

Prerequisites for the Recovery of Companies in Economic Difficulty by Concluding Agreements with Relevant Creditors

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Abstract

Insolvency prevention procedures have recently been reformed, in the context of aligning national legislation with the European requirements. To ensure an effective chance of recovery of viable debtors, more accessible and coherent out-of-court frameworks have been created. The restructuring agreement procedure gives distressed debtors the chance to restructure their debts, by means of an agreement with the relevant creditors in order to avoid insolvency. The initiative to make the agreement rests exclusively with the debtor, the law expanding the scope of those entitled to apply for this remedy. The attestation of the state of difficulty is made on objective grounds and not on simple presumptions, as a result of an assessment carried out by an insolvency practitioner and concretized in a report. The restructuring agreement is drawn up with the support of the restructuring administrator, who will ensure that its structure contains the mandatory elements stated by law. The approval of the agreement, negotiated in advance, is subject to the vote of the creditors whose claims are affected, according to the category to which they belong. The confirmation of the restructuring agreement by the syndic judge is carried out in a non-contentious procedure, with a legality control being carried out.

Keywords: state of difficulty, viable debtors, insolvency prevention procedure, restructuring agreement, restructuring administrator.

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1. Regulatory framework of the restructuring agreement

Given that the business environment is facing increasingly complex challenges, the importance of implementing effective tools to combat insolvency risk is decisive. Insolvency law has been reformed precisely to create effective frameworks for restructuring viable companies in financial difficulties². By adopting Law no. 216/2022³ for amending and supplementing Law no. 85/2014 on insolvency prevention and insolvency procedures and other normative acts, Directive (EU) 2019/1023 on restructuring and insolvency was transposed.⁴ The Restructuring and Insolvency Directive pays particular attention to the pre-insolvency phase.

The transformations made in the architecture of preventive procedures mainly aim to increase their accessibility, in order to encourage their application in practice. The legislative approach started from the finding that these remedy procedures were implemented only sporadically by debtors in the insolvency antechamber. It was considered that one of the reasons for such a situation may be the

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² The Commission's proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures, which outlined certain priorities, considered to be fundamental, at European Commission level: "Insolvency law covers a wide range of measures, starting with early intervention, which apply before a company faces serious difficulties".

³ Published in the Official Gazette, Part I, nr. 709 of 14 July 2022.

⁴ The Directive, also known over time as the 'Second Chance Directive' and the 'New Chance Directive' published in OJ L 172 of 26 June 2019, is available online at: <https://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1571073221410&uri=CELEX:32019L1023>, accessed 2023-10-15.

almost non-existent promotion of insolvency prevention procedures⁵.

The success of prevention procedures depends, among other things, on⁶:

- clear, up-to-date, concise and user-friendly information on preventive restructuring procedures;

- early detection of economic difficulties by means of means of alert;

- setting up one or more early warning tools to indicate when the debtor has not made certain types of payments – an example: when he has not paid taxes or social security contributions.

In addition to warning tools, it is also necessary to create mechanisms to hold accountable actors specialized in the early detection of signals of difficulty of a company or functional activity⁷.

The restructuring agreement procedure is the transfigured version of the ad hoc mandate procedure of the old regulation, which it replaces. The restructuring agreement is defined in art. 5 item 43*1 as the insolvency prevention procedure by which the debtor submits to the confirmation of the syndic judge a restructuring agreement, negotiated in advance with the creditors whose claims are affected and approved under the terms of this law, based on which it recovers its activity and pays all or part of its affected claims within the period established by the restructuring agreement.

2. Determination of the categories of debtors who can access the restructuring agreement procedure

The law does not expressly or exhaustively list the categories of debtors who can benefit from the restructuring agreement procedure, but establishes certain restrictions on entities qualified to access this remedy. Thus, two negative conditions regarding debtors can be identified, which must be verified when recognising legitimation under the preventive procedure:

2.1. Debtors should not belong to a category exempted from the application of the law

As regards the scope of debtors who have access to preventive procedures, there is a particularisation of the categories exempted from the possibility of resorting to such a remedy.

On the one hand, there is an extension of the application of preventive procedures in favour of liberal professions other than bailiffs and notaries public.

On the other hand, there is a restriction on the application of preventive procedures regarding:

i) credit institutions, investment firms as well as other financial institutions and entities⁸

ii) insurers and reinsurers⁹;

iii) central counterparties¹⁰;

iv) central securities depositories¹¹.

It is specified that in the field of insolvency prevention procedures, the debtor's rights and

⁵ Dumitru Vlad, *Ce înseamnă și în ce constă procedura de prevenire a insolvenței. Condiții de accesare și caracteristici generale*, the document is available online at <https://www.normedia.ro/2023/05/18/insolvente-procedura-r30rki45rg/>.

