# POST-WAR ECONOMIC RECOVERY OF UKRAINE: WHAT ROLE COULD THE EU PREVENTIVE RESTRUCTURING DIRECTIVE 2019/1023 PLAY FOR THE UKRAINIAN SMALL AND MEDIUM-SIZED ENTERPRISES?

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*Pre-trial restructuring is considered an efficient tool for avoiding bankruptcy litigation, minimizing bankruptcy stigma, and preserving viable businesses for both the debtor and its creditors. Developed in the United States (US), many other jurisdictions, including the European Union (EU), have adopted it, with particular attention to small and medium-sized enterprises that are vulnerable to economic problems and bankruptcy (Preventive Restructuring Directive 2019/1023). Germany was among the first EU jurisdictions to implement the Directive, while the United Kingdom (UK) introduced cross-class cramdown and other restructuring law amendments to remain an attractive "restructuring hub" in Europe post-Brexit. Although not without caveats, the German and UK experiences provide interesting examples for other jurisdictions looking to improve their bankruptcy and insolvency laws. The COVID-19 pandemic and Russia's aggression against Ukraine have had a catastrophic impact on Ukraine's economy, particularly on small and medium-sized businesses. This article argues that Ukraine should further develop pre-trial restructuring, based on the prudent implementation of the EU acquis (as a precondition for future EU membership) and best practices from jurisdictions such as Germany and the UK. Doing so may become an efficient tool for restoring Ukraine's economy, preserving jobs, and maintaining social peace after the war.*

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## INTRODUCTION

Within days of Russia's unprovoked aggression, the war in Ukraine (the "war") became the largest military conflict on European soil since the end of World War II. The war has already caused significant economic and logistical disruptions of global magnitude. Ukraine's economy has been suffering a great decline. After the first two weeks of hostilities, the International Monetary Fund estimated that due to the war, Ukraine's economic output in 2022 could shrink by 25% to 35%, based on real wartime gross domestic product (GDP) data from countries at war.[1] According to the latest estimates, the decline in 2022 was 29.2%.[2] As of February 2023, the country's collective losses amounted to USD 290 billion.[3] Needless to say, every day of warfare multiplies that amount.

The war is literally killing Ukrainian businesses. The impossibility or extreme hardships of doing business in wartime, physical destruction of assets, and loss of employees hit small and medium-sized enterprises

[1] *Ukraine Economy to Contract Sharply in 2022 Due to the War, IMF Report Says* (Mar. 15, 2022, 2:08 AM), https://www.voanews.com/a/ukraine-economy-to-contract-sharply-in-2022-due-to-war-imf-report-says-/6485747.html (referring to Lebanon, Iraq, Syria and some others).

[2] World Bank. *Ukraine Rapid Damage and Needs Assessment: February 2022 – February 2023,* 9 (2023).

[3] *Id.* at 9, 22.

(SMEs),[4] comprising more than 99% of all Ukrainian enterprises,[5]

[4] Ukraine`s definitions of micro-, small, and medium-sized enterprises contain some controversy. The Economic Code of Ukraine (ECU) introduces definitions depending on the number of employees and gross income from any annual activities. Those comply with the EU`s classification available in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422), 2003 O.J. (L 124) 36.

- Micro-enterprises shall be those who have an average number of employees during the reporting period (calendar year) not exceeding 10 persons and annual income from any activity not exceeding the amount equivalent to EUR 2 million, determined according to the yearly average exchange rate of the National Bank of Ukraine (NBU).

- Small enterprises shall be deemed those who have an average number of employees during the reporting period (calendar year) not exceeding 50 persons and annual income from any activity not exceeding the amount equivalent to EUR 10 million, determined according to the NBU's yearly average exchange rate.

- Medium-sized enterprises shall be deemed all those not meeting the criteria above for micro- or small enterprises with an average number of employees during the reporting period (calendar year) up to 250 persons and annual income from any activity not exceeding the amount equivalent to EUR 50 million determined according to the NBU`s yearly average exchange rate.

*See* Economic Code of Ukraine of Jan. 16, 2003 (official English translation as amended) (May 26, 2021, 03:43 PM), art. 55(3), https://zakon.rada.gov.ua/laws/show/436-15?lang=en#Text.

Under the Law on Accounting and Financial Reporting, classification criteria differ. Enterprises are divided into micro, small, or medium ones depending on meeting at least two criteria out of three (number of employees, balance sheet value, annual turnover), namely:

- Micro-enterprises are those with up to 10 employees, a balance sheet total not exceeding EUR 350,000, an annual turnover not exceeding EUR 700,000.

- Small enterprises are those with up to 50 employees, a balance sheet total not exceeding EUR 4 million, an annual turnover not exceeding EUR 8 million.

- Medium enterprises are those with up to 250 employees, a balance sheet total not exceeding EUR 20 million, an annual turnover not exceeding EUR 40 million.

*See* Zakon Ukraïny "Pro bukhalterskyĭ oblik ta finansovu zvitnist'v Ukraïni vid 16 lypnia 1999 roku, VIDOMOSTI VERKHOVNOÏ RADY UKRAÏNY ⟦VVRU⟧, 1999, No. 40, Item 365, art. 2(2).

particularly hard. In the first two weeks of the war, only 20% of Ukrainian SMEs managed to relocate, while 48% could not do so at all.[6] Between February and May 2022 (the first 75 days of the war), Ukrainian SMEs lost around USD 85 billion, which is approximately 20% of the national GDP.[7] On average, a Ukrainian SME generates 58% of the added value of a large company (in the EU, the average indicator is 64%), and Ukrainian SMEs account for 63.8% of all employees in the country.[8]

The war in Ukraine has had significant economic and social impacts, particularly on SMEs. Prior to the war, 84% of Ukrainian SMEs had experienced a turnover decline due to the COVID-19 pandemic, and 25% had reduced staff numbers.[9] Between 2020 and 2021, around 700,000 small businesses in the service sector alone have had to close.[10] Given that Ukrainian SMEs never had a chance to recover from the pandemic and have been exposed to all the war-related problems preventing "doing business as usual," many will face problems related to creditors' pressure, insolvency, and possible liquidation (via bankruptcy proceedings or by means of dissolution).

The war itself reduced the number of initiated bankruptcies.[11] Once the

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[5] *2021 SME Country Fact Sheet: Ukraine*, https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-09/ukraine_-_sme_fact_sheet_2021.pdf.

[6] *Doslidzhennia ukrainskoho businesa pid chas viĭskovyh diĭ: druga hvylia 11 – 13.03.2022* [*Study of Ukrainian business during hostilities: second wave 11 – 13.03.2022*], https://drive.google.com/file/d/1E8OhWZN7Mjv4Z4q7JWjAcnkzg5u8qgcY/view.

[7] *Zbytky malogo i seredn'oho biznesu v Ukraini cherez viĭnu siagnuly 20% VVP* [*Losses of Ukraine`s SMEs due to the war reached 20% of GDP*] (May 23, 2022, 11:29 AM), https://ua.news/ua/ubytky-malogo-y-srednego-byznesa-v-ukrayne-yz-za-vojny-dostygly-20-vvp/.

[8] *Supra* note 5.

[9] *Id.*; "COVID-19 blow" is not unique for Ukrainian SMEs, the situation is similar in other economies. *See* Federico J. Diez, Romain A. Duval, Jiayue Fan, Jose M. Garrido, Sebnem Kalemli-Ozcan, Chiara Maggi, Maria Soledad Martinez Peria & Nicola Pierri, *Insolvency Prospects Among Small and Medium Enterprises in Advanced Economies: Assessment and Policy Options,* IMF Staff Discussion Note SDN/2021/002 at 6 (April 2, 2021).

[10] *Supra* note 5. Unfortunately, more detailed information is not available due to the suspended access to Ukraine`s statistical data because of the war concerns.

[11] According to available open data sources on Ukraine, the total number of bankruptcy filings dropped from 199 cases opened between Jan. 1 and Feb. 24, 2022 (the date of the full-scale Russian invasion), to only 11 cases initiated between Feb. 25

hostilities are over and peace is reinstated, the number of bankruptcy filings by creditors most likely will be significant, as well as the number of respective liquidations.[12] SMEs, and small businesses remain especially vulnerable to the existing bankruptcy hurdles due to less capitalization compared to large companies; they frequently lack the resources and knowledge to effectively understand and use complex, costly insolvency procedures.[13] Abuses cannot be excluded either, and thus even viable businesses may be minced by merciless bankruptcy liquidation without any

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and Mar. 24, 2022. Ukrainian military success at the front and the revival of judicial proceedings by local courts resulted in the growth of initiated bankruptcy cases: 16 cases opened between Mar. 25 and Apr. 24; 18 cases between Apr. 25 and May 24; 145 cases between May 24 and Aug. 24; and 206 cases between Aug. 25 and Dec. 27. In total, in 2022, 595 bankruptcy cases were initiated in Ukrainian courts (vs. 770 in 2021). *See Praktyka bankrutstva: shcho zminylosia pislia 24 liutoho* [*Bankruptcy Practice: What Has Changed After February 24*] (Dec. 29, 2022, 1:36 PM), https://yur-gazeta.com/publications/practice/bankrutstvo-i-restrukturizaciya/praktika-bankrutstva-shcho-zminilosya-pislya-24-lyutogo.html.

[12] Bankruptcy of businesses is explicitly mentioned among key challenges for Ukraine`s economy, and that will have to be addressed soon. *See* Draft Ukraine Recovery Plan: Materials of the "Economic Recovery and Development" Working Group (July 2022), https://uploads-ssl.webflow.com/621f88db25fbf24758792dd8/62c16dde5ea0ee2f59bf8bf1_Economic%20recovery%20and%20development.pdf, at 5.

In 2022, Ukrainian legislators attempted to introduce a total ban on initiating bankruptcy cases for the entire duration of martial law. These initiatives were heavily criticized and have not materialized as of this writing. *See* Proekt No. 4409 pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva [Bill No. 4409 on Amending the Code of Ukraine on Bankruptcy Procedures] (Nov. 20, 2020), https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70493; Proekt No. 7442 pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva shchodo protsedur bankrutstva u period diï voiennoho stanu [Bill No. 7442 on Amending the Code of Ukraine on Bankruptcy Procedures Regarding the Use of Bankruptcy Procedures During Martial Law] (June 7, 2022), https://itd.rada.gov.ua/billinfo/Bills/Card/39710; Proekt No. 8231 pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva shchodo nedopushchennia zlovzhyvan` u sferi bankrutstva na period voiennoho stanu [Bill No. 8231 on Amending the Code of Ukraine on Bankruptcy Procedures Regarding the Prevention of Abuses in the Field of Bankruptcy During Martial Law] (Nov. 28, 2022), https://itd.rada.gov.ua/billInfo/Bills/Card/40884.

[13] International Bank for Reconstruction and Development [IBRD]. World Bank. *Finance for an Equitable Recovery*. World Development Report 2022, 13 (2022).

chance of survival.

While bankruptcy remains one of the most necessary tools to deal with debts and the problem of insolvency, it also reflects conflicts in the capitalist political economy between capital and labor, debtors and creditors, the state, and the market.[14] All of these conflicts might materialize in post-war Ukraine. Creditors will likely apply various forms of pressure on debtors and not hesitate to use the leverage of bankruptcy, as well as out-of-court problematic debt collection practices.[15] This will affect Ukraine's economy by reducing production, increasing unemployment, and causing the state to deal with all the related complications. Of course, as of this writing, it is too early to claim that a surge in bankruptcies is imminent in Ukraine. There is no doubt, however, that Ukrainian businesses will face hard times requiring new solutions, or at least a more efficient use of existing tools, such as preventive debt restructuring, in order to survive. According to international financial institutions,

> [c]ountries can mitigate the risk of an onslaught of insolvent households and businesses by investing in particular in establishing accessible and inexpensive in-court and out-of-court debt resolution procedures for micro-, small, and medium enterprises to facilitate the recapitalization of viable but illiquid firms and the swift, efficient market exit of nonviable firms. Rules designed for small entities can help resolve their debts more quickly and cheaply with less burden on the judicial system than requiring the same rules regardless of firm size.[16]

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[14] BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, RESCUING BUSINESS. THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES 1 (Clarendon Press 1998).

[15] Despite Ukraine's detailed amendments to the Law on Consumer Loans (Spring of 2021) aimed at regulating and pacifying the sometimes cruel practices of collectors (especially regarding consumer loans and loans received by sole merchants, which make up a large fraction of Ukrainian SMEs), these practices persist. *See* Zakon Ukraïny "Pro vnesennia zmin do deiakykh zakoniv Ukraïny shchodo zahystu spozhyvachiv pry vreguliuvanni prostrochenoï zaborhovanosti vid 19 bereznia 2021 roku [Law of Ukraine on Amending Certain Laws of Ukraine Pertaining to the Consumer Protection in the Settlement of Overdue Debts of Mar. 19, 2021], VVRU, 2021, No. 24, Item 205.

[16] S*upra* note 13, at 123.

The pandemic and war have hit SMEs much harder than large businesses. The COVID-19 outbreak has prompted financial experts and other professionals to advocate for dedicated reforms to design insolvency systems that cater to SMEs.[17] They suggest reforms that would increase the efficiency of debt restructuring for viable firms by simplifying legal processes, allowing debtors to maintain control of their businesses when possible, making fresh financing available, and using out-of-court proceedings to keep costs down. These reforms could help facilitate the survival of viable but illiquid businesses and the swift exit of nonviable ones.[18] Solid empirical evidence supports the effectiveness of restructuring tools in jurisdictions where they have become available to businesses.[19] The author believes that these suggestions are also valid for economies going through wars and can be applied to Ukraine in particular.

This article intends to explore the most recent developments related to preventive restructuring in developed European economies, namely Germany and the United Kingdom ("UK"), each representing a distinct model. Germany, being the biggest EU jurisdiction, has historically had a significant influence on Ukrainian commercial law, including bankruptcy.[20] The UK represents an interesting example of an effort to remain an

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[17] *Id.* at 13; Federico J. Diez et al., *supra* note 9, at 5; PREVENTION AND MANAGEMENT OF A LARGE NUMBER OF CORPORATE INSOLVENCIES 3 (European Systemic Risk Board 2021).

[18] *Supra* note 13, at 13.

[19] *See*, e.g., FROM HIBERNATION TO REVITALIZATION: ANALYSIS OF INSOLVENCY COVID-19 RESPONSE MEASURES AND THEIR WIND-DOWN (The World Bank Group, INSOL, IAIR 2022).

[20] For more information on the influence of German law on Ukraine *see* Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995); INVESTOR PROTECTION IN THE CIS: LEGAL REFORM AND VOLUNTARY HARMONIZATION 4 -7 (Rilka Dragneva ed., Martinus Nijhoff (Publ. 2007).

For similarities between bankruptcy procedures in Germany and in Ukraine *see* Arne Engels, Oleksandr Biriukov & Roman Chumak, *Protsedury bankrotstva v Ukraïni: porivnialny analiz (II). Lypen 2019 – serpen 2020, proekt dokumenta 25_2020/09/06* [*Bankruptcy Procedures in Ukraine: Comparative Analysis (II). July 2019 – August 2020, Draft Document 25_2020/09/06*), (Pravo Justice 2020), https://www.pravojustice.eu/storage/app/uploads/public/5ff/c3b/b1d/5ffc3bb1d2c95028982223.pdf, at 5.

attractive European "restructuring hub" after Brexit,[21] while Ukraine's existing pre-trial restructuring has several resemblances to the UK's restructuring framework.[22]

Part I, "Bankruptcy Basics," will briefly introduce the socio-economic background and general ideas of bankruptcy and restructuring, emphasizing the benefits of pre-trial restructuring to save viable businesses. Part II, "European Restructuring Efforts," will discuss the implementation of the EU Preventive Restructuring Directive 2019 (PRD)[23] with a short analysis of its pros and cons as of this writing.

In Part III, "Bankruptcy in Ukraine," an overview of the current Ukrainian bankruptcy law will be provided along with an analysis of the existing practical peculiarities. A brief analysis of the problems related to the existence of bankruptcy stigma,[24] not much different from the phenomenon

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[21] Ali Shalchi, *Corporate Insolvency and Governance Act 2020*, 10 House of Commons Library Document 8971 (Apr. 6, 2022), https://researchbriefings.files.parliament.uk/documents/CBP-8971/CBP-8971.pdf.

[22] *See infra* part III.

[23] 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 (Directive on restructuring and insolvency), 2019 O.J. (L 172) 18.

[24] As a form of social discrimination for initiating bankruptcy proceedings and/or declaring bankruptcy. More on the stigma phenomenon *see* Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQ. L. 365, 365-394 (2006) (outline of the stigma phenomenon and its historical development); Scott Andersen, *Is Social Stigma Towards Bankruptcy and Liquidation Useful?* (Aug. 2, 2021), https://worrells.net.au/resources/news/is-social-stigma-towards-bankruptcy-and-liquidation-useful?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (general description of the social bankruptcy stigma and its connotations in bankruptcy law); Wim Decock, *Law, Religion, and Debt Relief: Balancing above the 'Abyss of Despair' in Early Modern Canon Law and Theology*, 57 AM. J. LEGAL HIST. 125, 125 -141 (2017) (on the religious history of bankruptcy stigma and canon law tools available to debtors of certain social status in Christian states); Christoph G. Paulus, *The New German Preventive Restructuring Framework* (May 19, 2021), RIVISTA ORIZZONTI DEL DIRITTO COMMERCIALE (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3849428 (emphasizing the language peculiarities contributing to stigmatization of bankruptcy in German law); Michael D. Sousa, *Bankruptcy Stigma: Socio-Legal Study*, 87 AM. BANK. L.J. 435, 482 (2013) (describing "[t]he present day stigma experienced by consumer debtors who

in other jurisdictions, will also be introduced.

Part IV, "Lessons for Ukraine," will attempt to provide suggestions for Ukraine, emphasizing the use by SMEs, based on foreign experience. Special emphasis will be made on Ukraine's European integration efforts and released governmental plans for post-war economic recovery.

## 1. BANKRUPTCY BASICS

### 1.1. UNDERSTANDING OF BANKRUPTCY

Regardless of the size of an enterprise or jurisdiction, and whether bankruptcy law is developed or not, businesses may find themselves in financial distress. Such distress might be caused by different factors such as bad luck in the normal course of business, changes to loan terms by financial institutions, unwillingness or inability of new owners who inherited the enterprise to continue business,[25] lockdowns (like the ones imposed all over the world during the recent pandemic), wars, and many others. As a result, businesses might be unable to pay their debts, and creditors might need to use some leverage to receive whatever is owed to them. That is exactly where the institution of bankruptcy comes into play.

Both in civil and common law jurisdictions, the notion of bankruptcy is linked to insolvency/financial distress (debtor's inability to pay debts as they

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have filed for bankruptcy"); Yvana L.B.H. Mols, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience*, 29 EMORY BANKR. DEV. J. 289, 289 - 331 (2012) (detailed analysis of stigma`s effects on debtors); Nicola Howell, Rosalind Mason, *Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce*, 38 UNSW L. J. 1529, 1529 – 1574 (2015) (describing the stigma of bankruptcy and various bankruptcy restrictions in Australia); Tibor Tajti, *Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructuring in China, Europe and the United States*, 6 CHINA – EU L. J. 1, 1 – 31 (2018) (elaborating on similarities of debtors'stigmatization in different jurisdictions); Brook E. Gotberg, *Reluctant to Restructure: Small Businesses, the SRBA, and COVID-19,* 95 AM. BANKR. L. J. 389, 412 – 416 (2021) (elaborating on the stigma as a phenomenon affecting the small businesses` willingness to file under Chapter 11 in the US).

