Increasing Legal Certainty for Cross - Border Investments by Making National Insolvency Procedures More Efficient and Effective

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Abstract
We have proposed to carry out this article starting from the premise of a transdisciplinary research, reflecting an analysis of insolvency law as "metamorphosed" by the conglomerate of social, economic and political elements and events, which, in reality, permanently "roll" this "legislative snowball" found in the dynamics of globalization and Europeanization, context in which the classical branches of law are resized by acquiring mixed characteristics. The penetration into the realm of transdisciplinarity reflects nothing but the need to adapt the norms of law to the diversity and dynamism of developments, "mutations" and global challenges. The core of our research concerns insolvency law, a law that has reached the stage of remodeling in a global economic context, being permanently "imprinted" by international and regional legal instruments. Enjoying a "thirsty" field of accelerated reform, we will try to synthesize legislative novelties such as the proposal of EU Directive on the harmonisation of certain aspects of insolvency law and we will explore restructuring benchmarks in the USA, India, Dominican Republic or Saudi Arabia, with often "crossed" visions on insolvency regimes, in order to outline the international picture of the restructuring market in 2023 but also the prospects for 2024, in the idea of identifying coherent measures capable of mitigating the socio-economic consequences at the intersection of contemporary crises, crises that have profoundly changed the approach of the insolvency field. Last but not least, we will stop at one of the key dimensions of the new directive on the EU agenda, namely the creation of a special insolvency legal regime for SMEs, already outlined internationally by UNCITRAL. Beyond the draft directive still on the negotiating table and uncertainties, an initiative that is part of the Commission's priority objective of strengthening the capital markets union (CMU) with the motto "Make the outcome of cross-border investments more predictable in terms of insolvency proceedings", beyond the effervescence of international and European insolvency legal instruments, we must reflect on the importance of divergences in the regulatory approach to insolvency as an obstacle to cross-border investments, a firm concern and commitment being needed in order to harmonize legislation and streamline national insolvency procedures insolvency. Let us not forget that effective and harmonised insolvency rules support efficient capital allocation, economic recovery from recessions and therefore economic growth in each country, with insolvency being a key criterion for cross-border investors.

Keywords: *cross-border insolvency, trans-disciplinary vision, socio-economic analysis, cross-border investments, integration, harmonization and legislative innovation, global practices, benchmarks of the restructuring and insolvency framework.*

JEL Classification**:** K22, K33, K35

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1. Introduction

„Albert Einstein said that "*in the midst of difficulties lies the opportunity*", and this multidimensional crisis unprecedented in human history has triggered a spectacular mobilization of science and research in identifying opportunities for legislative reform and the redefinition of the society, economy and politics in a "moving" geopolitical framework, the next period being defining for many decades to come. The pandemic, which was the first "*reminder*"of humanity in the sense that science, research, technology and innovation remain the essential pillars for sustainability and adaptation transitions to shocks, followed by Russia's war of aggression against Ukraine, which has led to significant consequences through the "abrupt braking" of economies and energy market security, and subsequently the ongoing hostilities in the Middle East, which have generated multiple scenarios on a global scale, especially the disruption of oil and gas supplies, represent a brief enumeration of the interconnected crisis spheres and generating other major crises at the macro and micro level. Transposed over the re-intensification of geopolitical competition for regional or global supremacy, skirmishes that endanger the peace of humanity, over the revolution of transformative technology, of digitization, over the revolution of green technology and ecological transition, we find that never in the history of humanity has there been such a combination, such a multifaceted overlap, which involves accelerated measures in a very dynamic "quadrangle", in which economy, security, technology and society find a new balance.

Avoiding calling into question the "supposed and unknown plan of the world order", we are forced to "embrace" such a reality and be proactive in everything that means green economy, circular economy, integrative artificial intelligence (AI), cyber resilience, economic security, biotechnology and synthetic technology (here we are talking about nanorobots that will implant in the body to fight cancer), incredibly transformative mechanisms in all areas, especially legislation, education, research, health, economic environment, governance, etc., between them there is an indissoluble, intrinsic link.

2. The dynamic area of insolvency and restructuring – "key criterion" for cross-border investors. Crisis, entrepreneurs and responsibility - transdisciplinary vision

That's why we're talking about "*mobilising science in times of crisis*"[3], learning and taking lessons from such events and the need for *interdisciplinary, transdisciplinary* dialogue, to identify legislative reform priorities, but especially the appropriate regulatory "formulas" that do not stifle innovation, this dimension being another huge challenge to guide the exit from the multiplied global crisis. It is obvious that we must remain alert and prepare for future crises, such as climate change or other pandemics, a restart also imposed in research, through the transdisciplinarity approach, defined by what is between, above and beyond any discipline. In reality, interdisciplinarity and transdisciplinarity are only answers to the diversity of global social, political and

[3] OECD, *Science, Technology and Innovation Outlook 2023 - Mobilising science in times of crisis: Lessons learned from COVID-19*, https://www.oecd.org/sti/science-technology-innovation-outlook/, last accessed on 5/11/2023.

economic changes, to the interdependencies of the contemporary world and to the trends of universalism[4] or uniformity. This “decompartmentalization”, “decomposition” of a discipline, as a marked stage of the progress of science, implies an analysis passed through the filter of the challenges of the globalized world, achieving “a nodal point”, a binder between the theme subject to research and its “anchoring” in the socio-economic reality, according to the principle of “sphere-in-sphere”, the law being “a living instrument”, “shaped” and “reshaped” permanently by the given context.

This rigorous route of knowledge of any theme subject to scientific research, namely the deepening of disciplinary and segmented type to understand the essence, is followed by the multidisciplinary approach, pluridisciplinary through juxtaposition of information, but also interdisciplinary, which offers that integrative vision, from synthesis up to transdiciplinarity, which involves overcoming disciplinary boundaries and the ability to work with concepts, theories or methodologies nonspecific to any discipline, branch. This high level of knowledge actually offers the opportunity to be able to respond in a favorable way to such complex global challenges.

Our research will focus on the transdisciplinarity methodology, approached from the angle of multiple mutations of our societies, starting from the global, regional and national economic context and the analysis of the business environment, in order to subsequently identify the priorities of legislative reform in the field of insolvency, since, as highlighted by renowned researchers in the field of transdisciplinarity[5], it is preferable that any analysis relates to all the evolutionary mechanisms of society, discovering international prerequisites and analyzes that can be useful to arrive at a result.[6]

Beyond any philosophical speculation, a transdisciplinary legal thinking, opposed to the specific rigidity of traditional disciplinarity, becomes an approach *sine qua non* of a “chameleonic” and dynamic field such as insolvency, where bankruptcy, judicial reorganization or restructuring become “sides of the same coin”, the way of regulation at global or national level highlighting the various forms that this phenomenon can take but also its impact on the evolution of the economy. Moreover, superimposed on globalization and the idea of universalism, new technologies, especially AI (artificial intelligence) have triggered a reshaping of the way the business environment works and a deep international interconnection, inevitably overcoming the problems of adaptation to different cultures, perceptions and ways of working, characteristics that begin to circulate in research and education at international level.[7]

Moreover, the idea of subjecting the field of insolvency to an interdisciplinary

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[4] For development see Kirshner Jodie Adams, *International bankrupty. The challenge of Insolvency in a Global Economy* – “*Where do we go from here? - Nationalism as an obstacle to universalism, possible solutions*”, Chicago, The University of Chicago Press, Chicago and London, 2018, pp. 130-139.

[5] See Cristina Elena Popa Tache, *The Possibility of a Law of all Forms of Life in the Context of Transdisciplinary Mutations in International Law*, in Federica Cristani, Cristina Elena Popa Tache (eds.), *Tempore Mutationis in International and Comparative Law*, ADJURIS - International Academic Publisher Bucharest, Paris, Calgary 2023, p. 11, http://www.adjuris.ro/reviste/tmic/Tempore%20Mutationis%20in%20International%20and%20Comparative%20Law.pdf, last accessed on 15/11/2023.

[6] See Cristina Elena Popa Tache, *Le dynamisme du droit international public contemporain et la transdisciplinarité,* Collection: Le Droit aujourd'hui, L”Harmattan, France, 2023, p. 75 et seq.

[7] See Cristina Elena Popa Tache, Catalin Silviu Sararu, *New Transdisciplinary Directions in International Law?*, Lex Humana, vol. 15, no. 4, 2023, pp. 86-109 - https://seer.ucp.br/seer/index.php/LexHumana/article/view/2705.

and transdisciplinary analysis has been at the center of our attention since 2016-2021[8], a sense in which insolvency offers a broad spectrum of analysis and represents a real interest in the current and future socio-economic environment, extended interest also in the international context (cross-border insolvency). Thus, insolvency law can be considered a result of the approach of interdisciplinary research and analysis in the context of branches related to the sphere of economics, sociology, psychology but also of the branches of law, by interfering with other domestic and international normative acts, such as labor law regulations, criminal law, civil law, civil procedural law, administrative law, public procurement, etc., which have left their trace on the evolution of the insolvency institution and have created new perspectives of analysis, new legal views, outlining why not, a new law, a special, particular, self-contained law, that of insolvency. Moreover, a business is part of a complex network of relationships with suppliers, investors, creditors, employees, customers and public authorities, the opening of insolvency proceedings directly affecting the rights and positions of all these stakeholders, with an inevitable echo in matters of property law, labour law and freedom of economic activity.

As a result, interdisciplinarity implies a multiplication of perspectives that synthesize and create in an integrative vision a complex final "product", as is the case with the insolvency institution, which has transcended the boundaries of traditional branches of law, by incorporating social, economic, administrative, management factors, the law proving a flexible sizing and legal management, adapted to the needs that are imposed in the midst of economic crisis, conflicts and global problems. Therefore, the law must conceptualize links, participate in the evolutionary actions of the economic-social system, face different forms of crisis, all branches of law being permanently "plugged" to the same circuit although they can function autonomously. Without a permanent connection to socio-economic evolution, norms would remain without form and substance.

If we accept the idea of transdisciplinarity, we realize, in fact, the complexity of this "legislative world" and the implicit impact of each regulation in a specific field on other areas, namely the social impact, the impact on the environment, on fundamental rights, etc., being interdependent in the configuration of the reality in which we live, on the principle of "sphere-in-sphere" invoked above.

For example, with regard to *environmental impact* following the reform of insolvency legislation, we can consider promoting the transition to a more sustainable economy by reducing the share of zombie companies in the economy, which could allow the reallocation of capital and labor to companies with a higher rate of innovation and productivity, indirectly contributing to the acceleration of structural changes towards more sustainable production. At the same time, an efficient, harmonised and transparent regulation of cross-border insolvency can partly contribute to predictability for investors and other economic actors, which is one of the objectives of the *European Climate Law*.[9]

If we relate to *social impact* of insolvency, we are already talking about shaping the social dimension in the insolvency structure and of the interaction between the

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[8] Diana Maria Ilie, *The effects of insolvency on the economic and social environment in Romania in the context of globalization,* Universul Juridic Publishing House, Bucharest, March 2021, p. 67 et seq., paper that includes the doctoral thesis with the same title, held in 2020.

[9] https://climate.ec.europa.eu/eu-action/european-climate-law_ro, last accessed on 10/11/2023.

economic sphere and the social sphere that characterizes insolvency[10]. Insolvency, as it has evolved over the past few years, pays attention to interests above those of creditors and tends towards a social approach. In this sense, the new vision detaches somewhat from the purely economic dimension of insolvency, as configured in the past, by integrating into its structure the side, the social dimension and the gradual elimination of that personal stigma attributed to the honest bankrupt or not. Of course, the institution of insolvency, by its specificity, implies a close and balanced interweaving between the economic and social dimensions, respecting the principles of business ethics, without destabilizing the civil and commercial legal circuit. The focus on "second chances" for distressed debtors is a reflection of the recent European Commission communications calling on member states to encourage second chances for the debtor, in the sense of supporting business restructuring at an early stage, as well as facilitating the adoption of a reorganisation plan towards honest, viable debtors.

Moreover, in the social aspect we also speak of the convergence between the economic dimension, specific to insolvency law and the social dimension, specific to labor law, this "rivalry" between the special laws outlined in the economic and social fields, having to be annihilated. A balance can only be achieved through mutual sacrifices and compromises, through an open and flexible right, the reverse of the intangibility of the legal matrix of rights enshrined in labor law being the impossibility of economic and social progress.[11] In terms of social impact, insolvency reforms designed to encourage debt restructuring and internal reorganisation help to maintain jobs. Let's not forget that at the national legislative level, employees of insolvent employers enjoy a preferential legal regime, salary claims reflecting a strong social component that, in contraposition with the other claims of the debtor, includes special labor law norms – the Labor Code, special norms for harmonization and implementation of European Union law, such as Law no.200/2006 on the establishment and use of the Guarantee Fund for the payment of salary claims, in balanced interference with the special rules on insolvency procedure regulated by Law no. 85/2014. At the same time, the insolvency legislation incorporates in perfect balance the protection of pension rights in the insolvency procedure, as well as the protection of employees in the case of the transfer of enterprises made in the context of the transferor's insolvency, being outlined a specific legal regime for the dismissal of employees in the insolvency procedure.

The global socio-economic picture that we will "unveil" during this study will outline the idea promoted in our previous research, namely that insolvency transcends the traditional branches of law and creates a viable mechanism of "resuscitation" of the economy, a survival mechanism against budgetary imbalances, which is at the center of interest of national, union and international bodies.

Considered to be a cross-cutting area of civil law, insolvency law must strike a "delicate" balance between the legitimate interests of creditors and debtors, as well as

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[10] The premise of this analysis started from the writing of the article presented at the International Conference on Law, European Studies and International Relations, organized on 17-18 May 2018 at Titu Maiorescu University, Bucharest. In this regard, Ionel Didea, Diana Maria Ilie, *"The social dimension versus the economic dimension of insolvency"*, in the volume of the International Conference on Law, European Studies and International Relations, sixth edition.

