and liabilities, changing the bodies of management, and other appropriate measures. (Commercial Act, Art. 761, para 1 and 2).

The management bodies are well advised to have an action plan in place in order to identify in a timely manner the occurrence of "likelihood of insolvency" and to take the necessary restructuring / stabilization steps.

3.4.2 The new procedures introduced by the Directive

The preventive restructuring tool adopted by Bulgaria is the stabilization procedure (based on the implementation of a court-approved stabilization plan). The stabilisation procedure can be applied for legal entities that are in immediate danger of insolvency but still have the possibility to continue their activity. This procedure is intended to prevent the initiation of insolvency proceedings by enabling the debtor to reach an agreement with its creditors on the restructuring of the enterprise and the means of fulfilling the debtor’s obligations, thereby protecting jobs and securing the continuation of the debtor’s business (Article 761).

The restructuring may include changing the composition, conditions and structure of assets and liabilities, changing the management bodies and taking other appropriate measures. It resembles a private debt settlement supervised by the court.

The stabilization proceedings shall be opened upon a written application submitted to the court by the company (Art. 769). Along with other financial documents, the application shall include a stabilization plan proposed by the company. The stabilization plan shall be prepared in compliance with the practical guidelines approved by the Minister of Justice, the Minister of Economy and Industry, and the Minister of Innovation and Growth, and published on the official websites of the relevant ministries and the Bulgarian Small and Medium Enterprises Promotion Agency (BSMEPA). The proposed stabilization plan shall contain (Art. 770) the relevant administrative documentation, as well as a statement of the circumstances that have led to the immediate danger of insolvency, including:

- the relevant reasons and the envisaged measures for restructuring, as well as any changes in the company‘s composition and structure of assets and liabilities;
- the envisaged duration of the restructuring measures;
- the obligations for information and consultation in case of changes in the activity, economic status and labor organization of the enterprise according to the Labor Code and the applicable regulations of the European Union;
- the expected financial receipts resulting from the implementation of the measures envisaged in the stabilization plan;
- the terms and conditions under which the outstanding debts are to be paid to the company’s creditors;
- guarantees and securities to be provided to each class of creditors with regard to the stabilization plan;
- other circumstances relevant to the proposed stabilization plan;
- a reasoned statement of how the stabilization plan would prevent the company’s insolvency and ensure the business viability and continuity.

Restructuring can also be envisaged within the recovery procedure (adhering to the recovery plan adopted by the creditors and approved by the insolvency court). However, restructuring aimed at the recovery of the debtor is not preventive in nature.

This procedure provides for the implementation of a recovery plan as a stage of ongoing insolvency proceedings intended to provide fair satisfaction of the claims of the creditors and allow the preservation of business and jobs (Article 607).

The recovery procedure necessitates the development of a recovery plan (Art. 696), which may provide for the postponement or rescheduling of payments, partial or complete discharge of obligations, reorganization of the enterprise, or the performance of other actions and transactions.

The recovery plan, being a stage of the insolvency proceedings, may also provide for the sale of the entire enterprise or for the sale of a separate part of the insolvent company. The recovery plan shall specify the method and conditions of sale, the identity of the buyer, the possibility for the conversion of certain debt into equity, etc.

The entities, entitled to propose a recovery plan include:

- the insolvent company
- the creditors who own at least 1/3 of the secured or unsecured claims
- the partners, respectively the shareholders, who own at least 1/3 of the company’s share capital
- general partners
- twenty percent (20%) of the company’s total number of employees (Article 697).

The plan shall be adopted by the creditors meeting and approved by the insolvency court. The court’s resolution approving the plan terminates the insolvency proceedings. The deadline for concluding a contract for the sale of the entire enterprise, or a separate part thereof, is two months from the entry into force of the court's resolution approving the plan.

3.4.3 Early warning indicators

The Ordinance on early warning tools and access to information for enterprises facing insolvency that the Bulgarian Small and Medium Enterprises Promotion Agency (BSMEPA) shall organize, establish, and maintain a system of early warning tools and access to information for enterprises facing insolvency.

