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Review article

IMPLEMENTATION OF THE DIRECTIVE 2019/1023 IN THE CROATIAN LEGAL SYSTEM: A NEW TREND OF RESTRUCTURING IN THE CROATIAN INSOLVENCY LAW OR ANOTHER MISSED OPPORTUNITY?

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ABSTRACT

Saving companies as early as possible and providing new opportunities to faltering entrepreneurs has become one of the main priorities of the EU policy. Following the example of American legislation, the EU Commission has recognized the importance of acknowledging the difficulties in doing business and, through the Directive 2019/1023, created a legal basis for harmonized restructuring tools in EU member state. The aim of the Directive is to enable

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encouragement, reorganization and creation of new opportunities to faltering entrepreneurs. Although the aim of the Directive 2019/1023 is well thought out, its adoption has not been followed by smooth implementation. Many EU Member States used the possibility of extending the implementation deadline and have implemented the Directive 2019/1023, so to speak, at the last minute. One of such countries is the Republic of Croatia, which, with the latest amendments to the Bankruptcy Act from March 2022, passed a series of provisions implementing the goals and solutions from the Directive 2019/1023. This article opens with an analysis of the circumstances that led to the adoption of the Directive 2019/1023 and gives an overview of its objectives and provisions. In addition, the article addresses the short overview of the implementation solutions developed in Austrian and German law, which are role models for Croatian bankruptcy law. The central part of the paper provides a critical analysis of the amended provisions of the Croatian Bankruptcy Act, which implements the Directive 2019/1023 into the Croatian legal system. The authors warn of possible challenges in the enforcement of the objectives of the Directive through the prism of the amended rules of the Bankruptcy Act.

Keywords: *Directive 2019/1023, early warning tools, event of default, implementation moratorium*

1. INTRODUCTION

Statistics show that approximately half of the entrepreneurs operate for less than five years, with approximately 200,000 of them across the European Union facing insolvency each year, which results in the loss of millions of jobs. This means that a significant number of entrepreneurs in the European Union are failing every day and this number is on the rise, with the number of insolvencies doubling since the start of the COVID crisis, and that trend continues.[1]

Previously EU insolvency law focused on regulating cross-border insolvency processes, addressing concerns such as the court's jurisdiction, recognition of the effects of proceedings in the other Member States, and conflicts of laws.[2] With the expanding intercourse between nations, the negative repercussions of a lack of international collaboration in bankruptcy proceedings where assets are located in more than one country have become even more obvious. Creditor countries, of course, bear the brunt of the consequences. Some agreements on jurisdiction and judicial assistance in bankruptcy have been reached, the majority of them involv-

[1] Proposal of the Law on Amendments to the Bankruptcy Act, No. 50301-21/06-21-3, from 2 December 2021, p. 36

[2] Didea, I.; Ilie, D. M., *A New Stage in the Development and Strenghtening of a "Rescue Culture and Prevention in Business" in the Spirit of an European Legal Instrument of the Hard Law Type. Transposition at National Level of Directive (EU) 2019/1023*, Revista Universul Juridic, Vol. 2021, No. 4, 2021, pp. 91; See also: Consolidated text: Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

ing neighboring governments, according to international trade groups. Except for these treaties, no significant progress has been made so far.[3]

In this regard, Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (hereinafter: Directive 2019/1023, Directive)[4] is the first important step toward integrating the various European bankruptcy laws, going beyond the stage of implementing norms and standards that are confined to judicial cooperation and cross-border insolvency processes.[5]

The Directive, following the US Bankruptcy Law solutions, strives to ensure that entrepreneurs and businesses in financial distress can seek help as soon as possible to keep their operations afloat. Where insolvency is a possibility, Member States shall provide debtors with access to a preventive and flexible restructuring framework that allows them to restructure their company to avoid insolvency.[6] Its overarching purpose is to lower barriers to free capital flow within the EU, improve the methods for rescuing distressed businesses, and foster a culture of second chances for unsuccessful entrepreneurs.[7]

Therefore, apart from the process of the adoption of the said Directive and its goal, structure and objectives, the paper also deals with its implementation in Germany and Austria with an emphasis on its implementation in the Republic of Croatia. As a result of the implementation of the Directive, the Croatian Bankruptcy Act[8] was amended as the backbone of the Croatian insolvency system. Therefore, the paper emphasizes the amendments to the Bankruptcy Act and the impact of the Directive on its amendments. In conclusion, the authors warn of possible chal-

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3 Nadelmann, K. H., *The National Bankruptcy Act and the Conflict of Laws*, Harvard Law Review, Vol. 59, No. 7, 1949, pp. 43

4 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (hereinafter: Directive 2019/1023)

5 Didea, Ilie, *op. cit.,* note 2, p. 91

6 Directive 2019/1023, preamble (20)

7 Binard, S.; Mara-Marhuenda, C; Minne, G., *The New EU Restructuring Directive and Upcoming Reform of Luxembourg Restructuring and Insolvency Legislation*, Insolvency and Restructuring International, Vol. 14, No. 1, 2020, p. 29

8 Croatian Bankruptcy Act (*Cro*. Stečajni zakon), Official Gazette No. 71/2015, 104/2017, 36/2022, which amendments came into force on 31 March 2022 (hereinafter: Croatian Bankruptcy Act)

lenges in the enforcement of the early warning tools and the objectives of the amendments Croatian Bankruptcy Act.