[11] See Ionel Didea, Ramona Duminică, Diana Maria Ilie, *Interference Between the Insolvency Law and the Labour Law. Convergence Between Interests - Integrative Vision*, in Journal of Law and Administrative Sciences no. 10/2018, pp. 1-21 - http://jolas.ro/wp-content/uploads/2018/12/jolas10a1.pdf.

between those of different types of creditors, and an effective insolvency law should help to quickly and efficiently wind down non-viable firms and restructure viable firms in insolvency proceedings. It is obvious that a good insolvency framework leads to a more efficient allocation of capital within and between member states and facilitates cross-border investment and market-based financing flows. This primary goal of economic efficiency is complemented by specific "redistributive" goals that result from the models of cultural and social values of a particular society.

In a cross-border context, each of the states concerned has an interest in regulating the insolvency of an entrepreneur whose activities or assets are located on its territory, and in reality, in a not negligible number of situations, several laws and jurisdictions will have the power to manage the cross-border insolvency in question. In such a case of multiplicity of laws applicable to a cross-border insolvency case, the differences between these overlapping laws will be a barrier to an effective resolution of that case.

We must point out that the traceability of uniform insolvency rules at European and international level, in an attempt to create economic performance, proved to be a real challenge. *Moreover, in light of the above, especially the impact of the insolvency rules on the economy, we mention that the development of concrete strategies for financial recovery and economic recovery has become perhaps the most claimed object of research and analysis in the last 3 years.*

In December 2022, the Organisation for Economic Cooperation and Development (OECD) published a study on *insolvency framework-indicator* that summarizes the main features of insolvency systems in 45 OECD member countries,[12] among them being the EU members states. The OECD insolvency indicator is a composite indicator, originally built as part of an OECD project carried out in 2016[13], aimed at exit from insolvency and productivity growth policies, based on the responses and completion of a questionnaire by experts from each country. This first analysis carried out in 2016 identified 13 "key" characteristics based on international best practices and existing research, which included: 1) two characteristics that raise personal costs for bankrupt entrepreneurs: time to discharge and fewer exceptions; 2) the absence of three mechanisms that contribute to prevention and simplification: early warning mechanisms, pre-insolvency regimes and special insolvency procedures for SMEs; 3) five characteristics that could impose barriers to restructuring: the inability of creditors to initiate restructuring, the indefinite suspension of asset recovery, the lack of priority given to new financing, the involuntary failure to impose restructuring plans on creditors who disagree with them, and the "dismissal of the management" in office during the proceedings; 4) three other factors: a high degree of court involvement, a lack of distinction between honest and fraudulent bankruptcy, and restrictions on individual and collective redundancies during proceedings.

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[12] Christophe André, Lilas Demmou, *Enhancing insolvency frameworks to support economic renewal*, OECD Economics Department Working Papers No. 1738, available online at https://www.oecd-ilibrary.org/docserver/8ef45b50-en.pdf?expires=1700594355&id=id&accname=guest&checksum=FE34E01644CE37E1E7F31FBDFD07FFD9, last accessed on 16/11/2023.

[13] Müge Adalet McGowan, Dan Andrews, *Design of insolvencyregimes across countries*, OECD Economics Department Working Papers No. 1504, 2016, available online at https://www.oecd-ilibrary.org/docserver/d44dc56f-en.pdf?expires=1555057715&id=id&accname=guest&checksum=78CF5C280D89FEBDEA625C7C89C29C12), last accessed on 16/11/2023.

Although the indicators were designed to address the link between insolvency and productivity, they were relevant to understanding other economic phenomena, including the spread of macroeconomic shocks, financial sector behaviour and a number of other labour market consequences. Thus, the last analysis carried out by the OECD in December 2022, based on the same 13 macro-economic indicators and the same data collection mechanism, respectively through a questionnaire started in 2016, highlights that pre-insolvency proceedings are particularly relevant in the wake of COVID-19, but amid recent interconnected crises, the differentiation between viable and non-viable firms has become even more difficult to achieve. According to OECD specialists, countries should focus their actions in particular on five key areas to facilitate corporate restructuring and reallocation of resources: simplified procedures for SMEs[14] with specific procedures for these businesses currently available in just over half of OECD countries, efficient winding - up and the possibility of a new start – "fresh start", given that while costs for banckrupt entrepreneurs have been reduced in many countries, the time to discharge debts remains a long-term one in most countries, incentives for investors to provide new financing to debtors in financial difficulty and specific out-of-court procedures, as despite the progress made, the results of the analysis suggest the possibility of further exploring the prospects for a wider range of methods. According to statistics, the most affected companies during the pandemic were the small and micro enterprises (SMEs), which for a period relied only on government loans and subsidies to resist until the reintroduction of normal circumstances. Discussions and debates at both international and regional level have highlighted the need for an imminent instrument to help SMEs cope with new bottlenecks.

The OECD experts also point out that harmonising the elements of insolvency proceedings would have a significant impact on cross-border investment. First, changes in costs and liquidation time can be translated into changes in recovery rates. Second, economic studies have used recovery rates as indicators of insolvency rates and detected their significant impact on loan volumes, credit costs, cross-border asset holdings and risk sharing in transnational estimates. The difference in elements of insolvency between two countries could particularly deter investors from a higher-ranking jurisdiction, as the lack of any element induces investors to fear entering a market.

While several countries have implemented short-term insolvency measures[15] in response to the crisis generated by Covid-19, factors such as lower sales, rising unemployment and the challenge of the transition to a greener and digital economy, however, point to a likely increase in the number of insolvency requests in the near future, as, finally, once crisis response measures cease to take effect, insolvency rules will again apply with full force in all EU countries, and the full impact of pandemic distortions and cascading crises will only become apparent in the coming years. It is obvious that the global economy has suffered a series of deep shocks with a marked

[14] For development see Ionel Didea, Diana Maria Ilie, *A New Proposal for an EU Directive and a New Challenge to Harmonise Insolvency Law Rules. Creating a Special Insolvency Regime for SMEs - A "Key" Item on the EU and Uncitral Agenda*, article held at the International Conference "European Union's History, Culture and Citizenship", Pitesti, 26 May 2023, available at https://www.upit.ro/_document/298096/e-book_iccu2023.pdf, last accessed on 15/12/2023.

[15] See Ionel Didea, Diana Maria Ilie, *Restructuring Practice is Now Growing Worldwide Post-Covid Insolvency,* International Investment Law Journal, Volume 2, Issue 1, February 2022, p. 14-45, http://www.investmentlaw.adjuris.ro/anul2nr1.html.

impact on companies, and rapid and substantial government support has helped protect small businesses from the economic impact of the pandemic. However, new threats have emerged in the wake of Russia's aggression against Ukraine. The economic environment has thus become even more challenging due to growing geopolitical tensions, global financial risks, high inflation, tighter monetary and fiscal policies, stress in the financial sector, labour shortages, trade barriers and slowing integration in global value chains. As interest rates rise, debt repayment will become more burdensome, especially for heavily indebted SMEs and entrepreneurs.

If we also refer to the effects of the conflict in Israel, we will find that the "negative spiral of the socio-economic crisis" deepens, Kristalina Georgieva, the Managing Director of the IMF, said at the Annual Meeting of the International Monetary Fund (IMF) held in Morocco in October 2023 that it is "*new cloud on not the sunniest horizon for the global economy*".[16] Although it is difficult to outline an economic outlook for 2024 from the point of view of the effects of the Israel - Gaza conflict, due to the speed with which events are unfolding, we must expect harsh consequences, especially in terms of prices in the energy sector on the international market, rising inflation, rising interest rates, slowing the economy and the onset of recession, a vicious circle in which the global economy would deteriorate just at a time when it was beginning to normalize.

Taking the stock of the developments at the end of the year, we will also focus on the dynamic area of insolvency and restructuring, by reference to indicators and forecasts outlined by international bodies such as OECD or IMF, being ready to step into 2024 and "navigate through the global divergences" with more optimism by identifying the priorities of legislative reform and the responsibilities of entrepreneurs in times of crisis.

According to the *Global Financial Stability Report in the year 2023,* conducted by the IMF's World Economic Outlook[17] we are facing an era of high interest rates. The Global Financial Stability Report provides an assessment of the global financial system and markets and addresses the financing of emerging markets in a global context. According to IMF specialists, optimism about a "soft landing" of the global economy following the April 2023 Global Financial Stability Report seems to be fading, as the global credit cycle tends to change as debt repayment capacity decreases and credit growth slows.

Turning *stricto sensu* on the insolvency index, specialists[18] point out that it grew by 21% in 2023 and estimate that it will grow by 4% in 2024. In the US, specialists invoke a 49% increase in 2023 as a result of tighter credit conditions, which will mean a return to more than 20,000 insolvencies per year. The increase in insolvencies in 2023 and 2024 will have negative effects, in the sense that the Euro area and the US would need 1.3 percentage points and 1.5 percentage points of additional GDP growth on average in 2023-2024 to stabilise the number of insolvencies. Moreover, GDP is

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[16] Constantin Rudnițchi, *What the IMF says about the economic effects of the conflict in Israel,* 13 October 2023 - https://www.rfi.ro/economie-160442-spune-fmi-efecte-economie-conflict-israel.

[17] *Global Financial Stability Report*, *October 2023: Financial and Climate Policies for a High-Interest-Rate Era*, available online by accessing - https://www.imf.org/en/Publications/GFSR, last accessed on 14/ 11/2023.

[18] Maxime Lemerle, Maria Latorre, Ano Kuhanathan, *Insolvency report,* 11 April 2023 - https://www.allianz.com/content/dam/onemarketing/azcom/Allianz_com/economic-research/publications/specials/en/2023/april/2023_04_11_Insolvency-Report_AZ.pdf.

expected to remain below trend in both 2023 and 2024, although it will gradually increase until 2024 as inflation moderates and real incomes rise, meaning that reviving the economy will require ambitious structural reforms, as the study *Going for Growth 2023*[19] OECD also highlights.

In 2021, about 40% of countries for which data is available saw an increase in the bankruptcy rate, compared to only 20% in 2020. The most pronounced increases were recorded in Slovakia, Spain and the Czech Republic. In contrast, significant decreases in insolvencies were seen in other economies, notably Estonia, Sweden, the Netherlands and the United States. While bankruptcies continued to decline in the United States throughout 2022, in several European countries the pace of bankruptcies accelerated. In Western Europe, specialists speak of a relatively strong growth in 2023 (+20%), for the third consecutive year (+5% in 2020 and +22% in 2021), with a stabilization forecast in 2024 (+0%). Despite the mixed dynamics, the region has already exceeded the pre-pandemic level in 2022 (by +3%) and recorded further increases in all countries in 2023, with the region expected to register 25% more insolvencies in 2024 than in 2019. In Germany, the reversal of the upward trend in insolvencies began later than in most other European countries due to massive state support. Insolvencies have also made their presence felt in the United Kingdom with the phasing out of support measures (+4% in 2021 and +51% in 2022) in all sectors, but also as a result of Brexit. Thus, the United Kingdom faces a high risk of an increasing trend in insolvencies in 2023 (+16%, i.e. +3,930 cases) and 2024 (+9%, i.e. +2,600).

In Asia, China managed to keep the official number of insolvencies under control in 2022 (-13% - 7,530 cases) despite a difficult year with multiple bottlenecks and a large number of major failures. However, insolvencies should show moderate growth (+4% in 2023 and +5% in 2024) given that support measures still exist, especially in the real estate and construction sectors. The other countries in the region face a higher number of insolvencies due to negative factors such as high interest rates or inflation, in particular Australia (+15% in 2023 after +45% in 2022), Japan (+12% in 2023 after +7% in 2022) and India (+36% in 2023 after +50% in 2022). Overall, in Asia and Latin America there was an increase of 12% in 2023 and in 2024 an increase of 5% is expected%.

Although SMEs are only marginally exposed to the war in Ukraine, they have been significantly affected by sudden increases in energy and commodity prices, economic uncertainties and tightening financial conditions, widespread labour shortages and, last but not least, the shockwaves of the conflict in Israel. At the same time, digital transition, green transition and integration into sustainable global value chains pose additional challenges.

According to statistics made by OECD specialists[20], the share of “zombie” companies - indebted companies, which earn only enough money to operate and service debt but cannot pay their debt in assets, capital and debt, is much higher among SMEs than among large companies. Labour shortages and competition for skills also persist, putting SMEs at an even greater disadvantage. These challenges could exacerbate the

[19] OECD, *Going for growth - Economic Policy Reforms 2023* - https://www.oecd.org/publication/going-for-growth/2023/, last accessed on 11/11/2023.

[20] Annabelle Mourougane, Gueram Sargsyan, *Turbulent times for SMEs*, 28 June 2023 - https://oecdstatistics.blog/2023/06/28/turbulent-times-for-smes/, last accessed on 10/11/2023.

traditional difficulties SMEs face in attracting and retaining qualified employees, as they tend to offer less attractive pay and working conditions than large firms and lack the capacity and resources to identify qualified staff.

At the same time, the pace of digitalization accelerated in the first phase of the COVID-19 crisis, helping many companies to withstand the economic shock. However, most SMEs continue to lack the resources and skills to take advantage of the digital transition, increasing the risks of widening the gap. In addition, although small companies need the implementation of the green transition and the implementation of more sustainable, responsible and circular value chains, these transitions also present significant and almost impossible financial challenges for SMEs in these times of crisis.

Narrowing the scope at national level and performing an "X-ray" of the Romanian business environment, we will find that Romania continues to go through multiple challenges, the year 2023 being marked by fiscal uncertainties. According to the National Institute of Statistics[21], Romania's economy slowed sharply in the last quarter of 2023, by 0.4%, compared to the previous quarter of this year, when the economy registered an advance of 1.3% compared to the first three months of the year. Moreover, according to the IMF's 2028 forecasts, Romanian economic growth is expected to stop next year, with economic growth stagnating at 3.7%.