This includes a web-based electronic self-assessment information system for early warning of the probability of insolvency providing an algorithm for calculating certain indicators of the financial performance of the enterprise, as well as other relevant information related to liabilities, receivables and the way the business is managed (Art.9).

These (warning) indicators of the companies' financial situation shall be proposed by the Executive Director of the Bulgarian Small and Medium Enterprises Promotion Agency and approved by the Minister of Innovation and Growth.

Art. 13 of the Ordinance on early warning tools provides that the following sources of information can be used as indicators of the need to carry out a self-assessment and/or use other early warning tools:

1. certificates of public obligations under the Tax and Insurance Procedure Code, as well as data published in the E-Services Portal of the National Revenue Agency, indicating that the company is on the list of debtors with outstanding public obligations over BGN 5 000.
2. financial statements and reports, audit reports, as well as recommendations by accountants in charge of the company's financial records and bookkeeping;
3. invitations for voluntary discharge of obligations, subpoenas and notices of initiated legal proceedings, as well as recommendations by the company's lawyers and legal advisors;
4. notifications, inquiries and bank statements on overdue obligations under credit agreements;
5. statements and contracts that terminate or change existing contractual relationships;
6. force majeure or other events that affect or may affect the company's activities;
7. any other circumstances that may adversely affect the viability of the company.

Normally, BSMEPA staff, external contractors, consultants and all other persons who have access to information about the financial situation and the activity of the companies shall sign a non-disclosure declaration.

3.4.4 The role of the court

Since the purpose of the stabilization procedure is to prevent the opening of insolvency proceedings and to secure the continuity of the business activities, it is initiated by the legal entity through the submission of a written application to the court requesting for the opening of stabilization proceedings and proposing a stabilization plan.

The court shall immediately consider the application for opening stabilization proceedings at a closed session and, should there be proper grounds for opening proceedings for the stabilization of the company, the court shall issue a ruling initiating the stabilization proceedings and setting the date for an open court session to consider and approve the stabilization plan proposed by the company within three months from the date of opening the proceedings (Арт. 772).

Along with the ruling to open the stabilization proceedings, the court shall also announce in the Commercial Register the list of creditors drawn up by the merchant.

If approved by the court, the stabilization plan shall become binding on all parties concerned. According to Art. 772 of the Commercial Act, when it finds that there are grounds for opening stabilization proceedings, the Court may appoint a trustee (if needed). The trustee assists the debtor or their creditors in the development and adoption of a stabilization plan and supervises the debtor's activities in case there is such court ruling within the stabilization proceedings. (Art. 782).

The trustee's rights include (Art. 783):

- to consider the objections and opinions of creditors on the list of creditors drawn up by the debtor and to propose a list of creditors entitled to vote on the stabilization plan for court approval;
- to prepare a written report on the debtor's property and activities;
- to supervise the debtor's activity in accordance with the restrictions imposed by the court and to exert control over the implementation of the imposed restrictions;
- to notify the court immediately of all circumstances that are considered grounds for restricting the debtor's activities;
- to supervise the debtor's activities related to the implementation of the approved stabilization plan.
- Also, the trustee shall submit a written report to the court concerning:
- the state of the debtor's property and activities;
- the reliability of the data contained in the application for stabilization and its annexes;
- the reasons that have led to the risk of insolvency;
- the feasibility of the obligations undertaken through the stabilization proposal.

The written report shall be submitted to the court and made available to the creditors no later than 14 days prior to the scheduled court hearing for consideration of the stabilization plan.

The trustee shall attend the court hearing where the proposed stabilization plan will be considered, to confirm the findings in the written report and to answer questions asked by the court and the persons participating in the stabilization proceedings. In addition, at the opening of the proceedings or later, the Court may appoint ex officio an examiner, who must be a registered auditor (Art. 784).

The appointed examiner prepares a report to the court and the creditors on the compliance of the provisions specified in the stabilization plan and the way of satisfying the creditors with the debtor's financial and property resources, presenting it within 7 days prior to the court hearing.