2. THE PROCESS OF ADOPTING THE DIRECTIVE 2019/1023 IN THE EU

Historically, bankruptcy with liquidation has been one of the most common insolvency proceedings in the EU Member States, while the EU did not promote reorganization and restructuring proceedings.[9] A turning-point in this regard occurred in 2014 when the EU Commission concluded that the EU market was facing unprecedented economic crises and that an effective response would be a more flexible legislative framework for bankruptcy and the promotion of restructuring.[10]

In light of these conclusions, the EU Commission adopted the Recommendation on a New Approach to Business Failure and Insolvency in 2014.[11] The text of the 2014 Recommendation aimed at providing a second chance to entrepreneurs in financial distress through effective early warning tools and introducing preventive informal (extra-judicial) restructuring models.[12] The role model for the Recommendation was the US Bankruptcy Law Chapter 11 which enables reorganization to enable the continued operation of the entity facing liquidity problems. Such entities are assisted through various tools, such as the release from debt, deferral of payments, waiver of interest, etc.[13]

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9 Volberda, H., *Crises, Creditors and Cramdowns: An evaluation of the protection of minority creditors under the WHOA in light of Directive (EU) 2019/1023*, Utrecht Law Review, [https://www.utrechtlawreview.org/articles/10.36633/ulr.638/#n28], Accessed 25 May 2022. See also Martin, N., *The Role of Culture and History in Developing Bankruptcy and Restructuring Law: The Perils of Legal Transplantation*, Boston College International & Comparative Law Review, Vol. 28, No. 1, 2005, p. 51

10 *Ibid*. See also Garrido, Jose M.; DeLong, Chanda M.; Rasekh, Amira; Rosha, Anjum, *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive*, IMF Working Papers, No. 21/152, 2021, p. 5, [https://www.imf.org/en/Publications/WP/Issues/2021/05/27/Restructuring-and-Insolvency-in-Europe-Policy-Options-in-the-Implementation-of-the-EU-50235], Accessed 6 September 2021

11 *Ibid*. See also Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency [2014] OJ L74/6; Tollenaar, N., *The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings*, Insolvency Intelligence, Vol. 30, No. 5, 2017, pp. 65-66

12 Garrido *et al., op. cit.,* note 10

13 McCormack, G.; Keay, A.; Brown, S., *European Insolvency Law: Reform and Harmonization,* Edward Elgar Publishing, Cheltenham, 2017, p. 227. For more details on the US Bankruptcy Code solutions see Countryman, V., *A History of American Bankruptcy Law*, Commercial Law Journal, Vol. 81, No. 6, 1976, pp. 226-227. See also on comprehensive on consumer protection Ayer, J. D., *Some Awkward Questions about American Bankruptcy Law. An Agenda for Comparativists*, International Insolvency Re-

Although the Recommendation was not a legally binding instrument, the EU Commission extensively expanded its scope with additional early warning restructuring tools and activities and in November 2016 it adopted the draft Directive 2019/1023. The idea of the Commission was to non-binding Recommendation should be replaced with a Directive as a harmonizing and legally binding instrument.[14]

The drafting process for the final text of the Directive was not entirely smooth and it resulted in compromise solutions that reduced the harmonization effect of certain restructuring tools that were envisioned by the first draft if the Directive. The Member States were given the discretion to decide how each mechanism is to be implemented, and it was unclear in the drafting process which mechanisms would be used by each Member State.[15]

The process resulted in the adoption of the final text of the Directive 2019/1023 on 20 June 2019 whose stated goal was to harmonize and promote restructuring proceedings in the Member States through early warning tools and preventive restructuring.[16] However, immediately after the adoption of the Directive, it became apparent that, despite the proclaimed minimal standards of harmonization under the Directive, the pursuit of the desired goals will not be harmonized. Therefore, there is a risk of the emergence of models in some Member States that violate or reduce the rights of the creditors. Furthermore, there is a risk of reduced predictability of the outcomes in such proceedings, which may lead to forum shopping in cross-border disputes.[17]

3. THE STRUCTURE AND OBJECTIVES OF THE DIRECTIVE 2019/1023

The Directive 2019/1023 is divided into six parts. The first part of the Directive 2019/1023 defines its subject and scope of application in which the main definitions with the explanation of the early warning and access to information are given. In the second part, the Directive deals with the preventive restructuring

view, Vol. 1, No. 1, 1990, pp. 51, 52; Schecher, A. L., *United States – Canadian Bankruptcy Litigation: Is the Treaty the Way to Go*, International Insolvency Review, Vol. 1, No. 2, 1991, p. 107

14 *Ibid*. See also Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (COM/2016/SWD/723/final), p. 8

15 Garrido *et al., op. cit.,* note 10

16 *Ibid*., pp. 4-5.; Rotaru, V., *The Restructuring Directive: a functional law and economics analysis from a French law perspective*, Droit & Croissance / Rules for Growth Institute, Paris, 2019, p. 2

17 Garrido *et al., op. cit.,* note 10, pp. 5-9

frameworks such as the availability of preventive restructuring frameworks, facilitating negotiations on preventive restructuring plans, restructuring plans, protection for new financing, interim financing and other restructuring related transactions and duties of directors.[18] The third part addresses the discharge of debt and disqualifications, which are defined as follows: access to discharge, discharge period, disqualification period, derogations and consolidation of proceedings regarding professional and personal debts.[19] The fifth part deals with the monitoring of procedures concerning restructuring, insolvency and discharge of debt, which relates to data collection and Committee procedure. Finally, the sixth part of the Directive defines the relationship with other acts, transposition and entering into force[20].[21]

In the drafting process of the Directive, it was determined that there are many discrepancies among the restructuring models adopted in the Member States. Therefore the Directive aims to address the following three major issues: (1) the establishment of a preventive restructuring framework for each Member State, for debtors in financial distress prior to insolvency; (2) the enforcement of a maximum three-year discharge period, granting a "second chance" to entrepreneurs; (3) the improvement of the efficiency of the insolvency procedures and others of a similar nature.[22]