Moreover, there is a major pressure on companies that have to cope with the inability to pay "rolled" debts for a very long time, since the pandemic, many of the companies have become accustomed to this paradigm. The evolution of companies results from the dynamics of the financial statements for the 5-year economic cycle, namely 2018-2022, a cycle marked harshly by the impact of the Covid-19 pandemic in 2020. According to the latest Coface Romania study,[22] sales registered by companies active in Romania reached 2370 billion lei in 2022, by 56% more than the level recorded in 2018 and above the cumulative inflation in this period of 33%. Thus, in the 1st half of 2023, 3,358 new insolvency procedures were opened, down by 4% compared to the same period last year, and the number of insolvent companies with turnover of over 0.5 million. EUR decreased from 164 companies to 154. We find that despite a challenging economic and geopolitical context, marked by slowing economic growth, still high inflation, price volatility on the energy market and labor market pressures, Romanian companies showed resilience in the first half of 2023. However, given that the economic environment remains marked by multiple global challenges, we will certainly see an increase in the number of insolvencies in the coming period.

But we are glad to point out that in the first semester of 2023 the entrepreneurial environment opted for *restructuring mechanisms*, mechanisms increasingly visible on the economic market, while the number of companies that have resorted to arrangement with creditors is increasing. Thus, 30 companies appealed in the first half of 2023 to the arrangement with creditors, of which eight impact companies with assets of over 1 million euros, compared to 12 such requests in the whole year 2022, which may represent the start for changing our culture in addressing insolvency and restarting the Romanian

[21] Dana Arambescu, *Romania's economic growth slowed in the last quarter*, 14/11/2023 - https://adevarul.ro/economie/cresterea-economica-a-romaniei-a-incetinit-in-2316130.html.

[22] *Coface Study: Insolvencies in Romania Decreased by 4% in Q1 2023 Compared to Q1 2022* - https://www.coface.ro/Stiri-Publicatii/Stiri/Studiu-Coface-Insolventele-In-Romania-Au-Scazut-Cu-4-In-S1-2023-Fata-De-S1-2022, last accessed on 15/11/2023.

economy.[23] Moreover, maintaining viable businesses in operation has become one of the most important objectives of insolvency systems, since a complex insolvency regime adapted to socio-economic reality should inhibit the premature liquidation of those sustainable and forward-looking businesses.[24]

In addition, we are currently talking about a real mobilizing force of the European Commission regarding the legislative harmonization at EU level in the area of the development of a *rescue culture of debtors* in difficulty, through instruments such as arrangement with creditors, for example, as a procedure to prevent insolvency. Directive no. 2019/1023 is the first major step in the process of harmonizing the various European insolvency laws, going beyond the stage of achieving standards that are limited to cooperation between courts and coordination of insolvency proceedings of a cross-border nature, such as, for example, Regulation (EU) no. 848/2015 on insolvency proceedings.

Why to focus on legislative harmonization? Because recent studies have found evidence that insolvency regimes have a significant effect on the scale of cross-border investment and, consequently, on the economy. According to the results of the IMF (2019), the better the insolvency regime in the destination countries, the higher the cross-border investments. Consequently, according to the specialists' scenario, improving the quality of regulation will impact cross-border capital holdings, the ultimate goal being to balance the key "ingredients" in order to eliminate obstacles to the integration of the capital market, which consist in the quality of regulation, transparency and especially the convergence of the rules on insolvency procedures at European and, why not, international level.

What is the next step towards harmonising insolvency law at European level? Creating new tools of the hard-law type. In this regard, on 7 December 2022, the European Commission proposed *a new Directive on the harmonisation of certain aspects of insolvency law*[25], a legislative instrument aimed at accelerating the implementation of the capital markets union, considered a solid pillar for further financial and economic integration in the European Union. So far, the European Economic and Social Committee, the European Data Protection Supervisor and two EU member states, namely Portugal and the Czech Republic, have delivered favourable opinions, with the first reading in the European Parliament not yet taking place.

In the next section we propose to explore *key elements* of this proposal for a Directive, mirrored by the work of UNCITRAL (United Nations Commission on International Trade Law) in insolvency matters, the tendency being to merge systems of law, to harmonize and crystallize universal principles and rules, through these legal instruments of the type *hard-law*, such as the EU Directive, or *soft-law*, in the case of *model laws* masterfully drawn up by international bodies, thus realizing the likely path to adopt "*universal ideals*" in national law. In the light of these ideals of re-establishing

[23] https://www.juridice.ro/698108/citr-in-primul-semestru-al-2023-mediul-antreprenorial-a-fost-mai-orientat-catre-noile-mecanisme-de-restructurare-numarul-companiilor-care-au-apelat-la-concordat-preventiv-creste-iar-numarul-celor.html, last accessed on 14/11/2023.

[24] The World Bank, *Resolving Insolvency - Why does a good insolvency regime matter*? - https://subnational.doingbusiness.org/en/data/exploretopics/resolving-insolvency/why-matters, last accessed on 13/11/2023.

[25] https://data.consilium.europa.eu/doc/document/ST-15896-2022-INIT/ro/pdf, last accessed on 13/11/2023.

society, economy and security, *INSOL International*[26] specialists discussed, in a report from March 2019, the likely path to the adoption of UNCITRAL's model laws across the globe, through a universalist approach even to cross-border insolvency.

3. Fragmentation of insolvency frameworks and the need for greater convergence. Elements of legislative reform at Union and international level to increase legal certainty for cross-border investments

In order to penetrate the global socio-economic "stage" of intensifying the process of legislative harmonization in the field of insolvency, we aim to identify the complex reasons for possible malfunctions in insolvency proceedings, exploring the key concepts in harmonization, as well as the general and specific objectives of the legal instruments on the table of the Union and international bodies, the EU and UNCITRAL actions being the "engine of reform" of the insolvency legislation in this fragmented landscape.

In fact, our research will "gravitate" with priority around the proposal of *Directive on the harmonisation of certain aspects of insolvency law*, seeking to identify the pieces of this new insolvency "puzzle" that transcends the classic approach to bankruptcy and becomes a real tool of socio-economic (r)evolution, with a deep orientation towards building rescue mechanisms for debtors in difficulty. In the light of the avalanche of information in this field, we will try to synthesize elements such as the political context, the purpose of the new legislative initiative, the key concepts of insolvency in the current vision, the triggering economic context, the legal context in which we find ourselves, the barriers to harmonization, the consequences of the legislative reform, the need for action by the European Union actors, the targeted harmonization, the consequences of implementing the new Directive, procedural efficiency measures and last but not least, the benefits of these efforts and cascading legislative transformations in the field of insolvency.

We believe that the new proposal for an EU Directive represents an extension of UNCITRAL's work, with certain key objectives that can be found in this proposal already being "assembled" in international instruments such as *soft-law* of UNCITRAL, which we will mirror in this section, all these "pieces of the puzzle" called insolvency contributing to the rigorous and dynamic "polishing" of regulations, under the pressure and challenge of the evolution of the political, social and economic context.

From the perspective of the economic context of this draft legislation, we count on the fact that efficient and harmonised insolvency rules support efficient capital allocation, economic recovery from recessions and, therefore, economic growth. Furthermore, in terms of efficiency, research results show that lengthy, costly and inefficient insolvency proceedings undermine economic growth by preventing the reallocation of capital from businesses with low profitability and high indebtedness, leading to low recovery values. Such enterprises invest less and are less likely to carry out innovative activities, which slows down the diffusion of technical progress and

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[26] Evan J. Zucker and Rick Antonoff, *UNCITRAL's Model Law on Recognition and Enforcement of Insolvency-Related Judgments – a universalist approach to cross-border insolvency*, Insol International - Special Report, March 2019, available online https://www.blankrome.com/sites/default/files/2019-03/uncitralmodellaw-antonoffzucker2019.pdf, last accessed on 14/11/2023.

ultimately the potential for growth. At the same time, capital allocation is affected because economic resources remain locked in distressed entities - zombie companies, which expose banks to bad loans, compromising their ability to lend to truly innovative new businesses.

Magnifying the data collected and the indicators produced by the World Bank in the report *Doing Business*[27] finalised in June 2020, we find that the duration of insolvency proceedings and court costs in EU member states tend to be higher than in other OECD countries. National insolvency experts who provided estimates for the benchmark scenario used for the World Bank's doing business insolvency indicators indicated a range of 1.5 to 3.5 years for duration and court costs between 9 and 15% for EU member states, compared to 1.2 years and 5% costs for the fifth best return in the non-EU country panel. The duration of the insolvency proceedings is reflected in the adverse effects on the amount that can be recovered in the insolvency proceedings, such as the phenomenon of "ice cube melting".

Failures and fragmentation of national insolvency regimes only create legal uncertainty as regards the results of insolvency proceedings, as well as recovery rates, and give rise to additional information costs for cross-border investors having to obtain legal advice on the application and interpretation of a national insolvency law, leading to delays. *What are the consequences?* The first consequence of lengthy, costly and highly divergent insolvency proceedings is the impact on the allocation of capital, which is less efficient compared to the situation where insolvency regimes are more similar between member states. Furthermore, creditors and investors anticipate the consequences of inefficient insolvency regimes in their decision to credit or invest, thus limiting the supply of financing available to companies. The design of insolvency systems therefore has consequences for credit granting, capital costs and capital allocation, with analytical indicators identifying empirical evidence of the significant negative effects of inefficiencies in insolvency regimes on cross-border capital flows, financing costs and ultimately on the economy's adjustment capacity, with subsequent effects on the diffusion of technical progress and productivity growth. At the same time, the differences and inefficiency of insolvency regimes can also have an impact on business locations, meaning that debtors can relocate to declare bankruptcy and avoid paying creditors or to obtain certain advantages that would allow them to benefit from the availability of more favorable insolvency laws (forum shopping phenomenon). However, although the possibility of the company migrating to a different and more favorable jurisdiction may be an option in theory, in practice such company migration may end up being more costly and inefficient than remaining in the debtor's own jurisdiction, with studies showing that relocation can only be an option for large companies.

Trying to outline the legislative, social and economic picture in which we want to integrate the insolvency institution and identify the reform needs through an *in globo,* cross-disciplinary analysis, we will find that there is a well-established starting point among stakeholders, researchers, international institutions and decision-makers that the significant differences in insolvency rules between member states, as well as the complexity and opacity of these regulations, can build a solid wall in the way of cross-

[27] World Bank Group, *Doing Business 2020* - https://archive.doingbusiness.org/en/doingbusiness.

border investment, representing a key obstacle to further economic integration. Moreover, the European Central Bank (ECB) and the International Monetary Fund (IMF) have repeatedly signalled that removing the divergence between national insolvency rules is essential for making progress in the capital markets union, identifying three key barriers to greater capital market integration in Europe: *transparency, regulatory quality and insolvency practices*.[28]

Studies thus show that it is very important to address the major shortcomings and divergences between insolvency frameworks that persist at European level, this is why measures are needed beyond *Directive (EU) 2019/1023 on restructuring and insolvency,* which entered into force on 16 July 2019[29].

Moreover, from the statistical data and research of the IMF and the ECB[30] it results that a convergence of insolvency regimes would make the greatest contribution to the three key indicators of financial integration: *holding larger cross-border assets, a reduction in differences between countries in corporate financing costs and improved risk sharing across the country*.

The Commission's first action plan on building a Capital Markets Union in 2015 claimed that a "*convergence of insolvency and restructuring procedures would facilitate greater legal certainty for cross-border investors*". The European Parliament also adopted a resolution to this effect which led to the adoption of the restructuring Directive of 2019 and aimed at targeted harmonisation in the specific areas of pre-insolvency measures and debt discharge procedures following the closure of insolvency proceedings. Since this Directive provides the tools for debt restructuring before insolvency, but does not provide standards for the actual phase of insolvency, either the phase of judicial reorganisation or bankruptcy, the Commission has taken the initiative for increased convergence in the targeted areas of substantive corporate insolvency law, aiming at predictability and transparency, with the ultimate aim of achieving an integrated capital market. Moreover, the initiative of this proposal is part of the Commission's priority objective to strengthen the capital markets union (CMU), in particular action 11 of the CMU 2020 action plan with the motto: "*Make the outcome of cross-border investment more predictable in terms of insolvency proceedings".* At the same time, in its initial position of 8 October 2020, the European Parliament emphasised the need to "improve access to capital market financing, in particular SMEs, and further facilitate retail investors, in full line with increasing legal certainty for cross-border investments by making national insolvency proceedings more efficient and effective" (clause 24), calling on the Commission to take "*a stronger commitment to real progress in the convergence of insolvency regulations, which still pose major obstacles to the real integration of capital markets, with harmonisation in the areas of restructuring, insolvency and second chances for debtors in financial difficulty being indispensable for a functioning single market in general and a capital market in particular*".

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[28] *Commission Staff Working Document Impact Assessment Report,* accompanying the document Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 07/12/2022 - https://op.europa.eu/ro/publication-detail/-/publication/8adadc6c-76e9-11ed-9887-01aa75ed71a1/language-ro, last accessed on 13/11/2023.

[29] Published in the Official Journal of the European Union on 26 June 2019 - https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32019L1023&from=EN.

[30] Ibid. 25.

At the end of 2022, the European Commission also published an impact assessment (IA) accompanying the proposal of *Directive on the harmonisation of certain aspects of insolvency law*, showing that collecting information about other member states' insolvency laws is costly and has a negative impact on cross-border investment decisions. Moreover, according to the data obtained, national insolvency regimes continue to differ in efficiency, in particular in terms of the time it takes to wind up a firm and the value that is recovered. Procedures in some member states are marked by very long delays and have considerably lower recovery rates than those in the best performing member states. The specialists who conducted this impact study argue that the new legislation should aim at two *general objectives* namely - to increase the efficiency of capital allocation in the economy and to level the playing field between corporations in the EU capital markets. Also, following this impact assessment were drawn *specific objectives* related to the three *key dimensions of insolvency law*, namely:

- higher recovery values, especially through the introduction of rules on asset tracking actions;

- greater efficiency of insolvency proceedings, in particular through the establishment of a special insolvency regime for micro and small enterprises-SMEs;

- predictable and fair distribution of recovered value among creditors in member states, in particular through the introduction of rules on creditor committees and the rank of claims.