⁶ Recital 22 of Directive (EU) 2019/1023, accessed on 10.10.2023.

⁷ Augustin Fuerea, Andreea Deli Diaconescu, *Provocările profesionale aduse de Directiva privind restructurarea și insolvența*, „Revista Română de Drept al Afacerilor” no. 6/2019, pp.63-73.

⁸ These being subject to the provisions of Law nr. 312/2015 on the recovery and resolution of credit institutions and investment firms, as well as amending and supplementing certain normative acts in the financial field, with subsequent amendments and completions, to undertakings for collective investment in transferable securities, as defined in art. 2 para. (1) of Government Emergency Ordinance nr. 32/2012 on undertakings for collective investment in transferable securities and asset management companies, as well as amending and supplementing Law no. 297/2004 on the capital market, approved with amendments and completions by Law no. 10/2015, as subsequently amended and supplemented, and alternative investment funds, as defined in art. 3 point 20 of Law nr. 74/2015 on alternative investment fund managers, as subsequently amended and supplemented.

⁹ As defined in Article 1 para. (2) points 4 and 45 of Law nr. 237/2015 on the authorization and supervision of insurance and reinsurance activity, with subsequent amendments and completions, subject to the provisions of the aforementioned law, as well as Law no. 246/2015 on the recovery and resolution of insurers, as subsequently amended.

¹⁰ As defined in Art. 2 point 1 of Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

¹¹ As defined in Article 2 para. (1) point 1 of Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No. 909/2014. 236/2012.

obligations regarding the personal assets accumulated by him in a privately managed pension fund and/or optional pension funds and/or occupational pension funds or in respect of the private pensions from which the debtor benefits are not affected, based on and under the conditions of private pension legislation¹².

2.2. Debtors are not hampered by legal impediments

In order to benefit from the protection afforded by the preventive procedure, the debtor must not find himself in one of the following situations that temporarily restrict his access, namely:

- is within 12 months from the date of closure of another insolvency prevention procedure which has resulted in a final discharge of obligations – according to Art. 6*1;
- is within 3 years from the date of conviction for a particular offence¹³ – according to Art. 6*2.

3. Detection of financial distress justifying the interest in concluding the restructuring agreement

Insolvency prevention procedures apply to debtors in *financial difficulty* but not insolvent.

The key factor ensuring the effectiveness of preventive procedures is early intervention in order to take the necessary measures for the recovery of viable businesses¹⁴. Early detection of the debtor's financial distress is facilitated by the introduction of *early warning* mechanisms. The role of these mechanisms is to alert the existence of circumstances that could give rise to the debtor's state of difficulty or insolvency and which may signal to him the need to act without delay and/or to provide, free of charge, information on recovery solutions¹⁵.

The Restructuring and Insolvency Directive pays particular attention to the pre-insolvency moment. Regardless of the inherent relativisation of this moment, which is so difficult to establish on the temporal axis of the existence of a company in general financial difficulty, stabilising rules and creating appropriate legal instruments may indeed represent a substantial change in the landscape of large insolvencies at European level¹⁶.

Difficulty is defined in Article 26*1 as the condition arising from any circumstance causing a temporary impairment of activity giving rise to a real and serious threat to the debtor's future ability to pay its debts as they fall due, unless appropriate measures are taken; the distressed debtor is able to perform his obligations as they fall due.

With this reformulation of the concept of difficulty, the scope of situations in which they can resort to preventive procedures is extended, since it is no longer restricted to financial difficulty, as required under the previous regulation¹⁷. Moreover, determining the debtor's state of financial difficulty was hampered by the ambiguous way of defining this concept, which referred to the situation in which the debtor, "although executing or being able to perform the outstanding

¹² Ioana Viorică, Roxana Apostolescu, *Legea nr. 216/2022: Cum se modifică legislația privind procedurile de prevenire a insolvenței și de insolvență?* The document is available online at <https://universuljuridic.ro/legea-nr-216-2022--se-modifica-legislatia-privind-procedurile-de-prevent-a-insolventei-si-de-insolventa->, accessed on 10.10.2023.

¹³ Crimes against patrimony, crimes of corruption, office, forgery, for the crimes provided by the Companies Law no. 31/1990, republished, with subsequent amendments and completions, Law no. 129/2019 for preventing and combating money laundering and terrorist financing, as well as for amending and supplementing certain normative acts, with subsequent amendments and completions, Law no. 227/2015 regarding the Fiscal Code, with subsequent amendments and completions, Law no. 241/2005 for preventing and combating tax evasion, with subsequent amendments and completions, Competition Law no. 21/1996, republished, with subsequent amendments and completions, as well as for the offences provided for in art. 240 and 241 of Law no. 286/2009 regarding the Criminal Code, with subsequent amendments and completions.