The underlying goal of the Directive is to remove any obstacles to the proper functioning of the internal market[23] and the enjoyment of the fundamental freedoms (free movement of goods, persons, capital[24] and freedom of establishment).[25] The

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18 Directive 2019/1043, Art. 1-19.; See also Zhang, D., *Insolvency Law and Multinational Groups: Theories, Solutions and Recommendations for Business Failure*, Routledge, Abingdon, 2020, p. 69

19 Directive 2019/1043, Art. 20-24. Measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt are presented in the fourth part of the Directive. The Directive prescribe that Member States should introduce specified judicial and administrative authorities who impose these measures, then practitioners in procedures concerning restructuring, insolvency and discharge of debt, supervision and remuneration of practitioners and usage of electronic means of communication. *See also:* Directive 2019/1043, Art. 24-28

20 Directive 2019/1043, Art. 31-36

21 See McCormack, G., *The European Restructuring Directive*, Edward Elgar Publishing Limited, Cheltenham, 2021

22 Gassner, G.; Wabl, G., *The New EU Directive on Restructuring and Insolvency and its Implications for Austria*, Insolvency and Restructuring International, Vol. 13, No. 2, 2019, pp. 5-6

23 See Yu, T., *European Unio Internal Market Law Book Review*, Chinese Journal of Global Governance, Vol. 4, No. 1, 2018, pp. 77-78

24 See: Sehnalek, D., *Free Movement of Capital*, Bialstockie Studia Prawnicze, Vol. 4, No. 81, 2008, pp. 81-82

25 See Maestripieri, C., *Freedom of Establishment an Freedom to Suppy Services*, Common Market Law Review, Vol. 10, No. 2, 1973, pp. 150-153

Directive seeks to remove the barriers created by divergencies in the national regulation of preventive restructuring[26], insolvency[27], debt discharge, and disqualifications, while protecting the rights and freedom of the workers. This is achieved by creating a framework that provide effective national preventive restructuring frameworks for viable enterprises in financial distress, the discharge of debt for honest bankrupt or overly-indebted marketers, and the general improvement of the efficiency of related procedures.[28] Therefore, restructuring should enable debtors to overcome economic difficulties and maintain their operations by remodeling or converting their composition or form, including their assets and liabilities, and by operational modifications. Where such activities are not expressly regulated by national law, contractual, and property-related restructuring activities are conducted under the general conditions provided in bylaws, civil regulations and labour law guidelines. Any debt-to-equity exchange must be compliant with national law, to ensure a timely and effective procedure to prevent unwarranted insolvency and liquidation. The purpose of these frameworks is to prevent the loss of jobs, know-how and opportunities, and to maximize the benefits for lenders in their assessment of the value of assets in liquidation, versus the opportunities that will arise in continued operations. There are also benefits for the business owners and the broader financial system as a whole.[29]

Preventive restructuring frameworks must also reduce the rate of loan defaults by ensuring that organizations can take action before they are forced to default on a loan, thus reducing the risk of loans being concealed in cyclical downturns and mitigating unfavorable economic effects.[30] A large percentage of businesses a nd jobs may be salvaged by establishing a preventive framework in all the Member States where such businesses are established, or where their property or creditors are located. The preventive frameworks should account for and balance the rights of all relevant stakeholders.[31]

On the other hand, non-viable organizations that have no prospect of survival should be liquidated as quickly as possible. If the debtor in financial distress can-

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26 See Moffatt, P., *Debt Restructuring*, International Insolvency Review, Vol. 26, No. 2, 2017, pp. 233-236

27 See Lee, E. B., *Insolvency Law*, Singapore Academy of Law Annual Review of Singapore Cases, Vol. 2011, No. 319, 2011, pp. 319-323

28 See Fannon, I. L., et. al., *Corporate Recovery in an Integrated Europe: Harmonisation, Coordination and Judical Cooperation*, Edward Elgar Publishing Limited, Cheltenham, 2022, pp. 162.-192

29 Directive 2019/1043, preamble (1-2)

30 See Omar, P. J., Research Handbook on Corporate Restructuring, Edward Elgar Publishing Limited, Cheltenham, 2021, p. 384

31 Directive 2019/1043, preamble (3)

not reasonably recover, and restructuring is not possible, there should be efforts to accelerate the process and reduce the losses to the detriment of the lenders, workers and other stakeholders, as well as the financial system as a whole.[32]

Furthermore, different Member States have adopted a range of restructuring mechanisms for debtors in economic distress.[33] Some Member States provide limited recourse to restructuring mechanisms that are available to businesses at a very late stage of the insolvency proceedings. Such approaches have proven to be of limited effectiveness, in light of their formality and limited use of out-of-court preparations. The more prominent trend in insolvency law has been towards a more preventive approach. In the different Member States, restructuring is possible at an early stage, but the available mechanisms were not effective, or they were overly formal, limiting the use of out-of-court preparations. Preventive answers are a developing trend in insolvency law.[34]

In the many Member States, good faith bankrupt marketers need over 3 years to be discharged from their debts in order to re-start their operations. Such inefficient and rigid frameworks lead many entrepreneurs to relocate their business to different jurisdictions where they can have a fresh start, which comes at an expense for the entrepreneurs and their lenders.[35] Such a framework that is prevalent in several Member States is one of the key reasons for the low restoration fees, which has a deterrent effect on traders from engaging in jurisdictions with lengthy and expensive procedures.[36]

The diverging approaches between Member States regarding restructuring, insolvency and the discharge of debt create additional expenses for traders in their risk assessment of the borrowers' likelihood of falling into financial distress in different Member States, as well as additional restructuring costs for businesses that have offices, property or lenders in different member States. This is particularly for the restructuring of global corporations.[37] Investors have noted that the uncertainty related to insolvency rules and the risks of lengthy insolvency proceedings in different Member States are among the key reasons for deciding not to invest in a particular jurisdiction, or not to engage with a company from a particular country. This uncertainty is a disincentive, which obstructs the freedoms undertakings and

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32 *Ibid*.

