Desk research on the transposition of the Directive by some EU Member countries with particular attention to the project partners' countries

14/12/2024

Draft of questions to be considered in the analysis

1. Has the Member State 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)"?

   (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1023)

   - Yes
   - **No**

2. If no, what does national legislation provide regarding any obligations (within companies) related to monitoring the company's economic and financial situation and **business continuity** (*1 - Technical Glossary*)?

   Source: **Law on Bankruptcy**

   Published in the Službeni glasnik RS, Nos. 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

   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.

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   Source: **Bank and Insurance Company Bankruptcy and Liquidation Law**
   Published in the Službeni glasnik RS, Nos. 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.

3. According to national regulations, specify which **economic entities** (*2 - Technical Glossary*) **can be subjected to the bankruptcy procedure** (*3 - Technical Glossary*) and **which economic entity cannot be subjected to the bankruptcy procedure** (4 - Technical Glossary).

   Source: **Law on Bankruptcy**

   Published in the Službeni glasnik RS, Nos. 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

   Article 14

   Bankruptcy procedures **cannot be conducted** against:

   - The Republic of Serbia; autonomous provinces and local self-government units;
   - Funds or organizations of mandatory pension, disability, social and health insurance;
   - Legal entities whose founder is the Republic of Serbia, an autonomous province or a local self-government unit, and which are exclusively or predominantly financed through ceded public revenues or from the republic budget, i.e. the budget of an autonomous province and a local self-government unit;
   - The National Bank of Serbia;
   - Central registry, securities depository and clearinghouse;
   - Public agencies.

All other legal entities can be subject to bankruptcy.

* In Serbia, if you want to start a business, you can register as a company or entrepreneur. Unlike a company, which is a legal entity, an **entrepreneur** in the sense of the Law is:

Source: **COMPANIES LAW**

Published in the Službeni glasnik RS, Nos. 36/11 of 27 May 2011, 99/11 of 27 December 2011, 83/14 of 5 August 2014 (other law), 5/15 of 20 January 2015, 44/18 of 8 June 2018, 95/18 of 8 December 2018, 91/19 of 24 December 2019 and 109/21 of 19 November 2021

Article 83

An entrepreneur is a business-capable **natural person** who performs activities with the aim of generating income and who is registered as such in accordance with the law on registration.

Article 85

The entrepreneur is personally responsible for all obligations arising in connection with the performance of his activity with his entire property, and this property includes the property he acquires in connection with the performance of his/her activity.

Responsibility for obligations from paragraph 1 of this article does not end with the deletion of the entrepreneur from the register.

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So, an entrepreneur is responsible for the obligations of his business with all his/her personal assets **and bankruptcy of entrepreneurs is not currently legally regulated in Serbia.**

4. In the context of a **business crisis** (*5 - Technical Glossary*), are there different procedures to apply if the economic entity (not an individual) falls into the category of businesses that can be subjected to the bankruptcy procedure rather than to the category of businesses that cannot be subjected to the bankruptcy procedure? If yes, please specify these procedures.

   Source: **Law on Bankruptcy**

   Published in the Službeni glasnik RS, Nos. 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

   Article 14

   Its founders, that is, owners, as members or shareholders, are jointly and severally liable for the obligations of a legal entity against which bankruptcy proceedings are not conducted in accordance with paragraph 1 of this article.

5. Has the State established (or delegated to national bodies) a set of **early warning indicators** (6 – Technical Glossary) to monitor business crises? If yes, please provide a brief description of them.

No.

6. Is it possible to carry out a preventive restructuring process (7 – Technical Glossary)? If so, please indicate who is responsible for initiating it (e.g. the entrepreneur or other parties).

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.

7. What are the national bodies responsible for overseeing the preventive restructuring process related to a business crisis? Describe the tasks of these bodies.