¹⁴ Nicoleta Țândăreanu, *Codul insolvenței comentat*, vol. I, art. 1-182, Universul Juridic Publishing House, Bucharest, 2017, p. 21.

¹⁵ According to art. 5*1 newly introduced in Law no. 85/2014.

¹⁶ David Skaurszun, W. Nijens, *New Toolbox, New Questions – Interpreting the EU Directive*, în „Eurofenix, The Journal of INSOL Europe”, Autumn 2019, p. 19.

¹⁷ Luiza Cristina Gavrilă, *Condițiile în care debitorul în dificultate își poate restructura datoriile prin intermediul unui acord cu creditorii pentru a evita insolvența*, presentation held at the National Conference "Mechanisms of plurality in law", on 28.10.2022, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

obligations, has a low short-term liquidity and/or a high long-term degree of indebtedness, which may affect the fulfillment of contractual obligations in relation to the resources generated from the operational activity or to the resources attracted through financial activity"¹⁸.

Therefore, at present, the state of difficulty that may temporarily affect the debtor's activity can be determined by any circumstance, to the extent that it materializes in a real and serious threat to the debtor's ability to honour its outstanding debts on time. However, the failure does not prevent the debtor from fulfilling its obligations at the time of its detection and can be removed by taking appropriate measures.

The express indication that the debtor wishing to access a restructuring framework can or will be able to perform its outstanding obligations was introduced at the suggestions made by stakeholders, who complained about the need to identify precisely the cases in which the application of insolvency prevention and insolvency procedures is justified.

4. Proposal for restructuring agreement by the debtor

The decision to use the restructuring agreement procedure shall be taken by the debtor who detects, on the basis of early warning and other specific tools, that he is in a state of difficulty.

The Directive on restructuring and insolvency establishes that the concepts of 'insolvency' and 'likelihood of insolvency' are to be defined by national laws, but with the aim of locating restructuring prior to insolvency, but without clarifying 'how previous' restructuring frameworks should be to insolvency¹⁹.

The proposal for the restructuring agreement is a right of the debtor and not an obligation, as if it were insolvent. The initiative for the restructuring agreement rests solely with the debtor, with creditors invited to negotiations only required to approve it.

The restructuring agreement can be useful for debtors who, although in financial difficulty, are not subject to foreclosures, have the resources to negotiate with creditors, do not need court intervention²⁰.

The verification of the debtor's state of difficulty will be done by the restructuring administrator, who will certify this fact. To this end, it shall draw up a report containing the minimum elements indicated in the law. Therefore, the proof that he is in difficulty will be made by the debtor under the conditions of art. 6 by the report drawn up by the restructuring administrator or concordat administrator.

Therefore, a personalized approach stands out, depending on the context of each company and the degree of difficulty, the presumptions of difficulty being analysed by a restructuring specialist through a report on his state of difficulty²¹.

The solution of adopting the requirement of the report as a means of proof was preferred to that proposed in the initial draft of the amending law, which provided for a series of presumptions of difficulty, on the grounds that it presents a greater certainty than that of inferences drawn from factual elements. The content of the report differs depending on the size and type of business, type of industry, seasonality, age of the business, business cycle. Although its elements may vary, the minimal structure of the report consists of elements expressly indicated by law:

(a) the nature of the difficulty, i.e. a description of the circumstance causing the temporary impairment of the activity and the expected effects,

(b) the internal and external factors determining the debtor's failure,

¹⁸ Text of Article 5, para. (1), point 27 of Title 0, Chapter II, Section 2 was repealed on 17-Jul-2022 by Art. I, paragraph 13. of Law no. 216/2022.

¹⁹ Andreea Deli Diaconescu, Augustin Fuerea, *Adoptarea și transpunerea Directivei privind a doua șansă cadrele de restructurare-repetiția unor compromisuri acceptate*, „Revista de insolvență Phoenix”, no. 75-76, pp 11-19.

²⁰ Dumitru Vlad, loc. cit., *Ce înseamnă și în ce constă procedura de prevenire a insolvenței. Condiții de accesare și caracteristici generale*.

²¹ Alexandru Stănoiu, *Implementarea Directivei privind restructurarea – o șansă în plus pentru companii*, the document is available online at <https://www.rtp.ro/ro/stiri/legal-update/implementarea-directivei-privind-restructurarea-o-sansa-in-plus-pentru-companii/> accessed on 20.10.2023.

(c) financial indicators applicable to that debtor which may justify the existence of a threat to the debtor's future ability to pay its debts as they fall due no later than 24 months after that circumstance has occurred,

(d) why the difficulty cannot be considered naturally reversible by continuing the debtor's bakery business without adequate recovery measures being taken.

Of course, other facts and circumstances considered relevant to the case may also be mentioned in the report. The report is to be annexed either to the restructuring agreement or to the debtor's request for the opening of the arrangement with creditors procedure.