33 Directive 2019/1043, preamble (4); See more: Olivares-Caminal, R., *et al.*, *Debt Restructuring*, OxfordUniversity Press, Oxford, 2016

34 *Ibid.*

35 Directive 2019/1043, preamble (5); See more Marney, R., *et al.*, *Corporate Debt Restructuring in Emerging Markets: A practical Post-Pandemic Guide*, Palgrave Macmillan, Cham, 2021, pp. 62-65

36 Directive 2019/1043, preamble (6)

37 Directive 2019/1043, preamble (7)

the promotion of entrepreneurship, which is detrimental to the proper functioning of the internal market.[38]

As the objectives of the Directive cannot be achieved under the existing fragmented regulations of the Member States, it was elevated to the Union level, so it can adopt measures in accordance with the principle of subsidiarity as set forth in Article 5 of the Treaty on European Union.[39] In conformity with the proportionality principle outlined in that Article, this Directive does not go beyond what is necessary to attain the stated goals.[40]

Therefore, the Directive should take into account the culture of the countries in order to reduce the effects of insolvency and to provide entrepreneurs a "second chance".[41]

4. OVERVIEW OF THE IMPLEMENTATION PROCESS OF THE DIRECTIVE IN AUSTRIA AND GERMANY

The European approach to insolvency law is known to be strict and rigid, which is a remnant of the traditional notions of bankruptcy as a failure.[42] Before the adoption of the Directive 2019/1023 in the EU Member States there were a lot of discrepancies regarding the restructuring regime. On one hand, in restrictive regimes such as in Greece and Italy, only individuals that are involved in a business could qualify for bankruptcy protection, i.e. there was no consumer bankruptcy system. On the other hand, Norway, Sweden, Denmark, Finland, Austria, Germany, France, Spain, and Portugal offer some sort of relief, allowing judges to consider on the discharge requests. Therefore, the Directive came as a reaction of the EU bodies, having recognized the need for urgent changes in this area.[43]

Despite the fact that countries had to implement the Directive initially by 17 July 2021, or under the extended deadline until 17 July 2022, with the exception of a few provisions, only several countries have adopted and published the legislation

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38 Directive 2019/1043, preamble (8-9)

39 See: Arnull, A., *et al.*, *The Oxford Handbook of European Union Law*, Oxford University Press, Oxford, 2015, p. 87

40 Directive 2019/1043, preamble (100)

41 Didea, Illie, *op. cit.*, note 2, preamble (92)

42 Volberda, H., *Crises, Creditors and Cramdowns: An Evaluation of the Protection of Minority Creditors under the WHOA in Light of Directive (EU) 2019/1023*, Utrecht Law Review, Vol. 17, No. 3, 2021, p. 68

43 Martin, N., *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, Boston College International and Comparative Law Review, Vol. 28, No. 1, 2005, pp. 40-41

by which the transfer would be performed.[44] Therefore, Germany, Austria, Greece, France, Portugal, and recently Croatia, have fully or partially implemented the Directive, and all the other Member States are in the process of implementation or have not even started the implementation process.[45] Consequently, as an example of a timely transfer into domestic legislation, the following is an overview of the process of implementation of the Directive in Austria and Germany, and for comparison, the course of implementation in Croatia.

4.1. Austria

Before the implementation of the Directive in Austria, a well-functioning out-of-court private workout practice dominated as the main restructuring mechanism in the Austrian market.[46] Despite the fact that such workouts had to be done on a contractual, consensual basis, commercial and practical solutions were frequently found because the main players (especially banks, courts, and advisers) are very professional and tend to act in accordance with (non-binding) 'gentlemen's agreements'.[47] However, there were certain evident flaws with such private workouts. Even though that system was not new in Austria, as the Business Reorganization Act (ger. *Unternehmensreorganisationsgesetz* or URG) was passed in the 1990s to allow pre-insolvency reorganizations inside official proceedings. Such processes, however, have never been recognized in Austrian law.[48]

The implementation of the Directive in Austria started on 22 February 2021 when the draft of the Restructuring and Insolvency Directive Implementation Act[49] was released, and ended on 17 July 2021 when the Restructuring Code[50] (ger. *Restrukturierungsordnung*, hereinafter: "ReO") entered into force. According to Section 6 of the ReO, the debtor is obliged to submit the restructuring plan together with the

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44 McCarthy, J., *A Class Apart: The Relevance of the EU Preventive Restructuring Directive for Small and Medium Enterprises*, European Business Organization Law Review, Vol. 21, 2020, p. 897

45 National transpositions measures communicated by the Member States concerning Directive on restructuring and insolvency, [https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX-:32019L1023], Accessed 5 March 2022

46 See Klauser, A., *Austria, Germany, Italy*, International Business Lawyer, Vol. 30, No. 6, 2002, pp. 258-259

47 See Diago Diago, M. P., *Gentlemen's Agreements and International Financing Agreements*, Cuadernos de Derecho Transnacional, Vol. 4, No. 1, 2012, pp. 124-128

48 Business Reorganization Act (*Ger.* Unternehmensreorganisationsgesetz – URG), Official Gazette No. 114/1997

49 *Restructuring and Insolvency Directive Implementation Act (Ger.* Restrukturierungs- und Insolvenz-Richtlinie-Umsetzungsgesetz – RIRUG), *Federal Law Gazette I No. 147/2021*