A very important aspect in achieving the expected effect remains the harmonization process at internal level, being necessary for the insolvency rules to be consistent, in balance with the other branches of law, actually achieving a cascading harmonization of the national legal system, covering areas such as company law, labor law and property law, in order not to compromise the coherence of the national law system as a whole.

According to the assessment carried out, the new Directive could increase recovery rates by up to 1.5 percentage points, which could not only potentially reduce financing costs, but also increase cross-border investments in the portfolio, with indirect benefits expected to exceed EUR 10 billion per year.

Continuing the analysis of the current legal context, we will find that there is a limited scope for previous action by the European Union, in the sense that the new proposal for a Directive seeks to cover a different segment from the existing legislation, focusing on substantive insolvency law. The Union began legislating in the area of insolvency many years ago. At first, the European legislator did not intend the convergence/harmonisation effect of national insolvency law systems, but rather intended to ensure coordination and cooperation between national regimes in cross-border insolvency cases. Furthermore, Directive no.2019/1023 represents the first major step in the process of harmonizing the various European insolvency laws, going beyond the stage of achieving standards applicable to certain insolvency procedures with[31] cross-border nature, such as Regulation (EC) no. 848/2015 on insolvency proceedings (EIR),

[31] *Commission Staff Working Document Impact Assessment Report* accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC, SWD/2022/142 final - https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52022SC0142, last accessed on 12/11/ 2023.

which introduced uniform rules on international jurisdiction and the law applicable to cross-border insolvency cases, in particular rules on the member state in which insolvency proceedings are to be opened and the applicable law. In parallel, there were uniform rules ensuring that judgments given by the courts competent in these cases are recognised and, if necessary, enforced on the territory of all member states. However, EIR had no impact on the content of the national insolvency law, leaving no features or minimum standards for that law. Therefore, it did not address the divergences between member states' insolvency laws, especially issues that are relevant from a cross-border investment perspective. However, the EIR opened a narrow "window" to the perspective of cross-border investors' analysis, as it allowed them to determine which law would be applicable in the event of a debtor's insolvency, leaving substantial divergences in national insolvency rules. These differences continued to affect the ability of cross-border investors to anticipate the outcome of value recovery in the event of insolvency in another member state, while affecting capital market integration[32] in the EU.

Before summarizing the challenges of the new Directive, we must point out that the previous EU Directive no.1023/2019 has revealed somewhat of the intentions of the immediate future perspective of the EU institutions, stating in its content that the support of SMEs is needed in order to ensure low-cost restructuring. In this regard, the European Commission has since recommended the need to develop model restructuring plans tailored to the needs and specificities of SMEs, to be made available electronically, and to insist on early warning tools to be effectively implemented to warn debtors of the urgency to act, taking into account the limited resources of SMEs to hire experts. Directive 1023/2019 "gravitated" mainly around elements corresponding to the prevention area, in the area of insolvency prevention procedures, the preventive restructuring procedure being available only to debtors for whom there is only a probability of insolvency. As a result, national insolvency laws remain divergent. However, the express regulation of pre-insolvency procedures by Directive 1023/2019 was a first step towards harmonisation,[33] for a considerable number of national legal orders, there are major shortages on the side of giving second chances to borrowers and strengthening a rescue culture.

The initiative of the proposal of the *Directive on the harmonisation of certain aspects of insolvency law*[34] it is not to reopen the analysis on the elements already covered by Directive 1023/2019, but to take another step towards legislative harmonization at European level, this "pedalling" on the establishment of minimum standards in the area of the insolvency procedure itself, namely the judicial reorganization procedure and bankruptcy, more precisely beyond the pre-insolvency

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[32] See the Special Report of the European Court of Auditors, *Capital Markets Union - A slow start towards an ambitious goal*, 2020 - https://www.eca.europa.eu/lists/ecadocuments/sr20_25/sr_cmu_ro.pdf, last accessed on 12/11/2023.

[33] For development regarding the harmonization of the insolvency field through the implementation of Directive 1023/2019 see Ionel Didea, Diana Maria Ilie, *A new stage in the development and consolidation of a "rescue culture and prevention in business" in the spirit of a European legal instrument such as hard law. National transposition of Directive (EU) 2019/1023*, 8 April 8, 2021, Universul Juridic portal - https://www.universuljuridic.ro/o-noua-etapa-in-dezvoltarea-si-consolidarea-unei-culturi-a-salvarii-si-a-preventiei-in-business-in-spiritul-unui-instrument-juridic-european-de-tipul-hard-law-transpunerea-la-ni vel/.

[34] *Proposal for a Directive harmonising certain aspects of insolvency law* - https://op.europa.eu/ro/publication-detail/-/publication/8adadc6c-76e9-11ed-9887-01aa75ed71a1/language-ro.

phase, when the debtor is already at the stage of initiating an insolvency procedure. The expected echo of this regulation, however, remains the completion of the capital markets union.

Thus, although the proposed Directive will be the third part of EU insolvency law, this legislative instrument will be the first to focus on harmonising material legislation in this matter, and one of the proposed actions addresses the divergence between national insolvency regimes, seen as a long-standing structural barrier to cross-border investment.

Why should the European Union act? In order to concretize the main objective of European integration and the proper functioning of the single market in the interests of the EU and all member states, the most likely scenario is that member states would limit themselves to keeping the legislation linear, stagnating, "freezing" for a long period the regulations just reformed by Directive (EU) 2019/1023 on restructuring and insolvency, which entered into force on 16 July 2019 and whose implementation was completed in July 2022 in most member states. At the same time, there would be a risk that national reforms would be mainly in favour of national stakeholders and would not pay enough attention to the interests and disadvantages faced by cross-border lenders, for example. Moreover, national rules with a cross-border component, such as tracking assets across state borders or information passed on to cross-border creditors, would perhaps be incomplete and would not meet the needs of these creditors, while implying higher legal advice costs in the absence of a common "legislative design" of insolvency. As divergences between insolvency regimes are a key obstacle to cross-border investment, addressing this obstacle and successfully implementing it will be crucial to achieving a single capital market in the EU.

With regard to the recognition of insolvency proceedings and the enforcement of judgments handed down by courts outside the EU, the states are considering Chapter III of the UNCITRAL Model Law, according to which the foreign representative can make a request for recognition, without other conditions, except for the requirements imposed by public order. In this context, the foreign procedure will be recognized either as a main foreign procedure (center of main interests - COMI) or as a secondary procedure (headquarters). The effects of such a request imply the possibility of ordering interim measures such as suspension of local forced execution proceedings, suspension of the debtor's right to transfer assets, automatic and immediate suspension of actions, proceedings, executions or transfers, when we are talking about a recognized foreign main proceeding. At the same time, the right of the foreign representative to participate in any proceedings in which the debtor is involved is recognized, according to the local law. At the level of the European Union, the general principle applicable takes into account that any decision to open insolvency proceedings given by a court of a member state having jurisdiction under art. 3 of Regulation (EU) no. 848/2015, will be automatically recognised in all other member states, leaving no discretion to the courts. However, a recognition of the main proceedings cannot prevent the opening of secondary proceedings by a court of another member state. Moreover, Union and international legislation offers multiple tools and mechanisms useful in the management of cross-border insolvency, one of which is the "Protocol",[35] also referred to as "cooperation

[35] For development, see Nicoleta Mirela Nastasie, *Cross-border protocol in group insolvency*, article presented at the National Conference on Commercial Law Stanciu D. Cărpenaru, 16 November 2023.

agreement" or "cross-border agreement". This cooperation instrument has a legislative basis both in Regulation (EC) no. 848/2015 on insolvency proceedings (Recital 49 and article 42 (3) (d)), as well as in the UNCITRAL Practice Guide (2009), being recognised at Union and international level as a mechanism for improving cooperation between multiple insolvency proceedings or pre-insolvency mechanisms. The protocol creates a bridge between jurisdictions to coordinate parallel insolvency proceedings that are opened in different countries and involving the same debtor or group of companies, being built to adapt to the specific circumstances of individual cases and to reduce uncertainty, in particular that related to applicable law. Here is a really useful mechanism that can help increase legal certainty for cross-border investments.

We welcome the effort and actions of the Union and international bodies in creating effective mechanisms of cooperation, coordination and communication, and legislative instruments of uniformity, which are the engine of legislative reforms through a balanced and interdisciplinary coordination of *in globo* regulations, mutually reinforcing, with the aim of achieving equitable and proportionate objectives. The idea of creating a balance between pan-European standards in the areas concerned does not, however, preclude the flexibility of member states in implementing European legislative instruments at national level in order to maintain the coherence of their own regulatory system.

Bypassing the brief and transient exposure in our research, on the cooperation and communication of courts in cross-border insolvency proceedings, as well as the legal basis in the recognition and enforcement of decisions of these courts in insolvency matters, we return to the draft directive, specifying that it is accompanied by an external study[36], a study providing a further analysis of the impact of harmonisation in this area and the way in which those rules are currently applied in the member states. The study presents two harmonisation options that differ in their degree of reformatory exigency. The first option focuses on elements for which there are already some common aspects in the member states, which is why it would not require states to review the fundamental principles of current national insolvency law. Instead, the second option is more ambitious, as it aims to address the issue in a more holistic way, referring in particular to the stages of insolvency proceedings and the hierarchy of claims, which have also materialised in the draft Directive on the harmonisation of certain aspects of insolvency law.

As the set of regulations on the harmonisation of insolvency procedure was designed, it involves legislative changes that must be transposed, implemented, through a legal instrument of the type *hard-law*, renouncing the idea of Recommendation, as a legal instrument of the type *soft-law* without the obligation to be implemented internally. *Why implementation through a Directive?* Because a Directive remains a binding but flexible legal instrument in the process of transposition, which respects the different legal cultures and legal systems of the member states in the field of insolvency law rules, while a recommendation merely maintains this "precipice" between insolvency regimes. If we

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[36] Deloitte/Grimaldi (2022), *Study to support the preparation of an impact assessment on a potential EU initiative increasing convergence of national insolvency laws* (Study in support of an impact assessment on a potential EU initiative to increase convergence of national insolvency rules), draft final report, DG JUST, March 2022 - https://commission.europa.eu/system/files/2023-02/Insolvency%20laws_IA%20support%20study_Final%20Report.pdf, last accessed on 13/11/2023.

consider legislative harmonisation by means of a regulation, we will find that it is, however, an instrument which cannot provide sufficient flexibility for member states to adapt to local conditions and to maintain coherence of insolvency procedural rules with the national legal system as a whole.

What are the effects of these options for legislative harmonisation in the field of insolvency? Synthesizing, with certainly the initiative will improve legislative instruments in all member states and create the framework for reducing the duration of insolvency proceedings and increasing the value recovered by creditors.

Going beyond the political, socio-economic and legislative context, as well as the purpose of the initiative, we continue to dwell on the analysis of *general and special objectives* of the proposal for a Directive, *key elements* with an echo on the matter of insolvency, represented mainly by the facilitation of the recovery of a higher value from the debtor's assets, a shorter duration of the insolvency proceedings and a predictable and fair distribution of the recovered value among creditors.[37]

First *general objective* targeted is the more efficient allocation of capital in the economy, which means supporting the lending of companies and improving the adjustment capacity of the EU economy as essential elements for balanced economic growth and a highly competitive social economy. In order to achieve this objective, it is necessary to achieve more efficient insolvency regimes in the member states, capable of generating a higher recovery value of assets from the liquidated mass of assets subject to insolvency, in a shorter time and at lower costs than at present.

Second general objective is to ensure the free movement of capital in the single market by boosting investor confidence and increasing cross-border investment, with the ultimate objective of creating a level playing field for all EU economic operators with regard to insolvency rules, regardless of their location. This objective can be achieved by designing similar, uniform, universal insolvency regimes in all member states.

Both general objectives are interdependent and mutually reinforcing, in the sense that accelerating the implementation of effective and transparent insolvency mechanisms leads to increased cross-border investment in the single market, and therefore competition between financing providers intensifies and the cost of financing for companies becomes lower.

As regards *specific objectives* of the proposed Directive, they aim to complement the toolkit used in insolvency cases by adding specific elements, i.e.:

- developing more *effective and similar* norms in the member states with regard to the pursuit and recovery of assets belonging to the insolvency estate, the powers and liability of directors approaching insolvency and *pre-pack* proceedings.

- development of similar norms for insolvency proceedings in respect of *simplification of SME procedures*, as well as *ensuring transparency* of insolvency rules.

- development of similar rules for *efficient and fair distribution of recovered values in the member states,* in particular in the area of creditor committees and claims hierarchy, with a view to reducing legal uncertainty and information costs related to insolvency processes for cross-border creditors.

[37] Katrin Alegren-Benndorf, *Completing the Capital Markets Union: The Commission's Proposal for a Directive Harmonising Certain Aspects of Insolvency Law*, 17 January 2023 - https://europeanlawblog.eu/2023/01/17/completing-the-capital-markets-union-the-commissions-proposal-for-a-directive-harmonising-certain-aspects-of-insolvency-law/.

However, the process of harmonisation on all these levels is a long-term one, since convergence of insolvency rules must not compromise the coherence of national insolvency regimes with other parts of national legal systems either.