With regard to the relevant period to which the debtor's "future ability to pay its debts as they fall due" must be reported, the law does not specify a fixed deadline, but in determining its duration in practice, the recommendations formulated by the recitals of the Directive will be taken into account. Thus, the relevant period for establishing such a threat may relate to a period of several months, or even longer." Since the particular aspects of each business must be taken into account in determining which term represents a relevant period, the task of quantifying the revealing timeframe in terms of impact on the viability of the business lies with the restructuring manager²².

The analysis of the report drawn up in order to ascertain the debtor's state of difficulty rests with the syndic judge, both in the case of the restructuring agreement and in the case of the preventive composition.

In interpreting the elements of the report in order to assess the state of difficulty, the syndic judge may use the *viability test of the debtor*. Carrying out the test would help avoid abuse of preventive restructuring frameworks. Such a test must be carried out without prejudice to the debtor's assets, which could take the form, inter alia, of granting an interim stay or carrying out the test without undue delay. However, the absence of detriment should not prevent Member States from requiring the debtor to prove his viability at his own expense'.

5. Preparation of the agreement by the restructuring manager

The drafting of the agreement shall be carried out by the restructuring manager or by the debtor with the assistance of the restructuring manager²³.

For this purpose, the debtor employs a specialist (restructuring administrator) whose appointment and remuneration are determined exclusively by contractual agreement between the debtor and the administrator. The restructuring administrator must be one of the insolvency practitioners²⁴. The administrator's fee is established based on legal criteria and is borne from the debtor's property²⁵.

In drawing up the agreement, it shall be taken into account that it contains all the elements required by law. *The content of the agreement* must include the following mandatory elements²⁶:

- a) *identification data* of the debtor and of the restructuring manager;
- b) *the composition of the debtor's patrimony, broken down by patrimonial mass where applicable, respectively assets and liabilities and their value at the date of drawing up the agreement;*
- c) *analysis of the debtor's economic situation, of the situation of employees, as well as a description of the causes and level of debtor's difficulties at the time of drawing up the agreement, according to the report drawn up according to art. 6 para. (2);*
- d) *the list of claims, identifying creditors, grouped by categories of claims and divided into:*
 - receivables whose realisation will be affected by the restructuring agreement, with an indication of their sufficiency;

²² Geanina Oancea, *Acord de restructurare sau concordat preventiv?*, „Revista de insolvență Phoenix” no. 75-76, pp. 3-34.

²³ Luiza Cristina Gavrilescu, *Redresarea activității întreprinderilor în dificultate prin intermediul procedurii acordului de restructurare*, presentation held at the Conference "Legislative changes in the field of commercial law. Challenges for Theorists and Practitioners", on December 17, 2022, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

²⁴ The restructuring administrator will be selected from active insolvency practitioners with valid professional insurance.

²⁵ The criteria are set out in Art. 38 of Government Emergency Ordinance nr. 86/2006 on the organization of the activity of insolvency practitioners, republished, with subsequent amendments and completions.

²⁶ Expressly listed by art. 15*2 of Law no. 85/2014 – hereinafter referred to as Law.

- unaffected receivables, together with a description of the reasons why the debtor proposes that they should not be affected by the restructuring agreement. *Unaffected claims* have been defined by Art. 16*2. Thus, they represent claims that are not directly modified by a restructuring agreement or an arrangement with creditors; any claim not included in the list of affected claims shall be an unaffected claim;

e) *disputed claims* and their treatment; proposing treatment for disputed claims does not amount to recognition of the disputed right.

The list of receivables shall refer to the date of drawing up the agreement, to be updated, if necessary, during negotiations with creditors and shall mention at least the following information²⁷:

- identification of the creditor and contact address;
- the amount of claims,
- the categories into which claims are grouped for the purposes of voting on the agreement;
- rights of preference.

The debtor shall ensure that the amount provided for in the plan for the payment of salary claims is at least equal to that which he would obtain in the event of foreclosure, but not less than he would receive in the scenario of the next best alternative.

f) *the explanatory memorandum* explaining why the restructuring agreement has *reasonable prospects of preventing the insolvency of the debtor and ensuring the viability of the business*, including the prerequisites necessary for its success.

This explanatory statement will be made or validated by the restructuring manager;

g) *the proposed restructuring measures* or a combination thereof, such as:

- operational restructuring of the debtor's activities;
- change in the composition, conditions or structure of the debtor's assets or liabilities;
- capitalization of some assets of the debtor;
- capitalization of the enterprise as an independent whole;
- merger or division of the debtor, according to the law;
- changing the structure of the debtor's share capital by increasing the share capital by co-opting new shareholders or associates or by converting receivables into shares, with a corresponding increase of the share capital.