50 Federal Act on the Restructuring of Companies (*Ger*. Restrukturierungsordnung - ReO), Federal Law Gazette BGBI I. No. 147/2021

request for initiating the restructuring procedure or within the deadline allowed for its submission and submit a request for its closure.[51] The outcome of the implementation of the Directive in Austria is a new age in restructuring law. Restructuring measures are currently available even against the objection of individual creditors.[52]

4.2. Germany

Over the last two decades, Germany has made significant progress in the sphere of insolvency and restructuring law. Unlike the previous system that was hostile to restructuring and often included forced administration, the dissolution of the debtor's company, the liquidation of its assets, and the reputation of a failed entrepreneur, the new German insolvency law reflects a more friendly attitude to restructuring.[53] Germany adopted its Development of Restructuring and Insolvency Act (*Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts, SanInsFoG*) on December 29, 2020. The *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen*, *StaRUG*, from January 1, 2021 has had a significant impact on this Act.[54]

The biggest impact ofthe act Act is the establishment of a comprehensive legal framework for out-of-court restructuring, which did not previously exist in German restructuring law.[55] Also, the new Act fills the gap in the previous legal framework for restructuring taking place within a consensual pre-insolvency and insolvency process. It gives the opportunity to the parties to engage in restructuring against the opposition of individuals who do not participate in the insolvency proceedings via a cram-down, involving the possibility of a debt-to-equity swap. This allows the restructuring contract to be terminated as needed, offering the possibility of a moratorium on individual enforcement measures. [56] This makes the German restructuring practices a competitive, effective and practical restructuring mechanism in the international market.[57]

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51 Section 6 of the ReO

52 Schimka, M.; Spiegel, E., *Austria - Draft law complete, likely to make July 2021 deadline, Progress report on implementation of the Restructuring Directive*, Change & Recovery Series, Wolf Theiss 2021, [https://wolftheiss.com/app/uploads/2022/03/BF-EU-Insolvency-Directive.pdf], Accessed 04 March 2022

53 Ehmke, D. C.; Gant, J. L. L.; Boon, G.-J.; Langkjaer, L.; Ghio, E.; *The European Union Preventive Restructuring Framework: A Hole in One*, International Insolvency Review, Vol. 28, No. 2, 2019, pp. 190-192

54 The Act for the Development of Restructuring and Insolvency Law (G*er.* Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts, SanInsFoG), Federal Law Gazette BGBI. I, No. 66/2020

55 Wessels, B., et. al., *International Cooperation in Bankruptcy and Insolvency Matters*, Oxford University Press, New York, 2009, pp. 88-90

56 Wessels, B., et. al., *Rescue of Business in Europe*, Oxford University Press, Oxford, 2020, pp. 685-729

57 Girotto, F.; Backer, A., *Implementation of the EU Restructuring Directive in Germany,* Financier Worldwide Magazine, No. 216, 2020, [https://www.financierworldwide.com/implementation-of-the-eu-re-

5. IMPLEMENTATION OF THE DIRECTIVE IN CROATIA WITH AN EMPHASIS ONTO THE NEW AMENDMENTS OF THE CROATIAN BANKRUPTCY ACT: REAL CHANGE OR MORE OF THE SAME

The implementation of the Directive 2019/1023 in the Republic of Croatia lasted for three years.[58] Due to the Updated proposal of the Plan of Legislative Activities of the Ministry of Justice and Administration for 2021, the Proposal of the Law on Amendments to the Consumer Bankruptcy Act[59] and the Proposal of the Law on Amendments to the Bankruptcy Act[60] should be sent to the procedure of the Government of the Republic of Croatia in the first quarter of 2021. However, the original deadline was not met[61]. In December 2021 the Government published the Proposal of the Law on Amendments to the Bankruptcy Act[62] and in February 2022 the Final Proposal of the Law on Amendments to the Consumer Bankruptcy Act[63]. On March 11, 2022, the Croatian Parliament finally decided to amend the Bankruptcy Act and the Consumer Bankruptcy Act[64] by a majority vote, thus completing a significant part of the implementation process.[65] Finally the amendment of the Bankruptcy Act entered into force on the 31 March, 2022.[66]

Despite the fact that the subject of this paper is not the Consumer Bankruptcy Act, it should be emphasized that the Directive has left its mark on it, especially in the general provisions, the position of commissioner, regular consumer bankruptcy proceedings and simple consumer bankruptcy proceedings.[67] Namely, the amend-

structuring-directive-in-germany#.Yov2MKhBxPY], Accessed 5 March 2022

58 Proposal of the Law on Amendments to the Bankruptcy Act, No. 50301-21/06-21-3, from 2 December 2021 (hereinafter: Proposal of the Law on Amendments to the Bankruptcy Act), p. 2

59 Proposal of the Law on Amendments to the Consumer Bankruptcy Act, No. 65-21-02, from 2 December 2021

60 Proposal of the Law on Amendments to the Bankruptcy Act, *op. cit*., note 58

61 Updated proposal of the Plan of Legislative Activities of the Ministry of Justice and Administration for 2021, Ministry of Justice and Administration, from 23 December 2021 [https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=14930], Accessed 12 February 2022

62 Proposal of the Law on Amendments to the Bankruptcy Act, *op. cit*., note 58

63 Proposal of the Law on Amendments to the Consumer Bankruptcy Act, *op. cit*., note 59

64 Final Proposal of the Law on Amendments to the Consumer Bankruptcy Act, [https://www.iusinfo.hr/document?sopi=RDOCSB201D19900101NX6902022T1736178600], Accessed 15 March 2022