4. The approach of non-EU countries: The Balkan countries

4.1 The case of North Macedonia

In order to transpose directive 1023 in the Republic of North Macedonia, a draft of the new Insolvency Law has been prepared. The transposition process is ongoing, and not yet complete.

The Republic of North Macedonia has not yet transposed "Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, discharge of debt, and measures to increase the efficiency of restructuring, insolvency, and discharge procedures and amending Directive (EU) 2017/1132 (Restructuring and Insolvency Directive)"

4.1.1 The regulatory framework of the Directive

However, the process to comply with this EU Directive has been started a couple of years ago. It is in an advanced stage and so far the following activities have been undertaken, in chronological order:

- In 2020, the Ministry of Economy, in cooperation with the International Finance Corporation (World Bank Group), drafted a Draft Law on Insolvency, which is compliant with EU Directives 2019/1023 on preventive restructuring and 2017/1132 Restructuring and Insolvency Directive.
- In March 2021, the Insolvency Draft Law was publicly announced on the government's national public opinion platform.
- After discussions with stakeholders, public debates and brainstorming, the Draft Law on Insolvency has been submitted to the Macedonian Government.
- In February 2023, the Government reviewed the Draft Law on Insolvency, determined the Law, and decided to submit it to the Assembly of the Republic of North Macedonia for adoption.
- At the moment, the Draft Law on Insolvency is in the parliamentary procedure and is waiting to be adopted.
- It is expected to be adopted after the elections (May 2024), most likely at the end of 2024.

Although the valid Bankruptcy Law from 2006 has been amended on several occasions (the most extensive amendment was in 2013) in order to promote or impose the possibility of restructuring or reorganization instead of opening bankruptcy proceedings against the debtor. In our currently valid Bankruptcy law, there are certain elements that have been taken over from the EU legislation, but it cannot be said that 1023 has been transposed into the domestic legislation, that is, at this moment preventive reorganization (which is provided for in directive 1032) in our bankruptcy law is not contained. There is a prevailing opinion that this concept is very difficult to apply in our country, except for some large financial companies whose bankruptcy would have major social implications (although they are certainly subject to greater control from the Central Bank), because the reality is that a large number of companies in our country have financial problems and even work for years under blockade. And when bankruptcy proceedings are initiated, in 99% it is by a creditor, not by the debtor. So, if the debtor is not aware of initiating bankruptcy proceedings (when he has a legal obligation to do so), it is unlikely that he would request pre-bankruptcy reorganization.

That concept of economic rationalization of the company's situation (or the possibility of future over-indebtedness or future insolvency as a basis for initiating bankruptcy proceedings) was introduced in our country some time ago, but in practice it has not yet been applied by managers in companies, and for will of the truth and the courts do not recognize it.

4.1.2 The procedures available to avoid insolvency

According to the current Law on Bankruptcy, in article 29, point 5 it stipulates that the restructuring plan should refer to a period of the next 5 years from the date of submission of the proposal for opening a procedure for out-of-court settlement. But nowhere in the legal solution is it stipulated that the implementation of the plan should be completed within these 5 years. The financial and operational restructuring plan contains:

1. description of the facts and circumstances that indicate the existence of conditions for the opening of out-of-court settlement procedure;
2. calculation of shortage of liquid assets on the day of the attached financial reports;
3. description of financial restructuring measures and calculation of their effects on the shortage of liquid assets;
4. description of financial restructuring measures and calculation of their effects on profitability of operations and removal of insolvency;
5. plan of operation for a period of five years with a detailed explanation of the reasons for determination of each position of the plan;
6. planned balance sheets on the last day of the five-year period for which it is compiled the plan of operation and
7. proposal for an out-of-court settlement with:
    a. analysis of claims by size, category (priority claims, export rights, separation rights and unsecured claims), expected level of settlement and proposal of deadlines for their settlement and comparison with expected settlement in case of bankruptcy and
    b. calculation of restructuring costs.