Restructuring measures are not imposed by law, their determination being the prerogative of the debtor and the restructuring manager, with the assistance of creditors affected by the agreement, as a result of negotiations conducted with the aim of finalizing the restructuring agreement²⁸.

h) *the modalities of informing and consulting the employees' representatives*, carried out in accordance with the law and collective labor agreements, and the ways in which the restructuring agreement will affect the debtor's workforce - individual dismissal procedures, collective redundancy procedures, possible cases of suspension of employment contracts at the initiative of the employer, reduction of the work schedule corresponding to the temporary reduction of activity;

i) *the debtor's estimated income and expenditure budget and financial flows* over the duration of the restructuring agreement, dividing creditors between affected and unaffected debt holders;

j) *new financing* and the reasons why it is necessary to implement the Agreement;

New financing has been redefined²⁹ as any financing, including the provision of guarantees, supplier credit with a payment term of more than 90 days, granted by an existing or a new creditor, in order to implement an agreement/restructuring plan/reorganization plan and included therein;

k) *simulation of distributions that affected creditors would benefit from in case of the scenario of the next optimal alternative, which may even be bankruptcy*, based on an evaluation report, prepared by an authorized valuer no later than 6 months prior to the date of opening of the procedure, of the assets existing in the debtor's patrimony and the comparative presentation of these distributions with those foreseen by the restructuring agreement;

²⁷ According to art. 15*2 para. (3) of the Law.

²⁸ Dumitru Vlad, *loc.cit.*, the document is available online at <https://www.normedia.ro/2023/05/18/insolvente-procedura-r30rki45rg/>.

²⁹ Art. 5, point 28 *2.

l) *the private creditor test* drawn up in accordance with art. 5 para. (1) point 71, where reductions in the budget amount receivable are proposed by agreement;

According to a provision introduced by the amending law, the private creditor test may also be carried out at the request of the party proposing a restructuring agreement/plan or a reorganisation plan, at its expense, by an independent expert, including the insolvency practitioner in the proceedings, and will be communicated to the budgetary creditor together with the restructuring agreement/restructuring plan or with the reorganisation plan;

m) *the schedule for payment of receivables*, in relation to financial flows and duration of the agreement.

The most recent data and information shall be used to draw up the agreement, but not older than 6 months prior to the date of communication of the agreement to creditors holding affected claims.

The list of receivables shall refer to the date of drawing up the agreement, to be updated, if necessary, during negotiations with creditors and shall mention at least the following information:

- identification of the creditor and contact address;
- the amount of claims,
- the categories into which claims are grouped for the purposes of voting on the agreement;
- rights of preference.

The debtor shall ensure that the amount provided for in the plan for the payment of salary claims is at least equal to that which he would obtain in the event of foreclosure, but not less than he would receive in the scenario of the next best alternative.

6. Communication of the restructuring agreement to creditors

Unlike insolvency proceedings, which are applicable to all creditors whose claims are entered in the table, creditors entitled to participate in pre-insolvency proceedings are only creditors holding claims affected by the restructuring plan.

Thus, not all claims contracted by the debtor must be affected by this procedure, but the restructuring agreement may expressly provide that certain claims are not affected, i.e. not directly modified by the restructuring agreement. However, this will have to be substantiated by the debtor. The receivables that are affected by the restructuring agreement are those receivables that may suffer either reductions in amount or incidental amounts, or payment instalments³⁰. Any claim not included in the list of affected claims shall be considered an unaffected claim.

The restructuring administrator shall communicate the proposed restructuring agreement to creditors whose claims are affected by any means of communication acknowledging receipt. When submitting the proposed restructuring agreement, the restructuring administrator will also indicate the voting procedure and the mailing address, including e-mail, at which the vote can be communicated. The deadline for transmitting the vote may not be less than 20 days from the date of communication of the agreement³¹.

7. Negotiation of the debt restructuring agreement

Once the draft restructuring agreement has been communicated to creditors, creditors will be invited to negotiate. The negotiation will take place between the debtor, assisted by the restructuring administrator or, at his request, represented by him, and creditors, both individually and in a collective meeting, at the discretion of the restructuring administrator or at the request of creditors.

Creditors are helped by the analyses and information provided by experts, thus being able to form more easily a clear and objective opinion on the debtor's activity and viability.

³⁰ Cristina Dinu, *Acordul de restructurare – noul instrument de prevenire a insolvenței*, the document is available online at <https://www.linkedin.com/pulse/acordul-de-restructurare-noul-instrument-prevenire-insolventei>, accessed on 15.10.2023.

³¹ Art. 5 pt.15 *3 of the Law.

A prerequisite for starting the restructuring agreement procedure is for the debtor to find himself in a good relationship with his creditors, enabling him to negotiate with some of them³².

The peculiarity of the restructuring agreement is that it comprises only part of the debtor's claims, which are thus affected by the approved plan for the recovery of its business.