Control of restructuring procedures can be entrusted to judicial or administrative authorities. It is justified on the basis of efficiency: in some Member States, administrative authorities can better perform the functions of monitoring restructuring negotiations. Also, it is necessary to consider the degree to which the administrative authorities can make decisions on private law issues, or how the actions taken by the administrative authorities in this area would be subject to the control of the courts. A judicial or administrative body should apply the creditor's best interest test only if the restructuring plan is challenged on that basis, in order to avoid a case-by-case assessment, and Member States should be able to provide ex officio an examination of the other conditions necessary for confirmation . Member States should be able to add other conditions to be met in order to confirm the restructuring plan, such as adequate protection of shareholders. Judicial or administrative authorities should be able to refuse to confirm restructuring plans when there is no reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business. However, Member States should not be required to ensure that such an assessment is carried out ex officio.

In Serbia there is preventive restrukcutirng proces for banking sector. In the banking sector, the National Bank of Serbia initiates the restructuring procedure when it determines that the following conditions are met:
1. that the state of the bank is such that it cannot or probably will not be able to continue operating;
2. that it is unlikely that any other measure taken by the bank or a person from the private sector, a measure undertaken in the control procedure in accordance with this law or a measure of capital write-off and conversion could remove obstacles to the continuation of the bank's operations within a reasonable time, taking into account all the circumstances individual case;
3. that the restructuring of the bank is in the public interest.
In order to determine whether the conditions for starting the restructuring procedure are met, as well as for the selection of the appropriate restructuring instrument and measure (if it determines that the conditions are met), the National Bank of Serbia is obliged to provide an independent, fair and realistic value assessment before starting the restructuring procedure assets and liabilities of the bank and to prepare a report on the least cost test. Exceptionally, if the need for urgent action in a specific case requires it, the National Bank of Serbia will provide a preliminary assessment of the bank's assets and liabilities, which is temporary and is used in the restructuring process until the final assessment of the bank's assets and liabilities is carried out.

8. What is the preventive restructuring tool (or tools) adopted by the State? Please provide a brief description.

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.
- consulting services provided by public or private organizations;
- 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.

9. At what stage of the preventive restructuring process and in what manner does the judicial authority (Court Approval) intervene (8-Technical Glossary)?

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).

10. In how much time should the preventive restructuring process be implemented and closed?

The directive left a high degree of discretion to the member states, prescribing a rule according to which the initial length of the temporary prohibition of enforcement cannot be longer than four months. Therefore, the Directive prescribes only a maximum, and not a minimum, duration of the initial ban period. The initial prohibition period can be extended, whereby the total duration of the prohibition of execution cannot be longer than 12 months.

Technical Glossary

1. **Business Continuity**: it represents the usual operation of a business. The company is normally considered capable of continuing its operations in the foreseeable future. Business continuity is a fundamental prerequisite, as it allows the company to continue to exist and operate in a normal situation, carrying out the activities for which it was created.
2. **Economic Entity**: an economic entity refers to the entity to which rights and obligations arising from the exercise of economic activities are attributed.

3. **Economic Entity subjected to the bankruptcy procedure**: it represents an economic entity that exceeds the insolvency thresholds imposed by national law, and therefore, if the entity is in an insolvency state, it runs the risk of being declared bankrupt.
4. **Economic Entity not subjected to the bankruptcy procedure**: it represents an economic entity that is below the insolvency thresholds imposed by national law, and therefore, even if the entity is in an insolvency state, it cannot be declared bankrupt. Thus, bankruptcy procedures do not apply to this category of entities.
5. **Business Crisis**: an enterprise is considered to be in a state of crisis when it is no longer able to pursue the "purposes" for which it was created due to economic losses.
6. **Early Warning Indicators**: a set of economic and financial indices used to identify a potential business crisis.
7. **Preventive Restructuring**: measures that aim to restructure the activities of the debtor, including modifying the composition, terms, or structure of the debtor's assets and liabilities or any other part of the debtor's capital structure, such as the sale of assets or parts of the business, and, if provided for by national law, the sale of the business as a going concern, as well as any necessary operational changes or a combination of these elements.
8. **Court Approval**: it represents a safeguard for compliance with the agreement reached through mediation among all parties involved in the recovery process, especially in cases where one party does not adhere to the terms and conditions of the agreement. When the court intervenes, the effects of the recovery plan become binding on all parties.