65 *Sabor izmijenio Stečajni zakon*, [https://www.edusinfo.hr/aktualno/dnevne-novosti/49907], Accessed 16 March 2022

66 Croatian Bankruptcy Act (*Cro*. Stečajni zakon), Official Gazette No. 71/2015, 104/2017, 36/2022 which amendments came into force on 31 March 2022 (hereinafter: Croatian Bankruptcy Act)

67 Bodul, D., *Pogled na Nacrt Zakona o stečaju potrošača za 2022.: treća sreća?,* [https://www.iusinfo.hr/strucni-clanci/pogled-na-nacrt-zakona-o-stecaju-potrosaca-za-2022-treca-sreca], Accessed 20 March 2022

ments to the Consumer Bankruptcy Act shorten the period of consumer behavior testing from five to three years. The reason for denying the right to release from remaining obligations is also altered, so that instead of ten years, the condition is that the consumer in the six years preceding the filing of the bankruptcy petition or in the last three years (instead of the previous five years) preceding the filing of a simple consumer bankruptcy procedure, be released from remaining obligations or be denied exemption. This aligns these deadlines with the shortening of deadlines for the consumer behavior review period.[68]

5.1. Amendment to the Croatian Bankruptcy Act

One of the main purposes of amending the Bankruptcy Act is the establishment of an early warning system that would signal to debtors in financial difficulties that it is necessary to act without delay, simplifying the adoption of the restructuring plan, the establishment of a system for collecting and monitoring bankruptcy data, improving the legal framework for bankruptcy trustees by establishing more restrictive entries into the profession, enhanced initial and continuing professional development; and finally improving the position of workers in bankruptcy proceedings.[69]

According to the obligations arising from the Directive[70], the Amendment to the Bankruptcy Law adopts an early warning system in order for the debtor to detect his financial difficulties as soon as possible and take appropriate action, thus potentially avoiding impending insolvency or liquidation. Also, in order to increase the support of workers and workers' representatives, the obligation to inform them in a timely manner about the availability of the early warning system and about the ways of restructuring and debt relief is introduced. The amendment imposes an obligation on employers to inform their employees at least once a year about early warning tools and procedures related to debt restructuring and debt relief, if the employer is threatened with insolvency or bankruptcy proceedings have been opened against him.[71]

The Directive also requires that the application of the latest information and communication technologies should provide clear, up-to-date and concise informa-

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68 *Izmjene Stečajnog zakona za prevenciju i lakše restrukturiranje*, [https://www.iusinfo.hr/aktualno/dnevne-novosti/48572], Accessed 20 March 2022

69 *Ibid.*

70 Law on Amendments to the Bankruptcy Act, Official Gazette No. 36/2022 (hereinafter: Law on Amendments to the Bankruptcy Act). See also: Bodul, D., *Analiza Nacrta novele Stečajnog zakona iz 2022: još jedne (reformske ili kozmetičke) izmjene?*, [https://www.iusinfo.hr/strucni-clanci/CLN-20V01D2022B1639], Accessed 20 March 2022

71 Art. 4 of the Law on Amendments to the Bankruptcy Act

tion tailored to the users on available preventive restructuring procedures, providing the debtors with sufficient access to clear and transparent early warning tools. The availability of such tools should indicate the likelihood of insolvency and signal the need to act without delay.[72] Thus, the Ministry of Finance, the Tax Administration and the auditor have a duty to warn the debtor of the negative development in their payment that is noted during the course of their work. The employer is obliged to provide employees information about the early warning tools an annual basis, while the debtors and the public can access the relevant and updated information on the e-Bulletin board.[73] According to the amendments to the Bankruptcy Act, the Ministry in charge of justice has a duty to collect and generate data on procedures related to restructuring, insolvency and debt forgiveness, information on the number of debtors who have been subject to restructuring or insolvency proceedings and who, within three years before the application or initiation of such proceedings, if such initiation is provided for by applicable regulations, have confirmed the restructuring plan under the previous restructuring procedure, and other information referred to in Article 9 of the Law on Amendments to the Bankruptcy Act.[74] Such information must be collected at the national level on annual basis. Furthermore, taking advantage of the application of new technology, the existence of a strict but not inflexible framework for action, emphasized literacy and speed of decision-making, are ideas that have been translated into the Act regarding the use of electronic means of communication. Thus, electronic means of communication can be used in pre-bankruptcy and bankruptcy proceedings, with the appropriate application of the rules of civil procedure before commercial courts.[75]

Furthermore, the amended Bankruptcy Act provides for two scenarios: acceptance of the plan by the creditor and confirmation of the plan by the court. Therefore, the court gets much more autonomy in approving the plan and is no longer bound by the creditor's decision on whether or not to approve the plan. Also, the new Bankruptcy Act almost equates the conclusion of bankruptcy and pre-bankruptcy proceedings through the development of a bankruptcy plan. Before the end of the bankruptcy proceedings, the debtor is obliged to settle the costs of the pre-bankruptcy proceedings and the due undisputed creditor's claims incurred after the opening of the pre-bankruptcy proceedings, and is obliged to provide security for the disputed claims. When making a decision on concluding pre-bankruptcy proceedings, the court is obliged to inform the debtor and the trustee about the

72 Art. 3(1) of the Directive 2019/1023

73 Art. 4 of the Law on Amendments to the Bankruptcy Act

74 Art. 9 of the Law on Amendments to the Bankruptcy Act

75 Bodul, *op. cit.*, note 70

time of occurrence of the legal effects of concluding pre-bankruptcy proceedings. Furthermore, a novelty in the law is a special list of bankruptcy trustees called "List of highly qualified bankruptcy trustees", and the possibility of opening a joint office of two or more bankruptcy trustees with the status of a legal entity is introduced. Also, the conditions for taking the professional exam are changing and the adoption of the Code of Ethics for Bankruptcy Trustees is envisaged. The provisions on the right to file a bankruptcy plan have also changed, according to which the debtor would have the right to file for bankruptcy together with the proposal to open bankruptcy proceedings, and after its opening the bankruptcy trustee and the individual debtor would have the right to file for bankruptcy.[76]