If the debtor's recovery required restructuring of all its debts, it would most likely already be insolvent and thus exceeded the timing of the preventive procedure.

The restructuring administrator will take steps to settle amicably any dispute between the debtor and creditors or between creditors. The version of the agreement resulting from the negotiations will be checked for legality by the restructuring manager³³.

If the restructuring agreement needs to be amended as a result of negotiations, its amended version and updated list of claims will be communicated by the restructuring administrator to creditors for the exercise of voting rights³⁴.

8. Approval of the agreement by vote of creditors

The restructuring agreement is voted only by creditors whose claims are affected (not paid in full), creditors whose claims are not affected do not have a voting right over it, assuming they have no interest contrary to the procedure³⁵.

The creditors' vote on the restructuring agreement is in reality a vote of claims, a creditor can be the holder of several claims, registered in different classes (groups) and can vote differently with each claim he holds; In other words, the principle becomes "a claim, a vote". Correlatively, the bill envisages the concept of "affected receivables" and not that of "affected creditors".³⁶

Voting shall be carried out separately, by categories of claims, as configured in the list of creditors.

The law provides for the following distinct categories of claims:

- a) claims enjoying preference rights;
- b) wage earnings;
- c) claims by indispensable creditors, where appropriate;
- d) budget receivables;
- e) other claims.

The category of indispensable creditors may be formed for the purpose of voting on the restructuring agreement. The category of indispensable creditors has been redefined³⁷ as suppliers that cannot be replaced under reasonable economic or financial conditions, compared to the debtor's continued activity.

In order to be deemed accepted by a class of claims, the agreement must be accepted by an absolute majority of the value of claims in that class.

The establishment of categories of receivables is not mandatory for debtors who have a net turnover or, as the case may be, a gross income of up to the equivalent in lei of EUR 500,000, in RON equivalent, in the previous year. If the debtor does not opt for the establishment of categories of claims, the agreement will be deemed accepted if it is voted by an *absolute majority* of the value of the affected claims.

Any conditionality of the vote, abstention or failure to vote shall be considered a negative

³² Geanina Oancea, *op. cit.* (Acord de restructurare...), pp. 3-34.

³³ Claudia Antoanela Susanu, *Administratorul judiciar – aspecte teoretice și practice relevante din perspectiva desemnării, desfășurării activității și a înlocuirii acestui organ care aplică procedura insolvenței*, „Revista de insolvență Phoenix” no. 82/2022 (October-December 2022), pp. 5-14.

³⁴ Luiza Cristina Gavrilescu, *Efectele acordului de restructurare asupra activității debitorilor viabili*, presentation at the National Conference "Law in European and pan-European context" on 06.05.2023 at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

³⁵ Alice Ene, *Noi instrumente pentru restructurarea afacerii în dificultate*, the document is available online at <https://www.vf.ro/noi-instrumente-pentru-restructurarea-afacerii-in-dificultate/>, accessed on 09.10.2023.

³⁶ Flavius Moțiu, *Transpunerea Directivei UE 2019/1023 Concordatul preventiv*, „Revista de insolvență Phoenix” no. 75-76, pp. 19-30.

³⁷ Art.5 item 23 of the Law.

vote. A positive vote may not be withdrawn.

The voting procedure shall resume after each amendment.

Given that the restructuring agreement is finalised before the case is brought before the court, there is no statutory deadline for the restructuring agreement to be finalised³⁸. There is no legal deadline within which the debtor must draw up and negotiate the restructuring agreement. The deadline within which the restructuring agreement must be approved shall be communicated by the restructuring manager together with the restructuring agreement.

Any vote received within 10 days after the expiry of the deadline set by the restructuring administrator will be attached to the confirmatory application and taken into account by the syndic judge when confirming the agreement.

9. Confirmation of the agreement by the syndic judge

Following the voting procedure, the debtor submits an application for confirmation of the restructuring agreement to the competent court. The application must be submitted within maximum 3 days from the conclusion of the voting report, accompanied by the following documents:

- a) the report of the restructuring manager analysing the state of failure;
- b) a declaration by the debtor that he is not in one of the situations referred to in Articles 61 and 62;
- c) documents certifying the restructuring administrator as an active insolvency practitioner and valid professional insurance;
- d) the restructuring agreement, in the final form voted by creditors under this Law;
- e) the valuation report on the assets of the debtor's patrimony taken into account when drawing up the restructuring agreement;
- f) proof of receipt by affected creditors of the proposed restructuring agreement and voting procedure or, if no proof of receipt is missing, proof of transmission to the registered office mentioned in the registers in which they are registered/their domicile;
- g) the minutes of ascertaining the creditors' vote and the votes cast by them.

The court's intervention is therefore limited to this stage, after the negotiation and approval of the restructuring agreement.