With regard to measures of *procedural efficiency and transparency* in regulation, these are primarily reflected in the matrix of the key elements of the insolvency regime, the transparency of the characteristics of this matrix being essential for debtors and creditors, in the sense of being able to assess the conditions of the onset of an insolvency procedure, but also its evolution. This configuration allows debtors to react effectively, even pre-emptively, and lenders to identify solutions. At the same time, regulatory transparency and consistency reduces uncertainty for lenders and especially for cross-border lenders, which translates into the willingness of these investors to lend to companies and lower financing costs. Incidentally, the Study *Deloitte/Grimaldi (2022)*[38] reports that insolvency experts assign considerable gains on the basis of uniform regulations, which automatically imply efficiency and transparency in the cross-border context, supporting the idea that these costs of informing cross-border investors are an important obstacle in practice. Under the new Directive, ensuring greater transparency of the main features of national insolvency proceedings to support cross-border creditors by allowing them to estimate what would happen if their investments were involved in insolvency proceedings would be achieved through easy access to this information in a predefined, comparable and user-friendly format. Member states should therefore develop and make available to the public a *standardised information document* with key information, essential document for potential investors to carry out a rapid assessment of the rules on insolvency proceedings in a given member state.

In addition to better transparency, which would encourage both creditors and debtors to use the most efficient toolkit to ensure a more efficient procedure, procedural rules should also be proportionate to a particular type of insolvent firm/company. In this respect, as a chain of these elements to streamline the insolvency procedure, among the measures that contribute to this streamlining there is also the need to implement some *simplified insolvency proceedings for SMEs*, which would make the insolvency regime more attractive to distressed borrowers. In general, cross-border lenders tend to be less exposed to SMEs, given the low transaction value compared to larger companies. However, there is an increase in interest in highly innovative start-ups. In addition, "intertwined" with other policy measures under way at EU level with the aim of increasing the visibility of SMEs in member states (such as the creation of the single European access point for company data), the number of cross-border lenders developing interest in SMEs is likely to increase in the future.

Starting from the premise that SMEs are the backbone of the EU economy, the need to implement simplified procedures remains a very tense, sensitive dimension of the insolvency matter, amplified by the entrepreneur's emotional attachment to the company, which, unlike the hired, emotionally detached manager, can generate a behavioral bias towards keeping the non-viable enterprise alive as much as possible, which reduces the recovery value. The new directive proposes a simplified special procedure for SMEs at EU level, eliminating the idea of derogations from existing general rules on insolvency proceedings. According to the harmonisation Directive, this

[38] Deloitte/Grimaldi (2022), *op. cit.* (*Study to support the preparation...).*

specific procedure should follow a flexible, modular approach in which the implicit winding-up process takes place with little formality and without the involvement of lawyers or insolvency practitioners. Additional elements, such as involving insolvency practitioners, could optionally be included at the request of the debtor or creditors, while keeping costs as low as possible. In order to make this procedure attractive to SMEs, the procedure would be automatically coupled with a discharge of debt, stating that the opening and carrying out of simplified winding-up proceedings cannot be refused on the grounds that the debtor has no assets, or their assets are not sufficient to cover the costs of simplified winding-up.

Perhaps the most innovative feature of the new Directive remains the introduction of this simplified winding-up procedure for SMEs, given that around 90% of all insolvency proceedings relate to micro-enterprises, which is why the practical impact of this new procedure will be significant.

It is still a thorny ground, as more flexibility often means fewer guarantees for vulnerable parties, which include cross-border lenders. It should be noted that the general trend outlined by the World Bank, UNCITRAL or the United States, is to simplify insolvency procedures for SMEs. Moreover, in recent years, the World Bank has raised awareness of the need to better address the insolvency needs of SMEs, on 2 April 2021 [39] releasing a revised edition of its *Principles for effective insolvency regimes*, principles covering issues as diverse as the role of courts and judicial training, business groups, effective cross-border insolvency protocols, but also targeting a particular area, namely *the need for flexible and efficient rescue and restructuring laws for SMEs.* This last area has indeed become a strong focus point on the agenda of international bodies such as OECD, INSOL International, UNCITRAL and the International Association of Insolvency Regulators, highlighting the fact that the formal insolvency procedures that prevail are designed primarily for larger companies. According to World Bank estimates, SMEs account for more than 95% of businesses and account for more than 60% of global employment, and the scale of these adverse effects is therefore particularly profound. The main difficulty remains finding the balance between implementing a simplified insolvency procedure for SMEs and protecting the rights of all stakeholders. On the one hand, there are relatively simple solutions, such as the introduction of standardised forms, electronic information packages, mediation or subsidised advice, but on the other hand, some issues remain controversial, such as the imposition of short deadlines for creditors.

As proof of the continuous interconnection and cooperation in the field of insolvency, a key element in the re-establishment of the world economy, we note that not only at the European level are efforts to reshape the insolvency institution and harmonize the legislation, but also at the international level, especially in the area of SME insolvency. In fact, numerous discussions and debates have been launched[40] which highlighted the need for an imminent instrument to help SMEs cope with the bottlenecks

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[39] Scott Atkins, Kai Adam Luck*, The New World Bank Insolvency Principles: Informal Workouts and MSE Insolvency Processes as Key Pillars of Economic and Financial Stability*, July 2021 - https://www.nortonrosefulbright.com/en-bi/knowledge/publications/ffbd7c0b/the-new-world-bank-insolvency-principles-informal-workouts-and-mse-insolvency-processes, last accessed on 14/11/2023.

[40] Jennifer Gant, *UNCITRAL Working Group V and a Simplified Insolvency Regime for MSEs*, Insol Europe – Inside Story (June 2021) - https://www.insol-europe.org/news/inside-stories, last accessed on 12/11/2023.

generated by the cascading crises of recent years. In this regard, the foundations were laid for the *Draft legislative guide on insolvency law for micro and small enterprises* [41], Working Group V of UNCITRAL providing after long efforts a model agreed by states and specialists for a simplified insolvency regime for microenterprises. The first full draft of the simplified insolvency regime was considered at the 56th session in Vienna in 2019, discussed and revised several times during the sessions that followed in 2020, with the last updated at the 59th session of the Working Group on 13-17 December 2021 in Vienna. This draft is largely based on similar concepts and provisions included in the legislative guide *UNCITRAL on insolvency law*[42], which was designed to provide *"a comprehensive statement of key objectives and principles that should be reflected in the insolvency laws of a state*".

The key objectives of the simplified insolvency law through the UNCITRAL guide filter aim at a fast, simple, flexible and low-cost insolvency procedure and easily accessible by SMEs. The regime also aims to promote the opportunity for a "fresh start" and a discharge of debtor obligations by agreeing and implementing a debt restructuring plan with creditors. According to this legislative guide produced under the aegis of UNCITRAL, states should provide for a simplified insolvency regime for SMEs and, under this aim, take into account the following key objectives[43]: "(a) the establishment of fast, simple, flexible and low-cost insolvency procedures for SMEs, hereinafter referred to as 'simplified insolvency procedures'; (b) making available and facilitating access to simplified insolvency procedures for micro, small and medium-sized enterprises (SMEs); (c) promoting a "fresh start" for the SME debtor by facilitating the liquidation of a non-viable SME and the reorganisation of a viable SME through simplified insolvency procedures; (d) ensuring the protection of persons affected by the simplified insolvency procedure, including creditors, employees and other stakeholders throughout the simplified insolvency procedure; (e) providing effective measures to facilitate the participation of creditors and other stakeholders in simplified insolvency procedures; (f) implementing an effective sanctions regime to prevent abuse or misuse of the simplified insolvency regime and imposing appropriate sanctions for misconduct; (g) addressing concerns about stigma due to insolvency; and (h) where reorganisation is feasible, preserving employment and investment".

The importance given to this sector of the economy represented by SMEs, also results from the establishment of a specialized group at UNCITRAL level, dedicated exclusively to the analysis and substantiation of recommendations to these enterprises. In this sense*, Working Group I: Micro, Small and Medium-sized Enterprises* managed at the 39th session, held in New York on February 13-17, 2023, to complete the review of the latest version of the *Guide on access to credit for Micro, Small and Medium-sized enterprises*[44], counting on the fact that SMEs contribute most to job creation and supply

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[41] *Draft legislative guide on insolvency law for micro and small enterprises*, https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/074/07/PDF/V2107407.pdf?OpenElement, last accessed on 12/11/2023.

[42] The UNCITRAL legislative guide on insolvency law can be found by accessing - https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law, last accessed on 12/11/2023.

[43] United Nations Commission on International Trade Law, Fifty-fourth session Vienna, 28 June–16 July 2021, *Report of Working Group V (Insolvency Law) on the work of its fifty-eighth session*, New York (online), 4–7 May 2021 - https://undocs.org/en/A/CN.9/1052.

[44] Draft Guide on access to credit for micro, small and medium-sized enterprises (MSMEs), 2023 - https://documents-dds-ny.un.org/doc/UNDOC/LTD/V22/186/87/PDF/V2218687.pdf?OpenElement.

chain development, entrepreneurship, innovation, the economy and social welfare. Moreover, the World Bank estimates that around 600 million jobs will be needed to absorb young people entering the labour market over the next 15 years, which is why supporting SMEs becomes crucial and requires priority for funding.

However, the UNCITRAL Guide does not provide any kind of binding harmonisation instrument, such as Directive no.1023/2019, but it can be a model to follow, already representing a prospect of legislative reform at European level.

Exploring the *soft-law* tools of UNCITRAL on the regulation of simplified insolvency proceedings for SMEs and mirroring them with European legislative instruments such as *hard-law,* we will find that there is one essential minus in the European instruments, namely the lack of regulation of a simplified judicial reorganisation procedure for SMEs. We confess that we had higher expectations from the European legislator regarding the regulation of SME insolvency. Unlike UNCITRAL, the European legislator proposes simplified procedures only in the liquidation area, in this regard Title VI - *Liquidation of insolvent microenterprises* - of the proposal for a Directive, as a quick and orderly way out of the market. However, this loophole in regulation, whether voluntary or forced, is in contrast to what has been intensively promoted in recent years by the Union bodies, namely the development of a "rescue culture" that relaunches the optics on the insolvency mechanism, to put "under the spotlight" the other side of this insolvency field, namely judicial reorganization.

De lege ferenda, it would be necessary for the European legislature to take over *simplified judicial reorganisation mechanisms for SMEs* proposed by UNCITRAL. In this sense, the UNCITRAL guide refers to "reorganization" as the process by which one can restore the financial well-being and viability of a business while continuing to operate, using various means, including debt erasure, debt rescheduling, debt-to-capital conversions, and the sale of the business (or parts thereof). Reorganisation in the case of SMEs will translate into a reduction, write-off or rescheduling of debt for which complex reorganisation steps usually envisaged for larger companies will not be required. It seems that the European legislator is stepping so timidly in this area of SME insolvency. A big disadvantage remains the fact that only a few member states of the European Union have adopted the UNCITRAL Model Law of 1997.

Going further with the analysis of the specific objectives of the proposal for a Directive on legislative harmonisation in the field of insolvency, we specify that *asset tracking actions*, among the important instruments for recovering the value of assets from the insolvent debtor's enterprise are actions for annulment of acts concluded by the debtor in defrauding its creditors, the calculation of the suspect period, the type of legal acts that may be subject to this cancellation, as well as the term within which such appeals can be filed, legislative side for which there are already some minimum standards but which differ considerably from one state to another. The new Directive establishes a minimum set of harmonised conditions for such fraudulent actions, with the minimum suspect period ranging from three months to four years prior to the filing of the application for the opening of insolvency proceedings. Thus, according to Chapter 2 of the Proposal for a Directive - *Specific conditions for actions for annulment* - member states must ensure that legal documents benefiting a creditor or a group of creditors may be declared void if they have been completed: (a) within three months before the application for the opening of insolvency proceedings has been lodged, provided that the

debtor has been unable to pay its debts reaching their maturity date; or (b) after the application for the opening of insolvency proceedings has been lodged. In this respect, the party who benefited from the legal act declared invalid is obliged to compensate in full the mass of the assets subject to the insolvency in question for the damage caused to the creditors by that legal act.

Another important tool for recovering the debtor's wealth is the tracing of property belonging to the debtor's estate. To this end, national legislation allows insolvency practitioners to gain access to bank account information and property information on the basis of national asset registers. The new Directive allows the insolvency practitioner to exercise in other member states the powers conferred by the law of the member state in which the main insolvency proceedings were opened.

On the "*pre-pack*" procedure, which aims to maximise the recovery value of the debtor's business at an early stage through the sale of the business, or part of it, rather than through piecemeal liquidation, the Directive comes with a plus, in the sense that unlike the preventive restructuring procedure, the "pre-pack" procedure will also be available to businesses that are already insolvent. The "pre-pack" procedure allows the preparation and negotiation of the sale of the business before the opening of formal insolvency proceedings, followed by a brief insolvency proceeding in which the court authorizes the sale and the proceeds are distributed among creditors. This "pre-pack" mechanism involves selling a business as an enterprise that has the ability to continue its business. At the same time, when transposing at national level, member states must ensure that the "pre-pack" procedures consist of the following two consecutive steps: (a) the preparatory stage, aimed at finding an appropriate buyer for the debtor's undertaking or part thereof, and (b) the liquidation stage, which is aimed at approving and executing the sale of the debtor's enterprise or part of it and distributing the proceeds received to creditors. The sales process is competitive, transparent, fair and complies with market standards. Moreover, during this period of completion of the "pre-pack" mechanism, the debtor can benefit from the suspension of forced execution actions.[45]

Other features of the proposed Directive concern the obligation of debtors to file an application for the opening of insolvency proceedings no later than three months after the occurrence of insolvency, failure to comply with this obligation attracting the liability of the debtor for the damages incurred. It also reinforces the idea of improving creditors' rights by representing them in creditors' committees, in which sense the Directive lays down minimum harmonisation rules, including the appointment of its members and the composition, working methods and functioning of the committee, as well as the personal liability of its members. Fair representation of creditors in the committee of creditors becomes extremely important with regard to unsecured creditors who are micro, small or medium-sized enterprises, which may also be exposed to insolvency if they are not paid promptly, and here we speak of the "domino effect". According to the proposal for a Directive, an adequate representation of these creditors in the committee of creditors could ensure that during the distribution of the recovered income they would receive their due shares more quickly. At the same time, an important task of the creditors' committee should be to verify that insolvency proceedings are conducted in a way that protects the interests of creditors, and that the role of the committee in monitoring the

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[45] Katrin Alegren-Benndorf, *op. cit. (Completing the Capital Markets Union...).*

fairness and integrity of proceedings can only be fulfilled effectively if the creditors' committee and its members act independently of the insolvency practitioner and are accountable only to the creditors who set it up.[46]

We will close the circle of analysis of this section with the question – *Is Europe Welcoming the New Commission's Proposal*?[47] Undoubtedly, the complexity of insolvency proceedings remains a huge challenge for all parties involved, especially regulators and decision makers. Through the new Directive, the legislator comes with a package of measures to intensify, accelerate the harmonisation process so dynamic at European and international level in the field of insolvency, aiming to strengthen the transparency of the national legislation on insolvency procedures, to simplify and streamline their specific mechanisms, focusing on the areas where it fails to unravel the complex reasons of dysfunctional insolvency procedures.