Financial restructuring is a plan of measures to be implemented the debtor to become liquid and solvent which include:

1. reduction and postponement of due debt obligations;
2. in capital companies, an increase in the founding stake;
3. repayment of instalments, change of maturity dates, interest rates and others terms of credits, loans or other claims or security instruments;
4. monetization or transfer of property for the purpose of settling claims;
5. write-off of debt, write-off of interest and change of interest rates;
6. execution, change or waiver of lien;
7. investment of additional funds for security by the debtor or third parties, including providing sureties and guarantees;
8. conversion of creditors' claims into a stake in the company;
9. connection with business contracts with a strategic partner in order to ensure the sustainability of further operations;

10. recapitalization by the strategic partner and
11. other measures that enable the debtor to be liquid and solvent.

According to the Draft Law on Insolvency, the early warning system is aimed at timely warning of creditors. It is an early warning tool in the form of an alarm mechanism that indicates when a certain company has not made certain types of payments, for example, non-payment of taxes or social security contributions. The Ministry of Economy at least once a month will publish on its website a list of companies that have come to a state of financial difficulties in their operation i.e. have not performed certain payments to third parties and therefore they have a future insolvency. The Public Revenue Office, and other institutions and legal entities are obliged to submit data to the Ministry of Economy about the companies with untimely settlement of obligations towards third parties. The Ministry of Economy within its own competencies will provide opportunities for the advisory services of debtors who have entered a state of future insolvency to solve this situation.

Early warning tools should be adapted depending on the size of the company. Special early warning tools would be created for large companies and groups that would take into account their specificities. Additionally, the entire early warning system should be elaborated in a by-law, which should be adopted by the Minister of Economy.

4.1.3 Early warning indicators

The new Draft Law on Insolvency, in Article 7, provides provisions for an early warning system. Early warning system is a set of tools that enable timely information to creditors about debtors facing future insolvency and creation of conditions for debtors to take all actions in a timely manner for timely resolution of future insolvency.

(1) The early warning system is established in order to enable debtors to recognize financial difficulties early and take measures and implement procedures in order to overcome the future insolvency provided for by this law, as well as to inform creditors in a timely manner in order to take appropriate measures.

(2) The Ministry of Economy at least once a month on publishes on its website a list of companies that have not made certain payments to third parties and therefore face future insolvency.

(3) The Administration for Public Revenues, and other institutions and legal entities

are obliged to submit to the Ministry of Economy data about the companies they came across in their operations related to untimely settlement of obligations towards third parties.

(4) The Ministry of Economy, within the framework of its competences, will provide opportunities for advisory services to debtors who have entered a state of future insolvency for exiting such a state.

(5) The Minister of Economy will, by an act, regulate the manner and procedure of publishing data on the website, the delivery of data from other institutions and the provision of advisory services for debtors who have come to a state of financial difficulties in their operations.

4.1.4 The role of the court

According to the Draft Law on Insolvency the court supervises the work of the trustee, the court is obliged to endeavor that all actions in pre-bankruptcy reorganization are undertaken within the deadlines determined by the Law on insolvency.

The court will stop the preventive restructuring procedure with a decision in the following cases: 1) if the court rejects the proposal for approval of the contract in accordance with Article 34 paragraph (4) of this law, 2) if the debtor within the period specified in Article 32 paragraph (3) of this law does not submit a request for the approval of the contract, 3) if the creditors with a claim of at least 30% of the amount of all claims included in the basic review of claims request the suspension of the procedure, 4) if the debtor requests a suspension before submitting a request for approval of the contract, 5) if the debtor is more than 15 days late with the payment of wages to the employees up to the minimum wage or with the payment of taxes and contributions that he was obliged to pay together with employee salaries.

If the reasons for stopping the preventive restructuring procedure arise, the court will pass a decision which: 1) states that the reasons for stopping the preventive restructuring procedure have been fulfilled 2) states that by stopping the preventive restructuring procedure, the legal consequences that arose with the opening of this procedure.