[25] The point is well illustrated by *Galler v. Galler*, 203 N.E.2d 577 (Ill. 1964), especially in the case of sole traders and SMEs with only one owner or one family in control. When the owner or a family member in control dies, it can create various complications for the business.

fall due). With some variations from jurisdiction to jurisdiction, the term "bankruptcy" is understood and defined as a statutory procedure triggered by insolvency, by which a person (debtor) is relieved of most debts and undergoes judicially supervised reorganization or liquidation for the benefit of that person's creditors.[26] The procedure is normally triggered in cases when there is no other way for the debtor to repay and/or for the creditor to get what is due to them. This article will use the described correlation between "bankruptcy" and "insolvency" unless explicitly stated otherwise.

## 1.2. THE IDEA OF A FRESH START – RESTRUCTURING

By the 21st century, the prevailing goal of bankruptcy law (regardless of jurisdiction) has become to allow the debtor to have a "fresh start," and the creditor to be repaid. Through bankruptcy, debtors liquidate their assets or

[26] To better understand terminological differences, this Article briefly examines respective definitions used in the US, EU *acquis*, Ukrainian, and UK`s law.

In the US law "bankruptcy" is normally defined as "[t]he fact of being financially unable to pay one`s debts and meet one`s obligations" or "[t]he statutory procedure, usu. triggered by insolvency." *See* BLACK`S LAW DICTIONARY 141 (7th ed. 1999).

EU law uses "insolvency proceedings," "bankruptcy," and "bankruptcy proceedings" to emphasize all possible proceedings related to the debtor and terminological discrepancies in various Member States, no definitions as such are provided. For example, "insolvency" must be understood as defined by national law of a respective Member State, the same applies to "insolvency proceedings" and "bankruptcy proceedings." *See* Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), 2015 O.J. (L 141) 19; PRD.

Under Article 1 of the Code of Ukraine on Bankruptcy Procedures (BCU), "bankruptcy" means the debtor's inability recognized by the commercial court to recover its solvency through the rehabilitation and restructuring procedures, and to pay monetary claims of creditors, established in accordance with the procedures stipulated in the Code, otherwise than through the application of the liquidation procedure. In Ukraine, "bankruptcy" is often used to collectively address all the procedures under the BCU. *See* The Code of Ukraine on Bankruptcy Procedures of October 18, 2018 (official English translation as amended) (June 14, 2021, 1:48 PM), https://zakon.rada.gov.ua/laws/show/en/2597-19#Text.

In the UK the term "bankruptcy" is used to deal with the debts of individuals, while "insolvency" refers to companies. Insolvency (inability to pay debts) triggers bankruptcy proceedings against legal entities. *See* Insolvency Act 1986, § 264 (UK), https://www.legislation.gov.uk/ukpga/1986/45/section/264; Companies Act 2006, 26A, § 901A (UK), https://www.legislation.gov.uk/ukpga/2006/46/section/901A.

restructure their finances to fund their debts. The assumption is that debtors are then better able to emerge as productive members of society.[27] In short, bankruptcy law interferes with the relationships between the creditor and debtor that would exist outside of bankruptcy.[28] Restructuring of debts is considered preferable to liquidation for both debtors and creditors.[29] In practice, liquidation often means that the debtor's entire assets are worth less than the liabilities, and due to various classes of creditors, it will be impossible for them to receive at least part of the debt owed to them, while the debtor's enterprise is "eliminated" in the process. Restructuring, on the contrary, allows for the continuation of a viable business as a going concern, i.e., the enterprise will be able to continue business and make profits. In sum, restructuring aims to: (1) maximize returns to creditors; (2) protect wider stakeholder interests;[30] and (3) rehabilitate the debtor.[31] Hence, the continuation of business by the debtor will be more beneficial to creditors,[32] allowing them to be repaid (at least partially), while the debtor remains afloat and continues to earn profits.

Debt restructuring procedures (rehabilitation or restructuring/reorganization scheme in some jurisdictions)[33] can be part of

[27] The practical implementation of restructuring proceedings, which are intended for honest but unfortunate debtors, often encounters difficulties in differentiating between those who are genuinely struggling and those who are trying to delay the inevitable liquidation of their unviable businesses. *See, e.g.*, Vasile Rotaru, *The Restructuring Directive: a Functional Law and Economics Analysis from a French Law Perspective* 9 (Droit & Croissance/Rules for Growth Institute, Working Paper, 2019), https://droitetcroissance.fr/wp-content/uploads/2015/01/Vasile-Rotaru-The-Restructuring-Directive-a-functional-law-and-economics-analysis-from-a-French-law-perspective.pdf.

[28] Anthony J. Casey, *Chapter 11`s Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1728 (2020).

[29] BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, *supra* note 14, at 259, 312; Dominik Skauradszun, Georgia Tsignopoulou, *The Transposition of the Directive on Preventive Restructuring Frameworks into Greek Law*, 10 NIBLEJ 1, 5 (2022).

[30] Debtor`s employees, for example, who would become unemployed should the liquidation occur.

[31] BANKRUPTCY AND INSOLVENCY LAW IN CANADA: CASES, MATERIALS, AND PROBLEMS 507 (Stephanie Ben-Ishai & Thomas G.W. Telfer eds., Irwin Law 2019).

[32] The procedure may also serve as checks and balances versus selfish creditors.

[33] Definitions vary from jurisdiction to jurisdiction. International financial institutions define restructuring as a set of rules for debt restructuring of distressed

bankruptcy litigation as an alternative to liquidation due to insolvency. Alternatively, it can represent separate pre-trial proceedings allowing the debtor to avoid insolvency without going through complicated bankruptcy litigation and publicity, even though courts are often involved.[34] To use the procedure, the following qualifiers usually apply:

(1) The financially distressed business has a substantial value as a going concern;

(2) Its creditors cannot sort out the financial distress through ordinary bargaining with the debtor and instead require a collective forum provided by the restructuring procedures set up in the respective legislation;

(3) The business cannot be collectively sold in the market as a going concern.[35]

Normally, the procedure is divided into stages:

(1) Notifying creditors about financial distress (threat of insolvency);

(2) Filing an application with the court or other

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enterprises that includes eligibility, negotiations, and steps to reach an agreement. This scheme may be developed by a state authority, in cooperation with the financial sector, and may include public support for preparation of restructuring plans, assistance with negotiations, and dispute resolution, as well as guidance for different distress situations. In this context, debt restructuring schemes are seen as a form of enhanced out-of-court workout. *See* Financial Stability Board [FSB], *Thematic Review on Out-of-Court Corporate Debt Workout,* Peer Review Report 3 (May 9, 2022).

[34] *Supra* note 31, at 505 ("[a]lthough corporate restructuring is often associated with bankruptcy and insolvency law, it is broader and more informal than this association implies. It is important to realize that much restructuring occurs before the point of insolvency and out of the public spot light, through private negotiations between corporations and their largest creditors. The terms "restructuring" and "reorganization" are informal and interchangeable, and do not have a specific legal definition.").

[35] BARRY E. ADLER, ANTHONY J. CASEY & EDWARD R. MORRISON, BANKRUPTCY: CASES, PROBLEMS AND MATERIALS 769 (Foundation Press 2020).

administrative authority, moratorium;

(3) Negotiations with creditors and between creditors regarding the existing debts and priorities for repayment;

(4) Development of the restructuring plan with the hierarchy of creditors' classes entitled to repayment in one form or another;

(5) Approval of the restructuring plan by a majority of creditors with the possibility to cram down the plan on dissenting creditors who will not be unfairly discriminated against by the plan;

(6) Sanctioning of the plan by the court and (optional) appointment of the trustee to supervise compliance with the plan.

Laws in different jurisdictions vary regarding the debtor's ability to remain in control of their assets and manage the daily business once restructuring has been initiated. As will be shown in the following parts of this article, the current trend is to follow the debtor-in-possession (DIP) approach found in the United States Bankruptcy Code (the "Code"),[36] where the debtor can negotiate restructuring details with creditors without any third-party involvement and remains in charge of managing daily business affairs. However, some jurisdictions (such as Germany and Ukraine) still heavily rely on a special administrator (rehabilitation trustee) who substitutes for the company's management and facilitates negotiations with creditors. Trust in an administrator, rather than the company's own management, can be explained by the bankruptcy stigma. In short, creditors do not trust managers who brought the company to the edge of bankruptcy.[37] Besides, the management and/or shareholders may lack the

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[36] For more information on the variety of approaches and pertaining explanations *see* Gerard McCormack, *Control and Corporate Rescue: An Anglo-American Evaluation*, 56 ICLQ 515, 521 – 525 (2007); *supra* note 31, at 507.

[37] On the stigma in Germany *see* Christoph G. Paulus, *supra* note 24. Ukrainian

necessary skills to guide the business through difficult times. In any case, the debtor does not have to bear exorbitant expenses associated with the bankruptcy litigation and can retain control of their business without sliding into insolvency and ultimate liquidation. This pre-trial restructuring is the central focus of this article and can benefit SMEs with limited legal and financial resources for a prolonged bankruptcy litigation.

## 2. EUROPEAN RESTRUCTURING EFFORTS

### 2.1. THE PREVENTIVE RESTRUCTURING DIRECTIVE 2019

Harmonization of bankruptcy/insolvency legislation is an important part of the establishment and integration of the EU's internal market.[38] The internal market can only function effectively "[i]f competition is not distorted, and if the free movement of production factors is not impeded by existing divergences between national legal orders."[39] Hence, harmonization creates a coherent system for all actors and provides them with a level playing field.[40]

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scholars prefer to refrain from mentioning "stigma." However, if one analyzes the available case law, often creditors (banks especially) would insist on appointing a special administrator and emphasize the debtor`s low credibility.

[38] Consolidated Version of the Treaty on the Functioning of the European Union art. 26(1), Oct. 26, 2012, 2012 O.J. (C 326) 47.

[39] Consolidated Version of the Treaty on European Union art. 3, Oct. 26, 2012, 2012 O.J. (C 326) 43; Protocol (No. 27) on the internal market and competition, 2008 O.J. (C 115) 309; Emilie Ghio, Gert-Jan Boon, David Ehmke, Jennifer Gant, Line Langjaer & Eugenio Vaccari, *Harmonizing Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic*, 30 INT'L INSOLV. REV. 427, 431 (2021).

[40] Emilie Ghio et al., *supra* note 39, at 431. *See* also Manfred Balz, *The European Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485 (1996) ("a functioning bankruptcy system is essential to any economy that aspires to achieve the freedoms of establishment of business and the free flow of goods, services and capital, and to integrate national markets into a unitary internal market").

EU`s attempted some early but unsuccessful harmonization efforts. *See* Convention on Insolvency Proceedings of 23 November 1995, 35 I.L.M. 1223 (1996). The Convention never entered into force because some Member States did not want to ratify it. *See* Resolution on the Convention on Insolvency Proceedings of 23

After years of proposals and discussions,[41] using the United States

November 1995, 1999 O.J. (C 279) 499.

Notably, similar efforts at the Council of Europe level also failed. *See* The European Convention on Certain International Aspects of Bankruptcy of 5 June 1990, 30 I.L.M. 165 (1991).

*See also* Emilie Ghio et al., *supra* note 39, at 436 ("[T]he history of the early EU initiatives shows that the EU institutions' ambition to adopt a binding instrument in the shape of a convention harmonising substantive aspects of insolvency law across all Member States was eventually replaced by a more pragmatic approach. When these original initiatives faced strong political resistance, the EU institutions realised that if they were to reach a consensus among the Member States, they would need to decrease the scope and ambition of their harmonization initiatives").

[41] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Overcoming the stigma of business failure – for a second chance policy - Implementing the Lisbon Partnership for Growth and Jobs Commission, COM (2007) 584 final (Oct. 5, 2007) (urging the Member States to improve their national laws regarding business failure, emphasizing the need to differentiate between fraudulent and honest businesses); European Parliament resolution of Nov. 15, 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law, Eur. Par. Doc. 2011/2006(INI), 2013 O.J. (CE 153) 1 (focusing on the need to improve EU bankruptcy law); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 January 2013 Entrepreneurship 2020 Action Plan Reigniting the entrepreneurial spirit in Europe, COM (2012) 795 final (Jan. 9, 2013); Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency, 2014 O.J. (L 74) 65 (emphasizing the need for a new approach to business failure and insolvency, including a fresh start for honest businesses, the necessity to reduce restructuring costs for both creditors and debtors, removing barriers to effective restructuring, dealing with disincentives entrepreneurs face when triggering bankruptcy proceedings, such as social stigma and ongoing inability to pay debts); 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) 723 final (Nov. 22, 2016).

Bankruptcy Code as a guide,[42] the PRD[43] adopted on June 20, 2019, became a significant development in EU insolvency law[44] along with the European Insolvency Regulation.[45] According to the PRD, the European Insolvency Regulation "does not address the differences between national laws"[46] on bankruptcy. Therefore, the Directive complements the Regulation and goes "beyond issues of judicial cooperation" by establishing "[m]inimum substantive standards for preventive restructuring procedures as well as for procedures leading to a discharge of debt for entrepreneurs."[47] The PRD ensures that:

> [v]iable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and

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[42] 11 U.S.C. § 101 *et seq.*

The leading role of Chapter 11 in shaping preventive restructuring laws of many jurisdictions (both common and civil law) has been emphasized by many authors. PRD, recital 4, for example, states that

[P]reventive solutions are a growing trend in insolvency law. The trend favors approaches that, unlike the traditional approach of liquidating a business in financial difficulties, have the aim of restoring it to a healthy state or, at least, saving those of its units which are still economically viable. That approach, among other benefits to the economy, often helps to maintain jobs or reduce job losses.

For more remarks on the role of Chapter 11 *See* Elizabeth Warren, Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 604 (2009); Gerard McCormack, *The European Restructuring Directive and Stays on Creditor Enforcement Actions*, 30 INT'L INSOLV. REV. S67 (2021).

[43] *Supra* note 23.

[44] Jose M. Garrido, Chanda M. DeLong, Amira Rasakh & Anjum Rosha, *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive* 4 IMF Working Paper WP/21/152 (2021).

[45] Regulation (EU) 2015/848, *supra* note 26. It covers conflict of law rules and concentrates on jurisdiction, recognition and enforcement, applicable law, and cooperation in cross-border insolvency proceeding, leaving "widely different substantive laws," to the Member States. *See* COMMENTARY ON THE EUROPEAN INSOLVENCY REGULATION 41 (Reihard Bork & Kristin van Zwieten eds., Oxford University Press 2nd edition 2022).

[46] PRD, recital 12.

[47] *Id.*

> that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length.[48]

The Directive stipulates that "[r]estructuring should enable debtors in financial difficulties to continue their business, in whole or in part, by changing the composition, conditions, or structure of their assets and liabilities, or any other part of their capital structure."[49] In turn, it would provide greater coherence of restructuring and insolvency procedures,[50] which would benefit SMEs in particular, as they are more prone to liquidation due to the lack of necessary resources compared to larger businesses.[51] According to McCormack, the Directive emphasizes the role of early warning tools that intend "[t]o facilitate the development of a new culture of preventive restructurings, with viable enterprises in financial difficulties being able to access early restructuring procedures," and cramdown is introduced "[t]o enhance the possibility of successful restructuring."[52]

The structure of the PRD is divided into three main elements: (1) a "preventive" restructuring framework; (2) provisions on second chance/fresh start; and (3) more general provisions aimed at improving the efficiency of restructuring, insolvency, and second chance procedures.[53] The preventive restructuring framework itself follows a two-step approach:

> (1) restructuring out-of-court/pre-trial outside the official insolvency/bankruptcy proceedings, and
>
> (2) restructuring within the framework of insolvency proceedings as an alternative to debtor liquidation.

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[48] PRD, recital 1.

[49] PRD, recital 2.

[50] PRD, recital 15.

[51] PRD, recital 17.

[52] Gerard McCormack, *The European Restructuring Directive – a General Analysis*, 33(1) INSOLV. INT. 11 (2020). Importance of the early warning tools had also been emphasized by the IBRD and the World Bank. *See supra* note 13, at 132.

[53] Gerard McCormack, *supra* note 52, at 11.

The Directive stresses the importance of the first step to prevent further insolvency proceedings.

Despite receiving general praise,[54] the PRD is not without its shortcomings. Critics have pointed out that the final version of the Directive is a compromise that differs from the original recommendation made by the European Commission.[55] Some have argued that it would have been better to adopt a Regulation to avoid discrepancies in national legislation.[56] Additionally, the Directive provides too many optional solutions for national legislators, leading some to criticize it as "a harmful piece of legislation"[57] with "incongruous elements"[58] that could be detrimental to SMEs. In 2017, Professor Gerard McCormack commented on the Commission's preventive restructuring initiatives, stating that unless the reforms build on local practices that work well, they may fail and risk disillusionment with further top-down bureaucratic requirements from Brussels.[59]

## 2.2. THE EU MEMBER STATES NATIONAL PREVENTIVE RESTRUCTURING EFFORTS AND PRD`S

[54] IMF, for example, explicitly said that the Directive "[w]ill strengthen national systems at a time when most Member States will experience widespread enterprise distress." *See* Jose M. Garrido et al., *supra* note 44, at 5.

[55] Reinhard Bork, *Directive on Preventive Restructuring Frameworks: Political Compromise in the Trilogue Talks and Imminent Adoption* 18 (Spring 2019), https://www.insol-europe.org/download/documents/15; IRENE LYNCH FANNON, JENNIFER L. L. GANT & AOIFE FINNERTY, CORPORATE RECOVERY IN AN INTEGRATED EUROPE: HARMONIZATION, COORDINATION, AND JUDICIAL COOPERATION 163, 192 (Edward Elgar Publishing 2022).

[56] Ionel Didea and Diana Maria Ilie, *COVID-19 – The Catalyst of a Legislative Reform in the Field of Insolvency* in *Innovation and Development in Business Law* 130 (Thierry Bonneau & Cristina Elena Popa Tache eds. 2021).

[57] Horst Eidenmüller, *The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union*, 20 EUR. BUS. ORG. L. REV. 547, 565 (2019).

[58] Jonathan McCarthy, *A Class Apart: The Relevance of the EU Preventive Restructuring Directive for Small and Medium Enterprises*, 21 EUR. BUS. ORG. L. R. 895, 910 (2020).

The EU is continuing its work to harmonize insolvency law in the Member States. *See* Proposal for a Directive of the European Parliament and the Council harmonizing certain aspects of insolvency law COM (2022) 702 final (Dec. 7, 2022) (focusing on insolvent debtors and their debt discharge).

[59] Gerard McCormack, *Business Restructuring Law in Europe: Making a Fresh Start*, J. CORP. L. STUD. 167, 169 (2017).

TRANSPOSITION.

The PRD did not become the only catalyst of bankruptcy reforms in the EU Member States. Well before its adoption, some states engaged in the so-called regulatory competition aiming at implementing other jurisdictions' best practices and preventing forum shopping among businesses looking for the most favorable laws all over the EU.[60] Years before the Directive, the UK had already been famous for its scheme of arrangement introduced in 1986 and modified several times through the years with a culmination in 2006 when the new Companies Act introduced cramdown procedures and further "polished" possibilities for arrangement. Eventually, prior to Brexit, it made the UK "a restructuring hub" of the EU.[61] Back in 1999, Germany enacted its new Insolvency Act (*Insolvenzordnung - InsO*) that allowed special insolvency plan procedures for debtors and became a German answer to Chapter 11 of the Code.[62] However, the uniformity of respective laws, the very approach to restructuring, and the bankruptcy stigma remained a problem; therefore, the Commission proceeded with the PRD.