In general, stakeholders consulted[48] expressed support for greater convergence in the legal landscape of insolvency proceedings in the EU. The reality is that national insolvency regimes currently differ significantly in terms of the time it takes to wind up a company and the recoverable amount, but this does not necessarily imply that each proposed measure will be adopted, and there are voices criticising some of the measures proposed by the Directive. The negative echo is directed in particular at the proposal of the simplified winding-up procedure for SMEs. Although the need to simplify the procedure for microenterprises is obvious, its implementation could be problematic in practical terms given that for most member states it is a completely new procedure that requires new organisational structures at national level. In addition, the responsibilities previously exercised by the insolvency practitioner will be transferred to the court and the debtor, the debtor whose fidelity is preconditioned for the success of the new procedure. Since insolvency practitioners also act as investigators for the detection of the debtor's assets in order to be able to initiate actions for liability and actions for annulment, their disposal could result in a decrease in the recoverable value of the asset, with creditors not having sufficient access to the relevant information and documents necessary for the initiation of such actions. On the other hand, there are voices arguing that it is particularly difficult for SMEs to find investment partners, and more legal certainty for cross-border investors can only be welcomed. At the same time, some specialists believe that SMEs are allowed to bear a huge responsibility in simplified

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[46]https://data.consilium.europa.eu/doc/document/ST-15896-2022-INIT/ro/pdf, last accessed on 14/11/2023.

[47] *Harmonisation of EU Insolvency Law: Is Europe Welcoming the New Commission's Proposal*? - Faculty of Law Blogs/University of Oxford, 24 Martie 2023 - https://blogs.law.ox.ac.uk/oblb/blog-post/2023/03/harmonisation-eu-insolvency-law-europe-welcoming-new-commissions-proposal, last accessed on 14/11/2023.

[48] The Commission consulted stakeholders throughout the proposal preparation process. Thus: (i) organised an open public consultation for this purpose (18 December 2020 - 16 April 2021); (ii) consulted the public on an initial impact assessment (11 November 2020 - 9 December 2020); (iii) organised specialist meetings with experts from the member states on 22 March 2022 and on 25 October 2022; (iv) organised a specialist meeting with stakeholders on 8 March 2022. In response to the online public consultation, 129 contributions from 17 member states and the UK were submitted. One third of the responses were made on behalf of insolvency practitioners and professionals (this category includes insolvency practitioners as well as lawyers). About 20% of responses were submitted by financial sector stakeholders, about 12% by business and trade stakeholders, 7% by organisations of social and economic interest and 5.5% by members of the judiciary (judges). In addition, 10 responses (7.75 %) were received from public authorities in 8 member states, 7 of which coming from central government.

liquidation procedures, defending the danger of holding managers liable for unintentional mistakes in such rather complex insolvency procedures. At the same time, the lack of essential parameters for identifying improvements through “pre-pack” procedures is cited, and it is still unclear how these mechanisms can provide better efficiency than the usual insolvency procedure.

Some have also said that the proposal for a Directive is exaggerated and is at odds with the national insolvency law currently operating in the EU member states, while other experts have called for broader harmonisation proposals.[49] We ask ourselves, however, what degree of harmonisation has been achieved as a result of the efforts made so far by the Union bodies, given that very many member states have implemented these directives, recommendations in a selective way? In many countries business restructuring remains only aspiration and not reality, and this is confirmed by comparative studies conducted by numerous regional and international bodies.

It remains only to follow closely the evolution of the implementation of this European legal instrument and the dynamics of the harmonisation of insolvency legislation on the European and global “stage”, such a complex and branched field that will certainly continue to challenge the lawmaking capacity of judicial systems. We must admit that from a simple proposal to the assimilation, implementation and especially the awareness and sedimentation in the culture of a nation of new mechanisms of insolvency, represents a tortuous, thorny road, but which nevertheless opens horizons for the better.

4. “Cross” visions on insolvency regimes. Exploring regulatory models in the European Union, the US, the Dominican Republic or Saudi Arabia that can help to legally secure cross-border investments

Although insolvency rules remain fragmented along national borders, we want to maintain our optimism, driven, moreover, by the scale of Union and international insolvency reforms, an area “centrifuged” at an accelerated pace by significant regulatory revisions for a good period of time. This accelerated concern to resize the field of insolvency, demonstrates once again its importance in relaunching a globalized, digitized economy. All these reforms bring insolvency law closer to international standards and stimulate Union cooperation, as harmonised laws facilitate cross-border business operations.

It is important to be aware that differences between national regimes create legal uncertainty regarding the outcome of insolvency proceedings and lead to higher information and advice costs for cross-border creditors compared to those operating only at national level. The European Banking Authority[50] conducted a large-scale study of the insolvency landscape at EU level in 2020, finding that the results of insolvency proceedings differ substantially from one member state to another, with the average recovery period ranging, for example, from 0.6 to 7 years and court costs ranging from

[49] David Haberle, *SMEunited’s ambivalent reaction to proposal for a Directive harmonising certain aspects of insolvency law,* 17 March 2023, available by accessing - https://www.smeunited.eu/news/smeuniteds-ambivalent-reaction-to-proposal-for-a-directive-harmonising-certain-aspects-of-insolvency-law, last accessed on 14/11/2023.

[50] See the European Banking Authority, *Report on the benchmarking of national loan enforcing frameworks*, 2020, EBA/REP/2020/29 - https://www.eba.europa.eu/sites/default/documents/.

0 to over 10 %. At the same time, the average recovery of business loans in the EU was 40% in 2018 and 34% for small and medium-sized enterprises (SMEs). These determinants, such as low recovery values, long insolvency proceedings and high costs, impact not only the efficiency of winding up a business, but in particular cross-border investments, representing a primary consideration for investors or creditors when determining the level of risk premium they expect to recover from an investment. Cross-border investors are effectively forced to take into account 27 different insolvency regimes when assessing an investment opportunity outside their home member state, which certainly discourages them from investing in member states whose legal systems are less familiar to them.

Moreover, the conditions of competition are losing their fairness in such a context in which similar investments in member states with more efficient insolvency regimes will be considered more attractive than those in member states with less efficient insolvency regimes, which creates a huge "precipice" in the way of the cross-border flow of capital and the functioning of the EU single capital market. At the same time, companies in those member states with more efficient and transparent insolvency frameworks have a greater chance of gaining access to finance, which gives them a competitive advantage compared to companies in other member states. According to the European Banking Authority's survey, of the 120,000-150,000 annual insolvency cases in the EU between 10 and 20% contained a cross-border provision of credit. Of course, the Covid crisis can distort a little the information and results obtained in 2020, thanks to the "buffer" measures to stabilize the economy that have persisted in a differentiated manner at the level of the states.

From the same negative perspective of differences in legal regimes, we must point out that some member states do not open insolvency proceedings if the available assets are less than the cost of the proceedings, a practice that reduces the judicial burden. And we can give as an example Belgium, Germany, Spain, Greece, Italy or Austria. The German Federal Statistical Office published, for example, detailed data on the distribution of insolvency cases among corporations in 2021, revealing that almost 30% of insolvency applications were rejected, most often for those with claims under EUR 5,000.[51] The draft Directive seeks to remove such discriminatory national regulations.

The study *Deloitte/Grimaldi on the impact of specific business insolvency measures on the recovery of the value and efficiency of insolvency proceedings*[52], commissioned by the European Commission to strengthen the "foundation" of the new proposal for a Directive, provides a general description of the insolvency frameworks in the member states, ticking off recent reforms related to the insolvency regime, many of the reform elements referring to the transposition of the EU restructuring directive 2019/1023.

We will find that this "design" of insolvency regimes is extremely varied. For example, the Danish Bankruptcy Act (DBA) provides for the following insolvency regimes: restructuring, bankruptcy and rescheduling of debts. The restructuring and bankruptcy regime is available to both insolvent individuals and legal entities (companies), while the debt rescheduling regime is only available to individuals. A

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[51] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022SC0395&qid=1678380246652, last accessed on 10/11/2023.

[52] Deloitte/Grimaldi (2022), *op. cit. (Study to support the preparation...).*

scheme familiar to Romania, for example, we find in Estonia, Estonian legislation regulating three different insolvency procedures: bankruptcy procedures, reorganization procedures and debt restructuring procedures. Bankruptcy proceedings are governed by the Bankruptcy Act (BA), the rules covering reorganization are set out in the Reorganization Act (RA), and the rules for debt restructuring are set out in the debt restructuring and Debt Protection Act (DPA), but in Estonia there is no unification into one single *corpus,* insolvency code of these insolvency mechanisms, as the Romanian legislator did. In Finland, insolvency laws regulate: corporate restructuring; bankruptcy; seizure and restructuring of private debts. For companies, Finnish law recognises two statutory forms of insolvency proceedings, namely corporate restructuring (i.e. company reorganisation) and bankruptcy (i.e. compulsory liquidation).

In France, any person exercising a commercial or craft activity, any farmer, any other natural person exercising a self-employed activity, including a liberal profession, and any entity governed by private law may be subject to safeguard, judicial reorganisation or judicial liquidation proceedings. Safeguard procedures are opened in the event that the debtor is experiencing insurmountable difficulties, but has not yet reached the stage of termination of payments.

The Grand Duchy of Luxembourg has managed to regulate several types of insolvency proceedings, three of which apply only to traders, individuals and legal entities, respectively: the bankruptcy procedure; the arrangement with creditors procedure and the judicial reorganization procedure. In addition to these procedures, Luxembourg law provides for a procedure whereby traders can obtain the suspension of payments under certain conditions. A fourth procedure is open only to individuals who are not traders: this is the over-indebtedness procedure.

Insolvency reforms in EU member states have often been the prerogative of an economic adjustment programme, in many cases also covering reforms to restructuring and out-of-court enforcement procedures. For example, there were reforms introduced in the context of economic adjustment programs in *Greece, Portugal, Cyprus, Romania or Latvia*.

In *Greece*, a number of legislative initiatives taken in 2015-2018 have improved tendering procedures, with a new integrated corporate and personal insolvency framework being adopted in October 2020. Thus, Greece has a single legal framework for effective procedures, especially in the area of preventive restructuring. New Greek Law no. 4738/2020, entitled "Debt settlement and facilitating a second chance", entered into force on 1 January 2021, regulates an electronic early warning mechanism that classifies debtors into three levels of insolvency risk, respectively low, medium or high and is supervised by the special secretariat for Secretariat for Private Debt Management, being designed for both natural and legal persons. This tool can identify circumstances that could make the debtor insolvent. Greece has implemented the out-of-court debt relief mechanism that replaces the procedure of existing Greek Law no. 4469/2017. The process can also be initiated by creditors through an invitation to debtors to submit an application within 45 days. Applications for out-of-court settlement are submitted digitally to the special Secretariat for Private Debt Management via an electronic platform. The platforms in the new insolvency framework have gradually started to deliver results, especially in out-of-court settlements, with further improvements being worked on.

And *Portugal* has enjoyed the reform of the insolvency law since the spring of 2012, facilitating the rapid resolution of insolvency cases both in court and out of court. However, the insolvency framework required further changes to improve the process of corporate rescue and restructuring, which is why in 2017 the use of electronic means was expanded, while the possibility for creditors to choose the insolvency practitioner was restricted to complex cases. In 2022, Law no. 9/2022 aimed at simplifying insolvency court proceedings, in particular the processing of verification and hierarchy of creditors' claims. Further legislative measures are planned in the coming period to streamline and speed up insolvency processes in Portugal. The review of the legal framework for insolvency and recovery is also part of a broader reform envisioned in the country's national recovery and resilience Plan.

In *Cyprus* a legislative package on insolvency proceedings was introduced in 2015, but a new legislative package was introduced in July 2018 to make the measures more effective. Thus, electronic tenders were introduced in 2019, and recently Cyprus' recovery and resilience Plan included a reform to strengthen existing systems and introduce new ones to create efficiency through digitisation.

Latvia enjoyed a new insolvency Law in 2010, which concerns both legal entities and individuals, following international best practice. The Law underwent changes in 2015, with efforts being made to reduce the duration of insolvency proceedings by introducing electronic auctions. At the same time, a review of the legal framework in 2016 aimed to improve the accountability and public oversight of administrators in insolvency proceedings.

And here we come to *Romania*, which according to the 2022 Deloitte/Grimaldi study adopted a new insolvency and bankruptcy Law in June 2014, and in May 2015 a new personal insolvency law was introduced, which came into force in December 2015, building on good international practice and including more balanced provisions for both debtors and creditors. Perhaps we are subjective, but the exposition of the study is so succinct in relation to the explosion of modifications and the "effervescent palette" of mechanisms favorable to the development of a culture of salvation that the Romanian legislator has managed to implement over the past years.