The confirmation of the restructuring agreement is made in the non-contentious procedure, in the council chamber, without summoning the parties. If he considers that further explanations are necessary, the syndic judge may summon the debtor and/or the restructuring administrator. The syndic judge may also ask the debtor or restructuring administrator for any missing documents within a maximum of 48 hours from the registration of the confirmatory application³⁹.

The syndic judge will pronounce a solution within maximum 10 days from the date of registration of the application.

The rejection of the application for confirmation of the restructuring agreement may be decided solely on grounds of legality.

The admission of the application for confirmation of the restructuring agreement is decided by an enforceable conclusion pronounced by the syndic judge, provided that it finds the following cumulative conditions met:

- the debtor is in difficulty;
- the restructuring administrator fulfils the legal conditions for exercising this capacity;
- the restructuring agreement was approved, in compliance with the cumulative conditions imposed by law.

The conditions relating to the approved restructuring agreement which must be fulfilled in

³⁸ Dumitru Vlad, *loc.cit.*, the document is available online at <https://www.normedia.ro/2023/05/18/insolvente-procedura-r30rki45rg/>.

³⁹ Luiza Cristina Gavrilăscu, *Mandatul administratorului restructurării în procedura de prevenire a insolvenței debitorului*, presentation held at the National Conference "Representation, representatives, representatives – approaches in public and private law", on 27.10.2023, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

order to be confirmed are⁴⁰:

- each class of claims has approved the restructuring agreement by an absolute majority of the value of creditors' claims;
- the voting conditions were respected and the division into categories of receivables was made according to the law;
- creditors of the same class of claims shall be treated equally and in proportion to their claim,
- the restructuring agreement has been communicated in accordance with the law to all affected parties;
- creditors who did not vote for the restructuring agreement or did not participate in the vote shall be *treated fairly and equitably*;
- *new financing*, if justified by the implementation of the restructuring agreement, does not unfairly prejudice the interests of creditors;
- claims proposed not to form part of the restructuring agreement are *not directly affected* by the measures provided for therein and the grounds for excluding them from the agreement are well founded;
- the agreement presents reasonable prospects of preventing the insolvency of the debtor and ensuring *the viability of the company*;

If the restructuring agreement has not been approved by an absolute majority of the value of creditors' claims of all classes, the request for confirmation of the agreement may nevertheless be granted if the following cumulative conditions are met⁴¹ :

- the agreement has been approved:
- a majority of the categories of claims, one of which must be a class of claims benefiting from causes of preference or any category of claims other than the generic category "other claims" or, failing that,
- at least one class of voting claims other than a class of claims which would receive no payment in the event of bankruptcy;
- the agreement was voted by at least 30% of all affected claims;
- classes of claims which did not vote for the agreement shall be treated more favourably than any other category of lower-ranking claims, as determined by the hierarchy established by law;
- all other conditions required cumulatively for approval are fulfilled.

In terms of the minimum required approval threshold of 30%, it is noted to be significantly lower than that practiced in other jurisdictions (e.g. 75%), where it was considered necessary to maintain it at a higher level than the insolvency one, precisely given the fact that it was assumed that the debtor runs a viable business and, even if it gets into trouble, it can recover after an agreement with creditors.

From the perspective of the voting requirements expressed by the categories of creditors, there are a number of differences compared to the insolvency procedure (e.g. the gradual lowering of the levels of exigency, corroborated with an adjustment of the fair and equitable treatment of creditors), largely based on the "cross-class cram down" (CCCD) mechanism, which could lead to certain elements of asymmetry between debtors' intention to restructure and creditors' interest not to restructure them. be affected by the claim⁴².

The treatment of creditors who did not vote for the restructuring agreement or did not participate in the vote therefore differs in relation to the degree to which the agreement was approved. Thus, *if the agreement has been approved by all categories of creditors by absolute majority, they benefit from fair and equitable treatment, whereas if the agreement has been approved by only a*

⁴⁰ Luiza Cristina Gavrilă, *Cerințele confirmării acordului de restructurare în vederea prevenirii insolvenței*, presentation held at the International Conference "Law and its challenges in socio-economic and administrative filed", on 28-30 June 2023, CIPPA 2023.

⁴¹ Cristian Ianca, *Ce este acordul de restructurare?*, the document is available online at <https://cristianianca.ro/ce-este-acordul-de-restructurare/>, accessed on 11.10.2023.

⁴² Andreea Bocioacă Andrei Manea, *The Restructuring Agreement, the new insolvency prevention tool, to be introduced by the latest amendments to Law 85/2014*, the document is available online at: <https://blog.pwc.ro/2022/07/12/acordul-de-restructurare-noul-instrument-de-prevenire-a-insolventei-in-curs-de-a-fi-introdus-prin-ultimele-modificari-ale-legii-85-2014>, accessed on 12.10.2023.

majority of the classes of *claims*, then claims that have not voted will have to be treated *more favorably than any other category of lower-ranking claims*.