4.2 The case of Bosnia and Herzegovina

There are two types of laws: Bankruptcy Laws of the Republic of Srpska and the Federation of Bosnia and Herzegovina (separate laws for two entities). This module focuses on the bankruptcy law of Republika Srpska.

4.2.1 The regulatory framework of the Directive

As per the Bankruptcy Law of the RS, the restructuring procedure and the bankruptcy procedure can be carried out over the property of a legal entity and the property of an individual debtor, who is a general partner in a limited partnership and a founder of a partnership.

Small entities that do not have the status of a legal entity (such as small entrepreneurs) cannot be subject to the bankruptcy procedure as described in the Bankruptcy Law. The law that would regulate personal bankruptcy has been on hold in Bosnia and Herzegovina for over 10 years.

4.2.2 The procedures available to avoid insolvency

The goal of the restructuring process is to financially and operationally restructure the debtor (the entrepreneur). Financial and operational restructuring is a procedure conducted by the court with the aim of agreeing with creditors and the bankrupt debtor on the method of settling creditors' claims to improve the debtor's liquidity and eliminate his bankruptcy.

The restructuring procedure is initiated at the proposal of the debtor (the entrepreneur) or at the proposal of the creditor and is examined by the Court. Then, the report on the debtor's financial and operational position is drafted, and based on that the financial and operational restructuring plan is submitted to the Court, which then decides whether to go forward with the restructuring or not.

If the restructuring process is approved by the Court, the creditors of the entity are informed and asked to submit proof that they have receivables to claim from the entity.

According to the financial and operational restructuring plan, the creditors are paid off.

4.2.3 Early warning indicators

Yeas, there is one main indicator: threatening insolvency exists if the debtor will not be able to settle the assumed payment obligations upon maturity in the next 12 months according to the maturity plan.

4.2.4 The role of the court

The court is first involved when the financial and operational restructuring plan is submitted to the Court.

The legal consequences of the opening of the restructuring procedure occur at the moment of publication of the decision on the opening of the restructuring procedure on the notice board of the court.

The legal consequences of the opening of the restructuring procedure occur for all the creditors' claims against the debtor that arose before the opening of the procedure.

4.3 The case of Serbia

Since there is no specific regulation on the prevention of insolvency, the main reference is the Serbian State Bankruptcy Law. Published in the Službeni Glasnik RS, No. 104/09 of 16 December 2009, 99/11 of 27 December 2011 (other law), 71/12 of 25 July 2012 (CC), 83/14 of 5 August 2014, 113/17 of 17 December 2017, 44/18 of 8 June 2018 and 95/18 of 8 December 2018.

4.3.1 The regulatory framework of the Directive

With regard to bankruptcy law, we can mention the following articles:

- Article 1

  Bankruptcy proceedings, within the meaning of this Law, shall be liquidation or reorganization.

  Liquidation shall comprehend creditor satisfaction from the value of the bankruptcy debtor's whole assets, and/or the bankruptcy debtor as a legal entity.

  Reorganization shall comprehend creditor satisfaction accomplished in the manner and under the conditions contained in the plan of reorganization by redefining relations between the debtor and the creditor, or changing the debtor's legal status, or in another manner provided by the plan.
- Article 2

  The aim of bankruptcy shall be to ensure the most favorable collective settlement of bankruptcy creditors by achieving the highest possible value for the bankruptcy debtor or its assets.

  Further information can be found in the Act on Bankruptcy and Liquidation of Banks and Insurance Companies Published in the Službeni Glasnik RS, No 14/15 of 4 February 2015 and 44/18 of 8 June 2018.
- Article 1

  This Law shall govern the conditions and procedure for bankruptcy and liquidation of banks, insurance companies and financial leasing companies.
- Article 2

  Bankruptcy procedure shall be initiated over a bank and an insurance company by a decision of a competent court on initiation of the bankruptcy procedure, adopted on the basis of the decision of the National Bank of Serbia on fulfilment of conditions for initiation of the bankruptcy procedure over a bank, and/or an insurance company.