The implementation of the Directive was affected by the COVID-19 outbreak, which coincided with the deadline for transposition (July 17, 2021),[63] and disrupted its implementation.[64] To prevent a surge in insolvency filings, from 2020 to 2021, many states had to adopt numerous legal, regulatory, and fiscal measures that provided "[b]reathing space," both for debtors facing unexpected disruptions to their business operations and for institutions, including courts, justice administrations, and other institutions charged with carrying out insolvency and debt enforcement

[60] Emilie Ghio et al., *supra* note 39, at 432; Christoph G. Paulus, *A Vision of the European Insolvency Law*, 17 NORTON J. BANKR. L. PRAC. 607 (2008).

[61] Jennifer L. L. Gant, Gert-Jan Boon, David Christoph Ehmke, Emilie Ghio, Line Langkjaer, Eugenio Vaccari & Paul J. Omar*, The EU Preventive Restructuring Framework: in Extra Time?* (Jan. 4, 2022), https://jogaszvilag.hu/szakma/the-eu-preventive-restructuring-framework-in-extra-time

[62] Christoph G. Paulus, *supra* note 24.

[63] PRD, art. 34(1).

[64] Jennifer L. L. Gant et al., *supra* note 61. (emphasizing that the COVID-19 pandemic created incentives for more flexible rescue procedures for viable businesses suffering financial distress caused by lockdowns, restrictions, and other unforeseen economic consequences of the pandemic).

activities."[65] These efforts helped to curb insolvency filings and keep them below pre-COVID levels. According to international financial watchdogs, however, this only postponed a rise in insolvency filings, and the relaxation of government support may push some businesses that survived the pandemic to "the brink of bankruptcy." [66]

Germany became one of the first EU jurisdictions to implement the PRD. The UK decided to implement the scheme following EU's suit to keep up with the status of a competitive restructuring jurisdiction after Brexit.[67]

## 2.3. GERMANY

The German Stabilization and Restructuring Framework of Companies Act (*StaRUG*)[68] became effective on January 1, 2021. According to commentators, it introduced "[a] framework of tools including a new restructuring plan, which will enable debtors to restructure and cram down minority creditors outside of German insolvency proceedings for the first time."[69] It brought the German restructuring legal framework closer to the Code and the English scheme of arrangement. Unlike its UK counterpart and the text of the PRD itself, *StaRUG* is a lengthy (more than 100 sections) and complicated product of German legislators, which is typical for the country. It offers the debtor certain options and a possibility to use "[a] tool-box from which the debtor may choose whichever tool(s) appear to be most appropriate."[70]

### 2.3.1. Restructuring possibilities

[65] *Supra* note 19, at 10.

[66] *Id.*

[67] Jennifer L. L. Gant et al., *supra* note 61.

[68] Unternehmensstabilisierungs- und -restrukturierungsgesetz [StaRUG], Dec. 22, 2020, BGBl. I S. 3256 as amended by Gesetz [G], Aug. 10, 2021, BGBl. I S. 3436.

[69] Britta Grauke, Matthias Eiden, *New German Restructuring Regime (StaRUG): An Introductory Guide* (January 2021), https://www.weil.com/~/media/weil-london-thought-leadership/restructuring/new_german_restructuring_regime_starug_introductory_guide.pdf.

[70] Christoph G. Paulus, *supra* note 24.

The *StaRUG* provides possibilities to restructure all secured and unsecured liabilities (except pension and payroll, and liabilities under executory contracts yet to be incurred),[71] including deferrals and partial debt waivers, restructuring of affiliate guarantees and collateral, exchanging debt for equity swaps, and altering shareholders' rights. The debtor has the freedom to select the affected creditors, but these creditors must be put into classes, and respective classifications and explanations must be provided in the restructuring plan. *StaRUG* mandates that certain classes, such as secured creditors or shareholders (when applicable), are mandatory.[72] Within the classes, creditors must be treated equally (*par condicio creditorum*), but there is no such requirement among classes.[73]

### 2.3.2. Early warning, filing, and the court's involvement

The debtor has the possibility to file either a restructuring framework or an insolvency petition with the court in case of imminent insolvency but not yet actually insolvent or (technically) overindebted.[74] In the first decision based on *StaRUG*, the court noted that a company was only entitled to use the restructuring framework if it had a liquidity gap which, on the one hand, must not occur within the next 12 months, but, on the other hand, would be certain after 12 months and at most would occur in 24 months.[75]

Filing a restructuring framework petition allows for a moratorium of three to eight months to be imposed by the court, providing breathing space for the preparation of a restructuring plan.[76] Court involvement is not mandatory, and the debtor may opt out and proceed to negotiate a restructuring plan with creditors without petitioning the court. *StaRUG* is notable for changing the old rule that required public notification of insolvency proceedings. *StaRUG* allows debtors to decide whether to make

[71] StaRUG, §§ 3-4.

[72] StaRUG, § 9.

[73] StaRUG, § 10(1); Christoph G. Paulus, *supra* note 24.

[74] *Snapshot on the Status of Implementation of the EU Restructuring Directive in Selected Member States and the New English Scheme, Baker McKenzie European Restructuring Schemes. Update:* May 2022, 4, https://www.bakermckenzie.com/-/media/files/insight/publications/2022/05/european-restructuring-schemes.pdf.

[75] AMTSGERICHT KÖLN [[COLOGNE DISTRICT COURT]] MAR. 3, 2021, 83 RES 1/21.

[76] StaRUG, §§ 49 – 59.

such notification (aiming at preventing stigmatization),[77] and a respective motion to the court must be made before the first decision. However, the optional nature of this requirement has a caveat that undermines its usefulness in the case of cross-border restructuring procedures across the EU. If no public notification is made, the restructuring procedure will not be treated as a regular insolvency proceeding within the meaning of the European Insolvency Regulation.[78] As a result, recognition of German proceedings in other Member States may be problematic.

*StaRUG* provides that if the debtor is not sure about the outcome of negotiations with creditors (which is often the case in practice), and feels the need to bind dissenting creditors to some sort of agreement, the debtor is advised to seek court approval of the plan or to use the so-called "tool box"[79] procedures:

> [f]or getting the plan accepted by the mechanisms of binding the outvoted creditors, the debtor needs the judicial confirmation of the plan. But, as the case might be, further support might be necessary; the statute has four additional remedies which work as a tool box from which the debtor is basically free to choose what is needed.[80]

The tool box consists of judicial voting, pre-check, moratorium, and plan confirmation. If the debtor wants to use the tool box, the following steps must be taken:

(1) The debtor must notify the court of the intended restructuring using the tool box.[81] The notification must include the restructuring plan or its draft; a report on the status of negotiations with affected creditors; evidence of how the debtor has prepared to comply with the duties imposed by *StaRUG*; an indication of whether the rights of consumers or SMEs will be affected by the plan and whether

[77] StaRUG, §§ 84 – 88.

[78] StaRUG, § 84(2).

[79] StaRUG uses the words "restructuring and stabilization instruments/tools." *See* StaRUG, division 2.

[80] Christoph G. Paulus, *supra* note 24.

[81] StaRUG, § 31.

opposing creditors exist.

(2) The court investigates the facts to determine whether there are any potential reasons to end the case,[82] such as an earlier insolvency petition or a grave violation of the debtor's duties. The court also decides whether it is necessary to appoint a restructuring practitioner (*Sanierungsbeauftragter*) and renders a decision on the court̀s jurisdiction in the case.[83]

(3) The debtor is subject to additional duties under *StaRUG*,[84] which are burdensome. These duties include engaging in the restructuring case with the care of an "orderly and conscientious restructuring manager" and omitting all actions that contradict the goal of the restructuring (for example, to serve or give security for a claim which shall be rescheduled in the restructuring plan).[85] Additionally, the debtor must keep the court informed of all issues that might be relevant to the success of the future restructuring, including the predictable failure of the plan and if the debtor becomes insolvent. Failure to fulfill these duties is sanctioned by civil and criminal liability, as well as creditors' damage claims against the debtor and its officers.

2.3.3. Out-of-court negotiations and the role of a restructuring moderator

The debtor has the right and possibility to enter out-of-court negotiations with creditors, with an option to use a restructuring moderator appointed by the court. The moderator's role is to help the debtor reach an agreement with creditors on the restructuring plan.[86] Any natural person "experienced in business matters and independent from the creditors and

[82] StaRUG, § 33.
[83] StaRUG, §§ 36 – 38.
[84] StaRUG, §§ 32 – 42.
[85] Christoph G. Paulus, *supra* note 24.
[86] StaRUG, §§ 94 – 100.

from the debtors"[87] can be a moderator. This moderation procedure was not envisaged by the PRD. Moderation can precede the restructuring framework and represents a fully consensual procedure without the possibility of majority decisions or ordering a moratorium. In short, this moderation allows the parties to reach a restructuring settlement that is "insolvency-proof" (i.e., no insolvency claw back).[88]

In practice, it is difficult to avoid the involvement of a moderator. Moderator`s participation is mandatory when the rights of consumers and/or SMEs will be affected by the envisaged restructuring plan[89] or when all admissible creditors, or at least "essentially all," will be affected by that plan.[90] However, in these cases, a restructuring practitioner is appointed; it can be the same person as the moderator, provided he/she meets the statutory requirements.[91] Once the debtor triggers the notification to use the restructuring tools mentioned above, the court will decide on the practitioner; the debtor no longer has any discretion at his disposal. The restructuring practitioner's participation is also essential if it is evident that a considerable number of creditors oppose the restructuring plan, and a cross-class cramdown will be necessary (see section 2.3.4. below).[92]

The use of a moderator or practitioner can benefit SMEs[93] with their limited resources and their lack of knowledge about the proceedings. However, at the same time, the powers given to the moderator and/or restructuring practitioner to investigate the debtor's financial situation and report it to the court might hinder the use of the entire restructuring procedure.[94]

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[87] StaRUG, § 94.

[88] Claw back allows the moderator (bankruptcy trustee etc.) to void a restructuring settlement and get money or property back for the benefit of unsecured creditors. Claw back provisions can be found in many jurisdictions.

[89] StaRUG, § 73(1).

[90] StaRUG, § 73(2).

[91] Pursuant to StaRUG, § 74, it can be a tax advisor, certified public accountant, lawyer, or other comparably qualified natural person experienced in restructuring and insolvency matters, chosen from among all those persons willing to undertake the office, who is suitable in respect of the individual case and is independent of the creditors and the debtor. This difference in terminology creates certain difficulties for comprehending the StaRUG.

[92] StaRUG, § 73(2).

[93] Christoph G. Paulus, *supra* note 24.

[94] Paulus calls the moderator "a court`s spy" since he is obliged to report to the

### 2.3.4. Plan confirmation by the court and Cramdown

As far as plan confirmation is concerned, the court's role is limited to controlling compliance with procedural formalities. If an agreement with creditors is reached and the plan is confirmed by the court, possibilities to avoid an agreement are limited both for the debtor and creditors. The debtor is free to pick the moment when the court confirms the restructuring plan.[95] There is no such need if the plan was unanimously supported by creditors; yet only one dissenting creditor is enough to trigger the need for the court's confirmation and cramdown use.

*StaRUG* provides for the possibility to use a cramdown on dissenting creditors when voting for the restructuring plan. The requirement is that the voting is conducted by reference to the affected classes of creditors and shareholders (if applicable)[96] with a threshold of 75% by value in each class (this percentage is calculated by reference to the total value of the class, not just the value of those voting).[97] It is essential to comply with all the numerous formalities on voting; otherwise, the court will not confirm the plan.[98] If the 75% majority is reached in each class, the plan is accepted with subsequent court confirmation; if this is not the case, a cross-class cramdown can be used. The latter represents:

> ⟦a⟧ kind of legal magic; since a "no" is transformed into a "yes" – provided that three requirements are fulfilled: firstly, the members of the particular class are presumably in no worse condition by the plan than without any plan at all; secondly, the members of that particular class receive an adequate portion of the value which is supposed to be given to all

court any reasons for the insolvency of the debtor`s entire estate. *Id.*

[95] StaRUG, § 60.

[96] According to StaRUG, § 2(3), if the debtor is a legal entity or a company without legal personality, the share or membership rights of the parties holding a participating interest in the debtor may also be modified by the restructuring plan, other provisions that are admissible under company law may be made and share or membership rights may be transferred.

[97] StaRUG, § 25.

[98] StaRUG, § 63(3).

> affected creditors of the plan (the so-called plan value); and thirdly, a numeric majority of classes has voted in favour of the plan (when there are just two classes, it suffices that one class has given its consent).[99]

If voting took place without court supervision, it is essential to supply the court with all the evidence of compliance with *StaRUG*. Before the final decision on confirmation/non-confirmation, the court may hear all parties affected by the plan. Confirmation may be rejected if:

(1) the debtor is not imminently insolvent;

(2) the rules on the contents of the restructuring plan and procedures for its approval had been violated; or

(3) the plan affected claims as well as the other non-affected claims obviously cannot become fulfilled due to the debtor's financial or economic situation.[100]

Confirmation of the plan makes all restructuring arrangements effective.[101] Optionally, the restructuring practitioner may supervise the fulfillment of the plan.[102]

2.3.5. Criticism of the German approach

Being the German transposition of the PRD aimed at benefiting businesses with the use of a transparent and relatively quick preventive restructuring framework, *StaRUG* turned out to be a complex source of German statutory law. Without professional help, debtors can hardly use it in practice.[103] Once *StaRUG* became effective, it was predicted that "entrepreneurs for whose benefit the preventive restructuring framework

[99] Christoph G. Paulus, *supra* note 24.
[100] StaRUG, § 63.
[101] StaRUG, § 67.
[102] StaRUG, § 79.
[103] Christoph G. Paulus, *supra* note 24; Kirsten Schümann-Kleber, Gerrit Hölze & Manuel Holzmann, *StaRUG Summary by Experts* (Feb. 4, 2021), https://starug-blog.de/en/articles/starug-summary-by-experts/.

was originally intended for – the SMEs – will make little if any use of this innovation."[104] Another problem mentioned by practitioners and commentators is that the motion for public notification (covered in section 2.3.2. above) and public hearings of *StaRUG* cases became available in Germany only in July 2022.[105] Hence, it made it impossible to enjoy cross-border recognition under the European Insolvency Regulation, and it also affected dealing with the debtor's assets in other EU Member States.[106]

On the other hand, confidentiality might benefit debtors to overcome stigmatization. Yet, in addition to the cross-border recognition problem, confidentiality will complicate the evaluation of *StaRUG*'s efficiency because no official restructuring statistics are available. Available data about 22 *StaRUG* court cases reported in Germany between January 2021 – January 2022, and only four cases concluded with a confirmed restructuring plan,[107] do not contribute to the success story.[108]

Another point worth mentioning is the potential conflict between the *StaRUG* voting majorities and consent provisions in intercreditor agreements. The majorities required by the latter are normally higher (especially for debt haircuts) than the 75% required by *StaRUG*. In short, a cramdown within one class may imply a violation of the duties under intercreditor agreements towards other creditors. The court's confirmation of the restructuring plan is likely to give effect to the voting and supersede the restrictions, yet the breach of contractual duties will remain, and it would be logical for the dissenting creditor to demand compensation from

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[104] Christoph G. Paulus, *supra* note 24.

[105] Respective StaRUG provisions became effective on July 17, 2022. *See* Britta Grauke, Matthias Eiden, *One Year of German StaRUG – Lessons Learned With Respected to the Tested and Yet Untested* (Jan. 31, 2022), https://eurorestructuring.weil.com/german-restructuring/one-year-of-german-starug-lessons-learned-with-respect-to-the-tested-and-yet-untested-2/.

[106] *Id.*

[107] SABINE REIFENBERGER, *PRÄVENTIVE SANIERUNG: SO VIELE STARUG-FÄLLE GAB ES BISLANG* [PREVENTIVE RESTRUCTURING: THIS MANY STARUG CASES THIS FAR] (FEB. 3, 2022), HTTPS://WWW.FINANCE-MAGAZIN.DE/TRANSFORMATION/RESTRUKTURIERUNGSTRENDS/PRAEVENTIVE-SANIERUNG-SO-VIELE-STARUG-FAELLE-GAB-ES-BISLANG-109121/.

[108] Horst Eidenmüller, *What Can Restructuring Laws Do? Geopolitical Shocks, The New German Restructuring Regime, and the Limits of Restructuring Laws* 4, ECGI Law Working Paper No. 672/2022 (Dec. 2022).

the majority creditors.[109] If that happens, the entire restructuring result will be *ad absurdum*.[110] With only a handful of reported *StaRUG* court cases mentioned above, it still remains unclear how the German judges will deal with the described complications and how German case law will evolve.

### 2.4. THE UNITED KINGDOM

#### 2.4.1. The Corporate Insolvency and Governance Act 2020

The UK left the EU on January 31, 2020, without any obligations to implement the PRD into its national legislation. However, due to the UK's wish to remain "Europe's restructuring hub," the COVID-19 pandemic, and the government's determination to offer urgent help to affected businesses based on the US Chapter 11,[111] Parliament swiftly adopted the Corporate Insolvency and Governance Act 2020 (CIGA)[112] which became effective on June 26, 2020 (almost one year before the PRD's transposition deadline). Based on the well-tested scheme of arrangement introduced back in 1986 (which later transformed into what became known as Part 26 of the Companies Act 2006), CIGA amended the Companies Act 2006 Part 26 by adding a new Part 26A covering restructuring plans with the possibility of a cross-class cramdown,[113] as well as the Insolvency Act 1986 by introducing a new statutory moratorium[114] which prevents the enforcement of security or the commencement of insolvency proceedings *per se*.

#### 2.4.2. New restructuring plan framework and the old scheme of arrangement

Unlike the German *StaRUG*, which offers either a restructuring or an insolvency procedure, the new UK Part 26A allows directors faced with financial distress to choose between a new restructuring plan or the existing

[109] Sabine Reifenberger, *supra* note 107.
[110] *Id.*
[111] Ali Shalchi, *supra* note 21, at 10.
[112] Corporate Insolvency and Governance Act 2020 ⟦CIGA⟧ (UK), https://www.legislation.gov.uk/ukpga/2020/12/contents/enacted/data.htm.
[113] CIGA, c.12.
[114] *Id.*

tried and tested scheme of arrangement.[115] The latter represents a procedure under which creditors agree to accept a certain proportion of the debts due to them, or agree that their debt will be converted into equity in the company. The scheme:

> [c]an be used to bring about a solvent reorganisation of a company or group structure as well as to effect insolvent restructurings by a wide variety of debt reduction strategies (such as a "debt for equity swap"). The main advantage of this statutory procedure is its flexibility – there are almost no restrictions on the nature of the arrangement that can be reached between the parties – but it also provides for court oversight and creditor protections.[116]

The scheme consists of the following steps:

(1) A practice statement letter;
(2) A convening hearing;
(3) An explanatory statement and plan document;
(4) Plan meeting(s) at which classes of creditors and/or members vote; and
(5) A sanction hearing (by the court).

The main differences between the scheme and a new restructuring procedure are: (i) the possibility to use a cross-class cramdown to bind dissenting creditors to the plan, and (ii) overriding provisions (which can be used, for example, to override pre-emptive rights of shareholders).[117]

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[115] The British system distinguishes four corporate insolvency regimes:

(1) administration;
(2) administrative receivership;
(3) winding up (liquidation);
(4) arrangement with creditors.