Therefore, novelties in the Act can be distinguished as novelties in pre-bankruptcy and bankruptcy proceedings. The main novelties introduced in the Act are related to the submission of a proposal for opening pre-bankruptcy proceedings, appointment of the Commissioner, the preconditions for the appointment of the Commissioner have also been amended, voting and classification of creditors, deciding on the approval of the restructuring plan and its legal effects, temporary financing in pre-bankruptcy proceedings, the conclusion of pre-bankruptcy proceedings, filling legal gaps, bankruptcy plan, classification of participants in the plan.

The novelties in pre-bankruptcy proceedings are aimed at preventing insolvency in accordance with the objectives of the Directive and efforts to apply various measures to preserve business continuity. Under the amendments of the Act, only the debtor can submit a proposal to initiate proceedings.[77] If the restructuring plan has not been submitted with the proposal for opening pre-bankruptcy proceedings, the plan must be submitted to the court no later than 21 days from the day the decision on established and disputed claims becomes final, or from the day of delivery of the appellate court's decision.[78]

The rules on persons against whom pre-bankruptcy proceedings cannot be conducted have been amended,[79] Namely, the debtor has the right to submit a restructuring plan and the proposal of the restructuring plan must be amended in such a way that the proposal of the restructuring plan is extended.[80] Furthermore, it is now possible to encroach on the rights of separate creditors, stipulating that the rights of separate creditors may be limited by a restructuring plan without their

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76 Deković, D., *Prijedlog zakona o izmjenama i dopunama Stečajnog zakona*, [https://www.iusinfo.hr/aktualno/u-sredistu/49187], Accessed 14 March 2022

77 Art. 12 of the Law on Amendments to the Bankruptcy Act

78 *Ibid.*, Art. 13

79 *Ibid.*, Art. 3

80 *Ibid.*, Art. 15; see also Omar *et al.*, *op. cit.*, note. 30, p. 347

consent, but they must not be put in a worse position than they would be if there were no plan and that bankruptcy proceedings have been opened.[81]

The preconditions for the appointment of the Commissioner have also been amended. Namely, the preconditions for the appointment of a trustee in pre-bankruptcy proceedings remain the same as the preconditions for the appointment of a trustee in bankruptcy, except that the appointment of a trustee is now an obligation and not within the discretion of the court.[82]

The role of the court and the determination of claims has been clarified by stipulating that the court manages the examination hearing and does not examine the reported claims because the claims reported within the prescribed period are considered determined if they were not disputed by the debtor, trustee or creditor.[83]

Now, if there is an enforceable document for the disputed claim, the court will refer the disputant to the litigation to prove the merits of its dispute,[84] The manner in which the determination of the claim in the litigation may be requested is elaborated in further detail.[85]

Regarding voting and classification of creditors, the amended act now clearly states that the proposed restructuring plan must cover all identified and disputed claims,[86] Restructuring is encouraged by stipulating that creditors will be deemed to have voted in favor of the restructuring plan if they do not submit a voting form or submit a form from which it is not possible to determine unequivocally how they voted by the beginning of the voting hearing.[87]

Under the amended Act, after the creditors accept the restructuring plan and their consent to the debtor, the court will decide whether to approve the restructuring plan. The Act prescribed the situations in which the court will ex officio, upon the proposal of creditors, debtors, shareholders holding shares and holders of other founding rights, legal entities, deny confirmation of the restructuring plan,[88] If the preconditions for confirming the restructuring plan are not met, the court will deny the confirmation of the restructuring plan and suspend the pre-bankruptcy

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81 Art. 20 of the Law on Amendments to the Bankruptcy Act

82 *Ibid.*, Art. 17

83 *Ibid.*, Art. 23; see also Luca, De N., *European Company Law*, Cambridge University Press, Cambridge, 2021, p. 550

84 Art. 24 of the Law on Amendments to the Bankruptcy Act

85 *Ibid.*, Art. 25

86 *Ibid.*, Art. 26

87 *Ibid.*, Art. 28; see also Luca, *op. cit.*, note 83, p. 559

88 Art. 30 of the Law on Amendments to the Bankruptcy Act

proceedings, and if the preconditions for confirming the restructuring plan are met, the court will confirm the restructuring plan.[89]

The amended Act also regulates the right and conditions for filing an appeal against the decision approving the restructuring plan or denying the approval of the restructuring plan.[90]

An approved restructuring plan has legal effect on all its participants. Instead of 300 days, the pre-bankruptcy proceedings must be completed within 120 days, and exceptionally the court may, at the proposal of the debtor, creditor or trustee, allow an extension of a maximum of 180 days if it deems it expedient to conclude pre-bankruptcy proceedings.[91]

The amended Act expanded the reasons for the court to suspend the pre-bankruptcy proceedings,[92] and FINA's[93] treatment of payment bases after the opening of pre-bankruptcy proceedings is changing.[94]

The amended Act changes the provisions relating to the assumption of a new indebtedness in cash, and a new provision is added to regulate the protection of other transactions related to restructuring.[95]