  Bankruptcy procedure over a bank and an insurance company shall be conducted also at the proposal of a liquidator upon determining that the assets of the liquidation debtor are insufficient to settle all claims of creditors.
- Article 3

  Liquidation procedure shall be initiated over a bank and an insurance company by a decision of a competent court on initiation of the bankruptcy procedure, adopted on the basis of the decision of the National Bank of Serbia on fulfilment of conditions for initiation of the liquidation procedure over a bank, and/or an insurance company.

4.3.2 The procedures available to avoid insolvency

The model of preventive restructuring belongs to the group of procedures that are applied exclusively to economic entities that are in the period of risk of bankruptcy. In this sense, the Directive limits the situations in which access to the preventive restructuring procedure should be allowed. Entities that have the authority to initiate the procedure of preventive restructuring are the debtor, and the member states are left with the possibility to grant this capacity to creditors and employee representatives. The proposal of creditors and employee representatives is limited, unless member states abolish the condition of consent by national law. In the Republic of Serbia, the authority to submit a pre-prepared reorganization plan is exclusively held by the bankrupt debtor, except in the case of a legal entity operating with majority public or social capital, when the Agency for Licensing Bankruptcy Trustees has that authority.

4.3.3 Early warning indicators

Early warning tools may include the following:

warning mechanisms when the debtor has not made certain types of payments - they could be activated, for example. in case of non-payment of taxes or social security contributions. This type of tool can be developed by Member States or private individuals, provided that the objective is met. Also, Member States should be able to adapt early warning tools depending on the size of the company and its specificities. It is also important to benefit from services provided by public or private organizations and provide incentives under national law for third parties with relevant information about the debtor, such as accountants, tax authorities and social security authorities, to notify the debtor when they notice a negative trend.

4.3.4 The role of the court

There are differences between Member States when it comes to the range of procedures available to debtors in financial difficulties to restructure their business. Some member states have a limited set of procedures that allow company restructuring only at a relatively late stage, in the context of bankruptcy proceedings. In other Member States, restructuring is possible at an earlier stage, but the available procedures are not as efficient as they could be or are very formal, especially as they limit the use of out-of-court mechanisms. Preventive solutions are a growing trend in bankruptcy law. Within this trend, priority is given to approaches that, unlike the traditional approach aimed at liquidating companies in financial difficulties, aim at the recovery of the company or at least the rescue of its units that are still economically viable.

Among other benefits to the economy, such an approach often helps preserve jobs or reduce job losses. In addition, the degree of involvement of judicial or administrative authorities, or persons appointed by those authorities, varies from no or minimal involvement in some Member States to full involvement in others. Similarly, national rules allowing entrepreneurs a second chance, in particular by granting them the repayment of debts incurred in the course of business, differ between Member States as regards the duration of the dismissal period and the conditions for granting such dismissal.

The Serbian model of preventive restructuring is part of the bankruptcy procedure and its goal is related to the most favorable collective settlement of creditors. The Law on Bankruptcy stipulates that the reorganization procedure can be carried out only if this procedure ensures a more favorable settlement of creditors compared to the implementation of bankruptcy. The aforementioned rule applies equally to ordinary reorganization procedures and to procedures carried out on an advance basis

prepared reorganization plan. In the Republic of Serbia, priority is given to the interests of creditors even when the bankrupt debtor is not yet insolvent (a situation in which there is a threatening inability to pay).

4.4 The case of Albania

In Albania, the transposition of the EU directive on restructuring and insolvency processes has been incomplete. A significant component of Albania's framework involves the bankruptcy law (Law No. 43/2022), which aligns with the EU recommendations to some extent, especially in defining micro, small, and medium enterprises (SMEs). This alignment has practical implications on how businesses approach financial distress and insolvency, particularly focusing on SMEs, which play a crucial role in the Albanian economy.