Without exaggerating, the current insolvency law, Law no. 85/2014, is considered in the literature, rightly, a genuine *Insolvency code*[53] which encapsulates in a *common corpus* all insolvency legislation, i.e. general legislation applicable to all economic operators, special legislation applicable to credit institutions and insurance companies, groups of companies, as well as regulations on cross-border insolvency, plus insolvency prevention instruments. Currently, Law no. 85/2014 lists thirteen principles taken from the World Bank principles, the European insolvency principles and the UNCITRAL Insolvency guide. Their integrative function reflects the interest of the Romanian legislator to implement internally the entire "architecture of insolvency", as these principles are found *in globo* in the normative structure of the Insolvency Code, definitely adapted to the differences in structure, purpose, concepts and formulations. At the same time, Romania extended the scope of insolvency to individuals[54], but also to

[53] For development see Diana Maria Ilie, *op. cit. (The effects of insolvency on the economic...)*, chapter "*Direction of expansion of the phenomenon "nsolvency" - shaping the new code of insolvency through the current economic and social filter*", pp. 22-26.

[54] Ionel Didea, Ramona Duminică, Diana Maria Ilie, *The Insolvency of the Natural Person - Forgotten*

administrative-territorial units[55].

We must remind here that the Romanian insolvency legislation also entered a "time loop" for the protection of debtors in difficulty during the Covid-19 pandemic,[56] the legislature allocating Section 8 of Law no. 55 of 15 May 2020 on some measures to prevent and combat the effects of the COVID-19 pandemic[57], exclusive to insolvency matters. This was followed by Law no. 113/2020 regarding the approval of the Emergency Ordinance of the Government (GEO) no. 88/2018 for amending and supplementing some normative acts in the field of insolvency and other normative acts.[58] Law no. 55/2020[59] was only the start of the legislative reform of the insolvency matter, as part of the measures initially ordered only for the period of the alert state were subsequently taken over by Law no. 113/2020, which gave them the definitive character in the Insolvency Code - Law no. 85/2014.

Law no. 113/2020[60] created, in reality, the legislative framework necessary to

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Realm in Romania? New Trends in Approaching Consumer Over-indebtedness - comparative Law, Journal of Law and Administrative Sciences, No.16/2021, p. 11-38, http://jolas.ro/wp-content/uploads/2021/12/jolas16a2.pdf

55 See Ionel Didea, Diana Maria Ilie, *Legal regime applicable to the Insolvency of the Administrative-Territorial Units in Romania. Comparative law aspects - Colombia, Hungary, South Africa, Switzerland and the United States*, Journal of Law and Administrative Sciences, 18/2022, pp. 1-23, https://jolas.ro/wp-content/uploads/2022/12/jolas18a8.pdf.

56 For a detailed overview of the changes made by Law no. 55/2020, respectively by Law no. 113/2020 on Law No. 85/2014, see Ionel Didea, Diana Maria Ilie*, Covid-19 – the catalyst of a legislative reform in the field of insolvency*, article delivered at the tenth edition of the International Conference "Perspectives of Business Law in the Third Millennium" and published in the book Thierry Bonneau, Cristina Elena Popa Tache (eds.), *Innovation and Development in Business Law. Contributions to the 10th International Conference Perspectives of Business Law in the Third Millennium*, ADJURIS – International Academic Publisher, Bucharest, January 2021, p. 112-134, https://www.adjuris.ro/reviste/idbl/Innovation%20and%20Development%20in%20Business%20Law.pdf.

57 Published in the Official Journal no. 396 of 15 May 2020.

58 Published in the Official Journal no. 600 of 8 July 2020.

59 Measures regulated by Law no. 55/2020 concerned, among other things, a suspension of art. 66 of the Insolvency Code - Law no. 85/2014 on insolvency prevention and insolvency proceedings, in the sense that the debtor no longer had the obligation to file an application for the opening of insolvency proceedings during the alert state, but this option was not restricted either, the legislator leaving to the discretion of the insolvent debtor the possibility to choose between requesting the closure of the proceedings, either during the alert state or after its expiration. At the same time, the law promoted the insolvency prevention procedures, especially the arrangement with creditors, by providing longer deadlines for the elaboration of the arrangement with creditors offer, but also by conditioning the creditors of the prior negotiation with the debtor, proven, moreover, by documents, before requesting the opening of the insolvency procedure. Thus, during the alert period, the legislator added a new condition for creditors to be able to request the opening of insolvency proceedings, namely the proof that they tried to conclude a payment agreement with the debtor. In addition to extending specific deadlines for the pre-trial arrangement with creditors procedure, the legislator also opted for extending certain deadlines of the insolvency procedure itself, namely the duration of the observation period and the reorganization plan.

60 Amendments to Law no. 113/2020 that produced the biggest echo are represented, on the one hand, by the elimination of the right of current creditors holding a debt above the threshold value, with a maturity of more than 60 days, to execute the debtor by force, and on the other hand, by the elimination of the condition on the existence of a tax claim below 50% of the total declared claims of the debtor, in the situation in which the application for the opening of insolvency proceedings is brought by the debtor. Basically, insolvency regained its meaning and purpose for which it was regulated and ended a chapter in the history of this procedure, a chapter that meant the suffocation of the courts with litigation, the pressure exerted abusively by the current creditors, especially the fiscal ones, the increase in the number of bankruptcies and the loss

transpose at domestic level of the EU Directive 1023/2019 *for preventive restructuring frameworks, on discharge of debt and disqualifications*, based on *Law no. 216/2022* [61] *to amend and supplement Law no. 85/2014 on insolvency prevention and insolvency procedures and other normative acts*, thus ensuring a modern support for the practice of insolvency.

This chain of legislative reforms at national level triggered an important alignment for Romania to the requirements of the European Union, optimizing three important levels, namely the introduction of innovative concepts such as early warning and resizing the concept of debtor in difficulty, early restructuring through pre-insolvency procedures, respectively the restructuring agreement and the arrangement with creditors, applicable to the subjects of the restructuring still viable from the economic point of view, but also the judicial reorganization from the stage of insolvency, by introducing elements that shape the culture of prevention and rescue in business.

Consequently, we are proud to note that at national level insolvency law has emerged upward and reached a modern regulatory stage in the European legal landscape, harmonised with European norms and international principles. As we said, in recent years the insolvency law has reached an advanced stage of development, becoming a stand-alone law, which aspires to unify and consolidate a complex and complete insolvency code that, in our opinion, should incorporate in a common corpus the entire insolvency legislation, and we refer here also to the norms of *Law no. 151/2015 on insolvency of natural persons* and the rules on *insolvency of administrative-territorial units, regulated by Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016*, which encompasses the regulatory field of insolvency in Romania.

Continuing with the brief description of the general insolvency frameworks in the EU member states, we will find that these interconnected crises have triggered legislative reform initiatives in most states, generating significant degrees of legal alignment, and ultimately, *a phenomenon of natural convergence.*

Belgium has also seen a strong rise in the field of insolvency, in this country already being regulated a code of economic law that includes through what is called Book XX and the field of insolvency. For example, the legal system in Belgium today offers the possibility to approach three forms of judicial reorganization, namely reorganization by mutual agreement ("*Réorganisation par accord amiable*"), reorganization by collective agreement („*Réorganisation par accord collectif*") and reorganization by transfer ("*Réorganisation par transfert*")[62]. What has drawn our attention in the case of these reorganisation procedures is the possibility of obtaining a "patent of honour" by the Belgian debtor who has successfully applied a reorganisation plan, in practice it is very important to formally establish that the insolvency has been

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of confidence in the insolvency procedure. Another major change brought by Law no. 113/2020 is the one regarding the increase of the threshold value, from lei 40,000 to lei 50,000, an amount provided for both creditors and the debtor in order to open the insolvency procedure. Moreover, the threshold value was increased to lei 50,000 also during the alert period for debtors who interrupted their activity in whole or in part, based on Law no. 55/2020 on some measures to prevent and combat the effects of the Covid-19 pandemic, a measure that has now become permanent.

[61] Published in the Official Journal no. 709 of 14 July 2022, date of entry into force: 17 July 2022.

[62] Cedric Alter, Zoe Pletinckx, *Depistage, mesures provisoires et reorganisation judiciaire (nouvelles dispositions)*, in Cedric Alter (coordinateur), *Le nouveau livre XX du Code de droit economique consacre a l'insolvabilite des entreprises*, Larcier, Bruxelles, 2018, pp. 133-152.

successfully concluded. Moreover, in Belgium we are talking about a heightened concern and a legislative avalanche in the restructuring area, on 1 September 2023 the Belgian legal framework on insolvency underwent a new reform. This legislative reform amends Book XX of the Code of economic law by introducing new procedures for reorganizing and amending the conditions for the application of certain existing procedures. Among other goals, the new rules aim to give struggling companies a wider range of *custom restructuring instruments* to protect their assets or businesses. At the same time, in addition to the implementation of the EU restructuring Directive 2019/2023, the Law of 2023 - *The New Belgian Restructuring Law* - introduces other novelties aimed at improving existing restructuring instruments. Some of these new procedures are accessible to both the ailing company and its creditors. This not only gives the debtor an expanded set of instruments, but also gives creditors increased initiative rights. The new Belgian restructuring law innovates by allowing an amicable settlement with only one lender instead of at least two, as previously agreed. In addition, the court may impose a (mandatory) payment plan on creditors with whom an amicable settlement could not be concluded. Also interesting is the "transfer of business" approach in Belgium, the transfer under judicial authority continuing to allow a transfer of business without obliging the transferee to take over all employees, insofar as technical, organizational and economic reasons support the low number of employees. The Court may refuse the transfer if these grounds are not transaparent. In fact, the European Court of Justice has ruled in several decisions (*Smallssteps*[63]*, Plessers and Heiploeg*[64]) that the Belgian insolvency regime could violate *EU Council Directive 2001/23/EC on the protection of employees' rights in case of business transfers.* However, the new Belgian restructuring law allows the transferee to choose which part of the business and the transferred employees will take over, as long as clear, transparent and reasoned technical, organisational and economic selection criteria are applied. Moreover, according to the latest case law of the European Court of Justice, the transferee is not obliged to take over all employees in the framework of "pre-pack" procedures.

The Belgian insolvency legal regime represents an example of reform in the direction of supporting the restructuring and judicial reorganization of debtors in difficulty and from the innovative perspective of the tax regime approach, in the sense that the legislator considers that a reorganization leading to a debt reduction will automatically generate an extraordinary profit subject to corporation tax in the hands of a Belgian corporate debtor. Thus, in order not to jeopardise a successful judicial reorganisation due to the negative tax consequences triggered by such debt relief, a tax deduction was introduced both on the income of the debtor in the reorganisation and on the income of the Belgian corporate creditor who waives his claim, benefiting from more relaxed conditions for the tax deductibility of the impairment of his claim. Currently, Belgian tax law has not (yet) been adapted to the new provisions of the economic Law Code, creating some uncertainty about the application of special tax regimes to the new private restructuring procedures, and a legislative amendment is expected to align the

[63] Judgment of the Court (Third Chamber), 22 June 2017, https://curia.europa.eu/juris/document/document.jsf?text=&docid=192065&doclang=EN, last accessed on 12/11/2023.

[64] Judgment of the Court (Third Chamber), 28 April 2022, https://curia.europa.eu/juris/document/document.jsf;jsessionid=1792650BC99377132C48BC4EAA6743CF?text=&docid=258484&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=992342, last accessed on 12/11/2023.

scope of special tax regimes with the restructuring procedures introduced by the new Belgian restructuring law[65].

The impulse for making insolvency proceedings more efficient was not only associated with countries under a macroeconomic adjustment programme. Several countries facing challenges related to their "stock" of non-performing loans received specific recommendations to expressly increase the efficiency and speed of their insolvency and recovery procedures and to facilitate debt restructuring and/or out-of-court settlement. Among these countries are *Croatia, Bulgaria, Italy, Slovenia, Spain and Hungary.*

In *Croatia,* the Bankruptcy Act (BA), in force since 2015, is the main law governing the insolvency of enterprises, including individual entrepreneurs, also improving the pre-insolvency procedure. More recently, Croatia's recovery and resilience Plan has included a reform to amend the Bankruptcy Law and Consumer Insolvency Law in 2022, with the aim of ensuring greater efficiency in insolvency proceedings.

Bulgaria also introduced a new legislation on corporate restructuring, which entered into force on 1 July 2017, but was lacunar in the aspect of several important elements, which is why in 2019 a roadmap on the insolvency and bankruptcy stabilization framework was adopted, aimed at amending the Commercial Law, while also requiring legislative harmoniaation under Directive 2019/1023. This was also reflected as a distinct reform in the country's national recovery and resilience Plan.

Also, *Slovenia* completed the reform of its insolvency framework in 2014, allowing more restructuring opportunities for companies in financial difficulties.

In *Italy*, the government completed in early 2019 the reform of the insolvency framework, but its entry into force was postponed to 2022 due to the impact of the pandemic. Further improvements to the insolvency framework have been incorporated as an effect of the Italian recovery and resilience Plan, and a new agreement/arrangement out-of-court restructuring, the so-called "*Composizione negoziata*". The new arrangement introduces the possibility for the debtor to turn to an independent expert to propose a negotiated procedure with creditors. In addition, between August and December 2021, Italy took various legislative and administrative decisions to accompany the new out-of-court restructuring agreement/arrangement. As a result, an online platform for out-of-court dispute resolution was put into operation in November 2021, allowing document exchanges between debtors and creditors, and automated restructuring procedures were introduced for debts under EUR 30,000.