*See* EWAN MCKENDRICK & ROY GOODE, GOODE AND MCKENDRICK ON COMMERCIAL LAW 927 (LexisNexis 2020).

[116] Ali Shalchi, *supra* note 21, at 10 n.6.

[117] Inga West, *Reflections on a Year of Restructuring Plans*, 34(3) INSOLV. INT.

Another possible option for the debtor is to trigger a so-called company voluntary arrangement (CVA) under Part 1 of the Insolvency Act 1986. CVA allows the debtor to come to some other arrangement with its creditors over the payment of its debts. In practice, the debtor will settle its debts by paying only a proportion of the debt owed to creditors. CVAs are normally used by companies seeking to restructure, but they cannot affect the rights of secured creditors or preferential creditors without their consent.[118]

2.4.3. Filing and court involvement

Under the Companies Act 2006 Part 26A, a restructuring plan can be proposed by the company (debtor) or by any creditor or member.[119] All companies incorporated under UK law[120] are eligible to apply for a restructuring plan if they meet the conditions (see below). Some non-corporate entities, such as limited liability partnerships, and foreign companies with sufficient connection to the UK[121] might also apply. Unlike the German *StaRUG*, restructuring under the plan can include payroll and pension plans. In the case of pension plans, it is necessary to inform the Pension Protection Fund, and the latter will be able to vote on the restructuring plan.[122]

To be eligible for a restructuring plan, the company in question must meet two conditions:

(1) It has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

(2) The purpose of the proposed plan must be to eliminate,

62, 62 – 63 (2021).

[118] Ali Shalchi, *supra* note 21, at 10.

[119] Companies Act 2006, 26A, § 901C(2).

[120] Companies providing financial services are excluded. *See* Companies Act 2006, 26A, § 901B.

[121] This happened in *Smile Telecom* where a company from Mauritius (also established in England) applied. *See* Re Smile Telecoms Holdings Ltd [2022] EWHC 740 (Ch).

[122] Companies Act 2006, 26A, § 901I.

> reduce, prevent, or mitigate the effect of those financial difficulties. [123]

These entry criteria distinguish the scheme of arrangement and the new restructuring plan procedure.

To start the proceedings, the company or a creditor must file an application to the court for leave (permission) to convene the class meetings to consider a restructuring plan. Depending on the case at hand, the court may "[o]rder a meeting of the creditors or class of creditors, or of the members of the company or class of members…, to be summoned in such manner as the court directs."[124] Summoned parties must be supplied with a statement explaining the effects of the restructuring plan or a scheme of arrangement.[125]

### 2.4.4. Moratorium and monitors

Unlike Germany, the moratorium is optional. A moratorium may be used by the financially distressed company to prepare a restructuring plan.[126] Moreover, *per se* the moratorium is not even a part of the restructuring plan procedure, but rather "a free-standing tool, not linked to any particular insolvency procedure"[127] provided in accordance with CIGA amendments to the Insolvency Act 1986.[128] According to CIGA explanatory notes, the aim of the moratorium is to provide struggling companies with: "[a] streamlined moratorium procedure that keeps administrative burdens to a minimum, makes the process as quick as possible and does not add disproportionate costs onto struggling businesses."[129]

The company in distress may apply for the moratorium by filing an application with the court. The court will grant the moratorium where it is satisfied that the moratorium would achieve a better result for the company's creditors as a whole than would be likely if the company were

[123] Companies Act 2006, 26A, § 901A.
[124] Companies Act 2006, 26A, § 901C(1).
[125] Companies Act 2006, 26A, § 901D.
[126] Ali Shalchi, *supra* note 21, at 11 – 12.
[127] *Id.* at 11.
[128] CIGA, § 1.
[129] Corporate Insolvency and Governance Bill 2020, Explanatory Notes ¶ 6.

wound up without first being subject to a moratorium.[130] During the moratorium (which initially lasts for twenty business days with a possibility of an extension for another twenty business days) no legal action can be taken by creditors against the company without court permission. It can be extended beyond forty days only under the creditors' consent or by the court. The maximum duration of a moratorium is twelve months from its commencement in the case of an extension made with creditor consent. However, it is possible for directors to apply to the court for a longer period or to request a further extension after the twelve months are over.

The moratorium is overseen by a "monitor" who must be a licensed insolvency practitioner. But the company directors continue to run day-to-day business.[131] The monitor scrutinizes the company and its directors for the duration of the moratorium, assessing whether it is likely that the moratorium will result in the rescue of the company as a going concern.[132] The monitor's consent is required for certain transactions, including non-ordinary course disposals, any grant of security and payment of certain debts in excess of a *de minimis* threshold.[133] Another interesting function of the monitor is to confirm to the court considering an application for a moratorium that the moratorium would result in the rescue of the company as a going concern.[134] Unlike Germany, the UK`s restructuring plan does not normally require appointment of any moderator/insolvency practitioner (trustee, monitor or else). Thus, the monitor works outside the scope of restructuring.

### 2.4.5. Plan confirmation. Voting and cramdown peculiarities

Both the restructuring plan and the arrangement scheme require creditors and shareholders (members) to be grouped into classes based on their rights (priority, secured, unsecured creditors, equity holders/shareholders depending on the situation). The Pension Protection Fund may exercise certain rights exercisable by the trustees, as if it were a creditor of the company.[135] The court approves class formation. The classes

[130] Insolvency Act 1986, § A1.
[131] Insolvency Act 1986, § A7.
[132] Insolvency Act 1986, § A35(1).
[133] Insolvency Act 1986, §§ A25 – A26.
[134] Insolvency Act 1986, § A6(1).
[135] Companies Act 2006, 26A, § 901 (3)-(5).

then vote on whether to accept the proposed plan or scheme, and in each case the final approval rests with the court. However, unlike the new restructuring plan procedure, the scheme of arrangement cannot use a cross-class cramdown. In other words, a single class of creditors can block a scheme of arrangement from being agreed even when it is in the company's and creditors' interests. Another option for "greedy creditors" would be "[t]o unfairly benefit by "holding out" support unless they are offered more than they are due, based on what they would likely recover in the event of the company failing and entering insolvency procedure."[136]

In case of voting on a restructuring plan, the same 75% majority (in value of creditors or voting members within each class) required by the PRD is necessary to approve the plan.[137] That is another difference from the scheme of arrangement where a majority in number of creditors is required to approve it, thus, the headcount is not to be used for restructuring plan voting.

To sanction a plan where the cross-class cramdown is to be used, the court must be satisfied with the following:

(1) If the plan is sanctioned, no members of the dissenting classes would be any worse off than they would be in the event of a relevant alternative;[138]

(2) At least one class of creditors or members that would receive a payment or have a genuine economic interest in the company in the event of a relevant alternative has voted in favor of the plan.[139]

The relevant alternative is defined as "whatever the court considers most likely to occur in relation to the company if the compromise or arrangement were not sanctioned" by the court.[140] The court has a wide discretion to consider what the relevant alternative would be. In *Hurricane Energy,* for example, the court refused to sanction a restructuring plan

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[136] Ali Shalchi, *supra* note 21, at 21.
[137] Companies Act 2006, 26A, §§ 901F - 901G.
[138] Companies Act 2006, 26A, § 901G(3).
[139] Companies Act 2006, 26A, § 901G(5).
[140] Companies Act 2006, 26A, § 901G(4).

because it was not convinced the "relevant alternative" would involve an imminent insolvent liquidation.[141]

The common features between the scheme of arrangement and a new restructuring plan come into play once the court must deal with voting and approval of the plan in question. Much of the developed jurisprudence around schemes of arrangement has been drawn upon by the courts in relation to the restructuring plan,[142] and the explanatory note to CIGA explicitly states

> [w]hile there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate.[143]

The English courts have relied on existing case law discussing Part 26 and the legislative history of CIGA[144] to guide their decisions on restructuring plans. However, "[a] restructuring plan is like a scheme, except when it is not,"[145] and the introduction of cross-class cramdowns has necessitated a modification of the courts' approach.[146] There is disagreement among judges as to how to make these adjustments. In *Hurricane Energy*, the judge acknowledged that the courts' reluctance to depart from the outcome of a properly convened meeting of a class of creditors in scheme proceedings should not have the same weight in restructuring plan proceedings.[147] In *Re DeepOcean*, the court determined that if the two conditions for a cross-class cramdown are satisfied, the plan has a "fair wind behind it," and the court can sanction it unless it is not just and equitable to

[141] Hurricane Energy Plc [2021] EWHC 1759 (Ch), at 1.

[142] *Supra* note 74, at 3.

[143] Corporate Insolvency and Governance Bill 2020, Explanatory Notes ¶ 16.

[144] *See, e.g*, Virgin Atlantic Airways Ltd [2020] EWHC 2376, at 45; Hurricane Energy Plc [2021] EWHC 1759 (Ch), at 31.

[145] Inga West, *supra* note 117, at 63.

[146] Re DeepOcean 1 UK Ltd, Re DeepOcean Subsea Cables Ltd, Re Enshore Subsea Ltd [2021] EWHC 138 (Ch), at 44 – 46; Hurricane Energy Plc [2021] EWHC 1759 (Ch), at 40.

[147] Hurricane Energy Plc [2021] 6 WLUK 382, at 40.

do so.[148] In *Virgin Active*, the judge emphasized that the same rationality test that applies to schemes should be applied to restructuring plans, but this cannot be done in the same way when the court is considering whether to approve a plan against the wishes of dissenting classes. The court must also consider other relevant factors when exercising its discretion in such cases.[149] The best illustration of "other relevant factors" can be found in the recent decisions in *Nasmyth*[150] and *Great Annual Savings*.[151] In the former case, the court refused to sanction a cross-class cramdown on the tax authority, His Majesty's Revenue & Customs ("HMRC"), because in the court's view, it would have been unfair. The judge stated that he should not be seen as approving the non-payment of tax, as deciding otherwise would give a 'green light' to companies to use restructuring plans to cram down their unpaid taxes.[152] In *Great Annual Savings*, the court pointed out the debtor's failure to prove that the HMRC would not be worse off under the restructuring plan,[153] and therefore, it would be unfair to sanction it.[154]

Another interesting feature of Part 26A is the possibility for a company to exclude creditor classes from voting on a plan if it is established that those classes have no genuine economic interest in the company (i.e., no prospect of any recovery through either the restructuring plan or the relevant alternative).[155] *Smile Telecoms* became the first case in which this new rule was applied,[156] and it became the first restructuring case used by a relatively small business.[157] In this case, a small telecom provider applied to approve

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[148] Re DeepOcean 1 UK Ltd, Re DeepOcean Subsea Cables Ltd, Re Enshore Subsea Ltd [2021] EWHC 138 (Ch), at 48 *et seq.*

[149] RE VIRGIN ACTIVE HOLDINGS LTD, RE VIRGIN ACTIVE LTD, RE VIRGIN ACTIVE HEALTH CLUBS LTD [2021] EWHC 1246 (CH), AT 221 *ET SEQ.*

[150] Re Nasmyth Group Ltd [2023] EWHC 988 (Ch).

[151] Re The Great Annual Savings Company Ltd [2023] EWHC 1141 (Ch).

[152] Re Nasmyth Group Ltd [2023] EWHC 988 (Ch), at 98 *et seq.*

[153] Re The Great Annual Savings Company Ltd [2023] EWHC 1141 (Ch), at 69-72.

[154] *Id.* at 105, 123, 133 – 135.

[155] Companies Act 2006, 26A, § 901C.

[156] Re Smile Telecoms Holdings Ltd [2022] EWHC 740 (Ch).

[157] Smile Telecoms had a revenue of approximately British pound sterling ("GBP") 27 million while according to PricewaterhouseCoopers, between July 2020 – April 2021, restructuring filings were made by companies with an average revenue of GBP 700 million. *See Restructuring Plans – What a Difference a Year Makes,* https://www.pwc.co.uk/services/business-restructuring/insights/restructuring-plans-

a restructuring plan which provided that the company's sole super senior facility lender, a finance company owned by the same family who owned the majority of the company, could increase its facility to the company and take 100% ownership. The existing members would then receive nominal consideration for their shares, and the company's other debts would be compromised, with some creditors to receive only small sums. At a hearing for an order convening class of creditors, the court ruled that the super senior facility lender was the only class of creditor with a genuine economic interest in the company and summoned a single meeting comprising only that lender.[158]

If the court approves the restructuring plan it will be binding on all creditors and members regardless of whether they, individually or as a class, approved the plan.

2.4.6. Criticism of the UK approach

The popularity of the new restructuring under the CIGA appears low. Between June 26, 2020, and June 30, 2023, 45 companies obtained a moratorium and only 21 restructuring plans were registered throughout the UK.[159] One possible explanation is that under UK law, it is impossible to launch the restructuring plan procedure without already having a plan or at least its draft. In the context of SMEs,[160] it means that a company unprepared to develop a restructuring plan may face problems like those in

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what-difference-year-makes.html.

[158] Re Smile Telecoms Holdings Ltd [2022] EWHC 740 (Ch), at 32 – 55.

[159] The Insolvency Service, Official Statistics. Commentary – Company Insolvency Statistics: April to June 2023 (Jul. 23, 2023), https://www.gov.uk/government/statistics/company-insolvency-statistics-april-to-june-2023/commentary-company-insolvency-statistics-april-to-june-2023.

[160] The Companies Act 2006 defines micro, small, and medium-sized companies based on their turnover, balance sheet total, and number of employees. A micro-entity is a company that meets two or more of the following criteria: turnover of not more than GBP 632,000, balance sheet total of not more than GBP 316,000, and no more than 10 employees (§ 384A). A small company is one that meets two or more of the following criteria: turnover of not more than GBP 10.2 million, balance sheet total of not more than GBP 5.1 million, and no more than 50 employees (§ 382). A medium-sized company is a company that meets two or more of the following criteria: turnover of not more than GBP 36 million, balance sheet total of not more than GBP 18 million, and no more than 250 employees (§ 465).

Germany. SMEs might not be able to benefit from the CIGA without professional help (normally Senior Counsels[161] engage in restructuring plan cases). According to the March 2022 governmental report, restructuring procedures are far too costly for SMEs, which account for 99.9% of the UK's business population.[162] In particular, the report compares the costs of a new restructuring plan and the old CVA procedure under the Insolvency Act 1986 and concludes that:

> [T]he inherent cost of the measure is seen as a real problem for the SME market. The cost for a straightforward SME RP is estimated to be around £100,000 - £150,000 (although it may be possible to complete a RP more cheaply). It is difficult to see RPs becoming commonplace in the SME sector due to the expense. Although the typical costs of a CVA are likely to be £25,000 - £35,000, this may be a false economy if the CVA is subsequently challenged.[163]

The March 2022 report contains suggestions to amend the existing legal framework and practical approaches to restructuring plans to reduce the cost burden for SMEs:

Introduce a standardized template specifically designed for SMEs to apply;

(1) Get rid of two court hearings (convening hearing and a hearing to sanction/deny the plan) in favor of a single sanction hearing done by an Insolvency and Company Court judge;

(2) Reduce reliance on Senior Counsels, which may come with

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[161] A high-level barrister licensed to practice law.

[162] 5.6 million SMEs exist in the UK vs. only 7,700 large businesses. *See* The Insolvency Service, *Corporate Insolvency and Governance Act 2020*, Interim Report March 2022 (Dec. 19, 2022), https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports/corporate-insolvency-and-governance-act-2020-interim-report-march-2022.

[163] *Id.*

time and experience as more insolvency practitioners and lawyers become familiar with the procedure;

(3) Appoint a single joint independent expert to reduce the costs necessary to provide valuation evidence;

(4) Develop some kind of pragmatic approach to evidence in simple cases by applicants and judges.[164]

Another issue is the criteria to qualify for a restructuring plan. In *DeepOcean*, the court held that the financial difficulties threshold which the company must satisfy should be widely construed.[165] Practitioners noted that it had been broad enough to include a loss-making company using restructuring to promulgate a solvent dissolution:

⟦A⟧ terminal financial state counts as "financial difficulties", and a plan that is designed to promote a solvent wind-down of the company by injecting additional group funds in order to give creditors an uplift above the dividend they would receive in an insolvent liquidation, counts as mitigation of those financial difficulties. The financial difficulties threshold is a fairly low bar.[166]

## 3. UKRAINE

### 3.1. UKRAINIAN BANKRUPTCY LAW AND PRE-TRIAL RESTRUCTURING

#### 3.1.1. Bankruptcy laws in general

Unlike Germany or the UK, Ukrainian bankruptcy law is relatively young, not including the national variant of the preventive restructuring procedure. The notion of bankruptcy/insolvency was alien to the Soviet state-planned economy. The first Ukrainian Law on Bankruptcy was adopted in May 1992, almost eight months after the declaration of

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[164] *Id.*

[165] Re DeepOcean 1 UK Ltd, Re DeepOcean Subsea Cables Ltd, Re Enshore Subsea Ltd ⟦2021⟧ EWHC 138 (Ch), at 23, 49.

[166] Inga West, *supra* note 117, at 63.

independence. In short, between 1992 and 2018, the Ukrainian Parliament had adopted four bankruptcy laws. Accordingly, there are four distinct stages[167] of the development of Ukrainian bankruptcy law:

(1) adoption of the Law on Bankruptcy of May 14, 1992;[168]

(2) revision of the Law on Bankruptcy and adopting its new wording[169] as the Law on Restoring Debtor`s Solvency or Recognizing It Bankrupt of June 30, 1999;[170]

(3) revision of the Law on Restoring Debtor`s Solvency or Recognizing It Bankrupt and adoption of the new wording thereof (Law of December 22, 2011);[171]

(4) adoption of the Code of Ukraine on Bankruptcy Procedures (BCU) of October 18, 2018.[172]

Frequent legislative changes in Ukrainian bankruptcy can be explained by inconsistencies and gaps in the 1992 Law on Bankruptcy and subsequent laws, as well as the need to improve terminology, introduce trustees, reshape

[167] I.V. Mynchynska, *Otsinka efektyvnosti zakodavstva pro bankrutstvo v Ukraïni: ekonomiko-pravovyĭ aspekt* [*Performance evaluation of bankruptcy legislation in Ukraine: economic and legal aspect*], 10 EFEKTYVNA EKONOMIKA (Nov. 27, 2020), http://www.economy.nayka.com.ua/?op=1&z=8267.

[168] Zakon Ukraïny "Pro bankrutstvo" vid 14 travnia 1992 roku, VVRU, No. 31, Item 440.

[169] To bypass the complicated requirements of the Parliamentary Rules of Procedure, MPs in the Ukrainian Parliament (*Verkhovna Rada*) frequently resort to a practice of adopting new wordings of existing laws. The new wording represents an entirely different legal text, but formally, it is simply an amendment rather than an entirely new law.

[170] Zakon Ukraïny "Pro vnesennia zmin do Zakonu Ukraïny "Pro bankrutstvo" vid 30 chervnia 1999 roku, VVRU, 1999, No. 42-43, Item 378.

[171] Zakon Ukraïny "Pro vnesennia zmin do Zakonu Ukrainy "Pro vidnovlennia platospromozhnosti borzhnyka abo vyznannia ĭoho bankrutom" vid 22 grudnia 2011 roku, VVRU, 2012, No. 32-33, Item 413.