Under the Albanian legal framework, preventive restructuring processes are mentioned but not fully developed, indicating a gap between legislative frameworks and practical implementation. The central bank's role in publishing data about blocked accounts is a critical measure for identifying financially distressed companies before they file for bankruptcy, but it highlights the lack of a comprehensive early warning system that could facilitate more effective preemptive restructuring actions.

4.4.1 The regulatory framework of the Directive

Law No. 43/2022 "For the development of micro, small and medium enterprises" is partially aligned with the recommendation of the EU Commission of May 6, 2003, regarding the definition of micro, small and medium enterprises (Official Notice L 124, 20/05/2003 P. 0036 – 0041).

According to this Law:

1. SMEs are the enterprises in which less than 250 people are employed and realize a total annual balance not greater than 250 million ALL.
2. A small enterprise is considered an enterprise with less than 50 employed persons, which has a total annual balance not exceeding 50 million ALL.
3. A micro-enterprise is considered an enterprise with less than 10 employed persons, which has a turnover or total annual balance not exceeding 10 million ALL.
4. A medium-sized enterprise is considered an enterprise with 50 up to 249 employed persons, which has a turnover or a total annual balance from 50 million ALL to 250 million ALL.
5. On insolvency, Albania stated that its legislative framework was partially aligned with the EU acquis. Albania has a National Insolvency Agency.

In the article 119 of law for insolvency no. 110/2016 "For Insolvency" is a specified article regarding the obligation the companies for monitoring the economic and financial situation:

1. Unless otherwise specified, the supervisory administrator prepares an annual report on the progress of the implementation of the plan and files it with the bankruptcy court for consultation with creditors.
2. If there is no supervisory administrator, this duty is assigned to the debtor.
3. Creditors and the bankruptcy court have the right to request, at any time, additional information on the progress of the plan.

Albania's example demonstrates how banks can complement public institutions in assessing companies' financial situations.

4.4.2 The procedures available to avoid insolvency

When it comes to preventive measures, Albania has made no major progress since the last assessment. The economy's early warning infrastructure remains undeveloped. The central bank publishes data from different banks on blocked accounts of entrepreneurs on its website, allowing financially distressed companies to be identified before they file for bankruptcy. However, the system does not currently allow enough time or information for a customized reorganization. The regulations oblige the central bank to publish data on instances of forced collection procedures, including the names of the legal entities/entrepreneurs, their registration numbers, the blocked accounts and the number of days of uninterrupted account blockage.

Article 104 et seq. of the Bankruptcy Law provides that, after the opening of the bankruptcy proceeding, depending on the financial situation of the debtor, the creditors' committee may decide on the dissolution/liquidation or the reorganization of the debtor. In such cases, a plan of reorganization may be filed with the Bankruptcy Court by:

1. the bankruptcy or supervisory administrator;
2. creditors with claims representing 20% or more of the total amount of claims; or
3. the debtor themselves who may file it, immediately or at any time, along with the request, upon the opening of the bankruptcy proceeding.

The system in place was created with the aim of avoiding non-performing loans, thus potentially preventing SMEs from filing for bankruptcy. In that respect, some banks and some private credit registries developed their own mechanisms to assess customers' credit performance, by drawing on information from multiple sources such as tax declaration, social security declaration, and balance sheets. These credit information sources could be coordinated under a potential "insolvency register", allowing the government to have an overview of credit performance.

4.4.3 Early warning indicators

The economy's early warning infrastructure remains undeveloped. The central bank publishes data from different banks on blocked accounts of entrepreneurs on its website, allowing financially distressed companies to be identified before they file for bankruptcy. In addition, Article 104 of Law no.9920 dated 19.05.2008 "On Tax Procedures", as amended ('Tax Procedure Law') relates to the right of the tax office to initiate the insolvency proceedings for taxpayers registered in the form of commercial companies. Tax administration shall request the start of insolvency proceedings for taxpayers (registered in the form of commercial companies) in the following cases:

1. Where for 2 (two) years the company has been registered by the National Registration Centre ('NRC') as under a passive status;
2. When the tax liabilities of this taxpayer are declared as uncollectible;
3. Where a company declares losses of its own capital for at least 3 (three) consecutive years;
4. Where the company has not carried out any commercial activity for a time period of at least 2 (two) years from the effective date of this law;
5. Where the company has unpaid liabilities towards the tax administration for at least 2 (two) years from the effective date of this law.