When it comes to the claims and rights not affected by the pre-bankruptcy proceedings and proceedings affected by the pre-bankruptcy proceedings, the provisions relating to claims and rights not affected by the pre-bankruptcy proceedings are redefined in the amended Act.[96] It is now stipulated that on the day of the opening of the pre-bankruptcy proceedings the civil and arbitration proceedings are terminated, while new litigation and arbitration proceedings against the debtor in connection with claims affected by the pre-bankruptcy proceedings are prohibited.[97]

The period of prohibition of enforcement is now clearly prescribed, first 120 days, after which the court may, at the proposal of the debtor, trustee or creditor, extend

89 *Ibid.*, Art. 33

90 *Ibid.*

91 *Ibid.*, Art. 37

92 *Ibid.*, Art. 38

93 See Bodul, D., *Položaj Financijske agencije u predloženim izmjenama Stečajnog zakona*, Informator, No. 6723, 2022, [https://informator.hr/strucni-clanci/polozaj-financijske-agencije-u-predlozenim-izmjenama-stecajnog-zakona], Accessed 10 April 2022

94 Art. 44 of the Law on Amendments to the Bankruptcy Act

95 *Ibid.*, Arts. 35-36

96 *Ibid.*, Art. 39

97 *Ibid.*, Art. 42

it two more times for a further 90 days,[98] The amended Act introduced a new article regulating bilaterally agreements that have not been fulfilled by any of the contracting parties.[99]

The amended Act introduced a new provision on the conclusion of pre-bankruptcy proceedings stipulating that the court will issue a decision on the conclusion of pre-bankruptcy proceedings as soon as the decision on the confirmation of the restructuring plan becomes final.[100]

Furthermore, the novelties related to the bankruptcy procedure refer to several key issues, as laid out below.

The article regulating legal remedies and legal consequences of refuting the legal actions of the bankruptcy debtor is completely changed, so the legal actions of the bankruptcy debtor are authorized to be refuted by bankruptcy creditors and the bankruptcy trustee on behalf of the bankruptcy debtor.[101] The decision according to which the final hearing will be determined no later than one and a half years after the reporting hearing was revoked, and the deadline for continuing business operations has no longer been set.[102]

Measures of an economic, financial, legal and organizational nature now provide a far greater number of opportunities for the bankruptcy debtor to emerge from the crisis and settle his creditors in an acceptable manner. To file a bankruptcy plan, the debtor may submit the bankruptcy plan together with the proposal for the opening of bankruptcy proceedings, and after the opening of the bankruptcy proceedings the bankruptcy trustee and the individual debtor have the right to submit the bankruptcy plan to the court.

New provisions are added regarding the classification of participants in the bankruptcy plan,[103] Namely, creditors with small claims may be classified in a special group and the court will take special care of the protection of vulnerable creditors such as small suppliers when establishing groups.

Other amendments include the adaptation of the plan rejection rule to state that the court shall reject the bankruptcy plan ex officio within 15 days of its submis-

98 *Ibid.*

99 *Ibid.*, Art. 41

100 *Ibid.*, Art. 48; Bodul, *op. cit.,* note 75

101 Art. 72 of the Law on Amendments to the Bankruptcy Act

102 *Ibid.*, Arts. 283, 212

103 Art. 308 of the Bankruptcy Act

sion for reasons provided by law.[104] Furthermore, creditors will be deemed to have accepted the bankruptcy plan if in each group the majority of creditors voted for the plan and the sum of the claims of the creditors who voted for the plan exceeds twice the sum of the claims of the creditors who voted against the plan.[105]

6. INSTEAD OF A CONCLUSION: NEW REORGANIZATION TREND IN THE CROATIAN INSOLVENCY LAW OR JUST ANOTHER ONE MISSED OPPORTUNITY

The Directive 2019/1023 entered into force on 26 June 2019, and it was implemented into the Croatian legal framework through the amendments of the Croatian Bankruptcy Act enacted in 31 March 2022. Despite the long implementation process, it appears that three years were not enough time for the Croatian legislator to fully take advantage of the opportunities presented by the Directive.

Namely, it is apparent that the Croatia legislator repeated some common mistakes, and despite some good normative solutions, it remains uncertain whether preventive reorganizations will take root in the Republic of Croatia. Even a cursory review of the amended provisions of the Croatian Bankruptcy Act indicate the legislator's unrealistic expectations and a lack of consideration for the traditional ailments of the Croatian insolvency law that lacks a developed culture of preventive restructuring.

It is not clear how administrative support will be provided to debtors in distress, since the provisions of the Bankruptcy Act are not specific in this respect, and the implementation guidelines that should enable the application of the amended provisions of the Bankruptcy Act have not entered into force.

Furthermore, despite the provisions related to the work and the profession of bankruptcy administrators, it appears that their position and duties have not changed substantially. In addition, it remains unclear how the bankruptcy administrators can provide effective help to debtors seeking reorganization and whether they will possess sufficient motivation and knowledge without constant and systematic professional support of the Croatian Ministry of Justice and Administration. There is also the question of oversight over the work of the bankruptcy administrators, since the Republic of Croatia is one of the countries without a Chamber of bankruptcy administrators, which was not addressed in the new amendments.

[104] *Ibid.*, Arts. 317-318

[105] *Ibid.*, Art. 330; Bodul, *op. cit.*, note 75

In any case, it remains to be seen how these matters will unfold in practice, regardless of the good intentions of the legislators. Often the enactment of a good law does not guarantee effective enforcement, and vice versa. The key stakeholders for the implementation of the potential changes will be the entrepreneurs whose conduct will determine the situation in the unstable EU market, in light of the consequences of the Covid-19 pandemic and the current situation east of the EU. Practice will soon provide answers to the ideas put forth in the legislation, and it remains to be seen whether Croatia will become a recognized oasis for the reorganization of businesses, or if bankruptcy with liquidation will remain the norm.

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