Fair and equitable treatment shall be verified against the value of all claims on the same date, both affected and unaffected, so that:

- a) no creditor shall receive more than the amount of his claim;
- b) the holder of an affected claim who does not vote on the agreement does not receive less than the amount of distributions that would be made in the next-best-alternative scenario if the restructuring agreement were not confirmed, which may even be bankruptcy, according to the simulation provided for in the agreement;
- c) creditors receive less favourable treatment than other creditors in the same class of claims, according to the list of claims, only if they expressly agree to such treatment.

The decision on the confirmatory application shall be communicated to the debtor, to the restructuring administrator and to all creditors whose claims have been affected by the restructuring agreement, as well as to creditors holding unaffected claims.

The restructuring agreement, approved by creditors and confirmed by the syndic judge, shall be communicated to affected creditors and creditors holding unaffected claims through the restructuring administrator within 48 hours of the judgment.

If the restructuring agreement is confirmed by the judge, the company's business will be restructured accordingly, with the confirmed agreement *enforceable against all affected creditors*, including those who voted against or did not vote. The restructuring agreement will have no effect on creditors not affected by its provisions⁴³.

10. Endorsement of restructuring agreement not requiring confirmation

As regards debtors who achieved in the previous year a net turnover or, as the case may be, a gross income of up to the RON equivalent of EUR 500,000, and the restructuring agreement was voted unanimously, confirmation of the agreement by the syndic judge is not required⁴⁴.

In this situation, the debtor will apply only once to a contracted insolvency practitioner to approve the agreement. The agreement drawn up and negotiated by the debtor will be approved if the following conditions are met:

- a) the debtor is in difficulty;
- b) the restructuring agreement is approved unanimously by the affected creditors;
- c) the votes were collected within 90 days of the first vote of approval received by the debtor;
- d) communication of the restructuring agreement to all affected creditors was made in accordance with the law;
- e) the agreement presents reasonable prospects of preventing the insolvency of the debtor and ensuring its viability.

The insolvency practitioner shall conclude a report by which it shall ascertain, where appropriate, that the conditions set out in para. (3) and confirm the agreement or non-fulfillment thereof and reject the agreement. If the conditions are verified, the insolvency practitioner will endorse the restructuring agreement no later than 30 days after the expiry of that 90-day period. The legal provisions regarding the tax regime of receivables reduced by agreement are applicable to the extent of compatibility.

The minutes will be submitted to the National Union of Insolvency Practitioners in Romania, will be registered in a special register and will be communicated by the insolvency practitioner to the debtor and to the affected and unaffected creditors, according to the provisions of Law nr. 134/2010, as subsequently amended and supplemented. At the same time, the minutes confirming the agreement will also be mentioned in the Trade Register.

⁴³ Paul Popovici, *Inefficiency or uselessness? The practical avatar of regulating the preventive concordat and the ad hoc mandate*, „Curentul Juridic”, 2013, vol. 53, p. 141-144.

⁴⁴ Art. 15¹³.

An objection may be lodged against the report concluded by the insolvency practitioner within 10 days of notification, the provisions of Art. 59 para. (7) being applied accordingly.

The approval procedure does not apply if there is new funding, as well as if the restructuring agreement provides for the dismissal of more than 25% of employees.

11. Conclusions

The restructuring agreement procedure is a modern version of the ad hoc mandate procedure, regulated in the light of the European Insolvency Prevention Directive. By adapting the legislative framework of Member States, viable debtors are given the chance to save their business from insolvency through debt restructuring. Increased transparency is ensured by the establishment of strict criteria for the composition of the agreement, imposed by binding legal standards. The assistance provided by the restructuring manager provides the guarantee of an objective assessment, materialized in its report, which will serve as an important reference element in the assessment of the chances of recovery.

The hybrid nature of the procedure derives from the combination of contractual and judicial character. The vote on the agreement follows negotiations with creditors whose claims are affected. Establishing flexible approval limits in relation to the quality of claims increases the chances of success of the procedure. To the extent that the legal minimum threshold is reached, the agreement will be subject to confirmation by the syndic judge. The verification will be carried out in a non-contentious procedure and will be limited to a legality check, which streamlines the completion of the judicial process. Therefore, the law transposing the European Directive establishes a simplified procedure of the restructuring agreement, in which the syndic judge is involved only if appeals are lodged.

One of the main advantages of the new regulation is therefore the establishment of benchmarks for objective detection of the state of difficulty and effective tools with which pre-insolvency can be treated efficiently. The increased degree of confidentiality offered by this procedure, but also by the organised out-of-court framework, are incentives designed to convince debtors in difficulty to confidently resort to this means of recovering viable businesses.

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