4.4.4 The role of the court

Bankruptcy proceedings result in the suspension of the judicial judgment of all civil actions where the debtor is a party, plaintiff or defendant. The purpose of such suspension is to preserve the bankruptcy mass, but the bankruptcy administrator can reopen judicial cases where the debtor is a plaintiff.

Temporary administrator

1. Before starting the procedure, the bankruptcy court may appoint a temporary bankruptcy administrator or a supervisory temporary administrator as a temporary measure.
2. If the bankruptcy court appoints a temporary bankruptcy administrator and does not allow the debtor to dispose of his property, the right to administer and dispose of the debtor's property is given to the temporary bankruptcy administrator. In such cases, the provisional bankruptcy administrator:
    a. Guarantees the safety and preservation of the debtor's property;
    b. Continues the day-to-day administration of the debtor's activity until the bankruptcy court decides to start a bankruptcy procedure;
    c. Performs, as an expert, the tasks described in point 1, article 19 of this law, at the request of the bankruptcy court;
    d. Performs other duties that the bankruptcy court may order

Appointment of the expert

If for the ascertainment or clarification of the facts, special knowledge is required in the fields of science, technique or art, which are not covered by the specific knowledge of the administrator, the bankruptcy court may call, at any stage of the bankruptcy procedure, one or more experts if requested by the parties or if deemed reasonable by the bankruptcy court.

Appointment of administrators in bankruptcy

The bankruptcy court is competent to appoint bankruptcy administrator, supervisory administrator and temporary administrator the candidate who is suitable for the case and independent of creditors and debtors.

5. Conclusions

The EU Directive 2019/1023 represents a significant step forward in the European regulatory framework, aiming to unify and enhance approaches to corporate crisis management. The transposition of the Directive by Member States, including Italy, has introduced substantial innovations in the field of insolvency law and restructuring, highlighting the intention to support struggling businesses through more effective and timely mechanisms.

The importance of these regulations lies in their ability to anticipate crisis-related issues, providing tools for preventive restructuring and, where possible, avoiding the most drastic consequences of insolvency. This not only helps safeguard the economic fabric of businesses but also contributes to preserving jobs and protecting the broader economy.

The Directive places particular emphasis on giving entrepreneurs a "second chance," reflecting a more modern and humane view of business failure as not just a definitive endpoint but part of a learning and development process. The encouraging approach towards swift restructuring and crisis resolution reflects a philosophy that prioritizes preserving business value and operational continuity over mere asset liquidation.

In light of these considerations, the importance of continuous evolution and adaptation of regulations in response to economic dynamics and market challenges is underscored. Directive 2019/1023 serves as a vital tool within an increasingly EU regulatory framework aimed at supporting innovation and sustainability of businesses in the era of globalization and digitalization.

Countries analyzed under this initiative, such as Spain, Portugal, Italy, and Bulgaria, demonstrate a shared commitment to improving national regulations to align with European standards, offering effective instruments to prevent insolvency and support business continuity. However, the implementation of the directive varies across states, reflecting national specificities and local economic needs.

Regarding the Balkan countries like North Macedonia, Serbia, Bosnia and Herzegovina, and Albania, there is a notable commitment to enhancing insolvency and restructuring procedures. Nevertheless, the effectiveness and speed of these reforms vary significantly. The main challenge remains balancing the modernization needs of laws in accordance with European standards while considering specific local conditions such as economic circumstances, administrative capacities, and political realities. These states are working to strengthen their economic and legal systems while tackling both internal and external obstacles.

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Italy, Bulgaria, Portugal and Spain

Albania, Bosnia and Herzegovina, North Macedonia, Serbia

Directive 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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