[172] Kodeks Ukraïny z protsedur bankrutstva vid 18 zhovtnia 2018 roku, VVRU, 2019, No. 19, Item 74. Official English translation as amended as of June 14, 2021 (June 14, 2021, 1:48 PM), https://zakon.rada.gov.ua/laws/show/en/2597-19#Text.

the authority and subordination of state institutions dealing with bankruptcy,[173] encourage solvency restoration rather than debtor liquidation, and introduce pre-trial restructuring. In addition, the treatment of consumer debts and individual bankruptcies, has caused further legislative changes.[174] Moreover, vested interests of different stakeholders and constant attempts to patronize state-owned enterprises also explain frequent amendments and revisions.

Some statistical data may clarify Ukraine's bankruptcy realities of those days. Following the drastic and rather rapid economic transformations in post-independent Ukraine, the practical application of bankruptcy law demonstrated a tendency of increasing numbers of court decisions recognizing the debtor as bankrupt. For example, between 1996 and 2010, under the 1992 Law on Bankruptcy,[175] on average, 28.78% of debtors were recognized as bankrupts (57.43% in 1996-2000 and 14.45% in 2001-2010). Between 2001 and 2017, under the 1999 Law on Restoring Debtor's Solvency or Recognizing It Bankrupt and its 2011 revised version, the average indicator increased to 77.47% (81.73% under the 1999 Law and 67.23% under the 2011 Law).[176] Another illustration is the number of cases: in 1996 there were 3,632 cases on bankruptcy, and in 2007 the number increased to 11,898 (81 of which were still tried under the rules of the 1992 Law).[177] In other words, Ukraine suffered from controversial, pro-debtor legislation allowing debtors to avoid their obligations for years and protracted bankruptcy proceedings.

According to the Explanatory Note to the Draft BCU, the need for its adoption was justified by the necessity of increasing Ukraine's investment attractiveness, improving Ukraine's rankings in the World Bank's Doing Business Report,[178] securing equal rights and opportunities for all creditors

[173] Institutions dealing with trustees, including their licensing, training, and valuations, have had their respective functions juggled between the Agency on Prevention of Bankruptcy under the Cabinet of Ministers and the Ministry of Economy by Ukrainian legislators and the Cabinet of Ministers. As of this writing, a special department at the Ministry of Justice of Ukraine is responsible for exercising these functions.

[174] I. V. Mynchynska, I., 2020, *supra* note 167.

[175] The Law applied to bankruptcy procedures initiated while it was effective, therefore, many cases lasted for years.

[176] All figures cited from I.V. Mynchynska, *supra* note 167.

[177] *Id.*

[178] According to the World Bank's 2018 Doing Business Report, Ukraine's

in defending their rightful interests in bankruptcy proceedings, reducing possibilities for various abuses during bankruptcy (especially regarding debtors who do not honor obligations to creditors), and making the new law more pro-creditor rather than pro-debtor.[179] The BCU also introduced restructuring of consumer debts. The new Code was enacted on October 18, 2018, and became effective on October 21, 2019.

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insolvency proceedings were ranked 149th out of 190 countries, indicating a low ranking. The score for resolving insolvency was 28.24 out of a possible 100. On average, bankruptcy cases lasted for 2.9 years, costs were relatively high at 40.5% of the estate, and the recovery rate (measured in cents on the USD) was low at 8.9. The insolvency framework index, which measures the strength of the legal framework, was only 7.5 out of a possible 16.

To compare the 2018 rankings of comparator jurisdictions, Germany was ranked 4th out of 190 countries. Its score for resolving insolvency was 90.27 out of a possible 100. Bankruptcy cases on average lasted for 1.2 years; costs were only 8% of the estate, the recovery rate (measured in cents on the USD) was high at 80.6, and the insolvency framework index (strength of the legal framework) was 15 out of a possible 16. The UK was ranked 14th out of 190 countries. Its score for resolving insolvency was 80.24 out of a possible 100. Bankruptcy cases on average lasted for only one year; costs were 6% of the estate, the recovery rate (measured in cents on the USD) was 85.2, and the insolvency framework index (strength of the legal framework) was 11 out of a possible 16. *See* World Bank, *Doing Business 2018: Reforming to Create Jobs*, Doing Business Annual Report 2018, 87, 126, 127 (2018).

The authors of the BCU intended optimistic outcomes without delving into explanations. According to the Explanatory Note to the respective bill, Ukraine's ranking would jump from 149 to 68. In 2019, Ukraine did indeed improve its ranking, but only insignificantly. Its ranking jumped to 145 out of 190. The score for resolving insolvency was 31.72 out of 100. Timing for bankruptcy procedures and costs did not change at all and remained at 2.9 years and 40.5% of the estate, respectively. The recovery rate (measured in cents on the USD) increased to 9.6, and the insolvency framework index (strength of the legal framework) increased by 1 to 8.5 out of a possible 16. *See* World Bank, *Doing Business 2019: Training for Reform*, Doing Business Annual Report 2019, 211 (2019).

[179] Poiasniuvalʹ na zapyska do zakonoproektu No. 8060 vid 26 liutoho 2018 roku ⟦Explanatory Note to Bill No. 8060 of Feb. 26, 2018⟧ (Feb. 26, 2018), http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63518.

3.1.2. Pre-trial restructuring: Ukrainian peculiarities

3.1.2.1. Available by law but hardly available in fact

Pre-trial restructuring was introduced in 2011 with the new wording of the Law on Restoring Debtor's Solvency or Recognizing It Bankrupt, which was developed with active participation from the World Bank and International Finance Corporation.[180] The authors of the respective bill law emphasized the need to promote bankruptcy prevention measures, use pre-trial procedures, including pre-trial restructuring, broaden opportunities for diagnosing possible debtor insolvency as early as possible, and take measures to restore solvency via restructuring.[181]

However, it was impossible to use the new mechanism in practice until 2013, when the Higher Commercial Court of Ukraine[182] issued Regulations on Pre-trial Restructuring Procedures[183] that elaborated on applicable provisions of the 2011 Law and provided excessive procedural details.[184] In particular, the Higher Commercial Court emphasized that pre-trial restructuring aimed to:

(1) Voluntarily settle debts between creditors and the debtor,

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[180] Poiasniuval'na zapyska do zakonoproektu No. 8531 vid 18 travnia 2011 roku [Explanatory Note to Bill No. 8531 of May 18, 2011] (Dec. 21, 2011), http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=8531&skl=7.

[181] *Id.*

[182] No longer exists as an independent court. In 2017, it became the Cassation Commercial Court within the Supreme Court of Ukraine.

[183] Postanova Plenumu Vyshchoho Hospodarskoho Sudu Ukraïny No. 15 vid 17 hrudnia 2013 roku "Pro zatverdzhennia Polozhennia pro poriadok provedennia sanatsii do porushennia provadzhennia u spravi pro bankrutstvo" [Resolution of the Plenum of the Higher Commercial Court of Ukraine No. 15 of Dec. 17, 2013 on Approving Regulations on Restructuring Prior to the Opening of Bankruptcy Proceedings] (2013 Regulations) (Dec. 17, 2013), https://zakon.rada.gov.ua/laws/show/v0015600-13#Text.

Plenum resolutions used to serve as a persuasive authority to ensure the uniform application and interpretation of laws by courts of lower instances. They were developed by teams of practicing judges and legal scholars. Although the practice of issuing Plenum resolutions has been discontinued, judges and practitioners often refer to them if they do not contradict existing laws.

[184] Anton Molchanov, *Ukrainian Schemes of Arrangement: Passing the Stress Test*, 14(2) INSOLV. AND RESTR. INT. 10 (2020).

between unsecured creditors, as well as between unsecured and secured creditors;

(2) Achieve mutually beneficial (parity) conditions for debt settlement;

(3) Use an inexpensive debt settlement procedure;

(4) Secure a procedurally economical mechanism for settling the debtor's debt;

(5) Ensure a fair satisfaction of creditors' claims;

(6) Prevent violation of creditors' rights during the repayment of their monetary claims;

(7) Implement additional guarantees for creditors;

(8) Preserve the business.[185]

According to the BCU, pre-trial restructuring[186] is:

> ⟦a⟧ system of measures to recover the debtor's solvency, which can be carried out by a founder (participant, shareholder) of a debtor, the owner of the property (a body authorized to manage the property) of a debtor, and other persons, in order to prevent the debtor's bankruptcy by

[185] 2013 Regulations, section 1.4.

[186] The terminological peculiarities of Ukrainian legislation apply equally to both repealed legislation and the current BCU. Instead of using "pre-trial restructuring" (*restrukturizatsiia do porushennia spravy pro bankrutstvo*), the term "pre-trial rehabilitation" (*sanatsiia do porushennia spravy pro bankrutstvo*) is used. Additionally, "rehabilitation" (*sanatsiia*) also applies to debtors as an alternative to liquidation. This rehabilitation can only take place within the framework of the bankruptcy proceedings once the case is already open. This confusing terminology has been pointed out as a problem by international experts. *See* Arne Engels, Oleksandr Biriukov, Roman Chumak, *supra* note 20, at 69. For the sake of clarity and consistency, the term "pre-trial restructuring" will be used unless indicated otherwise.

> taking organizational and business, managerial, investment, technical, financial and economic, legal measures in accordance with the legislation prior to the opening of bankruptcy proceedings.[187]

Before the enactment of the BCU, the implementation of pre-trial restructuring was challenging, even with the introduction of the 2013 Regulations and modifications to the 2011 Law on Restoring Debtor's Solvency or Recognizing It Bankrupt. Commentators observed that pre-trial restructuring only accounted for 10% of insolvency cases, which was due to the absence of consequences for management or shareholders who failed to file or engaged in wrongful trade. Additionally, there was no limitation on the formation of new companies, making court-guided liquidation and subsequent incorporation of a new business a more attractive and less time-consuming option.[188]

In addition, the old legislation included "dead"[189] provisions, such as the requirement that the approval of the restructuring plan needed support from 100% of secured creditors, [190] which was extremely difficult to obtain. However, the BCU introduced a within-class cramdown by lowering the threshold to 2/3 of those voting in the class. [191] With the amendments introduced by the new Code, the Ukrainian restructuring procedure became "[m]ore akin to the English scheme of arrangement under the UK Companies Act and embraces some features of the Chapter 11 US Bankruptcy Code restructuring procedure."[192] However, compared to these

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[187] BCU, art. 4(5). The definition itself was copy pasted from the Law on Restoring Debtor`s Solvency or Recognizing It Bankrupt of Dec. 22, 2011, art. 5(5).

[188] Anton Molchanov, *supra* note 184.

Pre-trial restructuring can be used not only by debtor legal entities but also by individual merchants (natural persons registered as entrepreneurs without incorporation of a company). The BCU treats these businesses equally. The restructuring of consumer debts is covered by a separate section of the BCU and is not considered pre-trial restructuring as such.

[189] Olha Stakheyeva-Bogovyk, *New Bankruptcy Code of Ukraine: What to Expect*, EUROFENIX, 26 (Summer 2019), https://www.insol-europe.org/download/documents/1585.

[190] Article 6(2) of the Law on Restoring Debtor`s Solvency or Recognizing It Bankrupt of Dec. 22, 2011.

[191] Olha Stakheyeva-Bogovyk, *supra* note 189.

[192] *Id.*

systems, the Ukrainian approach remains much less structured.[193]

#### 3.1.2.2. Restructuring possibilities under the BCU.

Like Germany, the new Ukrainian Code provides opportunities[194] to restructure all secured and unsecured liabilities, except pension and payroll obligations, and liabilities under contracts with IT specialists under the Law on Stimulating Digital Economy in Ukraine.[195] This includes the possibility of deferrals and partial debt waivers, restructuring of affiliate guarantees and collateral. The BCU also includes a list of measures that can be used to restore the debtor's solvency and be included in the restructuring plan, either by the debtor or by creditors. These measures include:

(1) enterprise restructuring;[196]

(2) production conversion;

(3) closure of unprofitable productions;

(4) extension of a period for or postponement, or cancellation

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[193] Anton Molchanov, *supra* note 184, at 12. Unlike in the UK or the US, pre-trial restructuring in Ukraine is covered by only one article in the BCU (Article 5 consisting of 11 lengthy paragraphs). There is no separate chapter, title, or similar section dedicated to it.

[194] BCU, arts. 5(3), 64(1).

[195] This Law was adopted to set up a special legal regime for IT industry in Ukraine (the so-called "Diia City regime") aimed at creating favorable conditions for running innovative businesses, raising investments, building digital infrastructure and attracting talented IT professionals. *See* Zakon Ukraïny "Pro stymuliuvannia rozvytky tsyfrovoï ekonomiky v Ukraïni" vid 15 lypnia 2021 roku ⟦Law of Ukraine on Stimulating the Development of Digital Economy in Ukraine of July 15, 2021⟧, Ofitsiĭnyĭ Visnyk Ukraïny ⟦OVU⟧, 2021, No. 65, Item 4103.

[196] Restructuring of an enterprise is defined as the implementation of organizational, business, financial and economic, legal, technical measures aimed at reorganizing the enterprise, in particular, by splitting it off, with the transfer of debt obligations to a legal entity not subject to rehabilitation, at changing type of ownership, management, organizational and legal form that will contribute to the financial recovery of the enterprise, increase in production efficiency, increase in the volume of competitive products, and to full or partial satisfaction of creditors' claims. *See* Article 51(3) BCU.

(write-off) of debts or part thereof;

(5) fulfillment of the debtor's obligations by third parties;

(6) other means to satisfy creditors' claims that does not contradict the BCU;

(7) liquidation of receivables;

(8) restructuring of the debtor's assets in accordance with the requirements of the BCU;

(9) sale of part of the debtor's property;[197]

(10) fulfillment of the debtor's obligations by the debtor's owner and its/his responsibility for non-fulfillment of the undertaken obligations;

(11) alienation of property and settlement of creditors' claims by replacing assets;

(12) dismissal of the debtor's employees who cannot be involved in the process of implementation of the restructuring;

(13) obtaining a loan to settle redundancy payment to the

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[197] The drafters of the BCU aimed, among other things, to improve the provisions of the law relating to the sale of the debtor's assets. This was done to secure the sale of property at the highest price possible. Specifically, the drafters aimed to introduce rules on control over the sale of substantial assets, ensure the sale of all property on a competitive basis via an auction, and improve the rules for notification of the sale of property via the Internet. Since 2019, the sale of debtor's assets has been administered through Prozorro.Sale, an online platform for the sale and lease of property. This platform is also used for public procurement, privatization purposes, and enforcement of court decisions.

*See* Poiasniuval'na zapyska do zakonoproektu No. 8060 vid 26 liutoho 2018 roku [Explanatory Note to Bill No. 8060 of Feb. 26, 2018] (Feb. 26, 2018), http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63518; Prozorro.Sale e-auctions, https://prozorro.sale/en.

debtor's employees who are dismissed in accordance with the restructuring plan, which is reimbursed in accordance with the requirements of the BCU on an extraordinary basis, through the sale of the debtor's property;

(14) obtaining loans and credits, purchasing goods on credit;

(15) other measures to recover the debtor's solvency.[198]

Selecting an adequate measure is a challenging task for an unsophisticated debtor, or even for creditors. Professional assistance is essential, especially in complicated cases.

3.1.2.3. Initiation-Court involvement

The adoption of the BCU has eliminated the old preconditions for initiating pre-trial restructuring.[199] Under the new Code, distressed companies' management is required to inform a founder (participant, shareholder) of a debtor or the owner of the property (a body authorized to manage the property)[200] of any signs of bankruptcy.[201] The founder or property owner must take necessary measures to prevent bankruptcy,[202]

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[198] BCU, art. 51(2) is in the section of the Code that deals with the restructuring (rehabilitation) procedure as an alternative to liquidation. The measures listed in this art. 51(2) are aimed at providing alternatives to liquidation and can contribute to confusion between the two types of restructuring under the BCU.

[199] Those preconditions were: (1) a debt threshold, which was the outstanding uncontested claim in the amount of 300 minimal wages (approximately EUR 41,454.00 back in late 2019); (2) the collection of debt proofs via the court and enforcement authorities, which required obtaining the final court decision and the ruling on the opening of enforcement procedure; (3) the debtor's failure to repay the debt within a three-month period as of the set date for its settlement; and (4) a written consent of creditors holding more than 50% of the debtor's liabilities, certified by accounting data. *See* Article 6 of the Law on Restoring Debtor`s Solvency or Recognizing It Bankrupt of December 22, 2011; Section 2.1. of the 2013 Regulations; Olha Stakheyeva-Bogovyk, *supra* note 189.

[200] Normally those cover state-owned and municipal enterprises.

[201] BCU, art. 4(2).

[202] BCU, art. 4(1).

and pre-trial restructuring is one of the possible measures. Compared to the old bankruptcy legislation, the BCU's criteria for initiating respective procedures are somewhat vague, and its initial practical application caused certain difficulties, requiring the courts to step in. According to the Supreme Court of Ukraine, any failure to meet a monetary obligation qualifies as a proper ground to initiate proceedings under the BCU, even if no prior attempt to collect had been made by initiating a lawsuit against the debtor.[203]

Indeed, pre-trial restructuring under the new BCU resembles the UK's restructuring framework or a scheme of arrangement. The procedure cannot be initiated without having a restructuring plan already approved by creditors. Only a debtor can initiate the procedure under the decision of the founders (participants, shareholders).[204] Restructuring of a debtor prior to the opening of bankruptcy proceedings shall be carried out in accordance with the restructuring plan, which must be enclosed with the application filed with a court of law. The debtor's application should also be supported by a liquidation analysis, a document confirming that, as a result of performance under the restructuring plan, the repayment ratio for creditors might be higher than in case of the debtor's liquidation.[205] Thus, the debtor files an application with the court post-factum, after the owner of the business (founders, participants) has sanctioned pre-trial restructuring and the creditors have already approved the restructuring plan.[206]

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[203] Postanova Verkhovnoho Sudu Ukraïny vid 3 chervnia 2020 roku u spravi No. 905/2030/19 [Decision of the Supreme Court of Ukraine of June 3, 2020 in case No. 905/2030/19], https://verdictum.ligazakon.net/document/89707066?utm_source=biz.ligazakon.net &utm_medium=news&utm_content=bizpress01.

[204] BCU, art. 5(1). Under the old legislation, creditors could do that as well.

[205] BCU, art. 5(2).

[206] Ukhvala Hospodars`koho Sudu Kharkivs`koï Oblasti vid 23 bereznia 2020 roku u spravi No. 922/326/20 [Ruling of the Commercial Court of Kharkiv Region of Mar. 23, 2020 in case No. 922/326/20], https://zakononline.com.ua/court-decisions/show/88430457 ; Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku u spravi No. 924/1083/20 [Decision of the Supreme Court of Ukraine of June 9, 2021 in case No. 924/1083/20], http://iplex.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b4402 5ba3f92604ad78&d=5

#### 3.1.2.4. Preparation of a plan-Categories of creditors

Once the debtor decides to invoke pre-trial restructuring and its owner (including founders and shareholders, if any) approves, the debtor must develop a restructuring plan and notify creditors of their intentions to invoke restructuring. To approve the restructuring plan, the law requires the debtor to convene a meeting of creditors by notifying in writing all creditors participating in the restructuring in accordance with the draft plan.[207] The debtor must also provide creditors with the restructuring plan and publish an announcement about the meeting of creditors on the official web portal of the Ukrainian judiciary. [208] In practice, the debtor sends individual notifications to creditors informing them of the intention to convene a meeting of creditors and publishes a respective announcement in printed mass media (local and national newspapers). Creditors' meetings shall be convened no earlier than 10 days after the announcement is placed on the official web portal of the Ukrainian judiciary.