Due to these periods marked by the crisis, *Spain* is also one of the countries that has had to reform the Insolvency Code four times, namely in 2009, in 2012 and twice in 2014, the aim being to reduce the duration of insolvency proceedings and increase the percentage of successful reorganizations. In 2015, another reform of the Code was approved, with the aim of solving the problems of over-indebtedness of individuals, by giving a second chance involving the cancellation of debts that these debtors cannot pay, of course, under the empire of fulfilling certain requirements. More recently, Spain has included in its national recovery and resilience Plan further amendments to the Insolvency Law, finalised in 2022, aimed at making the procedure for granting second

[65] *Deep dive into the new Belgian Restructuring Law*, 05/09/2023 - https://www.loyensloeff.com/insights/news--events/news/upcoming-reform-of-belgian-restructuring-procedures/, last accessed on 13/11/2023.

chances to individuals more efficient, while at the same time establishing a special, faster and more cost-effective procedure for SMEs, fully processed by electronic means.

A number of reforms in the area of insolvency have been announced in member states' recovery and resilience Plans, with many of the reform elements referring, however, to the transposition of restructuring Directive 2019/1023, i.e. the creation of early warning tools or out-of-court procedures, areas not covered by the current Commission initiative, i.e. the proposal for a Directive of December 2022 aimed at speeding up harmonisation in particular of insolvency proceedings themselves.

By staying in this area of restructuring, as the new identity of insolvency, we are trying to get out of the area of the European Union a little bit and turn our attention to *Dominican Republic,* from the perspective of the benchmarks of the legal framework and the practice of restructuring and insolvency.

The Dominican Republic benefits from a relatively recent law, respectively *Law no. 141-15 on restructuring and liquidation of trading companies and businessmen*, promulgated in August 2015, entering into force on 7 February 2017 after a transitional period of 18 months. According to this law, the debtor can only ask the court to open the judicial reorganization procedure when it faces imminent insolvency, unlike, for example, the USA, where debtors based in that territory can file a voluntary reorganization application without the company being in a state of actual insolvency. It is presumed that the debtor is insolvent if it has exceeded a period of 90 days from the date on which the debts are certain, liquid and due, an important advantage in favor of the Dominican debtor being the fact that it cannot pass the stage of judicial reorganization against the will of the debtor, at the request of the creditors. Only the lack of cooperation of the debtor, the lack of a feasible reorganization plan or failure to implement can lead to the initiation of bankruptcy proceedings, in order to avoid a decrease in the value of the mass of assets ("ice cube melting phenomenon"). At the same time, the Dominican insolvency law has ordered the establishment of specialized sections for the trial of insolvency proceedings, with exclusive competence over all measures arising from the conduct of a judicial reorganization or liquidation procedure (including precautionary measures, safeguarding of assets, claims on assets that are the subject of the debtor's assets, suspension of forced execution proceedings, etc.), procedures that are intended to be accelerated. Of course, the Dominican insolvency law also regulated the legal suspension of judicial, extrajudicial and forced execution actions for the realization of claims, including salary claims, the suspension operating from the date of the opening of the insolvency procedure.

Dominican doctrine[66] points out that insolvency proceedings still face various gaps in the law that the courts have covered by recourse to comparative law, in most cases to Spanish and Colombian doctrine and jurisprudence, and a draft law is currently in progress to amend law enforcement Rules 141-15. However, the Dominican insolvency law of 2015, applicable in 2017, represents a first step towards modernising this area and opening new horizons to cross-border investment.

Returning to one of the special objectives of the proposal for an EU Directive, namely the implementation of simplified insolvency procedures for SMEs, objectives

[66] Pamela Benzán Arbaje, *Highlights of the Restructuring and Insolvency legal framework and practice in the Dominican Republic,* INSOL I-READ Student Newsletter, ISSUE 8, June 2023 - https://email.insol.org/4WAM-TZZ6-283F4B840858D2322ZC2NH4D2BDF44F20FD96E/cr.aspx, last accessed on 14/11/2023.

which have already been achieved by several EU member states as we have observed above, we will continue to focus on the measures adopted by *USA* in this direction. As we said, in order to flatten the insolvency curve, it is essential that in the future SMEs can benefit from a simplified insolvency regime, in particular a simplified judicial reorganisation procedure. We consider it an urgent and absolutely necessary measure, promoted at international level by UNCITRAL since 2019, ordered by the USA since 2020 and taken over here by the EU, to be implemented through a legal instrument of the type *hard-law* - proposal for a Directive on the harmonisation of insolvency. We have to admit that Directive no.1023/2019 on restructuring, already implemented in the national laws of the member states, has paved the way for a special regulatory framework for SMEs in insolvency matters. For example, the Romanian legislator came to their support through *Transposition Law no. 216 of 14 July 2022 for amending and supplementing Law no. 85/2014 on insolvency prevention and insolvency procedures and other normative acts* but only in the prevention area. Here, too, we are considering the possibility for SMEs with a turnover below EUR 500,000 to benefit from an entirely out-of-court solution by concluding a restructuring agreement that "coagulates" the unanimity of the votes of the affected creditors.

The Covid pandemic has also caused a strong echo in the United States of America, which have facilitated the restructuring of SMEs since February 2020 by introducing the *Small Business Reorganization Act*. Thus, the Small Business Reorganization Act introduced subchapter V to Chapter 11 of the U.S. insolvency code, which became the necessary framework for a simplified and cost-effective path to the reorganization of SMEs.[67] Prior to the entry into force of this law, SMEs generally had two insolvency options: the application of Chapter 7 on liquidation and the well-known Chapter 11 applying the reorganisation procedure to allow SMEs to remain in the economic circuit. However, the legislator considered that the approach of a traditional Chapter 11 reorganization could present real financial obstacles for an SME to recover, debtors being subject to significant obligations during the reorganization period, which is why it regulated a more likely path to the success of a reorganization plan undertaken by the SME debtor.

Subchapter V of the US insolvency code thus offers debtor SMEs many benefits compared to traditional Chapter 11 on insolvency, including the fact that the debtor SMEs has the exclusive right to propose a restructuring plan, as well as the right to an accelerated plan approval process. Such a plan must generally be submitted within 90 days from the date of submission of the application to open the procedure. It also excludes the absolute priority rule, applicable for traditional Chapter 11 cases, as well as the requirement that at least one disadvantaged class vote in favour of the plan, which can save the SME. At the same time, the debtor SME may pay administrative expenses, such as legal fees and fees for other professionals and advisers, during the reorganization plan, this feature not being available to other debtors who do not fall into the SME

[67] Maja Zerjal Fink, Justin Imperato, *Subchapter V of Chapter 11 of the U.S. Bankruptcy Code: A Framework for A Streamlined, Cost-Effective Path to SME Reorganization*, INSOL I-READ Student Newsletter, ISSUE 8, June 2023 - https://i.emlfiles4.com/cmpdoc/8/7/4/8/2/2/files/37427_spotlight-sme_chapter-11-of-u.s.-bankcruptcy-code_insol-i-read_june2023.pdf?utm_campaign=1399650_Student%20Newsletter%20June%2023&utm_medium=email&utm_source=INSOL%20International&dm_i=4WAM,TZZ6,2ZC2NH,3RC9P,1, last accessed on 14/11/2023.

category, since the administrative expenses must be paid at the date of entry into force of the reorganization plan. As regards creditor committees, they will be appointed only if deemed imperative by the court, which also contributes to a substantial saving of case management for an SME. SMEs, however, receive assistance from a qualified person with experience in SME management, called "*Subchapter V Trustee*".

The implications and interpretations of the provisions of subchapter V continue to evolve, but its purpose is undeniably positive and offers SMEs a revolutionary, courageous and committed tool to survive in times of crisis, an instrument that can also become an example for EU member states, the Union bodies barely outlining timidly mechanisms for simplifying liquidation procedures for SMEs, but not judicial reorganization. Or, in our opinion, SMEs need more than multinationals the chance of a time scheduling, debt elimination and suspension of enforcement by implementing a judicial reorganization plan that would allow them a new start – "fresh start". Indeed, in relation to the key element of our research, namely cross-border investments, we must admit that until now foreign lenders have invested in small companies quite rarely. However, there is an increase in interest in innovative businesses with high potential for expansion.

USA have thus succeeded in reducing the complexity and costs of an insolvency procedure, this simplified insolvency procedure dedicated to SMEs being innovative in that it deviates from the standard procedures controlled by creditors, in which the reorganisation plan must be approved by the majority of participating creditors, thus giving the court extensive power to limit cases of dissent and encouraging voluntary agreements between creditors and debtors. The initial debt ceiling was set at around $ 2.7 million, but was temporarily raised to $ 7.5 million during the pandemic to allow as many debtors as possible to access these easy restructuring and reorganization mechanisms.

If we turn our attention to the Muslim world, we will notice that on these lands, too, insolvency is in a legislative effervescence, being connected to modern international instruments to approach the legal regime of insolvency. An example of this is *Saudi Arabia,* which as recently as 16 December 2022, implemented *UNCITRAL's model law on cross-border insolvency* (MLCBI), being the 56th state to adopt this international legal instrument of the type *soft-law.* This national legislative reform certainly offers new perspectives on cross-border insolvency cases, all the more so since before 2018 Saudi Arabia was "poor" in having a comprehensive, complex and modern insolvency framework as it is today. This fragmented approach to insolvency has made the liquidation procedure confusing for business and has also blocked cross-border investment in Saudi Arabia.

Thus, the first step in reforming the legal framework of insolvency was taken in 2018, when the new insolvency law replaced the bankruptcy section of the Commercial Law, which was an old law passed in 1931, and the "preventive insolvency" regulation of the bankruptcy law, issued in 1996, creating a uniform set of rules applicable to all companies, regardless of their size. At the same time, in December 2022, the trade minister issued *Resolution no. 149 establishing the rules governing cross-border insolvency proceedings*, rules that represent a significant departure from the previous framework, mainly because such regulations did not exist before in Saudi Arabia's legal "infrastructure". The new MLCBI-based rules provide a structured system for dealing

with cross-border insolvency, through transparent and predictable regulation for handling such cases, facilitating cooperation between Saudi courts and foreign courts or foreign representatives. The new legal framework for cross-border insolvency also promotes legal certainty for trade and investment, as well as the protection of the rights of creditors and debtors in cross-border proceedings. How is this achieved? Through various forms of assistance, such as: temporary legal aid to foreign officials prior to a formal application for recognition of foreign insolvency proceedings, collection of evidence or information relating to the debtor's assets, rights or obligations, authorisation of the designated person in the country where the debtor has its principal place of business to pursue the debtor's assets in Saudi Arabia, in particular if the assets are at risk of being depreciated or lost, suspension of rights upon admission of the application for recognition of foreign main insolvency proceedings, such as: suspension of the right to take or complete any action against the debtor's assets, rights or obligations-opened insolvency proceedings recognised in Saudi Arabia, suspension of forced execution of any property of the debtor, suspension of the debtor's right to transfer, mortgage or dispose of any of its assets, authorisation of the foreign trustee appointed by the court to manage or dispose of some or all of the assets of the debtor in Saudi Arabia, distribution of the proceeds from the sale of the assets of the debtor in Saudi Arabia, provided that the interests of its creditors are sufficiently protected, and any other proceedings or actions that may be taken under law.[68]

However, it is essential that any request for assistance does not contravene Saudi public policy, with the court having the power to refuse any action that contradicts public policy, in order to protect moral values and standards, ensuring that the implementation of new rules does not disturb or contradict these aspects.

Certainly, the establishment of clear rules for cross-border insolvency now provides more clarity, security and predictability to foreign investors, making Saudi Arabia an even more attractive country for such investments. Improving business confidence will boost the confidence of foreign investors, encourage entrepreneurship, international cooperation in a globalized, interconnected economy, providing a safe, fast, fair and transparent solution for dealing with cross-border insolvency cases.

5. Conclusions

This "game" of global reset, with a major impact on the transformation and metamorphosis of the laws of the member states, will have as always in history, both winners and losers. If we manage to "embrace" innovation, but not only as an element of research and development, but as an element of *mood* of society and of the individual, we will be among those who win, otherwise, we will inevitably find ourselves on the list of victims of these fulminant multidimensional transformations. It is essential to act at a rapid pace in terms of legislative reform, being constantly connected to the sometimes-subtle transformations at global level, to the multifaceted Union and international

[68] Mohammed Negm, *Implementation of the MLCBI in Saudi Arabia*, INSOL I-READ Student Newsletter, Issue 8, June 2023 - https://i.emlfiles4.com/cmpdoc/8/7/4/8/2/2/files/37427_spotlight-sme_chapter-11-of-u.s.-bankcruptcy-code_insol-iread_june2023.pdf?utm_campaign=1399650_Student%20Newsletter%20June%2023&utm_medium=email&utm_source=INSOL%20International&dm_i=4WAM,TZZ6,2ZC2NH,3RC9P,1, last accessed on 14/11/2023.

developments, since the current times do not allow us to stagnate. Many people, many societies, do not lead their "life", identity, culture and values, but accept them in a form "alien" to them. Or, if we simply accept them, we do not create our own future, but only assimilate it as it comes. Let us, however, be one step ahead, armed with vision and tenacity and "absorb" like a sponge the legislative potential in the international sphere, the potential and innovation in the digital sphere, in order to be ready to create a competitive, sustainable, job-generating economy, so that, in the future, we have a positive, optimistic answer to the question – *What will the restructuring market look like in 2024 and what are the prospects for 2025?*

Innovation transcends the obligation to transpose European Directives, to incorporate into legislation Union or international regulations, which we often accept as they come, by binding force. Innovation comes from the way we manage to "infuse", to settle in our culture these regulations that we must apply through the filter of our values and beliefs. Let us not forget that insolvency remains a "living" and complex legal instrument, which "vibrates" with socio-economic shocks, being able to become one of the main pillars of the reconstruction and dynamism of the economy and society in general, as evidenced by the status of a key element in achieving major objectives at European and international level that we have developed with the same enthusiasm in our research.

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