In the process of preparing a restructuring plan, the debtor must meet the BCU's requirements regarding the plan's contents. The plan should include: (i) the amount, procedures, and terms of redemption of claims of creditors participating in restructuring; (ii) measures to implement the restructuring plan and to monitor its implementation; and (iii) the scope of authority of the restructuring trustee (if appointed).[209] The division of creditors into classes (categories) is not an essential part of the plan under the BCU. The BCU allows the division of creditors participating in restructuring into categories depending on the type of claims and the presence (absence) of security for the claims, but it is optional to include in the plan.[210] Furthermore, it is at the discretion of the debtor and/or creditors to include different conditions for satisfying claims for creditors of different categories, measures to obtain loans or credits, and measures to recover the debtor's solvency as listed in the BCU. [211]

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[207] BCU, art. 5(4).

[208] Official website of the State Court Administration of Ukraine, https://court.gov.ua/ (access suspended for national security reasons since Feb. 24, 2022).

[209] BCU, art. 5(2).

[210] *Id.*

[211] *Id.* The list of such measures is provided in BCU, art. 51(2). *See supra* note

Ukrainian courts[212] explicitly note that division of creditors into classes should not be confused with the order of priority in satisfaction of creditors' claims (when the debtor is to be liquidated).[213] The Supreme Court emphasized:

> [D]ivision of creditors into categories according to one of the criteria, depending on the type of claims, does not contain a direct reference to priority, and therefore is not equated with priority in the sense of Article 64 … At the same time, the second criterion for division into categories is directly specified in the law - the presence/absence of security.

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198. The Supreme Court emphasized the discretionary nature of those, as well as the division of creditors into classes. *See* Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku u spravi No. 904/3325/20 [Decision of the Supreme Court of Ukraine of Apr. 15, 2021 in case No. 904/3325/20], para 8.3, https://verdictum.ligazakon.net/document/96501402.

[212] There are no separate bankruptcy courts in Ukraine. Commercial courts, which have jurisdiction in commercial cases involving businesses and natural persons registered as merchants, handle bankruptcies and preventive restructuring. Ukraine has trial commercial courts (courts of the first instance) and appellate commercial courts. The Cassation Commercial Court operates within the structure of the Supreme Court of Ukraine, alongside the Cassation Civil Court, Cassation Administrative Court, and Cassation Criminal Court. The Cassation Commercial Court has a special chamber dedicated to handling bankruptcy cases. Certain cases can be referred to the Grand Chamber of the Supreme Court, typically those requiring decisions on the uniform application of laws, when justices of the Supreme Court believe it necessary to deviate from decisions rendered by the Supreme Court in similar cases, or in cases when the Supreme Court acted as a trial court. Decisions of the Supreme Court of Ukraine are final and cannot be appealed. *See* David Vaugh, Olha Nikolaieva, *Launching an Effective Anti-Corruption Court: Lessons from Ukraine* CHR. Michelsen Institute U4 Practice Insight 2021:1 at 11 (2021), https://www.u4.no/publications/launching-an-effective-anti-corruption-court.pdf (infographics of the Ukrainian judicial system).

[213] BCU, art. 64 provides for six orders of priority:

(1) Claims related to payment of wages, salaries and other payments due to the debtor`s employees;
(2) Claims arising from harm to life and/or health;
(3) Claims related to taxes and other duties;
(4) Unsecured claims;
(5) Claims related to employees'contributions to the debtor`s authorized capital;
(6) Other claims.

> The practical application of the division into categories depending on the type of claims in the pre-trial restructuring consists in the requirement of the legislator to provide in the restructuring plan different conditions for meeting the requirements for creditors of different categories (Article 5(2) of the Code), as well as in the requirement of approval of the restructuring plan in each category by unsecured creditors who own more than 50% of the total amount of unsecured claims, with the same (not worse) conditions for meeting creditors' claims, regardless of whether an individual creditor voted for or against the approval of the restructuring plan…[214]

The debtor is not required to include all creditors in the restructuring plan. In particular, the debtor may refrain from including claims where the deadline for their fulfillment has not yet arrived, *i.e.,* creditors holding those claims have not become creditors within the framework of the BCU.[215]

#### 3.1.2.5. Approval of the plan by creditors-Cramdown rules

If the restructuring plan involves secured creditors, such a plan must be approved in each category by secured creditors who hold 2/3 of the creditors' votes of the total value of secured claims included in the restructuring plan in that respective category of secured creditors. However, claims of secured creditors who are interested parties in relation to a debtor[216] shall not be considered for voting purposes when approving the plan in question.[217] If the plan provides for a change in the priority of secured creditors' claims, the plan must be approved by each creditor losing

[214] Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku u spravi No. 904/3325/20 [Decision of the Supreme Court of Ukraine of Apr. 15, 2021 in case No. 904/3325/20], para 8.6, https://verdictum.ligazakon.net/document/96501402.

[215] *Id.*

[216] According to Article 1 BCU, affiliated persons, owners (participants, shareholders) of the debtor, debtor's managers, CFO, their relatives, as well as other persons who may have an interest, are considered related parties.

[217] BCU, art. 5(4).

their priority. The BCU contains an obscure option for secured creditors. A secured creditor may request to include in the plan a provision on the secured creditor's refusal of security. In such a case, the creditor shall be an unsecured creditor for the claims for which they refused security.[218] This option is hardly attractive for secured creditors because the return on unsecured claims is typically much lower.

The author has not found any case law where this rule has been applied, and commentators have chosen to omit it in the text of the BCU commentary[219] that was prepared with the participation of the National Association of Arbitration Managers.[220] This obscure norm simply serves the purpose of providing the creditor with a better solution if the secured creditor's indebtedness exceeds the value of its the collateral. Indirectly, such a conclusion follows from bankruptcy case law focusing on restructuring (as an alternative to liquidation) under Article 51 of the BCU and liquidation *per se*. For example, in Case No. 905/2852/16, when deciding on secured creditor`s claims, the court noted:

> [S]ecured creditors have the option to waive their security in whole or in part. If the value of the collateral is not sufficient to cover the entire claim, the creditor will only be considered secured in part of the collateral's value, and the remaining balance of the claim will be considered unsecured.
>
> This procedure for including the claims of secured creditors provides them with an alternative choice: either to submit their claims in the appropriate order of priority according to Article 64(1) of the BCU, or to submit them as extraordinary claims.[221]

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[218] *Id.*

[219] *NAUKOVO-PRAKTYCHNYĬ KOMENTAR DO STATTI 5 KODEKSU UKRAÏNY Z PROTSEDUR BANKRUTSTVA* [SCIENTIFIC AND PRACTICAL COMMENTARY TO ARTICLE 5 OF THE CODE OF UKRAINE ON BANKRUPTCY PROCEDURES] (Nov. 11, 2021), https://ips.ligazakon.net/document/KK008456.

[220] A professional self-regulating organization for professionals in the field of bankruptcy, restructuring, and liquidation created in accordance with BCU, arts. 32-33.

[221] Ukhvala Hospodars`koho Sudu Donets`koï oblasti vid 8 lypnia 2021 roku u spravi No. 905/2852/16 [Ruling of the Commercial Court of Donetsk Region of July 8, 2021 in case No. 905/2852/16], https://youcontrol.com.ua/en/catalog/court-document/98168925/.

The restructuring plan must be approved in each category by unsecured creditors who own more than 50% of the total unsecured claims included in the plan in that respective category. Like in case with secured creditors, claims of unsecured creditors who are interested parties in relation to a debtor must not be taken into account for voting purposes when approving the plan.[222] If the restructuring plan provides for the satisfaction of claims of an individual creditor immediately after the confirmation of the restructuring plan, such claims will not be taken into account for voting purposes when approving the plan.[223]

Ukrainian courts do not hesitate to exclude interested parties from voting on the restructuring plan. For instance, in Case No. 911/482/20 the court of appeal quashed the decision of the trial court confirming the restructuring plan. In particular, the court noted that 30.43% of the creditors' votes cast belonged to M Ltd. which is an interested party within the meaning of the BCU. The court reasoned that the same natural person was simultaneously a member of the debtor company and M Ltd., therefore M Ltd.`s votes could not participate in voting to approve the plan.[224]

The BCU deals with tax debts in a unique way. If a restructuring plan proposes deferment or installment repayment of any tax debts, the consent of the tax authority is not required. Any tax debts that exist three years prior to the approval of the plan must be written off, and any later-matured tax liabilities may be deferred or allowed for installment repayment under the same conditions as unsecured creditors. [225]

As such, it is not uncommon for Ukrainian tax authorities to challenge

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[222] BCU, art. 5(4).

[223] *Id.*

[224] Postanova Pivnichnoho apeliatsiĭnoho hospodars`koho sudu vid 10 grudnia 2020 roku v spravi No. 911/482/20 ⟦Decision of Northern Commercial Court of Appeal of Dec. 10, 2020 in case No. 911/482/20⟧ cited from V.V. Dutka, *Sanatsiia borzhnyka do vidkryttia provadzhennia u spravi pro bankrutstvo* ⟦*Debtor`s Rehabilitation Prior to Opening Bankruptcy Proceedings*⟧, 1(60) ECONOMICS AND LAW 99 (2021) (Apr. 15, 2021), http://economiclaw.kiev.ua/index.php/economiclaw/article/view/1027/984. The Supreme Court affirmed, *see* Postanova Verkhovnoho Sudu Ukraïny vid 14 kvitnia 2021 roku v spravi No. 911/482/20 ⟦Decision of the Supreme Court of Ukraine of Apr. 14, 2021 in case No. 911/482/20⟧, https://vkursi.pro/vsudi/decision/96462328.

[225] BCU, art. 5(3).

decisions confirming a restructuring plan. In Case No. 924/1083/20, the tax authority filed a cassation appeal with the Supreme Court, claiming, among other things, that the confirmed restructuring plan had disregarded the existence of a tax debt. The Supreme Court rejected the appeal, noting that a tax authority representative had participated in the creditors' meeting and even voted against the approval of the plan. Additionally, the Supreme Court noted that the trial court had partially written off the existing tax claims,[226] including fines and penalties, which did not fall under the category of monetary obligations as defined by the BCU, unlike the debtor's debt owed to one of its main creditors.[227]

Ukrainian law contains the requirement of the best-interest-of-creditors test like the one provided by the PRD. The BCU states that the terms and conditions of the restructuring plan in terms of satisfying the claims of

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[226] Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku v spravi No. 924/1083/20 [Decision of the Supreme Court of Ukraine of June 9, 2021 in case No. 924/1083/20],

http://iplex.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b44025ba3f92604ad78&d=5.

[227] *Id.*

BCU, art. 1 defines monetary obligations as the debtor's obligation to pay a creditor a certain amount of money based on a civil transaction (contract) or other legal grounds in accordance with Ukrainian legislation. Monetary obligations also include obligations to pay taxes, fees (mandatory payments), and insurance contributions for compulsory state pension and other social insurance, as well as obligations arising from the inability to fulfill contracts, such as storage contracts, leases, and annuity agreements, that must be expressed in monetary units.

Monetary obligations do not include forfeits (fines, late payment interest) or other financial sanctions determined on the date of the application to the commercial court, obligations arising from causing harm to the life and health of citizens, obligations to pay royalties, or obligations to the founders (participants) of a debtor - a legal entity that arose from such participation.

The amount of monetary obligations, including the amount of indebtedness for goods transferred, work performed, services rendered, and loans (including interest) to be paid by a debtor, shall be determined on the day of filing an application with the commercial court for opening bankruptcy proceedings unless otherwise stipulated in the law.

When filing an application for opening bankruptcy proceedings, the amount of monetary obligations shall be determined as of the date of submission of such an application to the commercial court.

creditors who did not participate in the vote or voted against the approval of the debtor's plan must be no worse than the conditions for satisfying the claims of creditors who voted for the approval of the plan.[228]

#### 3.1.2.6. DIP Restructuring trustee

Appointment of a restructuring trustee (*keruiuchyi sanatsieiui*)[229] is optional under the BCU.[230] If creditors decide to appoint such a trustee, the scope of his authority is determined in the restructuring plan.[231] With or without a trustee, the debtor remains in possession of all assets and controls daily activities; however, the plan may provide for certain limitations.

A trustee is appointed from the ranks of the so-called arbitration managers (*arbitrazhni keruiuchi*) who are licensed professionals in the field of bankruptcy/insolvency, restructuring, liquidation. The Ministry of Justice keeps the Unified State Register of Arbitration Managers.

If no trustee is appointed, normally the restructuring plan would contain a direct stipulation that the company`s CEO is liable for controlling compliance with the plan.[232] The debtor has a possibility to suggest a particular candidate to be appointed as a restructuring trustee.[233] The final decision is made by creditors via voting. The BCU requires that the trustee is to be selected by those present at the creditors' meeting, whose claims together constitute more than 50% of the total value of claims included in the restructuring plan.[234] Appointment is subject to further confirmation by

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[228] BCU, art. 5(3).

[229] Those are qualified practitioners in the field of bankruptcy licensed by the Ministry of Justice of Ukraine.

[230] BCU, art. 5(2).

[231] *Id.*

[232] Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku v spravi No. 904/3325/20 [[Decision of the Supreme Court of Ukraine of Apr. 15, 2021 in case No. 904/3325/20]], para 3.8, https://verdictum.ligazakon.net/document/96501402.

[233] Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku v spravi No. 924/1083/20 [[Decision of the Supreme Court of Ukraine of June 9, 2021 in case No. 924/1083/20]],

http://iplex.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b44025ba3f92604ad78&d=5.

[234] BCU, art. 5(7); Ukhvala Hospodars`koho sudu Kharkivskoï oblasti vid 23 bereznia 2020 roku v spravi No. 922/326/20 [[Ruling of the Commercial Court of Kharkiv Region of Mar. 23, 2020 in case No. 922/326/20]],

a respective commercial court.

Upon filing an application with the court for ratification of a restructuring plan (see the section below), the debtor or creditor(s) may request the respective court to appoint a trustee to take measures to secure creditors' claims and to limit the effect of the moratorium on satisfaction of such claims.[235]

3.1.2.7. Filing. Moratorium. Court confirmation

Within five days from the date of approval of the restructuring plan by creditors, the debtor must file an application with the respective commercial court at the debtor`s domicile for confirmation of the restructuring plan.[236] The application must be accompanied by the plan itself (along with the enclosed liquidation analysis), paperwork confirming the plan`s approval by creditors, the list of creditors.

Within five days upon the date of filing, the court must render a decision whether to accept/deny the application for further consideration.[237] Denial is possible only if

(1) the restructuring plan does not meet the BCU requirements;

(2) there are problems regarding jurisdiction;

(3) bankruptcy proceedings have been instituted against the debtor;

(4) a legal entity — the debtor — is terminated in the manner prescribed by law.[238]

If the court accepts the application, it must render a decision that includes a moratorium on the satisfaction of creditors' claims included in the restructuring plan.[239] In exceptional cases, the court may limit the effect of

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https://zakononline.com.ua/court-decisions/show/88430457.

[235] BCU, art. 5(7).

[236] BCU, art. 5(5).

[237] *Id.*

[238] *Id.*

[239] *Id.*

the moratorium if it may result in the loss of collateral of a secured creditor. The moratorium lasts until the end of the proceedings on the application, which can take up to thirty calendar days. If the court fails to consider the application during this period, the effect of the moratorium on satisfying secured creditors' claims using collateral will be automatically terminated after sixty calendar days from the date of acceptance of the application for confirmation of the restructuring plan.[240] The decision to accept the application for confirmation of a restructuring plan cannot be appealed.

Acceptance of the application does not mean that the court confirms the restructuring plan. Pursuant to the BCU, the court is supposed to consider confirmation within one month from the date of acceptance of the application in question.[241] The court is required to hear every creditor present at the hearing who has objections to the restructuring plan, even if such creditor has voted in favor of the plan's acceptance. The BCU contains an exhaustive list of reasons to deny confirmation:

(1) in the process of approving the restructuring plan, legal requirements were breached, and those violations could have affected the result of the creditors' voting;

(2) the creditor who did not take part in the voting or voted against the approval of the restructuring plan proves that in case of liquidation of a debtor in the manner prescribed by the BCU, his/her claims would be satisfied in excess of the claims that will be satisfied in accordance with the plan;

(3) the debtor provided inaccurate information that is essential for determining the success of the restructuring plan.[242]

Ukrainian courts do not verify the feasibility of a restructuring plan under consideration. In a recent cassation appeal regarding the initial decision to confirm a pre-trial restructuring plan under the new BCU, the Supreme Court of Ukraine emphasized that:

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240 BCU, art. 5(8).

241 *Id.*

242 *Id.*

> [a]lthough the court has the authority, according to Article 5(2) of the BCU, to review and assess the restructuring plan, it does not have the power to conduct a detailed economic evaluation of each measure planned by the debtor to restore their solvency.
>
> However, the court is obligated to consider the decisive criterion of the profitability of the restructuring plan for creditors compared to liquidation, based on information from the liquidation analysis. . .[243]

In Case No. 922/326/20, the Commercial Court of Kharkiv Region emphasized the importance of comparing the restructuring plan with a possible liquidation. The court noted that the restructuring plan includes a liquidation analysis that demonstrates the profitability for creditors in implementing the plan versus liquidating the debtor's assets. In a liquidation procedure, only 10% of the bankruptcy creditors would be satisfied, and the creditors' claims would not be enforced at all. However, if the debtor's pre-trial restructuring plan is executed, the claims of all creditors will be fully repaid. The debtor's restructuring plan also includes a financing and cash flow plan for 2020 and 2021, which confirms the debtor's ability to meet the conditions of the restructuring plan.[244]

However, even if a restructuring plan has already been approved by creditors, its confirmation may be subject to further scrutiny by the court. The court's reasons for denying confirmation may also go beyond the scope of the reasons outlined in the BCU. For instance, in Case No. 908/1817/21,

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[243] Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku v spravi No. 904/3325/20 [Decision of the Supreme Court of Ukraine of Apr. 15, 2021 in case No. 904/3325/20], para 8.7, https://verdictum.ligazakon.net/document/96501402. The same reasoning was applied in Postanova Verkhovnoho Sudu Ukraïny vid 9 chervnia 2021 roku v spravi No. 924/1083/20 [Decision of the Supreme Court of June 9, 2021 in case No. 924/1083/20], http://iplex.com.ua/doc.php?regnum=97735108&red=100003a134181032b08b44025ba3f92604ad78&d=5.

[244] Ukhvala Hospodars`koho sudu Kharkivskoï oblasti vid 23 bereznia 2020 roku v spravi No. 922/326/20 [Ruling of the Commercial Court of Kharkiv Region of Mar. 23, 2020 in case No. 922/326/20], https://zakononline.com.ua/court-decisions/show/88430457.

the Supreme Court of Ukraine overturned the decisions of lower courts and remanded the case to the trial court due to procedural violations committed during the acceptance of the application for plan confirmation. The court highlighted the non-compliance of the restructuring plan with the BCU requirements as one of the violations. Specifically, the plan did not include measures to monitor its implementation, and the trial court and court of appeal had overlooked this violation when deciding the case. [245]

Once the court confirms a restructuring plan, it becomes binding for all included creditors.[246] If the debtor and/or creditors wish to amend the plan, the entire approval and confirmation procedure must be restarted.[247] The debtor and a creditor can change their rights and liabilities under the plan by reaching an agreement. This may include postponing or extending the performance period, if it does not give a creditor an advantage over the terms and conditions of the restructuring plan.[248] A copy of the agreement must be submitted to the restructuring trustee (if any), creditors involved in the restructuring, and investors.[249] Therefore, the BCU provides two possibilities to amend the plan.[250]

#### 3.1.2.8. Restructuring duration and court oversight

Unlike the old legislation, the BCU does not limit the total duration of pre-trial restructuring.[251] Despite initial concerns that courts would continue to apply the old norms and limit the period of pre-trial restructuring

[245] Postanova Verkhovnoho Sudu Ukraïny vid 10 liutoho 2022 roku v spravi No. 908/1817/21 [Decision of the Supreme Court of Ukraine of Feb. 10, 2022 in case No. 908/1817/21], paras 113 - 114, http://iplex.com.ua/doc.php?regnum=103851679&red=1000035874e6034b15f8bfa165e79df933c052&d=5.

[246] BCU, art. 5(10).

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] Postanova Verkhovnoho Sudu Ukraïny vid 15 kvitnia 2021 roku v spravi No. 904/3325/20 [Decision of the Supreme Court of Ukraine of Apr. 15, 2021 in case No. 904/3325/20], para 8.14, https://verdictum.ligazakon.net/document/96501402.

[251] According to the Law on Restoring Debtor`s Solvency or Recognizing It Bankrupt of Dec. 22, 2011, pre-trial restructuring could not last longer than 12 months.

to twelve months,[252] Ukrainian courts have been flexible. For example, in Case No. 927/605/19, the court initially confirmed the restructuring plan for twelve months and later extended it for six more months.[253] Other cases available as of this writing demonstrate that Ukrainian courts have been willing to approve restructuring plans lasting for twenty-four months[254] or even fifteen years.[255]

When a trustee is appointed, the court normally orders the trustee to periodically report to both the creditors and the court.[256] At the request of the debtor or creditor, the court may terminate the restructuring procedure in case of a violation of the confirmed plan, or if there are grounds to believe that the restructuring plan will not be implemented.[257] The court's decision to terminate pre-trial restructuring cancels the measures taken by the court,[258] and the restructuring plan is considered terminated, and creditors'

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[252] Oksana Prud`, *Vdoskonalennia protsedury dosudovoï sanatsiï pidpryiemstv* [*Improving the Procedure of Pre-trial Restructuring of Enterprises*] (2019), http://ekmair.ukma.edu.ua/bitstream/handle/123456789/16666/Prud_Vdoskonalennia_protsedury_dosudovoi_sanatsii_pidpryiemstv.pdf?sequence=1&isAllowed=y.

[253] Ukhvala Hospodars`koho sudu Chernihivs`koï oblasti vid 30 veresnia 2020 roku v spravi No. 927/605/19 [Ruling of the Commercial Court of Chernihiv Region of Sep. 30, 2020 in case No. 927/605/19], https://youcontrol.com.ua/en/catalog/court-document/92004846/.

[254] Postanova Verkhovnoho Sudu Ukraïny vid 18 travnia 2021 roku v spravi No. 922/2071/20 [Decision of the Supreme Court of Ukraine of May 18, 2021 in case No. 922/2071/20], para 3, https://zakononline.com.ua/court-decisions/show/98391246.

[255] Ukhvala Hospodars`koho sudu Kyïvs`koï oblasti vid 10 chervnia 2020 roku v spravi No. 911/482/20 [Ruling of the Commercial Court of Kyiv Region of June 10, 2020 in case No. 911/482/20] cited from Artur Megeria, *Dosudova sanatsiia abo riativna solomynka dlia borzhnyka* [*Pre Trial Restructuring or Catching at a Straw for the Debtor*], YURYDYCHNA GAZETA ONLINE (Jan. 14, 2021), https://yur-gazeta.com/publications/practice/bankrutstvo-i-restrukturizaciya/dosudova-sanaciya-abo-ryativna-solominka-dlya-borzhnika.html.

[256] Ukhvala Hospodars`koho sudu Kyïvs`koï oblasti vid 10 chervnia 2020 roku v spravi No. 911/482/20 [Ruling of the Commercial Court of Kyiv Region of June 10, 2020 in case No. 911/482/20] cited from Postanova Verkhovnoho Sudu Ukraïny vid 14 kvitnia 2021 roku v spravi No. 911/482/20 [Decision of the Supreme Court of Ukraine of Apr. 14, 2021 in case No. 911/482/20], https://www.zakon-i-normativ.info/index.php/component/lica/?href=0&view=text&base=5&id=93505&menu=94103 (last accessed on August 25, 2022).

[257] BCU, art. 5(10).

[258] *See supra* note 198.

claims are to be restored in full in their unsatisfied part.[259]

Based on the results of the implementation of the restructuring, the debtor, or the restructuring trustee (if appointed) files an application for ratification of the report on the plan`s implementation with the respective commercial court.[260] The court must consider it within ten days upon receipt. Once the report is approved and the court renders a respective decision, all measures taken by the court are cancelled.[261]

3.1.2.9. Statistics, criticism, and problems

Due to Russian aggression and limited access to Ukrainian court registers, it is hard to obtain the most accurate statistical data on pre-trial restructuring cases after the enactment of the new BCU. At the same time, the available data demonstrates that pre-trial restructuring remains unpopular among distressed Ukrainian businesses. In 2019, upon the enactment of the new BCU, 133 pre-trial restructuring cases were initiated; it was a jump from only seventeen such cases in 2018.[262] However, this number comprised only 8.18% of all bankruptcy proceedings initiated in 2019.[263] Only in fourteen of those cases did courts ratify reports of the restructuring trustees.[264] In early 2020, the share of pre-trial restructuring cases in all bankruptcy-related cases considered by Ukrainian courts was between 5-6%.[265] The COVID-19 pandemic did not result in a surge of respective applications with commercial courts either.[266] In early 2021, only

[259] BCU, art. 5(10).

[260] BCU, art. 5(11).

[261] *Id.*

[262] K.V.Vas`kivska, Ia. M. Grynchyshyn, *Sanatsiia iak instrument antykryzovoho upravlinnia pidpryemstv* [*Restructuring as a Tool of Anti-Crisis Management of Enterprises*], 2 EFEKTYVNA EKONOMIKA (2021) (Feb. 26, 2021), http://www.economy.nayka.com.ua/?op=1&z=8664.

[263] *Id.*

[264] *Id.*

[265] Figures provided by the Justice of the Commercial Court of Cassation within the Supreme Court of Ukraine. *See Pro sudovu praktyku u spravah pro bankrutstvo rozpoviv suddia Verkhovnoho Sudu* [*Supreme Court Justice Told Us about Bankruptcy-related Jurisprudence*], ZAKON I BIZNES (May 25, 2020, 4:58 PM), https://zib.com.ua/ua/142791.html.

[266] Partially, it can be explained by the moratorium on creditors filing for bankruptcy of debtors based on claims that arose after the outbreak of the COVID-19

three applications for pre-trial restructuring were filed.[267] Available 2020-2021 cases (mostly those cited in this section) were filed predominantly by debtors representing large enterprises rather than SMEs: examples include Dniprovsky Metallurgical Plant,[268] Plysetsky Granite Quarry,[269] Kharkiv Tractor Factory,[270] Tschepetivsky Woodworking Plant,[271] Kolos Agricultural Enterprise.[272] Thus, one can see that this far SMEs have not been the main beneficiaries of pre-trial restructuring.

To answer the question why pre-trial restructuring remains in low demand in Ukraine, the following must be discussed. First, most businesses (regardless of the size) remain ignorant about the procedure.[273] Second, the bankruptcy stigma still affects the number of cases that are filed. Business owners do not distinguish the procedure from bankruptcy. OECD, for example, remarked on the standing Ukrainian rules that "[e]ntrepreneurs seeking a fresh start cannot apply for a bank loan for three years or file for bankruptcy for five," and that contributes to the "stigma of insolvency."[274]

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pandemic. The moratorium applied to claims that arose starting from March 12, 2020, and was lifted only in January 2022. *See* Zakon Ukraïny Ukrainy "Pro vnesennia zminy do Kodeksu Ukraïny z protsedur bankrutstva shchodo nedopushennia zlovzhyvan` u sferi bankrutstva na period zdiïsnennia zakhodiv, spriamovanykh na zapobigannia vynyknenniu i poshyrenniu koronavirusnoï khvoroby Covid-19" vid 18 chervnia roku [Law of Ukraine on Amending the Code of Ukraine on Bankruptcy Procedures to Prevent Abuses in the Bankruptcy Sphere for the Duration of Measures Aimed at the Prevention of Spread of Coronavirus Disease COVID-19 of June 18, 2020], VVRU, 2020, No. 46, Item 396.

[267] Figures from the presentation made by Roman Zahriia, Managing Partner, Pravo Garant Law Firm, at the Fourth Ukrainian Forum on Restructuring and Bankruptcy (May 18, 2021).

[268] Case No. 904/3325/20.

[269] Case No. 911/482/20.

[270] Case No. 922/2071/20.

[271] Case No. 924/1083/20.

[272] Case No. 922/326/20.

[273] *Supra* note 262; Kseniia Talamanchuk, *Borhy, yaki krashche viddaty* [*Debts that It Would Be Better to Repay*], ZAKON I BIZNES (May 30 – June 6, 2020), https://zib.com.ua/ua/print/142871.html.

[274] BCU, art. 135 reads:

[A]rticle 135. Restrictions on persons recognized as bankrupt

1. Insolvency proceedings may not be initiated within five years after an individual has been recognized as bankrupt, unless the debtor has not repaid all debts in full as prescribed herein.

The European Commission explicitly noted that "[k]eeping a record for three years after bankruptcy and limiting access to loans is likely to affect companies looking to make a fresh start."[275] Ukrainian companies that engage in the collection of debts do not hesitate to use unconventional methods such as quoting the Bible and canon law experts emphasizing the sinful nature of outstanding debts[276] to force repayment. Even though those methods are used to collect consumer debts, it contributes to stigmatization on a broader scale, and affects pious business owners.[277]

Third, distrust in the Ukrainian judiciary is another contributing factor explaining low popularity of pre-trial restructuring. According to 2020 survey, only 1.7% of respondents completely trusted in courts; only 11.3% - trusted in courts rather than distrusted; 40.6% - completely distrusted in the Ukrainian judiciary, and 37.4% distrusted rather than trusted the

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2. Within five years after being recognized as bankrupt, an individual must notify in writing the other parties to any loan, credit, surety, or pledge agreements before concluding such agreements of their insolvency.

An individual's business reputation cannot be considered impeccable for three years after being recognized as bankrupt.

*See* Organization for Economic Co-operation and Development [OECD], European Union [EU], European Training Foundation [ETF] and European Bank for Reconstruction and Development [EBRD], *SME Policy Index: Eastern Partner Countries 2020: Assessing the Implementation of the Small Business Act for Europe*, SME Policy Index, European Union 166 (Brussels/OECD Publishing 2020), https://doi.org/10.1787/8b45614b-en.

[275] Commission Staff Working Document. Analytical Report following the Communication from the Commission to the European Parliament, the European Council and the Council Commission Opinion on Ukraine`s application for membership of the European Union SWD (2023) 30 final, at 40 (Feb. 1, 2023).

[276] *See*, for example, *Bibliia pro groshi* [*The Bible on Money*] (Dec. 19, 2017), https://simeinyi-budzhet.ua/moneyandlove/bibliya_pro_groshi/.

[277] There is currently no recent census data available on the religious affiliation of the Ukrainian population. However, according to a 2020 survey, 75.4% of respondents identified as Orthodox Christians, 8.2% belonged to the Ukrainian Greek Catholic Church (Uniat), 0.7% belonged to Protestant and Episcopal churches, and 0.4% belonged to the Roman Catholic Church. *See* Razumkov Center, *Konfesiĭna ta tserkovna nalezhnist` gromadian Ukraïny (sichen 2020 r., sotsiologiia)* [*Confessional and Church Affiliation of Ukrainian Citizens (January 2020, Sociology)* (Feb. 3, 2020), https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/konfesiina-ta-tserkovna-nalezhnist-gromadian-ukrainy-sichen-2020r.

courts.[278] Problems with the Ukrainian judiciary had been specifically pointed out by the European Commission in its opinion on Ukraine`s application for the EU membership.[279]

Finally, the flaws of the BCU itself must be mentioned. Among the most serious weaknesses of the BCU is the lack of a general statutory moratorium or stay of individual creditor actions.[280] If a dissenting or aggressive creditor files for the debtor company's insolvency or pursues an individual collection action, the restructuring procedure would not stop the action.[281] Furthermore, the absence of a moratorium similar to the one applied in the German *StaRUG* does not provide any "breathing space and time" for the debtor to prepare a restructuring plan. The BCU's pre-trial restructuring procedure is already complicated, and the need to prepare a plan and coordinate it with creditors before filing a court application further increases the complexity, which may require professional assistance that may not be available or affordable for SMEs with limited human and financial resources. In summary, the new BCU "has failed to play the role determined by the legislator – restoring debtors' solvency and efficient liquidation of insolvent persons," and the liquidation procedure still prevails in Ukraine.[282]

### 3.2. FINANCIAL RESTRUCTURING

#### 3.2.1. Financial restructuring explained

The slide of non-performing loans (NPLs) brought about by the global financial crisis of 2008-2009 and the outbreak of the military conflict with Russia in eastern Ukraine in 2014 contributed to the Ukrainian banking

278 Razumkov Center, *Doslidzhennia na zamovlennia Rady Ievropy* [[*Survey Requested by the Council of Europe*]] (Oct. 9-14, 2020), https://rm.coe.int/annex-1-representative-survey/1680a0c2af.

279 Communication from the Commission to the European Parliament, the European Council and the Council: Commission Opinion on Ukraine`s Application for Membership of the European Union COM (2022) 407 final, at 8 (June 17, 2022).

280 Anton Molchanov, *supra* note 184, at 11.

281 *Id.*

282 Oleksandr Biriukov, *Rik reform bankrutstva: zoseredzhennia na rozv`iazanni shtuchnykh problem* [[*One Year Since the Bankruptcy Reform: Concentration on Solving Artificial Problems*]], YURYDYCHNA GAZETA ONLINE (Nov. 12, 2020), https://yur-gazeta.com/publications/practice/bankrutstvo-i-restrukturizaciya/rik-reformi-bankrutstva-zoseredzhennya-na-rozvyazanni-shtuchnih-problem.html.

crisis, currency crisis, and sovereign debt crisis, with systemic repercussions across the banking and business sectors resulting in a decline of real GDP by 17.2% in 2015.[283] With encouragement from the World Bank and the EBRD, Ukrainian authorities developed a respective law to address the NPLs. On June 14, 2016, it was adopted as the Law on Financial Restructuring (hereinafter referred to as "LFR")[284] and became effective on October 19, 2016. The LFR was designed:

> [t]o help stabilize and support the recovery of the banking system, assist banks and borrowers in restructuring their debts, salvage and revitalize viable businesses, and preserve jobs – an essential first step in rebuilding the economy. The Law establishes an efficient framework to accelerate recovery in both financial and business sectors. The Law also enables businesses to access new financing with protections, while preserving all rights of secured creditors, and provides tax relief and other benefits to the parties. Where parties have disputes among themselves related to their debts or disagreements on a restructuring plan, these disputes can be submitted for resolution by arbitration, rather than going through a longer, more costly court procedure.[285]

Any Ukrainian commercial undertaking/legal entity (other than a bank or a financial institution) with outstanding financial indebtedness to at least one Ukrainian or foreign financial institution and whose business is deemed financially distressed but viable is eligible to participate as a debtor in a financial restructuring under the Law.[286] The LFR does not set up any minimum threshold for the size of the eligible business. At the commencement of the proceedings, the debtor's business is presumed viable, but its viability is verified by an independent expert selected by the

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[283] GORDON W. JOHNSON, OLEXANDER DROUG & KONSTANTIN PENSKOY, GUIDE TO LAW ON FINANCIAL RESTRUCTURING OF BUSINESS IN UKRAINE xiii (Master Druk 2018).

[284] Zakon Ukraïny "Pro finansovu restrukturizatsiiu" vid 14 chervnia 2016 roku, VVRU, 2016, No. 32, Item 555.

[285] Johnson, Droug, and Penskoy, *supra* note 283, at xiii – xiv.

[286] LFR, arts. 1(1)(5), and 4(1).

creditors.[287]

Financial restructuring under the LFR is an extrajudicial procedure administered by the Secretariat. The Secretariat provides administrative support, ensuring that parties comply with the procedural requirements of the LFR, and provides notice to involved creditors and other parties at various stages of the proceedings. The Secretariat takes no part in restructuring negotiations or in resolving disputes between the parties.[288] The procedure is fully consensual. No one can be forced to participate; rather, each participant must sign a written consent to join the restructuring process.[289] Parties that consent to the procedure are not obliged to vote in favor of a restructuring plan, but they must consent to arbitration for the resolution of any disputes pertaining to their claims or the plan.[290] The financial restructuring procedure is intended to be efficient, allowing the parties 90 days (extendable by a maximum additional 90 days)[291] to negotiate and approve a restructuring plan.[292]

### 3.2.2. Access to financial restructuring

To access the financial restructuring procedure, a debtor must obtain the consent of one or more financial institutions holding at least 50% in value of the debtor's debts to financial institutions, excluding any liabilities to parties affiliated with the debtor.[293] Another important requirement is that a debtor cannot be involved in pending bankruptcy or pre-trial restructuring

[287] LFR, art. 4(1).

The LFR uses the term "involved creditors." According to Article 1(1)(11), this term refers to creditors who have been defined by the debtor and whose claims can be restructured in accordance with the procedures outlined in the LFR. Additionally, involved creditors are those who have signed a restructuring agreement and any enforcement authority that the debtor has identified as an involved creditor in their application for restructuring. Such involved creditors participate in the financial restructuring proceedings in the manner specified by the LFR.

[288] LFR, art. 15.

[289] *Supra* note 283, at 4.

[290] LFR, art. 16(2).

[291] During this period moratorium applies.

[292] LFR, arts. 21 and 23(3).

[293] LFR, art. 18(4). This requirement mandates that a sufficiently significant proportion of the financial debts be restructured to achieve the goals of resolving non-performing loans (NPLs) and restoring businesses to viability. *See supra* note 283, at 3.

when they make an application to the Secretariat to commence financial restructuring proceedings.[294] In short:

> [t]he financial restructuring procedure relies on good faith, fair dealing and cooperation among all parties to achieve a consensual agreement. Intra-creditor cooperation is particularly important and requires the equal sharing of information among creditors, the establishment and operation of creditors' committees and common decision-making on issues such as whether to sign a standstill agreement, extend the duration of the proceeding and vote in favor of the restructuring plan proposed by the debtor.[295]

The LFR was enacted prior to the adoption of the BCU, when the old Law on Restoring Debtor's Solvency or Recognizing It Bankrupt was still in force. Back then, the new procedure of financial restructuring was considered to allow "better protections and more reliable outcomes" compared to restructuring under the Law on Restoring Debtor's Solvency or Recognizing It Bankrupt. [296]

The financial restructuring procedure was designed for lenders to help them deal with NPLs, as well as for creditors. Non-financial creditors, such as other businesses, may join the procedure, but the debtor must still comply with the requirement of approval from the financial institution holding at least 50% of their debts to financial institutions. If no financial creditors are involved, the procedure will not apply at all. Thus, the scope of application is somewhat limited. The LFR might benefit only those SMEs that have substantial debts to banks or other financial institutions interested in using the LFR procedure rather than pre-trial restructuring under the BCU or complete debtor liquidation.

### 3.2.3. Cramdown "complications"

The LFR contemplates a "complicated cramdown." The general rule is

294 LFR, art. 18(2).
295 *Supra* note 278, at 4 – 5.
296 *Id.* at xiv.

that the restructuring plan must be approved by full consensus of all involved creditors.[297] If full consensus and affirmative votes cannot be achieved, the following options are possible:

(1) if the plan was approved by the involved creditors holding more than 2/3 of claims of all involved creditors, any of the involved creditors may initiate arbitration proceedings, and the arbitral tribunal may confirm the plan;[298]

(2) in 2019 the BCU introduced an important amendment to the LFR which allows the parties of financial restructuring to exclude an arbitral award to confirm a restructuring plan and agree on approval envisioned by the BCU instead.[299] In case when the plan was approved by the involved creditors holding more than 2/3 of claims of all involved creditors, the debtor must file an application to confirm the plan to a respective commercial court within five days from the day of the plan`s approval by creditors.[300]

The court will use BCU`s procedures to confirm/reject the plan; the only difference will be the requirement to use the evaluation of the debtor`s business prepared by an independent expert in accordance with the LFR requirements.

If during the procedures under the LFR the debtor had prepared a restructuring plan not subsequentially approved by involved creditors but approved in compliance with the procedures envisaged by the BCU for pre-trial restructuring, the creditor is entitled to file such a plan with the respective commercial court without the need to commence a creditors' meeting under the BCU.[301]

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[297] LFR, art. 25(4). Involved creditors within the meaning of art. 4(1), *see supra* note 287.

[298] LFR, art. 25(4).

[299] LFR, art. 25-1(2).

[299] *Id.*

[300] *Id.*

[301] LFR, art. 25-1(1).

#### 3.2.4. Statistics and questionable value for SMEs

Financial restructuring procedures under the LFR became operational on April 3, 2017, when the Secretariat started accepting applications for restructuring.[302] The LFR's efficiency has been successful in practice, with all cases submitted being approved in an efficient and timely manner, typically within the initial 90-day period allocated. Some cases have even been completed within a shorter timeframe. As of this writing, the Secretariat has reported a total of sixty-three cases, and new cases have been filed even after the commencement of the Russian aggression.[303] Ninety-seven percent of all reported cases have been completed with approved restructuring plans.[304] Between 2017 and late 2021, NPLs amounting to about UAH 72.3 billion[305] have gone through financial restructuring.[306]

The "success" of financial restructuring in Ukraine remains questionable. Even though the LFR does not contain any minimum threshold for the size of eligible businesses, most restructured NPLs have covered large companies from the capital and Kyiv region,[307] and only a handful of companies from other parts of Ukraine.[308] As previously stated, SMEs without substantial NPLs in financial institutions can hardly benefit from the LFR mechanism. Trust in the procedure, both on the lenders' and creditors' part, remains an

[302] *Id.*

[303] Nine new cases were initiated in 2022 and one case in 2023 (as of Oct. 1, 2023). *See* Publications on the Procedure of Financial Restructuring, https://fr.org.ua/en/publikatsiyi-po-protseduri-finansovoyi-restrukturizatsiyi.html; Serhiĭ Shkliar, *Chy dosiah mety zakon pro finansovu restrukturyzatsiiu* [Whether the Law on Financial Restructuring Has Fulfilled Its Purpose] (Dec. 29, 2021), https://thepage.ua/ua/economy/chi-dosyag-meti-zakon-pro-finansovu-restrukturizaciyu.

[304] Serhiĭ Shkliar, *supra* note 303; Iuriĭ Moiseiev, *Pozychalnyky i kredytory poku shcho ne doviriaiut' mekhanizmu restrukturyzatsiï* [*Lenders and Creditors Have Been Skeptical about the Mechanism of Debt Restructuring This Far*] (May 20, 2021), https://www.ligroup.com.ua/yurij-moiseyev-pozychalnyky-j-kredytory-poky-ne-doviryayut-mehanizmu-restrukturyzacziyi-borgiv/#pll_switcher.

[305] Approx. USD 2.67 billion (according to the pre-war exchange rate).

[306] Serhiĭ Shkliar, *supra* note 303.

[307] In 2019, the City of Kyiv and Kyiv Region accounted for more than 83% of NPLs restructured with the help of the LFR procedures.

[308] Andreĭ Borovik, *Iz etogo vyĭdet dolg* [*It Will Result in a Debt*] (Feb. 28, 2019), https://fr.org.ua/ua/stattya-vidannya-yuridichna-praktika-9.html.

issue. The complicated nature of the procedure and the need to engage professional counsel[309] can be regarded as another obstacle. Initially, the LFR was supposed to have a limited duration (three years), but it was extended through October 19, 2022. In July 2022, Parliament approved another extension until January 1, 2028, because of the devastating effect of the war on the Ukrainian economy and its financial sector, and the future need to restructure NPLs of businesses sustaining daily damages due to the continued Russian aggression.[310] Certainly, the extension of the LFR may give a new impetus for financial restructuring, but it still remains unclear whether SMEs, especially those with a modest turnover, will benefit from it.

## 4. LESSONS FOR UKRAINE

### 4.1. NO WAY TO BYPASS THE PRD

At the start of this article, the author viewed pre-trial restructuring as a useful tool to assist struggling Ukrainian SMEs in surviving the turbulent war and post-war period. The success of pre-trial restructuring in foreign jurisdictions, particularly within the EU, served as compelling examples and possible guidelines. Ukraine's application for EU membership in February 2022, and the EU's swift positive decision in June 2022, added another dimension to the research. As Ukraine enters accession negotiations, it will need to approximate its national bankruptcy legislation to EU standards, including the PRD. In its analytical report on Ukraine's EU membership application, the European Commission identified Ukraine's problems with fresh start provisions for distressed businesses and the lack of early warning services.[311] In January 2023, the Commission demanded that Ukraine introduce legislation aligning with the main principles of the Directive as one of the preconditions for receiving EUR 18 billion in micro-financial

[309] Iuriĭ Moiseiev, *supra* note 304.

[310] Zakon Ukraïny "Pro vnesennia zmin do deyakykh zakonodavchyh aktiv Ukraïny shchodo osoblyvosteĭ diyalnosti finansovoho sektoru u zviazku iz vvedenniam voiennoho stanu v Ukraïni" vid 27 lypnia 2022 roku [Law of Ukraine on Amending Some Legislative Acts of Ukraine Regarding Peculiarities of Financial Sector Functioning in Connection With the Introduction of Martial Law in Ukraine of July 27, 2022], OVU, 2022, No. 66, Item 3944.

[311] *Supra* note 275, at 40.

assistance, in addition to "adopting a roadmap for capacity-building activities to support the implementation of the bankruptcy code."[312]

In September 2023, the Ukrainian Ministry of Justice adopted the corresponding roadmap. This roadmap encompasses several measures, such as organizing educational events for Ukrainian judges and bankruptcy trustees, preparing reports, and carefully examining the experience and statistical data of EU Member States in the field of preventive restructuring.[313] While this article was in the final stages of editing for publication, a bill for transposing the PRD ("PRD Bill")[314] was introduced in the Ukrainian Parliament. Thus, the challenge now is to determine which provisions of the PRD to prioritize, with lessons from Germany and the UK (which seek to compete with the EU) possibly being particularly valuable.

## 4.2. SPECIAL CONCERNS

### 4.2.1. Early warning tools

The PRD emphasizes the need for debtors to have access "[t]o one or more clear and transparent early warning tools which can detect

[312] The Memorandum of Understanding between the EU as lender and Ukraine as Borrower – Instrument for providing support to Ukraine for 2023 (micro-financial assistance+) of up to EUR 18 billion (Jan.16, 2023), https://economy-finance.ec.europa.eu/system/files/2023-01/Memorandum%20of%20Understanding_EU-UA.pdf.

[313] Dorozhnia karta shchodo diial'nosti z rozbudovy potentsialu dlia pidtrymky vprovadzhennia Kodeksu Ukraïny z protsedur bankrutstva, zatverdzhena nakazom Ministerstva iustytsiï Ukraïny No. 3427/5 vid 26 veresnia 2023 roku [The Roadmap for Capacity-Building Activities to Support the Implementation of the Bankruptcy Code of Ukraine approved by the Ministry of Justice of Ukraine on Sep. 26, 2023, Order No. 3427/5], https://minjust.gov.ua/news/ministry/minyust-zatverdiv-dorojnyu-kartu-u-sferi-bankrutstva.

[314] Proekt No. 10143 pro vnesennia zmin do Kodeksu Ukraïny z protsedur bankrutstva ta inshykh zakonodavchykh aktiv Ukraïny shchodo implementatsiï Direktyvy Ievropeĭskoho parlamentu ta Rady Ievropeĭskoho Soiuzu 2019/1023 ta zaprovadzhennia protsedur preventyvnoï restrukturyzatsiï [Bill No. 10143 on Amending the Code of Ukraine on Bankruptcy Procedures and Other Legislative Acts of Ukraine Regarding the Implementation of Directive (EU) 2019/1023 of the European Parliament and of the Council and Introducing the Preventive Restructuring Procedures] (Oct. 12, 2023), https://itd.rada.gov.ua/billInfo/Bills/Card/42981.

circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay."[315] Examples of such warning tools include:

(1) alert mechanisms when the debtor has not made certain types of payments;

(2) advisory services provided by public or private organizations;

(3) incentives under national law for third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to alert the debtor to a negative development.[316]

The German *StaRUG* does not elaborate much on the warning tools. Instead, it emphasizes that those who are legally responsible for running a business have an obligation to constantly monitor the business's prospects.[317] This application of existing rules in a general way has been criticized for not adding to the clarity and simplicity of the applicable German law.[318] Additionally, the *StaRUG* states that the Federal Ministry of Justice will provide information about the availability of sets of tools for early crisis identification.[319] In order to comply with the respective PRD provisions, the *StaRUG* obliges tax advisors, tax accountants, certified public accountants, sworn auditors, and lawyers to inform their clients of the possible grounds for insolvency when working on their annual financial statements.[320]

Indeed, Ukrainian businesses, particularly those struggling with the bankruptcy stigma, could benefit from early warning tools. The German model could be adapted for Ukraine with greater clarity. However, in the case of SMEs, especially those with relatively small turnovers, warnings from accountants or third-party counsels may not be feasible, as such SMEs

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[315] PRD, art. 3(1).
[316] PRD, art. 3(2).
[317] StaRUG, § 1.
[318] Christoph G. Paulus, *supra* note 24.
[319] StaRUG, § 101.
[320] StaRUG, § 102.

may not be using them at all. It seems that creditors should be given more leverage to inform the debtor accordingly, with banks or larger retailers (supplying smaller businesses, for example) being well suited to do so. Additionally, the Bankruptcy Department under the Ministry of Justice of Ukraine could provide relevant advice to SMEs, which would be in line with the PRD. The PRD Bill appears to adopt the German approach by requiring auditors, accountants, and lawyers to inform the debtor's manager when they discover any signs of insolvency.[321] The PRD Bill does not offer any specific solutions for SMEs. On a positive note, the Ministry of Justice will be responsible for maintaining a special web portal containing a range of recommendations on preventive restructuring.[322]

Given that the PRD emphasizes the use of up-to-date IT technologies for notifications and communication,[323] and the Ukrainian government is promoting digitalization of public services in various fields,[324] the introduction of an electronic tool provides users with information about preventive restructuring, detection tools, and perhaps even an algorithm for further action in case of distress. It sounds bold but also realistic to imagine the possibility of filing an electronic application to launch a pre-trial restructuring procedure. This is not completely new, as the Ministry of Digital Transformation of Ukraine has been a European leader in implementing digital solutions for businesses since 2020,[325] including the ability to submit reports, pay taxes, and obtain licenses and permits online. Ukraine's digitalization efforts have "[a]lready contributed to more efficient

[321] PRD Bill, art. 4(2).

[322] PRD Bill, art. 3(2)-(4).

[323] PRD Bill, art. 3(1).

[324] *See*, for example, Programa diialnosti Kabinetu Ministriv Ukraïny, zatverdzhena postanovoiu No. 471 vid 12 chervnia 2020 roku [Action Plan of the Cabinet of Ministers of Ukraine approved by the Resolution of the Cabinet of Ministers of Ukraine No. 471 of June 12, 2020], OVU, 2020, No. 50, Item 1571; Ukraine Recovery Plan: Materials of the "Digitalization" Working Group (July 2022), https://uploads-ssl.webflow.com/621f88db25fbf24758792dd8/62dacb0f931ea6867feb01cf_Digitalization.pdf.

[325] Cat Zakrzewski, Gerrit De Vynck, *The Ukrainian Leader Who Is Pushing Silicon Valley to Stand Up to Russia*, THE WASHINGTON POST, Mar. 2, 2022; Tom Simonite and Gian M. Volpicelli, *Ukraine`s Digital Ministry Is a Formidable War Machine* (Mar. 17, 2022, 7:00 AM), https://www.wired.com/story/ukraine-digital-ministry-war/.

and transparent government." [326] Digitalizing preventive restructuring could further promote government goals, help SMEs, and benefit the Ukrainian economy overall.

4.2.2. Stay of enforcement/Moratorium

The lack of a general statutory moratorium or stay on individual creditor action, discussed in section 3.1.2.9, is perhaps the most significant flaw of the BCU. Although Article 5 of the BCU contains many elements like the German *StaRUG*, the absence of a moratorium is a distinguishable feature of the Ukrainian approach. This contradicts the PRD, which states that "[M]ember States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework."[327] The requirement to have a plan ready before launching the entire restructuring procedure makes the pre-trial restructuring process challenging to sell to debtors.

The LFR contains provisions that are completely opposite to those of the BCU. According to the LFR, a 90-day moratorium is to be introduced from the commencement of the financial restructuring procedure, with a possibility of being extended for another 90 days.[328] This disparity between the LFR and BCU needs to be eliminated.

The transposition of the PRD provisions on the stay/moratorium is crucial. Since the introduction of pre-trial restructuring, Ukrainian law has not included any stays to enable the debtor and creditors to prepare a plan. When the newly adopted BCU was introduced, commentators pointed out the usefulness of a stay that would allow a debtor company several months to prepare a complete scheme of arrangement. [329]

The PRD Bill proposes the introduction of a stay;[330] however, for a debtor to initiate preventive restructuring, the debtor must provide a draft

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[326] Association Implementation Report on Ukraine SWD (2022) 202 final (July 22, 2022), at 3.

[327] PRD Bill, art. 6(1).

[328] LFR, art. 21(1).

[329] Anton Molchanov, *supra* note 184, at 11 (referring to the Italian pre-insolvency procedures named *'la domanda di concordato preventivo 'in bianco''* – the 'blank' filing being extremely useful in case of a race between several proactive creditors).

[330] PRD Bill, art. 5-4(1).

preventive restructuring plan or, in the case of micro- or small businesses, a 'concept of preventive restructuring'[331] (with the actual plan to be developed later in close cooperation with the preventive restructuring administrator).[332] This suggestion is likely to be a subject of debate, particularly considering that the PRD itself does not include the notion of a concept of preventive restructuring and the PRD Bill offers a special solution only to micro- and small enterprises, excluding medium ones.

The PRD allows for flexibility regarding the introduction of stay, including such options as the exclusion of certain classes of creditors or certain claims, the court`s discretion in granting/denying the stay, and the lifting individual stays. Certainly, to avoid possible abuses, Ukraine can refrain from the introduction of an automatic stay, and borrow, for example, the UK`s model. Another solution can be opting for special options for SMEs (an automatic stay available, for example) or for restructuring where a trustee is involved. It appears to be a better solution compared to the approach taken by the PRD Bill.

#### 4.2.3. More structure, more education

Having only one long article in the BCU related to pre-trial restructuring is perhaps not the best legal drafting technique. Transposition of the PRD will most certainly require numerous revisions of the Code, which would benefit from the inclusion of a separate section or title on restructuring with several articles.[333] Special attention should be paid to terminology to avoid any confusion between pre-trial restructuring and rehabilitation, which is used as an alternative to the debtor's liquidation. This approach would provide more structure and clarity, minimizing misinterpretations and ambiguities. The existing PRD Bill appears to consider those proposals.

Raising awareness about pre-trial restructuring and its benefits is another important issue to be addressed. The war will have its effect on the perception of the bankruptcy stigma. Russian aggression, hostilities, and the physical destruction of assets are to be blamed for many debts, rather than

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[331] PRD Bill, arts. 5-2(2), 5-3(2), 5-9(9).

[332] A new designation for the restructuring trustee. *See* PRD Bill, arts. 5-1 and 5-2(2).

[333] The PRD Bill achieves that by completely rewriting arts. 4 and 5 and adding 19 new articles dedicated to preventive restructuring procedures.

the business manager himself. But it would be naïve to believe that the war will eliminate the stigma. Therefore, Ukrainian authorities will have to engage in an education campaign.[334] Ukrainian businesses need to understand the difference between pre-trial restructuring and bankruptcy. Special attention must be paid to educating businesses in the regions since regional SMEs normally lack the respective information and are limited in terms of resources. The Ministry of Justice, the National Bank of Ukraine, banks, and other financial institutions may want to dedicate some time to explain financial restructuring options and help non-qualifying SMEs to better understand available options under the BCU. Ukraine`s post-war renovation can most certainly benefit from this kind of education; more viable businesses and more jobs can be saved.

## CONCLUSION

The author notes that at the time of finalizing the article, the war had been ongoing for nearly twenty months and shows no signs of ending soon. The devastating impact of the Russian aggression on Ukrainian towns and cities such as Bucha, Irpin`, Mariupol`, Kakhovka, Bakhmut, as well as the continued missile attacks on other areas, have become a daily reality for millions of Ukrainians. In July 2022, Ukrainian authorities released a Recovery Plan blueprint that estimated the need for USD 750 billion to rebuild the country's economy.[335] While the plan contains various measures to support SMEs, such as reducing regulatory burdens and promoting exports, it does not include measures to save businesses from bankruptcy. The author suggests that perhaps this measure is implied or has been forgotten given the scale of physical destruction caused by the war.

The impact of the war on Ukrainian businesses is clearly visible in daily news reports and social media posts. Destroyed shops, burned fields, looted crops and goods, and displaced merchants and farmers are a common sight. Despite the chaos and controversy surrounding official statistical data, the

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[334] Similar issues had been raised in case of Romania (the need to raise awareness, promote financial education, negotiation, and rescue culture), *see* Ionel Didea and Diana Maria Ilie, *supra* note 56, at 118, 125, 130.

[335] Ukraine`s National Recovery Plan (July 2022), https://uploads-ssl.webflow.com/621f88db25fbf24758792dd8/62c166751fcf41105380a733_NRC%20Ukraine%27s%20Recovery%20Plan%20blueprint_ENG.pdf.

war has taken a heavy toll on Ukrainian businesses, especially SMEs. Unfortunately, the worst is yet to come, including the assessment of damages after the war and the inevitable surge in bankruptcies.

The pre-trial restructuring discussed in this article may appear less significant compared to the enormous financial aid and investments required to rebuild the Ukrainian economy. However, restructuring does not require financial inflows and can serve as a tool to safeguard "internal investments" by rescuing viable businesses. As emphasized earlier in this article, restructuring can help mitigate reductions in production, unemployment, and social pressures. Although it is a small component in the larger machine necessary for saving the national economy, its significance should not be understated. Ukraine need not reinvent the wheel; the PRD and national restructuring approaches already provide potential solutions that Ukraine can and should employ prudently.